



*Preventing corruption  
through administrative measures*

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Handbook edited by Enrico Carloni  
in collaboration with Diletta Paoletti

Preface by Raffaele Cantone

Morlacchi Editore *U.P.*

# Preventing corruption through administrative measures

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\*. This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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## Preface

### Strengthening the prevention of corruption: sharing “good practices”, learning by experience

Is corruption an invincible enemy or is it more simply a very difficult enemy to defeat, to be faced with new strategies, without abandoning the old ones? Despite all the difficulties, many countries have developed – and are developing – new approaches to fighting and preventing corruption: it is precisely the logic of prevention that today appears to be the most advanced frontier of anti-corruption policies.

Corruption, as we know, is not absent from the Italian institutional scenario: it is a major problem, that characterized the political and administrative system.

Today Corruption is the subject of a highly articulated anti-corruption policy in Italy, developed during last few years, since Law no. 190 of 2012. As in other fields (for example in the fight against *Mafia*), Italy is an interesting “laboratory”, experiencing problems and attempting to solve them, focusing on measures of administrative prevention, rather than on the traditional repressive responses entrusted to the criminal prosecutor.

Corruption prevention strategies have recently been proposed in several European countries, and in particular in those that, like Italy, share an unsatisfactory position in the main international corruption rankings (as the one published by Transparency International).

The need to develop a more effective fight against corruption is well perceived at international and European level, and the new prevention policies are part of a regulatory framework that is strengthened thanks to international conventions and European solicitations.

The improvement of Italy in the rankings of perception of corruption shows (albeit taking into account the limits of classifications based on “perception”) seems to confirm the usefulness of the new approach. The progress of Italy international ranking between 2012, the year of adoption of the law that founded the new prevention strategy, and 2018, supports the idea of an

Italian “good practice” on the prevention side corruption that deserves to be widespread, and compared with similar experiences in the European scenario.

Moreover, the importance of a more effective fight against corruption is increasingly perceived, not only thanks to the international solicitations (starting with the UN Convention against Corruption). Corruption contributes to undermining confidence in public institutions, distorts competition in the economic sphere (in particular, with regard to public contracts), causes an enormous increase in average costs (and delays) for the provision of infrastructure, favours the poor quality of public works, and constitutes an untenable economic weight. From the European point of view, for the States belonging to the Union or aiming to join the EU, corruption hinders the good functioning of the European administration, which is largely indirect administration, operated through the States.

Compared to the approach adopted twenty years ago, the recent reforms appears to be more effective and incisive.

The mentioned legislation reflects comparative models, at least in terms of the basic concept of the adaptation of a broad spectrum of policies to the specificities of each administration, and the revival of the role and importance of codes of conduct, in this case tailored to the characteristics of various administrative contexts.

The comparative influence, and the equal importance of international demands (among other things, the law implements two international anti-corruption conventions signed by Italy), can not be overlooked.

The 2012 law is developed along two fronts: the traditional one, in terms of penal sanctions, and the innovative one, in terms of administrative prevention. Referring to the reinforcement of repressive mechanisms, the law represents an important, though not entirely satisfactory, step: penalties for corruption offenses are strengthened by the legislation, while new offenses are provided for.

The most interesting and innovative aspect of the law does not, however, regard the amendments to criminal legislation, but rather the development of a comprehensive administrative approach to preventing corruption: the phenomenon of corruption is redefined in administrative terms, as a set of behaviours that are the expression of maladministration, which are more extensive than those configurable as relevant from the perspective of their criminal sanction.

In terms of the administrative dimension of the fight against corruption, and the use of preventive measures, rather than the repressive mechanisms of criminal prosecution alone, the new approach provides a range of instruments, both general and sectoral, which have a “systemic” (involving the en-

tire administration) or circumscribed impact: for example, the requirement of the rotation of managers, the protection of whistle-blowers, post-employment limits, etc.

These reforms developed a new anticorruption strategy, producing an organic and wide ranging attempt to provide the administrative system with a number of “auxiliary precautions” for the prevention, containment, and uncovering of corrupt behaviour and, more generally, the phenomena of maladministration.

In comparison with other eras, over the last years the widespread perception of the phenomenon of corruption, albeit including uncertainties and, above all, afterthoughts and contradictory attitudes at the level of policy and legislative guidelines, has involved the definition of a system for preventing and combating the phenomenon through administrative measures.

To this challenge, the administrations are approaching by sharing good practices, but also, sometimes, in an improvised and disorganized way, neglecting the lessons that can be derived from the experiences of other countries. Sharing good practices, learning from the mistakes of others, building a network of corruption prevention experts, were some of the objectives of the training activity, funded by the OLAF’s Hercule III program, coordinated by Professor Enrico Carloni, which is the starting point for this volume of lessons.

The project, which completes this volume with this volume, is fully part of the activities that the Italian National Anti-Corruption Authority has supported and developed over the years, with particular and specific attention to the development of collaborations with universities, to support the dissemination of models and good practices to combat corruption, to support anti-corruption policies in the Balkan countries. It is therefore in some way a point of arrival, of a broader planning, but also a starting point, because the battle against corruption is extraordinarily complex and difficult and requires constant action, a support network, collaboration and sharing of good practices.

The anti-corruption winter school, was run by the University of Perugia in January-February 2018 with the support and participation of the OLAF (European Anti-Fraud Agency) that funded it, of the ANAC (Italian National Anti-Corruption Authority) that has supported and promoted it, by the RAI (Regional Anticorruption Initiative, based in Sarajevo), by the Centro Studi Villa Montesca Foundation (which hosted the lessons). It has seen the participation of thirty students, anticorruption experts from twelve European countries with a large prevalence of the Balkan area: in this sense the school is fully part of the initiatives supporting the Berlin Process, aimed at joining the European Union of the Western Balkan countries.

*Raffaele Cantone*



## Introduction

**F**ighting corruption through administration, and prevention, rather than through judicial and criminal prosecution: an ambitious goal, central for democratic systems. An embankment to populism, an instrument of legitimisation of institutions, a central need for the improvement of the quality of life and the efficient use of public resources: the fight against corruption is today, perhaps more than yesterday, one of the central challenges for contemporary public institutions.

The project “Preventing corruption through administrative measures” was carried out in 2018 by the Department of Political Sciences of the University of Perugia, which has a specific vocation in the field of interdisciplinary studies on public administration and has gained experience in the field of anti-corruption. Within the department, study programs have been designed in terms of public ethics, transparency of institutions, prevention of corruption; scholars of the department have conducted national and European research on these issues (in particular, we note the participation in the project AnticorrP, funded by the European Union in the VII Framework Program, under the direction of Prof. Paolo Mancini). The Department has recently been funded by the Italian Ministry of Education and University as a “department of excellence” for research in the field of legality, with a specific focus on the quality of institutions and anti-corruption policies.

The fact that this project is born within a department of Political Science is not indifferent to its contents: the interdisciplinary approach is central in the Department’s activity and is reflected on the methods of analysis of the phenomenon of corruption and related contrast strategies. Economists, political scientists, sociologists, psychologists, statisticians, jurists (mainly, especially scholars of administrative law), contribute together to deepen the theme, and to enrich the tools of understanding and prevention.

The structure of this volume reflects the contents of the winter school, of which it collects a series of lessons: the theme of prevention of corruption is therefore analyzed from several points of view.

The volume opens with some experiences of contrast and prevention at the international level (Joksimovic, with reference to the area of south-ea-

stern Europe and experiences of supranational cooperation), with particular attention to the Balkan area (Cvetkovic, Bozanovic). (“Part 1 – P Share good practices. Support for the development of anti-corruption policies”).

The comparative perspective makes it possible to place the issue in the context of the main trends in the international and European scenario: both in terms of policies for integrity and good administration (Ponce), and in terms of administrative transparency (Cerrillo-i-Martinez) (“Chapter 2 – Preventing Corruption And Promoting Good Government And Public Integrity: A Comparative Overview”). Public contracts are one of the most important sectors in terms of anti-corruption, both for the economic dimension and for the critical issues it presents. Hence the need to devote specific attention to the problem of corruption in the field of public contracts: a “laboratory” of innovation (in the perspective of new forms of control, strengthening of impartiality, transparency), in which, both at a supranational and national level, the need for specific measures to prevent corruption is strongly felt (Racca, Rinaldi) (Chapter 3 – “Public Procurement And Corruption”).

It is therefore the phenomenon itself that is brought to the attention: corruption as a distortion of public ethics, an ancient but ever-present problem that challenges the reflection of the classical and modern philosophers, which requires to be deepened in the framework of the most up-to-date analysis of the political science (Vannucci), paying particular attention to the problem of the relationship with the dynamics of organized crime (Segatori) and to the role of mass media as “watch dog” (Mancini), always within the framework of citizens’ right to good administration (Mannella) (Chapter 4 – “Public Ethics And Corruption”).

The prevention of corruption is therefore analyzed through the study of corruption prevention plans (Monteduro and Moi, Tubertini) (Chapter 5 – “Preventing The Risk Of Corruption”). The logic of risk prevention (understood as mapping of processes, risk analysis, treatment of corruption risk with the most appropriate measures) is central to the new approach and is at the heart of the most recent and innovative policies to prevent corruption.

The volume deals with the relationship between public management reform policies, the promotion of integrity and the fight against corruption, both from a theoretical and operational point of view (Pioggia, Gardini, Bianconi). Being able to count on a bureaucratic leadership careful to combine the requirements of impartiality and those of efficiency is a decisive challenge for contemporary public administrations (Chapter 6 – “Enforcing Public Management To Fight Corruption”).

The volume therefore dedicates attention to the question of the “measurement” of corruption and the “risk” of corruption. The same ability

to understand the phenomenon in quantitative terms is deepened in light of the available indicators (both subjective and objective) and the ability to analyze an “occult” phenomenon through economic-statistical sciences (Galli, Pieroni, Gnaldi). The analysis deepens the problem, showing in particular the usefulness of having indicators able not only to represent the phenomenon, but also to alert against the risk of corruption present in a specific context (“red flags”) (Chapter 7 – “Knowing Corruption: Measures Of Corruption And The Public Datasets”).

The volume continues by analyzing specific aspects of corruption prevention: in particular, issues of behavioral rules, integrity and the search for ethics in the behavior of officials are studied, with a legal (Falcone) and psychological (Pacilli, Spaccantini and Giovannelli) approach. (Chapter 8 – “Public Duties And Code Of Ethics To Prevent Corruption”). As the two writings show, that of “deviant” behaviors is an area in which an interdisciplinary approach is particularly useful, and in particular the integration between the legal and psycho-social analysis tools.

Among the specific prevention tools, the issues related to digitization (Donati, Piras, Ponti) (Chapter 9 – “E-Government Strategies And The Preventing Of Corruption”), which presents itself as a potentially decisive tool for strengthening the institutional capacity to combat and prevent corruption.

A particularly interesting study is then dedicated to one of the main tools to combat corruption: transparency (confirming the thesis that sunlight is “the best disinfectant”). Administrative transparency is analyzed both in overall terms (Di Mascio, Dominici) and with reference to the specific issue of the protection of whistleblowers (Maneggia) (Chapter 10 – “Public Transparency And The Prevention Of Corruption”).

The final chapter 11 (“Eu and national strategies to prevent corruption”) is dedicated to the European approach, in particular paying attention to European policies for the good management of European funds (Parisi, Rinoldi, Raspadori).

The volume concludes with a series of reports on specific experiences, the result of the work of some of the experts who took part, as learners, in the winter school. It is a synthetic and operative part, but certainly interesting to understand the current dynamics in the field of corruption prevention in South-East Europe (“Annex: National Reports On Anticorruption”).

The volume aims, therefore, to provide tools, theoretical and operational, to address the challenge of preventing corruption. This is an ambitious work, which is hoped to meet the challenges that public institutions face in the new season of preventing corruption through administrative measures.

*Enrico Carloni*



# PART I

Share good practices. Support for the development  
of anti-corruption policies. The experience of ANAC and RAI.  
Ongoing projects and objectives



### *1. About RAI*

Regional Anti-Corruption Initiative – RAI is an intergovernmental regional organization, which deals solely with anti-corruption issues and is comprised of nine member states. It has been institutionalized by signing the Memorandum of Understanding concerning cooperation in fighting corruption through Regional Anti-Corruption Initiative, signed in 2007 and the Protocol amending the MoU, signed in 2013 in Zagreb, Croatia. The organization was initially established in Sarajevo in February 2000, as Stability Pact Anti-corruption Initiative (SPAI), but in 2007, the SPAI was renamed to Regional Anti-corruption Initiative (RAI), in line with the transformation of the Stability Pact for South Eastern Europe into Regional Cooperation Council (RCC). RAI is funded through Member States’ annual contributions to the budget and through projects. RAI is responsible for the South Eastern Europe 2020 Strategy Dimension on “Anti-Corruption” under the Pillar Governance for Growth.

The Steering Group chaired by RAI Chairperson is the decision-making body of the Regional Anti-corruption Initiative. It is composed of high level representatives of South Eastern European member countries. Head of the Secretariat participates, as well as other staff members when it is appropriate, at the Steering Group meeting. Head of the Secretariat identifies, develops and implements new and improved policies and ways of working to support achievements of the strategic objectives of RAI, coordinates in cooperation with Anti-Corruption Expert in order to ensure the achievement of the Work Plan objectives as proposed to and approved by the Steering Group.

The Secretariat is based in Sarajevo, Bosnia and Herzegovina.

Members are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Republic of Macedonia, Moldova, Montenegro, Romania and Serbia. Observer status is given to Poland, Georgia and Slovenia. RAI has a good and fruitful cooperation with a number of other international partners: United Nations Office on Drugs and Crime (UNODC), United Nations Development Programme (UNDP), European Commission, Regional Cooperation Council (RCC); Regional School for Public Administration (ReSPA), Organization for Economic Co-operation and Development (OECD), RACVIAC – Centre for Security Cooperation, World Bank, SELDI Network and ANAC.

The forms of possible cooperation with or within the RAI are determined by the organizations' internal rules, mainly contained in the Memorandum of Understanding concerning Cooperation in Fighting Corruption through the Regional Anti-corruption Initiative (MoU) and Annex I "Institutional Mechanism" of the Strategic Document (Annex I). According to these rules, there are three shapes of cooperation within RAI: Core Member, Associate Member and Observer

Core Member can only be a country which is party to the MoU or acceded to the MoU upon the invitation of the RAI Steering Group. The acceding countries have to deposit an instrument of accession at the Depositary Country.

Associate Member can be considered all countries, organizations or international financial institutions which are actively and substantially engaged in support of preventing and fighting corruption in South East Europe and contributing to the programmatic activities of the RAI with at least the yearly minimum amount determined in the MoU. The RAI Steering Group can decide on this as it is the decision-making body of the Initiative.

There are two main differences between a Core Member and an Associate Member:

- An Associate Member is not party to the MoU;
- An Associate Member has the right to vote in the Steering Group on programmatic issues only.

The status of Observer in RAI can be granted to partners, countries and organizations. The prerogative to invite them to participate in RAI as Observers is given to the Steering Group. As a rule, this status can be provided to other interested partners, countries or organizations which are involved in fighting corruption in SEE, but not being able to contribute financially to RAI with a yearly minimum amount determined in the MoU, or to those organizations that are only implementers of projects to the RAI activities.

*1.2 Programmatic Activities. Southeast Europe Regional Programme on “Strengthening the Capacity of Anti-corruption Authorities and Civil Society to Combat Corruption and Contribute to the UNCAC Review Process” – funded by Austrian Development Agency (ADA)*

RAI has started implementation of ADA Programme in December 2015 and it shall last till the end of 2018. According to the Programme, it is expected that at least three beneficiary countries will have introduced/strengthened their corruption risk assessment and corruption proofing of legislation, and that a regional framework for cooperation on data exchange in asset disclosure and conflict of interest will have been strengthened. RAI’s partner in this Programme is UNODC with other goals to be reached.

*1.2.1 Benefits of Corruption Risk Assessment as a Preventive Measure*

Corruption Risk Assessment (CRA) is a process which aims at increasing the level of integrity (resistance to corruption and unethical behavior) of a sector or institution by identifying the risk factors that may facilitate a corruption case, as well as by developing and implementing measures for mitigation or elimination of those factors and risks.

There are different models of how this process can be organized, and the national authorities will be able to examine each of them with the assistance from RAI Secretariat, and also to tailor a selected model to the existing circumstances, legal and institutional frameworks.

CRA is critical for the long-term successful operation of different parts of public sector. If not managed, corruption risks will sooner or later expose the entity to the possibility of a public official to engage in corrupt or unethical behavior. If a corruption or an integrity breach does occur, the short and long-term consequences for the particular public sector organization include loss of reputation, loss of public confidence, direct financial loss, wasted resources, and cost of criminal justice or audit system to respond to corruption, adverse effects of other staff and negative impact of the moral of the institution.

*1.2.2 Benefits of Anti-Corruption Assessment of Laws as a preventive measure*

Anti-corruption assessment of laws, or corruption proofing of legislation, is a review of form and substance of drafted or enacted legal rules in order to detect and minimize the risk of future corruption that the rules could facilitate.

Corruption proofing is aimed primarily at closing entry points for corruption contained in draft or enacted legislation. Its main potential is to prevent future corruption facilitated through poorly drafted legislation. Once corruption proofing becomes an established practice, it will make legal drafters think ahead on what corruption risks the assessment process may uncover and how these risks can be avoided from the very beginning of the drafting process. Corruption proofing is targeted at regulatory corruption risks, which constitute existing or missing features in a law that can contribute to corruption, regardless of whether the risk was intended or not.

Corruption proofing has the potential to improve the quality of the legislative drafting. Many of the tools used to minimize corruption risks will lead to clearer, simpler and more consistent wording in legal drafts and to more well-reasoned and documented, coherent and thought-through regulations. Practical experience from training even shows that rather “dry” rules of good legal drafting can come to life once public officials understand how even a small grammatical error in a for example health law can facilitate bribes and extortion from patients.

Corruption proofing further enriches public debate surrounding legal drafts. It makes corruption a standard feature of awareness in public debates.

### *1.2.3 International Treaty on Exchange of Data for the Verification of Asset Declarations*

This international treaty developed by RAI, which is a result of cooperation of national preventive anti-corruption-integrity bodies in the region. RAI was and still is facilitating the process, firstly of drafting the document and these days of its adoption. The document is the result of a series of three workshops held in 2015 and 2016 with representatives of integrity bodies in South-Eastern Europe and of international stakeholders (Basel Institute of Governance, UNODC, UNDP and World Bank). The European Commission also provided written input to this document.

### *1.2.4 Why the treaty is important/necessary?*

It not unusual that public officials spend their wealth out of the country of origin/abroad – buying real states, deposit money and own businesses. The public officials simply abstain from disclosing these foreign assets, even though declaration of wealth held abroad is mandatory under most, if not all, declaration systems. Similar is true for private interests. Thus, integrity bodies in charge for verifying the veracity of asset declarations need access

to information held by foreign authorities. This Treaty shall facilitate such international exchange of data. So far, no mechanisms exists for integrity bodies to exchange data internationally for their administrative checks.

#### *1.2.5 How does the treaty work?*

The purpose of the present Treaty is to prevent and to combat corruption by providing for a direct administrative exchange of information concerning asset declarations between the Parties to the Treaty.

The Treaty shall apply to an exchange of information irrespective of whether the declaration system of the requested Party includes identical aspects of finances or personal interests, covers the same categories of declarants, uses the same categories of information for verifying the veracity of a declaration, or foresees the same consequences as does the declaration system of the requesting Party. Information which Parties may exchange, includes, but is not limited to information taken from databases maintained by State authorities or private entities on taxes, bank accounts, financial securities, businesses companies, trust and foundations and similar legal arrangements and entities, real estate, vehicles and other movable equipment, intellectual property rights, and gifts.

As a basic rule, integrity bodies of two State parties may exchange data if both integrity bodies use this category of data for their verification purposes. Integrity bodies can also provide additional data which only the requesting State party uses for the verification of declarations.

There are two types of verification envisaged by the Treaty: targeted and random. The wording of the Treaty is based on the Convention on Mutual Administrative Assistance in Tax Matters, developed jointly by the Council of Europe and OECD.

#### *1.2.6 Exchange of data and compliance with international standards*

Resolution 6/4 of the sixth Conference of the States Parties to the UNCAC (November 2015) is highly relevant in this context. Among other issues, it invites State Parties “to consider the possibility of concluding multilateral, regional or bilateral treaties, agreements or arrangements on civil and administrative matters relating to corruption, including international cooperation, in order to promote the legal basis for granting mutual legal assistance requests concerning natural or legal persons in a timely and effective manner”; “to inform the Secretariat about designated officials or institutions appointed, where appropriate, as focal points in the matter of

the use of civil and administrative proceedings against corruption, including for international cooperation”; “to work with the Secretariat and other international anti-corruption organizations, donors, assistance providers and relevant civil society organizations, as appropriate, to promote bilateral, regional and international activities to strengthen the use of civil and administrative proceedings against corruption, including workshops for the exchange and dissemination of relevant experiences and good practices”.

The draft treaty has a much narrower scope of data than exchange of data in tax matters and only concerns public officials and their families. The ECtHR has decided that the online publication of asset declarations of public officials is justified<sup>1</sup>. The Draft Treaty thus concerns data which the Court considers to be public information. Furthermore, the Court approved in 2015 an international administrative exchange even of banking data for tax verification purposes<sup>2</sup>.

## 2. *Whistleblowers*

The Regional Anti-corruption Initiative is providing support to the Southeast Europe Coalition on Whistleblower Protection, the world’s first regional initiative dedicated to Whistleblowing. Southeast Europe is among most active regions in the world in developing, passing and implementing whistleblower protection laws. Leadership by governments and NGOs has been the key to these advancements, together with growing public support and guidance from regional and international organizations. Regional Anti-corruption Initiative in collaboration with Blueprint for Free Speech and with funding by the Regional Cooperation Council under implementation of RCC’s South East Europe 2020 Strategy, held a coalition-forming event in Belgrade, Serbia, in November 2015. The Coalition is serving as an umbrella function for policy-making, advocacy and awareness-raising efforts as well as a network for exchange of knowledge, experiences and support.

## 3. *Summer School – Money Laundering and Recovery of Crime Related Proceeds*

RAI Secretariat continued its successfully established annual project “Summer School for Junior Anti-corruption Practitioners from South East

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1. *Wypych v. Poland*, October 2005.

2. *G.S.B. v. Switzerland*, December 2015.

Europe”. It is an intensive five-day programme designed for familiarizing participants with contemporary insight in selected areas of corruption theory and anti-corruption practice. By attending and completing the courses of the Summer School, junior practitioners from the South Eastern European countries set the basis for enhanced knowledge on international anti-corruption standards and their implementation in practice.

Summer School editions for 2016<sup>3</sup> and 2017<sup>4</sup> were both dedicated to Financial Investigations, Asset Recovery and cross-border cooperation. In total 36 practitioners coming from anti-corruption law enforcement institutions and judiciary from RAI member countries and Kosovo\* were trained. The Summer School helped to create an informal network among junior anti-corruption practitioners able to further consolidate the cooperation at bilateral and regional levels.

The participants were provided with in-depth knowledge and training on topics like national and international instruments for recovering criminal assets, pre-MLA and mutual legal assistance cooperation for the purposes of seizing and confiscating, management of seized assets, use of open sources in financial investigations, international money movements, understanding offshore jurisdictions and investigating offshore money laundering. RAI Secretariat intentions for the next two years are to research and pursue a potential projects and partners in this area.

#### *4. Asset Recovery*

The European Commission country reports reveal that all Western Balkan countries face a number of common obstacles. The biggest obstacle to effectively fighting corruption in the region is the lack of proper implementation of existing legal frameworks, including international obligations. It has been noted that final conviction rates remain low, particularly in high-level corruption cases, and powers to impose harsher penalties and to order asset recovery are not being used proactively. There is a need to further develop the effectiveness of asset confiscation and recovery systems in the region, including capacity for conducting financial investigations, based on the EU standards and minimum rules on the freezing of property with a

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3. <http://rai-see.org/summer-school-project-2016/>.

4. <http://rai-see.org/summer-school-project-2017/>.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

view to possible subsequent confiscation and on the confiscation of property in criminal matters.

Under the UK funded project RAI is conducting comparative analysis in this matter. RAI will cover participation of Moldova, Croatia, Romania and Bulgaria, as RAI member states outside of WB region through the OSCE funds.

### *5. Integrity in law Enforcement Agencies*

Being aware of the fact that integrity and fight against corruption in law enforcement present one of the challenges in the region, and there is a need for regional cooperation in this field, RAI has introduced the objective in the last Work Plan and sees great potential in this field. Key argument for RAI to engage in the law enforcing is also the fact that one of the themes of GRECO fifth round of evaluation will be “Preventing corruption and promoting integrity in law enforcement agencies”. Considering that this specific topic needs to be treated multi-disciplinary, RAI Secretariat will seek for partners (international organisations and CSOs) which would work with RAI in this field.

RAI Secretariat will conduct a needs analysis with countries as to what would be most suitable interventions. In this context, experience and best practices applied in the countries of the Region would be valuable and peer learning will be promoted.

Key areas of intervention will be supporting the units for professional standards and internal control units’ capacity building activities; strengthening capacities and resilience of border services; implementation of risk assessment in the law enforcement sector; and actions as a follow up to recommendations given by GRECO.

### *6. Other areas of interest*

RAI developed its Work Plan 2018-2020 and has introduced some new areas in which will potentially, depending on human and financial resources, develop projects and activities.

Oversight of political parties financing – Potential ideas would go in the direction of exchange of experience in this area, looking for improvements in a legislative framework but also in the practice and implementation of

existing national laws, with endorsement of international standards relevant for oversight of political parties.

Corruption prevention through education – this theme has received strong positive feedback from member countries. The general idea is to start with prevention as early as possible and encompass a wider audience. Options will be explored such as identification of partners in national institution and civil society who could be used as a platform for educating teachers and youth and children about corruption and how it affects society.

Corruption in sports<sup>5</sup> – Sport is a multi-billion-dollar sector. It has intricate ties to political and private interests. This means numerous forms and opportunities for corruption. The actions would entail promotion of the CoE Convention on the Manipulation of Sports Competitions<sup>6</sup> and lobby with the RAI member countries to adopt the Convention. Long term perspective would include, but not be limited to, supporting the member states with the Convention implementation.

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5. Please see Transparency International's Global Corruption Report: Sport for more details about the topic: [https://www.transparency.org/research/gcr/gcr\\_sport/0/](https://www.transparency.org/research/gcr/gcr_sport/0/).

6. CoE Convention on the Manipulation of Sports Competitions full text: [http://www.coe.int/t/dg4/sport/match-fixing/convention\\_EN.asp](http://www.coe.int/t/dg4/sport/match-fixing/convention_EN.asp).



## The administrative prevention of corruption: the Italian model and its pillars

### 1. *Prevention of corruption in Italy*

The Italian way of preventing corruption currently stands as an interesting point of reference in the recent construction of administrative systems to fight corruption. Corruption mainly characterizes Italy<sup>1</sup>, but it is also evident in other countries, for example in southern and eastern Europe<sup>2</sup>. The Italian strategy, which is a recent novelty in a country that traditionally did not develop an organic and comprehensive approach to containing corruption<sup>3</sup>, is characterized by a series of elements that need to be illustrated, to describe the new “Italian system” – with its strengths and its weaknesses – as it emerged during the five years following the law no. 190/2012<sup>4</sup>.

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1. See A. Vannucci, *La corruzione in Italia: cause, dimensioni, effetti*, in *La legge anticorruzione*, (a cura di) B.G. Mattarella, M. Pelissero, Torino, Giappichelli, 2013, pp. 25 ss.; European Commission, Eurobarometer 76.1, Corruption, February 2012, TNS, Opinion & Social, 2012, spec. 374, in [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_374\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf); Quality of Government Institute, *Measuring the Quality of Government and Sub-national variations a dataset*, 2010, in <http://www.qog.pol.gu.se/data/euproject>.

2. See Cerrillo Martinez, J. Ponce (a cura di), *Preventing corruption and promoting good government and public integrity*, Bruxelles, Bruylant, 2017.

3. See D. Della Porta, A. Vannucci, *The controversial legacy of “mani pulite”: a critical analysis of italian corruption and anti-corruption policies*, in *Bullettin of Italian Politics*, 2009, pp. 233 ss.; GRECO – Group of States against corruption, *Evaluation report on Italy*, Strasbourg, Council of Europe, 2008. Commissione per lo studio di misure per la trasparenza e la prevenzione della corruzione, *La prevenzione della corruzione: per una politica di prevenzione*, 2011, in [http://www.governo.it/GovernoInforma/documenti/20121022/rapporto\\_corruzioneDEF.pdf](http://www.governo.it/GovernoInforma/documenti/20121022/rapporto_corruzioneDEF.pdf).

4. Law no. 190, novembre 6, 2012 “Disposizioni per la prevenzione e la repressione della corruzione e dell’illegalità nella pubblica amministrazione” (G.U. n. 265 del 13 novembre 2012).

In regulatory terms, the new system's design originates from the "anti-corruption" Law, no. 190/2012, also known as the "Severino Law", named after the Minister of Justice of the Monti Government who promoted it, also following some international requests<sup>5</sup>. Not particularly simple in reading (due to its structure: the discipline is essentially contained in a single article, the first one, made by 83 paragraphs), in some parts the Law itself contains innovations, in other parts it delegates the the new discipline to the government<sup>6</sup>. On the basis of these delegations, the Government adopted two fundamental legislative Decrees (No. 33/2013, on the subject of transparency<sup>7</sup>; No. 39/ 2013, on incompatibility and "inconferability"<sup>8</sup>) and other measures, among which, in particular, the regulation on the subject of codes of conduct (Presidential Decree no. 62/2013<sup>9</sup>). This "package" constitutes the fundamental and original nucleus of the anti-corruption system, later enriched by successive measures which has been intended to strengthen the role and powers of the guarantee authority and reformed some institutions<sup>10</sup>.

Among the most significative innovations it is necessary to point out three other measures: the abolition of the authority for public contracts, with the transfer of its functions to the National Anti-Corruption Authority (ANAC), contextually strengthening ANAC in terms of the role and functions in matters of transparency and prevention of corruption (legislative Decree 90/2014, converted into Law no. 114/2014<sup>11</sup>); the reform of the legislation on administrative transparency, within the framework of the overall admini-

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5. On the "external context" which requests this regulatory intervention, see S. Bonfigli, *L'Italia e le politiche internazionali di lotta alla corruzione*, in F. Merloni, L. Vandelli, L. (a cura di) *La corruzione amministrativa. Cause, prevenzione e rimedi*, Bologna, Il Mulino, 2010, 109 ss.

6. Law no. 190, 2012.

7. Legislative Decree no. 33, march 14 2013 "Riordino della disciplina riguardante gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni" (G.U. n. 80 del 5 aprile 2013).

8. Legislative Decree no. 39, april 8, 2013 "Disposizioni in materia di inconferibilità e incompatibilità di incarichi presso le pubbliche amministrazioni e presso gli enti privati in controllo pubblico, a norma dell'articolo 1, commi 49 e 50, della legge 6 novembre 2012, n. 190" (G.U. n. 92 del 19 aprile 2013).

9. Presidential Decree no. 62, april 16, 2013 "Regolamento recante codice di comportamento dei dipendenti pubblici, a norma dell'articolo 54 del decreto legislativo 30 marzo 2001, n. 165" (G.U. 4 giugno 2013, n. 129).

10. See, briefly F. Merloni, B. Ponti, *Fight against corruption in Italy*, in A. Cerrillo Martinez, J. Ponce (a cura di), *Preventing corruption and promoting good government and public integrity*, cit., pp. 201 ss.

11. Law no. 114, august 11, 2014 "Conversione in legge, con modificazioni, del decreto-legge 24 giugno 2014, n. 90 - Misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari" (G.U. n. 190 del 18 agosto 2014).

strative reform policies (so-called “Madia reform”<sup>12</sup>), through the Law no. 124/2015<sup>13</sup> and especially with the subsequent delegated legislative decree, no. 97/2016<sup>14</sup>; the new Code of public contracts, adopted with legislative decree no. 50/2016<sup>15</sup> and recently revised and corrected by Legislative Decree no. 56/2017<sup>16</sup>.

Generally speaking, the Law 190/2012 is crucial mainly because it provides a new definition of corruption, which some commentators defined as “administrative corruption”, essentially belonging to the concept of “maladministration”. Corruption can be identified in “relevant situations broader than the criminal cases”, including “not only the full range of crimes against the public administration regulated in Title II, Chapter I, of the Penal Code, but also the situations in which – regardless of criminal relevance – a malfunction of the administration due to the use of the assigned functions for private purposes is highlighted<sup>17</sup>.”

This approach is influenced by the scientific literature that defined corruption as a dynamic process that “pollutes” the relationship between “principal” and “agent”: it refers not only to concrete behaviors that violate the rules of the penal code on crimes against the administration (embezzlement, “own” and “improper” corruption, bribery, abuse of office, “traffic of influences”), but also actions conflicting with disciplinary duties or with the rules on the correct management of public resources, with particular attention to conflicts of interest.

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12. Generally speaking, see B.G. Mattarella, *Il contesto e gli obiettivi della riforma*, *Commento a l. 7 agosto 2015*, n. 124, in *Gior. dir. amm.*, 2015, fasc. 5, pp. 621 ss.

13. Legge no. 124, august 7, 2015 “Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche” (G.U. n. 187 del 13 agosto 2015).

14. Legislative decree no. 97, may 25, 2016, “Revisione e semplificazione delle disposizioni in materia di prevenzione della corruzione, pubblicità e trasparenza, correttivo della legge 6 novembre 2012, n. 190 e del decreto legislativo 14 marzo 2013, n. 33, ai sensi dell’articolo 7 della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche” (G.U. 8 giugno 2016, n. 132).

15. Legislative decree no. 50, april 18, 2016 “Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture” (G.U. n. 91 del 19 aprile 2016) now more briefly titled “Codice dei contratti pubblici” by Legislative decree no. 56, 2017.

16. Legislative decree no. 56, april 19, 2017 “Disposizioni integrative e correttive al decreto legislativo 18 aprile 2016, n. 50” (G.U. n.103 del 5 maggio 2017).

17. See the Circular no. 1 2013 from the Ministry for simplification and public administration, “Legge n. 190 del 2012 - Disposizioni per la prevenzione e la repressione della corruzione e dell’illegalità nella pubblica amministrazione” registered by Corte dei conti in 22 march 2013 - reg. n. 3 - fog. n. 54.

However the Law no. 190/2012 pays attentions also to the traditional repression of corruption and to the discipline of the alleged crimes of the public official, but the innovative feature of this legislation lie on the fact it adds a new policy of contrast through administrative “prevention”<sup>18</sup>.

We are going to clarify some characteristic elements, related to the “perimeter” of application of these rules, both from a subjective point of view (to which “officials” these measures are addressed), and objective (which are the public entities receiving the anti-corruption rules).

## 2. *The Italian National Anti-Corruption Authority*

The pivot of the new system is a specific independent authority, the National Anti-Corruption Authority (ANAC), which has quickly become a central protagonist, sometimes criticized, in the evolution of the Italian administrative system.

The introduction of an administrative body responsible for coordinating policies, defining guidelines, supervising and controlling corruption has a troubled history in the Italian experience, which can be recalled very briefly.

In the past – in the absence of a comprehensive policy on the subject – the functions for anticorruption were attributed to the Ministry for the public function (and in particular, internally, to the Anti-Corruption and Transparency Service - SAET<sup>19</sup>). Later, after the fleeting and “weak” experience of the High Anti-Corruption Commissioner<sup>20</sup>, an important step was the establishment of a special body (Commission for evaluation, integrity and transparency - CIVIT), born to guarantee the efficiency and productivity of officials and public structures and their transparency, within the fra-

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18. See M. Pelissero, *La nuova disciplina della corruzione tra prevenzione e repressione*, e M. Clarich, B.G. Mattarella, *La prevenzione della corruzione*, in B.G. Mattarella, M. Pelissero (a cura di), *La legge anticorruzione* cit., pp. 374 ss.; pp. 59 ss.

19. The law of 6 August 2008, no. 133, “Conversion of the decree-law of 25 June 2008, n. 112 - Urgent provisions for economic development, simplification, competitiveness, stabilization of public finance and tax equalization “(G.U. n. 195 of 21 August 2008) to the art. 68, in suppressing the figure of the High Anti-Corruption Commissioner, transferred the relevant functions to the Department for the Public Function, where a specific service was established (the Saet).

20. The law of 16 January 2003, no. 3, “Regulations for public administration” (G.U. n. 15 of 20 January 2003) to the art. 1 provided for the establishment of the High Commissioner for the Prevention and Countering of Corruption and Other Forms of Unlawfulness within the Public Administration, placing it “in the direct functional dependence of the President of the Council of Ministers”.

mework of the 2009 reforms (Legislative Decree No. 150/2009<sup>21</sup>, the so-called “Brunetta decree”)<sup>22</sup>.

It is around this body that the new guarantee authority develops: first, in 2012 the Civit is identified as the national reference for anti-corruption policies, and shortly thereafter, through the legislative decree no. 101/2013, it is transformed into a National Anti-Corruption Authority<sup>23</sup>. Since then there has been a progressive strengthening of this Authority, of its independence and its powers. This happened by two successive measures, which first brought together the powers, functions and staff of the suppressed Supervisory Authority on public contracts<sup>24</sup> and then clearly concentrated on the ANAC all the functions regarding transparency and anti-corruption (contextually moving the competences concerning the efficiency and performance of the personnel, previously belonging to Civit, to Ministry for the public function)<sup>25</sup>.

The resulting scenario sees Anac being competent, as authority, over three macro-areas: anti-corruption, transparency (intended essentially as obligations of publication), public contracts. These three areas dialogue each other and, at the same time, the authority strengthens its ability to understand the phenomena, its capacity of intervention and its ability to influence the action of the administrations<sup>26</sup>.

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21. Legislative Decree no. 150, October 27 2009, “Attuazione della legge 4 marzo 2009, n. 15, in materia di ottimizzazione della produttività del lavoro pubblico e di efficienza e trasparenza delle pubbliche amministrazioni”, (G.U. n. 254 del 31 ottobre 2009).

22. In implementation of article 4, paragraph 2, letter f) of the law of 4 March 2009, no. 15, the decree n. 150 of the same year established, in art. 13, the Commission for the evaluation, transparency and integrity of public administrations, “which operates in a position of independent judgment and evaluation and in full autonomy.

23. With the entry into force of law no. 125 of 2013, for the conversion of the decree law of 31 August 2013, n. 101, the Civit, already identified as “national anti-corruption authority” by law n. 190 of 2012, took the name of “National Anti-Corruption Authority and for the evaluation and transparency of public administrations” (Anac). The current name of “National Anti-Corruption Authority” is the result of a further amendment made by Legislative Decree n. 90 of 2014.

24. See especially M. Corradino, I. Lincusso, *La soppressione dell’Avcp e il trasferimento delle funzioni all’Anac*, in R. Cantone, F. Merloni (a cura di), *La nuova autorità nazionale anticorruzione*, cit., pp. 11 ss.

25. See M. De Rosa, F. Merloni, *Il trasferimento delle funzioni in materia di prevenzione della corruzione*, ivi, pp. 51 ss.; E. D’Alterio, *I nuovi poteri dell’Autorità nazionale anticorruzione: “post fata resurgam”*, in *Giornale di diritto amministrativo*, 2015, pp. 757 ss.

26. See in R. Cantone, F. Merloni (a cura di), *La nuova Autorità anticorruzione*, Torino, Giappichelli, 2015; I. Nicotra (a cura di), *L’Autorità Nazionale Anticorruzione*, Torino, Giappichelli, 2017. L’importanza di questa integrazione è evidenziata dalla stessa Autorità: si v. Autorità nazionale anticorruzione, *Relazione Annuale al Parlamento dell’Autorità Nazionale*

In particular, a central core of functions is identified by the law no. 190 itself, at the art. 1, paragraph 2: the ANAC collaborates with its foreign counterparts, with the relevant regional and international organizations; adopts the National Anti-corruption Plan; analyzes the causes and the elements of corruption and identifies the strategies for prevention and contrast; monitors the effective application and effectiveness of the measures adopted and of the rules on the transparency of administrative activity; oversees and control public contracts relating to works, services and supplies; reports to Parliament on the fight against corruption and illegality in the public administration and on the effectiveness of the provisions in force.

The functions are exercised by a collegial body, the Anac Council, composed by five members appointed by the Government following a favorable opinion (with qualifying majority) from the competent parliamentary committees, including the President.

In addition to the powers exercised collegially, there are special competences entrusted to the President by the Law: the President is responsible for an institutional guarantee function of the legality and correctness that is “activated” for exceptional situations (for example when scandals for the construction of the Milan EXPO occurred, or in general terms when companies involved in corruption or mafia win public contracts).

This trend of the Italian system to resort to the figure of the President of the Anac in emergency and crisis situations (EXPO, the earthquake, the Jubilee), strengthening its role and powers<sup>27</sup>, made the last President, Raffaele Cantone (already known as an important anti-mafia magistrate), a central figure in the national public and political debate.

### 3. *The “pillars” of the Italian model*

The pivotal mechanism of the system preventing corruption is the “anti-corruption plans”. It is a national plan, adopted by the National Anti-Corruption Authority, valid for three years and annually updated, through which Anac provides individual public administrations with both methodological and content indications for the adoption of their own (three-year) corruption prevention (PTPC) plans<sup>28</sup>. The national plan contains, in sum-

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*Anticorruzione per l'anno 2015*, Roma, 2016.

27. Referring to the specific powers of the ANAC President, see R. Cantone, B. Cuccagna (a cura di), *I poteri del Presidente dell'Anac nel d.l. n. 90*, in R. Cantone, F. Merloni (a cura di), *La nuova autorità nazionale anticorruzione*, cit., pp. 97 ss.

28. F. Merloni, *I piani anticorruzione e i codici di comportamento*, in *Diritto penale e pro-*

mary, the strategic objectives for the development of the prevention strategy at the central level and provides guidelines and support to the public administrations for the implementation of the prevention of corruption and for the drawing up of their Three-year Plan.

In each public administration we find therefore a specific three-year plan, subject to an annual update, which – starting from an analysis of the context, of the events of corruption and maladministration, of the procedures and of the related “levels of risk” - sets out the interventions necessary to contain and prevent the risk.

As stated by the “anti-corruption” Law, each public administration define “a corruption prevention plan that provides an assessment of the different level of exposure of offices to the risk of corruption and indicates organizational interventions aimed at preventing the same risk” (Article 1, paragraph 5, letter a) of the L. 190/2012).

The model is therefore that of the so called “Risk assessment” or risk management: given a high risk of corruption, robust organizational measures, transparency, control, preventive regulation of procedures will be necessary, and so on. Measures that will become less necessary where the risk is reduced: this is an operation that starts from a not simple action of assessing the risk of corruption, to be done both in general terms (with regard to the entire administration) and especially with reference to the individual sectors of intervention and to individual proceedings<sup>29</sup>.

Following the indications already contained in the Law no. 190/2012, the National Plan identifies a series of “high risk areas”, with reference to any public administration: the area of recruitment and promotions of personnel, the area of public contracts, the area of contributions and subsidies, the area of measures that indirectly produce an economic advantage (such as authorizations, or concessions, or building permits); each administration, based on its own risk assessment processes, can identify further areas.

The first national plan, dated 2013, provided the methodological indications for drawing up the plans and the “risk assessment”. It still constitutes the fundamental structure around which the subsequent updates are developed. It is the same for the new national plan of 2016, which only partially replaces the previous one<sup>30</sup>.

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cesso, 2013, n. 8S, pp. 4 ss.; F. Di Cristina, *I piani per la prevenzione della corruzione*, in *La legge anticorruzione* cit., pp. 91 ss.; F. Merloni, *Le misure amministrative di contrasto alla corruzione*, in *Ragiusan*, 2015, n. 369-370, pp. 9 ss.

29. See ANAC, *Relazione Annuale al Parlamento dell’Autorità Nazionale Anticorruzione per l’anno 2015*, cit.

30. On 11 September 2013, the National Anti-Corruption Authority approved with the

The “bet” of the legislator is to transfer to the public administrations a model for risk prevention with references at the international level and at national level (with Legislative Decree No. 231/2001<sup>31</sup>), designed for the prevention of corruption and corporate social responsibility.

While the national plan is prepared by the National Authority<sup>32</sup>, in a path open to stakeholder participation, the three-year administration plan is adopted, again after a participatory process, by the top political bodies, but is drafted essentially by the manager for the prevention of corruption, which is an official (usually a manager and in the local authorities the municipal secretary<sup>33</sup>) in charge of this function. The fact that the anti-corruption measures regard essentially the administrative structure and that it is up to an official to draw up the plan (and then to monitor its compliance) mean that, as often complained by the anti-corruption authority itself, political bodies often do not pay enough attention both to the phase of the drafting of the measures and to the one of their implementation.

The prevention manager of each administration represents the inner referee of the corruption prevention system: in constant relation with the Anac and its guidelines, is assisted by the managers (called to monitor the applica-

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CIVIT resolution no. 72 / 2013, on the proposal of the Department of Public Administration, the National Anti-Corruption Plan. Following the changes made with the legislative decree 90/2014, converted, with modifications from l. 114/2014, the National Anti-Corruption Authority, on October 28, 2015, approved the updating of the PNA with Resolution n. 12 of 10/28/2015. On 3 August 2016, the National Anti-Corruption Authority, pursuant to art. 1, co. 2-bis of the l. 190/2012, introduced by Legislative Decree 97/2016, approved the 2016 National Anti-corruption Plan with Resolution no. 831 of 08/03/2016.

31. The introduction of organizational measures for the prevention of corruption has been foreseen, for subjects of a private nature, with the legislative decree 8th June 2001, no. 231, “Administrative liability from crime” (G.U. June 19, 2001). In particular, the decree provides that (article 6, paragraph 1) If the crime was committed by the persons indicated in article 5, paragraph 1, letter a), “the body does not respond if it proves that [...] the a governing body has adopted and effectively implemented, prior to the commission of the fact, models of organization and management suitable to prevent crimes of the kind that occurred”.

32. The first National Plan was approved by the Authority (then Civit) on the proposal of the Department for Public Administration, following the directives contained in the Guidelines of the Interministerial Committee. After the reform of the Authority’s powers, in 2014 the adoption of the new Plan is an autonomous act, even if developed through participatory processes and in collaboration with other institutions, of the Anac.

33. As stated in Circular no. 1/2013 of the Department for the public function, “The rationale for this choice was to consider the function of prevention manager as” naturally integrative “of the general competence due by law to the secretary, who, according to the art. 97 of Legislative Decree no. 267 of 2000, “carries out tasks of collaboration and functions of legal-administrative assistance towards the bodies of the body in relation to the compliance of the administrative action with the laws, the statute and the regulations”.

tion of the various measures in the structures and by the staff they manage) and in particular by some reference figures (the “referents”) in the main areas of action of the administration. Usually, the person responsible for preventing corruption also covers the role of Transparency manager, being responsible for supervising the compliance with the publication duties and therefore for the related “program” (which constitutes a section of the prevention plan).

Among the measures of prevention of corruption already contained in the law no. 190/2012 and in the subsequent implementing decrees, we find first of all mechanisms aimed at reinforcing the “objective impartiality”, intervening on the characteristics of the organizations and on the choices of identification of the managers of the management bodies. This approach appears a characteristic of the Italian experience, starting from a choice (re-affirmed and reinforced by the system of the anti-corruption law) to foresee a “distinction” of roles and competences among the political bodies, responsible of the acts of addressing the administrative action, and the bureaucratic and professional bodies (the managers), responsible for the management acts and therefore for the “punctual” measures, addressed to the citizens.

This choice matures following the “Mani Pulite” (Clean Hands) scandals, the famous story of corruption that affected an important part of the Italian political system in the early 1990s: the objective is to “remove” the politics from the direct relationship with interests, creating a more transparent system (of management acts guided by formal guidelines), less arbitrary, and less tied to political or party evaluations.

The logic is therefore to limit the conflicts of interest, in situations considered less “serious” than those involving non-conferral: managerial positions, which involve supervisory powers over controlled or financed private entities, are included and declared incompatible with the assumption and maintenance, during the assignment, of offices and responsibilities in these same bodies.

The law regulates a wide range of hypotheses of incompatibility between positions and offices: are considered the hypotheses of incompatibility between management positions in health care companies and the performance of professional activities or positions in private bodies regulated or financed by the regional health service; the various hypotheses of incompatibility between management/administration positions in public bodies and “political” positions at state, regional and local level; the hypotheses of incompatibility between the role of director of a private body in public control and political positions, at state, regional and local level.

Another element, even more important, of the new system of prevention tools is given by the “codes of conduct”: an institute that in the Italian experience has a long tradition, having been foreseen for the first time already in 1993, but which has been completely redesigned by the anti-corruption law. The Law no. 190/2012, in fact, rewrote the art. 54 of Legislative Decree no. 165/2001 (Consolidated text of work in public administrations<sup>34</sup>), introducing a series of highly innovative elements. In general terms, the code of conduct constitutes a list of duties defined unilaterally by the government and then detailed and supplemented by a similar document adopted by each administration, aimed at ensuring the impartiality of the public official and its correct fulfillment of the functions assigned. It is in some way the execution of that “constitutional statute”, which define the public administrations official<sup>35</sup> an employee required to serve the general interest (he is “at the exclusive service of the Nation”<sup>36</sup>), to ensure impartiality<sup>37</sup>, to work faithfully and “with discipline and honor”<sup>38</sup>. These constitutional values are translated into a series of duties which constitute a manifestation and specification of them<sup>39</sup>: duties which, unlike the more strictly relevant obligations from the point of view of work performance, are linked to the care of public functions and are subtracted from the contractual rules, but are reserved to a public law source<sup>40</sup>.

Another above mentioned important innovation is the choice to articulate a system of duties on two levels: the national level, with a code of conduct

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34. Legislative Decree no. 165, march 30, 2001 “Norme generali sull’ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche” (G.U. 9 maggio 2001, n. 106).

35. See G. Sirianni, *I profili costituzionali. Una nuova lettura degli articoli 54, 97 e 98 della Costituzione*, in F. Merloni, L. Vandelli (a cura di), *La corruzione amministrativa. Cause, prevenzione, rimedi*, Firenze, Passigli, 2010, pp. 129 ss.; ampiamente F. Merloni, R. Cavallo Perin (a cura di), *Al servizio della Nazione*, cit.

36. Art no. 98 Italian Constitution, paragraph 1, “public officials are at the exclusive service of the Nation”.

37. Art. 97 Italian Constitution, paragraph 2, “The public offices are organized according to legal provisions, so that the good performance and impartiality of the administration are ensured”: the constitutional provision is addressed to the legislator and to the organization, but places a principle which also has a subjective value for the official.

38. According to the Italian Constitution, art. 54, in addition to the duty of “loyalty to the Republic”, which is of every citizen (paragraph 1), “The citizens entrusted with public functions have the duty to fulfill them with discipline and honor, taking an oath in the cases established by law” (paragraph 2).

39. B.G. Mattarella, *Le regole dell’onestà*. Bologna: Il Mulino (2007); F. Merloni, R. Cavallo Perin (eds.), *Al servizio della Nazione*. Milan: Franco Angeli (2008).

40. See recently E. D’Avino, *L’imperfetta contrattualizzazione del lavoro pubblico nel prisma della disciplina anticorruzione*, in *Il Lavoro nelle pubbliche amministrazioni*, 2015, fasc. 2, pp. 285 ss.

common to all employees (this code was adopted with Presidential Decree 62/2013) and therefore integrative, special and “decentralized” codes, proper to each administration. These second level codes have the same value as the national code, and each administration must equip itself with this tool which is, particularly at this level, an important measure for preventing corruption. It should therefore respond not only to the specificities of each type of administration, but also to the specific characteristics of each public entity in terms of internal and external context.

The National Anti-Corruption Authority monitors, even eventually applying sanctions, the actual adoption of these codes by the various administrations (which must not limit itself to reproduce, as has sometimes happened, the national code or “copy” the code of other administrations) and monitors the application<sup>41</sup>.

However, in the overall structure of the reform, the main preventive measure is first of all administrative transparency<sup>42</sup>: the long-affirmed idea that the “sunlight” is the best disinfectant<sup>43</sup> is present in the drawing outlined by the law no. 190/2012. The Italian legislation is, on this side, particularly interesting: traditionally characterized by an idea of transparency intended as the right of access to documents provided for by the law on administrative procedure (No. 241/1990<sup>44</sup>), has recently known an evolution that has progressively led to an increasing role of publication obligations, achieved through the dissemination of information through the websites of public administrations<sup>45</sup>.

The anti-corruption law further develops this design, defining a series of additional publication obligations and above all delegating the government to the drafting of a “single text” containing all the publication obligations

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41. Regarding this “Regolamento in materia di esercizio del potere sanzionatorio dell’Autorità Nazionale Anticorruzione per l’omessa adozione dei Piani triennali di prevenzione della corruzione, dei Programmi triennali di trasparenza, dei Codici di comportamento”, del 9 settembre 2014.

42. See, among others, A. Cerrillo Martinez, *Public transparency as a tool to prevent corruption in public administration*, in A. Cerrillo Martinez, J. Ponce (a cura di), *Preventing corruption and promoting good government and public integrity*, cit., pp. 1 ss.

43. W. Brandeis, *Other people’s money – And how the bankers use it*, 1914, in <http://www.law.louisville.edu>; cfr. in senso analogo ANAC, *Relazione Annuale al Parlamento dell’Autorità Nazionale Anticorruzione per l’anno 2015*, cit., p. 5.

44. Law no. 241, august 7 1990 “Nuove norme sul procedimento amministrativo”.

45. E. Carloni, *La casa di vetro e le riforme. Modelli e paradossi della trasparenza amministrativa*, in *Diritto pubblico*, 2009, pp. 779 ss.; C. Cudia, *Trasparenza amministrativa e pretesa del cittadino all’informazione*, in *Diritto pubblico*, 2013, pp. 99 ss.; D.-U. Galetta, *Transparency and access to public sector information in Italy: a proper revolution?* cit., pp. 213 ss.

already provided by the legislation. This provision, also known as the “code of transparency” was adopted in 2013 (Legislative Decree No. 33) and is essentially characterized by two elements: on one side, a consistent regime that accompanies the publication obligations, from the other, an extended list of publication obligations relating to different aspects (organization, personnel, deeds and activity, use of resources, public services, specific sectors of action), all identified as relevant in the perspective of widespread control and therefore aiming to preventing and combating corruption<sup>46</sup>.

Consistently with this approach, the Anti-Corruption Authority is called upon to monitor compliance with the publication obligations, in relation to the person responsible for transparency and the person responsible for preventing corruption, present in each administration. The Anac therefore qualifies itself as the authority of transparency, as well as the prevention of corruption, with reference to this specific “proactive” transparency tool.

Transparency is therefore intended, in the legislative decree no. 33, as amended by the most recent provisions, “as total accessibility to data and documents held by public administrations, in order to protect citizens’ rights, promote the participation of those interested in administrative activity and favor widespread forms of control over the pursuit of institutional functions and on the use of public resources”<sup>47</sup>: these different needs are realized primarily through publication obligations, and now through the new “generalized” right of access.

This “proactive” type of disclosure model has recently been completed and supplemented by a “reactive” type of know-how, inspired by the US-based experience of the “Freedom of information act”<sup>48</sup>. Precisely starting from the “Foia-model”, which had a global success and wide circulation, the “Madia” reform wanted to introduce a “freedom of information” (Article

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46. . Carloni, *L'amministrazione aperta. Regole, strumenti, limiti dell'open government*, Rimini, Maggioli, 2014; B. Ponti (ed.) *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33*. Maggioli: Rimini (2013). Cfr. M. Savino, *Le norme in materia di trasparenza amministrativa e la loro codificazione*, in *La legge anticorruzione* cit., 113-123; A. Bonomo, *Il codice della trasparenza e il nuovo regime di conoscibilità dei dati pubblici*, in *Istituzioni del federalismo*, 2013, pp. 725 ss.; G. Gardini, *Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?* in *Giornale di diritto amministrativo*, 2014, pp- 875 ss.; A. Natalini, G. Vesperi (a cura di), *Il Big Bang della trasparenza*, Napoli, Editoriale Scientifica (2015).

47. Based on art. 1, “Principio generale di trasparenza”.

48. On the success of the american model and its circulation, see J.M. Ackerman, I.E. Sandoval-Ballesteros, *The global explosion of Freedom of Information Laws*, in *Administrative Law Review* (2006) 85-130; OECD, *The right to open public administrations in Europe: emerging legal standards*, ed. M. Savino, 46 Sigma Paper (2010).

7, paragraph 1, letter h) of the Law no. 124/2015) h): the government has therefore been delegated to introduce the “recognition of freedom of information through the right of access, even by telematic means, of anyone, regardless of the ownership of legally relevant situations, to the data and documents held by public administrations [...] in order to favor widespread forms of control over the pursuit of institutional functions and the use of public resources”.

The scenario delineated by the introduction of the new Italian “Foia” appears at first sight to be interesting: the disclosure duties are completed with mechanism able to enlight also areas not subjected to publicity obligations<sup>49</sup>. This aimed to allow diffuse check and wider participation to the public debate.

A picture, as can be seen, very broad and articulated, which is also composed of the new rules on public contracts and therefore by the role of the Anti-Corruption Authority as supervisory authority on the matter: a non-secondary aspect of the Anac action and the overall strategy to combat corruption<sup>50</sup>.

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49. Judges positively the new approach D.-U. Galetta, *The Italian Freedom of information act 2016 (why transparency-on-request is a better solution)*, in *Italian Journal of Public Law*, 2016, iss. 2.

50. G.M. Racca, *La prevenzione e il contrasto della corruzione nei contratti pubblici* (art. 1, commi 17-25, 32 e 52-58), in B.G. Mattarella, M. Pelissero (a cura di), *La legge anticorruzione*, cit., spec. pp. 101-102; G.M. Racca, *Dall’Autorità sui contratti pubblici all’Autorità Nazionale Anticorruzione: il cambiamento del sistema*, in *Diritto amministrativo*, 2015, fasc. 2-3, pp. 345 ss.



## Good practices in implementing anti-corruption projects-twinning project “prevention and fight against corruption”

The Anti-Corruption Agency of the Republic of Serbia has been implementing two-year Twinning Project “Prevention and Fight against Corruption” as of July 2016 with the partner institutions from the Republic of Italy and Kingdom of Spain, i.e. National Anti-Corruption Authority, the Ministry of Justice, the Higher School of the Judiciary of the Republic of Italy and the General Prosecutor’s Office of the Kingdom of Spain. The Project, amounting to two million euro is funded by the European Union as a part of Instrument for Pre-Accession Assistance (IPA<sup>1</sup>) 2013<sup>2</sup>.

The Serbian Anti-Corruption Agency is independent and autonomous state institution<sup>3</sup> (operational as of January 2010), established in accordance with the Article 6 of the United Nations Convention against Corruption<sup>4</sup> with numerous preventive, control and oversight competences, encompassing monitoring of the implementation of the National Anti-Corruption Strategy and its Action Plan, control of assets and income of public officials, control of financing political activities, resolving conflict of interest and incompatibility of public offices, acting upon complaints, integrity plans, corruption risk assessment in legislation, international cooperation,

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1. European Commission, *Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA)*, viewed 19 February 2018, from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:170:0001:0066:EN:PDF>.

2. European Commission, *IPA National Programme for the Republic of Serbia-2013*, viewed 19 February 2018, from [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/ipa/2013/national\\_programme\\_for\\_serbia\\_2013.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/ipa/2013/national_programme_for_serbia_2013.pdf).

3. Anti-Corruption Agency of the Republic of Serbia, *Law on the Anti-Corruption Agency*, viewed 25 January 2018, from <http://www.acas.rs/law-and-regulations/laws/law-acas/>.

4. United Nations Office for Drugs and Crime, *United Nations Convention against Corruption*, viewed 5 February 2018, from [https://www.unodc.org/documents/treaties/UN-CAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UN-CAC/Publications/Convention/08-50026_E.pdf).

etc. Besides the previous international projects implemented by the Anti-Corruption Agency (supported through European Union funds, bilateral assistance, assistance of international organizations, such as the Mission of the Organization for Security and Cooperation in Europe to Serbia, United Nations Development Programme, United States Agency for International Development, etc.), the pertinent Twinning Project stands for one of the most complex ones implemented so far.

Twinning Project is comprehensive in such a manner that it covers all competences of the Serbian Anti-Corruption Agency, including resolving conflict of interest and incompatibility of public offices; control of assets and income of public officials; control of financing of political activities; corruption prevention and international cooperation.

As per the Twinning Manual<sup>5</sup>, Twinning is an institution building instrument based on partnership cooperation between public administrations and mandated bodies of European Union Member States and of a Beneficiary with the purpose of achieving mandatory results/outputs jointly agreed with the European Commission.

Projects are built around policy objectives deriving from the joint European Union-Beneficiary country political agenda, i.e. combining the European Union policy orientations and the Beneficiary administration's efforts for reforms.

Given the aforementioned, the Twinning Project is closely related to the activities from the national strategic anti-corruption documents as well as relevant legislation, primarily the Law on the Anti-Corruption Agency. It is based upon the recommendations deriving from the European Commission Screening Report for Chapter 23 (Judiciary and Human Rights)<sup>6</sup>, which are thoroughly reflected in the Action Plan for Chapter 23<sup>7</sup>, i.e. its subchapter related to the anti-corruption policy. The respective recommendation<sup>8</sup> par-

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5. Ministry of Finance of the Republic of Serbia, Department for Contracting and Financing of European Union funded Programmes, Twinning Manual-update 2013-2014, viewed 19 February 2018, from [http://www.cfcu.gov.rs/dokumenti/sr/24\\_484589\\_twinning-manual-2012-update-2013-2014-final.pdf](http://www.cfcu.gov.rs/dokumenti/sr/24_484589_twinning-manual-2012-update-2013-2014-final.pdf).

6. The Delegation of the European Union to the Republic of Serbia, European Commission Screening Report for Chapter 23, viewed 13 January 2018, from <http://www.europa.rs/upload/2014/Screening-report-chapter-23-serbia.pdf>.

7. Ministry of Justice of the Republic of Serbia, Action Plan for Chapter 23, viewed 13 January 2018, from <https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>.

8. Ministry of Justice of the Republic of Serbia, Reports on implementation of the Action Plan for Chapter 23, viewed 13 January 2018, from <https://www.mpravde.gov.rs/files/Report%20no.%204-2017%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf>.

ticularly refer to the need of further improvement of the efficiency of the Anti-Corruption Agency and bolstering of its administrative capacities, ensuring an effective implementation of the legislation on the control of financing of political activities and enhancement of the legal and administrative framework to prevent and deal with conflict of interest.

One of the main features of the Twinning projects pertains to targeted administrative cooperation aimed at strengthening capacities of future European Union Member States. Experience in implementing the Twinning Project indicates that this is a peer learning process and substantial experience exchange between the institutions dealing with curbing corruption, thus being the great example of bolstering structural links among the Serbian Anti-Corruption Agency and the partner institutions from the Republic of Italy and the Kingdom of Spain, going much beyond the plain “project cooperation”. This is also a “living” project, meaning that it follows the needs of the Anti-Corruption Agency with the possibility to mitigate any potential project risk that might arise, as is the case with the delay in the adoption of the new Law on the Anti-Corruption Agency, which was one of the main assumptions for the proper implementation of the project. Albeit the new Law on the Anti-Corruption Agency has not been adopted yet, the Project Team and the Anti-Corruption Agency as a whole keep adjusting the project activities to this circumstance as to achieve mandatory results and the best possible benefit from this kind of European Union support.

The Project is divided into two components of which the first one pertains to enhancing capacity, efficiency and coordination role of the Anti-Corruption Agency whereas the second one is related to strengthening corruption prevention mechanisms in line with the best European Union Member States’ practices and national strategic documents.

In accordance with the Action Plan for Chapter 23, the National Anti-Corruption Strategy for the period 2013-2018 and its Action Plan, the Project aims at improving mechanisms, tools, methodologies and legislation to prevent corruption in the Republic of Serbia and promote an active role of the Anti-Corruption Agency, other competent public authorities, civil society organizations and media. In the light of pre-accession negotiations between the Republic of Serbia and the European Union, the Project is to contribute to the process of reforms and harmonization with the European Union standards pertaining to the efficient fight against corruption.

The main activities of the Project include the ones related to reinforcement of the capacities of the Anti-Corruption Agency’s staff through numerous advanced trainings on conflict of interest, control of assets and income of officials, acting upon complaints indicating suspicion on corruption, trans-

parency, etc.; enhancement of internal and external communication; study visits and internship programmes in the partner institutions; upgrade of the existing software applications related to monitoring of the implementation of the National Anti-Corruption Strategy for the period 2013-2018 and its Action Plan as well as integrity plans; comparative analyses and best practice examples in combating corruption within the European Union Member States; development and testing of indicators for conflict of interest and incompatibility of public offices; support to defining categories of public officials being particularly prone to corruption; database management, etc.

The Twinning Project also strongly relies on the sector approach given that it encompasses activities which involve participation of all relevant state institutions but also civil society and media.

The Core Project Team consists of Member State Project Leader (representative of the Lead Twinning Partner – Italian National Anti-Corruption Authority), Resident Twinning Advisor (representative of the Italian Judiciary), Junior Twinning Partner (representative of the Spanish General Prosecutor's Office), Beneficiary Country Project Leader (representative of the Serbian Anti-Corruption Agency) and Beneficiary Country Resident Twinning Advisor Counterpart (representative of the Serbian Anti-Corruption Agency).

As stipulated by the Contract and Twinning Manual as well as Project Cycle Management principles, the Project Team organizes Steering Committee meetings on a quarterly basis. Steering Committee consists of representatives of the European Union Delegation to the Republic of Serbia, Department for Contracting and Financing of European Union funded programmes of the Ministry of Finance (*CFCU*) as a Contracting Authority, Ministry of Justice, Ministry of European Integration and the core Project Team.

There is a regular and constructive communication among the members of the core Project Team as well as with the Serbian Ministry of Justice and *CFCU*. This particularly applies to communication related to the implementation of the project activities, such as drafting analyses and providing comments for its improvement.

Project Team also makes a significant effort as to ensure sustainability of the (mandatory) project results, i.e. reform efforts. The Project pays due attention to ensuring sustainability through several modalities, including capacity building of the Anti-Corruption Agency's staff and other involved actors (state bodies, civil society, media, etc.), reinforcing coordination and communication with relevant stakeholders, creating database for training so that it is easily accessible for later use, training for trainers, upgrade of the

current software applications, analyses and recommendations deriving from the Twinning partners' expertise, reinforcement of structural links between Twinning partners and the Anti-Corruption Agency so as to preserve project achievements and improve it further.

As per Communication and Visibility Manual for European Union External Actions<sup>9</sup> due attention has also been paid to the visibility aspect of the whole Project aimed at presenting its results and benefits to the broader public, through visibility materials, public events, social media as well as sub-site of the website of the Anti-Corruption Agency, particularly devoted to the achievements of the Twinning Project (<http://www.acas.rs/twinning/en/>).

The Project will have been finalized in 2018.

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9. European Commission, *Communication and Visibility Manual for European Union External Actions*, viewed 18 February 2018, from [https://ec.europa.eu/europeaid/sites/devco/files/communication\\_and\\_visibility\\_manual\\_en\\_0.pdf](https://ec.europa.eu/europeaid/sites/devco/files/communication_and_visibility_manual_en_0.pdf).

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## Experiences in fighting corruption in Europe: Republic of Serbia

There is a strong international consensus that corruption have to be tackled both with repressive and preventive actions. Prevention together with criminalisation and law enforcement constitute key tools to fight corruption.

The fight against corruption and the strengthening of the rule of law are among the key areas in the region in the framework of the EU accession process.

The common legislative grounds and the most important international standards addressing these issues are incorporated in the United Nation Convention against Corruption, the Council of Europe Twenty Guiding Principles for the Fight Against Corruption, Council of Europe Criminal Law Convention Against Corruption, Council of Europe Civil Law Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).

Those conventions also constitute body of European Union law. This is why these documents are strongly related to the pre-accession negotiation process of all countries striving to join the EU.

The United Nation Convention against Corruption (UNCAC) was adopted by the UN General Assembly in late October 2003 and is the first international convention setting global standards in the area of corruption prevention. Serbia ratified the Convention in 2005.

The Convention was developed with a purpose to:

- promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

- promote integrity, accountability and proper management of public affairs and public property.

In its Chapter II entitled Preventive measures, State parties are required to develop and maintain anti-corruption policies and effective measures to prevent corruption.

During past several years, many countries in Europe have introduced anti-corruption policies, specific legislative acts as well as institutional measures to prevent corruption and enhance integrity. There is a wide range of anti-corruption strategies and action plans, institutions specialized in prevention of corruption, conflict-of-interest prevention and ethics rules, codes of conduct, formal requirements for public officials to declare their assets, improvements in civil service recruitment policies and public procurement, laws on access to information, political party financing and others aimed at preventing corruption.

However, as EU reports and some studies indicated, the implementation remain weak. The reason for that could be a lack of political will, a lack of enforcement mechanisms, lack of information, the lack of practical guidance, counselling, internal rules and effective supervision in the area of conflict of interest prevention, gifts, incompatibilities, asset declarations and related issues.

Having in mind international standards, efficient corruption prevention and specialized anti-corruption institutions, I would also like to draw your attention to the Anti-Corruption Authority standards issued by the European Partners Against Corruption and adopted in November 2011. These standards are consistent with aforementioned international conventions and legal instruments.

The *Anti-Corruption Authority Standards* including an annex (The Ten Guiding Principles on the Notion of Independence) are designed to promote transparent and independent anti-corruption bodies through sustainable modes of operation.

In the framework of this session I will mention the most important principles which relate to the rule of law, independence, accountability, integrity and impartiality, transparency, resources, recruitment and cooperation.

First on the list is certainly the Rule of Law principle.

One of the essential prerequisite for an effective anti-corruption authority is to provide a proper, comprehensive and stable legal framework which serves the purpose of the establishment and maintenance of the ACA.

The mandate, institutional jurisdiction, sanctioning regime as well as operational tools and mechanisms have to be clearly defined. Establishment

by specific law or, as experience shows, constitutional guarantees of independence, enhance the likelihood that the body will have sufficient power to promote effective policies and ensure implementation, as well as conveying a sense of stability. The institution should have the authority to follow up on whether and how its recommendations have been implemented and they should be able to develop and retain staff that have the necessary expertise against corruption. These issues are highlighted in international recommendations in the context of a precondition which guarantee sustainability, continuity and independence of the anti-corruption institution.

This leads us to the second principle – the independence.

The independence is a key element for establishing and safeguarding overall credibility of the ACA. In relation with the status and role of the anti-corruption institution, the independence issue is much more than a legal provision that states that one institution is independent. There are several aspects of independence which include political independence, functional and operational independence as well as financial independence.

That means that the independence is actually a crosscutting issue that encompasses all aspects of work of anti-corruption agencies, starting with the substantial exemption from undue influence, through institutional financing, merit based recruitment of employees and appropriate human resource management to data exchange systems and cooperation with other relevant institutions both at the national and international level.

International standards particularly highlights the link between independence and adequate financial and material resources. In order to function properly and fulfill its mandate effectively and efficiently, the ACA must have proportionate and sufficient budget which should allow employment of sufficient number of highly qualified and skilled individuals, appropriate system of remuneration and incentives, specialized training's and ensure proper working conditions.

In order to ensure public confidence, the ACA needs to be accountable for the way in which it discharges its responsibilities. Likewise, staff within the ACA must be accountable for their decisions and actions. ACAs shall report regularly and publicly on their activities.

It goes without saying that integrity and impartiality is a fundamental principle for all ACA employees in the discharge of official duties.

When we speak about the anti-corruption policies, what Serbia learned from the past is that the comprehensive national anti-corruption strategy with related Action plan have to be agreed by all key national players, including wide consultations with non-governmental organizations and academia. Results of different analysis, corruption risk assessments and research

on corruption (regular, specific and evidence-based) have to be a baseline in policy making and have to be public. Corresponding Action Plan must include clear priorities, concrete and effective measures and mechanisms for implementation, including clear division of tasks, precise guidelines and time frame, designated body in charge for coordination of the implementation as well as regular public reporting about its implementation. In order to have objective picture, to access whether envisaged measures have been taken in practice or had manifest the results, an independent and specialized anti-corruption bodies (or well established unit within an existing public administration) have to be responsible for monitoring of the Strategy implementation, to discriminate knowledge about the prevention of corruption and regularly cooperate with civil society. Comprehensive awareness raising and education events have to be developed and conducted for general public and targeted groups addressing also civil society associations and business sector. Awareness raising events have to be useful and focused on specific and practical aspects.

According to the Constitution of the Republic of Serbia, generally accepted rules of international law and ratified international treaties are an integral part of the legal system in the Republic of Serbia. National laws and other general acts have to be in compliance with the ratified international treaties and generally accepted rules of the International Law.

The Law on the Anti-Corruption Agency, adopted in late 2008, was made in accordance with international standards, especially Article 6 of the UN Convention against Corruption and specific recommendations from the Group of States Against Corruption (GRECO).

The Agency was established as an autonomous and independent state authority with numerous preventive, control and oversight competencies in several areas – resolving cases of conflict of interest of public officials in Serbia, controlling the asset declarations of public officials and dealing with complaints, controlling the funding of political parties, supervising the implementation of the National Anti-Corruption Strategy and related action plan, fulfilling international obligations, anti-corruption assessment of legislation, developing training programmes, conducting surveys, monitoring the implementation of integrity plans and achieving cooperation with all governmental and non-governmental institutions in Serbia.

The bodies of the Agency are the Board and the Director.

For conducting activities within its competences, the Agency is accountable to the National Assembly, to which it is required to file the Report on Annual work that shall include a Report on the implementation of the Strategy and related Action plan.

As said, the Agency has the whole range of available preventive measures. I will highlight some of them:

1. Serbian Anti-Corruption Agency is tasked to monitor the implementation of the National Anti-Corruption Strategy and the Action Plan for its implementation. All findings, available data, possible concerns regarding the measures and activities as well as recommendations for overcoming the obstacles are part of the mentioned Report. The Anti-Corruption Agency cooperates with CSOs through various cooperation forms and initiatives.
2. Participation of civil society in monitoring of the strategic documents was promoted through their inclusion in so-called alternative reporting of the CSOs about the implementation of the NACS. All priority areas of the National Anti-Corruption Strategy such as the Political activities, Public Finances, Privatization and Public Private Partnership, Judiciary, Police, Urban and Spatial Planning, Health, Education and Sport, Media and Corruption Prevention were addressed by the alternative reports. The ACA used their findings when drafting the final Report on the implementation of the Strategy and related Action plan.
3. Common challenges to the rule of law, linked to the problem of corruption, include lack of accountability, lack of independence, lack of transparent work, lack of integrity, existence of redundant and unnecessary procedures, lack of clear, precise and previously set requirements, criteria and standards for decision making, lack of adequate oversight and control. Comprehensive system for corruption risk management is needed to respond to these challenges. Corruption risk management implies identification, assessment, evaluation and decision making on how to treat and control the risks. That is why one of the significant corruption prevention measure is an integrity plan. Integrity Plan represents a document which is being developed as a result of the self-assessment of a degree of institution's exposure to corruption risk and exposure to ethically and professionally not-acceptable acts. The purpose of the Integrity Plan is to establish a mechanism that will ensure the efficient and effective functioning of institution by strengthening accountability, simplifying complicated procedures, increasing transparency in decision-making, controlling discretionary powers, strengthening ethics, eliminating inefficient practices and inapplicable regulations, introducing efficient system of supervision and control. When developing Integrity Plan, an institution is assessing its current risk management measures in those areas which are, by their nature, more prone to cor-

ruption, such as: public procurement, HR management, signing different types of contracts for procurement of certain goods and services, project financing and co-financing, public finance management, issuance of different types of permits, deciding on the rights and interests of the citizens and legal entities and the similar. The Agency is monitoring development and implementation of integrity plans. Control is done in a direct manner, by visiting sampled institutions and through assessment of plans submitted by institutions.

4. All integrity measures need sound regulatory environment as a precondition for their effectiveness. Adoption of the clear, precise and justified legislation, devoid of corruption risks, is an indispensable part of that process. The most important mechanism in this regard is anti-corruption assessment of legislation. The Agency developed the Methodology for corruption risk assessment in legislation, as a preventive tool to help in elimination of rules and practices that create favorable conditions for corruption. Applying the Methodology the Anti-Corruption Agency provided more than 140 opinions on draft laws in areas that are particularly prone to corrupt practices and 6 initiatives for amending the existing laws in areas such as customs, public-private partnership and concessions, privatization, land regulations, investment policy, bankruptcy, etc. The most frequent shortcomings and corruption risks are unclear provisions, legal gaps, excessive discretionary powers of public bodies and leaving the space for ministries to define some important issues with by-laws. Conclusions of assessments have to be considered thoroughly by legislators and legally binding on the decision makers. In addition, the Agency conducted numerous training's on corruption risk assessment in legislation for participants who are dealing with drafting legislation and other general acts at all levels of government.
5. As a part of strengthening integrity and accountability regime of public officials, the Agency is conducting asset and income declaration control of public officials and detection of conflict of interests. Asset declaration control is pursued through regular (targeted) and extraordinary checks. Each year the ACA drafts annual verification plan, that basically means the priority list of public officials who will be subject to review. The Agency is comparing the reported data with information acquired from relevant institutions such as the Tax administration, Ministry of Interior, Business Registry Agency, Republic Geodetic Authority, etc. If public officials do not report their assets

to the Agency or provide false information on their assets intending to conceal the data on their assets, the ACA files criminal charges. When in its analysis of the data collected in the review of the declaration the Agency finds irregularities and misconduct it notifies other government authorities thereof to allow them to initiate appropriate measures in accordance with their statutory competencies and authority and duly notify the Agency. Reports are filed to competent prosecutor's offices and other competent government authorities (such as Tax Administration, Administration for the Prevention of Money Laundering, Administrative Inspectorate, State Audit Institution, Budget Inspectorate, etc.) due to a reasonable suspicion that public officials, whose assets and income were subject to review, committed some other criminal acts (taking/giving a bribe, tax evasion, money laundering, etc.), or an act punishable in accordance with some other rules. As of its establishment, the ACA filed more than 60 criminal charges, more than 100 reports to prosecutor's offices and other competent authorities as well as about 550 requests for initiation of misdemeanor proceedings.

6. The Agency is dealing with conflict of interest cases *ex officio* and upon reports. Inter-sector cooperation is also established in order to address this issue. After the thorough proceeding, the Agency issues various measures among with the most important one is related to the recommendation for dismissal of public official. Other measures are warning measure and measure of public announcement of decision on violation of the law. To date, the ACA has issued 138 measures of public announcement of recommendation for dismissal. In the area of conflict of interest, the ACA has filed more than 160 requests for initiation of misdemeanor proceedings due to violation of the Law on the ACA, i.e. its conflict of interest related provisions. The ACA acts upon complaints submitted by natural persons or legal entities indicating corruption related practice in functioning of public authority bodies or public officials. The ACA conducts administrative inquiry, collects necessary evidences, refers complaints to other competent public authorities and monitors the course of the procedure. After gathering of relevant documents and careful case study, the ACA mostly submits reports on irregularities to the competent prosecutor's office due to suspicion that criminal offence, prosecutable *ex officio*, had been committed. (In terms of acting upon complaints, the ACA has filed 6 criminal charges and 17 reports to prosecutor's offices.)

7. Another ACAs competence with oversight and accountability element is control of financing of political entities. The ACA controls reports on regular activities and reports on election campaign costs. In addition, the ACA is also conducting monitoring of activities of political entities during the election campaigns. Content control of the reports is performed by comparing the data provided in the reports of political entities with the data collected during the election campaign monitoring, and with the data obtained from state authorities, banks, legal entities and natural persons that finance the political entities or provide them a certain service. Upon completing the control procedure, the ACA files the request for initiation of misdemeanor proceedings, or criminal charge before the competent authority in case the established facts indicate a violation of the Law. To date the ACA has filed over 1.300 requests to initiate misdemeanor proceedings, two reports to prosecutor's office resulting in over 537 first instance judgments and 240 final ones and over 80 decisions on loss of funds from public sources. In general, the majority of misdemeanor proceedings the ACA has started due to the failure of political entities to submit annual financial report and report on election campaign costs, but there were also failures to publish the donation on its web site, to submit the opinion of a certified auditor and other failures prescribed by the law (to use funds received from public sources in the amount not less than 5% of aggregate funds received for regular work at annual level for professional upgrading of the membership, to remit funds, to submit the requested documents, information and data).
8. In its capacity to develop and deliver specific training programmes, the ACA has created on-line training course on ethics and integrity in public sector by using the open-source platform for distance learning. In addition, ACA is organizing training for trainers in the area of ethics and integrity. The training for trainers has the aim to empower participants with knowledge and skills in order to make them capable to deliver training by themselves in public institutions in which they are employed. Total of 85 participants successfully completed online ethics and integrity training whereas 130 trainers were trained on this topic. Ethics and Integrity on-line training course consists of the following topics: Values and Role of Public Sector Employees, Conflict of Interest in working environment, Importance of Code of Ethics in resolving Ethical Dilemmas and the Concept of Accountability in the Public Sector. Lessons consist of presentations, interactive exercises and video material. At the end of each lesson participant has to

provide correct answers to 80% of questions so as to continue with the work and obtain a certificate at the end of the course. So far, 84 certificates were issued to the on-line training participants who passed the test successfully (out of 119).

9. International cooperation, through various mechanisms, contributes to improvement of results of all countries in fight against corruption, especially having in mind its transnational character. Establishing and reinforcing international cooperation, exchange and alignment of anti-corruption standards and practice is of utmost importance for efficient prevention and fight against corruption. At the international level, especially having in mind European integration process, the ACA participates in the work of all international anti-corruption initiatives, such as Council of Europe Group of States against Corruption (GRECO), Anti-Corruption Network of the Organization for Economic Cooperation and Development, UN Office for Drugs and Crime (related to the implementation of the UNCAC), European Partners Against Corruption and others.

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## PART II

Preventing corruption and promoting good government and public integrity: a comparative overview



## Preventing corruption through the promotion of the right to good administration<sup>1</sup>

*1. Better safe than sorry: obligations of good administration as a useful tool to prevent corruption*

The legal development of the right to good administration could be a good antidote against corruption. If Klitgaard's corruption formula is

$$C = M + D - A,$$

or (to put this back into words): "Corruption equals monopoly plus discretion minus accountability."<sup>2</sup>

Then the antidote that we propose is

D+B+T+P or Discretion+good administration+transparency+participation.

In that sense, the obligations of good administration (e.g. due process, duty of giving reasons and duty of due diligence or due care which will consider later) are linked to transparency (and participation) in the sense that transparency and access to information can help to get a good administration.

There are still many doubts about the relationship between good governance and good administration and the meaning, usefulness and contents

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1. Director of Transjus, research institute of the University of Barcelona. The study is linked to the Spanish research project titled: «Retos jurídicos del uso de datos masivos para el fomento de la innovación y la Buena administración a través de la inteligencia artificial (DER2017-85595-R)».

2. Klitgaard, R. (1988) *Controlling Corruption*. University of California Press.

of a right to good administration<sup>3</sup> Sometimes both expressions (good governance and good administration) are used in a similar way and also with good government. It depends on each legal tradition and on the language used<sup>4</sup>. Whilst good governance is more used by Political Science in a broad and political context (including all public powers and private ones that are involved in public decisions) the right to good administration must have a precise legal meaning because it has been included in legal texts, as we will see<sup>5</sup>, and it is used to establish administrative obligations which are enforceable by means of judicial review.

Therefore, the challenge is to understand the right to good administration and make it available for better prevention of maladministration and corruption and improvement of administrative decisions. This is the goal of this article: promoting the understanding and operational use of the right to good administration, with a global perspective, from an international and interdisciplinary point of view.

Although it has been said that good administration means different things in different countries<sup>6</sup> a juridical perspective gives us, at least in the field of the EU, a *minimum common denominator*, as an interesting Swedish report underlines<sup>7</sup>, pointing out that:

“The general idea behind a law on good administration is that if public administrations follow proper procedures, the probability of making good decisions increases dramatically. Designing procedures that ensures that the official considers all relevant facts, balances all relevant interests and ensures that all parties can hold him/her accountable during the process by transparent procedures and forcing the public authority to explicitly state the

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3. Trimarchi, M. (2011), “The Impact of Article 41 of the EU Charter of Fundamental Rights on Italian Administrative Law: Some Observations”, *Ius Publicum*, num. 3, p. 11, available at: [http://www.ius-publicum.com/repository/uploads/05\\_10\\_2012\\_19\\_20-Trimarchi.pdf](http://www.ius-publicum.com/repository/uploads/05_10_2012_19_20-Trimarchi.pdf).

4. Addink G.H. (2014), “Three legal dimensions of good governance. Some recent developments”, in Castro, A., (Ed.), *Buen Gobierno y Derechos Humanos*, PUCP, available at: <http://idehpucp.pucp.edu.pe/publicaciones/buen-gobierno-y-derechos-humanos-nuevas-perspectivas-en-el-derecho-publico-para-fortalecer-la-legitimidad-democratica-de-la-administracion-publica-en-el-peru/>.

5. As it is known, now it is included in Article 41 of the Charter of Fundamental Rights of The European Union.

6. Wilson, G. (2010), “The Quality of...”, op.cit.

7. Swedish Agency For Public Management (Statskontoret) (2005): *Principles of Good Administration in the Member States of the European*, p. 78. Available at: <http://www.statskontoret.se/globalassets/publikationer/2000-2005-english/200504.pdf>. We will consider again this report later.

grounds for their decision, will ensure a minimum level of rational reflexivity in the process”.

It is important to take into account that the traditional concept of discretionary powers entails two common aspects: choice and general interest. Academic writers agree that discretion means public administration is empowered by Law to choose from among several legal possibilities, taking into account non juridical criteria. This choice implies balancing public and/or private interests, by using extra-legal values to define a general interest which is not established by statutes)<sup>8</sup>.

The core of discretion, i.e. the choice between alternatives, has been something odd in traditional Administrative Law which does not encompass it, except for just *designing limits* for the selection that cannot be breached. The choice itself is considered a matter of politics, not a legal issue. In the traditional paradigm, Administrative Law provides, above all, a defence for individuals, a shield against arbitrary decisions.

But a new viewpoint is growing around the world, which can be considered an element of the so called Global Administrative Law. CASSESE has underlined that “si può dire che il nucleo essenziale del principio di buona amministrazione costituisca il nucleo principale del diritto amministrativo globale”<sup>9</sup>. This second approach is concerned with the quality of decisions. The discretionary choice itself is relevant for Administrative Law, because it is concerned with good decisions, with good administration. It is important that Public Administration makes both the legal and the *right* decisions because people demand good decisions, together with proper reasons to back them, and they want to be heard and to have a say in the matter (

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8. E.g. in Spain, p. Garcia De Enterría, E. and Fernandez, T.R. (2002), *Curso de Derecho Administrativo*, vol. I, 11<sup>th</sup> edition, p. 454, in France, Vedel, G. and Devolvé, P. (1990), *Droit Administratif*, I, PUF, 11<sup>th</sup> ed, p. 524, in the UK, Craig, P.P. (1994), *Administrative Law*, London, Sweet & Maxwell, 3rd ed., p. 384 and in Italy, Giannini, M.S., (1939), *Il potere discrezionale della pubblica amministrazione: concetto e problemi.*, Giuffrè.

In the field of EU Law, see the Recommendation n. R (80) 2, Concerning the Exercise Of Discretionary Powers by Administrative Authorities (Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministry’s deputies). In its appendix this Recommendation defines “discretionary power” as a “power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate”.

9. Cassese, S (2009). “Il diritto alla buona amministrazione”, *ERPL*, vol. 21, no. 3., p. 1039. See in that sense, Cassese, S. (2012), “New Paths for Administrative Law: A Manifesto”, *Int J Constitutional Law*, 10 (3): p. 605, available at: <http://icon.oxfordjournals.org/content/10/3/603.full> and Ponce, J., (Coord.) (2010). *Derecho Administrativo Global*, Marcial Pons, 2010. First pages available at: <https://www.marcialpons.es/static/pdf/100878475.pdf>.

That is, the proper use of discretionary powers matters to public law. It has been said that the 21<sup>st</sup> century is the century of good administration<sup>10</sup>.

In short, can Administrative Law foster good administration? The answer is yes<sup>11</sup>. Actually, “there can be little doubt that the central purpose of Administrative Law is to promote good administration”<sup>12</sup>.

Judicial review of administrative decisions is not the whole administrative law but just part of it. Administrative law is a branch of the legal science devoted to achieving *lawful and good* decisions. Judicial review is just an important tool which can guarantee by itself the former but not the latter, although it can contribute to achieving this goal, as we will see below.

There are several other important legal tools that can help to achieve good administration, besides judicial review (ethical codes, citizen’s charters, etc.<sup>13</sup>). We are not going to study all of them here but we will focus on the role of *administrative procedure* and the *duty of giving reasons*<sup>14</sup>. By administrative procedure the study implies a way of developing administrative powers, the manner in which Public Administration carries out its functions, as underlined in the interesting dynamic view outlined by BENVENUTI<sup>15</sup>. Thus, Administrative procedure is understood as the normal and suitable way of developing the *funzione amministrativa* of “service to general interests”, to use the beautiful expression in art. 103 of the Spanish Constitution.

The main idea is that “better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained”<sup>16</sup>. Therefore, the idea of procedure is linked to the idea of good use of powers, especially in the case of discretionary pow-

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10. Cassese, S (2009). “Il diritto a...” op.cit., p. 1098, quoting the European Ombudsman.

11. Macmillan, J., “Can Administrative Law Foster Good Administration?”, The Whitmore Lecture, available at: [http://www.ombudsman.gov.au/files/16\\_September\\_2009\\_Can\\_administrative\\_law\\_foster\\_good\\_administration.pdf](http://www.ombudsman.gov.au/files/16_September_2009_Can_administrative_law_foster_good_administration.pdf).

12. Beatson, Matthews And Elliott (2016) *Administrative Law: Text and Materials*, Oxford, 5<sup>th</sup> edition, p. 1.

13. Ponce, J. (2013), “Transparencia, innovación y buen gobierno”, *Blog de la Revista Catalana de Derecho público*, available at: <http://blocs.gencat.cat/blocs/AppPHP/eapc-rcdp/2013/11/25/transparencia-innovacion-buen-gobierno-y-buena-administracion/>

14. Millet, (2002) “The Right to Good Administration in European Law”, *Public Law*, summer 2002., p. 310, explains that “By good administration is meant good administrative procedures”. We agree with this statement but must add a nuance: good administration means good administrative procedures *and* good reasons to back the final decision, as we will see shortly.

15. Benvenuti, F (1952)., “Funzione amministrativa, procedimento, proceso”, *RTDP*, 1952, ff. 118.

16. Bonfield, A.E (1986)., *State Administrative Rulemaking*, Little Brown and Company, Boston, Toronto, p. 28.

ers (WÖEHLING, refers to rules of “bonne utilisation” of discretionary powers established by French case law<sup>17</sup>).

On the other hand, the need to express the grounds supporting a decision will be proof that public authorities have complied with due administrative procedure, weighing up all the relevant interests and taking into account all the data collected. This kind of behaviour is especially important whenever officials exercise discretionary power. In these cases, statutes do not intend to nor can they define the public interest to be implemented by public administration. Take the case of areas of public intervention where the concept of risk plays a relevant role (e.g. environment, public health...). Legislators are not able to assess and manage the risk. Thus, the “belt transmission” theory, as a formal model of explaining administrative activity and consequently of *legitimizing* it does not work on its own all the time<sup>18</sup>. In all these cases and in others (where there is a sphere of discretion) a new rationale behind public administrations is necessary; in other words, *a different source of legitimacy is needed*, besides the traditional view of the automatic implementation of statutes<sup>19</sup>. As pointed out earlier, procedures can be a way of rationalising value judgements and a complementary source of legitimation in our complex and modern societies<sup>20</sup>.

Therefore, the idea of good administration leads us to a new way of understanding administrative legitimacy, to a new paradigm. If during the last century we moved from the Weber bureaucratic paradigm to New Public Management (NPM, which did not give all that it promised<sup>21</sup>), and from NPM to Governance<sup>22</sup>, now in the 21<sup>st</sup> century the next step will be moving towards good government and good administration. As the OECD emphasizes:

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17. Woehrling, J.M (1988). “Le controle juridictionnel du pouvoir discretionnaire en France”, in VERA Parisio (Ed.), *Potere discrezionale e controllo giudiziario*, Giuffrè editore, 1998, p. 65 ff.

18. Stewart, R.B. (1975), “The reformation of American Administrative Law”, *Harvard Law Review*, vol. 88, num. 8 and FRUG, G. (1984), “The ideology of bureaucracy in American Law”, *Harvard Law Review*, vol. 97, p 1312 ff.

19. Luhmann, N (1969), *Legitimation durch Verfahren*, Neuwied: Luchterhand.

20. Alexy, R. (1989) *Teoría de la Argumentación Jurídica*, CEC, Madrid, 1989.

21. Hood, C. And Ruth, A (2015), *Government that Worked Better and Cost Less? Evaluating Three Decades of Reform and Change in UK Central Government*, Oxford University Press, (<http://xgov.politics.ox.ac.uk/>).

22. Prats, J. (2005), *De la burocracia al “management”, del “management” a la gobernanza. Las transformaciones de las administraciones públicas de nuestro tiempo*, INAP, Madrid,

“The idea that good governance generates trust by promoting fair processes and fair outcomes is an important concept in recent research”<sup>23</sup>

Thus, the right to good administration should force the change of paradigms regarding the administrative activity and their replacement for other new ones, more adapted to current necessities. Good administration, as a concept of necessary technical accuracy – but radically opposed to the indifference of the Law regarding the exercise of discretionary powers-, and the articulation of concrete legal mechanisms to implement it, like administrative procedures, can help to achieve better public decisions. Administrative procedures and the duty to give reasons are considered, among others, useful legal tools in order to implement principles of good administration which can help to provide better decisions. This view explains a growing interest in the literature on these topics related to the idea of good governance<sup>24</sup>, the right to a good administration and their connections with transparency.

As article 15 of the Treaty on the Functioning of the EU establishes:

“In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.”

## 2. *The European regulation of the right to good administration*

The Council of Europe has been active in the field of good administration. First of all, it is noteworthy to mention the resolution of 28 September 1977 on the Protection of individuals with regard to actions of administrative authorities. Although in its text there is no specific reference to the term “good administration”, this idea is implicit.

Secondly, the Recommendation number R (80)2, adopted by the Committee of Ministers on 11 March 1980, concerning the exercise of discretionary powers by the administrative authorities, does not refer to “good administration” either, but there are a number of principles designed to achieve this end. Finally, the Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration contains

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23. OECD (2010) *Public Administration after “New Public Management”*, 2010, available at: [http://www.keepeek.com/Digital-Asset-Management/oecd/governance/public-administration-after-new-public-management\\_9789264086449-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/governance/public-administration-after-new-public-management_9789264086449-en#page1) and (2017) *How better governances can help rebuild public trust* <http://www.oecd.org/governance/trust-and-public-policy-9789264268920-en.htm>. The quote is from that last report, p. 21.

24. See the 2001 European Commission white’s paper on Governance, available at: [http://europa.eu/rapid/press-release\\_DOC-01-10\\_en.htm](http://europa.eu/rapid/press-release_DOC-01-10_en.htm).

a number of interesting references to good governance and its relationship with regulatory quality, social needs and the weight of the interests of social and individual interests, good governance, other non-legal mechanisms (organizational quality, adequate human resources and governance), the requirements of the right to good administration (legality, equality, impartiality, proportionality, legal certainty, adopting decisions within a reasonable period, participation, respect of privacy and transparency) and its connections to administrative procedures. This Recommendation also includes several suggestions to Member States to promote good governance. Among them, there is one on the adoption of the standards established in a model code which is attached as an appendix to the Recommendation itself.

As evidence of the existence of a common European background in relation to the administrative procedure and good administration, the consecration of the Charter of Fundamental Rights should be noted.

“Right to good administration:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
  - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.”

This article refers to the right to a diligent performance as part of good administration in the first section and in the second specifies *a number of* consequences stemming from this right to good administration (“in particular”, as the text clarifies, so as not to limit possibilities): the right of access

to information contained in the file, the right to be heard (the *audi alteram partem* rule) and the duty of giving reasons for the decisions made.

The right in the Charter concerning good administration implies the explicit and visible confirmation of the existence of a legal duty for public authorities to be in the best position to be able to make appropriate decisions, absorbing this way a common European inheritance<sup>25</sup>. Therefore, this implies important support to the procedural issues which have now passed to a higher position. The initial limited scope of the Charter (see art. 51<sup>26</sup>) does not affect the importance that procedural matters will command in the future of Europe, nor does it seem that a process of a national filtration of this procedural relevance may be prevented, since it seems difficult to imagine that a national judge would be able to apply a certain standard of good administration in compliance with EC Laws and other procedural standards when applying national Laws for the internal public authorities<sup>27</sup>.

Although art. 41 can be considered a simple umbrella including previous existing procedural rights and making easier to citizens to know them, it is possible to identify something new in that article. In that sense, the most characteristic element in article 41 is the duty of due care or due diligence. Although this duty existed in some countries, in one or another way (eg. reasonableness, used in the well-known case *Associated Provincial Pictures Houses, Ltd. V. Wednesbury Corporation* [1948] 1 KB 223 in the UK, or

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25. In which art. 6 of the European Convention of Human Rights is relevant too.

26. “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”. See for example: See judgment of the Court (Grand Chamber) 26 February 2013 In Case C-617/10, judgment of the court (Grand Chamber) 26 February 2013 In Case C-617/10 (“the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law”) or judgment of the court (Fourth Chamber) 8 May 2014 In Case C-604/12 (an example of application of the right to good administration to national authorities: “the right to good administration do not preclude a national procedural rule, such as that at issue in the main proceedings, under which an application for subsidiary protection may be considered only after an application for refugee status has been refused”).

27. About this problem, Gordon, A. (2002), *UK Public Law & European Law. The Dynamics of Legal Integration*, Hart Publishing.

principle of proper administration used in Belgian law<sup>28</sup>), in others cases, like Spain, it was not included in the legislation nor stated by case law.

Therefore, when this article is criticized because it is mainly rhetorical<sup>29</sup>, we should be aware of that relevant duty which has been established by the Charter, following the EU case law which extracted it from some legal national traditions.

This reflection moves us to the national level to check the role of good administration and the impact of art. 41 of the Charter. The duty of due care or due diligence can be found in the legal systems of the EU member states. An interesting Swedish report already mentioned) identifies the *right to have ones affairs handled impartially and fairly* as one of the ten principles of good administration embraced by a majority of the EU Member States<sup>30</sup>.

It is interesting analyzing the common roots of the duty of care in the European legal system<sup>31</sup>. The duty of due diligence or due care which is extracted from the right to good administration (as a common standard in different European legal traditions) is different from the principle of proportionality. It is true that the prohibition included in the third level of the principle of proportionality (proportionality *stricto sensu*) regarding the need of avoiding an improper balance of costs and benefits in the exercise of discretion has a connection with the duty of care. Without the latter the principle of proportionality could not be achieved. In order to avoid an improper balance, it is clearly necessary to balance these principles<sup>32</sup>.

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28. Lust, S. (2002) "Administrative Law in Belgium" in RENÉ SEERDEN, F. A. M. STROINK (eds), *Administrative Law of the European Union, Its Member States and the United*, Groningen.

29. Bousta, R. (2013), "Who said There is a "Right to Good Administration? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union", *European Public Law*, 19, num. 3, p. 481 ff.

30. SWEDISH AGENCY FOR PUBLIC MANAGEMENT (STATSKONTORET) (2005): *Principles of Good Administration in...*, *op. Cit.* The core set of principles of good administration in EU member states is the following (p. 71): 1. The principles of lawfulness, non-discrimination, proportionality 2. The right to have ones affairs handled impartially and fairly and 3. Within a reasonable time. 4. The right to be heard before any individual measure is taken that would affect the citizen adversely. 5. The right to have access to his or her file, regarding any individual measure that would affect him or her. 6. The right of access to documents. 7. The obligation to state reasons in writing for all decisions. 8. The obligation to give an indication of remedies available to all persons concerned. 9. The obligation to notify all persons concerned of a decision. 10. The obligation to be service-minded.

31. See Ponce, J. (2017), "The Right to Good Administration and the Role of Administrative Law In Promoting Good Government", in CERRILLO, A., PONCE, J. (eds), *Preventing Corruption and Promoting good Government and Public Integrity*, Bruylant.

32. A comparative approach about this principle in Ranchordas, S. and De Waard, B. (2015): *The Judge and the Proportionate Use of Discretion: A Comparative Administrative Law*

But taking care and acting with due diligence when balancing is not the equivalent to acting proportionally. The public authority can respect the duty of care and break the principle of proportionality. Both are linked but are different: the duty of care is a positive obligation (to find the facts and interests and to balance them) whilst the principle of proportionality is a negative limit (do not trespass the proportionality line). As DOWNES has said from the common law perspective:

“Reasonableness covers a wider field than proportionality. A measure might be proportionate, but its adoption unreasonable, because, for example, of a lack of consultation. It is not clear to me that the tests are the same, or even that they will yield the same result. They are quite different tests. One is a test of rationality; the other is a relationship test. One is an overall and general test; the other is a precise test applied negatively to a previously identified relationship”<sup>33</sup>.

A good example of the meaning of the good administration standard can be found in the decision of the General European Court of the European Union of April 29, 2015, T-217/11, Claire Staelen vs. European Union Ombudsman.<sup>34</sup>

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*Study*, Routledge, 2015.

33. Dawnes, G. (2008), “Reasonableness, Proportionality and Merits Review”, Paper delivered to the New South Wales Young Lawyers Public Law CLE Seminar, The Law Society, Sydney 24 September, p. 12, available at <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/reasonableness-proportionality-and-merits-review>.

34. “81 Or, l’article 41, paragraphe 1, de la charte des droits fondamentaux consacrant un droit à une bonne administration prévoit que toute personne a le droit de voir ses affaires traitées impartialement, équitablement et dans un délai raisonnable par les institutions, organes et organismes de l’Union. L’article 41, paragraphe 2, de la dite charte précise que ledit droit comporte notamment le droit de toute personne à être entendue avant qu’une mesure individuelle qui l’affecterait défavorablement ne soit prise à son encontre, le droit d’accès de toute personne au dossier qui la concerne dans le respect des intérêts légitimes de la confidentialité et du secret professionnel et des affaires ainsi que l’obligation pour l’administration de motiver ses décisions.

82 Le terme « notamment » dans cette dernière disposition indique que le droit à une bonne administration ne se limite pas aux trois garanties précitées. Cela ressort également des explications relatives à la charte des droits fondamentaux (JO 2007, C 303, p. 17) qui précisent que l’article 41 est fondé sur l’existence de l’Union en tant que communauté de droit dont les caractéristiques ont été développées par la jurisprudence qui a consacré notamment la bonne administration comme principe général de droit.

83 Les explications relatives à la charte des droits fondamentaux se réfèrent notamment à la jurisprudence selon laquelle dans le cas où une institution de l’Union dispose d’un large pouvoir d’appréciation, le contrôle du respect des garanties conférées par l’ordre juridique de l’Union dans les procédures administratives revêt une importance fondamentale. Parmi ces garanties figurent notamment le respect du principe de diligence, à savoir, pour l’institution compétente,

Therefore, the right to good administration should encompass:

- a duty of collecting all relevant factors (facts, interests, law, rights) (a),
- a duty of considering the reasonable alternatives which rise during the procedure (b)
- a duty of taking into accounts all the relevant factors and dismissing all the irrelevant factors (c)
- a duty of keeping a rational relationship between the final decisions and those factors explaining the fulfilling of the three other duties through the duty of giving reasons. These reasons are the evidence that a careful consideration existed (d)<sup>35</sup>.

a. Judicial protection of the right to a good administration in the European level.

The case law of the ECHR has built the notion of good administration<sup>36</sup> and good governance, applying it to resolve conflicts both in the administrative and in the judicial field. Several decisions that use the concept of good governance to control public activity are of special interest<sup>37</sup>. Regarding the European Union, references to the principle

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l'obligation d'examiner, avec soin et impartialité, tous les éléments pertinents du cas d'espèce (voir, en ce sens, arrêts du 21 novembre 1991, Technische Universität München, C-269/90, Rec, EU:C:1991:438, point 14 ; du 6 novembre 2008, Pays-Bas/Commission, C-405/07 P, Rec, EU:C:2008:613, point 56, et du 9 septembre 2011, Dow AgroSciences e.a./Commission, T-475/07, Rec, EU:T:2011:445, point 154). 84 Il importe à cet égard de souligner que le respect du devoir pour une institution compétente de rassembler, de manière diligente, les éléments factuels indispensables à l'exercice de son large pouvoir d'appréciation ainsi que son contrôle par le juge de l'Union sont d'autant plus importants que l'exercice dudit pouvoir d'appréciation n'est soumis qu'à un contrôle juridictionnel restreint sur le fond, limité à la recherche d'une erreur manifeste. Ainsi, l'obligation pour l'institution compétente d'examiner avec soin et impartialité tous les éléments pertinents du cas d'espèce constitue un préalable indispensable pour que le juge de l'Union puisse vérifier si les éléments de fait et de droit dont dépend l'exercice de ce large pouvoir d'appréciation étaient réunis [voir, en ce sens, arrêts du 15 octobre 2009, *Enviro Tech (Europe)*, C-425/08, Rec, EU:C:2009:635, points 47 et 62 ; du 11 septembre 2002, *Pfizer Animal Health/Conseil*, T-13/99, Rec, EU:T:2002:209, points 166 et 171, et du 16 septembre 2013, *ATC e.a./Commission*, T-333/10, Rec, EU:T:2013:451, point 84]."

35. See Cane, P. (2015): "Records, Reasons and Rationality in Judicial Control of Administrative Power: England, the US and Australia", *Israel Law Review*, volume 48, issue 3, November, pp. 309ff., about the relationship between records, reasons and rationality in several countries, including the US case that we will consider later.

36. See decision of September 20, 1997, *Case Erstas Aydin and others vs. Turkey*, or decision of May 2005, *case Intiba contra Turquía*.

37. This is the case of the decisions *Cazja vs. Poland*, October 2, 2012, *Rysovskyy vs. Ucraina*, October 20, 2011, or *Öneryildiz vs. Turkey*, November 30, 2004. For example, in the first of them the ECHR (paragraph 70) says that:

of good administration have been found in the case law since the 60's. It is important to underline the well-known case *C-260/90 Technische Universität München v. Hauptzollamt München-Mitle* (1991) ECRI-546 in which the duty of due care is connected to the right to be heard and to the duty of giving reasons<sup>38</sup>. The first application of the right to good administration as included in the ECFR, was made by the European Court of First Instance in a decision of January 30, 2002. The Court analyses the obligation of the Commission to examine with diligence and impartiality the accusations presented in relation to art. 90.3 of the Treaty<sup>39</sup>. Since then, the EU Courts have used art. 41 several times to control administrative activity<sup>40</sup>. One recent example is the afore-

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“In examining the conformity of these events with the Convention, the Court reiterates the particular importance of the principle of good governance. It requires that where an issue pertaining to the general interest is at stake, especially when it affects fundamental human rights, including property rights, the public authorities must act promptly and in an appropriate and above all consistent manner (see *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I; *Önerıldız v. Turkey* [GC], no. 48939/99, § 128, ECHR 2004-XII; *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008; and *Rysovsky v. Ukraine*, no. 29979/04, § 71, 20 October 2011). It is desirable that public authorities act with the utmost care, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other such rights. In the present case, the Court considers that having discovered their mistake, the authorities failed in their duty to act speedily and in an appropriate and consistent manner (see *Moskal*, cited above, § 72).”

38. This decision states that: “13. It must be stated first of all that, since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks.

14. However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present”

39. *Max.mobil Telekommunikation Service GmbH v Commission of the European Communities*. This important decision pointed out that: “Since the present action is directed against a measure rejecting a complaint, it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1, hereinafter ‘the Charter of Fundamental Rights’) confirms that ‘[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.”

40. According to a limited and not very sophisticated research made at the web page <http://eur-lex.europa.eu/>, we found 305 judgements, covering from 1960 to 2015, in which

mentioned decision of the General European Court of the European Union of April 29, 2015, T-217/11, Claire Staelen vs. European Union Ombudsman.

b. The role of national legislation

If we consider the Spanish example, although the Spanish constitution does not include the words good administration, as we saw before, the Spanish legislator (eg. 2013 Transparency Act) uses the term good government and the regional legislators have included the right to good administration in the *Estatutos de Autonomía*, Administrative Procedure Acts (e.g. Catalan Act of 2010) and legislation on transparency (e.g. Catalan act of 2014). In relation to the Italian case and the role of the legislator, article 1 of the Italian Administrative Procedure Act that provides for administrative activity to be governed by the principles of EU law and therefore makes art. 41 of the Charter applicable in relation to Italian citizens in front of the national public administration<sup>41</sup>.

c. Judicial protection at the national level

Moreover, the Charter of Fundamental Rights has been quoted in judgments by the Spanish Constitutional Court (decision 53/2002), the Spanish Supreme Court and the Spanish regional courts. In the two last cases, many judicial decisions allude to art. 41 of the Charter of Fundamental Rights of the European Union in the resolution of strictly internal conflicts and that case law establishes the same standard that the EU level. Actually, EU case law guides the interpretation of Spanish Courts in relation to the right to good administration, according art. 10.2 of the Spanish Constitution and several legal provisions (Spanish Organic Act 2/2008 and Catalan Administrative Procedure Act of 2010, additional clause number 14th).

Most of these Spanish judicial decisions include the reference to the right in a rhetorical way to support the national duty of giving reasons. But some of them are quite interesting because they use the right to good administration to check the fulfillment of the duty of due care or due diligence, analyzing:

- The administrative procedure

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the term sound or good administration has been used. This use has increased dramatically in the last years: from 12 decisions in 2011 to 31 in 2015.

41. Trimarchi (2011), *op.cit.*, p. 4.

- The record, where all the activities are put down on paper making them “visible”
- The final decision itself, and
- The grounds that support it.

All of them are elements of a global system with different interactions. And this system is ruled by the idea of consistency, an expression of the principle of rationality. Thus, the documents included in the record (e.g., the answers to comments or observations made by the public), the content of the final decision, and the reasons given must be consistent and follow a rational link (e.g. in the field of rulemaking, decision of the Spanish Supreme Court of July 15, 2010, number of appeal.: 25/2008; in the field of adjudication, decision of the Catalan High Court number. 262 of 2011, March 30)

From that judicial perspective, the record and the reasons stated are similar to the black box in planes, but in relation to administrative procedures: a place where everybody (including the judge in the event of controls) can check what has happened, what was well done, and what was overlooked, or done badly. In other words, officials must prove that good administration has been conducted by means of records kept and reasons given, and this means that public administration has the burden of proof as with regard to good administration<sup>42</sup>.

### *3. Challenges in relation to preventing corruption through good administration: the concept of general interest, artificial intelligence, Better regulation and behavioral law and economics*

Future developments in the field of the right to good administration will lead to a different approach to the general interest, changing the idea that it is preexistent and can be found thanks to bureaucratic expertise and moving to an understanding of it as a combination of public and private interest that must be taken into account during the administrative procedure. It will lead to a new interest in conflict of interest and the role of lobbies in the field of the executive power. In that sense, the decision of the General Court in Case T-286/09, 12 June 2014, is interesting because it connects good admin-

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42. Migliari, W. and Ponce, J., (2015), “El derecho a una buena administración y su protección judicial. La contribución del Derecho y de los juristas al buen funcionamiento de las instituciones públicas”, available at: <http://blocs.gencat.cat/blocs/AppPHP/eapc-rcdp/>

istration with transparency, objectivity and the need of recording informal contacts<sup>43</sup>.

The role of the right to good administration can be enhanced by the use of artificial intelligence (AI) in decision-making. This is a sphere where the predictive data analytics could be of the major interest, using big data<sup>44</sup>. Future developments include automated decision-making, which will bring discussions about discretionary powers and the limits of computers<sup>45</sup>. Good

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43. “Second, as regards the principle of good administration laid down in Article 41 of the Charter of Fundamental Rights, it is apparent from settled case law that that principle imposes a duty on the competent institution to examine carefully and impartially all the relevant aspects of the individual case (*Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraph 404, and *Joined Cases T-458/09 and T-171/10 Slovak Telekom v Commission* [2012] ECR, paragraph 68). Although there is no general duty on the part of the Commission to establish records of the discussion which it has had with the complainants or other parties during the meetings or telephone conversations held with them (see, to that effect, *Atlantic Container Line and Others v Commission*, paragraph 359 above, paragraphs 351 and 385, and *Groupe Danone v Commission*, paragraph 614 above, paragraph 66), the fact none the less remains that the principle of good administration may, depending on the circumstances of the particular case, be under a duty to make such a record of the statements it receives (see, to that effect, *Case T-15/02 BASF v Commission* [2006] ECR II-497, paragraph 501). 620 In that regard, it should be pointed out that the existence of a duty on the Commission to record the information which it receives during meetings or telephone conversations and the nature and extent of such an obligation depend on the content of that information. The Commission is required to establish adequate documentation, in the file to which the undertakings concerned have access, on the essential aspects relating to the subject matter of an investigation. That conclusion is valid for all information of a certain importance and which bears an objective link with the subject matter of an investigation, irrespective of whether it is incriminating or exculpatory.”

44. Maer-Schönberger And Cukier, K. (2013), *Big Data: A Revolution That Will Transform How We Live, Work, and Think*

See the experience in New York at: <http://radar.oreilly.com/2012/06/predictive-data-analytics-big-data-nyc.html>.

45. Downes, G (2010) “Looking Forward Administrative Decision Making in 2020”, Paper presented to the Australian Corporate Lawyers Association, 2010 Government Law Conference, Canberra, 20 August 2010, available at: <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/looking-forward>. Downes, G. (2011), “Future directions in administrative law: Part 2”, (2011) 67 *AIAL FORUM* 35, available at <http://www.aial.org.au/Publications/webdocuments/Forums/Forum67.pdf>.

That author underlines that the increasing use of computers and automated decision-making “creates three potentially serious, but basic, problems which will affect my canons of good decision-making. First, the wrong data may be entered on the computer. Secondly, the right data may be wrongly entered. In both cases the absence of all the entries on paper makes verification more difficult. Thirdly, the computer may be incorrectly programmed.”. He believes that “the use of automated systems in decision-making when a discretion is involved” could be possible, because “Discretionary decision-making is applying a value judg-

governance, good government and the right to good administration will be affected by the so called algorithmic regulation or regulation by robot. Artificial intelligence and machine learning open interesting perspectives in optimizing government<sup>46</sup> and increasing impartiality, but open concerns about a possible *algocracy*<sup>47</sup>.

It is also relevant the extension of the obligations linked to the right to a good administration to the creation of rules. The movement of better regulation or smart regulation has been developed in the EU without any connection to the citizen's right to good administration. In our opinion, the better or smart regulation movement is linked to the right to good administration, because good regulations are a result of (good) administration and allow themselves future good administration, avoiding corruption<sup>48</sup>.

The ECJ has rejected the existence of a right to be heard in the creation of regulations, as a component of the right to good administration in several decisions. In that regard, the Court has pointed out that the right to good administration, as it results from that provision, does not cover the process of enacting measures of general application (e.g. judgment of 17 March 2011 in *AJD Tuna*, C221/09, ECR, EU:C:2011:153, paragraph 49). But regarding due care or due diligence, the ECJ made a first movement in the direction of connecting the creation of rules with certain obligations in the decisions *Spain v. Council* (Case C-310/04, 2006, in relation to Council Regulation N. 864/2003 establishing a new EU support system for cotton) and in *Sungro SA et al* (T-252/07, T271/07 and T-272/07<sup>49</sup>).

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ment. That may seem, at first, to be an area inappropriate for computer technology. But value judgments mostly only involve giving weight to complex factors. At least where there are only a defined range of outcomes, there may be room for computer generated discretionary decisions."

46. Coglianese, C., & Lehr, D. (2016). *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*. *Geo. LJ*, 105, 1147 and COGLIANESE, C. (2016). "Optimizing Government for an Optimizing Economy". Faculty Scholarship. Paper 1646. [http://scholarship.law.upenn.edu/faculty\\_scholarship/1646](http://scholarship.law.upenn.edu/faculty_scholarship/1646) .

47. Danaher, J. (2016). The threat of algocracy: reality, resistance and accommodation. *Philosophy & Technology*, 29(3), 245-268.

48. Rangone, N. And Allio, L. (2015) "Technical Background paper. Policy Implementation in Italy: Anti-Corruption and Transparency Initiatives for a More Accountable and Efficient Public Administration", ODCE, 2015, Ponce, J., *Negociación de normas y lobbies*, Thompson Reuters Aranzadi, 2015.

49. Alemanno, A (2013): "The reviewability of better regulation. When Ex Ante evaluation meets Ex post judicial control", in AUBY, J-B and Perroud, T., (2013), "Introduction", in AUBY, J-B And PERROUD, T. (Eds.), *Regulatory Impact Assessment*, INAP, GLP, p. 240 ff.

Those decisions state that when EU institutions have discretion, they “must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate (paragraph 122 of *Spain v. Council*) which includes the obligation of the institutions of being able “to procure and set out clearly and unequivocally the basic facts which have to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depend” (paragraph 123), otherwise, there is a failure to take account of all the relevant factors and circumstances (*Sungro SA et Al*, paragraph 60).

Although it reminds us of the due care or due diligence as a part of the right to good administration, the ECJ considered that the infringement of such a duty is a violation of the principle of proportionality not of the right to good administration.

We can find here a typical confusion that should be avoided in future decisions. The duty of care and the principle of proportionality are different as we have underlined before. Therefore, the right to good administration should have a role in the judicial review of the Impact Assessment of regulations and should be the point which closes the circle of the better or smart regulation.

A final trend can be identified too: a more sophisticated regulation of procedures and organizations to promote good administration, using scientific developments about the human mind.

Probably, we will be able to rely in the future on cognitive psychology to detect cognitive illusions, structure better the administrative procedure and suggest the proper standard of judicial review in relation to the duty of due care. In that sense, the combination of law and science in the research for good regulations is opening the door to behavioral economics and the *nudging* developments, which have been recognized by the 2017 Nobel Prize of Economics awarded to Richard Thaler, an Economist who published an influential book with a law professor on these topics<sup>50</sup>. *Nudging* implies the use of behavioral sciences to improve the effectiveness of regulation. The UK and the US have been very active in this area, creating special units to develop research in the field<sup>51</sup>. Obama’s recent executive order of September 2015

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50. Thaler, R.H., Sunstein, C.R., *Un pequeño empujón (nudge)*, Taurus, 2009

51. The Behavioural Insights Team in UK (<http://www.behaviouralinsights.co.uk>) and the Social and Behavioral Sciences Team in the US.

([https://www.whitehouse.gov/sites/default/files/microsites/ostp/sbst\\_2015\\_annual\\_report\\_final\\_9\\_14\\_15.pdf](https://www.whitehouse.gov/sites/default/files/microsites/ostp/sbst_2015_annual_report_final_9_14_15.pdf)).

(“Using Behavioral Science Insights to Better Serve the American People”) is a good example of this trend.

In that sense, one aspect of interest to be developed in the future is the relationship between good administration, administrative procedure and *cognitive limitations* following the latest jurisprudential developments *connecting cognitive psychology and law*<sup>52</sup>. According to some opinions, maladministration and bad administrative decisions could be the result of flaws in human judgment and choice among governmental actors. The core premise of cognitive psychological theory is an understanding that the human brain is a limited information processor that cannot possibly manage successfully all of the stimuli crossing its perceptual threshold. Good decision-making by government officials requires learning to allocate scarce cognitive resources well. This learning is made difficult due to two primary strategies that people (including public officials) use to make the most of their cognitive abilities: mental shortcuts (heuristics) and organizing principles (schemas).

The heuristics consist largely of simple rules of thumb that facilitate rapid, almost reflexive, information processing. Schemas consist of a scripted set of default information and organizational themes that help people focus on the information most likely to be relevant, thereby allowing them to ignore information likely to be irrelevant.

Reliance on heuristics and schemas allows people to process an amazing array of complex stimuli efficiently. Although these devices serve people well most of the time, they can lead to systematic errors in judgment, which psychologists often refer to as “cognitive illusions”<sup>53</sup> Although introducing expertise in decision-making can help to avoid these kinds of cognitive illusions, experts can still fall prey to illusions of judgment. Experts tend to be overconfident about their decisions and to myopically focus on issues within their area of expertise and thereby fail to recognize that a decision would benefit from accessing other bodies of knowledge or ways of thinking.

When decisions are made in an organizational setting institutional design can counter the effect of cognitive limitations. A government that seeks to

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52. Rachlinski and Farina (2002), “Cognitive Psychology and Optimal Government Design”, 87 *Cornell Law Review* 549-615 Available at <http://library2.lawschool.cornell.edu/facbib/faculty.asp?facid=1>.

53. I would like to offer just a couple of examples. As a consequence of relay on the “availability heuristic”, people often overestimate the frequency of disasters, such as airplane crashes, tend to get extra attention from the news media. Schema also can lead people astray. Due to the so-called “framing effects” people have the tendency to treat potential gains differently from potential losses (and public authorities can prefer one or another option under sanitary emergencies according to these effects).

avoid maladministration and bad decisions must be structured carefully to avoid predictable error in judgment<sup>54</sup>.

For example, public participation and judicial supervision could be useful cures for an administrative authority pursuing its public-interest mandate in good faith, but predictably vulnerable to expert myopia and overconfidence. Serious judicial review of record and reasons forces a public authority to articulate the factors it considers relevant to its decision, engage in some perceptible assessment of alternative courses of action, and respond to meaningful comments by outsiders avoiding undue influence from *lobbies*.

*Ubi Jus Ibi Remedium*: if there is a right, there is a remedy. It is true in the case of the right to good administration, where the affected person can go to the courts and ask for a judicial review of the lack of due care or due diligence or, in case of existing standards of quality, for the due result. The tendency should be to open the legal standing to everybody in order to defend the quality of the administrative behavior or, at least, to groups of people affected by the maladministration (e.g. users of a public service affected by non-compliance with the standards of a Citizen Charter) In that sense, the Italian Brunetta reform seemed to open the door to public class actions through a legal modification in 2009<sup>55</sup>. This evolution will underline the importance of the right administration as a component of modern citizenship (according to its inclusion in the Charter of fundamental rights in the section on “citizenship”).

However, judicial review cannot guarantee per se and by itself alone good administration. The reason is the principle of separation of powers, a common idea in European legal systems (and in the United States<sup>56</sup>). Judges cannot

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54. IP EC (2017) “Debiasing regulators; The behavioral economics of US Administrative Law”, *Common Law World Review*, vol. 46 (3) 171-197.

55. Ajello, T., (2011) “Ricorso per l’efficienza ed efficienza del ricorso”, *Gazzetta Amministrativa*, 1.

56. Hesse, K. (1983) *Escritos de Derecho Constitucional*, CEC, Madrid, 1983, p. 19 ff. In the case of the US, for example, the American Supreme Court stated in 1984 in the *Chevron* case: “Judges are not experts in the field [being regulated], and are not part of either political branch of government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences...While agencies are not directly accountable to the people, the Chief Executive [and Congress] is, and it is entirely appropriate for [the political branches of government] to make such policy choices”. The same idea may be found in the European context. For example, the Spanish Supreme Court has established in several decisions that when there is discretionary power judicial review cannot change administrative assessment. See, among others, the decision of the Supreme Court of July 24, 1987. The idea is included in article 71.2 of the Act 29/1998 of 13 July regulating the Jurisdiction for Judicial Review: “Judicial authorities may not determine how the precepts of a provision must be worded to replace quashed general provisions and may

substitute discretionary administrative decisions for the sake of a different opinion about the best solution, on the basis of social or economic ideas.

This is why the design of procedural and organizational safeguards is so important to prevent corruption and look for the better possible decisions.

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not determine the discretionary contents of quashed acts “ (translation made by the Spanish Ministry of Justice in 2015, available on internet: [http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427560225?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAct\\_on\\_the\\_Jurisdiction\\_for\\_Judicial\\_Review\\_\(Jurisdiccion\\_Contencioso\\_Administrativa\).PDF](http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427560225?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAct_on_the_Jurisdiction_for_Judicial_Review_(Jurisdiccion_Contencioso_Administrativa).PDF)).

# Public transparency as a tool to prevent corruption in public administration<sup>1</sup>

## 1. *Public transparency*

Corruption is a complex phenomenon and preventing it and fighting it requires a multiple approach which, ultimately, ensures effective knowledge of public activity. In this paper, we will focus our attention in public transparency as a tool to prevent corruption in public administration.

A century ago, Judge Brandeis said that “sunlight is said to be the best of disinfectants”. A century later, Carloni has stated that “la trasparenza sia un antibiótico a largo spettro” (Carloni, 2014, 33). Throughout the years, the literature has recognised the relationship between transparency and corruption and has highlighted the utility of transparency as a tool for preventing and fighting corruption and nowadays there is a broad consensus on the effect of transparency on preventing and fighting corruption (Kaufmann & Bellver, 2005). Along these lines, the final statement of the Anti-corruption Summit held London in 2016 stated the governments’ commitment to “enhance transparency over who ultimately owns and controls them, to expose wrongdoing and to disrupt illicit financial flows. As recent events have shown, we need to take firm collective action on increasing beneficial ownership transparency”.<sup>2</sup>

Public transparency seeks to provide the public with knowledge about what is happening within public authorities. In particular, public transparency consists of making available to the public information concerning the activity, operation and organisation of public authorities, the decisions they make and their reasons for finding out about, monitoring and controlling public activity.

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1. This paper is based on Cerrillo i Martínez, A. (2017). Public transparency as a tool to prevent corruption in public administration. In A. Cerrillo i Martínez & J. Ponce Solé (Eds.), *Preventing corruption and promoting good government and public integrity*. Bruxelles: Bruylant.

2. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522791/FINAL\\_-\\_AC\\_Summit\\_Communique\\_-\\_May\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf) (last consulted January 2018).

Transparency is the basis for good governance (Curtin & Meijer, 2006). Transparency also promotes public integrity as it makes easier to monitor the activity of public office holders and employees (Arena, 2008, 33), and makes it more difficult for conflicts of interest and corruption to arise (Cerrillo i Martínez, 2014).

Knowledge of what happens in public administration makes following and monitoring the activity of public office holders and employees easier and, in this way, facilitates accountability and the monitoring of public authorities (Vandelli, 2009, 22). Transparency can also disrupt or even prevent the emergence of conflicts of interest and cases of corruption generally associated with informal agreements made a long way from public channels or forums for decision-making and remove the cover of opacity and secrecy (OECD, 2009, 10). Transparency also promotes the integrity of public office holders and employees (Cerrillo i Martínez, 2014). Finally, transparency can allow greater public involvement in the fight against corruption (Merloni & Ponti, 2010, 403), turning citizens into millions of auditors (Kaufmann, 2002, 19).

There are three main mechanisms to channel transparency. Depending on the role adopted by public authorities and citizens in the process of disseminating public information, transparency mechanisms can be classified into three groups: active transparency mechanisms, passive transparency mechanisms and collaborative transparency mechanisms. All these mechanism they complement one another and have a common purpose to provide the public with knowledge of public information (Merloni, 2008, 10).

The use of technology has had over the last few years a great impact in the increase of transparency (Cerrillo i Martínez, 2012); (Meijer, 2015).

Transparency has largely been regulated through freedom of information laws adopted in more than one hundred countries. Governments have also implemented many initiatives seeking to disseminate public information over the Internet. A comparative approach shows that regulation plays a key role in determining the scope of transparency and guaranteeing it by establishing a framework in which public authorities can develop their transparency policies and citizens can demand real, effective knowledge of public information. Preventing and fighting against corruption through transparency not only consist in passing laws regulating it, but also guaranteeing its application by public authorities and the use of information by citizens. In fact, compliance with the regulation of transparency is the principal limitation on it because those responsible for promoting it are the same institutions or people involved in cases of corruption (Cerrillo i Martínez, 2012d, 308).

In addition, beyond an improvement in the regulation of transparency mechanisms, institutional and social changes are necessary to strengthen the capabilities of all actors that allow effective knowledge of public activity.

## *2. Passive transparency*

Passive transparency is the mechanism through which citizens can know public information after first requesting a public authority to reveal or provide a copy of it. Access to information is generally recognised as a subjective right, under judicial supervision, giving citizens the power to ask a public authority to show them an administrative document without the need for them to prove an interest in the matter.

The right of access to public information has been subject to wide-ranging regulation at international level. In Europe, the Council of Europe Convention on Access to Official Documents of 2009 has had an important role. Also several rules passed by the European Union (i.e., Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents and Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC).

Regulation of access to public information has evolved in the last few decades at comparative level. This evolution has been influenced by the political context of each country. However, the different regulations on access to public information share the same pattern (Holsen & Pasquier, 2012, 287)b. The first regulation on access to public information was passed in Sweden in 1766.

Many years later, from the 1950s, several regulations on access to public information were adopted in northern European countries (Finland, 1951) and the United States of America (1966). Later, from the 1970s to the 1990s, the regulation of access to information spread in various southern European countries like France (1978), Italy (1990) and partially in Spain (1992) as well as other English-speaking countries like Australia (1982) and New Zealand (1982). Finally, from the end of the last century to the first decade of the current one, access to information has been regulated in European countries that still lacked laws on the issue like United Kingdom (2000), Germany (2005), Switzerland (2004), the countries in the orbit of the former Soviet Union for example, the Czech Republic (1999), Estonia (2000) and Bulgaria (2000) and countries in Latin America, Asia and Africa. According

to *The Global Network of Freedom of Information Advocates*, 117 now have a law regulating access to information.<sup>3</sup>

Access to public information is an ideal mechanism for finding out about administrative activity, monitoring the operation of public authorities and requiring accountability (Mock, 1999, 1097) as it allows the public to request access to any document which they suspect demonstrates an irregularity that could conceal a case of corruption. However, it can have limitations when it comes to preventing and fighting corruption.

However, it is sometimes limited to protect other rights or interests. In fact, laws regulating access to information state some exceptions to access when knowledge of the information could prejudice other rights or property whose protection is considered to be a priority (for example, national security; defence; international relations; the prevention, investigation and persecution of crime; economic and monetary policy; the equality of the parties in judicial proceedings; personal data protection or industrial and intellectual property). The application of limits on transparency can leave large quantities of information, knowledge of which may be significant for detecting cases of corruption, far from public scrutiny. In particular, personal data protection has usually been a wide limit to transparency leaving large quantities of information containing personal data beyond public scrutiny in the public archives.

Access to information must be based on a request. As it has been said, this is the Achilles heel of this transparency mechanism, as it limits the scope of access to the knowledge the person requesting the information in the possession of the public administration has, because it is impossible to request anything beyond this (Vladeck, 2008, 1789).

Some regulations establish the possibility that access to the information is provided in the format requested by the public and also free of charge, although a charge may be made for the issue of copies.

In different regulations, Public Administrations have different periods for resolving access requests. In this respect, some countries establish very short periods (Estonia, five days) and others longer ones (Austria, eight weeks), with the normal period being between 20 days (United Kingdom) and 30 days (Spain, France, Italy).

Finally, some regulations have also stated some mechanisms to guarantee access to public information. Some countries have independent guarantor bodies (Spain, France), along with the attribution to the courts of justice of the duty to guarantee access to public information.

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3. <http://www.freedominfo.org/> (last consulted January 2018).

### 3. Active transparency

Active transparency refers to all mechanisms with which public authorities proactively disseminate public information, making it available to citizens via different media. The dissemination of public information consists of making information about the activities carried out and the decisions taken available to citizens.

The dissemination of public information has become important over the last few years as public authorities have promoted the use of the Internet and social networks to strengthen their relations with citizens. It currently constitutes one of the main tools for achieving greater transparency. In fact, in the European Union, 41% of individuals have used Internet to obtain information from public authorities' web sites.<sup>4</sup>

The dissemination of public information is one of the open government policies that have been promoted this decade. As it was stated in 2009 in the memorandum for the heads of executive departments and agencies transparency and open government passed by President Obama “my Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public”.<sup>5</sup>

Unlike the regulation of passive access to information which is generally included in all countries in laws, the dissemination of public information is governed by laws (for example, in the case of Spain, Italy, the United Kingdom and the United States of America). In other cases, the dissemination of information is governed by guidelines, legal notices, terms and conditions of use and other soft law instruments.

Some countries have adopted regulations establishing a specific obligation to disseminate public information on the Internet. In Spain and Italy, there is an established obligation to periodically disseminate and update public information on the Internet.<sup>6</sup>

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4. E-government activities of individuals via websites (code: isoc\_ciegi\_ac).

5. <https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government> (last consulted January 2018).

6. Spanish Law 19/2014 of 9 December 2013, on transparency, access to public information and good government and Italian legislative decree of 14 March 2013, n. 33, *Riordino della disciplina riguardante gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni*.

Some countries also specify in law the minimum information that must be disseminated on the Internet. In Spain and Italy, current legislation establishes a broad, detailed list of information that must be disseminated by public authorities (institutional and organisational information; information about planning; legally relevant information; economic and budgetary information; information concerning contracts and subsidies, and information about senior public officials and public employees). In other cases, the law attributes to each public authority the duty to specify the information disseminated through the approval of a list that must be complied with (in the United Kingdom through the publication schemes). Other countries include general clauses in their access to information legislation relating to the information public authorities can disseminate. This is later developed in circulars (France).<sup>7</sup> Other countries state that public authorities may disseminate information which is more frequently demanded (USA). However, it is established that, on their own initiative and when they consider it appropriate, public authorities may adopt the measures necessary to publish the official documents in their possession to promote transparency (Council of Europe convention of 2009 on access to official documents). It is particularly important that Government disseminates related to areas where cases of corruption most often occur (i.e., public procurement, urban development; activity of public authorities).

Some countries also legally establish the need for the information disseminated to comply with certain characteristics. For example, in Spain, it is established that the information must be disseminated clearly and with quality, in a structured way understandable to the interested parties, and in reusable formats, as well as being periodically updated free of charge. In Italy, it is established that public authorities must guarantee the quality of the information ensuring “l’integrita’, il costante aggiornamento, la completezza, la tempestivita’, la semplicita’ di consultazione, la comprensibilita’, l’omogeneita’, la facile accessibilita’, nonche’ la conformita’ ai documenti originali in possesso dell’amministrazione, l’indicazione della loro provenienza e la riutilizzabilita’” (article 6). In the United States, the Information Quality Act of 2001 establishes that the director of the Office of Management and Budget must adopt guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information” (section 515).

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7. Circular of 26 May 2011 concerning the establishment of a single website for French government public information “data.gouv.fr” by the “Etalab” project and the application of provisions governing the right to reuse public information.

Some regulations establish requirements concerning accessibility of information. In Spain, it is established that the information will be disseminated on the Internet in accordance with the principle of universal accessibility and design for everyone. Also, in Italy, the law defines different principles seeking to guarantee the accessibility of information, such as the simplicity of the query, the comprehensibility of the information and the ease of access.

Finally, some countries also establish mechanisms guaranteeing transparency obligations. The Spanish transparency law has attributed the duty for monitoring the Spanish central government's compliance with its transparency obligations to the Consejo de Transparencia y Buen Gobierno, a body which, although it is responsible to the Ministry of Finance and Public Administration, acts with autonomy and full independence in complying with its purposes. Also of interest due to its effect on the prevention of corruption is the *Haute Autorité pour la transparence de la vie publique* in France, intended to ensure that senior public officials comply with their transparency obligations. In the case of Italy, the law charges an independent body with checking the coherence between the objectives established in the three-year transparency and integrity plans and the transparency activity carried out by the public authorities. The Italian Autorità Nazionale Anticorruzione also checks compliance with transparency obligations. Finally, Information Commissioner in the United Kingdom also guarantees rights to information.

#### 4. Collaborative transparency

Collaborative transparency is based on the reuse by citizens of public information in order to increase transparency and monitor and supervise public activity. The extension of the technologies is allowing the public to disseminate public information (Mayo & Steinberg, 2007); (Fung, Graham, & Weil, 2007, 169).

Collaborative transparency is closely linked to the possibility that the public can reuse information from the public authorities. Reuse consists of the use of documents in the possession of public sector bodies by individuals or organisations for commercial or non-commercial purposes different from the initial public service purpose for which they were produced (article 2 Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 concerning the reuse of information in the public sector).

In the last few years, the reuse of the information has been promoted by opening up public data. As highlighted in the monitoring report on the Memorandum on Transparency and Open Government, promoted by Barack

Obama, openness promotes the accountability of government and the exchange of public information, making it available in open, accessible formats.

The information that can be accessed or is disseminated can generally be reused. However, the regulations governing reuse often establish some conditions that must be fulfilled. In particular, obligations for reusers to make proper use of documents; not to modify, denature or alter documents, and to give the source or date of the last update, are often established.

It is generally established that public authorities will provide their documents in any format or language in which they already exist and by computerised means when this is possible and appropriate. In the European Union, Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information has stated that “public sector bodies shall make their documents available in any pre-existing format or language, and, where possible and appropriate, in open and machine-readable format together with their metadata. Both the format and the metadata should, in so far as possible, comply with formal open standards”.

Finally, while free reuse is established in some cases, in other cases, reuse is subject to obtaining a licence or requesting permission.

##### *5. The effectiveness of transparency in preventing and fighting corruption*

The mere approval of regulations on transparency has a positive impact on preventing corruption (Mungiu-Pippidi, 2013, 6) by making it easier to detect corrupt actions and people against whom action can be taken (Cordis & Warren, 2014, 36) improving the efficiency of the provision of public services (Peisakhin, 2012, 148).

However, few studies have been made of the effectiveness of the regulation of transparency (Hazell & Worthy, 2010, 352); (Etzioni, 2010, 394) so there is little empirical evidence about the effectiveness of the rules that have been adopted (Calland & Bentley, 2013, 572) and their efficacy in preventing and fighting corruption (Tavares, 2007, 5).

Firstly, countries with transparency laws are not seen to have lower levels of corruption (Escaleras, Lin, & Register, 2010, 439). In some countries with a higher corruption perception index according to Transparency International, the quality of the transparency laws according to the indicator drawn up by Access Info and the Center for Law and Democracy (Global Right to Information Rating), is lower.

Secondly, the approval of transparency laws has no impact, at least not immediately, on the perception of corruption. As observed by Tavares, “it could be that the full impact of these laws will not be known until many years later, as they are used more often and as the information is passed on to voters” (Tavares, 2007, 23).

Thirdly, the effectiveness of the regulation of transparency in terms of preventing and fighting corruption is linked to the combination of certain elements making it possible to ensure effective knowledge of the information from public authorities.

However, beyond these aspects deriving directly from the existence of transparency regulations, as we understand it, the effectiveness of regulation is closely linked to a combination of other institutional and social variables which, on the one hand, provide real transparency and, on the other, make it possible to prevent and fight corruption. In other words, the relationship between transparency and preventing and fighting corruption is not always an immediate one. Different elements affecting both the range of public information and the demand for it must be taken into account. As Lindstedt and Naurin state, “transparency in itself is not enough. Making information available will not prevent corruption if the conditions for publicity and accountability are weak” (Lindstedt & Naurin, 2010, 316).

From the point of view of the range of information, the institutional conditions facilitating transparency and access to information need to be promoted (Holsen & Pasquier, 2012, 290) and like change in the organisational culture which means effective leadership (Kaufmann & Bellver, 2005, 16), assumption of ethical values linked with transparency and scrupulous compliance with the transparency obligations.

From the perspective of the demand for information, citizens need to be strengthened to increase access to and use of public information. To increase the demand for information, it may be useful to inform the public about the existence of rights of access to information and, in general, the various transparency mechanisms (Roberts, 2010) as well as strengthening the capacity of citizens to act in view of the information available (Lindstedt & Naurin, 2010, 301, 303). It is also necessary to promote the role of the mediators and, in particular, the activity of non-governmental organisations mobilised in this sphere to reduce the costs deriving from accessing and analysing information and acting in this respect (Calland & Bentley, 2013, 581); (Lindstedt & Naurin, 2010, 304).

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# PART III

Public procurement and corruption



Corruption is generally defined as the abuse of entrusted power for private gain.<sup>1</sup> It is a commonly shared view that poor integrity undermines the main objectives of private and public activities and distracts from their main goals.<sup>2</sup> The lack of integrity affects fundamental rights<sup>3</sup>. Moreover corruption “distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society”.<sup>4</sup>

Corruption is even more unacceptable and serious when it is perpetrated by public authorities as it erodes the pillars of democracy. People’s representatives are all too often captured by non-transparent economic interests and divert the pursuit of public and citizens’ interests.<sup>5</sup> Illegal behavior buys the loyalty that politicians should have towards citizens, and captures the

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1. See *UN Convention against Corruption – UNCAC*, the *Convention on Combating Bribery of Foreign Public Officials – OECD Antibribery Convention*, Council of Europe Conventions and EU Instruments. G. M. Racca – R. Cavallo Perin – G. L. Albano, *Public Contracts and International Public Policy Against Corruption*, in M. Audit- S. W. Schill (eds. by) *Transnational Law of Public Contracts* Bruylant, 2016, 845 et seq.

2. S. Rose-Ackerman, *Corruption and conflicts of interest*, in J.-B. Auby – E. Breen – T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014, 5-10; G. M. Racca – R. Cavallo Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent to the Lack of Loyalty*, in G. M. Racca, C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, in *Droit Administratif / Administrative Law Collection – Directed by J.-B. Auby*, Bruylant, Bruxelles, 2014, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2461594](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461594).

3. Council of Europe, *Civil Law Convention on Corruption*, Art. 13, signed on 4 November 1999, entered into force on 1 November 2003, Preamble, § 4, “corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies”.

4. Council of Europe, *Criminal Law Convention on Corruption*, signed on 27 January 1999, entered into force on 1 July 2002, Preamble, § 5.

5. EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 6.

independent exercise of sovereignty for the benefit of maintaining privileges among the corrupts. Corruption in the whole public procurement cycle represents an emblematic case of such diversion.

Integrity of public procurement processes is universally recognized as a necessary condition to achieve public policies, and thus to make proper use of precious taxpayer resources. Lack of integrity in public procurement at any level of Government is, however, a well-documented phenomenon, which takes several and sometimes surprising forms.<sup>6</sup> The (estimated) economic cost of corrupt procurement is staggering, and it exerts a profoundly negative impact not only on the economy of States but also on citizens' rights.<sup>7</sup>

In order to understand corruption in public procurement, it is important to comprehend the procurement process taking into account the entire public procurement cycle. There are generally four phases in the public procurement process: the pre-tender stage – with (1) the need assessment and (2) the planning phases –, the tendering stage – (3) award phase –, and the post-tender stage – (4) execution phase -. Corruption risks exist throughout the entire procurement cycle.<sup>8</sup>

It is important to note that the tendering stage (award procedure) in public procurement, in particular, is highly regulated. International texts on procurement, especially the UNCITRAL Model Law, the WTO Government Procurement Agreement (GPA) and the EU Public

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6. EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 3 February 2014, 8 et seq.

7. Transparency International estimates that “systematic corruption can add at least 20-25% to the cost of government procurement” see: International Council on Human Rights Policy – Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, 2010, available at [http://www.ichrp.org/files/reports/58/131b\\_report.pdf](http://www.ichrp.org/files/reports/58/131b_report.pdf), 43; EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012, 2013*, available at <http://fra.europa.eu/en/press-release/2013/eu-agency-fundamental-rights-fra-presents-its-annual-report>, 12 et seq.; G. M. Racca – R. Cavallo Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent to the Lack of Loyalty*, cit.

8. OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, available at <http://acts.oecd.org/>; United Nations Office on Drugs and Crime – UNODC, *Guidebook on anti-corruption in Public Procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, September 2013, available at <https://www.unodc.org/>. G. M. Racca – R. Cavallo Perin, *Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit.; G. M. Racca, R. Cavallo Perin, G. L. Albano, *Competition in the execution phase of public procurement*, in *Public Contract Law Journal*, 2011, Vol. 41, n. 1, 89 -108, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2011114](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011114).

Procurement Directives focuses on this stage. Practice, however, shows that corruption risks in the public procurement cycle can be equally high before the tender process even begins (in the pre-tender stage) or once the contract has been awarded (in the post-tender stage).

Policymakers crafting a sound procurement system must balance a number of goals<sup>9</sup>. Experience has shown that competition, transparency and integrity are probably the most important goals. If a government's procurement system reflects all three elements, the system is much more likely to achieve best value in procurement and to maintain political legitimacy.<sup>10</sup> These central goals, moreover, complement one another. A fully transparent procurement system is far less likely to have problems with integrity, as many more stakeholders can exercise oversight in a transparent procurement system.<sup>11</sup> The reverse is also true: a system with weak strategies to enforce integrity will probably have shoddy competition, and transparency is likely to erode as corruption drains the procurement system of political legitimacy.<sup>12</sup> Too often competition and transparency have been dealt with as issues of procurement reform, while integrity has been addressed separately, as part of anti-corruption initiatives. Transparency, if correctly addressed, allows disclosure and a greater access to information favoring additional controls, also by civil society.

Safeguarding efficiency of public spending requires a mindset shift among public officials and in public entities' organizational models.<sup>13</sup> Recently, EU Commission has identified six priority areas, where clear and concrete action can transform public procurement into a powerful instrument in each Member State's economic policy toolbox, leading to substantial benefits in procurement outcomes. These areas are: 1. Ensuring wider uptake of strategic public procurement; 2. Professionalising public buyers; 3. Improving access to procurement markets; 4. Increasing transparency, integrity and better data; 5. Boosting the digital transformation of procurement; 6. Cooperating

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9. S. L. Schooner, *Desiderata: objectives for a system of government contract law*, in PPLR, 2002, 107.

10. OECD, *Fighting Corruption and Promoting Integrity in Public Procurement*, 2005.

11. EU Commission, *Fighting corruption in the EU*, 6 June 2011, COM (2011) 308 final.

12. EU Parliament – Directorate General for Internal Policies, *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*, 2013.

13. EU Commission, *Making Public Procurement work in and for Europe*, 3.10.2017, COM(2017) 572 final.

to procure together.<sup>14</sup> This last section concerns the aggregation strategies of collaborative procurement to foster capacity and public purchasing power.<sup>15</sup>

To ensure legitimate procurement procedures and adequate public records, many elements are required: the establishment of a sound procurement system; transparency in procurement; objective decision-making in procurement; domestic review, or bid challenge, systems; integrity of public officials; and soundness of public records and finance. Efforts to promote such principles and instruments in order to prevent corruption must be maintained throughout the cycle of public procurement, from the beginning of the procurement procedure to the conclusion of the performance phase.<sup>16</sup>

Corruption in the field of public procurement usually involves a series of actors. The key actors facilitating corruption in public contracts are the entity paying the bribe and the recipient of the bribe. The briber is usually the legal entity competing for and delivering on contracts (e.g., the bidder, including consortium partners, subcontractors or suppliers). The recipient of the bribe is usually a procurement official with the procuring entity who is responsible for awarding and/or managing the public contract. Frequently, bribes do not flow directly between the bidder and the procuring personnel instead through an agent, consultant or other intermediary. Corruption -- broadly understood here to mean a breakdown in the best-value procurement process -- may take place even when no procurement officer is involved. A good example of this are anti-competitive agreements, such as price fixing between bidders.<sup>17</sup> Similarly, politicians tainted by corruption can attempt to influence a decision to initiate a procurement procedure, or

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14. EU Commission, *Making Public Procurement work in and for Europe*, cit.

15. G. M. Racca – S. Ponzio, *Nuovi modelli organizzativi per il joint procurement e l'innovazione dei contratti pubblici in Europa*, in R. F. Acevedo – P. Valcarcel Fernandez (eds. by) *Compra Pública Agregada*, 2016, 373-406; G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, in F. Lichère – R. Caranta – S. Treumer (eds. by) *Modernising Public Procurement: the New Directive*, DJØF Publishing, Copenhagen, 2014, 225-254; G. M. Racca, G. L. Albano, *Collaborative Public Procurement and Supply Chain in the EU experience*, in C. Harland – G. Nassimbeni – E. Schneller, *Strategic Supply Management* Sage Publications, Londra, 2013, 179-213; G. M. Racca, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119-133, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1714278](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1714278).

16. C. R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, in *PCLJ*, 2010, 40.

17. OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* OECD, 2009; OECD, *Recommendation of the Council on Fighting Bid Rigging in Public Procurement*, 17 July 2012, in <http://acts.oecd.org/>.

to award a particular contract to a certain company.<sup>18</sup> Sound legal frameworks for public procurement and anti-corruption are important pillars in the fight to reduce corruption. Both are prerequisites for a transparent, competitive and objective procurement system. Respect for the rule of law is essential. Experience has shown, however, that legislation alone is not sufficient to prevent corruption in public procurement. If that were the case, corruption in public procurement would barely exist in countries with advanced legal regimes based, for example, on the UNCITRAL Model Law or the EU Directives; indeed, on the contrary, excessive regulation can favor a lack of integrity. It is essential that legal frameworks must be supported by other efforts to ensure qualities such as accountability and integrity. Various additional strategies have proven to be particularly useful in fighting corruption in public procurement.<sup>19</sup>

It is very difficult to create “incentives” in public procurement for public officials as there is too little political support for high government pay, or for large bounties for “good” contractors.<sup>20</sup> The real dichotomy, therefore, is not between “incentives” and “disciplinary measures”, but rather between “transparency” and “disciplinary measures”. Of the two, in the long run transparency seems to be the better course. It forces officials to act with far less corruption, and it opens the procurement process to more stakeholders, which ultimately make the procurement system much stronger. While disciplinary measures are important and inevitable, it seems that transparency should always be the first choice, as it enhances both competition and integrity.

Public officials should promote and maintain the highest standards of probity and integrity in all their dealings. In assessing ethics requirement for public officials, including procurement officials, policymakers may wish to consider that ethics rules and screening procedures are almost always part of a broader fabric of social norms, laws and mechanisms for ensuring social harmony. In that light, the ethics rules crafted to protect the procurement system should complement the broader set of norms and rules, and may well draw upon other formal and informal mechanisms for maintaining social order.

The key puzzle in public procurement is, in fact, what economists would call a “principal-agent” problem. In public procurement governments regularly use agents and contracting officials, or intermediaries. This occurs

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18. S. Rose-Ackerman, *Corruption and government. causes, consequences and reform*, Cambridge, 1999.

19. United Nations Office on Drugs and Crime – UNODC, *Guidebook on anti-corruption in Public Procurement*.

20. OECD, *Integrity in Public Procurement: Good Practice From A to Z*, in <http://www.oecd.org/>, 2007, 56.

because governments are unsure of who the principal is – either the legislature, or the people, or the agency itself – and so the contracting official can serve as a sort of proxy for the collective goals of the uncertain principal. The contracting official, while ostensibly the agent, in fact becomes a proxy for the principal.<sup>21</sup>

The principal-agent model lends new clarity to concerns about integrity and corruption. Someone could argue that the anticorruption regime is sometimes overly cumbersome and inefficient because, beyond normal anti-bribery provisions, a vast array of lesser anticorruption rules impose additional constraints on procurement officials to discourage gratuities, constrain “revolving door” contacts, and bar the distribution of sensitive information. Agency theory suggests, however, that those additional constraints are necessary because as the chain of authority stretches from principal to agent, and from this latter to subagent, the risk that the procurement actions will diverge from the principal’s goals rises dramatically, and so there must be special legal controls to dampen the corrupt conflicts of interest that could otherwise arise.

By applying the principal-agent model it is possible to adopt an extensive oversight mechanism (as in place in the U.S. system) reflecting “monitoring” and “bonding”, undertaken in order to align procurement (the actual purchasing of goods and services) with the “principal’s” (or “the public’s”) interests.<sup>22</sup> Again applying this model, an active press can provide low-cost monitoring (and thus reduces risk), much as whistleblowers serve as surrogate monitors and enforcers of the principal’s interest. Bid protests, under this model, are arguably another means of monitoring and of forcing procurement officials to adhere closely to the principal’s goals, as defined by the procurement rules, including the conflict-of-interest rules.

Extending the agency model, fraud actions brought by whistleblowers are arguably stopgap solutions to enforce monitoring and bonding on the principal’s behalf where contracting officials have failed to detect fraud or malfeasance. Finally, under this model, those who admonish procuring offi-

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21. G. M. Racca, C. R. Yukins, *Introduction. Steps for integrity in public contracts*, G. M. Racca, C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit., available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2570726](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570726); C. R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, cit., 70.

22. D. I. Gordon – G. M. Racca, *Integrity Challenges in the EU and U.S. Procurement systems*, In G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit., available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2419224](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419224).

cials to follow the rules, including those in the “accountability” community (auditors, lawyers, courts, and the Government Accountability Office) are merely reinforcing that same monitoring role.

Whistleblowing allows insiders to provide information to other individuals or organizations, such as the compliance officer within the corporate structure of a private company participating in a public tender or a public anti-corruption authority, so they can take the necessary ameliorative steps. It is absolutely essential to have effective whistle-blower protection systems in place in order to encourage reporting of corruption.

Conflicts of interest, as economists understand them, are a natural result of a principal-agent relationship. An agent (here, a contracting official) may exploit his information asymmetry (his greater knowledge) to take advantage of an opportunity that may well be at odds with the goals of the principal. To combat this – to force the agent/contracting official to pursue the principal’s ends – economists suggest the use of monitoring (transparency) or sanctions (discipline). Of the two, monitoring and increased transparency in the procurement process ensures that the official follows the principal’s goals (the goals of the people, or the legislature, whoever is considered the “principal”) honestly and effectively. For these reasons, ethics rules typically require public officials to disclose gifts that they might receive, or outside financial interests that might tie them to prospective contractors.

Another, emerging approach is to force self-reporting by highly motivated organizations – including contracting firms.

As already recolled, the professionalisation of public procurement workforce is another relevant issue.<sup>23</sup> Specialized knowledge of procurement professionals sets them apart and helps them to create a “monitoring community” wherein every member can monitor one another, thereby discouraging corruption. Training will vary from organization to organization within the procurement system. Leaders in the system need to make very clear the core principles in a successful system – transparency, integrity, and effective

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23. EU Commission, *Recommendation on the professionalisation of public procurement, Building an architecture for the professionalisation of public procurement*, 3.10.2017, C(2017) 6654 final. See: P. McKeen *The Importance of a Professional Public Procurement Workforce: Lessons Learned from the U.S. Experience*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit.; A. Saddy *Front-Line Public Servants, Discretion and Corruption*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit., available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2561580](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561580).

competition – to guide the training undertaken by individual organizations within the system.

Along these same lines, electronic procurement is emerging as another tool for improving public procurement systems. The use of electronic procurement can be very efficient in increasing competition and transparency and in reducing corruption in public procurement. E-procurement in the area of anti-corruption is also important for other reasons. In particular, e-procurement has the advantage of allowing for easy data generation and data management. This could in particular be helpful in the assessment of offered prices, to assess whether bid prices are reasonable and in line with market rates, by benchmarking collected data such as prices/price items in an electronic database with offered prices in a particular tender procedure in order to detect overpricing or bid rigging.<sup>24</sup>

“Blacklisting”, or debarment, is also considered an useful instrument to fight corruption in public procurement, but there are several different models: a highly discretionary model, with rigorous but informal procedures, focused first on issues of performance risk;<sup>25</sup> a more structured and adjudicative approach, focused on issues of fiduciary loss (“leakage” through corruption) and reputational risk<sup>26</sup> and, the European approach, which remains a somewhat uneven hybrid of the discretionary and the compulsory, with only loosely described procedures. Discussions between officials in the various procurement communities and discussions including debarment

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24. A. Sánchez Graells *Prevention and Deterrence of Bid Rigging: a Look from the New EU Directive on Public Procurement*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit., available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2053414](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2053414); A. López Miño – P. Valcárcel Fernández, *Contracting Authorities’ Inability to Fight Bid Rigging in Public Procurement: Reasons and Remedies*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit., available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2557008](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557008). See also: G. L. Albano, *Demand Aggregation and Collusion Prevention in Public Procurement*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit.

25. E.g., the United States – see U.S. Gov’t Accountability Office, GAO Report, *Suspension and Debarment*, September 2012, available at: [www.gao.gov/assets/650/648577.pdf](http://www.gao.gov/assets/650/648577.pdf). See: E. Hjelmeng – T. Søreide *Debarment in Public Procurement: Rationales and Realization*, in G. M. Racca – C. R. Yukins (eds. by) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit.

26. E.g., the World Bank sanctions process – See C. R. Yukins, *Rethinking the World Bank’s Sanctions System*, November 2013, GWU Legal Studies Research Paper No. 2013-132, available at <http://ssrn.com/abstract=2357691>.

officials and their stakeholders, would be a very useful way to harmonize sanctions systems, and to regularize the incentives and deterrents regarding fraud, corruption and poor performance.

Civil society plays a vital role in monitoring procurement. Because of the complexity of procurement, however, members of civil society – professors, journalists, non-governmental organizations, users, etc. – are less effective in forcing transparency and professional standards at the operational level. The monitoring of the entire procurement cycle by the unsuccessful tenderers, by social witnesses, NGOs, the press, citizens, might cumulatively help assure correct performance, and might well create an incentive for proper conduct by officials and contractors during the award and execution of a contract.

It is therefore vital that anti-corruption initiatives and procurement reform work more closely together. Within the EU legal framework the national implementation of the three 2014 EU Directives on public procurement and concessions may represent a chance of the utmost importance to effectively enforce integrity in the public procurement process.

Promoting professionalism and stressing the ethical requirements binding procurement officials inside complex organizations, such as central purchasing bodies, will be useful means of pursuing the financial and economic benefits of transparent, efficient and competitive procurement. Efficient spending through good public procurement practices is a key lever to improve the quantity and quality of public entities activity.

Transparency, efficiency and monitoring must be correctly addressed. Moreover, the risks of overregulating the procurement process are high, and overregulation leads to waste and litigation and can simply reinforce a failure in integrity. Improving the instruments to prevent collusion between the tenderers is a crucial issue too and requires special capacity. To this purpose, the need of professional capacity becomes evident, as the main source of waste in public procurement seems to be incompetence rather than corruption. Highly trained and diverse professionals are required to assure the quality of spending for the benefit of the citizens. Correctly addressed, forms of aggregation of the procurement and of networks between procurement agencies could assure the needed mix of professional skills required to use procurement as a strategic tool for public interest and economic development.<sup>27</sup>

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27. EU Commission, *Making Public Procurement work in and for Europe*, cit.



## Transparency and anti-bribery measures in the Italian public procurement system

### *1. Transparency and anti-bribery measures in the public procurement system*

Transparency and anti-bribery are polysemous terms. It is therefore necessary to specify what do transparency and anti-bribery measures within the boundaries of the public procurement realm mean in the first place.

The term *transparency* is found in both the national and the European Union law having several meanings. As a first meaning, in the European Union law on public procurement, transparency is a general principle, originating from the principle of non-discrimination on grounds of nationality (CJEU Judgement of the Court (Sixth Chamber) of 7 December 2000 in C-324/98 *Teleaustria and Telefonadress case*) and it consists in guaranteeing an adequate level of publicity in order to enable the awarding of public contracts by means of a tendering procedure. Within the national law, transparency is a general principle of the legal system having constitutional relevance but it is at the same time a medium to prevent and hinder bribery, in that it allows a monitoring on the part of the social body of the choices made by the administration (Arena, 1996, 13 seq.; Merloni, 2008, 12; Marzuoli, 2008, 45 seq.; Manganaro, 2014, 4; Bombardelli, 2015, 1 seq.).

Technically, transparency is a measure aimed at the effective knowledge of information (Carloni, 2014, 28), which can be achieved both by means of publication and by the regulation of the right to access the administrative documents (Marzuoli, 2008, 47 e seq.; Ponti, 2016, 29 seq.; Cudia, 2016, 94 seq.). As we shall see, both dimensions of transparency can be found in public procurement.

On the other hand, when we talk about *anti-bribery measures* within the public procurement system we refer to a wider concept of bribery than the one used in criminal law (see art. 318 and 319 Penal Code) because in the administrative corruption a malfunctioning of the public administration emerges,

determined by the use for private purpose of the public office assigned to a party (Mattarella, 2014, 61 seq.; Cantone, 2017, 4 seq.; Racca, 2017, 208).

Anti-bribery measures not only aim at restraining bribery, but are also intended to prevent it by adopting measures of risk prevention. Therefore, anti-bribery measures do not have a typical content, given that they may refer to, for instance, the subjective requirements to participate in the economic operators' tenders, the content which is the object of the procurement contract to be entrusted and even the executive phase of the contract.

Concerning the public procurement system two kinds of measures can be identified: *a) prescriptive and regulatory anti-bribery measures* which derive from the European Union law, the public procurement code and the regulatory acts adopted by the Italian National Anti-Corruption Authority (ANAC); *b) contractual anti-bribery measures* which may be included by the procuring entities in the tender's *lex specialis* and then included in the public procurement by public authorities. Measures of the first kind are mainly employed to monitor the integrity requirements of the economic operators. The most relevant measures of the second type are the so called legality protocols and integrity pacts.

Reference to the public procurement system serves the purpose of identifying the perimeter within which it is necessary to prevent and contrast corruption: it thus refers to the comprehensive area of the contractor's choice stage, the awarding and the signing of the contract and its implementation. In the light of the EU legislation and the directives on public procurement (EU Directives n. 23, n. 24, n. 25/2014), the procurement procedure is a measure aimed at promoting competition and effective market relations. Therefore, the measures of transparency and anti-corruption in the public procurement are to be seen and evaluated in light of the principles of both national and European Union law.

It should be noted that in the Italian legislation the existing measures of transparency and bribery prevention have been disciplined separately from the contractor's choice system. Such lack of coordination between the distinct sources of law is a complicating factor, which entails the need for a harmonization of the measures of transparency and anti-bribery within the public procurement system.

## 2. *The peculiarities of the Italian procurement system*

The public procurement code, adopted with the Legislative Decree (DL) 18 April 2016, n. 50, came into force on the 19 April 2016 and was partly amended one year later with the Legislative Decree (DL) 19 April 2017, n. 56 (so-called corrective decree). With the new code, the legislator pursues a different design and adopts a new perspective. The stated purpose is that of creating a clear, simplified code to be implemented with a more streamlined and flexible regulation and also that of reducing the times of the detailed rules' adoption (De Nictolis, 2016, 503 seq.; Torchia, 2016, 605 seq.).

Firstly, it is expected that the previous regulation (Presidential Decree n. 207/2010) will be partly substituted by soft law acts (so-called ANAC guidelines on which see Chiti, 2016, 436 seq.) and partly by Ministerial Decrees (and other secondary State acts). About 50 implementing acts can be identified (14 Decrees of the Minister for Infrastructure and Transport; 15 acts by ANAC; 6 Decrees of the Prime Minister; 15 Decrees of other Ministers). The pursued plan aims at the streamlining of the overall system through the simplification of both means and procedures of the procurement, the simplification of the economic operators' qualification, the introduction of new regulations for the procuring entities' qualification and the recognition of ANAC as an independent authority with regulatory, supervisory and preventive tasks. However, such overall plan has only partially been implemented. In the first place, because the public procurement code has had a rushed birth; secondly, because only a section of the code's implementing acts has been adopted to date. Compared to other European countries, the Italian public procurement system entails some peculiarities among which primarily stands out the new role granted to ANAC. Following the incorporation of the Oversight Authority over public contracts within ANAC, from 2014 on ANAC has to take on both the tasks of supervision on public contracts and of preventing corruption (see legislative decree 24 June 2014, n. 90 converted into statute by Act n. 114 of 11 August 2014 and Racca, 2015, 345 seq.; Sticchi Damiani, 2015, 1 seq.; D'Alterio, 2016, 499 seq.). ANAC's mission is particularly relevant in the public contract field in that: on the one hand, ANAC plays a role of independent authority with regulatory, supervising and sanctioning powers; on the other hand, ANAC is the subject entrusted with the integration of the public contract, transparency and anti-bribery fields. Not only does ANAC fulfill a role as independent authority but it also takes on the task of "pivot" between the systems of transparency and anti-corruption within the public procurement (Cantone, 2017, 5), thus acting as a "binding force" between different fields. It shall be sufficient to recall,

as an example, the regulatory powers which are carried out with the adoption of the so-called *Bandi Tipo* (see *Bando Tipo ANAC n. 1/2017* of 22 December 2017) or with the adoption of the so-called Guidelines which are responsible for the code's implementation, thus substituting the preexisting implementing regulation; the management of the National Database of Public Procurement in which converge all the information contained in the existing databases and the Public Procurement Digital Data Record containing all the information and data on the economic operators; or even the advisory powers and the cooperative supervision which ANAC exerts in the forms of dialogue and support to the contracting authorities or finally the supervising and intervention powers in case of grave violations of public procurement code or the sanctioning powers enforceable in case of forged documentation and/or forged declarations given by the economic operators. Another relevant novelty introduced by the reform consists in the so-called qualification of the procuring entities. The new procedures and the awarding criteria require qualified contracting authorities, capable of governing complex procedures (cf. Donato, 2016, 9 seq.). Therefore the necessity of reducing and selecting the contracting authorities and the central purchasing bodies based on qualification and specific proven competence in both the reliance and the management of public service contracts.

*3. Transparency and publicity measures: A) Transparent Administration; B) publicity of the tendering procedures; C) access to the tenderers' offers*

We may identify at least three different ways with which transparency and publicity are implemented in the realm of public procurement. Such can be distinguished according to function, regulation and legal implications.

A. A first way is the so-called "*Transparent Administration*" applied to the field of public procurement.

In addition to what already established by law (see art. 37 par. 1 legislative decree of 14 March 2013, n. 33 and art. 1 par. 32 legislative decree of 6 November 2012, n. 190), the public procurement code has introduced, as a rule, the publication of all the acts inherent to the public contracts' planning and awarding procedures, including the names of the selection committee's members and their *curricula*; regulation of exclusion and admission as well as the list of the procurement reports and of the records of the financial management of the contracts at the end of their implementation (art. 29 par. 1 LD n. 50/2016 and subsequent amendments and additions; ANAC

has then specified the list with the LG on transparency, ANACs' decision n. 1310 of 28 December (2016, 11). Such acts must bear the publication date and are moreover published on the Minister of Infrastructure and Transport website and on ANAC's digital platform.

Such measure of transparency is particularly relevant because it fosters ways of regulating both the pursuit of the institutional functions on the entities' part and the use of public resources. For instance, it may allow the monitoring of the contract's implementing phase, which is the most delicate, through the supervision of both the costs and times of the works' execution, compared to the successful tenderer's offer during the procurement. However, such procedure of transparency does not have legal effects (in fact, the decree on transparency states "*remain steadfast to obligations of legal publication*": art. 37 par. 1 LD n. 33/2013 and subsequent amendment and additions).

B. A second mode is the publicity of the procurement procedures having legal effects. The public procurement code introduces a novelty expecting that, besides the publication on the Official Journal of the European Union, the publicity with legal effects of prior information notices and contract notices shall be guaranteed by the publication without burdens:

- on ANAC's digital platform concerning the contract notices ([portaletrasparenza.anticorruzione.it](http://portaletrasparenza.anticorruzione.it)) in cooperation with the Regions and the regional platforms of e-procurement;
- on the "buyer profile" of the procuring entity (it is the website of a procuring entity in which the acts of the public procurement code are published with legal effects, see art. 3 par. 1 lett. nnn LD n. 50/2016).

At present, the publication takes place on the Official Journal of the Italian Republic, while the procurement of works whose amount is below Euro 500.000 is published on the municipality's official noticeboard (art. 2 par. 6 Decree of the Minister of Infrastructure and Transport 2 December 2016) and the legal effects shall apply from the date of such publications. Here the main problem is given by the fact that several administrations have eliminated in practice the publication on the "buyer profile", which has legal publicity effects, merging all the publications in the section "Transparent Administration", whose publication does not have legal effects. It is therefore necessary to guarantee the publication for legal purposes and then guarantee that it be clear and distinct from the informative and surveying one, made on the "Transparent Administration" section.

C. A third mode is related to the access to the competitors' offers.

The public procurement code introduces, with respect to the procurement procedures, a specific regulation stating that: *a*) in relation to the competitors' tenders the right of access is deferred until awarding; *b*) the right of access is excluded for all information given on the tender having, in accordance to a motivated and proven statement of the competitor, "technical or commercial secrecy"; *c*) in relation to the previous hypothesis (sub. *b*), access is allowed to the competitor for the purpose of defence in court proceedings of his/her own interests in relation to the awarding of contract's procedure (see art. 53, par. 2 lett. *c*) and *d*) and par. 4 and 5 of the LG n. 50/2016 and subsequent amendments and additions). The aim of the deferment is to hinder disturbance of the procurement operations and pressures on the awarding committee's evaluation until the procedure is concluded. The prevailing administrative case-law restrains the exercise of the right of access because it considers the access on the one hand to be allowed only to the competitor that has taken part in the tender and, on the other hand, conditional upon the proven need for a defence in a court proceeding (see State Council, V sec., judgment of 16 March 2016, n. 1056, Council of Administrative Justice of Sicily, judgment of 23 September 2006, n. 324).

Within this framework, a delicate issue concerns the relation between the access regulation as set out in the existing code on public procurement and the other laws on transparency (for instance the LD n. 33/2013 and subsequent amendment and additions regarding the generalized civic access or the LD n. 267/2000 and subsequent amendments and additions regarding the right of access of municipal counselors).

In an official opinion addressed to the Municipality of Forlì, ANAC has qualified the right of access to the procurement's acts envisaged by the CCP as a "special norm" compared to the other laws on transparency and has affirmed on the one hand that the civic generalized right of access to the procurement's procedures acts can be allowed only after the awarding; on the other hand, that such right of access can be exercised without obligation to provide for a motivation but within the limits laid down by the law on transparency (protection of personal data and of the economic and commercial interests of the parties involved) (ANAC advice, resolution n. 317 of 5/4/2017).

4. *Anti-bribery measures: A) prescriptive and regulatory measures: supervision of the subjective requirements and the so-called grave professional misconducts; B) contractual anti-bribery measures: the so-called legality protocols*

Given the features of public contracts, how can anti-corruption measures integrate the contents of the procurement's *lex specialis* and constitute a best practice within the public procurement system? And to what extent can anti-corruption measures be allowed and tolerated with respect to the principles of the European Union law on procurement?

As far as the public procurement is concerned, the leading principle is the prohibition of *gold plating*, which implies the “*prohibition to introduce or maintain regulation levels superior to the minimum required by the directions*” (art. 1 par. 1 lett. a) law n. 11/2016) and it is binding even regarding the regulation acts of ANAC and in the code's implementing phase (see art. 213 par. 2 legislative decree n. 50/2016 and cf. State Council, Opinion n. 855/2016). The principle of *gold plating* prohibition is to be read and interpreted in the light of the art. 36 of the Treaty on the Functioning of the European Union and of the interpretation given by the European Union law, which allows restrictions and derogation from the competition principle for reason of public morality, public policy, public security, for health and human life protection, as well as for mandatory requirements (since the ruling of the judgment *Cassis de Dijon* of 20 February 1979 case C-120/78). Anti-bribery measures may be attributed both to public policy reasons, public security reasons and to the concept of overriding requirements developed by the Court of Justice and thus enable the introduction of further regulation levels compared to those given by the European Directives n. 23, 24 and 25/2014 EU, provided they meet with the general conditions established by the principle of proportionality.

A. prescriptive and regulatory measures: the supervision of the subjective requirements and the so-called economic operators' grave professional misconducts.

The main anti-bribery measure established by EU directives refers to the supervision of the subjective requirements of professional integrity (art. 57 par. 1, 4 and 6 of the EU Dir. 24/2014).

The new public procurement code has implemented the EU 2014 directives including: *a*) the exclusion of the economic operators who have been convicted by final judgment for a series of criminal offences (criminal association, mafia-type association, fraud, exploitation of child labour, etc.) and in any case for all those “offences for which the inability of contract with the

public authority is an additional sanction”; *b*) measures of self cleaning with which the economic operator can prove his reliability even risking an excluding lawsuit; *c*) has entrusted ANAC with the task of specifying through Guidelines the adequate means of proof and the deficiencies to be considered meaningful for purposes of procurement exclusion (see art. 80 par. 1 and par. 7, 8 and 13 LD n. 50/2016).

Concerning these rules, the public procurement code does not exclude the potential meaningfulness of certain facts of civil, administrative and criminal nature also found by non-final judgment as anti-bribery measures, when included in the “grave professional misconduct” category (see art. 80 par. 5 lett. c) of the LD n. 50/2016 and cf. on the point State Council, V sec., judgment 20 November 2015 n. 5299 and De Nictolis, 2016, 14 s.).

The operation carried out by ANAC has been the adoption of a regulatory act with a specific Guideline (Guideline n. 6/2016 updated on the 11 October 2017), aimed at identifying the grave professional misconducts determined by means of an implementation measure, which may question the competitor’s integrity (i.e. the professional morality) and his reliability (i.e. his technical ability) concerning the course of the activity in the area covered by the contract.

The new regulatory measures of ANAC on the so-called grave professional misconduct of the economic operators are to be welcomed in that they provide the procuring entities with a wide anti-corruption supervision measure on the economic operators’ subjective situations extended to the criminal, civil and administrative violations and guarantee their partaking in a procurement procedure and the cross-examination in compliance with the general principals of the law on the administrative procedure (law n. 241/90). Still, the main critical issue lies in the fact that such guidelines are “non binding” acts: a circumstance which will lead the procuring entities to different approaches, thus presumably increasing the competitors’ burdens and the litigations.

#### B. Contractual anti-bribery measures: the so-called legality protocols.

The legality protocols may be a crucial measure to prevent corruption. In practice however, the procuring entities often use the legality protocols as a container, including in them also clauses with heterogeneous content (for instance demanding further requirements or posing further conditions to the subcontract) providing for the automatic exclusion of the economic operators. At the risk of non preventing corruption, on the one hand, and damaging competitors, on the other.

Some useful directions come from the European Union law. I am hereby referring to the Edilux/Trapani Provincial Superintendence case in which the

Court of Justice has stated that the inclusion of the legality protocols in the procurement procedures complies to the European Union law's principles on the one hand, because it aims at preventing and counteracting the phenomenon of the infiltration of organized crime especially in the public procurement sector and it is moreover functional to the observation of the competition and transparency principles (see Court of Justice, X sec. judgment 22 October 2015 case C-425/14, par. 27 and 28 Edilux on which see Vinti, 2016, 318 s. and cf. Saitta, 2015, 244 seq.). On the other hand, the Court of Justice has declared as non complying with the European Union law and the principle of proportionality, the declarations contained in the legality protocol, according to which the candidate or the tenderer does not find himself in monitoring situations or in connection with other candidates or tenderers, has not made and will not make a deal with other procurement's participants and will not subcontract any workings to other undertakings participating in the same procedure (see Court of Justice, IV sec., judgment 19 May 2009 case C-538/07, case Assitur/CCCIA). It follows that the legality protocols can be very efficient anti-bribery measures and best practices when their adoption by the procurement entities guarantees the cross-examination with the economic operator involved and the compliance with the European Union law's general principles. On the other hand, the inclusion in the legality protocols of measures involving for instance the sanctioning by automatic exclusion from the procurement and introducing clauses which do not comply with the European principles on procurement may translate into a bad practice.

### 5. Conclusions

In conclusion: concerning the *measures of transparency and publication* it may be noted that the implementation of the so-called "*Transparent Administration*" to the public procurement sector may have positive effects, in that it allows the monitoring of the public contracts by means of the supervision of the costs and lead time of work's execution, even in the implementation phase, which is the less safeguarded and examined. As for the publication having legal purposes, it is required that such publication be always guaranteed and that it be neatly distinct from the informative one of the "*Transparent Administration*" section, thus ensuring the operators' right for purposes of tenders' submission and protection in judicial proceedings. With respect to the *regulation of access to public contracts*, the position of the administrative jurisprudence presents some rigidities. The provision of the CCP on the access' deferment has its own *ratio* even in terms of prevention

of bribery, but it has to be coordinated with the so-called “transparency decree” in case of generalized civic access.

As far as the *prescriptive and regulatory anti-bribery measures* are concerned, the measures adopted by ANAC on the so-called *grave professional misconduct* of the economic operators shall on the one hand be welcomed in that they enable the procuring entities to widely monitor the competitors’ subjective situation with respect to anti-bribery functions, extended to the criminal, civil and administrative offences, guaranteeing at the same time the participation in a procurement procedure and the cross-examination. On the other hand, though, it shall be noted that being such guidelines “non binding” acts, they may lead the procuring entities to apply different approaches, thus presumably increasing the litigations.

Finally, concerning the so-called *contractual measures* and the so-called *legality protocols*: they can be very effective anti-corruption measures and constitute best practices, provided that they be adopted by the procuring entities always guaranteeing the cross-examination of the economic operator involved and the observance of the European Union law’s general principles. Otherwise, such measures may turn into bad practice, affecting on the one hand the choice of the highest bidder and not ensuring on the other hand the effects of bribery prevention.

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# PART IV

Public ethics and corruption



## The formal and informal institutions of corruption: an analytical framework and its implications for anticorruption policies

### *Introduction*

In the last decades, a chain of scandals has fueled a growing popular awareness of corruption as a factor which may negatively affect political and economic decision-making, distorting public policy – in terms of growing ineffectiveness and inequality – in any kind of political regime. The issue of dissipation, misappropriation and distortions in the allocation of resources caused by systemic corruption has become a serious concern for international institutions and national policy-makers in many developed states as well as in developing countries. The perception of rampant corruption in the political, economic and financial arenas has been one of the leading factor of a growing dissatisfaction against the elites, as exemplified by the *Indignatos* in Spain or the “Occupy movement” of New York in 2011, with their radical protest against the top one percent of wealthiest people in society that exercise an opaque political influence, driven by the disproportionate share of financial and material capital that they possess and is actually converted into hidden and corrupt relationships with public decision-makers. In a vicious circle, more or less developed countries where bribery is perceived as a still significant or proliferating reality suffer a mounting de-legitimization of political representatives and institutions, since widespread mistrust towards public actors is at the same time a consequence and a facilitating factor for the development of a texture of systemic corrupt exchanges. Besides the protest of anti-establishment movements and the “exit” strategy of escalating abstention or de-engagement in political activity, also the populist appeals of would-be political leaders have been encouraged by the opportunity to wave the issue of corruption to challenge the traditional elite, occasionally challenging the stability of political institutions.

A corresponding interest on the issue of corruption in fact came out recently also within the social sciences. Nevertheless, in spite of a large scientif-

ic debate, no consensus has emerged on a commonly accepted definition of corruption beyond a generic notion of “abuse of entrusted power”, implying an actor’s violation of certain legal, cultural or “public interest” standards of behavior. Evidence of large-scale corruption practices in the public sector is at the same time a signal of the failure of the institutional and societal mechanisms of control over the integrity and effectiveness in public agents’ delegation of power, and a challenge to some of the basic principles of good government, such as equality, responsiveness, accountability, transparency. Moreover, since corruption develops behind the scene of the political representation, no objective measure of its extent exists, therefore any attempt to elaborate generalizations on its causes and effects have to rely on uncertain proxies to test the hypotheses on its non-observable nexus with other social phenomena.

In this contribution a neo-institutional perspective will be briefly presented: actors and resources involved in corrupt exchanges emerge in many institutional contexts, along with the emergence of internal governance mechanisms allowing individuals and organizations which are involved in it to reduce uncertainty (and transaction costs) in their interactions (della Porta and Vannucci 2012 and 2014). In spite of significant contextual differences, in fact, we can observe a substantive regularity in the recurrent mechanisms of internal regulation that create “hidden orders” among the many actors involved in corruption. An in-depth understanding of the governance mechanisms of corruption can have a twofold application, both in the explanation of the phenomenon and in the making of policy strategies to prevent and fight it. Anticorruption policies and tools can in fact benefit from a better understanding of the factors underlying its diffusion and persistence, targeting precisely those mechanisms of interaction, which would otherwise strengthen and “normalize” hidden links and relationships between corruptors and corruptees.

### *1. Four models of corruption*

Four different “models of corruption” can be singled out as a result of the crossing of two variables. The first one considering – coherently with the rational choice perspective – the capacity of State formal institutions and corresponding enforcement mechanisms to deter corruption through the menace of controls and sanctions. The relevance of this variable (put here on a vertical axis) is coherent with the representation of corruption in a principal-agent (P-A) model, with its emphasis on the relative effectiveness of formal rules, contractual proviso and enforcement to countervail the in-

centives to collusion in the relationship between agent and corruptor, due to information asymmetries within the public organization.<sup>1</sup> The vertical axis is the privileged environment for the application of rational calculus, modeling the agent's and corruptor's choice as addressed by variables which mirror the structure of incentives generated by formal rules and accountability mechanisms.<sup>2</sup> To simplify, we have singled out two cases along a continuum: the existence of effective/ineffective formal institution and corresponding enforcement mechanisms. Effectiveness can be assessed in terms of strong/weak incentives to comply with formal regulation prohibiting hidden exchanges with corruptors.

The second variable (on the horizontal axis) relates to the set of social variables which may encourage or weaken collective action, positive recognition of the value of law, interiorized adhesion to public ethics, or vice-versa strengthen the internal regulation – i.e. the extra-legal institutions – of corrupt deals. We enter into the realm of societal accountability, where also the capacity of informal “governance mechanisms” makes easier to conclude and “legitimize” corrupt exchanges, normalizing them as acceptable practices. In the horizontal dimension of social circles and collective action enters into play, and we have to take into consideration as relevant variables also the informal dimension of mutual recognition and transmission of interiorized values, cultural norms favoring participation (or vice versa strengthening trust bonds among corrupt agents), collective action in favor of public interests (or vice versa collusive orientations among actors involved), etc..<sup>3</sup>

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1. The basic components of corruption within a P-A perspective can be found in Banfield's definition (1975: 587) of corruption within governmental organization: “The frame of reference is one in which an agent serves (or fails to serve) the interest of a principal. The agent is a person who has accepted an obligation (as in an employment contract) to act on behalf of his principal in some range of matters and, in doing so, to serve the principal's interest as if it were his own. The principal may be a person or an entity such an organization or the public. In acting on behalf of his principal the agent must exercise some discretion; the wider the range (measured in terms of effects on the principal's interest) among which he may choose, the broader his discretion. The situation includes third parties (persons or abstract entities) who stand to gain or lose from the action of the agent. There are rules (both laws and generally accepted standards of right conduct) violation of which entails some probability of penalty (cost) being imposed upon the violator”.

2. As Klitgaard puts it: “corruption is a crime of calculation, not passion. True, there are both saints who resist all temptations and honest officials who resist most. But when bribes are large, the chances of being caught small, and the penalties if caught meagre, many officials will succumb” (Klitgaard 1998, 4).

3. Similarly, Mungiu-Pippidi (2012, 8-9) observes that normative constraints against corruption can be described through different distinctive components: “A prevailing societal *norm* of ethical universalism and integrity: let us call this *civic capital*. A *widespread practice*

Normative barriers and “moral costs” of corruption can be considered as a sort of final *distilled* of the conjoint effect of several extra-legal institutions on individual beliefs and preferences, which are shaped by such variables in a slow-moving social process. In other terms, we can assume that a socio-cultural environment where informal rules are more or less “corruption-enhancing” can be described – in drastically simplified terms – as populated by agents having (on average) lower or higher social and normative barriers against corruption. Such barriers are in fact strictly related (on average) to the degree of institutionalization of the non-written rules which create both societal and hidden accountability mechanisms, i.e. their capability to model both beliefs and preferences of actors involved in corruption deals, and having the power and the possibility to socially sanction them.<sup>4</sup>

Obviously, the formal and informal dimensions of corruption – represented by the vertical and the horizontal axis in our simplified scheme – influence each other through many complex and co-evolving mechanisms.<sup>5</sup> For analytical purposes we will take them as if they could be treated separately (at least at a certain time and in a certain context) as describing the general “institutional environment” where corruption may take place.

In table 1 a four-cases typology of dissimilar “institutional conditions” shaping the environment in which potentially corrupt agents operate is presented. It could be applied, *ceteris paribus*, at different levels, from a specific decision-making process to an organization, up to a state as a whole, in which individual choices respond to similar incentives and motivations. Which context is relevant depends upon the answer to a question: to which extent are (i) formal regulation and enforcement mechanisms; (ii) informal rules and social/interiorized accountability mechanisms effective in provid-

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of engaging in formal or informal collective action around shared interests, purposes and values; let us call this, following Robert Putnam, *social capital*. A dense *network of voluntary associations* (among which NGOs in the Western understanding of the term, but also unions, religious groups, etc.), *civil society*. A sustained *participation and political engagement* of the public opinion, for instance through media or social movements, *civic culture*. See also Mungiu-Pippidi (2015).

4. We focus here on the macro-to-micro transition, but obviously preferences and beliefs, in turn, address along time – in the Coleman’s (1990) micro to macro transition – individual choices responding to institutional incentives, along a path of incremental change of the informal norms regulating (with a more or less discouraging/encouraging influence) corrupt exchanges.

5. See della Porta and Vannucci (2012), especially chapter 9, for an analysis of the path-dependent dynamics of the extra-legal and formal “rules of the game” of corruption, fuelled by the interplay of individual’s beliefs, actions and institutional incentives.

ing agents a structure of beliefs and incentives addressing their choices towards integrity (versus corruption)?

When social and moral barriers against corruption are relatively high – due, for instance, to strong anticorruption collective mobilization and integrity-promoting standards of conduct within public organization – but the capability of state regulation to detect and sanction illegal deals is scarce (case 1) an *irregular* or *intermittent* diffusion of corruption may emerge. Agents in this case are subject to a significant, enduring “temptation” of potential gains from illegal deals, from which they are generally oriented to resist, consistently with the social and individual structure of values and beliefs. However, some of them – having weaker “public interest” oriented motivation – can be occasionally involved in such illegal activities, when they meet other agents having similar preferences and trust develops making them reliable partners to each other. The successful and unpunished payoffs obtained – in terms of illicit profits with almost no risk – may therefore attract few other agents within this “gray area” of willingness to accept corrupt deals. As a consequence, sometimes, in certain areas of public activity, single or small cliques of corrupt agents practice or accepts other’s corrupt exchanges, which will be constrained by the fear to be denounced or blamed by honest colleagues. Occasional and time-by-time corruption, with the involvement of a limited amount of agents, more or less homogeneously diffused in different areas and sectors of public activity, will be the corresponding outcome.

The most *virtuous* and transparency-enhancing conditions (case 2) obtain when both formal institutions, social and normative barriers converge towards making illegal deals not attractive at all. In this case, in fact the rational calculus of monetary risks/costs and the combined influence of “social pressure”, informal organizational control and interiorized values discourages – on average – the individual adhesion to corruption. Even in the best case, when agents are positively oriented towards the fulfillment of “official rules” stating their duties towards their public “principal”, within a well-designed institutional framework, corruption cannot be completely eradicated. Sporadically corrupt deals realize also in this “high-transparency” environment when by chance a public and a private agent meet having both low risk-aversion, weak moral barriers – due to their isolation from the socialization to the prevailing integrity standard of conduct in their business, political or administrative environment, for instance– and strong reciprocal trust ties. Corrupt exchanges, however, will be infrequent, confined to a very restricted number of bureaus and agents, without significant networking extension.

We enter in the territory of *systemic* corruption when low moral barriers and weak social controls against corruption are complemented by a substantial ineffectiveness of the legal system to constrain the individual and organizational involvement in illegal activities (case 3). In this context agents are de facto unrestrained in their incessant search for opportunities of illicit gains. When formal rules, accountability mechanisms and normative barriers have an impact almost nil on the individuals' consideration of the expected adverse consequences of their involvement, the overall outcome is a rampant, unrestrained corruption. Consequently, corruption tends to develop stronger regulation and "governance structures" reducing the uncertainty on what corrupt agents can expect from each other. Among the distinguishing features of systemic corruption, in fact, three aspects can be singled out:

- all, or almost all activities within a certain organization having an economic value for private agents, or relevant for the interest of corrupt agents, are somehow related, in the worst case aimed, to the collection of bribes;
- all, or almost all, public agents in the organization are implicated in an invisible network, which is ordered by unwritten norms and a commonly understood allocation of tasks and roles. Their regulated activities include the collection of bribes and their distribution; the socialization of newcomers; isolation or banishment of reluctant agents; measures of camouflage and protection from external inquiries; the definition of internal rules and their enforcement;
- all, or almost all, private agents in contact with the organization know the 'rules of the game' and are willing to pay bribes in order to obtain the benefits allocated as a result.

When corruption is systemic, in other words: "such acts become *normalized*, that is, become embedded in organizational structures and processes, internalized by organizational members as permissible and even desirable behavior, and passed on to successive generations of members. [...] There are three pillars that contribute to the normalization of corruption in an organization: 1) *institutionalization*, the process by which corrupt practices are enacted as a matter of routine, often without conscious thought about their propriety; 2) *rationalization*, the process by which individuals who engage in corrupt acts use socially constructed accounts to legitimate the acts in their own eyes; and 3) *socialization*, the process by which newcomers are taught to perform and accept the corrupt practices" (Ashford and Anand 2003, 3).

We may distinguish here between two sub-cases. In systemic *centripetal* corruption an effective third-party enforcer monitor and enforce the respect of the (illegal) norms, guaranteeing the fulfillment of corruption contracts and – eventually – imposing sanctions on opportunistic agents and free-riders, therefore reducing transaction costs. The resulting high-corruption equilibrium, in other words, is generally more strong and stable – even if a crisis of enforcement potential of the guarantor may produce its sudden collapse.

In systemic *centrifugal* corruption there is no dominant enforcer available or willing to provide such services. The informal codes regulating corruption activities are sometimes self-enforced, on reputational basis and de-centralized enforcement mechanisms, for instance banning unreliable partners from future interactions. A plurality of actors may also compete or alternate trying to supply protection in corrupt exchanges – in a polycentric model. As a consequence, the equilibria of centrifugal corruption are somehow less robust – even if sometimes more easily adaptable to challenges of a change in external conditions (della Porta and Vannucci 2014).

Finally, a fourth case is exemplified by agents having on average low social and normative barriers, who nevertheless feel to be constrained due to the operation of the machinery of effective state regulation and sanctions (case 4). A significant quote of agents seek actively opportunities for illicit gain, and when some of them find favorable conditions within a certain decision-making process, in the interstices of the legal apparatus, they naturally tend to enlarge the network of hidden exchanges to those who are considered willing and reliable. The involvement in corruption of several willing partners – colleagues, controllers, etc. – strengthen the protective barriers against external risks of formal sanctions, therefore making corruption a dominant strategy within the corresponding circumscribed areas of public activities. Similar to spots in the leopard skin, *macular* corruption flourishes in restricted and isolated contexts, where nevertheless it tends to become pervasive, persistent, deep-rooted: it becomes *locally systemic*, so to say.

Table 1: Institutional matrix shaping the agents' choices:

		Formal institutions and enforcement mechanisms	
		Ineffective	Effective
<b>Normative barriers and societal mechanisms of control</b>	<i>High moral and social barriers against corruption</i>	<b>1. Irregular/intermittent corruption</b>  <i>Temptation-resisting agents</i>	<b>2. Sporadic corruption</b>  <i>Official rules-oriented agents</i>
	<i>Low moral and social barriers against corruption</i>	<b>3. systemic corruption (centripetal/centrifugal)</b>  <i>Unrestrained agents</i>	<b>4. macular corruption</b>  <i>Opportunity-seeking agents</i>

*Concluding remarks: the “anti-corruption box”*

An inclination towards corruption or towards integrity is not etched in the genetic heritage or cultural roots of a society. Corruption, akin in this to good governance, is the outcome of a multitude of individual and collective choices, supported and discouraged by the institutional matrix, social relationships and circles of recognition, the structure of social values and cultural norms. The combination of these elements creates expectations, habits, beliefs, preferences, ways of thinking and judging the sense of one’s own – as well as others’ – actions, which direct its evolution over time and change public opinion towards corruption and its diffusion throughout the state, markets and civil society. An effective anticorruption policy addresses such change discouraging individual involvement in illicit deals through material disincentives, societal recognition of the value of integrity, moral barriers.

The four cases of corruption exemplified in table 1 show how different “institutional conditions” shape the environment of individual choice. It encompasses both the vertical dimension of formal regulation and enforcement mechanisms, implemented by the state coercive apparatus; and the horizontal dimension of informal constraints of social/interiorized accountability mechanisms, which as we have seen can be more or less integrity versus corruption-enhancing.

An hypothesis can be formulated that the four resulting “equilibria” are not equally stable. *Ceteris paribus*, the systemic – i.e. *high density* – and sporadic – i.e. *low density* – corruption cases (3 and 2 in table 1) are relatively more robust and persistent, since informal constraints and the state apparatus converge towards a coherent outcome, sanctioned in the first case also by the evolution of effective extra-legal regulation mechanisms of corrupt deals. In the “virtuous” case both support the respect of anti-corruption law and regulation, in the worst case both undermine it. The latter scenario realizes when a *competing* structure of expectations (finally sanctioned also by an alternative values system supporting them, i.e. lowering normative barriers) substitutes the ineffective formal institutions formally stating the prohibition of corrupt practices. “In such cases, formal rules and procedures are not systematically enforced, which enables actors to ignore or violate them” (Helmke and Levitsky 2004, 729). As Aoki (2001, 13) puts it: even if the government prohibits the importation of some goods by a statutory law, but if people believe it effective to bribe customs officers to circumvent the law and make it a prevailing practice, then it seems appropriate to regard the practice rather than the ineffectual statutory law as an institution.

Multiple equilibria – with ample variations in levels of corruption – may therefore reflect divergent adaptive expectations and social values, i.e. the complementary or competing nature of informal constraints and effective/ineffective formal institutions.<sup>6</sup>

In irregular/intermittent (i.e. widely present in many public organization, but as isolated deals) and macular corruption (i.e. having an in-depth penetration in relatively few and confined areas of public activity) (1 and 4 in table 1), on the contrary, there is a tension between the direction where preferences and beliefs would address individual activities and the incentives created by formal institutions. In the best case, a “virtuous evolution” may be guided by popular consent, where public opinion and grassroots anticorruption movements push more or less reluctant rulers towards a strengthening of the state enforcement of corruption crimes (1>2); or also by a few “enlightened” political entrepreneur, who after having set up an effective anticorruption apparatus invest in the promotion of the values of integrity and the strengthening of a public spiritdness among bureaucrats and in the populace (4>2).

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6. On the possibility of multiple equilibria in corruption see the models of Cadot (1987), with a variation in the amount of bribes paid, Lui (1985), showing a variation in the number of corrupt exchanges, Andvig and Moene (1990), with a variation in both variables. Murphy, Shleifer and Vishny (1993) single out a model of multiple equilibria in levels of corruption and income.

In the worst case instead a reverse process is set in motion. The lack of societal consensus or scarce support towards formal anticorruption authorities and measures may induce policy-makers to progressively weaken and de-facto dismantle them (4>3). An active and participant civil society may be gradually discouraged in its anticorruption mobilization by disappointing results obtained in terms of laws and reforms promoting public ethics, as the Hirshman (1982) approach to normative barriers could suggest (1>3)

A major challenge in anticorruption is how to accomplish with policy measures a difficult exit from systemic corruption (3>2). In general terms, anti-corruption policies are effective when they diminish opportunities for and increase societal and normative barriers against corruption. But any reform which influences macro-variables may have only a remote connection – in both spatial and temporal terms – with the factual conditions and informal constraints influencing the activities of a specific subset of actors who can accept or offer a bribe, while the *script* which regulates their transactions remains substantially unaltered.<sup>7</sup> There is no simple or univocal recipe to deal with anti-bribery measures, since corruption is a complex and multifaceted phenomenon, influenced by a multitude of interrelated variables which affect both the anticipated benefits, the expectations and the socially recognized values which allow for such calculations to take place in the first place. Such conditions can explain the difficulties encountered in their implementation: “the history of anti-corruption campaigns around the world is not propitious. At the national and local levels, in ministries and in agencies such as the police, even highly publicized efforts to reduce corruption have tended to lurch, lapse, and, ultimately, disappoint” (Klitgaard et al. 2000: 11).<sup>8</sup>

A point emerge from this analysis: reforms aimed at dismantling systemic corruption have to be finely tuned against its hidden governance structures, i.e. its internal regulation of exchanges and relationships. The hidden ac-

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7. According to the script approach, any crime can be identified and classified according to the routine steps followed by its actors, using this identification to find crime prevention measures (Cornish 1994).

8. Other challenges frequently arise in the design of appropriate anti-corruption strategies, such as *oversimplification* – i.e. the failure to target the incentives behind the individual involvement in corruption and the structure of opportunities shaped by the specific institutional context – and the *narrow focus* on the legal dimension and definitions of corruption, which hampers tackling other rent-seeking and corruption-related forms of influence of private interests on the public decision-making. The *multiplicity of goals* pursued in political activity also makes more difficult for the public opinion to distinguish corruption from other private agendas that politicians may have; and for policy makers to emphasize the relevance of the fight against corruption, which is hardly distinguished from other issues (Søreide 2010).

countability of corrupt deals, in fact, is a powerful force lowering the effectiveness of both legal and societal mechanisms of control and enforcement.

Moreover, in the absence of countervailing forces *external* to the corrupt environment – such as the entry of “honesty-promoting” competitors in the political arena, a strong anticorruption movement from below, channeling the pressure towards integrity of the public opinion, etc. – a vicious circle may emerge: the more an anti-corruption policy is needed, because corruption is systemic and “centripetal”, i.e. enforced by effective third-parties, the less probable its formulation and implementation. In this case, in fact, most policy makers will also be involved – as participants in illegal deals, therefore liable to be blackmailed, or indirect beneficiary of rents collected through corruption. In this context even apparently robust policy measures – the institution of an anti-corruption authority, for instance – can easily be reversed into yet another corruptible or useless public agency, not executing or financing its operations.

As shown in our simplified typology – the “anticorruption box” of table 2 – there are two distinct approaches in the fight against corruption: *top-down* policies, aimed at strengthening *vertical* control and sanctions over corrupt agents and bribers; and *bottom up* strategies, based on the *horizontal* mobilization and assumption of responsibility of societal actors and groups, which should fortify their role as circles of recognition of the values of integrity and law-obeying conducts (Pizzorno 1992). If the status quo is systemic corruption, any attempt to operate on the top-down axis of the anticorruption box – both with *step-by-step* or *big-bang, revolutionary changes* in institutions (Rothstein 2011, 119) – risks to be insufficient or doomed to failure. A persisting, deep-rooted diffusion of ethical orientation and informal norms endorsing illicit behavior as acceptable will undermine any intensification of repression and law enforcement.

Especially when the principal-agent combines with neo-liberal paradigm, in fact, the dominant canon of anticorruption dictates measures aimed at cutting public budget, deregulating, privatize public assets and dismantling the social state, intensifying the repression and punishment apparatus (della Porta 2013) – as in the inherently authoritarian ACAs (anti-corruption authorities) approach set up in Singapore and Hong Kong (Heilbrunn 2004). Moreover, in the principal-agent model the “equilibrium properties” of systemic corruption are generally ignored: the issue is not the relative effectiveness of institutional systems in reducing corruption incentives, but “which types of processes are likely to be successful for enacting such reforms” (Rothstein 2011, 104). The neo-liberal ideology promotes autonomy of the market from the state as a way to good governance. The assumption is

that, the less the state intervention, the less the potential for corruption: “in a neoliberal world, where non-state actors have greater power and influence, the anti-corruption industry increasingly acknowledges the role business can play in corrupt transactions. [...] Indeed, critical theorists assert that the ‘anti-corruption agenda’ promulgated by international anti-corruption organizations is both a product and a facilitator of neoliberalism, and that it has undermined the anti-corruption industry’s efficacy” (Walton 2013, 148).

Neo-liberal practices, without any strengthening of moral barriers, have on the contrary increased the connivance between politics and business, especially in systemic corruption.<sup>9</sup> The illusory advocacy of neo-liberalism turned into opposite outcomes: liberalization, deregulation and privatization fuelled corruption, while their advocates had claimed the opposite (Stiglitz 2012a, 176). If corruption did not diminish, it seemed however to have changed forms. In particular, neo-liberalism has – through various mechanisms – attacked the very basis of political parties, which are not credible nor effective as third-party enforcers of corrupt deals, so changing the balance and functioning of corrupt networks. In several countries, centripetal model of systemic corruption changed, as parties are substituted for by other collective actors (religious association, free-masonry, etc.) as trust supplier and guarantor of corrupt exchanges.

Only when official rules are complemented by coherent informal institutions they tend to produce the expected outcomes. The fertile ground of any anticorruption regulatory reform lies therefore in a simultaneous set in motion of bottom-up initiatives, empowering societal actors, allowing them to become really influential towards those political entrepreneurs having the authority to change the formal “rules of the game”, making anticorruption regulation more effective. The involvement of civil society and local community participation in anti-corruption policies may represent a potential preliminary *spark* to set in motion any conceivable *positive feedback* interplay between actors’ interests towards integrity and optimistic expectations that an exit from systemic corruption can be found. Recognizing the importance of “appropriate cultural resources” in the promotion and maintenance of integrity, anti-corruption projects should adapt to the social values prevailing in each country (Newell 2011).

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9. A comparative study of Argentina, Venezuela, Indonesia, the Philippines, Kenya, and Zambia shows that despite political transition through democracy and economic liberalisation – i.e. deregulation, trade and financial liberalisation and privatization – no significant reduction of systemic corruption can be observed (von Soest 2013, 5).

The mutual recognition of the role of the public in the monitoring of government activities and in generalized awareness about the costs of bribery (World Bank 2000: 44) should, in turn, increase the perceived significance of transparency and anti-corruption commitment for bureaucrats and policy-makers, who would pay a price in terms of consent and career prospects in the case of the issue's removal from the agenda, or even worse if involved in a corruption scandal. The shaping of similar beliefs about one's own and others' evaluations of the effects of bribe-taking or offering would therefore generate a self-reinforcing model of behavior. When everybody in a society start to expect that corruption is a marginal, risky, socially blamed, low-profit activity, nobody has any incentive to take the first step along the long (and dangerous) road of corruption. Moreover, anti-corruption "trial-and-error", incremental and decentralized processes have the well-known quality of avoiding the potentially catastrophic consequences of wider and ambitious reforms, while favoring a learning processes and the spread of "best practices" among social movements activists, social entrepreneurs, associations, policy makers and bureaucrats – a positive-feedback mechanism in itself.

In recent years social movements denouncing kleptocratic practices, corrupt politicians and entrepreneurs, have developed a radically different explanatory framework. Consequently, also the policy toolkit enlarged. The fight against corruption is a basic constituent of a wider effort of citizens to oppose the deterioration of the quality of democratic processes. In order to raise resistance against corruption it is therefore necessary to restore or discover new accountability and transparency mechanisms that will permit a more effective control of citizens on the rulers. This implies the revitalization of a conception of politics intended not as a technique, but as a contribution to a realization of the common good. Experiences and experiments that increase the citizens' opportunities to participate in public policies, in the formulation, decision-making and implementation phases, increase information available to the public, spreading a broad awareness and knowledge that in the "technocratic" conception of politics are instead – for ideological beliefs or "wilful misconduct" – kept jealously hidden. The fight against corruption needs to be re-framed as a public good in itself, and as such promoted and preserved by fitting institutions.

Table 2: The “anticorruption box”:

Moral and societal barriers against corruption	<i>Bottom-up anticorruption strategies</i>	<b>Irregular/intermittent corruption</b>	<b>Sporadic corruption</b>
		1	2
		3	4
		<b>systemic corruption (centripetal/centrifugal)</b>	<b>macular corruption</b>
		<i>Top-down anticorruption strategies</i>	
		State control and enforcement mechanisms	

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## Corruption and the right to good administration

### 1. Highlights on the right of “good administration”

#### 1.1 Functional evolution

The principle of “good administration” – previously considered a principle aimed at ensuring the effectiveness of the public administration – has become a principle aimed at guaranteeing citizens’ rights: before it was considered an instrument to guarantee the effectiveness of public power, then it turned into an instrument to ensure a *defense from public power*;

#### 1.2 Evolution from principle to right:

The principle of “good administration” born with *programmatic value*, that is, it represents a *target* provided for by internal *constitutions* and is addressed to the legislator for its implementation. It, therefore, has a limited value, internal to each State, to guarantee, in fact, the effectiveness of the public power. Instead, as a right, it projects itself outside the individual State, in the *community*, recognizing rights to individuals, with respect to which correspond *obligations and duties* (of various kinds) of public administrations;

#### 1.3 Variable content (“hanger” notion to which variable contents are linked)

1. on the one hand, it is made up of certain *core principles* such as the right of access, the right to be heard, the right to obtain a reasoned decision, the rights of the defence and fair trial (to which rights correspond as many obligations to the administration, such as: the obli-

gation of publicity and transparency of administrative acts; this part of the good administration overlaps, in a broader sense, with the *principle of legality in the administrative field (due process of law)*, which is mainly expressed in procedural rights, all of which are of external relevance;

2. on the other hand, it includes some other principles that must characterize the administrative activity (and that turn into public obligations) as the principles of impartiality, reasonableness, fairness, objectivity, consistency, proportionality, absence of discrimination: these principles also have an external relevance, but they are not usually articulated in procedures;
3. finally, the “good administration” also includes milder rules (from a strictly legal point of view), which fall within the broader concept of public ethics (guaranteed by the recognition of some public duties), such as the duty to courtesy, the duty of a written reply to the questions of private citizens, etc., which have a soft regulation function and cannot be generally operated in front of a judge.

#### *1.4 Addressee (active and passive) of the principle*

If we refer to the right of “good administration”, the relevant *beneficiaries* are the community as a whole, which is protected through a purely political control (Parliament), or the individuals, guaranteed by judicial review proceedings (Courts): to that effect, it has proven to be problematic – as we shall see better below – the interpretation of Article 41 of the Charter of Nice, which states that “every individual” (understood as citizen, private individual or even groups and associations?) holds the right of “good administration”.

On the other hand, *the subjects obliged to respect this principle* are both the national and the supranational (or even global) authorities.

However, the organization of public authorities on several levels (the so-called co-administration) raised a series of questions regarding both relations between such authorities and the application to them of this principle: does good administration also bind the activity carried out jointly by national and supranational authorities? Does it also apply to relations between public entities, for example between national administrations and the European Commission?

In both cases the jurisprudence of the Court of Justice gave an affirmative answer.

### 1.5 Control and guarantee bodies

The variety of contents and aspects related to the notion of “good administration” involves a certain variety of controllers, depending on the fields in which the principle is expressed: the most developed and solid part of the principle is enshrined in specific rules (internal and supranational), the conformity to which by the administrative action should be controlled by national and supranational courts (globally, there are control bodies of a semi-contentious nature, such as “*compliance committees*” or “*inspection panels*”, to which infra-State entities can turn in order to activate global actions aimed at correcting state or global decisions or actions)<sup>1</sup>.

Then there is the particular role of the *European Ombudsman*, a figure institutionally called to investigate cases of *maladministration*, which controls precisely the respect of those principles related to good administration and mainly contained in codes of ethics and good behaviour (unfair behaviour, discrimination, abuse of power, lack of information or refusal to provide it, unjustified delays, administrative irregularities)<sup>2</sup>.

In particular, it should be noted that, for the purpose of integrating and specifying the provisions contained in the European Code of Good Administrative Behaviour, the Ombudsman, following a public consultation, published a summary of high-level ethical standards to which the Public Administration European Union adheres, broken down in five arti-

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1. For example, a national Government wants to enforce rules on world trade, labour, environment to other Governments, in order to protect domestic producers and traders or even the national community. The private individual who requires the intervention of a global body because a national Government does not respect the rules acts for its own convenience, but, in this way, also maximises the influence of the global body, legitimating its power. The national Government which turns to a supranational or global body because another Government does not respect global rules acts in defence of the national interest, but, doing so, legitimates the non-state body and recognises and supports its action (S. Cassese, *C'è un ordine nello spazio giuridico globale?*, *Politica del diritto*, n. 1 of 2010, 142 s.).

2. The European Ombudsman (elected by the European Parliament for a five-year term) investigates complaints about instances of maladministration by institutions or other EU bodies, by citizens or residents of EU countries or by associations or companies based in the EU. The Ombudsman's office initiates investigations after receiving a complaint or on its own initiative. It is an impartial body, independent of governments or other organizations. It submits an annual report on its activities to the European Parliament. The Ombudsman can solve a particular problem even only informing the relevant institution. If this is not successful, it tries in every way possible to reach a friendly settlement that resolves the problem. In the event of a negative outcome, the Ombudsman may issue recommendations to the relevant institution. If such recommendations are not welcomed, the Ombudsman may send a special report to the European Parliament to take appropriate measures.

cles, which specify the key principles underlying the activity of the European Union officials: 1. commitment to the European Union and its citizens; 2. integrity; 3. objectivity; 4. respect for others; 5. Transparency (so-called *Public Service Principles*, June 2012).

However, it is necessary to consider the limit of these codes, which, in themselves, are not legally binding, but which, if evaluated together with the rules that protect the right to good administration (starting from the same Article 41), are also important instruments to contrast the maladministration.

## 2. *Good administration and fight against corruption*

The principle of “good administration”, as an “hunger notion” with variable meanings, can therefore be declined in actions against corruption. In particular, transparency and publicity principles appear to be incentivised and enriched by rules against corruption: transparency is regulated not only to guarantee the rights of citizens and to promote their participation in the administration, but also to combat corruption and illegality, which can be found, more and more frequently, where transparency is lacking.

Another aspect that binds the fight to administrative corruption is then found in the concept of *public ethics* that pursues the correctness of the administrative work: if the administrative activity has the fundamental goal to implement and protect the interests of the community, the need for a good administration and for the correctness of the relationship between administration and citizens goes well beyond the sanctioning of behaviours that are of criminal importance, also entailing vigilance and the consequent prohibition of further behaviour that may jeopardise the ultimate goal of good administration.

It follows a *definition of corruption more extensive* than the one adopted under member states criminal common law, including aspects such as integrity, transparency, responsibility and good management; this is due to the limited effectiveness of the criminal strategy to suppress corruption (2003, *Commission on the global policy of the European Union against corruption* document), with a view to developing appropriate *prevention* strategies.

In order to seek a *new meaning of “good administration”*, especially with a view to improving the quality of life for all citizens, it must first be noted that the ultimate goal of the administration is the *protection of public interests*. In this respect, other requirements relating to the quality of the administration are highlighted, for example an administration which is able to communicate with citizens and avoids imposing burdens not strictly functional to the

service, or a transparent administration to be implemented through the use of instruments such as the publicity of certain documents, a greater digitisation of the activity or the extension of the public access to documents. This new meaning of “good administration” is closely linked to and reinforces the broader definition of corruption, contributing to preparing the necessary instruments to combat maladministration, with a view to preventing any forms of corruption.

*3. The right to good administration in the European perspective: guarantees provided by the Charter of Nice*

In particular, among rights and privileges recognised and guaranteed by the European Union to its citizens in dealing with public administrations (following the evolution of the European integration process, characterised by its own administrative legal system and by the progressive development of *co-administration*) there is the so-called “*Right to good administration*”, as stated in article 41 of the Charter of Nice<sup>3</sup>, included in Chapter V of the Charter, related to citizenship and closely connected, in the broader interpretation of the “good administration” concept, to subsequent articles 42 (right of access to documents), 43 (mediator) and 44 (right to petition).

This right has increased its importance within the European Union as a *general principle* to which the organisation and functioning of public administrations and their actions towards citizens must conform. In particular, its wide and flexible content summarises the doctrinal positions and the previous case-law related to different claims of private individuals towards the public administration, which are configured as rights and therefore considered deserving of protection. The principle codified in article 41 – precisely by virtue of its wide semantic scope – can be easily extended, by way of

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3. Article 41 – Right to good administration: 1. every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes in particular: – the right of every individual to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; – the obligation for the public administration to justify its decisions. 3. Everyone is entitled to compensation for damages caused by Community institutions or agents in the performance of their duties in accordance with general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.

interpretation, to further situations – not specifically identified – considered deserving of protection.

Indeed, the Charter of Nice has merely transfused into an *ad hoc* legal text the principle of good administration which, although not expressly stated in the founding Treaty, has been progressively elaborated, with a broad content, by case-law in important Court of Justice rulings. The principle of ‘good administration’ is clearly outlined in the recognition of several duties and obligations such as: the duties of care and impartiality of the Community institutions, the obligation of the public Administration to carry out a complete and timely investigation of any proposed questions, the obligation of neutrality of Officials. Other corollaries were then added to these duties, including, without limitation, the duty to open an investigation, the principle of reasonable duration of the administrative proceedings, the duty to hear any person involved, the guarantee of the adversarial procedure and the right of defence.

The Charter of Nice was proclaimed in Nice on 7 December 2000 by the European Parliament, the Council and the Commission of the European Union. At the beginning it had a mere declaratory nature but, “even though it was without legal effect”, reference was often made to this Charter as it expressed principles common to the European legal systems. Due to the failure of the European constitutional process, the Treaty establishing a Constitution for Europe – whose Title II dedicated to “Fundamental rights and citizenship of the Union” incorporated the Charter of Nice with some editorial changes – did not enter into force due to the negative results of the referendum on the ratification held in France and the Netherlands, respectively, on 29 May and on 1 June 2005.

However, on 1 December 2009, new opportunities opened up for the Charter of Nice with the entry into force of the Lisbon Treaty, amending the Treaty on European Union and the Treaty establishing the European Community signed on 13 December 2007, one day after the Charter of Nice was adapted at Strasbourg. The Treaty of Lisbon can be interpreted as the response of the European integration process at a time of deadlock coincided with the two referendum against the entry into force of the European Constitution as well as the tangible rescue of that part of the work carried out by the constituent Convention which was immune to any division between Member States and includes the catalogue of fundamental rights. The redrafted text of article 6, paragraph 1, of the Treaty on European Union contains the explicit recognition of rights, freedoms and principles enshrined in the Charter of Fundamental Rights of 7 December 2000, adapted

at Strasbourg on 12 December 2007 and confers the same legal value on the Charter as the Treaties, *i.e.* the value of supranational primary law.

What is the content of Article 41?

Although Article 41 essentially regulates procedural aspects, it recognises a key role to the good administration principle, by defining it as a *right of every person*; it is no longer declined as an organizational and functional principle (according to a self-referential administrative view), but as a *subjective legal situation, i.e., as a claim that can also be exercised before a court*, recognised to anyone who has relations for any reason with European institutions and administrations (not only to European citizens).

In this sense, alongside political rights, there are *two new rights* (the right to good administration and the right of access under Article 42), which constitute an important change of perspective in the relationship between individuals and public administrations, declined in a more distinctly democratic sense. It follows that the recognition of the right to good administration in Europe places the citizen (and not only it) at the centre of the administrative system, whether European or national.

Contents of Article 41 were subsequently taken up, explained and integrated by the European Code of Good Administrative Behaviour, as well as by the Public Service Principles defined in 2012 by the European Ombudsman.

The codification of an administrative right between fundamental rights of the human person, with a minimum level of guarantees which will be extended by way of interpretation (fundamental, in this sense, the role played by the Court of Justice), that is additional to the classic content of the political citizenship and contributes to the creation of a European administrative citizenship, is an important innovation in the Community legal landscape. The introduction of a Charter of Rights which brings together in a single document several civil, political, economic, social and administrative rights represents, especially after Lisbon, a significant step: it is the first time that the Treaties recognise and guarantee a *list of fundamental rights* compared to the public authorities activity, strengthening the legal position of individuals and their participation in decision-making processes.

Good administration as a fundamental right also represents a *novum* in the *international* scene, since it appears for the first time in an international list of rights: it must be noted, in fact, that it was not codified by the Universal Declaration of Human Rights nor from the two successive United Nations Conventions on civil and political rights and on economic, social and cultural rights, neither from the ECHR, nor from the American Convention on Human Rights.

Profiles covered by Article 41 (already recognised in the internal legal systems) that contribute to configure the European notion of good administration, also according to the application given by the jurisprudence of the Court of Justice (even before the entry into force of the Charter of Nice and the related codification of this right):

- the right to impartiality and fairness of administrative decisions;
- the right to reasonableness of procedural terms;
- the right to rejection notice;
- the right to be heard (specification of the more general adversarial principle) and the right of access to documents;
- the obligation to state the reasons on which the decision is based;
- the right to compensation for damage caused by European administrations in the performance of their functions.

The identification of these rights demonstrates how the concept of “good administration” must now be understood at European level in the interest and protection of citizens: these are general parameters through which it is possible to evaluate the illegitimacy of any *inertia* of the single institution and measure any further liability of public institutions towards citizens affected by such guilty behaviours and omissions, which are not always susceptible, *per se*, to judicial sanction. It must be noted that the sphere of maladministration appears to be broader than that of illegitimacy, since maladministration includes illegitimacy but does not end with it, which is why it does not always imply it (in this connection, the role of the European Ombudsman becomes decisive).

This last consideration, corroborated by the previous ones, justifies and enhances the inclusion of the “new” right to a good administration among the instruments for fighting against and prevent corruption.

Confirming this last assumption, it should be noted that the strategic value of the recognition of this right is not limited to the *juridical* aspect, but invests more concretely the *economic* and *social* aspect. In fact, if a good administration – in terms of greater transparency, simplification and efficiency of public administrations organization and activities – submits administrative bodies to widespread controls, leading them to adopt legitimate behaviours which favour the good performance and the efficient management of resources, it follows that the good administration also becomes an obstacle to *corruption* or, more generally, to *maladministration*, increasing the reliability of public institutions, reducing administrative burdens and attracting investments in the States where such good administration operates.

With a specific view to administrative transparency, the right to good administration enable private individuals to fully understand public decisions and to participate consciously in them, where the relevant right leads to the accountability of public bodies (political and administrative) (*e.g.*, the Swedish model, according to which the right of access translates into a sort of *actio popularis* that can be used as an instrument of widespread control of the public administration).

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- Reg. CE n. 1049/2001 and Courte of Justice, 18 luglio 2017, Case C-213/15P, E. Comm. *v.* Patrick Breyer, EU:C:2017:563



## Corruption and organized crime: the “Mafia” approach to bribery

### *1. The starting question*

In Transparency International Corruption Perceptions Index 2016, which measures the perception of corruption in the public sector and in politics based on expert opinion and assigning an evaluation ranging from 0 for countries deemed to be very corrupt to 100 for the most virtuous, some European countries occupy rather critical positions: Italy (EU) 60th place and 47 score, Serbia (not EU) 72nd place and 42 score, Albania (not EU) 83rd place and 39 score.

Although this classification is questioned, at least for Italy, by different measurement criteria (for example, the *2014 Anti-Corruption Report* of the EU which highlights the direct involvement of respondents in cases of corruption, and which strongly reduces the Italian criticality), the situation appears serious.

Parallel to this situation, other sources (Gayraud 2005, Caneppele and Calderoni 2014, Eurojust 2017, Socta 2017, Unodc 2017) indicate in the Italian (‘Ndrangheta, Camorra and Cosa Nostra), Serbian and Albanian criminal organizations the most dangerous international mafias in the same manner as the Russian mafia, Chinese triads, Japanese yakuza and various criminal gangs of central and south America.

The questions we try to answer are therefore the following: a) is there a correlation between the two phenomena (corruption and presence of criminal organizations)? b) if so, has this correlation always existed or has it developed above all in these last decades? c) in the event that there has been a recent intensification, what is the reason for this evolution? d) do the national and European authorities know how to deal with the interdependence of the two phenomena?

## 2. *The historical mafia*

In the Italian case (initially with the Sicilian Cosa Nostra), the mafia can be better understood on the basis of three elements: a) the fundamental characteristic that connotes it; b) the institutional context in which it develops; c) the type of business to which it is dedicated.

First point: what is the mafia. From the beginning of its history, the mafia, with its men, shows itself as a criminal organization with coercive power that “provides” protection against the dangers of social life, requesting payment. If someone does not believe that such dangers exist, the mafia proves their existence with threats, attacks and recourse to direct violence.

Second point: the institutional context of origin. The historical mafia (Lupo 2011) has its roots in the feudal tradition of Sicilian society. The feudal structure was definitively affirmed in Sicily during the Norman period (1061-1194) and resisted under successive dominations until the advent of the unification of Italy. From 1860 Sicily has kept its princes and its barons, owners of the latifundia. They are accustomed to having their own militias or “campieri” to defend their properties from the criminals who tried to rob them of crops and animals. Then the nobles realize that it is preferable to recruit the militia and the “campieri” from among the same criminals; in doing so accepting to pay a service of protection or mediation with the bandits. In Sicily there has been neither a revolution nor a regime of enlightened absolutism. The Sicilians lived the advent of the Kingdom of Italy as a colonization by the “Piemontesi”. So the situation does not change when a large part of the land passed from the barons to the “bourgeois” through mafia-type operations. The more aggressive peasants were promoted to “campieri” (men of arms of the fief under the baron) and from “campieri” to “gabellotti” (land tenants), who progressively intimidated the same barons, making them loans with exorbitant interests therefore robbing them of income.

The mafia power is strengthened by the exercise of violence in a society in which institutions are still weak and where is no distinction between public and private. The mafia takes advantage of its function and its capacity for social intermediation to establish itself over time as a progressively autonomous organization. And if periodically the State tries to fight it, not being able to tolerate other autonomous forms of violence in its borders, the mafia defends itself practicing alternately secrecy and camouflage, when it is under attack, and blackmail or alliance with the groups of economic and political power, when public institutions appear weak and their representatives divided.

The correlation between the growth of criminal organizations and the problematic processes of the State-building between the nineteenth and twentieth centuries is not found only in the Italian case, but it is also found in countries in which they developed the major European mafias (Russian, Serbian and Albanian).

Third point: business of the first mafia. At beginning the mafia obtains its resources through threats to and extortion from landowners, entrepreneurs and traders. In addition, between 1947 and 1960, Cosa Nostra began to speculate on urban land, with the so-called “Sacco di Palermo”, thanks to the collusion with the then mayor of Palermo Vito Ciancimino.

Since 1960 the Sicilian mafia has become more and more like a company (Arlacchi 1988), also giving rise to two mafia wars for internal conflicts (beginning of the 60s and 80s), but in Italy other criminal organizations were also growing destined to become over time even more important, such as the Calabrian ‘Ndrangheta.

### *3. Current mafias*

Over time the mafia has continuously maintained a hierarchical structure and a militancy characterized by entrance filters and initiation rites. The reason why recently the ‘Ndrangheta has become more powerful than Cosa Nostra is due, among other things, to the fact that its basic units, the ‘ndrine, are based on blood ties and, therefore, remain more impermeable to the phenomenon of “pentitism”.

The main difference between the historical mafias and the contemporary mafias is the change in the type of illicit business. While continuing to make money with traditional crimes (racket, usury), some current mafias (especially Italian and Albanian in Europe) have devoted themselves above all to drug trafficking and other illegal trafficking (weapons, smuggled products, human beings).

Only to take the Italian case, Confesercenti’s SoS Impresa Report, showed that in 2009, faced with total revenues of mafias of about 135 billion euro, more than half of them depended on illicit trafficking and particularly (about 60 billion) of traffic of drugs. Similar information on a European scale can be obtained from the 2017 Europol Report (Socta 2017).

This business change produces very high profits and pushes criminal organizations towards new strategies. After the serious financial crisis of 2008 and the limitations of access to ordinary credit for economic operators (credit crunch), the financial mass accumulated by the mafia has become a

very powerful resource, on the one hand, to condition the choices of politicians and entrepreneurs and, on the other, to do “clean” business in a direct way. In relation to this, the mafias have progressively pursued: a) recycling of funds obtained illegally; b) penetration into geographical areas other than those of origin (northern Italy, central and northern European countries), both for drug dealing and for the use of capital to be recycled; c) systematic corruption actions towards politicians and public bureaucracies, holders of regulatory powers in urban planning and commercial matters, as well as public works commissioners.

In order to move from “dirty business” to “clean business”, the mafias operate substantially a fourfold contamination of: a) representatives of the institutions often attracted by the possibility of reaching or retaining power thanks to specific funding and “vote trading” packages ; b) entrepreneurs weakened economically by economic moments of crisis; c) professionals (accountants, lawyers, etc.) that constitute the so-called “gray area” more or less colluded with the mafia (La Camera 2012); d) ordinary citizens who find it hard to enter the legal labor market and looking for an opportunity for gain in the circuits controlled by criminality as in drug trafficking.

Europol and Transcrime (Catholic University of Milan) Reports reveal the penetration of the mafias in at least 24 countries of the EU, starting from Spain, the Netherlands, Romania, France, Germany. Lastly, in Italy there are numerous municipal administrations dissolved by mafia infiltration, with measures that have progressively expanded from Southern Municipalities to Northern Municipalities<sup>1</sup>.

#### *4. How to face the problem: conditions and paradoxes*

Actions to combat the spread of corruptive criminal phenomena should be at a double level: a) developing a civic culture of legality; b) introducing common criminal laws against organized crime, at least in all EU countries, and effective coordination of police forces and national courts.

First Level: the Corruption Perceptions Index shows that the countries perceived to be at the highest risk of corruption are those who have gone through the most controversial processes of the State-building (among them, as we have seen, Italy, Serbia and Albania). On the contrary, the CPI shows that the most virtuous countries (among the first, Denmark and Sweden) are

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1. [http://www.wikimafia.it/wiki/index.php?title=Consigli\\_Comunali\\_sciolti\\_per\\_infiltrazione\\_mafiosa](http://www.wikimafia.it/wiki/index.php?title=Consigli_Comunali_sciolti_per_infiltrazione_mafiosa).

those with the most solid tradition of democracy. It is clear that in order to develop a high civic culture of legality in countries where it is weak it takes a long time for a strong educational commitment to evolve in schools and public investment in employment policies, and also assurance of fair conditions in treatment of citizens.

Second level: European countries can take advantage of the experience of those countries that, like Italy, have had to cope with for more than a century the issue of the fight against the mafia.

Especially in the last forty years, Italy has introduced many more stringent regulatory provisions, such as those relating to the extension of the crime of mafia association with the article 416-bis (1982), the confiscation of the assets of organized crime even in the absence a definitive sentence (1982 and 1996), the protection and sanctions of the repentants (1991 and 2001), the dissolution of local administrations for mafia infiltration (1991), the telephone wiretapping regime.

In particular, the third paragraph of the art. 416-bis of the Italian Penal Code states that “the association is of the mafia type when those who are part of it make use of the intimidation force of the associative bond and the condition of subjection and of silence that derives from it to commit crimes, to acquire directly or indirectly the management or in any case the control of economic activities, concessions, authorizations, public tenders and services or to realize profits or advantages unfair for oneself or for others, or in order to prevent or hinder the free exercise of the vote or to obtain votes in self or others during election consultations”. This article correlates organized crime with corruption more explicitly and comprehensively than the EU did in the Council Framework Decision of 24 October 2008 (2008/841 / JHA).

The paradox of criminal laws on the subject of anti-mafia is that the countries with the most solid civic culture – but also subject to the increasing penetration of criminal organizations for drug dealing and recycling activities – ensure the greatest guarantees in criminal matters and are less willing to approve European common laws. Thus, Denmark and Sweden do not provide for the offence of organized crime, which is regulated in a mild way by Germany and the Netherlands. The United Kingdom and Denmark have not signed the European Directive on the blocking and confiscation of capital goods and proceeds from crime (2014/42 / EU).

The reason for these choices resides in the liberal tradition of these countries, but that tradition (in many respects enviable) allows criminal organizations such as the ‘Ndrangheta and the Russian, Serbian and Albanian mafias, to make fools of the police and the judiciary of individual States and to continue doing their dirty business and “pollute” the life of public institutions.

This is why Europol (the EU agency for the fight against serious international crime and terrorism) and Eurojust (the unit of judicial cooperation of the EU) have persistently been asking for the harmonization of anti-mafia laws, at least where in EU countries are concerned, and greater coordination of national police and prosecutors.

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PAOLO MANCINI

*Mass media and corruption*

During the Anticorruption winter school we discussed findings from the research project ANTCORRP funded within the 7<sup>th</sup> EU Framework Program. In particular we focused on workpackage 6 devoted to “media and corruption”. The study of the corruption coverage has been conducted on the print press of seven countries: France, Hungary, Italy, Latvia, Great Britain, Romania, Slovakia). Four newspapers were selected in an attempt to obtain a good sample of print news media in each country including tabloid, quality and business papers of different political affiliation (centre-left and centre-right oriented papers).

The analysis of the British coverage of corruption has been conducted on the quality newspaper *The Guardian*, the paper owned by Rupert Murdoch, *The Times*, the tabloid newspaper *The Sun* and the London edition of the leading international business paper *The Financial Times*. For France, the analysis has been conducted on the slightly centre-left, quality newspaper *Le Monde*, the centre-right daily *Le Figaro*, the regional paper with the widest French circulation, *Ouest France*, and the business newspaper *Les Echos*. The Italian newspapers have been the quality, centre-left *La Repubblica*, the centre-right paper owned by the Berlusconi family, *Il Giornale*, the quality, most widely distributed Italian newspaper *Il Corriere della Sera* (with no clear political affiliation) and the business paper *Il Sole 24 Ore*. As for Slovakia, the quality, centre-right newspaper *Sme* has been analysed together with the tabloid *Novy Cas*, the quality centre-left/liberal newspaper *Pravda* and the business paper *Hospodarske noviny*. In Hungary, the online versions of the following newspapers have been analysed: the quality, centre-right/conservative newspaper *Magyar Nemzet Online* (MNO), the quality, centre-left/liberal *Nepszava online*, the centre-left/liberal business paper *Heti Világgazdaság* (HVG) and the online tabloid portal *Origo*. As for Latvia, the quality paper *Diena* has been analysed together with the quality,

centre-right/conservative *Latvijas Avīze*, the quality, centre-right/conservative *Neatkarīgā Rīta Avīze Latvijai (NRA)* and the business paper *Dienas Bizness*. Finally, as for Romania, we have investigated the business paper *Ziarul Financiar*, the quality, centre-left/liberal *Jurnalul National*, the quality, centre-right/conservative *Romania Libera* and the tabloid *Libertatea*.

In the following lines the most important findings are stressed:

As to the print press coverage of corruption a large number of articles (183.491 published between 2014 and 2013 articles) have been analysed through a computer assisted content analysis (CACA) and 12.742 articles have been further investigated by human coders (HACA).

Over the years the number of published articles has slightly increased but with relevant differences year by year mostly depending on specific events taking place in each country. Italy is the country with the highest number of articles dealing with corruption and related topics followed by United Kingdom but, such as we will see in the next lines, this is a very different coverage.

As to the print press coverage of corruption a major difference emerged between what may be called established democracies (France and United Kingdom) and new/transitional democracies (Hungary, Italy<sup>2</sup>, Latvia, Romania, Slovakia). In the former group of countries corruption is mostly represented as related to foreign countries and international exchanges involving big corporations and sport actors too. In the latter group of countries corruption is mainly a problem of national politics and public administration involving figures of national politicians and businessmen (Figures 1 and 2). This finding may be related to the level of corruption in the country, to the circulation of newspapers (national vs international circulation) and to the role that journalism plays in the different countries. Indeed in new/transitional democracies journalism is often interpreted in an instrumental way to be part of political struggle and economic competition and the coverage of corruption responds to this specific function. Political actors and businessmen are central to this type of conflict and competition.

The two representations of corruption imply different roles of client and agent: the former one is the main actor in most of the articles in established democracies while the latter is at the center of all stories of corruption in new/transitional democracies.

In both groups of countries petty corruption appears very rarely in the print press as it is mainly addressed to an “educated” readership that is

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2. Obviously Italy is not a new democracy but because of the dramatic political changes that started in 1992/3 is still undergoing important transitions.

mostly interested in affairs of grand corruption, in political and business exchanges.

In spite of the possible aggregations of countries the coverage of corruption is strictly depending on the very national and contingent situations therefore offering representations that appear very “locally contextualized” both in terms of time evolution and covered cases.

The case studies (second part of the entire WP6 project) that have been conducted in Hungary, Italy, Latvia, Romania and Slovakia have strongly confirmed the findings deriving from content analysis. As to this second part of WP6 several cases of corruption involving journalists both as part of a corruption network and investigators have been analysed through different methods: data collection, interviews, analysis of the coverage, etc.

From the case studies that have been conducted (three/four in each country) it emerged that corruption coverage is very complex, ambiguous and multifaceted. In most cases different and contrasting interests mix together so that it is not easy to distinguish good and bad journalism.

One of the biggest problem is related to leaks: indeed most of corruption coverage starts with some leak and it is very difficult to catch who is leaking and for which reason. Very often this ambiguity goes all through the coverage of the corruption case representing a continuous source of uncertainty increased in many cases by the involvement of secret services as sources of the leak.

The study has shown the difficulties of investigative journalism in opposing corruption. Investigative journalism requires large amount of time and large economic resources and many news outlets do not have these resources. Moreover the study has shown that publishers and editors not rarely are reluctant to cover possible corruption cases for fear of retaliation and possible legal indictments.

The Internet, and particularly social media, can be an important resource against corruption but in this case too ambiguity is always a possible risk: in many countries there are portals of very ambiguous nature that circulates leaks that appear not aimed at revealing illegal behaviors rather they are instruments of political conflict and economic competition.

PREVENTING CORRUPTION THROUGH ADMINISTRATIVE MEASURES

Figure 1 Main event arena by country (%)

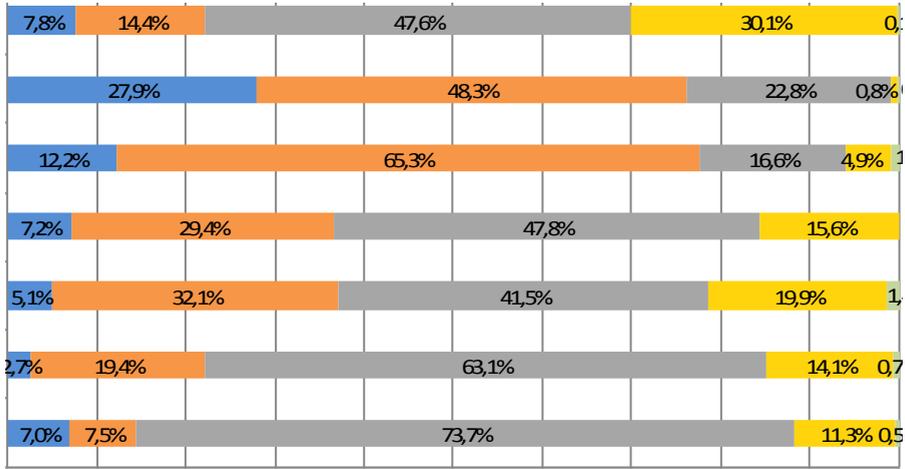
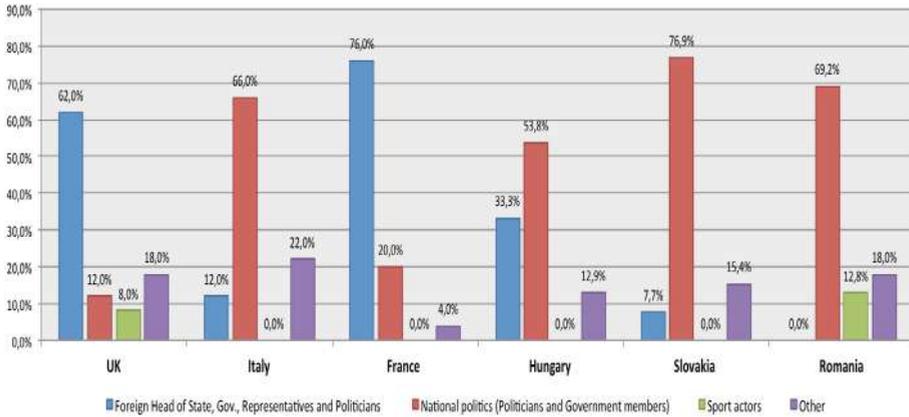


Figure 2 Most frequent actors



# PART V

Preventing the risk of corruption



## The “risk” approach and the standards to fight corruption in public organizations

### *Introduction*

In 2009, shortly before the enactment of Italian Law No. 190/2012, the “Group of States Against Corruption – GRECO” wrote to Italy that

[...] there was a widely shared perception [...] that corruption in Italy is a pervasive and systemic phenomenon which affects society as a whole. [...] The information gathered by this research suggests that corruption is not confined to a single area of activity or territory; in Italy, numerous sectors are affected by the problem. Italy has seen a significant number of corruption cases concerning prominent political figures, high officials and business leaders.<sup>1</sup>

When starting from such considerations, successfully responding to a problem of this magnitude was not (and is not) a simple matter. In this regard, Law No. 190/2012 is rather complex and detailed. It not only identifies and defines tools at various levels, but it provides for actions to discipline a number of areas (transparency, conflicts of interest, and the conduct of public-sector employees) so as to intervene at a “system” level with respect to a complex, multi-faceted problem, which has many causes and, in turn, is the cause of severe inefficiencies.

The law outlines a corruption-prevention system which is made up of two levels: a national level and a decentralized level, with different tools, actors, and responsibilities.

On the one hand, the National Anti-Corruption Plan (*Piano Nazionale Anticorruzione*, hereinafter, PNA) is the “national” initiative, with the purpose of guaranteeing the overall consistency of the corruption-prevention system through the definition of guidelines and operational mechanisms. On the other hand, the Three-Year Corruption-Prevention Plans (*Piano*

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1. GRECO (2009), Joint First and Second Evaluation Round. Evaluation Report on Italy.

*Triennale per la Prevenzione della Corruzione*, hereinafter, PTPC) represent the “decentralized” approach, with the aim of ensuring the autonomy of the individual administrations and the effectiveness of customized solutions.

The cornerstone of the law for the public administrations is the adoption of an instrument known as the Three-Year Corruption-Prevention Plan (PTPC). In this regard, Law No. 190/2012 (Article 1, Paragraph 5) states that public administrations define a corruption-prevention plan that provides an assessment of the different level of offices’ exposure to the risk of corruption, and indicates the organizational measures aimed at preventing the same risk. In addition, according to the anti-corruption law, the PTPC (Article 1, Paragraph 9), among the other things, must:

- identify the activities that incorporate a higher risk of corruption, and the related enforcement measures;
- provide, for those activities, training, implementation of measures, and control of decisions suitable to prevent the risk of corruption;
- identify specific transparency obligations.

This instrument must be based on a precise analysis, aimed at defining the level of exposure to risk for the administrations that adopt it. The analysis contains a key to the interpretation of the regulatory framework, as suggested by several leading international institutions. For example, according to the OECD:

One increasingly popular way to determine integrity is by focusing on the risks to integrity. In a process of risk analysis, one would map sensitive processes (e.g. procurement, promotion of staff members, inspection, etc.) and sensitive functions (typically staff-members with a responsible role in the sensitive processes or in decision-making in general) and identify the points where there is a significant vulnerability for integrity violations (e.g. selection of method for tendering or modification of rewarded contract).

This analysis would then be the basis for recommendations to the organization on how to increase the organization’s resilience towards these vulnerabilities, and in particular, its resistance to corruption. Given that the analysis focuses on risks that are embedded in the structure of the organization (processes and functions), the solutions are also typically of a structural nature, e.g. function rotation, conflict-of-interest regulations, regulations about the acceptance of gifts and gratuities, etc.<sup>2</sup>

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2. OECD (2009), *Towards a Sound Integrity Framework: Instruments, Processes, Structures, and Conditions for Implementation* [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=GOV/PGC/GF\(2009\)1](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=GOV/PGC/GF(2009)1) .

In addition, according to GRECO:

The first prerequisite for satisfactory prevention is an objective assessment of risks. GRECO has often noted that systematic analysis of risk factors (e.g. conflicts of interest, securing of improper advantages, the absence of rules on reporting of offences committed within the administration, etc.) and of the sectors exposed to corruption (e.g. public procurement, health care provision, issuance of permits and licences) is lacking. It has accordingly recommended in certain cases that a better knowledge of the vulnerable sectors and the relevant practices be achieved, for better prevention and detection of practices such as bribery, influence peddling, and favouritism, etc. GRECO has often noted the lack of adequate information or statistical data concerning criminal convictions or disciplinary measures imposed on public officials for corruption offences or breaches of rules of professional conduct relating to such offences (e.g. failure to report accessory activities which are liable to cause a conflict of interests). In certain circumstances, statistical data can be helpful in conducting an analysis of trends.”<sup>3</sup>

Therefore, the attention toward managing the risk of corruption becomes a priority for the public administrations. This priority has been sanctioned by the text of Law No. 190/2012, which introduces risk-management logic applied to fight against corruption. In this regard, the implementation of a risk-management process is instrumental to the identification and assessment of the risks to which an organization is exposed, and to the definition of a response strategy aimed at containing the adverse effects that potentially can be manifested.

### *1. Actors and responsibilities*

With reference to the actors at the central level of the anti-corruption system, the most significant is the National Anti-Corruption Authority (hereinafter, “ANAC”), whose tasks and responsibilities have been revised over time.

ANAC was created to take the place of the former Commission for the Assessment, Transparency, and Integrity of the Public Administrations (“CIVIT”). Among the tasks attributed to it by laws and regulations, ANAC is charged with:

- Working closely with its foreign counterparts and regional and international organizations having similar responsibilities;

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3. GRECO (2012), Lessons learnt from the three Evaluation Rounds (2000-2010) Thematic Articles <https://rm.coe.int/16806cbfc6>.

- Adopting the National Anti-Corruption Plan pursuant to Article 1, Paragraph 2-bis (Law No. 190/2012)
- Analysing the causes and the factors of corruption and identifying prevention and law-enforcement measures;
- Overseeing and controlling the application and effectiveness of the measures adopted by the public administrations;
- Presenting, on or before 31 December of each year, a report to Parliament on the activity carried out in fighting corruption;
- Defining criteria, guidelines, and standard forms for individual sectors or types of administration in relation to the code of conduct.

Moreover, the National Anti-Corruption Authority exercises inspection powers (Article 1, Paragraph 3) by requesting information, data, acts, and documents from the public administrations.

Within the original regulatory configuration, ANAC shared tasks and responsibilities with the Department of Public Function, which, in turn, was charged with coordinating the prevention and law-enforcement strategies at a national and international level by:

- Promoting and defining laws and regulations and standard methodologies for the prevention of corruption;
- Preparing the National Anti-Corruption Plan;
- Defining the criteria for ensuring the rotation of senior managers in sectors particularly exposed to corruption, and measures for avoiding the overlap of functions and the accumulation of mandates registered in the name of top public-sector managers, including external mandates.

However, with Article 19, Decree-Law No. 90, 24 June 2014, converted with amendments by Law No. 114, 11 August 2014, “the functions of the Department of Public Function of the Office of the President of the Council of Ministers regarding transparency and the prevention of corruption as referenced in Article 1, Paragraphs 4, 5 and 8, of Law No. 190, 6 November 2012, and the functions referenced in Article 48 of Legislative Decree No. 33, 14 March 2013, are transferred to the National Anti-Corruption Authority”.

The Prefects represent another essential actor, especially for the local public administrations. The Prefects are charged with supplying the necessary support (technical and informational) to the local public administrations (upon request) to ensure that the PTPCs are prepared and adopted in respect of the criteria provided by the PNA.

Nationally, another key actor defined at a regulatory level is the National Administration School, which is charged with:

- Preparing training courses regarding ethics and integrity, for the employees of the public administrations;
- Training the employees of the public administration who are working in “higher risk” sectors, as defined by the related PTPCs.

At a decentralized level, there are instead various actors involved in each individual organization.

First, there is the policy-planning body, which, based on Article 1, Paragraph 7 of the Law No. 190/2012, identifies a Corruption-Prevention and Transparency Manager (who is normally one of the tenured senior managers in the organization), ordering the organizational changes necessary, if any, to ensure suitable powers and functions for the execution of the Corruption-Prevention and Transparency Manager’s mandate with complete autonomy and effectiveness. Pursuant to Paragraph 8 of the aforementioned law, the policy-planning body is charged with defining the strategic objectives for transparency and the prevention of corruption, which represent the essential content of both the strategic-operational planning documents and the Three-Year Corruption-Prevention Plan.

On or before 31 January of each year, the policy-planning body is also required to adopt the Three-Year Corruption-Prevention Plan upon the proposal of the Corruption-Prevention and Transparency Manager.

As specified in the 2015 PNA Update

One reason for the mediocre quality of the PTPCs and the insufficient identification of the prevention measures is undoubtedly the limited involvement of the members of the policy-planning bodies in a broad sense.

The 2015 PNA Update has, therefore, urged greater sharing of the corruption-prevention strategy in all phases of the process, through, for example, a two-step system during the adoption phase: the approval of a draft of the PTPC, and later, the approval of the final PTPC. In addition, in the case of territorial entities having two policy-planning bodies (a general council and an executive council), ANAC recommends the general council’s approval of a basic document regarding the content of the PTPC and the executive council’s responsibility for the adoption of the final document. In this manner, the executive body (and its head, the mayor/chairman) would have more opportunities for examining and sharing the content of the PTPC.

As already pointed out previously, the key actor within the corruption-prevention system at a decentralized level is the Corruption-Prevention

and Transparency Manager who is responsible for the general coordination of the entire strategy at a decentralized level, and therefore, the PTPC proposal to the policy-planning body. In addition, the manager is responsible for reporting to the policy-planning body and the independent evaluation body with respect to the anomalies inherent to the implementation of the transparency and corruption-prevention measures, and he reports, to the office responsible for exercising disciplinary action, the names of any employees who have not properly implemented the transparency and corruption-prevention measures.

The law establishes that any discriminatory measures, direct or indirect, with respect to the Corruption-Prevention and Transparency Manager for reasons related, directly or indirectly, to the execution of his functions, must be reported to the National Anti-Corruption Authority.

The 2015 and 2016 PNAs include a comprehensive explanation of the tasks and the functions of the Corruption-Prevention and Transparency Manager, defining the criteria for the appointment, pointing out the need for a manager who is independent of the policy-planning body, defining the control and communications powers, providing knowledge and operational support to the manager, and using a network of contacts.

Alongside the senior managers, the other actors charged with participating in the implementation of the risk-management process include the independent evaluation body whose functions on the subjects of transparency and corruption prevention were initially assigned by Legislative Decree No. 33/2013. Amendments to Legislative Decree No. 97/2016 reinforced such functions. Among other things, the independent evaluation bodies verify the PTPC's consistency with the objectives established within the strategic-operational planning documents and that the anti-corruption and transparency objectives are considered in performance measurement and evaluation.

As part of its oversight and control powers, ANAC reserves the right to request information from the independent evaluation body and/or the Corruption-Prevention and Transparency Manager in relation to the status of implementation of the transparency and corruption prevention measures (Article 1, Paragraph 8-bis, Law No. 190/2012), and may elect to involve the independent evaluation body in procuring additional information about the control over the precise fulfilment of the transparency obligations.

Turning to responsibilities, they are also distributed at various levels, as summarized hereunder.

First of all, Article 19, Paragraph 5 of Decree Law No. 90, 24 June 2014 (converted with amendments by Law No. 114, 11 August 2014, n. 114) establishes that

in addition to the tasks set forth in Paragraph 2, the National Anti-Corruption Authority... except when the event constitutes a crime, applies, in respect of the regulations provided by Law No. 689, 24 November 1981, an administrative penalty no less than the minimum of EUR 1,000 and no greater than the maximum EUR 10,000, in the event in which the person under obligation omits the adoption of the three-year corruption-prevention plans, the three-year transparency programmes, or the codes of conduct.

In addition, based on Article 1, Paragraph 13, the disciplinary penalty for the account of the Corruption-Prevention and Transparency Manager maybe no less than the suspension from service, with the docking of pay from a minimum period of one month to a maximum period of six months.

Furthermore, in accordance with Article 1, Paragraph 14, in the event of repeated violations of the prevention measures provided by the plan, the Corruption-Prevention Manager shall be liable pursuant to Article 21 of the Legislative Decree No. 165, 30 March 2001, and subsequent modifications, as well as, for the omitted control, at a disciplinary level. Finally, should the employees of the administration violate the prevention measures provided by the plan, such violation shall constitute a disciplinary offence.

## *2. Three-Year Corruption-Prevention Plan and Risk Management*

As already pointed out in the introduction, the regulations establish that the corruption-prevention plan must provide an assessment of the differing level of offices' exposure to the risk of corruption, and indicate the organizational measures aimed at preventing such risk (Article 1, Paragraph 5).

In this regard, the PTPC is the streamlining of information acquired through the implementation of the so-called "risk-management process"<sup>4</sup> through which the individual organizations are required to identify the risks that might be manifested in the implementation of their activities, and to identify the related corrective measures.

For the implementation of the risk-management process, the 2013 National Anti-Corruption Plan recommends principles, technical procedures, and tools defined within the international ISO 31000:2009 regulations, developed by the ISO/TMB "Risk Management" technical committee.

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4. According to the UNI ISO 31000 standard, the risk-management process is defined as that group of activities coordinated for guiding an organization and keeping the organization under control with respect to risk. As early as 2013, the National Anti-Corruption Plan suggested the use of this standard in implementing all activities to be realized for the purpose of preventing corruption within the public administrations.

According to such regulations, the risk-management process consists of the following phases:

- Establishing the context analysis,
- Risk assessment
  - risk identification,
  - risk analysis,
  - risk evaluation,
- Risk treatment,

which are rounded out by the transversal processes of communications and monitoring.

Starting from such indications, the PNA has customized the application of the ISO 31000 standard to make it more pertinent to the management of the risk of corruption within Italy’s public administrations.

In this regard, the diagram of reference for the risk-management process becomes that represented by the following chart:

Figure 1:



Source: National Anticorruption Plan Update, 2015

In essence, the process consists of the following phases:

- Context analysis (internal and external)
- Risk assessment (risk identification, risk analysis and risk evaluation);
- Risk treatment (identification and executive planning of the measures).

The first phase of implementing the risk-management process is the context analysis. The context analysis, in turn, can be subdivided into the internal- and external-context analyses.

According to the 2015 Update to the National Anti-Corruption Plan, the external context analysis is to be defined as

the first and essential phase of the risk-management process [...] through which one obtains the information necessary for understanding how the risk of corruption can be manifested within an administration or an entity as a result of the specific elements of the environment in which the administration or entity operates, in terms of territorial facilities and social, economic, and cultural dynamics, or as a result of internal organizational aspects.

In line with the principle of the ISO 31000:2009 regulations, according to which the management of risk must be “customized”, the objective made explicit by the 2015 PNA Update is that of “*promoting the preparation of customized PTPCs and, therefore, plans that are potentially more effective at the level of any specific administration.*”

In other words, the construction of a customized corruption-prevention strategy can only start from the understanding of the context of reference, through which it is possible to evidence how the specific aspects of the environment in which the administration or the entity operates can enable the manifestation of corruptive phenomena.

The external context analysis must, therefore, originate from the definition of the variables necessary for understanding all of those factors that have a specific impact on the administration’s territory of reference, starting from cultural, political, legal, regulatory, and social variables, as well as variables regarding financial and business crimes.

In addition, it is necessary to analyse those factors and/or tendencies that might have an impact on the organization’s objectives, external stakeholder perceptions, as well as the relationships with external stakeholders and possible existing influences resulting in relation thereto.

The final objective is to evaluate the extent of the phenomenon and to facilitate the analysis and assessment of risk and the monitoring of the corruption-prevention system’s effectiveness.

To produce useful information, the data to be analysed will need to be different depending on the sector to which the organization belongs. For example, for local public administration, geographic location, territorial characteristics and/or local business activity (tourism, farming, or industrial) could have a determining impact; other variables can be similarly significant, including, for example, the types of “typical” crimes in the territory of reference, the perception of corruption on the part of local citizens, and the public’s confidence in local government institutions. Instead, for the organizations of the National Health Service, other types of data can be relevant, including, for example, the varying level of healthcare expenditure, the state of health of the local citizens, etc.

The search for data does not, however, complete the analysis. Indeed, since the final objective is to understand “*how the risk of corruption can be manifested within an administration or an organization as a result of the specific elements of the environment in which the administration or organization operates*”, it is necessary to consider such data within their context, to select those data useful for the identification and analysis of the risks of corruption, and to understand and to clarify their dynamics.

Therefore, the PTPC needs to provide comprehensible, summary evidence to the context analyses effected, making their methods and contents explicit to the extent possible, including through the use of tables summarizing the key data analysed and the factors considered, and the connection with the prevention measures adopted.

According to procedures defined by the ISO 31000:2009 standard,

establishing the internal context involves understanding capabilities of the organization in terms of: resources and knowledge; information flows and decision-making processes; internal stakeholders; objectives and the strategies that are in place to achieve them; perceptions, values and culture; policies and processes; standards and reference models adopted by the organization; and structures (e.g. governance, roles and accountabilities).

In other words, with reference to the internal context, it is also possible to distinguish between two types of data.

On the one hand, it is necessary to analyse the aspects related to the organization and operational management that influence the structure’s sensitivity to the risk of corruption. In this regard, it may be useful to point out, on the one hand, the system of responsibilities and on the other hand, the level of the administration’s complexity. It is accordingly necessary to consider data related to the policy-planning bodies, organizational structure, roles and policy responsibilities, objectives, and strategies; resources, knowledge, systems, and technologies; the quality and quantity of the personnel; organizational culture, with particular reference to the ethics culture; information flows and information systems; decision-making processes (both formal and informal); and internal and external relationships. Instead, for the system of organizational responsibilities, it is useful to include a summary report of the organizational structure as part of the PTPC. The administration’s organizational units need to be identified by illustrating the key activities carried out with the related responsibilities and skills. With reference to organizational complexity, it appears useful to analyse the activities carried out within the administration, operating procedures, and the responsibilities in relation thereto. With ref-

erence to the size of the organization, a significant indicator is the size of the workforce and its allocation by macro activities.

On the other hand, the other significant aspect is that related to the overall activity carried out within the organization, which can be evidenced through so-called “process mapping”.

More specifically, process mapping consists of the identification, description, and representation of the organizational processes as to their inter-relationships with other processes and their internal components, through the use of defined techniques and methods. In other words, through process mapping, it is possible to subdivide a complex organization into a set of basic activities, and therefore, to: reconstruct the links between the activities for the purpose of obtaining a summary representation of operations; identify the different activities which make up the processes; show the interdependencies between the various activities (even if carried out by distinct business units), clarify how the resources (human, instrumental, and financial) are to be employed within the organization, and areas of responsibility in the execution of activities; identify the critical control points; and understand if the process is being executed efficiently and effectively in the current state (“as is”) for the purpose of evaluating possible simplifications and modifications thereto (“to be”). Accordingly, process mapping represents a useful instrument through which the organization can address a number of objectives, including: the improvement of management planning and control activity; the restructuring of organizational procedures and roles within the organization; and the redistribution of the workload.

Therefore, in the case referenced herein, process mapping represents the instrument through which it is possible to examine the organization in detail for the purpose of understanding the means for carrying out the processes and activities, along with related responsibilities, with the objective of identifying, for the effect of the means with which the process is carried out, the vulnerabilities of the process in terms of the risk of corruption to which the process is potentially exposed. This analysis can only be effective if the process mapping is done with an adequate level of detail: in fact, as defined by the 2015 PNA, the level of detail of the analysis depends upon “*the comprehensiveness with which it is possible to identify the most vulnerable points of the process and, therefore, the risks of corruption that affect the administration or the organization.*” The PNA establishes that “*the mapping consists of the identification of the process, its phases, and the responsibilities for each phase,*” and it defines process mapping as “*a ‘rational’ way of identifying and representing all of the organization’s activities,*” and, in this particular case, “*it has an influential nature for the purposes of the identification, assessment, and treatment of the risks of corruption.*”

Process mapping implies a series of actions aimed at:

- Identifying the organization's processes;
- Describing such processes;
- Representing the processes.

More specifically, the identification of the processes represents the point of departure for process mapping. In this phase, it is thus necessary to employ a number of techniques and procedures (including documentary analysis, interviews, etc.) to gather the information needed for identifying the aggregate of the processes carried out by the organization, which are then to be analysed and studied. After having identified the processes, it is then necessary to understand the means for their execution through the identification of a number of variables (including, among others, inputs, outputs, process activity, interrelationships, as well as the responsibilities related to their execution). The output of this phase is a detailed description of the process, which aids in better understanding both its dynamics and its critical elements with respect to the "state of the art." Depending on the objectives for which the process mapping is done, the processes may be redesigned for improving their efficiency and/or reducing their critical elements. The final step is that of representing the process (through, for example, the use of flowcharts) for the purpose of graphically tracking the flow of process activities, interrelationships, and the responsibilities related to execution.

One of the main applications-related problem regarding the planning and execution of process mapping has regarded the identification of the subject matter of the analysis, with specific reference to the process/proceedings contradistinction. Although it is appropriate to clarify that the subject matter of process mapping (understood as "*an aggregate of interrelated activities that create value by transforming resources (process inputs) into a product (process output) to be used by a person inside or outside of the administration (user)*") (PNA)), the 2015 PNA does not necessarily make a contradistinction between the two concepts. Indeed, for the purpose of planning and executing process mapping, it is possible to start from the proceedings, should the administration already have defined the list of the same. According to the 2015 PNA, the final objective is that

all activity carried out is analysed, in particular, through the process mapping, for the purpose of identifying areas that, by virtue of the nature or the peculiarities of the activity itself, are potentially exposed to the risks of corruption.

The PTPC must, therefore, give clear evidence of the information related to the internal context. More specifically, with reference to the process mapping, such information can be easily summarized in tabular form, for the purpose of evidencing, in a basic manner, the list of the processes and the descriptive elements, accompanied by information related to the responsibilities connected with their implementation.

After the completion of the internal- and external-context analyses, the second phase of implementation of the risk-management process is the risk assessment.

According to the ISO 31000:2009 standard, risk assessment includes:

- *Risk identification*, that is the process of finding, recognizing and recording risks. The purpose of risk identification is to identify what might happen or what situations might exist that might affect the achievement of the objectives of the system or organization;
- *Risk analysis*, that is about developing an understanding of the risk. It provides an input to risk assessment and to decisions about whether risks need to be treated and about the most appropriate treatment strategies and methods;
- *Risk evaluation*, which involves comparing estimated levels of risk with risk criteria defined when the context was established, in order to determine the significance of the level and type of risk.

In line with such definitions, as defined in the 2015 PNA Update, “*the risk assessment is the macro-phase of the risk-management process in which the risk is identified, analysed, and compared with other risks for the purpose of identifying the action priorities and the possible corrective/ preventive measures (risk treatment).*” This entails:

- *Risk identification (or identification of risky events);*
- *Risk analysis;*
- *Risk evaluation.*

With reference to the identification of risky events, the objective is to identify all events of corruption that, even if only hypothetically, could occur in the execution of the administration’s processes, phases and/or activities, and for the effect thereof, within the means for execution of the same. The output of this phase is the preparation of a “Register of risky events.” The register is created by using a number of information sources, including: the results of the internal- and external-context analyses completed in the previous phases; the results of the process-mapping analysis; the structured

review of the opinions of the administration's managers or personnel; reporting received and any disciplinary proceedings; and so forth.

The risk analysis, instead, refers to the identification of the causes that may facilitate the occurrence of events of corruption as identified in the preceding phase, in defining which risk events are most significant and the level of the processes' exposure to risk.

The analysis of the causes is consequently of fundamental importance: considering this analysis makes it possible to study which organizational circumstances facilitate the occurrence of the identified risk events, it lays the foundation for understanding which measures are most appropriate for preventing the occurrence of such events. For example, in the 2015 PNA, ANAC suggests some possible causes, including the lack of controls, the lack of transparency, the insufficient development of a culture of lawfulness, and so forth.

To understand better the causes of the occurrence of the risk events, and more importantly, the level of the administration's exposure to risk, it is appropriate to use a set of variables that can be measured with objective or subjective (related to perceptions) data, with the involvement of all persons who have a full understanding of the administration's processes and activities under examination.

With reference to the objective data, the PNA suggests, among other things, i) analysing: the data about legal precedents and/or disciplinary proceedings against employees; the proceedings initiated with respect to administrative/accounting liability (Court of Auditors); reports received (including those obtained through special whistle-blowing procedures); and so forth; and ii) appropriately outlining the reasons for the conclusions drawn from the analysis effected.

Risk evaluation, the final phase, entails defining the risk-treatment priorities. In other words, following the analysis of the causes and the assessment of the processes' exposure to risk, the objective of the evaluation process is to "*facilitate, based on the outcomes of the risk analysis, the decision-making processes regarding which risks necessitate treatment and the related implementation priorities*" (2013 PNA).

In this phase, therefore, the administration is charged with analysing and comparing in detail i) the results of the previous phase, and ii) the organization's specific characteristics, with the aim of understanding, for the effect of such peculiarities, which risks are priorities to be addressed with corruption-prevention measures. A decision is also made as to which risks do not require other treatment measures.

The final phase of implementation of the risk-management process is risk treatment.

According to the ISO 31000:2009 standard, risk treatment refers to decisions to:

- Accept the risk;
- Reduce the probability and impact;
- Transfer the risk;
- Avoid the risk.

It involves the decision to identify appropriate risk-prevention measures.

More specifically, after having identified the risks to which the organization is exposed, and after having assigned the priorities for intervention, the administration is charged with determining the risk-treatment measures. To facilitate the analysis, the 2015 PNA Update makes the following distinction regarding the corruption-prevention measures:

- General measures (or “system” measures), which impact the overall corruption-prevention system, with action spanning across the entire administration;
- Specific measures, which affect specific problems identified through the risk analysis.

Furthermore, as defined in this same document, “*the identification and the assessment of the consistency of the measures concerning the objective of preventing risk are part of the fundamental tasks of any administration or entity.*”

More specifically, risk treatment provides, on the one hand, for the identification of prevention measures, and on the other hand, the operational planning of the same.

With reference to the identification of the measures, they need to be defined in response to criteria of effectiveness in the neutralization of the causes of the risk, based on the real sustainability (economic and organizational) of the measures, while being adapted to the organization’s specific characteristics. In addition, it is necessary to consider the existence or non-existence of measures previously adopted concerning the process.

With reference to operational planning of the measures, its fundamental importance is defined in the 2013 PNA: the PTPC must be

a programme of activity, with the indication of risk areas and specific risks, the measures to be implemented for prevention in relation to the level of danger of the specific risks, the managers responsible for the application of each measure, and the timing.

Planning of the measures represents the time when the corruption-prevention strategy becomes “operational”.

The minimum elements to be clearly described for each corruption prevention measure include:

- Timing, with the indication of the phases for implementation. The explicit definition of the phases is useful for scheduling the adoption of the measure, as well as for facilitating the monitoring by the Corruption-Prevention and Transparency Manager;
- The parties responsible, i.e., the offices involved in the implementation of the measure, with a perspective of accountability of the entire organizational structure;
- The monitoring indicators and expected values.

Should a PTPC not contain these elements, ANAC shall consider it as lacking the essential content as provided by law. In addition, the PTPC will also need to indicate clearly the connection between the analyses effected (context analysis, risk assessment) and identification of the measures.

Risk management is rounded out by monitoring, which entails the assessment of the level of risk, by continuously and regularly taking into account the prevention measures introduced. This phase is aimed at checking the effectiveness of the prevention systems adopted and the subsequent implementation of additional prevention strategies, as well as the effective implementation of the measures provided.

In other words, the system for monitoring the Three-Year Corruption-Prevention Plan necessitates the checking of two aspects:

- Plan implementation (and, therefore, implementation of the corruption-prevention measures);
- Effectiveness of the corruption-prevention measures.

In the case of more complex administrations (with respect to size of the organization, diversification of the activities carried out, or territorial presence), the 2015 Update recommends at least one interim verification during the year, for the purpose allowing for appropriate and timely corrections in the event of the detection of any critical elements, and in particular, following any shifts between the expected values and the values detected through the monitoring indicators associated with each measure. The Three-Year Corruption-Prevention Plan must report: i) the results of the monitoring effected concerning the measures provided in the previous plans, and ii)

the completion of the implementation phase contemplated concerning any measures being implemented.

Finally, should a measure not be implemented, the Three-Year Corruption-Prevention Plan must explain the reason therefor, along with revised programming for the same.

### *Conclusions*

The preparation of the Three-Year Corruption-Prevention Plan is based on a risk-management process, which is a complex system of activities that are essential for acquiring the information useful in defining a solid corruption-prevention strategy on the part of the individual public administrations.

With just over five years since the regulations were issued, the monitoring contained in the 2017 PNA Update indicates that the Three-Year Corruption-Prevention Plans are still a long way from optimal quality levels. However, there are clear, albeit slow, signs of improvement to suggest a positive framework for the proper implementation of systems for managing the risk of corruption.

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## Anticorruption programs and administrative measures within local governments: issues, models and best practices

### *Introduction*

According to the International and European institution, there is a strong link between anti-corruption strategies and the role of all levels of governments, local ones included.

In several occasions, the United Nations have stressed how corruption risks pose a threat to the universal access to basic services, sustainable cities and local development. This can significantly impede the implementation of the Sustainable Development Goals (SDGs), adopted by the UN General Assembly in 2015, especially in reaching out the most vulnerable population segments.

According to the United Nations Convention Against Corruption, ‘corruption hurts the poor disproportionately [as it feeds] inequality and injustice... and is a major obstacle to poverty alleviation and development’. For this reason, *accountable and transparent institutions at all levels* have been fixed as targets of SDG (sustainable development goal) number 16 on peaceful, just and inclusive societies. These targets are considered key enablers for reaching targets across all the SDGs, including SDG 11 on *sustainable cities*.

Looking at The EU approach to the anti-corruption strategy, we can see that the Commission’s efforts are centred around the following main pillars: mainstreaming anti-corruption provisions in EU horizontal and sectorial legislation and policy; monitoring Member States’ anti-corruption policies; supporting the implementation of anti-corruption measures at national level via funding, technical assistance and experience-sharing; improving the quantitative evidence base for anti-corruption policy.

The European Commission regularly receives reports about alleged corruption cases in Member States from citizens, it has no powers to intervene in individual cases.

It is important to underline that, the international anti-corruption conventions, so that the European commissions policies, are aimed mainly at the States and require an anti-corruption policy at a “national” level. In order to guarantee this objective, national anti-corruption authorities are required to be able to exercise – also through the adoption of a national anti-corruption plan – a strong coordinating role towards all authorities, especially those with autonomous legislative and administrative powers (Regions and local authorities). All public authorities – none excluded – are therefore actively engaged in the implementation of corruption prevention policies and are subjected to the powers of national Anti-Corruption Authorities.

In Italy, the art. 1, c. 59, Law No. 190/2012 states that the provisions of the aforementioned statute represent a “direct implementation of the principle of impartiality of art. 97 of the Constitution” and are referred to “all public authorities”; and therefore, that the National Anti-Corruption Plan (PNA) is an “act of address” for all the authorities that have to adopt their three-year plans for the prevention of corruption (PTPC) (article 1, c. 2, letter b), statute No. 190/2012).

The fact that the anticorruption policy is a “national” responsibility doesn’t imply a “top down” approach. First of all, anticorruption is an administrative choice, which begins with the drafting of the plans and their proper implementation, in order to achieve credible and efficient management and administration models

Secondly, the identification of specific preventive measures is up to each single administration, because only they are able to know their internal organization, the situation of their officials, the external context in which they operate. Uniform solutions would end up falling unnaturally into different organizational realities.

For these reasons, in Italy, the national anti-corruption Authority (ANAC) – has made – starting from 2015 – the choice to differentiate the content of the PNA (National Anti-corruption Plan), trying to overcome the logic of uniform and formalistic application of the national legislation.

The PNA it is therefore composed of a general part, valid for all public authorities, and by specific in-depth analysis for individual categories of authorities; starting from those that have shown greater problems in the application of the law and that are particularly exposed to corruption.

Among these administrations, the 2016 PNA has dedicated specific attention to the municipalities.

*1. The fight against corruption at local level: the role of the municipalities*

At local level, the design and implementation of an effective corruption prevention policy must take into account some peculiar aspects.

First of all, as a result of decentralization processes, local authorities have a very significant and heterogeneous number of administrative functions. This means more difficulty in designing an effective anticorruption program, valid for all the wide range of local competences. Functions granted to local authorities consist mainly in provision of services to the citizens, and this amplifies the opportunities for contact and possible interference between public and private interests.

Moreover, the fight against corruption at local level has to take into account the relationship with citizens. The proximity of local administration to citizens implies a greater risk of illicit influences, even by criminal organizations, both for the politicians and the civil servants.

Finally, we have to consider that citizens perceive maladministration more at local level than at national level, which must therefore be tackled with even more decision, to improve the general level of perceived corruption.

But what are the main problems that a local administration has to face in preventing corruption?

It should be noted that local administrations very often have to face a variety of “structural” difficulties. Most of them are related to their reduced financial capacity. The implementation of the prevention policy requires investments in staff, training, IT technologies, etc. Local authorities often suffer a lack of sufficient resources, or are subjected to strong spending constraints. Spending review policies have increased this issue. Another point of weakness is related to reduced human resources: very limited personnel, sometimes completely insufficient to guarantee the effective provision of all functions, not sufficiently trained and also subjected to constraint policies.

Another difficulty can derive from the territorial dimensions of municipalities, its the so called problem of «small municipalities», which affects Italy, like many others European countries. As a matter of fact, in Italy, out of 7,960 municipalities, 5,547 (70%) has less than 5,000 inhabitants and only 746 municipalities have a population of 15,000 or more inhabitants (data 1/1/2017). The legislative measures adopted to promote mergers between municipalities have so far led to the abolition of only 256 municipalities; but mergers themselves often create municipalities with a size of less than 5,000 inhabitants.

On the other hand, there are many inter-municipal bodies (in particular, the so called “*Unioni di Comuni*”), which however are distributed in a very

inhomogeneous way and do not always carry out a significant number of administrative functions.

Moreover, in Italy smallest municipalities are subjected to some peculiar rules, which can pose a threat to anti-corruption policies. For examples, in the municipalities with a population of less than 3,000 inhabitants, it is possible to entrust the members of the local executive body with administrative functions, avoiding the principle of separation between policy-making and administration that is mandatory for all public administrations in Italy. For the same municipalities, mayors and members of the executive body can remain in office for three consecutive terms (15 years), while for the other municipalities the limit is two terms, according to a general principle of rotation in public functions.

## *2. The implementation of anti-corruption policies by local governments: which strategy?*

It is important to underline that, according to ANAC, all Italian Municipalities with a population of less than 15,000 can be considered “small municipalities”, despite the fact that – as we have seen – they represent the overwhelming majority. It is because the anticorruption strategy requires adequate size and administrative capacity.

The periodical evaluations conducted by ANAC show that Italian territorial authorities (in particular, small municipalities) reach the lowest standards and face difficulties at all level of the prevention procedure: difficulties in updating plans within the scheduled time; in performing the analysis of the external context; in achieving an adequate mapping of internal processes; in applying the risk assessment and in identifying the measures; finally, in making an adequate monitoring.

According to the approach chosen by ANAC, the solution to the above-mentioned problems of local government passes through two possible tools.

The first and most important one is to promote mechanisms of structural cooperation between municipalities that allow, on the one hand, to guarantee the suitability of resources and means and, on the other hand, to ensure a response to corruption which is not only local, but more properly territorial and unitary.

The second possible solution is to simplify the implementation of legislation for local governments, in a logic of aid and support, in order to avoid that the activities of identification and implementation of anti-corruption measures

are seen by local officials only as a bureaucratic burden, rather than as a constant and dialectic process aimed at finding more functionality in prevention.

In any case, the “local” level of the administration cannot be a justification for avoiding to tackle corruption, which must be done right from the level closest to citizens. However, it is necessary to adopt organizational solutions to overcome the issues that these administrations encounter in implementing prevention policies. It is also possible to establish some exceptions, reductions in anti-corruption mandatory measures, which must be carefully evaluated to avoid excessive disparity.

Another important strategy to apply is that local administrations must be involved by the national level in designing specific organizational solutions and in identifying exceptions; in other words, it should be avoided a “top-down” approach.

It is also very important a constant monitoring carried out by the National Anti-Corruption Authority in order to verify the impact of the introduced exceptions and to promote an adequate level of implementation by local authorities.

### *3. The opportunities of the intermunicipal cooperation*

As we have already appointed, collaboration between municipalities can be a valid solution to achieve a level of technical competence appropriate to the implementation of anti-corruption policies. In this sense, intermunicipal cooperation can be a solution to create joint administrative structures specifically dedicated to the prevention of corruption; to organize training programs, dedicated to anti-corruption issues, for the civil servants; to unify the responsibilities and reduce the costs of administrative measures, etc.

More generally, it is the combined exercise of administrative functions and services that can allow small municipalities to strengthen their administrative capacity, making it easier to apply typical anti-corruption measures, such as: rotation of officials; duplication of officials assigned to inspection and control functions; implementation of internal controls, and so on.

According to PNA 2016, the activities concerning anti-corruption and transparency, due to the management and operational implications that they entail, should be considered within the basic functions list which in the Italian regulatory system all the municipalities with less than 5000 inhabitants (or 3000 in some cases) must exercise compulsory through an associated model. It entails that all small municipalities are called to join in

the exercise of these functions, being able to choose between the forms of cooperation provided for by legislation.

Special directives regarding Unions of municipalities (“*Unioni di comuni*”) are written in the PNA 2016. According to these provisions, the municipal joint body can approve a unitary Plan, which is designed both for the joint body and for the Municipalities included. In this “unitary plan” measures have to be distinguished in application of the criterion of the exercise of the function, depending on whether they refer to functions performed directly by the joint body, or functions remaining in the hand of the municipalities.

Another possibility offered by the PNA provisions is to unify only some parts of the triennial anticorruption and transparency plan (PTPCT), mandatory for all public administrations, with particular reference to the “analysis of the external context”. If a single unitary plan is set up, the person in charge of preventing corruption and transparency may also be unique.

#### *4. The actors of the anticorruption strategy within local government*

Political governing bodies (Council, Executive Committee, Mayor, etc.) play an important role in implementing anti-corruption strategy. In fact., they define the strategic objectives regarding the prevention of corruption and transparency, which constitute the necessary content of the strategic planning and management documents and the PTPCT; they receive and evaluate the annual report of the anti-corruption Officer; they approve the PTPCT. For local authorities, it is provided that the Council approves a general document on the content of the PTPCT, while the Executive body remains competent for the final adoption of the plan.

The anti-corruption officer (“*Responsabile prevenzione corruzione e trasparenza*”, RPCT) is another key subject of the whole policy of preventing corruption in Italy; for this reason it is necessarily present in each authority.

At local level, in Italy the anti-corruption officer generally coincides with the municipal (or general) secretary, appointed by the mayor (or the president of the province, or the metropolitan mayor), but among the members of a national register. Within 60 days of taking office, the new mayor / president can appoint a new secretary. This provision does not appear entirely consistent with the necessary autonomy and independence of the functions of the anti-corruption officer. Even for this reason, the law establishes that each authority must adopt specific organizational measures to ensure full autonomy and effectiveness for the anti-corruption officer. As a consequence,

a special support structure for him/her, or at least the availability of some personnel unit, is required.

The law also provides a special protection against discriminatory measures which could be applied to the anti-corruption officer. Any suspected case must be reported to ANAC.

Other figures involved in the anti-corruption strategy can be the so called “Referents” for prevention, which helps the Anti-corruption officer to exercise all his various functions. They are public officers, generally public managers whose role is important, too, to assure the application of anti-corruption measures by the personnel, and to implement the quality level of the administrative activity. It is important to remember that “administrative corruption” means disfunction, maladministration, not only corruption in strict sense.

#### *5. Anti-corruption measures, internal controls, performance evaluations*

For the implementation of anti-corruption measures, the link between the Anti-corruption Officer and the internal control bodies is fundamental. It is also necessary to seek integration and coordination with the subsequent control activities, harmonizing the types of decisions to be audited with those adopted in the context of the procedures and activities included in the “risk areas”. For example, in the Italian system, the municipal or general secretary also performs the function of legitimacy control on a sample of administrative decisions of the local institution.

It is also recommended a strong coordination between the anti-corruption officer and the independent evaluation commission (OIV), which has the competence to monitor the mechanisms for measuring and evaluating the performance of local managers and civil servants. The same coordination is provided between PTPCT and performance plans, which, according to the Italian legislation, have to be harmonized.

#### *6. The role of intermediate local authorities and regional authorities*

Intermediate local authorities can also perform an important function in favour of the first level of local government. These bodies generally have a function of support, technical assistance, development and dissemination of best practices, preparation of standard regulations, that can be implemented even regarding anti-corruption strategies and functions. This role can be particularly significant for the smallest municipalities. In Italy, recent legisla-

tion entrusts both to Provinces and Metropolitan Cities this important role. The PNA 2016 encourages in particular Metropolitan Cities to exercise a strong coordination role among included municipalities.

Even the regional authorities can perform an important function in supporting their local system anti-corruption strategies, promoting coordination between them, dissemination of best practices, training programs, etc.; particularly if they have – as in Italy- legislative powers.

An interesting example can be seen in the legislation of Emilia-Romagna Region: The «Integrity and transparency network» between Anti-corruption Officer of all local administrations (Legge Regionale dell'Emilia Romagna 28 ottobre 2016, n. 18: “Testo unico per la promozione della legalità e per la valorizzazione della cittadinanza e dell'economia responsabili”). This network aims at creating a structured relationship between the managers, or officials, who play a fundamental institutional role in each administration situated in the regional area, for the promotion of the culture of legality and transparency. From this point of view, it is characterized, first of all, as a “professional community”.

### *7. The important role of citizens*

In several occasions ANAC has underlined the importance of involving citizens to raise awareness of the culture of legality. Local Italian authorities have implemented the consultation method also used by ANAC, which is based on the involvement of stakeholders in defining the contents of the plan (PTPCT) through the publication of a specific notice on the institutional website in the Section “Transparent Administration / Other Content”. Other forms of civic participation can also be very useful to promote more effective participation in the elaboration and implementation of corruption prevention policies at local level.

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# PART VI

Enforcing public management to fight corruption



## The role of public management in fighting corruption: anti-corruption measures as performance targets

### *1. Corruption generates inefficiency and inefficiency generates corruption*

The idea of corruption as a “victimless crime” is not quite correct. Even if there may generally be no victims as witnesses, a large number of people may still suffer as a result of the corruption. Corruption undermines several aspects of public institutions, individual rights, and collective life. That happens for efficiency and effectiveness of public administration, and relatedly for the rule of law in satisfying social and civil rights, but especially corruption undermines the capacity of the Administration to satisfy fundamental rights, so affecting the fundamentals of our Social State of Rights

On the other hand, inefficiency may generate corruption, as people seek to overcome delays and disservices. For example, in some cases a payment of bribes can be seen as an antidote to uncertainty. After all a low quality of public sector management opens spaces in which corruption can prosper and it is clear that a lack of accountability between the government and citizens increases the attempts to corrupt civil servants.

### *2. Fighting both corruption and inefficiency*

If the dysfunctionality of public administration is considered to be one of the root causes of corruption, a well-functioning public sector, that delivers quality public services, is strategic in fighting corruption.

Performance-based accountability has the potential to improve government service delivery performance and to ensure the integrity of public action.

A 2004 World Bank study of the ramifications of corruption for service delivery concludes that an improvement of one standard deviation in the International Country Risk Guide corruption index leads to a 29 percent decrease in infant mortality rates, a 52 percent increase in satisfaction among

recipients of public health care, and a 30–60 percent increase in public satisfaction stemming from improved road conditions.

The UN General Assembly resolution, which adopted the International Code of Conduct for Civil Servants in 1996, emphasizes “the need to improve public management systems and improve accountability and transparency”.

In 1997 the Council of Europe resolution (1997) 24, On the twenty guiding principles for the fight against corruption, stresses the importance “To ensure that the organization, functioning and decision-making processes of public administration taking into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness”.

The present contribution intends to investigate, even if under a specific profile (that of the link between performance of managers and anti-corruption measures), the relationship between some dynamics, typical of both New Public Management and the season of the fight against corruption in the public administration. Indeed, these are reform philosophies of the public administration that have in common the investment on the efficiency and effectiveness of the administration to achieve the results on which the public sphere invests. It could also be said that, if New Public Management has risked losing sight of the specific nature of public action, which must not only meet the rules of economic efficiency and achieve a result, but it must also be carried out with full respect for legality, the investment in anti-corruption fills this gap by emphasizing the importance of the integrity of the administration and the demands for impartiality that must characterize its action.

### *3. The Italian model of fighting corruption*

In the Italian model, the term “corruption” is used in a broad sense, in a way to include any malfunctioning of administration (“maladministration”). The essentially preventive approach to the fight against corruption also concerns the improvement of the administration, its organization and the effectiveness of its action. The fight against corruption is also a fight against maladministration (inefficiency, slowness, hyper-bureaucracy). The gain is that to improve the administration to fight against corruption.

This is not an easy goal to achieve. Many of the measures introduced to fight corruption also require an organizational commitment from the administration. If the staff and the management interpret this commitment as

a formal and heavy fulfilment that is added to the ordinary activity, there is the risk of weighing down the administration with consequences also on the effectiveness and speed of its action.

The correct approach is that which revises and deeply redesigns the decision-making processes, to achieve a good administration whose action is characterized together by integrity and respect for the rules.

Anti-corruption measures in the Italian model could be described in two ways. The first ones are the measures introduced by law, which in turn can be distinguished in “static measures”, such as Ineligibility, Incompatibility, Pantouflage, but also Transparency and Code of Conduct; and “dynamic measures”, imagined as tools to be used to address the risks of corruption, such as: the duty of abstention in the event of a conflict of interest, even if only potential, change of assignment and others...

The second ones are the measures planned and adopted by each public administration to prevent corruption in their organization in Three Year Anti-corruption Plans adopted in line with the ANAC guidelines.

#### *4. Anti-corruption plans and organizational measures*

Anti-corruption plans are based primary on a Process analysis (analysis of all the steps that lead to a decision) and than, about each process, be made a Risks assessment (evaluation of corruptive risks in each step). After those passages, are planned the measures: organizational and procedural solutions to minimize risks.

The article 1, paragraph 5, law no. 190/2012, states that each Public administration presents: “an anti-corruption plan that provides an assessment of the different level of exposure of the offices to the risk of corruption and indicates the organizational measures aimed at preventing the same risk”.

Anti-corruption plans contain several measures foreseen by the National Plan. But each plan must contain also specific measures that have to be elaborated by each administration according to its specificity.

Specific measures often concern particular aspects of the organization and the concrete way of functioning of the administration. The administration’ contribution in identifying specific measures is important to adapt the measures to the various conditions under which administrations operate. The measures designed directly by the administrations can also be designed so as not to compromise the efficiency and effectiveness of the action and even in order to improve them, consistently with the objectives of having not

only an administration characterized by integrity and impartiality, but better administration.

*5. Who can best imagine and best implement organizational measures?*

Anti-corruption plans face an important challenge, that of identify anti-corruption measures that bring also efficiency and effectiveness. A key role in this challenge must be recognized to the “Prevention of corruption and transparency” officer and to public managers.

For better understand the key role of public managers in projecting anti-corruption measures, it must be remembered that in Italy the so-called dualistic model dictates that public managers are endowed with reserved powers, competences and specific responsibilities.

In Italy there is a clear distinction between competences attributed to public managers and political officials and this distinction also concerns organizational powers. We differentiate between macro-organization, attributed to political bodies, and micro-organization, attributed to public managers. The first concerns the main organizational choices, those that affect the way in which the public function will be carried out and which concern, for example, the composition of the organs, the relations between them and their public functions. The second concerns, instead, offices and how they operate in practice and the organization of work.

In anti-corruption plans, various measures to protect decision-making processes from corruption concern micro-organization and organization of work, such as the rotation of the personnel assigned to certain offices, the mentorship of one operator to another, the merging of two or more offices, the more accurate arrangement of the relationship with the users, as the order in which they are served, etcetera.

These are “small” measures, which however can be extremely effective precisely because they affect the relationship between people (officials and operators among themselves and with citizens). At the same time, these are also measures that can improve the way in which the administration is perceived externally. An administration that respects the reservation order of users of a given service, treating them all equally, respectfully and effectively, will be perceived as efficient and complete and will stimulate a smaller number of attempts at corruption.

The involvement of the public managers in the design and implementation of anti-corruption measures concerning these aspects then becomes a

key factor because of managers are involved in the design phase, but especially in the implementation phase of the measures.

Legislator seems having understood this key factor. Article 17 and Article 16 of Legislative Decree 165/2001 expressly include among the tasks of managers: the collaboration in defining suitable measures to prevent and fight corruption and to monitor compliance by employees; the obligation to provide information and monitoring of the activities in which the risk of corruption is highest.

#### *6. Anti-corruption measures as performance targets*

The fact that the direct involvement of managers in designing and implementing anti-corruption measures is expressly required by law is very important. This allows in fact to tightly link these functions to the responsibility system for the results of the management.

In the so-called dualistic model, public managers respond to the results they have achieved through the exercise of the powers reserved for them. This is a fundamental moment to put together the democratic principle (which wants fundamental decisions to be the prerogative of organs with political legitimacy) and the principle of impartiality (which in our country has led to the decision to reserve to management, subtracting from politics, the powers of active administration and management).

The managers periodically receive the objectives to be achieved, which are formulated by the political bodies of the administration, and are periodically assessed for the way they have achieved or failed to achieve these objectives.

This process foresees a Performance Plan in which the expected objectives and the indicators on which the achievement will be measured have to be indicated from the beginning.

In this frame some anti-corruption measures can become targets for public managers.

This is confirmed by the dictates of article 1, paragraph 8, of the law n. 190/2012, which provides: “The governing body defines the strategic objectives for preventing corruption and transparency, which constitute the necessary content of the strategic planning and management documents and the three year plan to fight corruption”

Anti-corruption measures and, in particular, those concerning micro-organization, the rationalization of procedures and the increase of transparency can become managerial objectives.

This allows to require to managers not only to comply with new rules and new procedures introduced to combat corruption, but to commit their managerial skills to pursue goals that are both quality and integrity. The inclusion of the anti-corruption objectives in the Performance Plan allows them to be subjected to the same “verification and prize” process envisaged for the management objectives.

At the end of the measurement period, the manager’s activity is subjected to an assessment that measures the level of achievement of the expected result and the manager’s contribution to achieving it. The outcome of the evaluation is linked to part of the manager’s remuneration.

The full achievement of the objectives allows it to receive all the share of the evaluation linked to the results. If the goal, on the other hand, is only partially achieved or not achieved, the remuneration is reduced accordingly.

The inclusion of the anti-corruption objectives in the performance appraisal and incentive system is therefore an important application of anti-corruption measures and reinforces their implementation possibilities.

But the inclusion of some anti-corruption measures in the performance evaluation system also has another advantage. The implementation of the strategy to fight corruption can in fact also take advantage of some tools that also serve to strengthen the dynamics of management by objectives: transparency, presence of an independent evaluation body and involvement of citizens and users. Since these are tools useful for both strategies, their joint use is functional both to a rational use of organizational resources and to enrich the reinforcing effects in a combined way.

Let’s now see separately what these tools are and how they are functional to the strategies for improving management and fighting corruption.

- Transparency: both Anti-corruption and Performance plans must be published in a section of the Administration’s website. A Performance Evaluation Report must be drawn up in each administration (article 10, Legislative Decree n° 150/2009). The report must be published on the Administration’s website. The inclusion of some anti-corruption measures among the performance objectives makes it possible to make the way in which they have been applied more transparent and the results of quality and integrity deriving from them.
- The performance system also provides for the presence of an Independent assessment body (OIV) which validates the Performance Assessment Report; verifies that Anti-corruption plans are consistent with the targets set in the strategic-management planning documents and verifies that the objectives related to anti-corruption and transpa-

rency are taken into account in measuring and evaluating performance. The OIV is thus entrusted with the task of monitoring the link between performance and anti-corruption.

- The third aspect to underline is the involvement of citizens and users in measuring performance. The law provides that they participate directly in the processes for assessing the organizational performance of the administration, also by communicating directly to the Independent Evaluation Body their degree of satisfaction with the activities and services provided. The inclusion of some anti-corruption measures in the performance system thus allows citizens to become actors also in the verification of their effective application and the achievement of the integrity results associated with them. This aspect is particularly important: many international studies show, in fact, how the involvement of citizens is a fundamental tool for the enforcement of anti-corruption measures.

### *7. Anti-corruption measures as performance targets: the advantages*

We can now consider what advantages this linking mechanism between performance and anti-corruption measures can also provide in fighting corruption.

The first consists in the fact that the anti-corruption measures, which, as we considered at the beginning, also require an important organizational commitment to the administrations, when they are included in the performance plan, as well as the other objectives assigned to the managers, are combined with the necessary means to achieve them: in terms of budget, personnel and organization.

The second advantage consists in the fact that, directly involving the managers in the planning and implementation of the anti-corruption measures, these penetrate deeply into the administration and reduces the risk that they are perceived as unsuitable to the specificities of the administration that must perform them.

A third type of advantage is that which allows monitoring the level of achievement of the results linked to the application of anti-corruption measures with the same instruments with which the achievement of the other performance targets is measured. This allows a more economical use of organizational resources, as we said before, but also allows the use of a system of measurement and assessment, that administrations have been using for over ten years, in the verification of ways to combat corruption.

The fourth advantage concerns the fact that the economic and career incentives that drive managers to achieve the performance targets also become incentives for the effective implementation of anti-corruption measures.

The fifth type of advantages concerns the possibility of combating corruption without over-burdening the administration's obligations, both by concentrating performance targets and objectives to combat corruption, and by stimulating managers to find operational and organizational solutions that enable anti-corruption measures to be implemented with the means at their disposal.

The last advantage is that regarding the considerations made at the beginning: if it is true that corruption thrives in the inefficiency, uniting the objectives of improvement of the administration with those of contrast to the corruption allows to fight together causes and effects of the corruption increasing the ability of the administration to resist the corruptive pressures also thanks to its good functioning.

### *Conclusions*

Finally we must ask ourselves what are the conditions that ensure that everything that has been said so far does not remain an academic exercise, but actually takes place in the administration, producing the advantages we have just mentioned.

We can not ignore the fact that even in Italy, where the performance assessment of managers has been part of the administration's functioning since the end of the 1990s, this system still does not operate satisfactorily and still has many limitations.

The basic elements that are necessary for the model to operate properly are:

- Transparency of the processes, which must be ensured not only by publishing the documentation on the websites of the administrations, but ensuring that these documents (performance plans, anti-corruption plans, performance reports) are written in a clear and understandable way for citizens.
- An effective and not only formal transparency is also the condition for realizing the second key element: the presence of an informed and aware citizenship. Only in this way the involvement of citizens can be considered a resource.
- Political elites must also be involved in this process, they must believe in the importance of fighting corruption and improving administra-

tion by setting and measuring performance targets for managers. This means that politicians must leave the managers sufficient room for maneuver to achieve the expected results.

- Several studies have shown how a complex and challenging system, like the one we have outlined, should be implemented gradually. In this way it is foreseeable that it will encounter less resistance and be inserted in the functioning of the organization not only as formal fulfillment, but as a process capable of effectively transforming the way it operates.
- Finally, it is important that the measures to fight corruption, as well as the other performance objectives, are “negotiated” with the managers, in order to make them responsible from the beginning with reference to their effective implementation. This also makes it possible not to set unreachable goals, which, in addition to frustrating the organization, would also make it appear to be inadequate and not capable of achieving its results in terms of combating corruption.



## Impartiality, independence of managers and the reforms of civil service in Europe

### *1. Impartiality's double face*

The prevailing doctrine reduces the impartiality to the pure administrative activity and procedure, while the organizational dimension of the impartiality remains in the shade.

In this sense, the concept of impartiality has always coincided with the general principle of the rule of law (more specifically, with obligations of equal treatment, not discrimination, prohibition of favoritisms and procedural rules in general)

Traditionally, the organizational rules are considered expression of internal relationships, without any relevance for the legal system<sup>1</sup>

This is a quite narrow perspective. As a matter of fact, with regard to the government, the choices concerning the organization anticipate the choices in administrative acts and procedures. The organization is the basis, the precondition of the administrative function

### *2. Impartiality and organization*

Impartiality shouldn't be conceived as a rule merely regarding the activity and the procedure (so called functional impartiality), but a general principle that inspires the whole life of a public administration, including relevant aspects of the organization.

The administration has to be impartial from the recruitment of personnel to the definition of the spheres of competence, from the relationship be-

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1. G. Zanobini, *Le norme interne di diritto pubblico*, in Riv. Dir. Pubbl., 1915; 3. G. Bachelet, *Profili giuridici dell'organizzazione amministrativa*, Giuffrè, 1965.

tween officers and offices, up to the way of carrying out the public activities and functions.

When a function is conferred to an office, it becomes a «competence» (in a broad sense).

Public organization, as distribution of competences between offices and bodies, can be fully listed among anticorruption measures.

A clear, intelligible and consistent allocation of the competences offers a double guarantee:

An objective guarantee that public organization allows the best pursuit (more functional and more impartial) of the public interest; A subjective guarantee that professional officers, selected by merit, are operating impartially in pursuit of the public interest, without unfairly undermine other private and collective interests<sup>2</sup>.

Public organization is based on unilateral choices, made through public and special laws.

From the citizen's point of view, public regulation ensures more stability to organizational choices and allows the stakeholders to retrace the organizational process and its consistency with the public interests. In a word, public regulation of offices is considered more "impartial" than common law regulation.

### *3. Different models of administration*

Italian Constitution offers three different models of administration:

1. Article 95 carries forward a conception of hetero-direct and centralized bureaucracy focused on a political summit (Minister), which can be summarized through the Anglo-Saxon formula of "ministerial responsibility".

All management powers and responsibilities are reserved for the minister.

So called "monistic" model, which finds its legitimacy in the principles of democratic representation and popular sovereignty.

2. The monistic model of administration is joined by a second one, more modern and autonomous. Article 97 Cost.: public management as an impartial, neutral and technical apparatus at the service of the nation.

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2. Article 98 of the Italian Constitution states that civil servants are at the service of the Country.

Public managers (PM) are entrusted with exclusive management functions, out of the political control.

Therefore, PM are subject to direct responsibilities, both professional and disciplinary.

So called dualistic model, which stems from the concept of a public administration autonomous from politics

3. Art. 5 of Italian Constitution provides a third models, so called decentralized administration, based on the existence of local government and on the principle of subsidiarity.

The relationship between politics and administration can not be regulated equally at central and local level, because the local government is very different, for culture and tradition, from the central one.

#### 4. *Democracy vs. technocracy*

Two opposite views are emerging in relation with this issue: on the one hand, the concern of an excessive dependence of administration on politics suggests to drop the monistic model, inherited from the liberal tradition, for a more autonomous, independent and technical bureaucracy; on the other hand, the autonomy of the public management rises the issue of the democratic control over the government, which should remain within the circuit of political responsibility.

Some critics has pointed out a sort of “strabismus” within our Constitution, because, on the one hand, it regulates the administration in the section relating to the Government, on the other hand introduces provisions which, on the basis of the teaching of Tocqueville, tend to protect administration from the “politicisation induced by the Government, which is its summit”<sup>3</sup>.

Actually, the Italian Constitution indicates different and necessary guidelines for the administration, but doesn't impose a radical and exclusive model. It is up to the legislator to identify a sustainable balance between these – apparently – conflicting models of administration

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3. S. Cassese – A.G. Arabia (a cura di), *L'amministrazione e la Costituzione. Proposte per la costituente*, Bologna, Il Mulino, 1993.

### 5. *The Italian Public management*

In Italy public management has been established in 1972.

In 1993 the civil service was “privatized”, with a big transition to common law regulation and ordinary jurisdiction

In 1998 privatization was extended to public management, which initially had been maintained under public regulation

After the Nineties’ reforms, a public manager is considered at the same time:

- “Guarantor of administrative impartiality” (against the intrusion of politics)
- “Responsible for results” (in terms of efficiency and management of resources)
- “Employer” (as a counterpart of employees and organizer of the work).

In the last twenty years, administrative impartiality has been pursued through three main lines of intervention: a) the distinction between politics and management; b) the adoption of measures aimed at preventing corruption; c) the establishment of independent Authorities.

- a. The distinction between politics and management. The distinction of competences between professional and political officers has given a strong expansion to the organizational impartiality, as opposed to the functional impartiality.

The public management has become a proper and exclusive competence of professional (chosen “through competition”; Article 97, par. 3), neutral and disinterested officers (“at the exclusive service of the Nation”; Article 98, par.1)<sup>4</sup>.

- b. A second line of intervention concerns measures to prevent corruption. The distinction between politics and management alone it’s not enough to guarantee impartiality, especially because it can be circumvented.

In this perspective, law 190/2012 introduces preventive actions against corruption, so to overcome the traditional repressive approach.

In the prevention perspective, the term “corruption” is used in a broad sense, which get closer to the idea of “maladministration”. Administrative

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4. G. Sirianni, *I profili costituzionali. Una nuova lettura degli articoli 54, 97 e 98 della Costituzione*, in F. Merloni, L. Vandelli (a cura di), *La corruzione amministrativa. Cause, prevenzione, rimedi*, Firenze, Passigli, 2010, pp. 129 ss.

corruption includes “All the situations in which a public officer, conducting administrative activities, abuses of the power conferred to him with the purpose to get private advantages”. Administrative corruption has a wider meaning than the offence of corruption in public sector: the former includes not only the whole range of crimes provided by the Criminal Code, but any malfunctioning of administration due to the use of the attributed powers to private ends. It covers any “pollution” of the administrative action *ab externo*.

Fighting corruption requires, on a objective level, that all the processes and the public activities are analyzed, and submitted to an evaluation of corruptive risks. On this basis are introduced measures of contrast.

On a subjective level, it requires also the regulation of the access to civil service, the exclusion from elective public offices (ineligibility, incompatibility, incandidability, temporary suspension, conflict of interest), the post-employment discipline (pantouflage).

These measures are strengthened by enforceable codes of behavior.

With the law 190/12 (law of delegation) preventive measures are added up (rectius: preferred) to repressive fines. It is a New policy to struggle administrative corruption.

The law 190/12 fixes some duties of abstention for the civil servants (“he/she must abstain in case of conflict of interest, reporting any situation of conflict, also potential”).

The same law introduces detailed rules for the access to the public offices, the regulation based on mere incompatibilities having been considered as not adequate for the purpose.

In this framework, the Whistleblowing is conceived as a general discovery tool, which facilitates the coming out of interest’s conflicts and corruption<sup>5</sup>.

The D.lgs. 39/2013 (delegated law) provides: the prohibition to confer managerial charges (inconferibilità) to subjects convicted (also not irrevocably) for crimes against the public administration; the prohibition to confer managerial charges to subjects coming from private corporate bodies regulated or financed by the PA; the prohibition to confer managerial charges to political officers or members of representative chambers or assemblies.

For the first time the opportunity to confer managerial charges to subjects that originate from positions that can jeopardize the expectation of an

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5. On this topic, see R. Cantone, *La tutela del whistleblower: l'art. 54-bis del d.lgs. n. 165/2001*, in B.G. Mattarella, M. Pelissero (a cura di), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino, 2013, 243 ss.; F. Gandini, *La protezione del whistleblower*, in F. Merloni, L. Vandelli (a cura di), *La corruzione amministrativa. Cause, prevenzioni e rimedi*, Firenze, 2010, 167 ss.

impartial exercise of public functions is considered by the law. In this perspective a general, compulsory “cooling period” is provided by the reform

The regulation is not limited to incompatibility among positions, but it also concerns the access to public management.

This doesn't mean that incompatibilities are removed.

Two type of incompatibility are still in force:

- among PM charges and positions in private corporate bodies in public control; positions in private corporate bodies regulated or or financed by public administrations; professional activities regulated, financed or however remunerated by the administration;
- among PM charges and positions of member of representative chambers or assemblies.

Beside these rules, a Code of behavior for public employees has been adopted in 2012. It has full juridical value (unlike the precedents), contains rules regarding personal behaviors and conducts in carrying out administrative activities.

The violation of the Code is source of disciplinary responsibility, there is no longer need of embodying it in collective contracts. This is a main difference from the previous ethical codes, normally without sanctions<sup>6</sup>.

The new anticorruption law rises also some criticism, together with approvals. Political officers are excluded from this new discipline on access and incompatibility, which concerns only PM charges. The anticorruption law should have regulated the access to all the public positions that involve the adoption of decisions for the care of the public interest.

This gap could give way to the idea, constitutionally unacceptable, that the politics has subtracted to the duties of impartiality.

Furthermore, it has been pointed out that the anticorruption law doesn't contain explicit reference to the position of the owner of a private enterprise regulated or financed by the administration. Likewise, there is no explicit reference to subjects who had played national political roles, while the prohibitions of conferment refer only to those who had played regional and local political roles<sup>7</sup>

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6. E. Carloni, *Il nuovo Codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, in *Istituzioni del federalismo*, 2013, pp. 377 ss.

7. F. Merloni, *Il regime delle inconfiribilità e incompatibilità nella prospettiva dell'imparzialità dei funzionari pubblici*, in *Giorn. Dir. Amm.* 2013.

From the law 190/12 stems also the legislative decree n. 33/13, which points out the transparency as method of struggling the corruption.

The transparency becomes a tool for the democratic control over public activities, organization and the use of public resources.

If the citizen has the right to know and to check the organizational choices and results, not only the efficiency but the same impartiality of the administration is more guaranteed.

- c. A third line of intervention for the administrative impartiality, developed especially during the '90, is represented by the pure separation of functions.

The separation aims to define whole categories of public activities that, for their nature, must be subtracted to the politics and submitted to neutral apparatuses.

ANAC (Anticorruption national authority) was set up in 2014 with supervisory powers for public administration, companies under public control or with public participation, and public contracts

The growth of independent authorities, separated from the politics, raises several doubts of constitutionality: the administrative functions must be subject to the democratic principle, and therefore to the political guidance. The Constitution affirms as independent only the jurisdictional branch, not the administrative one.

## *6. An overview of Europe*

In the majority of the European legal systems the monistic model is prevailing, according to the Weberian “myth” of public administration.

The bureaucracy operates as an instrument of the political power and it has “to conscientiously follow an order coming from a superior authority, even if this authority, despite the technical advice, persists to go down the wrong path.”

The civil servants don't have a political opinion, or this opinion doesn't have any relevance; their position is neutral with regards to choices made by the political officers.

In Europe there is no other country, apart from Italy, where public functions are subtracted to political bodies and expressly reserved to a professional lobby.

In Europe there is no other category of civil servants endowed with powers, competence and specific responsibilities (the only exception are the Chief executives of the Agencies in GB) as in Italy<sup>8</sup>.

In EU there is a general option for the ministerial responsibility model: the responsibility for administrative acts and decisions lies with the Minister (with political summit, in general).

Rigid hierarchical system between political and professional officers: the latter are subject to the power of guidance and punctual direction of the former.

No European country has adopted a “pure” monistic model, which generally exists with some adaptations, also relevant.

The PM legal regime is almost anywhere public in Europe, at least in continental Europe.

In some European countries civil service is regulated by private laws, but this is only happening with regard to professional figures that don't exercise the public functions (low-level employees).

There are concerns that private laws cannot properly guarantee the impartiality and may expose the public function to the dictates of the market

The use of administrative powers (“puissance publique”) results in the exercise of the “fonction publique”. The “fonction publique” is usually submitted to public rules, because they offer more guarantees of impartiality.

In that respect a second anomaly of the Italian system should be noted: in Italy the privatization covers the whole area of the “fonction publique”, with no exceptions for the PM.

Two major distinctions can be made within European systems:

- on the one hand, the distinction between the systems in which the civil service regulation arises from formal laws (private or public) in opposition to British system, where rights, duties and incompatibility are established by sources of uncertain juridical value (Orders in Council, terms and conditions fixed for each single department), or by sources expressly deprived of juridical value (the Codes of conduct).
- on the other hand, the distinction between the systems maintaining a special regulation of the public functions (France, Germany and Spain) and Italy, where the whole civil service has been privatized and submitted to common law rules.

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8. F. Merloni, *Dirigenza pubblica e amministrazione imparziale. Il modello italiano in Europa*, Bologna, Il Mulino, 2006.

A first, big driving force for changes in Europe PM is represented by the increase of responsibility of the political officers toward the citizens and the electors, due to direct investiture<sup>9</sup>.

Two side effects:

- Increase of the number of PMs selected (and revoked) by using political criteria (without any motivation or with short motivation);
- Reduction of the PMs terms of office to period not exceeding the mandate of the political officers who have appointed them (spoils system).

All the examined countries have broadly used these options: in Great Britain we have seen the overcoming of the centuries-old tradition that wanted the high officers not removable (although, in fact, they have always been removable “at the pleasure of the Crown”), with strong rotations in the charges related to positions of elevated responsibility, frequent attribution of managerial charges to external figures, big expansion of political staff (see the substitution of the private secretary with the policy adviser).

In France we have seen big changes in the composition of bureaucratic offices at every change of government and strong exploitation of external recruitment (the “tour extérieur”);

In Germany significant amount of “politische beamten” (PM politically appointed) not only to fill vacancies, but also in order to replace the professional officer with officer political appointed.

In Spain the changeover affects not only the highest bureaucratic positions but the main part of the PM.

In Italy there is an intensive use of the spoils system (even if the number of the replaced officers is surely lower than in Spain). Brief terms of office, removal from office in correspondence to the end of political mandates, external recruitment.

A second driving force for changes, beside the direct investiture, is the efficiency.

Two different tendencies: a more radical one, that is carried out by the neo-conservative doctrine in America (Reagan: “Government is not the solution, is the problem”) and GB (Thatcher), according to which “the best government is no government at all”, advocating the pure reduction of the public sphere in favour of the free market<sup>10</sup>.

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9. F. Merloni, *Dirigenza pubblica e amministrazione imparziale*, cit.

10. C. Hood, *Contemporary Public Management: a new Global Paradigm*, in *Public Policy and Administration*, 1995.

A more moderate doctrine, so called “New public management” (NPM), also stemming from the liberal economic theory, whose influence has gone beyond the right wing and conservative circles, to affect areas of the left wing and scholars of the market social economy (people that also defend the presence and active role of the State in the economy). NPM claims the result-oriented administration. If the PM is accountable for administrative acts and results of the administrative action, then her/his decisions should not be determined nor conditioned by the politics.

The political guidance should be general and not punctual, otherwise a relationship of hierarchy between these corps is still maintained. The Italian model tries to implement this logical pattern.

### *7. NPM in Europe*

In Europe the NPM has been applied with some compromises.

In the major part of the European countries, the NPM model is only half – accomplished: public offices are considered autonomous centres of cost, but the final responsibility of public management lies with political leaders.

In the EU Country Report of 2017 we can find good examples of this moderate approach to NPM.

1. In Bulgaria: current proposals for the performance-based remuneration;
2. In Repubblica Ceca: is under way a reform of internal management;
3. In Croazia: The action plan for 2017-2020 tackles three very relevant policy areas: efficiency of the public administration system, de-politization and efficient human resource management, and digitalization of public services. But the actual implementation of the strategy has not start;
4. In Romania: The envisaged measures would clarify roles, functions and mandates for each staff category, review performance management systems, increase transparency and neutrality in recruitment, and coordinate and prioritize employee training;
5. In Slovenia: In 2015 a functional analysis and benchmarking performance indicators of public institutions were finalized, and optimization measures were identified;
6. In Slovakia: The Act was adopted in February 2017 and contains provisions to reduce political influence on public administration, to increase transparency and raise the quality and mobility of staff.

*Brief conclusions*

No European country, apart from Italy, has introduced a clear distinction between public managers and political officers.

The most diffused model in Europe is the ministerial responsibility one, where the Minister still represents the vertex of the administration and has a hierarchical relationship with public managers (monistic model).

On the opposite, the dualistic model implies the creation of a really autonomous public management.

The dualistic model rises a theoretical problem:

The impartiality principle must be coordinated both with democratic principle (someone must respond to the citizens for the administrative activity) and functionality principle (the efficiency should not impose a loss of guarantees about discrimination in the pursuit of the public interests).

Hoping to solve the problems of the administration by building a public management wholly technique and neutral it is as trusting in a virtual reality “where the things are governed alone and find by themselves an answer”<sup>11</sup>.

A connection between politics and administration is essential, a clear separation is not sustainable. A certain level of trust between political leaders and high public officers is needed to maintain the principle of people’s sovereignty at the core of the system.

Otherwise, the public decisions (also the discretionary ones) would be entrusted to technicians without any democratic legitimacy.

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11. C. Schmitt, *Il Custode della costituzione* (original ed. 1931), Italian ed.. Giuffré, Milano, 1981, p. 166.

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## Skills of public managers and the fight against corruption

### *1. Difference between public managers and private sector managers*

Is there a real difference between the competences required of a public manager and a private sector manager?

We obviously mean strategic and behavioural skills that generally are listed to describe a profile of a manager in an organization.

Actually, substantial differences shouldn't exist between public management and private sector management (Hughes, 2018). Both have to make things run smoothly in their organisations, using their own powers, prerogatives and resources.

In fact, from the 90s onwards a lot of western countries reformed their public administration trying to take some features from private organisational models, generally considered more efficient than public models (C. Pollit, G. Bouckaert, 2011).

Dealing with and addressing resources represents the hallmark of management. Management means making choices, while taking responsibility for those choices. Even if the management activity is in turn led by political direction, the managers have the responsibility for how to move forward. It means guiding collaborators to proceed, to carry forward the activities according to an order that should be the most efficient way to achieve the results.

For the public manager the pattern is laid down by legality. Also in the private sector, in order to operate, people must respect the law, but what for the private represents the constraints and the limit, for the public represents the means to fulfil to the assigned function.

Even if the private sector is profoundly different from the public sector – and this is clear in every order of the western world, with or without a proper administrative law – we can't say that the strategic and the leadership skills have to be different in the different sectors. Actually, over the years, we

have seen a fruitful exchange between the two sectors. The mutual knowledge and permeability has brought benefits to both.

Moreover, the legislation of some countries (e.g. Italy) encourages private/public exchanges, by allowing people from the private sector to be temporarily appointed to management positions and public managers to gain experience in the private sector.

Mutual knowledge, using of means of both areas, contact with relative difficulties can promote the process of innovation and can increase the confidence of the private into public administration.

## *2. The difference: the principles of the public action*

If we are convinced that there aren't any substantial differences between the management skills necessary for proper administration, now we wonder if among them there are some skills more than others, which can help to fight against corruption and abuse in the public administration.

We can reply positively to this question: all those strategic competences, combined with a sound knowledge of the legislation and, generally, of the structure of the public administration system of a country, draw a profile of public servant/manger different from any other role in a private organisation.

Another question: what is most important, then, the knowledge and the respect of law and of proceedings or problem solving abilities, innovating, motivating and, above all, improving the organisation and the services for citizens?

Actually there is not a problem of prevalence between the two essences of the same nature. It is rather a question of recognising the order between an essential principle and what it needs in order to be effective.

Impartiality, legality, transparency, integrity are the essential principles of the public action and are the paradigms which all public managers' behaviour must comply with.

The implementation of these principles means taking effective action against corruption and the most important skills are those closely related to the awareness of role, the awareness of the function of rules and the ability to transmit, via communications and, above all, examples, the way to run a public administration (Kotter, 1999).

Another set of issues concerns the relationship with the collaborators. We must take for granted the integrity of the head of the organisation, so

the problem is what kind of skills the office manager has to put in place to ensure the integrity of his collaborators.

In fact, managers don't have strong monitoring and control instruments. Actually, monitoring and control is one of the aspects of a manager's activity, but is not the only one and not the core of his activity. There are other organisms which have this mission in the public system. A manager, definitely has to meet his collaborators often and has to develop listening skills and to encourage the exchange of information. A manager that is always in his own office, avoiding contact with his collaborators, calling them only to report when they make mistakes, certainly doesn't foster the knowledge of the working environment. The lack of knowledge about the work environment means creating a dangerous isolation and removal from organisation reality.

### *3. The skills of the good manager*

Obviously, the ability to interact effectively with collaborators and politicians could be an innate talent, but anyone who doesn't have enough talent can improve it through discipline (e.g. to meet his staff regularly and promote exchange situations).

Therefore, it is not a matter of finding specific skills for public managers, but only of implementing the principles of impartiality, legality, transparency and integrity.

Then it means that for example, in the public administration there can't be real efficiency outside of these principles. The cost control as well, which is a fundamental activity for any good organisation, can't be done for its own sake. A good public organisation, in fact, has to get value for money. So the goal shouldn't be to save money or to make profit.

Understanding these concepts and acting accordingly means having precious skills for management.

The knowledge of the rules of accounting is a basic requirement, but a public manager needs more than this. He has to be capable to plan of spending and investment and to handle routine tasks as well as special situations.

In the public system, the values of impartiality, legality and transparency have been codified, so they are mandatory.

In the private sector the respect of these values represents a positive reinforcement for the organisation. When these values no longer apply, both public and private organisation can have serious problems.

The role of management is fundamental in order to rewrite the map of the competences to give effect to these principles, using the best knowledge in the context of personal and organisational development.

Therefore, the specific features of public sector are not the kind of competences, but their different finalisation. Moreover, the implementation of the skills gains a new sense in this point of view.

#### *4. Skills to ensure impartiality, legality, transparency, integrity*

In the view of this proposal, the competences and the virtuous behaviours put in place to ensure the correct functioning of the public institutions, should have been oriented and valued by the cardinal principles that formed the basis of the smooth running of public action.

Therefore, the challenge is not to make public servants acquire the best skills and techniques developed in the private sector, but is to entrench the awareness in the use of the management instruments, concretely aimed to achieving impartiality, legality, transparency and integrity.

This awareness should inspire both the macro and the micro organisation, in which the good example appears particularly effective as well as empathy with the needs of citizens.

It is not easy to find a model to giving effect to the principles mentioned above. The institutions that deal with public servants' training should set up a new project in this sense. The Universities and the training Schools could have a fundamental role in this direction.

To build a skills model consciously oriented to public purposes requires first of all knowing how public action principles affect or should affect public organisations. These principles, then, must balance efficiency, cost effectiveness and simplicity.

Thus public administration must be impartial and transparent and at the same time must use resources in the best way to pursue its own institutional mission.

The need for continuous reconciliation of different values, sometimes outwardly conflicting with each other, requires the broadening of typical management skills with a wider vision that may come not only from a thorough knowledge of the public sector's rules but also from ethical engagement as well.

Can we consider integrity and morality as skills to develop or we should treat them as intrinsic qualities that one either has or does not and are therefore non-transferable? Everybody has, to a different extent, specific features

and qualities. So, some people can be better provided with emotional intelligence (D. Goleman, 1995), sense of ethics or empathic abilities. All these qualities are generally considered as typical features of a precious person for society and for an organisation as well. Therefore public administration should take care to recruit people with this kind of skills and put the best suited of them in the most important positions.

*5. Fighting corruption with connection between principles of good administration and management skills*

The close connection between the fundamental principles of the administrative action and the development of managerial skills is at the basis of the smooth running of public administration and is therefore at the basis of the opposition to corruption and abusive behaviour.

Aware and wide spread practice of impartiality, legality, transparency and integrity, represents the best defence against maladministration.

First of all, we need to consider the people that live in the organisations and make the organisations alive through personnel recruitment, training and continuous support to motivation.

The head of a public administrations, in every sector, can't be separated from a profound competence in human resources management. We mean anything concerning human resources: the recruitment, indeed, the development of each individual for the best allocation to the different parts of the organisation, the ability to motivate.

The recruitment of personnel, frequently, in the public administrations presents critical issues which may affect the quality of the recruited resources and drop-down the quality of the performances of the public servants.

The reasons for these difficulties, may be linked, with very few exceptions, with selection methods which are not always efficient.

The principles of impartiality, legality, transparency and integrity, when properly applied, may ensure the best personnel recruitment. Instead, if these principles are translated exclusively into the preservation of the forms without a real effort for their implementation, they could be counterproductive.

The slavish respect of the forms is not ethical behaviour. It doesn't mean that the rules haven't been respected. Sometimes, the uncritical application of the standards, though, can lead to misuse of power and abuse of process that hurts the organisation, the ordinary citizens and the businesses, undermining the image of the public administration.

The principles, thus, set the correct course and the sense of the rules, that can't be far away from the principles themselves.

The sense of the private manager's actions is represented by maximising the profits in the framework of workers protection. For the public manager the sense is represented by these principles.

A lot of public administrations in the western world are accused of being excessively complicated. Simplification is considered a necessary step to improve services for citizens and the management is fundamental to *cut the red tape*.

The managers can change the setting of the organisations. Good rules and bad managers make the administration inefficient. Good managers, instead, can avoid the inefficiency of bad rules.

Public managers as well as their capacity to manage human resources, must be able to analyze procedures for results, to prevent risks of corruption, to increase the level of transparency, using technology in the best way.

### *Conclusions*

The awareness of the role, the independence from politics, may arise only from competence and then from the merit to be appointed to a certain position.

On this basis we can set out a new model to develop management skills connected to good administration principles.

As regards the transversal and behavioural skills, a distinction can be made between technical skills and "ethical capacities".

To each principle may correspond some necessary technical skills and "ethical capacities" to the role. Some examples of technical skills: knowing how to handle the internal and external relations; knowing the political, organisational, technological context; being able to analyze situations, risks and processes; knowing how to manage human resources (recruiting; controlling, motivating, hearing); exercising leadership; etc.

About ethical capacities we mean all those ways to deal with good administration and public ethics. Some examples: users-orientation; decision-orientation; care of public assets, etc.

To this new setting model of management skills should correspond an accreditation system to ensure the development and the maintenance of this kind of skills.

The goal is to have in public administrations in general, and above all, in the head positions, highly motivated people who are proud to be at the State's service.

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# PART VII

Knowing corruption:  
measures of corruption and the public datasets



## Knowing corruption and transparency: a quantitative approach

In the last decades corruption and transparency have been at the forefront of the academic and political debate worldwide. Corruption is considered a severe obstacle to the economic and social development of a country while transparency may represent a relevant tool to increase accountability. Being complex phenomena, quantification is difficult but necessary. Measurement is indeed a departure point for the empirical analyses of the determinants and the effects of corruption and of transparency which allow not only a deeper understanding of the phenomena but also a more adequate design of anti-corruption policies.

### *1. Measuring corruption: A complex issue*

The existence of different methodologies to measure corruption reflects the complexity of the phenomenon and its multi-facets (behavioral, juridical, ex ante and ex post). A variety of indicators is developed at both national and regional level for large samples of countries; each measure captures a specific aspect of the phenomenon, resulting in significant discrepancies among them. None of the indicator is exhaustive since there are difficulties related to the definition of corruption adopted, lack of objective data, risk of under-reporting or over-reporting, measurement errors (Heywood and Rose, 2014) and the preference for a measure mainly depends on the type of analysis the researcher aims to perform.

The measures of corruption can be distinguished in subjective and objective. The first are based on survey data about corruption perceptions and/or direct experiences and are produced on regular basis. The most prominent subjective indicators are: the Corruption Perception Index (CPI) and the Bribe Payers Index (BPI) by Transparency International, the Corruption

Control Index (CCI) by World Bank, the International Country Risk Guide (ICRG) by Political Risk Services Group (PRS), the Freedom from Corruption by Heritage Foundation, the Global Corruption Barometer (GCB) by Transparency International, the Quality of Government Indicators, by EC and University of Goteborg (2010 and 2013).

These indicators are generally used to identify cross-country correlations and dynamic trends. Being very popular, they have the merit to make public opinion, managers and governments more aware of the relevance of the phenomenon. However subjective indicators have a few shortcomings: the meaning of corruption is driven by the dominant cultural approach and can vary from country-to country as well as from year-to-year. Moreover, there is the risk of under-estimation or over-estimation by the interviewed, as a consequence of the influence of media.

The objective measures, such as the number of corruption-related prosecutions and convictions of public officers and the economic proxies, are based on direct observations. The judicial measures, generally available as long time series and disaggregated by type of crimes and at state-regional levels, capture the emersion of corruption and can be interpreted as indicators of the efficacy of the anti-corruption policy and of the judicial system. They are generally lower than the subjective measures, more adequate for single country analyses as the differences in the judicial systems do not allow their use in cross-country studies and less useful in terms of corruption prevention.

The economic indicators instead focus on issues with measurable outputs: education, health care provision, infrastructures and measure corruption indirectly. Examples of this type of indicators are the difference between central grants to schools and use of the resources in Uganda (Reinikka and Svensson, 2004); the difference of prices of some standard inputs used in public hospitals in Buenos Aires before and after an anti-corruption campaign (Di Tella and Schargrotsky, 2003); the ratio of the potential stock and the physical stock of public infrastructures in the Italian Regions in 1996 (Golden and Picci, 2005); the difference between the citizens' estimated cost of building a road and the actual expenditures in Indonesia (Olken, 2007). Being issue- and context-specific, these measures can be used to interpret single cases; their computation is very costly and difficult to be generalized.

Recently, the experimental research on corruption has developed measures based on the direct observation of the phenomenon in a controlled environment created in a laboratory, which provide hints about the individuals and firms attitudes toward corruption and their reactions to different institutional contexts and rules (Serra and Wantchekon, 2012).

Moreover, the development of risk indicators or redflags, especially in the public works sector, is crucial to prevent corruption. A study by OLAF-University of Utrecht (2012- 2013) built 27 redflags for 8 countries (France, Italy, Lithuania, Poland, the Netherlands, Romania, Spain, Hungary) and 5 sectors (water, waste disposal, utilities, research and development, transportation and road). The Authorities which monitor public works in several European countries have built dataset containing risk indicators such as the frequency of anomalies about number of participants, rebates, extracosts, extratime (Fazekas, Tóth and King, 2013).

Finally, given the importance of the measurement issue, further methodological developments are under way and aim to: a) produce reliable measures of corruption on systematic basis, at national, local and sectorial level; b) identify and correct the different types of distortions and measurement errors with respect to each methodology; c) take systematically into consideration the environment conditions in the measurement methods to guarantee more robust estimates of the causes and effects of corruption in different contexts; d) develop a multi-angle approach which combines micro and macro corruption data in an interaction process between direct and indirect methods (Sequeira, 2012).

## 2. *Measuring transparency in Italy*<sup>1</sup>

Recently public administrations of the OECD countries have been required to be more transparent in providing information about their activities in order to increase their accountability and enhance citizens' trust in public institutions. The diffusion of corruption and the abuse of power in governments is at the origin of the growing demand of access to public information (Holzner and Holzner 2006).

There is a rich literature on the conceptual aspects of transparency, and the contributions on its measurement and consequently the empirical analyses are growing<sup>2</sup>. A "bottom up" approach develops measures of transparency based on the stakeholders' opinions through surveys. Along this line there are few initiatives by international organizations such as the *OECD Open Government Data* project and the *World Economic Forum Global*

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1. This section is drawn from the paper Galli, E., Rizzo I., Scaglioni, C., *Transparency, quality of institutions and performance in the Italian municipalities* WP11/2017/DE/UECE, ISEG – University of Lisbon.

2. For a recent and extensive review on transparency see Cucciniello et al. (2016).

*Competitiveness Report*, and partial/single country indicators provided by *Transparency International*, like for the Spanish Municipalities and specific transparency indexes based on a participatory method (Ferreira da Cruz et al., 2016; Bertelli and Piotrowski, 2010). A “top down” approach, instead, builds legal/formal indicators based on norms and regulations (for a survey, see Jorge et al., 2011). A branch of the literature focuses on the relation between transparency and performance of public administrations and in particular between transparency and corruption (see, among others, Islam, 2004; Lindstedt and Naurin, 2010; Peisakhin and Pinto, 2010; Park and Blenkinsopp, 2011). Other studies have investigated the main determinants of the level of transparency especially at local level (Piotrowski and Van Ryzin, 2007; Alt et al., 2006; Esteller and Polo-Otero, 2010; Bastida et al., 2011; Albalade; 2013; Alcaraz-Quiles et al., 2015; Navarro et al., 2014; Ferraz Esteves de Araújo and Tejedo-Romero, 2016).

The issue of pro-active transparency of public sector organizations has received attention in Italy since 2005, when the Code of digital administration<sup>3</sup> has been approved; few years after, in 2009, it has evolved toward the concept of ‘total accessibility’, as a major tool for the reform of public administration<sup>4</sup>. Notwithstanding implementation problems, the 2009 reform can be considered the starting point of a continuously evolving legislation on transparency, which through time has increasingly adopted a prevailing focus on the promotion of integrity and prevention of corruption. The pillar of this effort is the Anticorruption Bill<sup>5</sup>, which has put the basis for a legislative decree issued in 2013 on publication requirements, transparency and disclosure of information by the public administration. The rules introduced in 2013 require that more than 10,000 subjects, i.e. all public offices at any level of government and public companies, publish about 270 detailed obligations in a standardised format on their web site in the section *Amministrazione trasparente*. Each public organization is compelled to identify a Responsible for Transparency; an Independent Evaluation Unit (*Organismo Indipendente di Valutazione – OIV*) assesses the fulfilment of transparency obligations within each public organization and certifies it.

Transparency obligations cover information about the organization of the public administration with respect to politico-administrative bodies and top public managers and officials; information about the private-public

3. Legislative Decree n. 82/2005, “Code of digital administration”.

4. Legislative Decree n. 150/2009 containing provisions on “Optimization of the productivity of public employees and efficiency and transparency of public administrations”.

5. Law no. 190/2012, containing “Provisions for the prevention and repression of corruption and illegality in Public Administration”.

companies providing local public services; external consulting and collaborations; public procurement, management of the property and assets; timing of the payments and provision of public services. Government attention for transparency has continued through time, with a further reform of transparency in 2016<sup>6</sup>, which has also introduced the generalized dissemination of information upon request.

The recent Italian legislation on transparency represents an interesting opportunity to investigate the potentialities of transparency as a tool to disclose information about the public activity to the stakeholders, to prevent malfeasance and corruption, and favour accountability. In such a perspective, Galli et al. (2017) have developed a new “top down” approach to measure transparency using a quite diversified sample of the main municipalities (Province Capitals) differently populated and located in Italian Ordinary Statute Regions in different areas of the country (40 in the North, 24 in the Center and 25 in the South)<sup>7</sup>. Firstly, they build a completely new dataset containing information about several aspects of public administration activity, issued and validated according to ANAC resolution n.77/2013 by the OIV. Then they organize the selected information in two groups: one, labelled *Integrity*, includes items such as income and asset disclosure and conflicts of interest (of both politicians and top and senior public officials); the other, labelled *Performance*, includes information about the management of public property, the timeliness of public services provision, the quality of public services. The value of each of the selected items is based on the OIV evaluation in terms of information existence, completeness, updating and openness; each item is given equal weight. The outcome is a new composite indicator of transparency (CTI), which is constructed as a simple average of the two sub-indicators referring to *Integrity* (CTI *Integrity*) and *Performance* (CTI *Performance*). Those indicators are computed for all the municipalities in the sample and then aggregated on regional basis, to facilitate the analysis of the patterns. The CTI exhibits marked differences across the 89 municipalities of the sample across Regions (see Figure 1). The degree of transparency varies from 0.05 (or -95% below the average achieved by the other Regions) for Molise to 3.23 (or +223% above the average) for Emilia Romagna. Marche (1.04; 4%) is the Region mostly aligned with the average. In terms of the macro-areas, Northern and Central Regions show positive

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6. Legislative decree n. 97/2016, containing “Revision and simplification of rules on the prevention of corruption, publicity and transparency”. It is part of a wider reform for the reorganization of public administrations.

7. An extension of the sample is under way.

values in accomplishing the transparency obligations (50% and 21%, respectively), although they are quite diversified going from 0.77 (-23%) for Piemonte to 2.23 (123%) for Emilia Romagna. Lowest values are shown instead by the Southern Regions, except for Puglia.



Figure 1 – Composite Transparency Indicator by Regions (CTI, 2014)

Source: Galli et al. (2017).

As regards the sub-indicator CTI *Integrity* (see Figure 2.a), on average, Northern-Regions display a positive value significantly above the average (+59%), while the Central and Southern ones show negative values (-11% and -56%). Looking at the CTI *Performance* (Figure 2b), on average, the picture is slightly different. Northern and Central Regions perform significantly above the average (+41% and 52%, respectively), while Southern show a negative value on average (-69%). In both cases, the best and the least performers are in line with the results of the CTI.

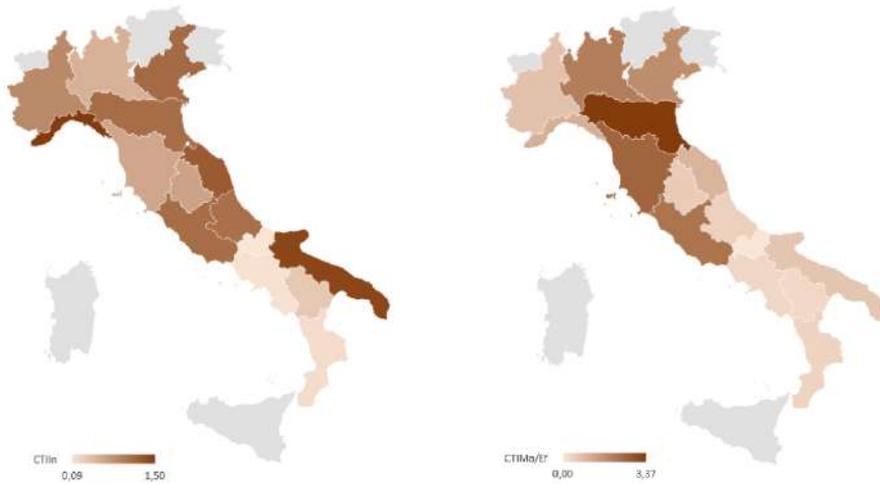


Figure 2a – CTI Integrity. Figure 2b. CTI Performance by Regions Source: Galli et al. (2017).

Although no systematic relation appears to occur between the level of CTI and each sub-indicator at the Regional level, all three indicators show a similar pattern in the least transparent municipalities.

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## Building knowledge from datasets of public administrations

### *Introduction*

This contribution is focused on the theme of building knowledge from datasets of public administrations and will concentrate, specifically, on risk and preventative measures of corruption, which will be discussed with reference to the rationale behind them, the objectives they allow us to gain, and their advantages and limitations compared to other measures of corruption repression and prevention. The final part will be devoted to the way preventative measures of corruption are accounted for in the Italian judicial system and, in particular, to a special case of such indicators, the so-called administrative anti-corruption efforts indicators.

Overall, the contribution is organised in five sections. I will start with a proposal for a new classification of measures of corruption, which leaves behind the traditional reference to objective/subjective indicators and recommends a new criterion of classification based solely on the object of measurement. In the second part, I will synthesize the principal methodological limitations and critical issues related to the construction and use of traditional corruption measures. This second section is instrumental to introducing the third section, devoted to risk and preventative measures of corruption, whose development has been solicited also by the acknowledgement of the limits of existing corruption measures. The fourth section concentrates on a special case of risk and preventative measures of corruption, that is, administrative anti-corruption efforts indicators, which represent a distinctive mark of the Italian legislation on corruption. The contribution will end with a discussion section where it will be stressed, on one side, the need for data of good-quality to support national administrative agencies in their decision processes and, on the other side, the concurrence of a number of difficulties the Italian administrative system undergoes playing as obstacles to such a key objective.

1. *Towards a new classification of corruption indicators*

Traditionally, corruption indicators are classified in subjective indicators of corruption, objective indicators of corruption, and judiciary measures of corruption. In this contribution it is proposed to abandon the traditional classification of corruption measures and adopt a new typology that classifies corruption measures on the basis of their measurement object, leaving behind the traditional dichotomy subjective/objective – which implies the misleading idea of a superiority/objectivity of some measures at the detriment of other partial or inferior measures. Based on this new criterion and typology, we identify five groups of measures and indicators, as exemplified in Table 1, where the adjective subjective/objective is omitted and indicators differentiate one another based solely on their measurement object.

Table 1: Corruption indicators classified by measurement object

<b>Corruption Indicators</b>	<b>Measurement object</b>
Composite Indicators of corruption perception	Corruption perception
Sample surveys based on direct experiences (self-reported)	Direct experiences of corruption
Judiciary measures	Judicial deeds (i.e., judgments, sentences, convictions for corruption crimes)
Statistical Inference and Market measures	Comparison btw real data and theoretical models (i.e., hypothesized model under the hypothesis of absence of corruption)
Risk and preventative measures	Presence of abnormalities signalling a risk of corruption

2. *Synthesis of limits of traditional corruption measures*

Any corruption measure has its own advantages and drawbacks. While a discussion of their advantages is out of the scope of the present contribution, a brief recall of their limitations is instrumental to introducing the next sections devoted to preventative indicators of corruption and is therefore presented in this section. Composite indicators of corruption perception have several drawbacks. The first source of limitation is linked to the fact that they are composite indexes, and thus they suffer from the same limits of any other composite index. A composite index is a synthetic measure obtained typically as a sum or as a mean of other simple indicators. As such, its value varies depending on the simple indicators considered, the choice of the aggregation scheme (i.e., sum or mean), the weighting scheme, etc. It follows that all the choices adopted in the process of composite indica-

tor construction affect the values assumed by the composite itself and its consequent variability at the detriment of its stability and robustness. The second limit points to the fact that, even if perception composite indicators are useful tools to simplify and communicate information to a non expert audience, they lose information on specific aspects contributing to qualify corruption and expressed through single indexes. Overall, the accuracy and explanatory power of perception composite indicators for measuring corruption is in doubt because perception-based indices try to aggregate and keep together too many different aspects of perceived corruption under a unique number/value, limiting the range of questions that can be asked and providing limited support for policy actions. However, perhaps the most evident drawback of these measures of corruption is that they measure corruption through perceptions, and not through direct experiences of corruption. Some authors, such as Donchev and Ujhelyi (2014) underline that even if perceptions can be positively related to direct experiences of corruption, the relationship is not linear. They report that perception-based measures of corruption are good at distinguishing among Countries when the perceived level of corruption is low, while they are not as good at differentiating Countries in cross-national studies when the perceived level of corruption is high. Finally, Sequeira (2012) stresses that these measures are affected by sample errors. This happens anytime two conditions apply: when the weight of a particular sector of activity is high in the economic fabric of a State and when that sector is perceived as highly corrupted by the experts (i.e., if the great majority of the experts in Nigeria are managers engaged in the oil extraction sector, and if this sector is perceived as corrupted, then Nigeria will end up with occupying a high position in international rankings of corrupted Countries, but with a high internal variability).

To overcome these limitations of perception-based indicators of corruption, the first step has been to develop further surveys or questionnaires that include questions assessing the direct involvement of individuals and firms in corrupt practices in well-defined instances, such as when obtaining a water contract or an electricity connection. On the other side, there has been an effort to define in a more accurate way the samples of reference, in such a way that they were representative of the whole population of individuals and firms. For instance, the World Bank Enterprise Surveys (WBES) and the Business Enterprise Economic Surveys (BEES) are examples of these kind of measures collecting the most widely used firm-level survey data on corruption. These measures allow us to overcome some limitations of perception-based indicators and thus, for instance, to get detailed info as regards to the distribution of corruption across the various activity sectors, to iden-

tify the distributional costs of corruption, and to devise targeted strategies to tackle it. Despite these important steps forward, these measures present drawbacks as well. A major challenge is the extent to which a respondent may purposefully misreport corruption events. Fear or shame of exposure could lead respondents to under-report corruption, while a strategic concern with influencing action on a particular corrupt practice could lead them to over-report instances of corruption. The direction of this *social desirability* bias is hard to ascertain as it depends on the particular interest of the respondent in either facilitating or preventing these practices. This is in turn tied to whether the respondent is benefiting or not from corruption, and to how detrimental or justified the respondent views his or her actions.

Judiciary measures show fewer challenges than the previous from a methodological/statistical point of view. However they also have limitations, linked first of all to their limited utility in terms of corruption prevention, in fact judicial deeds are usually issued after a corruption crime has taken place. Besides, cross-national surveys can hardly be based on such measures as judicial systems can be very different one another (Carloni, 2017a). This is the main reason that perception-based measures are still the preferred measures in current cross-national studies. Fisman and Golden (2017) also observe that relying on penal convictions for corruption crimes to measure corruption implies the efficiency of the judiciary system, while it is known that judiciary systems where corruption in a spread have a low probability to benefit of that independence, objectivity and freedom of judgment, which represent the preconditions to pursue corruption crimes. In this sense, thus, the absence of anti-corruption judiciary sentences can be indication of absence of corruption on one side and, on the other side, of widespread diffusion of corruption, in such a way that even public officials are involved in corrupt practices. On the other side, a high number of corruption convictions could mirror a high efficiency of the whole system, but would not exclude that those cases (i.e., anti-corruption sentences) are created ad hoc to give the fake image of a State that is dealing with corruption issues.

Statistical inference and market measures are further measures that estimate corruption through a comparison between real data and a theoretical statistical (or economic/ econometric) model hypothesising the non-corrupted behaviour. Such measures make previsions on the level of corruption verifying to what extent real data deviate from the hypothesis of absence of corruption. These studies are particularly promising as they allow to estimate the incidence of corruptive practices in specific contexts or sectors, to understand the micro-dynamics of corruption, and to study the economic impact of corruption. On the opposite, the biggest challenge is linked to the

fact that the measure of corruption they propose – in the form of a difference between what is can be observed from real data and what it should be observed (under a specific theoretical model) in the absence of corruption is just an indirect measure of corruption and, as such, it could not be linked to corruption itself but to other forms of inefficiency (Sequeira, 2012). Further, as these last measures use statistical models based on hypotheses and assumptions, the plausibility of the proposed conclusions depends on the plausibility of the theoretical assumptions the model is based on. This last limit has, however, a relative load as there are several statistical ways to verify the sensibility of hypotheses and their capability to realistically mirror real data.

### *3. Risk and preventative measures of corruption*

The acknowledgment of the limits of current measures of corruption, and the dissatisfaction in the public debate with the most frequently referenced indicators of corruption, has pushed to develop further measures of corruption. In this frame, risk and preventative measures of corruption mark a shift from an essentially repressive approach to a broader, preventative approach, in which good conduct and social practices are emphasized. The key target of such measures is no longer just understanding the dynamics of corruption, but framing those behaviours that, even if not necessarily relevant for the purposes of criminal law, need to be addressed in terms of corruption prevention (Carloni, 2018). Thus, the measurement of the “stock of corruption” leaves space to the development of a strategy to prevent and combat corruption beyond the central core of criminally relevant conduct.

Such a shift introduces a new conception of administrative corruption (Clarich, Mattarella, 2013) that includes not only criminally liable conduct, but also the full range of crimes against the public administration and all the situations in which – regardless of criminal relevance – a malfunctioning in the administration emerges, due to the use of assigned functions for private ends. This approach is therefore broadly “comprehensive of the various situations in which, in the course of administrative activity, there is evidence of the abuse by an individual of the power entrusted to him, in order to obtain private benefits” (Interministerial Committee, 2013; Greco, 2008).

Table 2: Approaches to corruption measurement

Approaches to corruption measurement	Object of measurement	Aim of measurement
Repressive approach	Criminal conducts	Measuring the level/stock of corruption
Preventative approach	Any behaviour signalling a malfunctioning, due to the use of assigned functions for private ends	Spot any situations at risk

According to the ANAC, the Italian Advisory Board for the fight against corruption, “*It is not as important to measure corruption, as much as to understand where it emerges from, and to issue an alert when such conditions arise, a warning light that can help prevention*” (ANAC, 2017). Indicators of risk and prevention are thus indicators that can highlight a specific “risk” of corruption and acting as “alarm bells” or “red-flags”. The basic idea behind the Italian legislation is that the use of an array of indicators signalling abnormalities can allow the level of risk to be represented in effective terms. In particular, the public contracts databases have the greatest and most direct potential for use and development for these purposes. This is not only true in the Italian context, as similar databases exist on the use of other Countries.

The National Anti-Corruption Authority viewpoint at this regard can be summarised by the following statement

Delay or failure to approve planning instruments, the excessive use of emergency procedures or contract extensions, the recurrence of small assignments with the same object, or the reiteration of the insertion of specific interventions in planning actions, which do not lead to the phase of awarding and the execution of tenders awarded with frequency to the same subjects, or tenders with a single valid offer, are all elements that reveal a lack of planning and, in the final analysis, signs of a distorted or improper use of discretionary powers (ANAC, 2015).

#### 4. Indicators of administrative anti-corruption efforts

A contiguous, yet different group of indicators compared to those of corruption risk and prevention, is that including indicators of administrative anti-corruption efforts, which prove especially useful to understand the capac-

ity of administrative institutions to fight the spread of deviant behaviour and corrupted practices in the administration offices they represent, by adopting and executing the preventative measures entrusted by the national legislation (Carloni, 2018). The rationale for the development of this further group of measures is a broader approach to the phenomenon of corruption, as we anticipated before, where it comes into play not only repression but also prevention targets, for which the monitoring of anti-corruption activities adopted by administrations is instrumental to assess not only the effective adoption and implementation of specific measures but also their effectiveness in preventing corruption. The pre-condition for the development of indicators in the field of combatting “administrative” corruption is being able to rely on data held by different administrations, primarily with respect to the adopted decisions and the occurrence of administrative, financial, and disciplinary events, experimented by the administration offices themselves, in the fight against corruption. What is the difference between risk indicators and this last type of indicators? Risk indicators primarily involve local administrations, while these last indicators regard the exercise of supervision and monitoring tasks at the central level, and the degree to which administrative offices activate anti-corruption measures entrusted by the national legislation.

Despite potentials, these indicators show certain criticalities as well. A main drawback, common to all measures based on official government-led corruption audits, is that once officials begin to understand the workings of a system that attempts to consistently detect and measure corruption through systematic audits, they may adapt their behaviour and find ways to elude it. Further, the capability to identify situations at risk of corruption largely depends on the truthfulness of claims and, eventually, on the system of control between such claims and real circumstances. Besides, summary indicators based on auto-declarations of administrative officials provide information on the capability of the administrative system to effectively adopt preventative measures rather than on the actual effectiveness of preventative measures themselves. In other words, these indicators provide information on the degree of *compliance* and adoption of preventative measures, rather than on the actual effectiveness of anti-corruption measures.

#### *4.1. Administrative anti-corruption efforts indicators: the case of ITALY*

With the recent law n.190 of 2012, named “Provisions for the prevention and repression of corruption and lawlessness in the public administration”, each Italian public institution (municipalities, regions, universities,

local health units, public research institutions, etc.) has to adopt a three-year plan for corruption prevention (“Piano Triennale per la Prevenzione della Corruzione”, PTPC), which provides an assessment of the different exposure levels of offices to the risk of corruption and specifies the organisational changes designed to prevent such risk. To this general aim, each institution selects a supervisor, indeed called prevention-of-corruption supervisor (“Responsabile per la Prevenzione della Corruzione”, RPC). Among his/her tasks, the supervisor has to fill in an annual report about the efficacy of the prevention measures defined by the PTPC. Such report is filled in through a questionnaire, made available in spreadsheet format by the Italian National Anti-Corruption Authority (ANAC) and has to be uploaded in the “Transparent administration” section of the public institution website.

The aspects dealt with by the RCP form include: monitoring the sustainability of all measures, general and specific, identified in the PTPC; specific measures, in addition to mandatory ones; computerising the flow to fuel data publication in the “transparent administration” website section; monitoring data publication processes; training of employees, specifically dedicated to prevention of corruption; staff turnover; checking the truthfulness of statements made by parties concerned with unfitness for office causes; measures to verify the existence of incompatibility conditions; prearranged procedures for issuing permits for assignments performance; reporting the collection of misconduct by public administration employees (whistleblowing).

By exploiting the data contained in the RPC forms, a number of case studies – see Gnaldi, 2018; Gnaldi and Del Sarto, 2017; Del Sarto and Gnaldi (2018); Gnaldi and Del Sarto (2018) – on corruption prevention have been carried out in Italy for investigating the degree of accomplishment of anti-corruption measures by Italian municipalities, with the aim of ascertaining clusters of units (i.e., municipalities) characterised by distinctive anti-corruption behaviors, their geographical distribution in the Italian macro-regions, and the association between anti-corruption behaviors and some relevant covariates (e.g., the municipality size). Overall, these studies provide a kind of “*Anticorruption Compass*”, not dissimilar to the “*Transparency Compass*” that was produced in Italy in the context of transparency obligations, providing a synthetic mapping of compliance that can be used by ANAC to guide its monitoring and control activities. A more complex objective would involve the establishment of suitable indicators to represent the *effectiveness* (or “quality”) of these measures, which will imply the cross-referencing of a large amount of data, from different sources, such as, for example, measures regarding the adoption of various

codes of conduct, the effectiveness of which can be evaluated by comparing data regarding the adoption of the measure with data relating to the disciplinary sanctions imposed (Carloni, 2018).

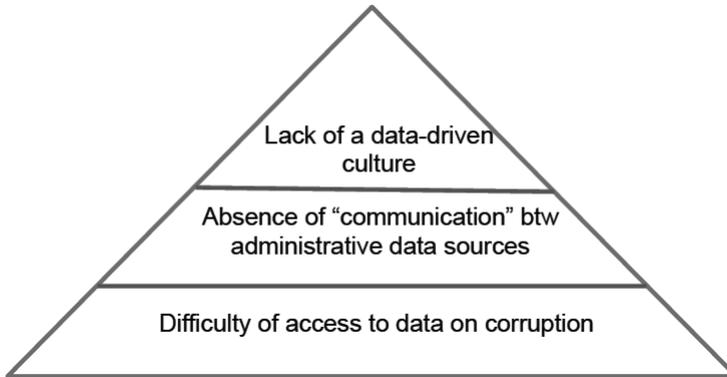
### *Discussion*

It is agreed that the basic and unavoidable general condition to support national administrative agencies in charge of contrasting and preventing corruption is allowing them to rely on an array of indicators, because none of them, taken alone, can provide a complete picture of corruption. This, in turn, sends back to the need of a system of data, of adequately organised and up-to-date datasets from different sources, matched together by expert statisticians, so that information contained in a dataset can be linked to information provided by other datasets.

The need for data to support the decision process of national agencies in charge of devising targeted strategies to tackle corruption clashes with a number of difficulties the Italian administrative system experiences at several pyramidal levels. We have seen that at the base of the pyramid there is a substantial lack of data on corruption repression and prevention. National data on corruption prevention is nowadays essentially unavailable in Italy, but downloading any single RPC form from each single public institution website. This allows researchers and practitioners to work only with small samples of the whole population. A limitation that, in the case of corruption prevention indicators could be overcome if the current administration system of the RPC forms were moved to an Internet surveying technique, which – as known – would allow us to obtain clean data right after the form completion. At a higher level of criticality, there is an absence of communication between data from different administrative sources. Italian available datasets on corruption meet transparency requirements but are built disjointedly and independently one another, each pursuing specific information targets (i.e., contracts, administrative preventative actions, and so on). On the contrary, it is known how important is to tie together information from data from different sources to gain a systematic overview of corruption. This level of criticality is straight linked to the chronic disorganization of the Italian administration system and to the lack of an overall view targeted at having datasets from different sources matched together in a coherent system of national databases. On top of the Italian criticalities there is the lack of a data-driven culture, that is, a culture that employs a consistent, repeatable approach to strategic decision-making through data proof. Such

a lack translates in an historic and actual weakness of Italian administration offices, playing as obstacle to the actual fulfilment of anticorruption policies.

Figure 1: Open issues in the Italian data system on corruption.



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## The economic impact of corruption

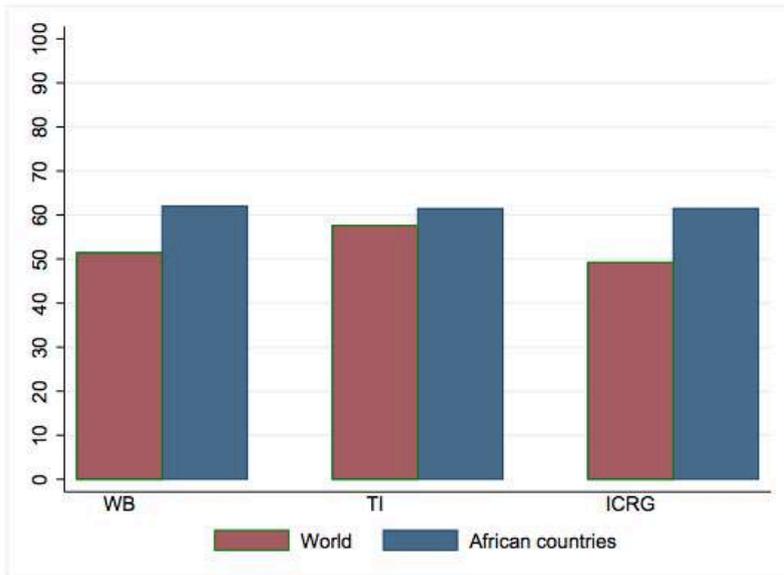
### *Introduction*

Corruption is a constant concern for countries facing economic problems and a considerable amount of research has gone into understanding its economic effects. It is a relatively complex phenomenon encompassing a range of human action, so to consider its effects on the economy or polity, it has been necessary to start with a relatively straightforward definition. The World Bank settled on the abuse of public office for private gain as a useable definition of corruption. Transparency International provides a similar, but more general definition which is not limited to the public sector as in the case of the World Bank definition. In most countries, one would expect these to show similar patterns over time. However, the excessively narrow current definition of these perception indices of corruption leaves many conceptual ambiguities open to question (Svensson, 2005). For example, although the term private gain may describe the receipt of money or some kind of asset of value, it may involve increased political power or status, in addition to advantages deriving from receiving promises for future favours or benefits for closely connected persons (nepotism or favouritism). In addition, this definition does not consider corruption as a multidimensional phenomenon. For example, there is a certain degree of consensus in recognising at least two relevant dimensions of corruption defined as political and administrative corruption – which should be taken into account when anti-corruption policies are implemented (Bardhan, 1997, 2006). Our contribution intends to examine the (detrimental) effects of corruption on the World economic growth, restricting the discussion on the aggregate indices of corruption calculated by World Bank or Transparency International. Our view is in accordance with large part of macroeconomic literature in which aggregate perception of corruption based on individuals actual experiences are views as the best and sometime the only, information available.

1. *Measuring perception of corruption*

Corruption is measured using the World Bank control of corruption index (WB), which is based on the perceptions of firms and is interpreted as indicating the extent to which public power is exercised for private gain, including administrative and grand corruption, as well as capture of the state by elites and private interests. The World Bank corruption index indicator ranges from 0 to 100, where 100 means that a country is perceived to be corrupt. An alternative measure is provided by the International Country Risk Guide Corruption Index (ICRG), which is produced by a team of country experts and is part of the WB index, but is more oriented to business corruption.

Figure 1: Measuring corruption perception



WB: World Bank corruption index. TI: Transparency International corruption index. ICRG: International Country Risk Guide corruption index.

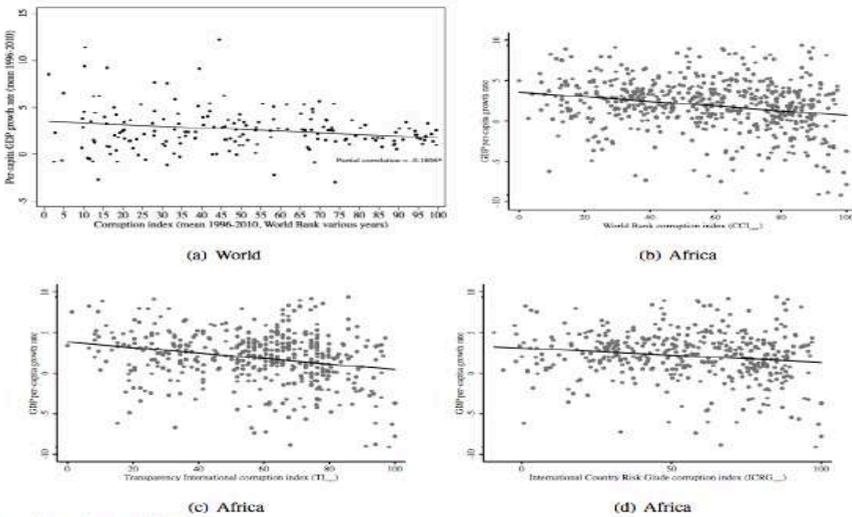
It ranges from 0 to 6, where 6 means that a country is non-corrupt, but in this study it is rebased to a scale ranging from 0 to 100, where 0 means that a country is perceived to be non-corrupt for comparability with the WB. Finally, Transparency International (TI) provides a corruption index that is similar to WBcorr, but based on a more general definition of corruption as the abuse of entrusted power for private gain, rather than just the public

sector. In Figure 1, we show the World and African average of the corruption scores for the three indicators. As we can note, African countries have corruption scores higher than the average of the World, although this difference is less important for the indicator of Transparency International which also accounts for private corruption.

## 2. Corruption and growth

A major concern for the World Bank and others is the impact of corruption on economic growth and this has been extensively researched, with most studies following the approach of Barro (1991) and reporting cross sectional regressions with the average rate of economic growth as a function of average corruption and a set of control variables. Some studies have found evidence of positive effects with, for example, Meon and Weill (2010) arguing that corruption can provide a greasing of the wheels rather than putting sand in them, meaning it is less detrimental to efficiency in countries where institutions are less effective and may even be positively associated with efficiency in countries where institutions are extremely ineffective.

Figure 2: The relationship between corruption and growth: the World economy and African countries



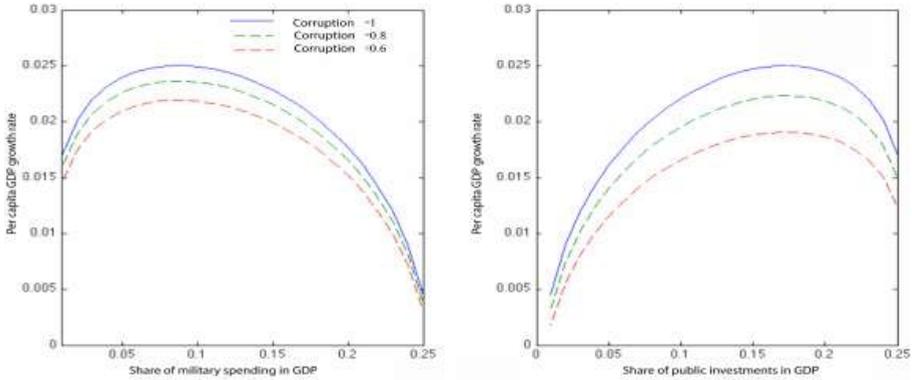
Sources: d'Agostino et al. (2016a, b).

While not denying that corruption may have played a positive role at particular times in specific countries, however, the main findings of the empirical literature have been that corruption tends to lead to lower growth, hampering both private and government investment spending, and inhibiting the efficiency of public services (Ugur (2014), d'Agostino et al., 2016). Figure 2 plots the average growth rate and average World Bank control of corruption index for 1996-2010 across all countries for which data are available (World sample) and for Africa. A clear negative association is apparent in the World sample. Countries with higher scores of corruption exhibit a slower per capita growth rate and these observations are confirmed selecting the sample for African countries or using alternative measures of corruption.

### *3. The main channel of the detrimental effect of corruption: the government expenditure*

While generally accepting the negative effects of corruption on growth, the literature still remains divided on the channels, through which this works and the size of the direct and indirect impact of corruption on the growth rate. The seminal work by Mauro (1995) found that much of the effect of corruption on growth comes through its effect on investment. Corruption is also seen to distort of tax collection, affecting not just the level of public expenditure, but also its composition, with Rose-Ackerman (1997) arguing that corrupt government officials are likely to adjust spending allocations to favour projects that allow them to collect bribes and to keep them hidden. It is certainly likely to be easier to collect substantial bribes on the high technology defence component or infrastructure projects than on teachers salaries (Mauro, 1997) and the nature of defence procurement and trade has certainly made it particularly prone to corrupt practices. Secrecy and limited competition have led to a relatively high level of informal contracts, encouraging rent seeking, increasing the cost of military activities, and crowding out productive investment in the private sector (Mauro, 1998). Thus, we follow the endogenous growth model in allowing corruption to influence the allocation of public spending and to create budgetary distortions. In particular, corruption not only acts as a proportional tax on a budget surplus, but also distorts the composition of public spending (d'Agostino et al., 2012). Below, a comparative statics analysis is carried out and the effects of corruption on the categories of government spending illustrated by model simulations.

Figure 3: Direct and indirect effect of corruption on growth



Sources: d'Agostino et al. (2016b).

Figure 3 presents simulation results for the effects of military spending and government investment spending on growth, with the parameters used to calibrate the model mainly taken from Devarajan et al. (1996). The solid line represents the baseline case in which corruption does not affect the growth (e.g.,  $h_i = 1$ , no-corruption) and the broken lines show the effect of corruption which reflect growing changes in the detrimental effects of corruption. The left hand panel shows that an increase in the share of military spending initially has a positive effect on the growth rate, but then its effect becomes negative, while the right hand panel shows that for investment spending the positive effect is rather more sustained. So reallocating funds from military spending to public investment is likely to increase growth. These results also clarify the conditions under which the growth rate rises when government spending falls. It is when the share of government expenditure is less that its optimal share with the precise path it takes depending on the relative productivity of the different sectors. Corruption linked to government investment spending has the largest effect on growth.

#### 4. The economic impact of corruption on growth rate

The theoretical results are tested empirically by using World and African panel data from 1996 to 2010. Table 1 lists the direct, indirect and net elasticities for corruption as calculated by d'Agostino et al. (2016a); d'Agostino et al. (2016b). These results provide valuable information on the complex manner in which corruption can affect the real per capita growth rate. A 10% reduc-

tion in the level of corruption increases the growth of real per capita growth by 7.86%, which seems reasonable and is consistent with the estimates made by Mauro (1995), and Pellegrini and Gerlagh, 2004, for similar groups of countries but shorter time series. Interestingly, the indirect effect of government investment spending on growth is estimated to be negative which implies that the response of government investment depends heavily on changes in corruption and less so on changes in military spending. The implied reduction in the effect of government investment spending on growth as corruption increases could be attributed to the rise in the costs of production and uncertainty that corruption causes, which could also exacerbate institutional weakness (Aidt, 2009). When the direct and indirect effects of corruption are combined the effect on economic growth would seem to be particularly strong. The gross negative effect of corruption is amplified by the negative effect on the share of government investment spending, which dominates any positive indirect effect that might come from military spending, giving a negative net elasticity (-0.943) that is larger than the direct. These results also hold when the estimated elasticities are obtained from the growth model using the other corruption indices as Transparency International and International Country Risk Guide.

Table 1: Estimate of elasticity from the World and African samples

	Direct		Indirect		Total	
	World	Africa	World	Africa	World	Africa
WB	-0.786 (0.350)	-0.432 (0.21)	-0.157 (0.06)	-0.276 (0.08)	-0.943 (0.35)	-0.709 (0.23)
TI	-1.223 (0.614)	-0.645 (0.32)	-0.240 (0.11)	-0.332 (0.10)	-1.463 (0.62)	-0.977 (0.33)
ICRG	-0.901 (0.42)	-0.850 (0.26)	-0.197 (0.09)	-0.145 (0.06)	-1.098 (0.46)	-0.996 (0.27)

Sources: d'Agostino et al. (2016a, b). *WB*: World Bank corruption index. *TI*: Transparency International corruption index. *ICRG*: International Country Risk Guide corruption index.

African countries have on average a lower negative impact on growth rate, although with impact not statistically different from the elasticities found in the World sample and results are not sensitive across the different indicators, a finding that increases confidence in the conclusions. Table 2 proposes an economic evaluation of an anti-corruption policy in reducing 10% corruption in the World economy or in Africa. By using estimates of elasticity and the per-capita GDP in dollars 2016, we estimate this anti-corruption positive impact in GDP

in a range of 982 to 1500 dollars. This magnitude is slightly reduced for Africa in which the GDP positive impact is between 750 and 946 dollars.

Table 2: The economic impact of corruption

Per capita GDP in Dollars 2016	Growth rate (Average)	Elasticity for 10% decrease	Change in growth rate	Changes in GDP
<b>WORLD:</b> 10417	2.63	9.43	0.24	982.32
		10.98	0.28	1143.79
		14.63	0.38	1524.01
<b>AFRICA:</b> 1638	2.40	7.90	0.18	750.97
		9.96	0.23	946.80
		9.77	0.23	928.74

### *Conclusions*

Growing concerns that high levels of corruption might have detrimental effects on economies have motivated a large amount of academic and policy-oriented research. Recent work has moved beyond simply analysing the direct effects and has tried to investigate the processes by which corruption affects growth, in particular its impact on the important relationship between government spending and economic growth. This investigation generally develops an extended endogenous growth model that allows for this effect and by highlighting with simulations the non-negligible indirect effect of corruption on military spending and government investment expenditure which have heterogeneous effects on per-capita growth rates. The extended model leads to test the hypothesis that corruption affects negatively growth is confirmed, even if it is slightly different for Africa with respect to the World economy. It also leads to the finding that corruption has a complementary effect with military spending, which make the negative impact of corruption larger. Therefore, countries with high military spending and high corruption are particularly disadvantaged. Overall, the results imply that when studying the effects of corruption on economic growth it is important to consider not just the direct impact, but also the indirect and complementary effects that come through the interaction between corruption and different types of government spending. Failure to do so is likely to lead to a serious misunderstanding of the way in which corruption can affect growth. It also means that countries that forcefully combat corruption are likely to see not only a direct improve-

ment in aggregate economic performance, but also an indirect improvement in the allocation of government spending.

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# PART VIII

Public duties and code of ethics to prevent corruption



MARIA GIUSEPPINA PACILLI, FEDERICA SPACCATINI, ILARIA GIOVANNELLI

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## Unethical behaviour in organizational settings: a socio-psychological perspective

### *Introduction*

Many people often tend to think that (im)morality, regardless of situations and contexts, corresponds to a stable personality trait which determines individuals' behavior in a predictable way. In this vein, individuals who engage in immoral behaviour are considered "rotten apples". Said differently, they are considered as characterized by relatively stable traits of personality that lead them to behave uniquely in an unethical manner, regardless of the contexts where they act. Despite its weakness, when applied in an organizational context, this approach plays a reassuring function. Indeed, it gives the illusion that employees' dishonest behavior can be preventively avoided in the hiring phase through *ad hoc* psychometric tests able to distinguish honest from dishonest individuals and select the first ones.

According to the research approach we will be adopted here, individuals' morality should be understood as a dynamic and malleable dimension – rather than a stable one – affected by interpersonal as well as social factors (Gino, 2015). The aim of the present chapter is to provide a review of the socio-psychological research on unethical behavior. First, we will provide a description of the different types of unethical behavior, examining the contexts and conditions under which they occur. Then, we will reflect upon the possible strategies aimed at promoting a more ethical behavior in organizational settings.

### *1. A taxonomy of unethical behavior*

Among the numerous existing definitions of unethical behavior, the one that will be adopted here conceptualizes unethical behavior as those actions that produce negative consequences for other people, that are illegal or morally unacceptable to groups, organizations or to broader society (Jones,

1991; Zhang, Gino, & Bazerman, 2014). The different manifestations of unethical conducts can be distinguished into two main categories (Gino, 2015; Moore & Gino, 2013). The first category pertains to those situations in which people assume unethical behavior without being completely aware of the moral implications of their own actions. The second category pertains to those situations in which people consciously engage in unethical behavior, tending to justify their conduct in their own eyes and other people's. In the next two paragraphs these two categories will be described more in details.

### *1.1 Moral unawareness and difficulty in recognizing moral implications of our actions*

Sometimes people act unethically being completely unaware of the moral implications of their own actions. For instance, it is more difficult to recognize an unethical conduct when it shifts gradually from being moral to being immoral, rather than when it suddenly shifts from being moral to being immoral (Gino & Bazerman, 2009). This is why the first dishonest act is the most important one to prevent (Ariely & Jones, 2012). Among the factors that play a crucial role in allowing us to neglect the moral contents of our decisions and actions, a particularly relevant role is played by social norms, understood as people's general behavioral expectations in a specific context (Cialdini, Kallgren, & Reno, 1991). Social norms can be either *descriptive* – i.e., by delineating how most people behave in a specific situation – or *prescriptive* – i.e., by specifying the way people should behave according to moral and social standards (Cialdini, Reno, & Kallgren, 1990). Social context is often crucial in determining which norms will be respected between descriptive and prescriptive norms. Indeed, people tend to behave in a socially approved manner by observing the behavior of others and inferring what is considered acceptable and what is not. For instance, when someone assumes a position in a new organization, they usually observe others in order to understand which is the right behavior to adopt in such a context. Specifically, by observing the unethical behavior of others, people can assess the costs and benefits of engaging in specific transgressions, how frequently people engage in such behavior and to what extent it is tolerated. For example, we are more inclined to behave altruistically when we see others behaving this way (Latanè & Darley, 1968). Just as when others ignore a person in-distress we are likely to do the same (Bryan & Test, 1967). Thus, other people with their action or non-action, help us establish a general standard of ethical or unethical behavior. Gino and colleagues (2009)

examined whether observing the unethical conduct of others could produce a *contagious effect*. The authors asked a sample of students to solve some simple math's problems in the presence of other people. In some of the experimental conditions, participants were given the opportunity to cheat by reporting higher but falsified results, thereby improving their performance in order to gain bonus money unfairly. Notably, participants were exposed to a confederate of the experimenter who manifestly cheated completing the task far too quickly. Results showed that when participants observed the confederate cheating, unethical behavior increased, especially when the confederate was a member of the same group of participants (experimenters manipulated the confederate's membership by making them wear either a t-shirt of the University of the participants or a t-shirt of another University).

Alongside social norms, the type of aims to be achieved by the personnel within the organization are decisive in determining the engagement in unethical behavior (Moore & Gino, 2013). Establishing aims is fundamental to ensure an optimal organizational functioning and to stimulate efficient workers' behavior. However, research showed some drawbacks of organizational aims. Indeed, it has been shown that when the aims to reach are established by others, people tend to behave more often in an unethical manner (Schweitzer, Ordóñez, & Douma, 2004). Thus, specific aims can potentially lead people to feel less responsible of the moral implications of their actions overlooking the unethical nature of their own choices (Shah, Friedman, & Kruglanski, 2002). Moreover, when people tend to focus on the achievement of the aims at all costs, this can imply overlooking the ethical and legal standards.

### *1.2. Awareness and moral justification*

Moral unawareness refers to the lack of consciousness of the (negative) moral implications of individuals' actions while moral justification refers to the process through which individuals, who are clearly conscious of the immoral nature of their actions, try to justify them. Moral justification has to do with individuals' tendency to redefine their actions in order to make these actions seem less immoral and more acceptable for them and for others. By redefining their action from immoral to moral, individuals make strategic adjustments in order to cope with guilt feelings and to reduce cognitive dissonance associated with their unethical conducts. Specifically, this mechanism enables individuals to cope with so called *ethical dissonance*, i.e., the discomfort produced by inconsistency between individuals' dishonest behavior and

their need to maintain a positive self-image (Ayal & Gino, 2011). Morality plays a primary role in people's definition of self-image: as a matter of fact, an important component of one's identity is the so called moral identity, i.e., the high relevance of being moral, honest and equipped with ethical characteristics (Aquino & Reed, 2002). When people face ethical dissonance, they are highly motivated to adopt numerous strategies in order to cope with this negative psychological condition caused by the concurrence of inconsistent motivations. Research literature identifies two main ways by which moral justification occurs, these are *moral credit* (Merrit, Efron, & Monin, 2010) and *moral disengagement* (Bandura 1990, 1999). *Moral credit*, or *moral self-licensing*, refers to the psychological mechanism through which people, drawing on past moral behavior as a form of moral credit, allow themselves to engage in and to justify immoral actions. Past moral behavior makes people feel secure in their positive self-image, especially as regards their personal morality. In other words, just as in the case of bank accounting, good and moral past actions give people moral credit, which they can invest for engaging in immoral actions without worrying about feeling immoral.

Bandura (1990, 1999) introduced the term *moral disengagement* to refer to the cognitive process by which people can engage in immoral actions without feeling uncomfortable with it. Moral disengagement downplays those negative feelings, such as sense of guilt and shame, which lead people to experience the aforementioned cognitive dissonance when immoral conducts are enacted. Moral disengagement serves to deactivate self-control and self-sanction which otherwise would impede people to act in an immoral manner. Bandura described several moral disengagement mechanisms, among which we can list *Euphemistic Labeling*, *Moral Justification* and *Advantageous Comparison*, which strategically redefine unethical behavior.

- *Euphemistic Labeling*. Behavioral actions can take on different appearances according to the language and labels used to describe them. The language chosen to describe one's unethical actions can be a powerful means to overcome feelings of guilt and shame associated with such misconducts. Indeed, euphemistic labeling makes unethical conducts more acceptable and hence legitimizes them (Bandura, 1990; 1999). There are many examples regarding euphemistic labeling such as: sexist insults and comments towards women defined as innocuous jokes, mass layoff defined by industries as strategical reorganization of workforce and massacres of civilians in wartime defined as collateral damages.

- *Moral Justification*. Unethical behavior is justified by invoking a good cause. Unethical behavior is often considered more acceptable if somewhat useful to society. Examples of this mechanism in organizational environment are those situations in which employees believe that it is acceptable to adjust or alter the truth in order to defend their organization, or when since they are acting on behalf of the organization, employees think they do not deserve to be blamed for their misconduct.
- *Advantageous Comparison*. How behavior is perceived often depends on what it is compared against. In the context of (im)moral conducts, by contrasting one's unethical behavior with worse and more deplorable actions, people willingly alter their judgments and perceptions of their own misconduct to reduce their feelings of guilt. A clear example of this mechanism within an organization is the idea that "it is not really harmful to damage an organization's equipment considering the illegal business conducted by managers" or that "It is hardly a misconduct to be frequently absent from work considering the laziness of many employees".

A second category of moral disengagement processes operates in order to conceal and minimize the consequences of unethical behavior. These mechanisms were identified by Bandura as *Displacement of Responsibility*, *Attribution of Blame* and *Diffusion of Responsibility*.

- *Displacement of Responsibility and Attribution of Blame*. These mechanisms refer to the psychological processes that allow people to engage in unethical behavior because, perceiving the legitimized authority as responsible for their actions, they do not feel personally responsible for the unethical conducts (Milgram, 1974). In an organizational environment these mechanisms occur when employees do not fulfill their work duties: the consequent damage for the organization and the responsibility rather than being attributed to employees, is attributed to an organizational error in hiring processes or job training. Another instance is the case in which items are stolen from the organization and the fault and responsibility are assigned to the lack of organizational preventive actions rather than to employees.
- *Diffusion of Responsibility*. According to this mechanism the responsibility for unethical conducts is distributed among people, generating a climate in which "if everyone is responsible, no one is responsible". A clear example of diffusion of responsibility is the way by which the employees of the Petrified Forest National park in Arizona (USA),

famous for its ancient fossilized trees, tried to solve the problem of the frequent thefts of fossilized remains carried out by tourists wanting to take home a souvenir. Employees affixed information plaques whereby tourists were asked to not steal ancient remains, given that the nature of the forest was changing due to frequent thefts. The unexpected result was that such affixion rather than solve the problem, tripled the number of thefts (Burkeman, 2015). The mechanism of diffusion of responsibility was activated among visitors: “if other visitors steal a fossil, my taking one more piece is not going to make any difference!”. This is a clear example of how people tend to engage in immoral behavior to a greater extent when the responsibility is diffused, rather than when people perceive themselves as personally responsible for their misconduct. In organizational environments there are many examples of this mechanism, such as the case in which employees who asked their colleagues to clock off for them because they wanted to leave early are not to be blamed because all colleagues do that, or the case in which employees who need to take time off do so because it’s considered the common norm. Another way through which the sense of responsibility for unethical conducts can be diffused and diminished, is the division of labor. The fragmentation of unethical behavior (without considering the whole action and its complexity) may alter the perception of one’s conduct in such a way that it appears harmless. By doing so, the focus is on the specific details of one’s own work activity, rather than on the nature of what one is doing as a whole.

Alongside the aforementioned cognitive processes, several studies provided evidence of the primary role of emotions in fostering moral disengagement processes in the workplace. It is well known that in organizational environments, when an employee perceives the working condition as stressful, it is likely that these distressed feelings can lead the employee to engage in varied unethical behavior. In this kind of situation, unethical behavior becomes a dysfunctional manner through which people try to cope with unpleasant and problematic emotional states such as excessive workloads, lack of necessary information to correctly perform the work, lack of resources, conflict with the manager or colleagues, a sense of lack of autonomy or support within the organization. Situations like these foster a wide range of negative feelings such as anger, frustration, sadness and anxiety. In particular, numerous studies found a relationship between anxiety, irascibility, low work satisfaction and engagement in deviant behaviour during workhours. The more people experience negative feelings, which

disrupt their work performance, the more they tend to justify their deviant behaviour. Moral disengagement processes mediate the relationship between negative feelings generated by work-related stress, and engaged deviant behaviour (Fida et al., 2014).

## 2. *When others engage in unethical behavior... the case of whistleblowing*

The term *whistleblowing* has been borrowed from the field of sports, where it is used to indicate the referee's whistle to signal irregularity. In the work environment, the term indicates employees who publicly denounces the dishonest conduct they witness within the organization (Fraschini, Parisi, & Rinoldi, 2011). Why it is so relevant to speak about whistleblowing from a socio-psychological point of view? In an ideal world, this kind of behavior should not be so complex: when individuals witness dishonest actions or when those actions come to the individuals' attention, what they should do is check that those actions are illegal and denounce them. However, in reality this is not quite so simple: in such situations, people often decide to remain silent, thus contributing to the unethical behavior by becoming an accessory to the fraud and by facilitating a rising spiral of fraudulent conducts. To promote whistleblowing practices, it is important to comprehend what induces people to remain silent. A first element to clarify in order to understand a person's difficulty to report and denounce, regards the nature of whistleblowing. It is incorrect to reduce whistleblower merely to the dilemma to denounce or not denounce, because in this way it seems that people are torn between a moral choice – i.e., to denounce – and an immoral choice – i.e., to remain silent. More deeply, whistleblowing entails uncertainty between two different moral-related components: *justice and loyalty* (Andrade, 2015; Dungan, Waytz & Young, 2015).

While justice refers to the fact that all individuals, regardless of their group membership, are equally treated and that they behave in adequate manner, loyalty is specifically oriented towards in-group members. It is not coincidence that dishonest practices – such as bribes – are more prevalent in collectivist countries, where group membership is of fundamental relevance in defying individual identities (Mazar & Aggarwal, 2011). Once clarified that the conflict is between loyalty and justice, then it is reasonable to think that the whistleblower's dilemma can be solved when justice prevails over loyalty. However, it is not that simple, because within organizations, it is not correct to totally downplay the relevance of loyalty. Indeed, loyalty, understood as attention to the quality of relationship, is a fundamental element

to guarantee a group's work efficiency. How can we solve this apparently insoluble dilemma? One of the possible strategies is to work on the concept of loyalty within organizations in order to foster whistleblowing practices. For instance, if in an organization denouncing dishonesty is considered a valuable practice, consequently being loyal to the organization means denouncing such misconducts. In this regard, research provided evidence that in those organizations where relevant value is placed on whistleblowing, employees tend to remain silent to a lesser extent than when they witnessed illegal conducts. Certainly, it is not easy to denounce misconducts when it will probably result in reprisal such as failure to be promoted or unjustified relocation. If employees perceive that cultural organization really values the denunciation of illegal conducts, they will be motivated to denounce and will feel protected against reprisals.

*3. What strategies could be adopted to promote a more ethical behavior at an organizational level?*

Given the complexity of the phenomenon, at an organizational level, interventions to combat unethical behavior are complex because they need to be based on a multilevel perspective that simultaneously takes into account the different dimensions involved, from the legal dimension to the socio psychological dimension.

In the present chapter, efforts have been made to reflect on the importance of the comprehension of those psychological, social and cultural factors that promote engagement in unethical conducts, in order to plan and realize efficient policies to combat the phenomenon. In the light of the above, an initial step to combat unethical behavior within organizations is to change the perspective through which moral behavior is observed: it is advantageous to set aside the idea that people are essentially moral or immoral, to shift the focus on the idea that an individual's choice to act in moral or immoral manner depends upon a complex interaction – determined on a case-by-case basis – between psychological, social and contextual factors. Another relevant aspect, well-linked to the aforementioned one, regards the promotion of a more concrete idea of morality among individuals (Ayal, Gino, Barkan, & Ariely, 2015; Gino, 2013). People often conceive morality as an intangible and idealized dimension, however, when it comes to violating ethical standards, they do so in a concrete manner. The infringements of ethical standards are perceived as isolated incidents or smaller issues due to the contrast between idealized morality and the real and concrete immoral-

al conducts. In organizational environments, enforcing the redefinition of morality in more a concrete manner with specific connection to employees' tasks, is fundamental. Finally, it is also important to improve people's awareness of the psychological mechanisms through which immoral conducts are justified and normalized, in order to disable self-condoning practices in the moment in which people adopt them to legitimize the misconducts.

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## Codes of ethics as a tool for preventing corruption

### *Introduction*

Public ethics has been a subject of interest at international level, for a great many years. Scientific research and international relations have long stressed the fundamental importance of building an ethics infrastructure and an integrity system in the general government, in order to reduce maladministration (OECD 1998; OECD 2000a). Reducing maladministration through public ethics improves the relationship between citizens and administration, it guarantees greater efficiency and effectiveness of public services, but most of all, it is essential in the fight against corruption.

When we talk about ethics infrastructure in public administration, we refer to the set of principles, regulatory instruments, procedures, institutions, and any mechanism that helps to build those foundations and those ethical bases, which strengthen public officials' ethics and prevent unethical behaviors in administrative structures<sup>1</sup>. A set of interacting elements, complementing each other, that succeed in building an integrity system, which allows the dissemination of ethically correct behavior and generally reinforces ethics within administrations (Parker et al. 2008; Stare, Klun 2016; Cerrillo i Martínez, Ponce 2017).

Among the elements composing ethics infrastructures<sup>2</sup>, ethical codes and codes of conduct are mentioned. Therefore, in this work, we will analyze the content of ethical codes in public administrations, by reading the main international documents on this subject. We will then take a look at the most

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1. Studies on ethics infrastructure and integrity system have mainly analyzed private organizations; however, over time, they increasingly focused on public administrations as well.

2. The elements composing ethics infrastructures are: integrity principles and values, rules on the public officials' conflicts of interest, the existence of a national authority to protect public integrity, rules on administrative transparency, promotion instruments and training tools in the field of public ethics, regulations, disciplinary measures and criminal sanctions, aimed at discouraging improper conduct.

popular models within some countries of the OCSE area, mainly European ones, and we will draw attention to the Italian codes of conduct's experience, its peculiarities, and those features that partially set it apart from others.

*1. The importance of behavioral duties and ethical rules in preventing corruption in international documents*

International and supranational organizations which have dealt with the question in a more consistent way, always stress the fundamental role of the ethical rules and behavioral duties laid down in codes, as a key instrument to enhance public officials' integrity and to develop effective anti-corruption policies (UN 1996; Council of Europe 2000; UN 2003; European Commission 2017).

Article 8 of the UNCAC Convention concerns the codes of conduct for public officials, such as the *International Code of Conduct for Public Officials*, a model ethical code used as a common reference in all international documents. Both of them stress how ethical codes and codes of conduct in administrations must, in particular, build some standards of behavior that strengthen the integrity of public officials. Among them, are included: proper personal conduct and appropriate conduct towards the public; impartiality and non-discrimination, while performing administrative duties; independence; honesty and integrity; loyalty to the competent administration; diligence at work; transparency; responsibility and responsible use of organizational and financial resources (UN 1996; UN 2003).

International documents repeatedly highlight how these ethical and behavioral standards, in order to be effective, must be accompanied by provisions able to lead officials to reach these standards.

The first category of these provisions is the obligation to report ethical code violations, which people could become aware of. The second category is the obligation to declare their conflicts of interest, activities outside the employment in public administrations, possible investments in certain assets, donations or substantial benefits received in specific situations or by specific people. Lastly, there is the obligation to refrain from specific decisions, in cases of conflicts of interest, from political activities that could interfere with the administration's impartiality, from privately disseminating information about their work.

The international documents analyzed are also unanimous in stating the importance of taking disciplinary measures and proceedings, as homogeneous and clear as possible, against public officials who violate ethical codes.

However, these disciplinary measures and proceedings should be accompanied by provisions that safeguard both a public official falsely accused, and a public official that decides to report improprieties and corrupt practices (UN 2009).

Therefore, international organizations in general outline a baseline model of ethical code of public administrations, for all States. In order to effectively prevent corruption, codes must contain some ethical standards, a set of rules and behavioral duties to be followed to avoid conflicts of interest and to pursue public officials' activities correctly and, finally, a set of rules and disciplinary procedures to ensure compliance<sup>3</sup> (UN 2009; European Commission 2017).

Furthermore, UNCAC's Technical Guide highlights also a series of recommendations intended to make ethical and behavioral codes more effective within the individual States.

The first recommendation concerns the legal value of these ethical codes, and the "strength" of the source of law which allows their implementation in each national system. Indeed, the Technical Guide emphasizes the need to make some regulations – such as the rules on conflicts of interest, as well as reporting and abstention obligations – as binding as possible for public officials, in order to ensure the measures' correct efficiency.

The second recommendation concerns the guarantee of widespread sharing of ethical codes' content, within each administration. Public officials' participation in drafting ethical codes, and duty-sharing among those officials to which they are addressed are essential to ensure ethically correct behaviors, while completing administrative tasks.

The third recommendation is about some implementation aspects, which help create the integrity system mentioned at the beginning. States should: accompany the adoption of ethical codes with training initiatives for officials; include detailed and clear procedures to fulfill the obligations laid down in codes; identify specific measures for those public officials who par-

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3. The Technical Guide stresses how ethical codes should describe in detail: the standards of integrity and the ethical values of the relevant administration; the rules and duties concerning conflicts of interest; the rules and duties concerning particularly exposed situations (such as the receipt of gifts, benefits, or bribes, during work); the rules and duties concerning discrimination and harassment; the duties concerning relations with the public; the rules and duties inherent to the management of confidential information; the rules and duties related to the personal use of the administration's resources (such as structures and equipment); the rules and duties concerning potential secondary employment; the rules and duties concerning public officials' involvement in political parties or organizations; the rules and duties related to code violation reports; the disciplinary proceedings and penalties, following code violations.

ticularly exposed to the risk of corruption; establish authorities to monitor compliance with the codes (UN, 2009).

## *2. Codes of conduct models compared, in the OECD area*

Thus, ethical and behavioral codes remain a key instrument for strengthening public officials' integrity, for increasing administrations' "antibodies" and, consequently, for preventing corruption (Cerrillo i Martínez, Ponce 2017).

Almost all States have adopted ethical codes with the aforementioned characteristics, some of them even before international conventions, each with its own system's peculiarities. Some States directly introduced ethical codes by primary or secondary legislation; other States decided not to directly legislate on the issue, or to only do it through principles, designating an ad hoc authority to adopt ethical rules and detailed behavioral duties, or by specific administrative sectors. Lastly, other States used laws on employment relationship in public administrations, or contract law directly, to establish behavioral duties and ethical standards (OECD 2000b).

In order to better understand ethical codes and codes of conduct models, implemented at international level, we analyzed some national models in the OECD area, European ones in particular, by dividing them into different areas: Anglo-Saxon area, German-speaking area, Scandinavian area, Eastern European area and, finally, the Italian and the French models.

This first superficial model analysis, which is still the object of an ongoing research, produces two general considerations. The first conclusion is that, on the one hand, there are some ethical and behavioral codes models, which are regulated on average – that is to say States whose ethical codes and codes of conduct are not strictly binding, or do not have hard legislation on public integrity. On the other, there are very "regular" models – that is to say States whose ethical codes are strongly binding and have hard legislation on public ethics.

The second conclusion is that ethical codes models vary, depending on the public administration model, as well as the public official's role and status, in their respective States.

Basically, to average regulated models corresponds a soft administration model, put in the service of political bodies, while to very "regular" models usually corresponds a more structured administration model, including a body of officials which are more independent from political bodies.

In our brief description, we will put together the geographical areas under consideration, according to the two integrity regulating categories de-

scribed above. We will then leave Italy out, since we will devote a separate paragraph to it.

### 2.1 Average regulated models (*Anglo-Saxon area; Scandinavian area; German-speaking area*)

Among average regulated models, namely States that do not have hard legislation on public ethics, but that do have ethical codes, we may include the Anglo-Saxon area (United Kingdom; USA; Australia), the German-speaking area (Germany; Austria), and the Scandinavian area (Sweden; Denmark).

In the Anglo-Saxon area, conduct and ethical rules are more the corollary of the principle of good administration, rather than of impartiality. This can be explained by the adoption of a different administration model in Anglo-Saxon systems, which are based on the idea of the citizen/user and the government/public services provider. This is particularly evident in the case of the United Kingdom, where ethical standards are clearly oriented to the minister's service, instead of political community's. Only in the United States there is clear attention to impartiality, in addition to good administration (Mattarella 2007; Monteduro 2013).

In the cases analyzed, ethical codes have been adopted through secondary legislative sources, such as the *Civil Service Management Code* in the UK, and the *Executive Branch Standards of Ethical Conduct* in the USA, while the *Public Service Act* in Australia is a true primary norm, which governs integrity in public office, in art. 13<sup>4</sup>. However, American and Australian codes shall apply only in central and federal administrations. Then each government, at state and regional level, adopts its own code of conduct, without a clear understanding of the hierarchy between these codes and central or federal ones. The *Civil Service Management Code*, instead, is binding on all UK administrations, with a chance to be integrated in each administration. The three codes, the British *Civil Service Management Code* in particular, associate specific behavioral duties with certain categories of officials.

These codes do not directly provide for disciplinary proceedings and measures, but ask national laws on public work for the legislation on sanc-

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4. In addition to art. 13 of the *Public Service Act*, the *Australian Public Service Commission* has adopted guidelines on behavioral duties, in the *APS Values and Code of Conduct in practice*, which is available at <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>.

tions. Only the *Public Service Act* in Australia refers to possible sanctions, in case of non-compliance with behavioral duties, such as the end of an employment relationship, demotion, withdrawal of the mandate previously assigned, wage reduction, or a mere reprimand.

The respective integrity systems are controlled by the *Committee on Standards in Public Life* in the UK, the Australian *Public Service Commission*, and the U.S. *Office of Government Ethics*. These bodies are part of the executive branch, and they are responsible for analyzing, monitoring, making recommendations to the government on public integrity, promoting public ethics principles through surveys and investigations. These bodies do not have control powers, nor powers to impose sanctions, which remain in the hands of those who are responsible for disciplinary rules in each office or agency (Office of Public Values and Ethics 2002; European Commission, 2014a).

In the German-speaking area, neither Germany nor Austria have specific federal provisions relating to public integrity, aimed at preventing corruption. Rules governing working relationships in public administrations are preeminent in this field. At federal level, we have the German ethical code, the *Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration*, adopted in 2004, and the Austrian *Code of Conduct to Prevent Corruption*, adopted in 2012. These are fluent guidelines, which do not impose behavioral duties or ethical rules on public officials, and are not legally binding; instead, they aim to guide public officials, in case of attempted bribery. Nevertheless, at state and local level, all administrations are provided with anti-corruption guidelines, with high attention on topics related to public integrity. None of these countries have authorities charged with protecting public integrity; only Austria has introduced an *Anti-corruption Forum*, composed of representatives of different federal and state administrations, which is a connection point and a place for institutional discussion on corruption prevention.

Therefore, in both countries, the task to prevent corruption is entrusted to specific functionaries within each administration, that are duty-bound to report corrupt practices and cases of non-compliance with principles of public ethics to the respective office manager. Only the office manager, who has wide discretion with regard to disciplinary matters, can sanction those officials who violate public ethics (European Commission, 2014b; European Commission, 2014c).

Similarly, in the Scandinavian area, there is no discipline dedicated to public integrity, for preventing corruption. Public ethics is a subject covered in ethical codes and in labor law in public administrations, as regards sanctions. The ethical codes under consideration – the Swedish *Shared Values*

*for Civil Servants* and the *Danish Code of Conduct for public officials* – have different degrees of bindingness; the Danish one is more binding than the Swedish, which looks more like a guide to appropriate behavior, rather than an ethical code. Both are addressed to all administrations. In Sweden, there are also guidelines on public ethics and corruption prevention at regional and local level, published by the *Swedish Association of Local Authorities and Regions*. As to the disciplinary aspects, these are covered by laws governing administrative tasks and public work, such as the *Danish Public Administration Act* (1985) and the *Administrative Act* (1986), and the *Act on Public Employment* (1994) in Sweden.

Authorities responsible for monitoring public ethics are very different. In Denmark, we have the *Agency for the Modernization of Public Administration*, a body under the Ministry of Finance that deals with good governance, with no particular power of control or to impose sanctions, while Sweden has chosen to entrust control over ethics to the *National Anti-Corruption Unit* of the *Office of the Prosecutor General*, thus focusing on repression, rather than prevention (European Commission, 2014d; European Commission, 2014e).

## 2.2 Very regular models (Eastern European area; France)

Among very regular models, namely States that have ethical codes which are strongly binding, and hard legislation on public ethics, we may include the Eastern European area (Poland; Romania; Hungary), the French model and the Italian model.

The Eastern European area has a very structured integrity system, including substantial and binding codes of conduct; a substantial legislation on incompatibility and conflicts of interest; a very repressive criminal law on crimes against Public Administration; a system of authorities with supervisory and intervention powers, in case of violation of rules on corruption and public ethics.

All the countries considered have ethical codes and codes of conduct for public officials; in Poland, these are usually supported by planning acts on corruption prevention; in Hungary and Romania, specific national programs have been adopted against corruption. Ethical codes are very structured, and they are modelled on standard ethical codes, adopted at international level: ethical standards, a number of abstention and reporting obligations aimed at avoiding conflicts of interest among officials, disciplinary measures and proceedings.

All three countries have independent administrative authorities (the *Central Anti-Corruption Bureau* in Poland and the *National Integrity Agency* (ANI) in Romania), that protect the integrity system, or an institutional grid control system (headed by the Ministry of Justice, in Hungary), aimed at ensuring compliance with public ethics rules.

Polish and Romanian authorities deal with integrity in the broad sense, within a more general anti-corruption or control strategy of the administration's performance. They analyze and monitor corruption in administrations; they produce documents and reports for the government; they ensure compliance with the rules on incompatibility and conflicts of interest (in the Polish case, they also have powers of investigation, similar to police powers); they apply sanctions to those who do not comply with ethical code provisions (in Romania, authorities also seize financial resources from those officials who are definitively convicted).

Instead, in Hungary, anti-corruption policies, as well as those on public integrity, are nationally coordinated by the Ministry of Justice, together with security forces.

Furthermore, each administration appoints integrity officials, instructed to monitor respect for ethical requirements. The *National Election Office*, the *National Election Committee*, the *Ombudsman* and the *State Audit Office* contribute to make the control system more effective (European Commission, 2014f; European Commission, 2014g; European Commission, 2014h).

The French model, based on the Italian model, comes as a strongly controlled integrity system, especially after 2016<sup>5</sup>, with the establishment of the *Agence française anticorruption* (AFA) and with new regulations on public officials' ethics.

Law 2016-483 of April 20, 2016 and the following implementing laws introduced new rules on public ethics, addressed to all public officials, at all levels of government. Most of the provisions are dedicated to the prevention of conflicts of interest, and regulate the so-called *pantouflage* or *revolving doors*. The law provides for various obligations for public officials to declare their assets and their interest. There is no national code of conduct, however, law 2016-1691 of December 9, 2016 stipulates that all public administrations (and more in general, several private entities) must equip themselves with their own codes of conduct, including ethical standards to prevent corruption and to adopt through participatory methods.

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5. Under Law 2016-1691 of December 9, 2016 on transparency, fight against corruption and modernization of economic life, and Law No 2016-483 of April 20, 2016 on ethics, public officials' rights and obligations.

The integrity system is overseen by two public entities: the *Agence française anticorruption* (AFA) and the *Commission de déontologie de la fonction publique*. The first one is an authority linked to the Ministry of Justice and the Ministry of Finance, headed by a magistrate appointed by the President of the Republic, for a nonrenewable term of six years. The Agency mainly ensures that public bodies and private parties implement their fulfillments aimed at preventing corruption, under art. 17 of Law 2016-1691 of December 9, 2016, including the adoption of a code of conduct. The *Agence française anticorruption* can impose financial penalties for not adopting the code, and can also use other persuasive instruments, such as online publication of injunctions.

On the other hand, the State nominating committee principally deals with compliance with ethical rules and rules about conflicts of interest required by law, by public officials, in particular those on *pantouflage* and reporting obligations. It gives opinions, also binding ones, on issues relating to public integrity; it has supervisory and reporting powers, but no sanctioning power. In addition to these two authorities, the 2016 Law stipulates that each administration should identify, among its officials, a *réfèrent déontologue*, which shall be responsible for checking compliance with public integrity laws.

Disciplinary measures are prerogative of the officials responsible in the administration, and are governed by disciplinary rules<sup>6</sup> (European Commission, 2014i).

### 3. *The national code of conduct and the administrations' code of conduct: the Italian model*

Italy has also a very regular system, in the field of public ethics. The national code of conduct, laid down by Law No 190/2012 on corruption prevention, and adopted by a secondary source (Presidential Decree No 62/2013), was completely amended. The national code of conduct is a particularly innovative tool, since it links the liability to disciplinary action with public ethics, as well as with the more general corruption prevention.

The Italian behavioral codes system consists of two levels: the national and the decentralized level. The national code includes traditional ethical

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6. Information about the new laws on corruption prevention and public ethics, as well as those on new inspection bodies, have been developed starting from institutional websites: <https://www.fonction-publique.gouv.fr/points-cles-de-la-loi-relative-a-la-deontologie-et-aux-droits-et-obligations-des-fonctionnaires> and <https://www.economie.gouv.fr/afa>.

standards required from public officials, while performing their administrative duties, also disseminated at international level. It sets out a series of abstention obligations in case of actual conflict of interest, accounting and reporting obligations, in case of potential conflict turning into real conflict, and in case of behavioral duties, such as the one on donations and gifts, in order to avoid potential harm to the administration's reputation. The national code contains minimum provisions, valid for all administrations, at all levels of government.

The second level, indeed, is the decentralized one. All public administrations must adopt their own codes of conduct, with all the behavioral duties and ethical rules contained in the national code, in addition to those supplementary duties and rules, which are specific to their own administrative structure. This system makes it possible for behavioral codes to guarantee each administration "personalized" ethical standards, at all levels and in all administrative sectors.

The codes' flexibility perfectly fits with the Italian anti-corruption policy, based on *risk assessment*: after analyzing their sectors at risk, individual administrations can include specific duties in their own codes of conduct, in order to avoid the risk of corruptive practices. The code becomes a tool for administrations to better adapt anti-corruption policies to their own situation.

The Italian integrity system, which includes legal provisions on incompatibility, fitness for office and other rules on public officials' conflict of interest, is overseen by the *National Anti-corruption Authority* (Anac), an independent authority that implements anti-corruption policy and, within this policy, monitors the correct implementation of preventive measures, such as behavioral codes. It has supervisory powers, control order powers, and the power to impose sanctions in case of failure to adopt the code of conduct. On the other hand, in individual administrations, the responsible authorities for corruption prevention and transparency are the ones who ensure that codes are adopted. They also point out to the disciplinary proceedings office manager those officials that do not observe the duties outlined in the code of conduct. Indeed, behavioral duties laid down in the national code and in individual administrative codes are directly binding and relevant, from a disciplinary perspective. The law states that serious or repeated breaches of duties may lead to the official's disciplinary dismissal.

Among behavioral duties, tasks related to the implementation of the anti-corruption plan and to anti-corruption measures in general are also included. According to this, those officials who do not comply with administrative measures aimed at preventing corruption are punishable from a disciplinary standpoint, as well.

Codes of conduct are also a tool to prevent corruption. Indeed, the law allows Anac to adopt behavioral codes models for specific administrations, in order to adapt public ethics rules to specific administrations or administrative sectors (European Commission, 2014; Carloni 2017).

Therefore, in the Italian legal system, codes of conduct retain their “ethical” value, which means that these texts have legal force and are construction (or reconstruction)-oriented, through behavioral duties, towards a system of values shared by a “community” of individuals.

Nevertheless, codes are a concrete part of anti-corruption policy: they include behavioral duties concerning the adoption of anti-corruption plans; they are a tool to better deal with the risk of corruption in individual administrations; they are an instrument in the hands of Anac to adjust national prevention policies.

These two elements characterize the Italian peculiarity and make codes of conduct very useful, in orienting officials towards general interest promotion and towards compliance with our constitutional rules on administration. The latter want public officials to “serve the nation”, with “loyalty and honor”, “impartially” but caring about good performance.

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# PART IX

E-Government strategies and the preventing of corruption



## Digitalizing to prevent corruption and ensure rights

### *1. The transparency principle. Its origins*

Transparency is the essential tool for knowledge, and through different stages of the history of democracy it has proved to be the most effective tool for guaranteeing the legitimate claims of women and men in their various roles as citizens, voters, workers and consumers. Transparency as a principle arises with the beginning of Liberal State, when the qualification of some subjects as “Public” started to imply not only that these subjects were in charge of the community interests as a whole, but also that what these subjects decided, and made, had relevance for everyone. Therefore, everyone had to have ensured the right to be acknowledged of those choices, and to speak up against or in favor of them. In that sense the Declaration of the Rights of the Man and of the Citizen<sup>1</sup>, written significantly during the French Revolution in 1789, dictates(art.15) that: «La société a le droit de demander compte à tout agent public de son administration». It has to be noted that transparency became a principle regarding the organization of power even before than its legitimate use.

Notions as “jurisdiction” or “responsibility” were defined as criteria for fencing and determining the precise assignment of power to a specific authority.

At the same time, the exercise of power through predetermined and (potentially) visible procedures caused the extraordinary effect of having people not anymore subject to other individuals, but covered by anonymous written rules.

Consider Weber categories<sup>2</sup>: the arising of the transparency principle represents the basis for a transition from “evocative, suggestive power” to

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1. The Declaration of the rights of the Man and of the Citizen issued on August 26, 1789, was based on the American Declaration of Independence and inspired many constitutional papers; its content represents one of the highest recognitions of human freedom and dignity.

2. One of Max Weber’s greatest contributions to sociology is the definition of three types of power. According to Max Weber what defines the State is “the monopoly of the legitimate

“rational and legal power”, assigned by people through the vote, according to determined and precise mechanisms, to an elite of rulers/decision makers who act following pre-established rules. And being accountable to people who elected them for the choices made and results achieved.

### 1.1 *Continues. Its features*

Passing to analyze the main features of transparency, we can start by saying it is undoubtedly a relational principle, as it evokes the relationship between two subjects, one observed and the other observing.

We can also note that it seems to act as an instrumental, intermediate value, aimed at pursuing further values.

The observed subject is asked to be transparent in order to ensure to the observer the satisfaction of his/her needs, ranging from democratic control to the formation of personal opinion, from the protection of individual rights and claims to the insurance of proper legitimate choices.

This idea is shared by the legislator that affirms, in art. 1 of legislative decree 14th march 2013, n. 33<sup>3</sup>, that

transparency is meant as total accessibility of data and documents held by public administrations, with the aim of protecting citizens' rights, promoting the participation of stakeholders in administrative activities and encouraging widespread forms of control over the pursuit of institutional functions and the use of public resources.

In addition, the law continues, respecting provisions on State secrets, professional secrecy, statistical confidentiality and personal data protection, transparency helps to implement the democratic principle itself and the constitutional principles of equality, impartiality, good performance, responsi-

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use of force”. He distinguishes two types of power: power as the possibility of asserting one's will even in the presence of an opposition; and power in the proper sense as an opportunity to find obedience from people to a given command. According to Weber, there are three cases in which people spontaneously accept the will of the rulers which correspond to three types of power: *legal legitimate power: in which the law establishes and arouses obedience; charismatic legitimate power: in which obedience is aroused by the approval of a superior personality; traditional legitimate power: in which the individual obeys because others in the past have obeyed.*

The purest type of legal power uses a bureaucratic administrative apparatus and the purely bureaucratic administration based on the principle of conformity to acts constitutes the more rational way of exercising power.

3. “*Riordino della disciplina riguardante gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni*” as amended by d.lgs 97/2016.

bility, effectiveness and efficiency in the use of public resources, integrity and loyalty to service the nation<sup>4</sup>.

And therefore it must be seen as the fundamental condition to ensure individual and collective liberties, as well as civil, political and social rights. It integrates the right of good administration and contributes to the creation of an open administration at the service of the citizen.

So, even if it is good for everyone just to be able to see inside the Government choices, and in general to gain access at knowledge, transparency as a juridical principle is meant to be the tool for further, higher goals.

It has finally to be noted that transparency (as many others) is a principle in continuing evolution. And this, for different reasons: the evolution of citizenship, and the changing of rights and claims that through transparency can be protected. But consider also the relevant role that played the evolution of internal and external conditions of the observed subject, Government and Public administration.

For the purpose of these pages, we will though focus on the development caused by digital technologies, and its effect on the transparency as we described it so far.

## *2. Ensuring rights and democratic control in the Information society*

A number of further and completely new issues arise as a consequence of these evolutions. Therefore, it becomes critical understanding what is peculiar in the Information Society that can be defined as

a society characterized by a high level of information intensity in everyday life of most citizens, in most organizations and workplaces; by the use of common or compatible technology for a wide range of personal, social, educational and business activities, and by the ability to transmit, receive and exchange digital data rapidly between places irrespective of distance<sup>5</sup>.

In such Society, “inclusion” in knowledge networks and access to information is instrumental to a full citizenship. Therefore

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4. In particular the model of inspiration for the total accessibility of information is that of the US Freedom of Information Act, which guarantees the accessibility of anyone who requests it to any document or data held by the PA, except when the law expressly excludes it (eg for security reasons).

5. IBM Community Development Foundation, *The Net Result - Report of the National Working Party for Social Inclusion*, 1997.

sovereignty itself turns to be full equality in information tools»<sup>6</sup> And also «if the new technology arouses utopian visions of equal access to information, at the same time adds knowledge to property as a fundamental stratification axis»<sup>7</sup>.

An even more radical vision claims that the overwhelming progress in ICTs has quickly deemed as recessive the value of traditional “market goods” – to which we reconnect property related rights –fundamental for the liberal economic systems. This kind of progress has instead established “data” as the new essential goods, consequentially the right of access and information as a fundamental right.

Even if some think we haven’t reached so far in this evolution, there is no doubt that data have become the most important asset of this millennium economy, and therefore «*control over communication services will be a source of power, and access to communication will be the condition of freedom*»<sup>8</sup>.

### *3. Access right to information as a fundamental condition of citizenship. Its evolution*

What we have seen shows clearly that today access to information is to be considered either an essential fundamental requirement for full citizenship and the right through which we can ensure further rights, democratic control and a better public administration. It is indeed the most effective subjective of the (constitutional) transparency principle.

Nevertheless, Italy has experienced a long and difficult process for the assertion of this right.

For long time the secret of all administrative activities and data has been the general rule, as part of the “duty of loyalty” that public servants had toward their office. The first disclosure occurred with Law 349/1986<sup>9</sup>, that established the Ministry of the Environment and set a discipline on environmental damage.

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6. S. RODOTÀ, *Tecnopolitica. La democrazia e le nuove tecnologie della comunicazione*, Laterza, Bari 1997 - translated by the author.

7. D. BELL, *The coming of post-industrial society: a venture in social forecasting*, Harper Colophon Books, New York, 1973.

8. J. RIFKIN, *The age of access, the new culture of hypercapitalism where all of life is a paid-for experience*, Jeremy P. Tarcher/Putnam, New York, 2000.

9. “Istituzione del Ministero dell’ambiente e norme in materia di danno ambientale” as amended by D.Lgs. 31 march 1998, n. 112 in conjunction with law 23 december 2005, n. 266, art. 1 co. 438 -442 and with D.Lgs. 3 april 2006, n. 152.

This evolution is due to the very special characteristics of this subject, that like no other urges for succeeding a joint effort by Government, firms and citizens themselves.

In order to achieve this cooperation, all the subjects mentioned above have to share the same relevant information. Therefore, as Law 349/1986, at art. 14, states:

- *The Minister of the Environment ensures the widest dissemination of information on the state of the environment;*
- *The acts adopted by the National Council for the Environment<sup>10</sup> must be motivated and, when their knowledge regards the generality of citizens and responds to information needs of widespread nature, they are published [...] in the Official Gazette of the Italian Republic [...];*
- *Every citizen:*
  - *has the right of access to available information on the state of the environment in the frame of law, by the offices of the public administration;*
  - *can obtain a copy, with reimbursement of reproduction costs and of-fice expenses [...].*

But this was just the beginning. In the following 30 years we have had:

- Documental access (law 241/90), a right that can be exercised only by citizens that can claim a direct, effective and present interest for administrative documents already been formed by the administration;
- Civic access (dlgs 33/2013), or the right for everyone to free access data and documents administration had the duty of publishing<sup>11</sup>;
- Open access (dlgs 33/2013 as modified in 2016<sup>12</sup>), or the right for everyone to access every data and documents held by an administra-

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10. The National Council of the Environment (CNA) was established with ministerial decree of the Ministry of Environment and Protection of the Territory and Sea. It shall be chaired by the minister and is renewed every three years; it provides opinions and proposals relating to the environment.

11. The introduction of the new institute of the civic access aims at strengthening the relationship of trust between citizens and PA and promotes the principles of legality and prevention of corruption; all citizens have the right to request and obtain from public authorities the publication of documents and information they hold and which, for whatever reason, have not disclosed yet.

12. Dlgs 25 May 2016, n. 97 “Revisione e semplificazione delle disposizioni in materia di prevenzione della corruzione, pubblicità e trasparenza, correttivo della legge 6 novembre 2012, n. 190 e del decreto legislativo 14 marzo 2013, n. 33, ai sensi dell’articolo 7 della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche”.

tion within the limits of conflicting private and public interests (as for individual privacy and secret of State)<sup>13</sup>.

#### 4. *From New Public Management to Digital Era Government*

All those different rights of the access right will be analyzed in other parts of this book.

They are relevant to be mentioned here though for digitalization of those procedures, and data themselves, will foster insuring a fast and effective access. The perspective, over all, is that a switch to a fully informed digital citizenship will be essential for building a better administration, as it's observed in 2016 OCSE Report «Digital Government for Transforming Public Services in the Welfare Areas» in which is clearly outlined the need for an evolution toward a Digital Public Administration.

These ideas tend to move beyond the approach New Public Management (NPM) theories suggested.

According to them, implementing the use of information technologies was only meant to achieve a significant cost reduction.

The new approach aims instead at the more advanced solution of the “Digital Era Government” (DGE) which focuses on a greater involvement of citizens in public administration.

Infact, through the use of Information technologies, users might be able to:

- express their point of view, indicate needs and preferences
- participate in decisions
- provide essential information to reprogram administrative action and priorities
- monitor and control public spending, with immediate consequences on methods and planning;

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13. The open access finds its limits in absolute hypotheses (secret State and particular limits) as well as in those provided for in art. 5, D.L. 33/2013: public security and public order, national security, defense and national issues, international relations, investigations and activities inspection. There are also limitations related to the protection of private interests such as the protection of personal data, freedom and confidentiality of correspondence, economic and commercial interests, including intellectual property. The indication of such large limits risks to neutralize the innovative aim of the institute: that's why it is provided for the possibility of restricting access or deferring it, in order to guarantee the opposing interests (opinion of the Council of State).

5. *The different approaches to Digital Divide*

This perspective, with a new language and a new technology, implies the risk of new illiteracy and the outcome of new marginalization.

In fact, in these days the so called “digital divide”<sup>14</sup> has to be measured not just with the number of the internet connections, or considering its speed; but also and even more as the reflection of inequalities pre-existing the introduction of ICT, based on sex, age, education, wealth, proficient English speaking, place of life and work.

So, if on one side there is an unprecedented discrimination between people with slow and fast connection (that cause the latter to evolve – not just economically- more rapidly and consistently) on the other it’s quite clear that digital literacy and an effective use of ICTs depend on other factors – more “social” than “technical” – that may cause a *«fracture that breaks the world into two big blocks, the first of which has new technologies, while the second exposes itself to them in an unconscious and indirect way»*<sup>15</sup>.

As underlined by the United Nations Development Program (UNPD)<sup>16</sup> *«the significant gap is no longer only or especially that one between information HAVEs and HAVE NOTs, but that, much deeper, between DO’s and DO NOT’S»*, which arises among the subjects that consciously use online technologies and information for fostering knowledge and participation and those that, on the contrary, use them essentially in a passive way.

In order to ensure citizens’ rights and democratic control in the digital era, the first concern has then to be enabling and empowering everyone to use these new “tools of citizenship”.

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14. The digital divide is the gap between those who have effective access to information technology and who is partially or totally excluded. The reasons for exclusion include various variables such as economic conditions, educational level, quality of infrastructure, age or gender differences, membership of different ethnic groups. Digital divide also includes disparities in the acquisition of resources or skills request in order to participate in the information society. The term digital divide can be used either to refer to a gap between different people, or social groups in the same area, or to the gap between different regions of the same state, or between states.

15. A. Mattelart, *History of the Information Society*, trad. S. Arecco, Turin, Einaudi, 2002

16. The United Nations Development Programme is the United Nations’ global development network. It advocates for change and connects countries to knowledge, experience and resources to help people build a better life. It provides expert advice, training and grants support to developing countries, with increasing emphasis on assistance to the least developed countries. It promotes technical and investment cooperation among nations. It is funded entirely by voluntary contributions from member nations and it operates in 177 countries.

There is a significant difference in the approach that various countries have adopted to face this emergency.

On one side, there are countries that decided to proceed defining new Constitutional rights related to the new information technologies.

In particular, some Latin American countries (as Brazil, Paraguay and Argentina) included in their Constitutions a set of rules, commonly named *habeas data*, that even though do not guarantee positive rights of action, rather provide a series of “protection and control” warranties about the use and the circulation of data.

On the other side there are countries, like Italy, that have intervened with statutory legislation. In this case the focus is on the potential role of public administrations in activating and promoting a proper and spread use of digital resources by citizens and firms.

#### 6. *The Digital Administration Code as a charter for digital citizenship*

According with this approach, the Digital Administration Code (CAD), dlgs 82/2005<sup>17</sup>, draws up what can be considered a statute for digital citizens.

The recent reform of this piece of legislation by D.Lgs. 217/20017<sup>18</sup>, seeks to define of a regulatory framework to enable and support the digital agenda, ensure citizens and firms proper rights, offer public administrations tools and services suitable for making digital citizenship rights effective.

CAD moves on a double level.

At the first level there is a provision for rights so wide-ranging that can be seen as proper general principles:

- right to computer literacy of citizens (art. 8), which obliges the State to promote *«initiatives aimed at facilitating computer literacy of citizens with particular regard to the categories at risk of exclusion, also with for favoring the use of the telematic services of the public administrations»*.
- right to electronic democratic participation (art. 9), according to which State must favor *«all utilizations of new technologies to promote a greater participation of citizens, including those living abroad, in the democratic process and to facilitate exercise of both individual and collective political and civil rights»*.

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17. D. lgs. 7 March 2005, n. 82 recently amended by d.lgs. 13 December 2017, n. 217.

18. The 6th restyling and the 30th modification that this decree has known.

At the second level, a number of more specific rights assign to citizens and firms well defined claims toward public administration.

Those are:

- a proper Charter for Digital Citizens (art 3) that attributes to all legal subjects the right to use, in an accessible and effective way, all digital tools in their relationships with public administrations, also for exercising access and participation rights in the administrative procedures;
- the rights to a digital identity (art 3 bis) In this way everyone is allowed to benefit of online services delivered by public administrations through their digital identity.
- the right to a digital domicile (art.6, art. 6 bis) that recognizes to every citizen and firm the right to choose their digital domicile and to have it registered in public indexes;
- the right to make every payment in digital form (art.5), that obliges Public Administrations to accept every type of payment, with electronic systems, including micropayments with telephone credit, through the platforms provided by the Agency for Digital Italy, and based on the public connectivity network;
- a number of rules for Digital Communications between firms and public administrations (art. 5 bis), where applications, declarations, data and the exchange of information and documents, also for statistical purposes, between firms and public administrations must take place exclusively using information and communication technologies. In the same way, public administrations adopt proper measures for the same communications;
- the right for simple and integrated online services (art.7), that attributes to everyone the right to use services provided by Public Administrations in digital form and in an integrated way, through the digital tools made available by administrations themselves, even though mobile devices. For this purpose, administrations provide for the reorganization and the update of services offered, on the basis of a prior analysis of the real users' needs and make their services available on-line. On their side users have the right to express satisfaction about the quality of service provided, also in terms of usability, accessibility and timeliness.
- finally, a number of rules for connectivity to the Internet in public spaces (art. 8 bis). Based on these provisions and according to the European Digital Agenda, Public Administrations promote the avai-

lability of connectivity to the Internet in all public offices and places, especially in schools, hospitals and sites of tourist interest, providing that the amount of band not used for work is made available to users.

### *7. The role of European and Italian Digital Agendas*

Apart from establishing new rights, there are programs (so called “Agendas”) aimed to share goals and coordinate joint actions for the evolution of public administration toward a full digitalization.

The European Digital Agenda is one of the 7 pillars of the “Europe 2020” Strategy, which indicates the EU’s growth targets up to 2020. EU Digital Agenda plans to address the potential of ICT technologies to foster innovation, progress and economic growth, with the main goal of developing a single European digital market.

In this framework, Italy has developed his own set of programs:

- first, the Italian Digital Agenda, a national strategy to achieve the objectives indicated by the European Agenda drawn up in collaboration with the Conference of Regions and Autonomous Provinces<sup>19</sup>.
- following to this, the Italian Strategy for ultra-broadband and the 2014-2020 Digital Growth Strategy were set up to pursue the objectives of the Digital Agenda.
- finally the Italian strategy for Next Generation Access Network aims at developing a high speed optical access network throughout the country to create a future-proof infrastructure of telecommunication, reaching at the same time the objectives of the European Digital.

Therefore, through the use of technologies and innovative methods, the Government has the duty to pursue open data policies and promote a culture of transparency in public administration.

In order to achieve this goal, every data processed by a public administration must be made accessible and usable, without interfering with the limits provided by the law on personal data protection.

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19. The Conference of Regions and Autonomous Provinces is a body of political coordination between the presidents of the regional councils and the autonomous provinces. The main aims of this body are the improvement of the connection and the comparison with the State through the elaboration of documents shared by the whole “system of regional governments”, the establishment of a permanent interregional comparison to foster the spread of “best practices”, the need to represent the “system of regional governments” on an ongoing basis in institutional relations.

State, regions and the local autonomies have to promote agreements to achieve the objectives of European and national Digital Agenda and realize a process of digitization of the coordinated administrative action. Specifically, regions promote actions aimed at carrying out a coordinated and shared process of digitization local autonomies.

For these same objectives has been established the Agency for Digital Italy (AgID) to achieve the goals.

AgID promotes digital innovation and the use of digital technologies in the organization of the public administrations and in all relationships with citizens and firms, respecting the principles of legality, impartiality and transparency, and according to criteria of efficiency, economy and effectiveness.

AgID is specifically in charge of:

- the elaboration of the national guidelines for the enhancement of information assets containing rules, standards and technical guides concerning digital agenda, digitalization of public administration, IT security and interoperability;
- planning and coordinating the administrations activities for the use of information and communication technologies, through a three-year Plan For Information Technology in Public Administration;
- the management of an open data index made available by public administrations;
- updating the national repertoire of public administration databases;
- the management of the National Geographic Data Repertoire (RNDT);
- the enhancement of information assets and the promotion of their re-use.

Finally, within AgID is established an Ombudsman for Digitalization and a platform for public consultation.

#### *8. ICT and administrative activity. Data requirements. Measures for insuring full transparency and use of data*

With these premises, and according to the Digital Administration Code Public administrations organize their activities autonomously using information and communication technologies to achieve efficiency, effectiveness, economy, impartiality, transparency, simplification and participation objectives, and in compliance with the equality and non-discrimination princi-

ples. The ultimate goal, once again, is to ensure the effective recognition of citizens' and firms rights in accordance with the objectives set out in the three-year Plan For Information Technology.

More in detail, Public administrations use information and communication technologies in their internal relations and in those with other administrations and private individuals, in order to guarantee the interoperability of systems and the integration of service processes between different administrations. They work to ensure uniformity and gradual integration of the user interaction methods with the IT services, including the mobile telephone networks.

As for data requirements, according to the current legislation, documents, information and all data due of mandatory publication (those also available through civic access) must be published in an open format and reusable.

It has to be noted that the obligation to publish personal data implies the possibility of dissemination of such data through institutional sites, as well as their treatment in ways that allow indexing and traceability via web search engines and their reuse. These documents, to be published promptly on the administration institutional websites, must be kept up-to-date and available for a period of 5 years. Every information about the civil servants' performance and the related assessment are made accessible by the administration they belong to.

Clearly, these recent reforms are not anymore fueled only by the idea of implementing citizens' rights, but also by the intent of preventing and contrasting corruption inside public administrations.

Their digitalization offers several positive outcomes:

- all the operations are traced and can reveal who and when has operated. And if some actions are unchangeable, others can be modified, and it's always possible to check by whom and when were made the subsequent changes;
- availability of online services remotely accessed and activated by users without ever entering a public office, increases the degree of “depersonalization”. A greater distance between users and public servants, with complete traceability of contacts between them, allows to avoid a number of potentially corrupt practices;
- also, an increase of e-Gov services facilitates impartial and equal treatment, as the premise of any preventive policy;
- a significant simplification in monitoring the terms for concluding the procedures and the interactions with beneficiaries of administrative activity.

On its side, AgID manages a website called “Public Money” in order to promote the access and improve the understanding of data that reveal about public spending. It allows citizens

- to know about every public expenditure
- to research these payments according to the type of expenditure, the administrations that made it, and the time frame in which it happened.

In order to achieve full accessibility to published information, on the home page of every institutional web site is mandatory to provide a special section called “Transparent Administration”.

Public administrations cannot use filters or other technical solutions to prevent web search engines from indexing and searching within this section.

On its side, National Anti-Corruption Authority<sup>20</sup> defines standards, models and schemes organizing, codifying and representing documents, information and data subject to mandatory publication according to current legislation, as well as for the organization of the «Transparent administration» section.

*9. Digital rights as an essential standard for public administration. From «Digital First» to «Digital Duty» (Court decision n. 251/2016)*

Dlgs 33/2013 already stated that all provisions, standards, models and schemes above mentioned are an essential standard for public administrations in order to guarantee transparency, prevention, contrast of corruption and maladministration.

Therefore, they must be observed as a minimum level of guarantee by any of them, even when they are capable of autonomous and discretionary decisions and innovation. The most important step in this same direction has though been made by the Constitutional Court, in its decision n. 251/2016.

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20. The National Anti-Corruption Authority (ANAC) is an Italian independent administrative authority. It was born in 2012 with law n. 190 which assigned to the independent Commission for the evaluation, transparency and integrity of the public administrations (CIVIT) the function of National Anti-Corruption Authority; in 2014 it incorporates the Authority for the supervision of public contracts for works, services and supplies (AVCP) with d.l. n. 90/2014 converted into law n. 114/2014. The Authority consists of 5 members, of which one is president. The Arbitration Chamber, an auxiliary body, (provided for by art. 242 of the Code of Public Contracts) has the function to prevent corruption in public administration, in owned and controlled companies, also through the implementation of transparency in all aspects of management, as well as through the supervision of public contracts, assignments and in every sector of the public administration that could potentially develop corruption.

The Court affirms indeed that not just those standards, but the respect of digital rights themselves is an “essential standard of performance” for every administration.

In this case Constitutional Court deciding to rule as unconstitutional some regulations descending from the very last reform of the Digital Administration Code, provided some interesting considerations. Affirming that when law “guarantees” access to data and IT services it states one of those “minimum and undefeatable standards” that must be provided to all and everywhere, for the first time, Constitutional Court actually refers to citizens’ digital rights toward digital administrative services.

The Court gives a strong and precise warning for outlining digital administrative services insuring a minimum standard. Therefore, the constitutional judges continue, once achieved the objectives of personal digital identity, interconnection and interoperability, the present principle of “Digital First”<sup>21</sup> will be outdated for being unsuitable to guarantee the minimum level of digitalization.

A proper “Digital Duty” must then takes its place, with benefits either for citizens and firms.

The Court affirms that also provision in digital form of public services is a minimum standard of guarantee for civil and social rights, aimed to protect those “goods of life” that must be ensured in the perspective of possible developments coming from society and technological evolution.

Public Administrations must then satisfy these guarantees providing services according to essential and uniform standards for “digital rights”. Therefore, even in regard of citizens without digital skills, it is not possible to continue with the use paper or other solutions, because this could indulge in behaviors that deny those rights

At the contrary, Public Administration must promote their full satisfaction, offering all needed assistance at citizens when necessary.

The change in perspective is impressive.

With “Digital First” principle all subjects are asked to rather operate digitally, even if paper-based solutions remain still possible. According to the “Digital Duty” principle, as expressed in 2016 decision, Public Administration must operate exclusively through digital technologies, of-

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21. Digital first prescribes the use of ITC before any other method, and specially paper; according to the digital first principle, with the emplementation of the new Digital Administration Code, at the end of a progressive switch-off process of analogue procedures, the Public Administrations are obliged to produce and transmit their documents exclusively electronically and in digital format. First of all, this allows to realize more timely communications reducing costs; it also allows greater certainty of time and transparency towards citizens and businesses.

fering every necessary help at citizens unable to access ICT and to use proficiently digital services. And all this, in order to ensure the same level of digital “satisfaction”.

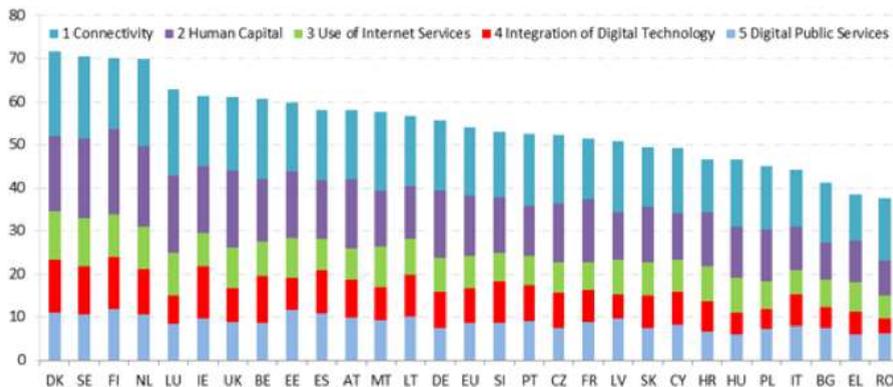
10. *Some (unsatisfying) data about the Italian situation*

Nevertheless, even if the Constitutional court seems to be so far sighted, in Italy the situation is not satisfying in these days.

Let’s take a look at Desi<sup>22</sup>, a composite index that measures the progress of digital technology through five components:

- Connectivity – Fixed broadband, mobile broadband, speed and broadband prices
- Human capital – Use of the internet, basic and advanced digital skills
- Use of the Internet – Use of content, communications and online transactions by citizens
- Integration of digital technologies – Digitization of businesses and e-commerce
- Digital public services – E-government (online public administration)

Figure 1: Digital Economy and Society Index (DESI) 2018 ranking



Source: European commission website [www.ec.europa.eu](http://www.ec.europa.eu)

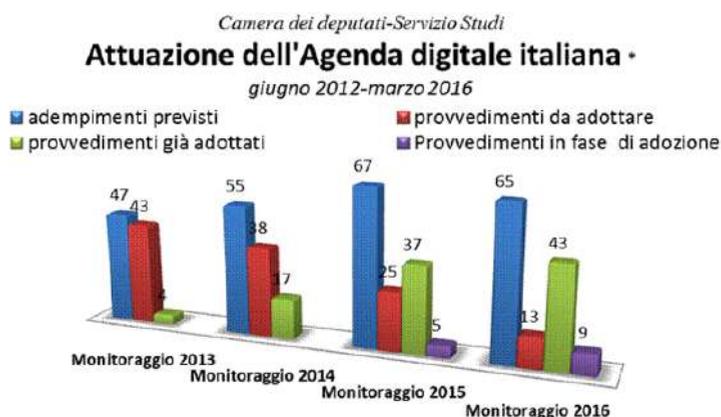
22. The Digital Economy and Society Index (DESI) is a composite index that summarises relevant indicators on Europe’s digital performance and tracks the evolution of EU member states in digital competitiveness.

As we can see Italy ranks at the 25th place (fourth from the very last position, before Greece, Bulgaria and Romania).

DESI 2017 Annual Report highlights also that

- users who are regularly connected to Internet are only 56% of the population aged between 16 and 74 (European average is 72%)
- 34% have never used the Internet (21% in Europe)
- Average values in using the various services on the net in Italy is less than half the average value of the European Union (data 2015).
- Even worse are the average values in use of digital technologies to acquire data held by P.A. or to encourage participation in decisions.

Figure 2: Italian digital Agenda implementation



Source: Chamber of Deputies-Study Service [www.documenti.camera.it](http://www.documenti.camera.it)

The graph above shows how the progress in Digital Agenda is considerably improved but still not satisfying though.

Even the Council of State has recently noticed this Italian anomaly through a comparison with other countries.

In its Opinion n. 785/2016 the main issues of digitalization of P.A. are synthesized as follows:

- the activity of administrations is strongly attached to the use of paper;
- complexity and incompleteness of current regulation on the digital domicile of citizens and businesses;
- use of software with unopened standards and dependent on specific proprietary technologies, different for each administration;

- lack of integration among stakeholders with relevant informative systems;
- absence of a digital identity for citizens and businesses to be used for e-Gov services, with the lack of effectiveness of principles about digital citizenship;
- digital illiteracy of citizens;
- electronic payments still too complex;
- technological incompetence of public managers to make a digital migration;
- difficulty in browsing the websites of public administrations, searching for documents and public information.

Acting just through the means of legislation and rules proves clearly to be insufficient. It is necessary instead to train public servants in the operation, action and most of all “in digital” thinking. Furthermore it is worth providing economic and technical resources aimed at building open, effective and easy-to-use systems, as well as empowering and educating citizens to the use of ICTs, through a measures diffusion.



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## The role of computerization in efficiency and impartiality

*Introduction. A strategic and conscious innovation towards efficiency and impartiality*

Over the last twenty years, studies on Administration and its reforms were aimed at starting a new modernization process in order to make the change in Administration adequate and consistent with that taking place in the society of the country. A path that was unraveled around a red thread: the aspiration to efficiency and cost-effectiveness.

This meant that law-makers focused on digital administration and on the added value represented by the use of technologies to achieve a modernization of the administrative apparatus thanks to its reorganization in the logic of cooperative coordination on the one hand, and the simplification of procedures and the rationalization of processes on the other hand, also by using computer files and the interoperability among administrations. In a word, we gradually identified the way to achieve simplification, transparency, security and accountability in the systemic application of ICTs to public administration (with its twofold face of both organization and activity, just like the god Janus).

In 2005, Italian Legislative Decree No. 82 approved the Digital Administration Code to implement the ‘rules’<sup>1</sup>. But, as Horace taught us in his Odes<sup>2</sup>, law per se cannot determine the application of the precepts contained in it. It is necessary for man to make his own law and respect it. This implies several critical issues. First of all, the idea that ‘administration’ and ‘digital administration’ are two distinct subjects, not the same one to which mandatory apply the new rules. Secondly, the contextualization of the law

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1. In *Lo Stato del digitale, Come l'Italia può recuperare la leadership in Europa* (The State of the digital, how Italy can regain its leadership in Europe, TN), Marsilio, Venezia, 2014, p.41, F. Caio has defined the DAC ‘a sort of Constitution of how to digitize Public Administration, a tool that is well structured, but often ignored by law-makers’.

2. Quintus Horatius Flaccus, *Odi ed Epodi*, edited by G. Zanghieri, Led on line, 2006, The odes, III, 24, p. 169. ‘What can laws, that needs must fail shorn of the aid of manners form’d within.’

through key words of the project, i.e. ‘change’ and ‘innovation’, which are often repeated without being filled with any content. We must add another criticality to this one, which is probably the most relevant: as per the implementation, we believed that applying new instruments to old models could be enough to induce change by opening up to new processes<sup>3</sup>.

That it is not how it works and so it did not. This is the reason why the issue of the reform of administration along with its weaknesses appears again years later cyclically. That it is why every new government<sup>4</sup> takes into account the opportunities – also in terms of growth – offered by e-government, as well the reorganization of public IT<sup>5</sup>.

We often disregarded what had already been done and what still remains to do based on the assessment of the dynamics and results. Instead, we started the process again in order to claim its paternity. Therefore we exacerbated the winding road towards computerization.

Now, however, it is necessary to admit that in this process of re-engineering and change of Administration in favor of a new, open, simplified and transparent relationship with the citizen, we have underestimated the critical effect caused by a dynamism not aimed at reconsidering and therefore redefining the models of a digital administration and that took into account only one side of the problem instead.

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3. In line with this consideration and the subsequent critical approach, see Linnefell, W., A. Hallin e M. Lagergren, E-government Policy Formation – Understanding the roles of change drivers, veto players and advocacy coalitions, *Electronic Journal of e- Government*, 2014, Volume 12, Issue 2, pp. 131-141.

4. In 2002, in *Public information technology, e-government and sustainable development*, in the Italian journal of European public law, v.5, p. 1099, M. Bombardelli made some proper reflections on how often it is inevitable to verify that the interest of the policy makers in individual administrations for e-government are translated into statements of principle which are not followed by the necessary concrete actions to implement them. It is hard to see that this consideration is still contemporary after so long.

5. The debate on e-government, from its definition and the criteria to refer to for its qualification (see OECD, *The e-Government Imperative, e-Government Studies*, OECD, Paris., 2003), to its emancipation or not as independent discipline (Heeks, R., e S. Bailur, *Analysing e-Government Research: Perspectives, Philosophies, Theories, Methods and Practice*, e-Government Working Paper Series, 2006, No. 16; as well as Hu, G., W. Pan, M. Lu e J. Wang, *The widely shared definition of e-Government: An exploratory study*, The Electronic Library, 2009, Vol. 27, Issue 6, pp. 968 – 985), it has been and still is subject of great attention in literature. For a general reconstructive introduction about this topic, see Grönlund, Å. and T.A. Horan, *Introducing e-Gov: History, Definitions, and Issues*, Communications of the Association for Information Systems, 2005, Vol. 15, Article 39.

Thus IT has been considered as the final aim because of its potentials as mere tool<sup>6</sup> to be applied to unaltered bureaucratic processes within a static organizational framework, whose staff has not been involved in dedicated and innovative training programs.

This way of proceeding – although pursuing a positive and declared intent –, of being willing to reform the PA and to foster the transition towards a digital administration, presented some strengths as it wanted to contribute to better quality services, reduce the waiting times, limit the costs, increase productivity and better identify responsibilities. However, it was hard to implement it, and in parallel it caused a digital divide<sup>7</sup>, both within and outside the Administration. Another consequence of this is the use of the double channel, the paper and the digital one<sup>8</sup>, something redundant and cumbersome, not in line with an overall strategic governance, the expression of a conscious reconsideration of Administration.

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6. Interesting assessments on the potentials of ICTs expressed in 2003 by P. Zocchi in *Il digital divide globale* (The global digital divide, TN) contained in Buongiovanni A., Marzano F., Tesi E., Zocchi P., “*Digital Divide: la nuova frontiera dello sviluppo globale*” (The global digital divide: the new frontier of global development, TN), Milano 2003, Franco Angeli ed., in which he notes that “...Information and Communication Technologies today have the strength of a different pattern, an alternative one, almost a revolutionary one, not only compared to the technologies of the past, but also regarding to the form and organization of our society as we know it.” If this is undeniably true, today we cannot but consider that paradoxically are the very same great potentials of these new tools to hinder change.

7. Again P. Zocchi, *The global digital divide*, cited above, correctly observes that acting against (and preventing, I would add), ‘the digital divide does not only mean to support the development of the digital components within the society, but also to relate virtuously the technological development to the one of the society as a whole.’ Allow me also to refer to P. Piras, *The digital divide*, Conference proceedings ‘Legal tools for e-government in Europe’, Caserta (Italy) 20-22 November 2003, at <http://www.teleamministrazione.it>; as well as to P. Piras, *Organization, technologies and new rights*, in “Information and information technology law”, 2005, p. 591.

8. In 2001 Fountain J.E., *Paradoxes of Public sector Customer service*, Governance: An International Journal of Policy and Administration, Vol. 14, No. 1, January, pp. 55-73, justified the double channel based on the assumption that the presence of users without any digital skill or with no access to computers imposes to the public sector to guarantee the provision of services, even if this means to keep traditional communication channels open in parallel to those online that have been developed in the meantime. See the more recent IDEM, *On the Effects of e-Government on Political Institutions*, Contribution in: D. L. Kleinman and K. Moore (eds.), Routledge Handbook of Science, Technology and Society, 2014, Routledge.

### 1. *The reorganization of public administrations and the open government model*

The actions implemented for a long time revealed the inadequacy of the paths already followed and aimed at affecting computerization only, regardless of the overall organization, insofar as the former imposes inevitably a radical change of the latter, and the latter is instrumental to the activity.

Therefore, if technological innovation of Public Administration is an essential prerequisite for the efficiency, the efficacy and the cost-effectiveness of the public action, the added value to achieve a real and full digitalization of administrative procedures is clear in an overall context of reappraisal<sup>9</sup>. The latter is also an organizational one, and should be developed after having considered the resistance to change often expressed by public bureaucracy and in the light of an assessment of the criticalities at the different levels of e-government<sup>10</sup>, which so far have affected also public administrations, and that obviously cannot be simply meant as functional to the mere provision of online services<sup>11</sup>.

Although aware of the value of online services, of the importance to shift the attention from accessibility – meant as mere quantity – to quality and to

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9. About the criticalities resulting from a mere transposition of the procedures on computer models, diffusely Zouridis, S., and M. Thaens, *E-Government: Towards a Public Administration Approach*, Asian Journal of Public Administration, 2003, Vol. 25, No. 2, December, pp. 159- 183; as well as Beynon-Davies, P., *Models for e-government*, Transforming Government: People, Process and Policy, 2007, Vol. 1, Issue 1, pp. 7 – 28.

10. Plans which erroneously have adopted in a plain way the assumption that the application of the IT tool per se would have led to modernization and change. Critically, Bonina, C.M. and A. Cordella, *The new public management, e-government and the notion of public value: lessons from Mexico*, Proceedings of SIG Glob Dev's First Annual Workshop, Paris, 2008, December 13th.

11. The annual US report on e-government (<https://publicadministration.un.org/egovkb/en-us/Reports/UN-E-Government-Survey-2016>) strongly emphasizes the provision of online services by the State and its positive effects. However, this does not mean that the state of implementation of e-government processes can be considered directly proportional nor overlapping to the quantity of access to online services (public or non-public) provided. So much so that from the data of the Digital Economy and Society Index published on May 19, 2016 (<https://ec.europa.eu/digital-single-market/en/news/2016-i-desi-report>), in which Italy registered positive figures as for digital services provided by Public Administration, even though only 18% of users make use of them. This despite the fact that Italy did not reach good results in the digital society, as it ranked among the last in the European ranking (it was ranked 25th out of 28 countries, while in 2015 it was ranked 24th). Although its performance is still not as good as that of the whole EU, Italy is among those countries which are recovering the delay, i.e. among those countries whose score has increased more rapidly than that of the overall EU. In fact, despite being below the EU average compared to the data of DESI 2015, the last year it registered progresses which approached it to the EU average.

the identification of the essential levels, there is the need to guarantee that the provision modes are compatible with the enjoyment of the rights pursuant to the equality principle stated in art. 3 of the Italian Constitution<sup>12</sup>.

Public administration has a dual role. On the one hand is affected by external dynamics, while on the other it provides new stimuli to relations with citizens to whom it provides services and with whom it communicates. Over the last years being aware of this has allowed the reorganization of public administrations and their modernization took into account open government policies based on transparency<sup>13</sup> and participation aimed at enhancing the role of active citizens also in relation to modernization and the use of information technologies.

Despite this, a study by the Bank of Italy<sup>14</sup> of February 2016 has highlighted a still unsatisfactory implementation of change in Italy, ‘...with a prevailing percentage of citizens and an important share of companies that usually interact with the Public Administration through direct contact at the counter<sup>15</sup>, maybe for the reasons outlined above – but not only.

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12. About this, diffusely, E. Carloni, *The provision of public services online*, Report presented at the LUISS- CNIPA seminar, ‘From e-government to e-administration’, in Rome at Centro Bachelet, 9 February 2006, available at <http://www.astrid-online.it/amministrazione-pubblica/e-governme/index.html>. See also G. Cammarota, *L'erogazione on line di servizi pubblici burocratici* (*The provision of bureaucratic public services online, TN*), in *Informatica e diritto*, vol. XI, 2002, pp. 45-82. It goes without saying that inequalities in new technologies only mirror the inequalities already present in the society, sometimes in an amplified way. In order to remove them, actions aimed at guaranteeing accessibility to the Internet are not enough, instead policies to support and stimulate the use of digital technologies are needed. See also Sartori L., *Il divario digitale. Internet e le nuove disuguaglianze sociali* (*The digital divide. The Internet and the new social inequalities, TN*), Bologna, Il Mulino, 2006.

13. Hoped for by F. Turati since 1908 as philosophy of public administration, Proceedings of the Chamber of Deputies, 17 June 1908.

14. Arpaia, Ferro, Giuizio, Ivaldi, Monacelli, *L'e-government in Italia: situazione attuale, problemi e prospettive* (*E-government in Italy: current situation, problems and prospects, TN*), QEF (occasional papers) Bank of Italy, No. 309, February 2016, p. 32.

15. IDEM, work cited, in which it is stated that ‘The studies carried out have shown deficiencies as for citizens in the demand of online services related to a lack of digital culture and to a low propensity to use the Internet in general. On the other hand, as for companies, they seem to indicate a greater responsibility for delays in public administration regarding the offers of e-gov: companies – especially larger ones – compared to the EU average, on the whole show a relative ‘digital maturity’ and they seem to be more prepared and receptive to the innovations offered by an e-gov present and efficient.

## 2. From the DAC to the 'new' DAC towards... a 'future' DAC?

Then, one wonders if today digital administration exists and where it is, and why we insist on connoting administration as such, without recognizing that at present it is the only possible one.

The processes and the organization of an administration which wants to mirror the dynamism of society, as well as being transparent, open and simplified, able to relate to citizens with due regard to the principles of participatory democracy, can only be computerized.

But, if we have a look at the 'life' of the Digital Administration Code, we cannot help but notice how the principles contained in it are deeply disregarded; how and how many times from 2005 to today, it has been necessary to amend it before the approval of Italian Legislative Decree no. 179/2016 (entered into force on 14 September 2016), which proposes to rewrite it based on the proxy provided by Law 124/2015 (and on the principles of Regulation No. 910/2014 of the European Parliament and of the Council<sup>16</sup>) defined as 'one of the most ambitious actions that the legislator has pursued in recent times'<sup>17</sup> and which radically reorganizes public administrations.

Therefore, we cannot help but wonder why when it was enacted they felt the need to surprisingly announce the imminent adoption of a 'future' DAC, different from the 'new' one that had been just issued, resulting from the stratification of subsequent interventions with an emendative character although radically rethought.

A Code that by going beyond the New Public Management model would match the *Digital Era Government model* consistently<sup>18</sup>, as wished for in the

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16. Reference to Regulation No. 910 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market.

17. In L. Vandelli, *La riorganizzazione delle amministrazioni pubbliche* (The reorganization of public administrations, NT), Astrid on line 2016; B. G. Mattarella, *Il contesto e gli obiettivi della riforma* (The context and the objectives of the reform, NT), *Il giornale di diritto amministrativo*, n.5/2015 p. 621, it is defined as 'an extraordinary maintenance law'.

18. P. Dunleavy, H. Margetts, S. Bastow, J. Tinkler, *New Public Management is Dead-Long live Digital –Era-Government*, *Journal of Public Administration Research and Theory*, September 8, 2005; P. Dunleavy, *The globalization of public services production: Can government be "best in world"?* *Public Policy and Administration* 9 (2): 16–46, 1997; Zhiyuan Fang, *E-government in Digital Era: Concept, Practice, and Development*, in *International Journal of The Computer, The Internet and Management*, Vol. 10, No.2, 2002, p 1-22; Fishenden Jerry and Thompson Mark *Digital Government, Open Architecture, and Innovation: Why Public Sector IT Will Never Be the Same Again*, *Journal of Public Administration Research and Theory*, 2013, 23(4) pp.977- 1004; Dunleavy Patrick, Margetts Helen, Z. Tinkler, Jane, Bastow Simon, *Digital-era Governance: IT Corporations, the State and e-Government*, 2006. Oxford: Oxford University Press.

OECD report of 2014<sup>19</sup>, focused on an overall revision of the processes, functional to the full participation of citizens.

Actually at present the sixth version of the Code approved by Legislative Decree 217 of 13 December 2017 and entered into force on 26 January 2018, does not radically rewrite the previous version, but once again it proceeds by successive stratifications and intervenes to amend in order to integrate and correct Legislative Decree 179/2016.

We must remember that Art. 1 of Law No. 124/2015 – the so-called Madia reform – labeled as Charter of digital citizenship, guarantees citizens and companies the right to access data, documents and services they need, also through ICTs, in digital mode. It also gives the Government the power to adopt decrees to reform, amend and integrate the DAC. Moreover, it identifies many directive criteria, among others the simplification of procedures; the definition of instruments to establish the minimum standard of security, quality, availability and timing of online services; as well as the single authentication through the Public Digital Identity System (SPID); the access and reuse; the participation in decision-making processes of public institutions through digital tools. Implementing decree No. 179/2016, approved by the Italian government in line with the proxy received, implementing the principles of good performance contained in Art. 97 of the Italian Constitution, and of good administration contained in Art. 41 of the European Charter of Rights, rejected the DAC reform through a path that can be summarized in three main points:

- The overcoming of the technological backwardness through actions aimed at ‘fostering the digital culture among citizens with particular regard to minors and categories at risk of exclusion, also to foster the development of legal information technology skills and the use of digital services offered by public administrations with specific and concrete actions, by using a set of different means, including radio and television services (Art. 8, still amended today).
- The definition of the contents of digital citizenship: generalization of the right to use technologies for public administrations and state-owned enterprises (Art. 3); introduction of the possibility for citizens to choose a digital domicile for the communications and notifications by public administrations and state-owned enterprises (Art. 5 bis); the right to make any payment using electronic payment systems (Art. 5); electronic democratic participation (art. 9); the possibility to

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19. OECD Council on 15 July 2014 [C(2014)88, available at <http://www.oecd.org/gov/digital-government/Recommendation-digital-government-strategies.pdf>.

contact the ombudsman responsible of the digital sector established pursuant to Art. 17, section 1 quater; the establishment of the permanent Conference for technological development at the premises of the Italian Council of Ministers, as an open system of participation to which submit the proposal of rules and administrative acts likely to affect the subjects regulated by the DAC (Art. 18).

- The start of a process regarding the management and structural reorganization of public administrations (Artt. 12-13) based on technical rules referred to in Articles 15 and 71, but not better specified, aimed at guaranteeing the ‘transition’ to the digital operative mode, pursuant to Art. 17.

All the points referred to have been revised by Legislative Decree 217/2017, which amended the DAC implementing Art. 1, approved as a preliminary item on 8 September 2017 and then definitively on 11 December 2017.

These considerations and the analysis of the text encourage some reflections.

First of all, if we consider that the first draft of the Digital Administration Code dates back to 2005, it is justified to feel a sense of amazement at the persistence to the reference to the ‘transaction’ from the paper format to the digital one, after 11 years, and it is a clear sign of the failure of the reform started then.

Secondly, on the basis of what has emerged so far, we can summarize briefly the main weaknesses of the current amendment of the DAC in macro categories. First of all, the persistent recourse to the instrument of the so-called ‘announcement’, and the deferment to future technical rules by AGID (the agency for making Italy digital), whose issuance strongly influences the implementation of the Code, beyond the good intentions and statements of principle contained in it.

Even today, in its recently approved version, technical rules are envisaged, although they are contained in AGID’s guidelines, with the aim of favoring a more agile and flexible regulation. These rules will come into force as soon as they are published online, encouraging the timing of their application.

But, from the substantive point of view, the criticality of the content of art. 71 still remains. In particular, as for the implementation of Chapter II on electronic documents and electronic signatures; of Chapter III on the making, management and storage of electronic documents; of Chapter IV on the electronic sending of the documents and of Chapter IV on the data of public administrations and online services.

This has led some to reiterate that after the DAC it is necessary to make the digital PA<sup>20</sup>.

Thirdly, the persistent reference to the invariance of spending and to the impossibility to introduce new burdens on public finance, even though in such an ambitious reorganizational context.

Law-makers imagine to start a revolution aimed at training qualified managers, with legal information technology skills, and they also aim to give life to a real digital citizenship. However, they unrealistically foresee to be able to disregard any investment.

Miele<sup>21</sup>, in a path revised also by Cassese, when designing the administrative function and explaining its organization, represented a circular process which, starting from the function to be pursued and the objectives underlying the action, quantified the human, financial and instrumental resources required and then observed the subsequent dynamic profile, represented by the activity. According to him, a different path would have resulted in a dysfunction. Looking back, thinking about the Masters' thought, we are led to the fourth point: the staff. In the light of the above, in fact, a reform project of such wide scope requires qualified staff, aware of being the engine of change. Therefore they do not only need to be trained with IT skills, but they should become the expression of a true digital culture. Exactly as already stated, from a formal point of view, in a way expressed by the combined provisions of Articles 8 and 13 of Legislative Decree No. 179/2016 and today included in the corrective and reiterated in Article 9 with regard to electronic democratic participation. To achieve this result, investments are needed also in terms of people, in their training, in their growth, as a 'new administration' necessarily passes through 'new and greater competences'. All this is missing today, or at least it is hidden behind a veil. It is not found in its substantial dimension in the 'new' Code strictly anchored to the logics of spending review, typical of the reforms of the last five years. It is therefore legitimate to ask oneself what is the state of the art towards digital administration: if we still should search for it 'with the lamp'<sup>22</sup>; if the path is completed or if we should recognize that we

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20. A. Longo, forumpa, leading article on the DAC.

21. G. Miele, entry *Funzione pubblica* (Public function, TN), in Noviss. Dig. it., 1961.

22. The paraphrase is referred to Diogenes the Cynic who used to wander with his lamp on his quest for finding man, not meant as a human being, rather the one who really had the features required to man. The lamp helps us to find a virtuous model of digital administration in the example provided by the Italian National Institute for Insurance against Workplace Accidents and Occupational Disease (INAIL) since 2012, when a strategic plan for the computerization of services was approved. See seminar ASTRID 2016.

are still in front of its mere enunciation, without having provided the actual tools to implement it.

### *3. The good performance of the 'new' Digital Administration or of the native Digital Administration?*

The path followed so far leads us to believe that the road may and should be different and that computerization can be a good instrument for the good performance of Public Administration. However, it should not be constrained by the grip of making it efficient in terms of saving public resources, but it rather should be efficient making the administrative action punctual, as M. Nigro<sup>23</sup> would put it.

Talking about innovation of Public Administration today means making progresses forward, reinventing it concretely, from inside, reconsidering rules and processes, and from outside, in the relations with the citizens, in a dimension that goes beyond the current simplification of the processes, the provision of online services and transparency in the exercise of power. In order to make computerization real, investments are required. Changing means to look at Administration with a critical awareness, to imagine it as 'digital native'. Now, however, it is clear that being a digital native in its true sense cannot be applied to administrations simply, as they are historical existing bodies, therefore they existed before the digital era. Thus, we can assume a different analysis for them. It should be organ-oriented and not institution-oriented; individually-oriented and focused on single processes linked to the public organizational culture. In this way we can try to grasp how the organ and the digital native physical person affect the overall administration context and, based on the identification with the organ, we can understand what are the consequences in terms of administrative processes – both internal and external – after being 'projected' in the digital native dimension. Apart from the example provided by some virtuous models of computerization experiences already implemented in local administrations, i.e. online services offered by public transports (in this regard, the Municipality of Cagliari ranks first in a national ranking) or in the global reorganizational one of the Italian National Institute for Insurance against Workplace Accidents and Occupational Disease, INAIL, or in the definition of functional platforms for the IT management of administrative procedures, also to standardize them and foster cooperation among adminis-

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23. M.Nigro, *Studi sulla funzione organizzatrice della pubblica amministrazione* (Studies on the organizational function of public administration, TN), Milano, Giuffrè, 1966, pp.66, 84.

trations. We can assert that the ‘substantial’ making of the digital, consistent with the modernization needs, which goes beyond the statement of principle expressed in the digital first and set as the priority objective of the reform, cannot be limited to the transposition of the new instruments on old models. Figuratively, we can say that designing the ‘new online home’ for those citizens who communicate with the PA is not enough, once we laid the foundations we must build it. We must pass from the blueprint to the actual building. We must raise the walls.

It is not enough to provide a more precise definition of digital domicile in line with the European and national legislations; reconsidering the establishment of the digital ombudsman as a central figure with mere moral suasion powers over non-compliant administrations; creating a national platform of public data, managed by the Italian National Institute of Statistics, ISTAT, to enhance the information assets held by the administrations or to include fundings for local administrations to be invested in the actions of the three-year IT plan.

It is essential to leave the past behind and to impose the abandonment of the dual channel in favor of the digital one only, setting the latter to respect the new rights and procedures, reconsidered and designed according to a different procedural engineering logic.

This is the only way to reach a turning point based on a renewed pact between citizens and public powers and, quoting Robert Frost<sup>24</sup> (*The road not taken*, Mountain Interval, NY, Henry Holt and Company, 1916), we will be able to say:

‘Two roads diverged... And... sorry I could not travel both and be one traveler, long I stood... Then took the other, as just as fair, and having perhaps the better claim... Oh, I kept the first for another day! Yet knowing how way leads on to way, I doubted if I should ever come back... I took the one less traveled by, and that has made all the difference.’

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## From eGov to OpenGov: the Open Data approach

### 1. From eGovernment to OpenGovernment

Open government has not descended directly from egovernment, along an ideal, straight-line course of evolution. Instead, *opengov* – if and to the extent it is effectively realized – is the result of a confluence of multiple factors (political, cultural, technological) many of which concern the treatment of information held and managed by the public administration. If we start from the definition of egovernment: The employment of the Internet and the world-wide-web for delivering government information and services to the citizens» (ONU, 2006), or the “utilization of Information Technology (IT), Information and Communication Technologies (ICTs), and other web-based telecommunication technologies to improve and/or enhance the efficiency and effectiveness of service delivery in the public sector» (Jeong, 2007), we can see immediately that the fulcrum of the concept is the application of ICT to improve the capacity to deliver public services to citizens. To use a metaphor, *egovernment* can be compared to the transition from transportation powered by animals to transportation powered by the combustion engine. A new technology (ICT hardware, software, and the net) powered by a new fuel (information processed, conserved, and managed in digital form) has brought about the possibility to move faster, over greater distances, more safely, and more extensively etc. This technology has created a new “engine” for public administrations that has allowed them to become more efficient and effective.

As we will see shortly, this metaphor has a fundamental flaw. Nevertheless, it permits us to describe the dynamics of eGovernment, by identifying information as the “fuel” for the machine. The metaphor also brings to mind another metaphor, which – in the knowledge society – identifies information as the new “petroleum”), or rather, “the world’s most valuable resource,” according to the famous May 6, 2017 cover of the “Economist,” featuring the OTT (over the top) companies (Google, Facebook, Amazon, etc.) pic-

tured as immense oil-drilling platforms intent on pumping “value” out of information reserves (hence, the new petroleum). In sum, eGovernment is nothing other than a specific manifestation of the transition to the centrality of the knowledge economy, in which information is the raw material for the production and reproduction of value. In the case of public administrations, this value consists in the production of more efficient and effective services. Nevertheless, in this transition, the boundaries between the respective roles of government and society are not called into question.

The paradigm shift to OpenGov, on the other hand, modifies this relationship. To understand the nature of this change (and what role information plays in this shift) let’s start with a definition: “Open government is a governing doctrine which holds that citizens have the right to access the documents and proceedings of the government to allow for effective public oversight. It opposes many traditional considerations, which have tended to legitimize extensive state secrecy. The origins of open government arguments can be dated to the time of the European Enlightenment» (*Lathrop; Ruma, 2010*). In the doctrine of OpenGov, the appeal to the need for secrecy traditionally advanced by the sovereign in regard to “affairs of state” is contested by the equal and contrary appeal on the part of citizens to the right to have access to and knowledge of the information held by public administrations. The central issue is the information held by the sovereign, by the government. In the OpenGov paradigm, citizens must have the maximum possible access to this information, so that they are able to exercise “effective control” over the government. Thus, in this interpretation, OpenGov becomes an expression of the democratic principle, to the extent that it aims not so much to make government more efficient but rather to make it subject to the effective scrutiny on the part of the “governed.”

To be sure, the OpenGov paradigm goes beyond this appeal (which we could define in terms of a claim to greater *accountability*). In fact, the specificity of OpenGov, that is, the *presumption* in favor of access to government-held information, opens up broader perspectives. The capacity for “oversight” enabled by the availability of information allows the citizenry (in its various expressions: individual citizens and associations, enterprises, professions, local agencies, etc.) to participate actively in the exercise of sovereign functions (that is, to bring their own points of view into play in the elaboration phase of public policies and in the exercise of the delivery/management of services). This can amount to an outright collaboration with public officials in the management of public functions and services (a system in which enterprises, associations and individuals operate in the first person, together with or alongside of public authorities, in the delivery of

services). To the extent that OpenGov intends to promote the capacity of citizens and enterprises to participate actively in the governance of public affairs, and to collaborate in the delivery of services, it has a direct impact on the government/society relationship insofar as it aims to alter the traditional boundaries between the parties to that relationship.

The information held by public administrations is at the center of this dynamic. OpenGov is constituted by the specific role of public information (that is information generated, held, and managed within the public sector) as *Open Data*.

## 2. *The Open Data Approach*

According to the definition of the Open Knowledge Foundation “Open data is data that can be freely used, shared and built-on by anyone, anywhere, for any purpose”. So, since the data are those collected and maintained by government (so-called public sector information), the aim of the open data (movement) is (mainly) to remove data from the exclusive use of the government and make it available to all, without restrictions.

This consideration allows us to return for a moment to the image of egov as an “engine” and information as “fuel” to highlight what makes this metaphor “incorrect.” Information, in fact, is not a material good (in the same way, for example, as fuel is for a combustion engine). Instead, information is the prototype of the *immaterial good* in that items of information are *not rivals*, their use does not determine their consumption, and therefore, it does not impede their repeated use by an indeterminate plurality of subjects. Now, with the advent of ICT, this feature of information has been bolstered by the specific features of digital support, which enables its representation, conservation, reproduction, management, and circulation. Once freed from its traditional *material* support, the potentially unlimited reproducibility of information becomes a concrete reality, concretely exigible. The Open Data movement has made this demand its own, by projecting it onto the patrimony of public information. There are two reasons for this “demand.” First, the open data movement insists that the nature of *non rival* goods requires that the information held and managed by the public sector be treated as *common goods*, belonging to the *public domain*. To put it another way, the movement emphasizes that citizens have already contributed (by way of their tax contributions) to financing the collection and management of such data, and, therefore, they cannot be required to pay further fees for

access to and use of this asset (thus, the information must be made available free of charge).

The quality of *openness* is thus defined in two ways, legally and technologically. From a legal point of view, “one must be allowed to get the data legally, to build on it, and to share it. Legal openness is usually provided by applying an appropriate (open) license which allows for free access to and reuse of the data, that is, by placing data in the public domain.” Technologically, “there should be no technical barriers to using that data. For example, providing data as printouts on paper (or as tables in PDF documents) makes the information extremely difficult to work with. So, the Open Definition has various requirements for “technical openness,” such as requiring that data be machine readable and available in bulk.”

With regard to the technical aspect of openness, the criterion is the *5 star system of classification*, elaborated by T. Berners-Lee, which distinguishes an ascending degree of openness by way of which administrations must release information: 1. make your stuff available on the Web (whatever format) under an open license; 2. make it available as structured data (e.g., Excel instead of image scan of a table); 3. make it available in a non-proprietary open format (e.g., CSV instead of Excel); 4. use URIs to denote things, so that people can point at your stuff; 5. link your data to other data to provide context. The last step is the optimal level of openness, in which information is released as *Linked Open Data*.

### 3. *The Growth of the Open Data Approach*

In the wake of initiatives undertaken in the United States promoted by President Obama (the Open Government Initiative of 2008), and in the UK following adoption of the Open Government License (for the release of public information), the growth and success of OpenGov (and Open Data) as an overall policy indication has been evidenced by several international initiatives involving numerous countries. Preeminent among these initiatives are the Open Government Partnership (2011, with 89 participating countries) and the Open Data Charter (2015, with over 50 participating countries). The promotion of open information policies has also acquired importance in the context of the European Union (a prominent example are the objectives of the Digital Agenda, the European Data Portal, as well as the guide to open information policy contained in the “Open Data Goldbook.”)

Despite this international success, operationally the open data approach depends primarily on policy choices made on the national (or sub-national)

level. One example, on the European level, is the important regulatory provision (Directive 98/2003 on the reutilization of public sector information), which applies to all member countries. Although modified several times to bring it more into line with the open data paradigm (see the modifications set forth in Directive 37 of 2013) the directive is still not fully in line with the open paradigm, since it leaves member states room to maneuver by subjecting the reutilization of information to certain conditions, including the payment of fees. In this regard, choices made in various national context are worthy of note (such as Italy, and England, for example) in which information made accessible/released through the internet is subject to the *open data by default rule*, that is, a scheme that favors the open data approach, with only circumscribed and justified exceptions.

*4. Key factors for the success of the open data approach (including for the purpose of containing/combating administrative corruption)*

Since the open data approach entails the sharing of publicly held information with the outside environment (citizens, associations, enterprises, research centers, etc.) it aims to activate energies, know-how, and engagement on the part of subjects outside the public administration. The key factor of these policies, therefore, is the effective activation, the *engagement* of subjects interested in reutilizing the information.

This *necessary* involvement of outsiders has some possible side effects and pitfalls.

- the digital divide and data literacy have an impact on the open data approach, in terms of equal opportunity: “data literacy must be encouraged from an early age. There’s little point in releasing a lot of data, if only a small fraction of the population is able to read them. Actually, it could even lead to more inequality”<sup>1</sup>;
- the «empower the (already) empowered» risk. The literature reports the well-known case of the digitization of land records in Bangalore in 2006: newly available access to land ownership and title information in Bangalore was primarily being put to use by middle and upper income people and by corporations to gain ownership of land from the marginalized and the poor.<sup>2</sup> Of course, account also needs to be

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1. F. Guerrini, *The Dark Side Of Open Data: It’s Not Only How Much You Publish, But How And Why*, Forbes, Jan 27, 2015.

2. M. Gurnstein, Open Data: Empowering the Empowered or Effective Data Use for

taken of cases in which the open data approach has made it possible, instead, to “empower the marginalized”.<sup>3</sup>

These weak points help to emphasize that the open data approach should always be attentively implemented (by the public administration), by paying special attention to the role and responsibilities “of subjects who propose themselves as intermediaries,” that is, those who are the actual reutilizers of public information.

### 5. *The Open Data Approach and Anti-Corruption Policy*

The possible repercussions of the opening up of data in terms of anti-corruption policies are evident, given that the underlying philosophy of OpenGov promotes greater outside “control” and at the same time greater accountability for public authorities. Indeed, in the founding documents of the principal international initiatives regarding open information, fighting corruption and fostering the integrity in the exercise of public functions are always cited, both among the purposes of the initiative and among the desired effects deriving from implementation of open information policy.<sup>4</sup>

Specifically, the use of open information is the basis for the fashioning of new instruments, useful in the first place for detecting and then for combatting the phenomenon. The use of information produced and managed by public administrations reinforces more consolidated instruments for investigating and measuring the extent of corruption, based on surveys of the perception of corruption. Using the data in combination with the methods of statistical analysis makes it possible to know the phenomenon better, identify and analyze risk factors, and analyze the impact of the preventive and repressive measures put into play. Taken together it all adds up to a set

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Everyone? (2010), mentioned by D. Kaplan, *Open Public Data: Then What?* (2011).

3. See the case of how open data help to show that the City of Zanesville, Ohio, Muskingum County, Ohio, and the East Muskingum Water Authority illegally denied water service to a predominately African-American community on the basis of race: <http://odimpart.org/case-kennedy-vs-the-city-of-zanesville-united-states.html>.

4. For another example to add to those cited in the text, see “G20 Open data Principles”(2015); one of the three “pillars” on which the G20’s “open data” strategy was built (along with “Trasparency” and “the increase in the amount, sources, quality of available data”) is described like this: “As such, Open Data can help prevent, detect, investigate and reduce corruption” (<http://www.g20.utoronto.ca/2015/G20-Anti-Corruption-Open-Data-Principles.pdf>).

of investigative tools capable of increasing the efficacy and effectiveness of anti-corruption policies.<sup>5</sup>

A fundamental contribution to this effort could come from some categories of mediators, interested for different reasons in developing these methodologies, experimenting with new measuring tools, and proposing new fields of investigation, in line with the philosophy of the OpenGov and OpenData approach. Specifically, we have in mind universities and research centers, the world of investigative journalism, NGOs active on issues of right to access, transparency and public accountability. There is an obvious advantage for public institutions committed to the prevention and repression of corruption in the creation of an environment favorable to the sharing of public information. If and to the extent “outside” actors are effectively engaged in developing innovative proposals and solutions, they can also turn out to be useful in the exercise of institutional anti-corruption activities, with the awareness that “the intelligence is out there” and that the “open data” approach could be the way to put it to work.

#### *6. The open data approach: many expectations, mostly still to be fulfilled*

The implementation of a mature and thoughtful open data approach has given rise to multiple expectations, not least with respect to policies for the prevention and repression of corruption. It must be recognized, however, that until very recently, these expectations still appear to be largely unfulfilled, as has been pointed out in the literature.<sup>6</sup> Among the factors identified as obstacles to the full realization of the potential benefits of open data, the two main ones are:

The delicate relationship between open information policies and the need to safeguard the privacy of personal information. The availability and processability of some classes of personal information appears to be of fundamental importance to the development of tools for the detection/measure-

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5. About the methodologies for measuring corruption based on use of public administrative data, see the contributions to this volume by G. Arbia, E. Galli and M. Gnaldi.

6. On the distance that still separates promise/expectation from actual progress, see RiSSC – Research Centre on Security and Crime (2015), *Revolution Delayed. A study on the impact of Open Data on Corruption*, Tacod Report, available at: [https://www.europeandataportal.eu/sites/default/files/2015\\_revolution\\_delayed\\_a\\_study\\_on\\_the\\_impact\\_of\\_open\\_data\\_on\\_corruption.pdf](https://www.europeandataportal.eu/sites/default/files/2015_revolution_delayed_a_study_on_the_impact_of_open_data_on_corruption.pdf); as well as Transparency International (2017), *Methodology and analytical framework: G20 anti-corruption open data principles assessment*, available at: [https://www.transparency.org/whatwedo/publication/connecting\\_the\\_dots\\_building\\_the\\_case\\_for\\_open\\_data\\_to\\_fight\\_corruption](https://www.transparency.org/whatwedo/publication/connecting_the_dots_building_the_case_for_open_data_to_fight_corruption).

ment/prevention of corruption based on the use of open data. Nevertheless, it is not yet clear if and to what extent (and under what conditions) the use of these classes of data is compatible with the need to safeguard personal information. The distinctive features of the open data approach are not easy to harmonize with the principles of safeguarding personal information inherent in the corpus of European law.

The existence and effective interest of “intermediaries” capable of exploiting the fact-finding potentialities created by the availability of open data. This factor, so crucial to the success of the *open data approach*, is often also strictly tied to the effective availability of information (so as to justify the investment, the engagement – or both – on the part of subjects “outside” of the public administration. This can give rise to a vicious circle apt to discourage the activation (or even the perceived desirability) of such policies. In this regard, there is by now (even in the literature) a general awareness about the role that public actors are called upon to play, which cannot be limited to freeing up the information, but must also include promoting and stimulating the engagement of “outside” partners, by favoring the encounter between information supply and demand.

# PART X

Public transparency and the prevention of corruption



## The role of transparency in anticorruption reform: learning from experience

### *Introduction*

Currently transparency seems to be a buzzword in the global anticorruption discourse. Pollitt and Hupe (2011) would call transparency a “magic concept”, a very broad, normatively-charged concept which lays claim to universal application and it is widely used by both academics and practitioners. The latter, however, should not be seduced into thinking that the fashionable concept of transparency provides usable recipes for strengthening accountability, reducing corruption and enhancing good governance in a specific context (Bauhr and Grimes 2017). Effective disclosure of information has not been a demonstrated achievement of the transparency rhetoric in many contexts, not by necessity it has strengthened the citizens’ capacity to act upon the available information (Lindstedt and Naurin 2010). The “transparency fix” builds on the powerful metaphor of the sunlight that perforate government secrecy to act as a disinfectant thanks to the flow of information from the state. Yet, this metaphor gives a misleading picture of the significance of transparency for good governance since it rises above the institutional and societal preconditions that shape whether the release of government information delivers the expected benefits (Fenster 2017).

Drawing on the literature on transparency and anticorruption, this contribution seeks to advance policy recommendations that might be included into a reform agenda. In order to qualify the claims of the global transparency discourse, section one presents the barriers for information disclosure and use. Then, section two provides an overview of the myths that are at the heart of the transparency rhetoric. The contradictions concealed by transparency myths are addressed by a set of policy recommendations outlined in section three. The conclusive section discusses broader practical implications of the fine-grained assessment of contextual conditions that are overlooked by simplistic and idealized views of transparency.

Before moving to the next section, it is worth noticing that transparency is articulated in a number of varieties of information disclosure, from reactive forms like freedom of information to proactive forms like open data. Each variety of transparency poses opportunities and challenges for anticorruption (Cordis and Warren 2014; Costa 2013; Garcia Aceves 2016; Granickas 2014; Vadlammanati and Cooray 2016; Worthy and McLean 2015). The exploration of the relationship between anticorruption and varieties of transparency is beyond the scope of this contribution. The latter focuses on policy recommendations that are set at a high level of abstraction transcending the nuances of different forms of transparency. This means building on a finding shared by previous research on varieties of transparency: whatever the form of disclosure is undertaken, its effectiveness as an anticorruption tool is strictly dependent on contextual enabling conditions (Mungiu-Pippidi and Dadasov 2017).

### *1. Barriers for the disclosure and use of government information*

This section first contributes to the conceptualization of barriers on information disclosure and derive practical implications concerning resistance from public servants to implement transparency laws. Drawing on recent literature, three key strains of resistance towards transparency can be identified (Barry and Bannister 2014; Conradie and Choenni 2014; Michener and Ritter 2017; Wirtz et al. 2016). The barriers identified below are often inter-related and this interrelatedness further lowers the chance of information disclosure by public bureaucracies.

- *Professional resistance*

The risk-averse attitude of the public servants builds an important barrier to implementing transparency provisions. It is well known that employees in the public sector are likely to display low willingness to implement reform in the context of an organizational culture which is conservative about the release of government information. Moreover, the predominance of negative frames in the current news media environment hardens the resistance of public servants since government information is mainly used to assign blame rather than to improve the daily work of public bodies, thus increasing mistrust in government (Grimmelikhuijsen 2012).

- *Resistance as an indirect effect of limited capacities*  
Government information does not exist as an object capable of simple release since it does not form a manageable archive (Fenster 2006). There are a number of barriers resulting from shortage of capacity to produce, archive, and disclose information of good quality, ranging from the unavailability of a supporting technological infrastructure to the lack of personnel, standards and procedures, complemented by the legacy of fragmented records. Further, this resistance often reflects a much larger difficulty: the lack of top-level leadership and planning.
- *Legal resistance*  
Public employees tend to perceive the existing transparency regulations to be under-specified since they do not provide clear instructions on how to handle the potential for controversies surrounding the protection of personal data, security issues and licensing. The lack of clear legislation thus leads to an inhibited attitude regarding transparency in the perception of public employees with fear of conflict with the law.  
With regard to the use of information, the existence of a public that stands in as the receiver of data and documents released by government has been contested by recent literature (Roberts 2010). One of the most substantial barrier is simply the lack of awareness about rights granted by transparency laws, particularly among the least educated citizens. For individuals who display awareness of transparency legislation, there a number of practical difficulties: lack of advice on how to file a request for information or a complaint about non-compliance with transparency laws; lack of information on the location of information that has been proactively released; lack of all kinds of resources and skills that are needed for the analysis and the interpretation of government information. To make sense of government information, in fact, data and documents must be collected, combined and integrated with contextual information in order to infer actionable knowledge with regard to the public sector's trends and anomalies.

## 2. *Myths of Transparency*

Drawing on the review of the barriers for the release and the use of government information that have been highlighted by the literature, Janssen et al. (2012) have identified five myths which have proved be at the heart of open government implementation in most countries so far:

- *Information disclosure will automatically yield benefits*  
 The aim of open government should not be merely the release of information for its own sake. This myth overlooks the barriers resulting in a lack of user actions. Placing too much emphasis on the supply of information and not providing any means to process information makes transparency useless. Supporting use of information should not be conceived as secondary to releasing information.
- *All information should be unrestrictively disclosed*  
 Transparency policies are often generic and stimulate the release of all information following the principle of full accessibility. This myth overlooks a number of issues. First, law might prevent the release of certain data. Second, resources for disclosing information are limited. Third, resource scarcity is further heightened in the eye of public servants by the perception of transparency as an extra task without a clear return since the benefits of disclosure are not always explicit. Fourth, information quality varies across records and datasets and in many instances it could be too low. Finally, the implementation of this myth can turn into a “snowing” effect, in which the release of so much data with so little interpretation and quality control has the effect of reducing rather than increasing effective use (Hood 2007).
- *It is a matter of simply releasing government information*  
 Many transparency policies adopt the model that takes formerly closed information and exposes it through a publicly accessible interface. Basically, information is made available without additional activities. However, additional activities are needed to improve records management (Casadesus de Mingo and Cerrillo i Martinez 2018). Additional activities are also needed to lower the barriers for accessing and using government information by meeting the two key empirical parameters of transparency: visibility and inferability (Michener and Bersch 2013). First, standardization of release methods and development of robust meta-data can improve visibility of information by making it complete and easy to locate. Second, transparency is more attractive for users if information is verified and simplified by third parties that check the accuracy of datasets and detect patterns meaningful for the public.
- *Every citizens can make use of government information*  
 Reformers often claim that transparency will enable the wider public to hold government to account. However, the experience of countries like the UK has highlighted that non-experienced citizens do

not constitute an army of “armchair auditors” looking over the books (Worthy 2015). Despite the rhetoric of reformers, the bulk of ordinary citizens is not interested in government information. Disclosure affects only a small core of users, mixing activists and professionals, meaning that transparency tends to be used by those already engaged in the policymaking process who are willing and able to handle the complexity of government information (Worthy and Hazell 2017).

- *Transparency will result in open government*  
The Open Government movement promotes transparency to deliver objectives like improved decision-making, better public understanding, more effective oversight, greater public participation and increased trust. Yet, the empirical analysis has highlighted that an increase in transparency in highly corrupt countries yields paradoxically more losses than gains in confidence towards government (Bauhr and Grimes 2014). These findings challenge the assumptions of open government rhetoric posing a direct link between transparency and better government institutions. Transparency reforms alone cannot be expected to ignite broad social indignation towards corruption. Transparency may instead give rise to resignation and withdrawal from public life as unintended effects. Only if accompanied by other institutional arrangements that channel public discontent with malfeasance exposed by disclosure, transparency can bring about improvements in governance (Vadlammati and Cooray 2017). Complementary institutional arrangements should focus on two key issues: participatory mechanisms that lower the costs of political engagement; reliable inter-institutional oversight mechanisms providing an avenue by which to utilize information to issue sanctions.

### *3. Policy Recommendations*

Given the success of the myths identified in the previous section, it seems that a more nuanced approach is needed for effective information disclosure, meaning a transparency policy capable of reaching the goals that are included in the open government agenda. In this section five practical steps are recommended to go beyond the current state of the art featuring a widening gap between the promises of transparency and the limited use of government information.

- *Demand-driven transparency*  
Transparency should be understood as a focused policy that devotes limited resources to the release of useful information. This implies that government information should be mapped in order to provide users with a clear data catalogue providing information with regard to data quality and to the costs and the time needed to release information. More consultation with key stakeholders complemented by research into the users' perspective is also needed to undertake the focused approach to information disclosure that prioritizes the release of information demanded by users. In addition, promotional or other forms of supportive activity (events, contests, conferences, civic monitoring, etc.) should encourage the use of disclosed information. Finally, more data should be collected with regard to the users' feedback and the actual social and economic impact of transparency (Sieber and Johnson 2015).
- *Performance management*  
Drawing on users' perspective to set transparency goals implemented is the first step to accommodate modern transparency initiatives within traditional models of performance management design. The latter provides factors like measurability, that is distinguishing specific areas of action and matching them with specific outcomes; performance milestones to track progress and evaluate results; and goal clarity sustaining better communication and coordination. All these factors support the implementation of the focused approach catalyzing the shift from transparency as a collection of disparate policy practices into a coherent administrative reform area (Ingrams 2017).
- *Lateral transparency*  
Transparency policies have been path-dependent so far, meaning that the legacy of vertical data management has been reproduced by laws mandating the release of information by public agencies conceived as monads. Yet, public agencies are usual part of larger organizational structures implying that transparency can also flow laterally between peer organizations sharing data (Piotrowski 2017). Lateral transparency yields immediate benefits for public servants by enabling better inter-organizational collaboration. Further, it makes feasible the establishment of data analytics units at the centre of government that help agencies detect possible misuse of public resources as well as contributing to institutionalize evidence-based decision-making.

- *Enforcement*

It is widely acknowledged that enforcement of transparency provisions is key to mitigating implementation gaps. The courts and oversight bodies are the two main enforcement mechanisms built into transparency laws. Many systems entrust oversight bodies with a primary role by resolving disputes that arise between users and the administration that holds government information. Most scholars demand oversight bodies endowed with strong enforcement powers including the right to issue legally binding orders. However, comparative research has shown that oversight bodies with binding decision power are not necessarily more effective than their counterparts with recommendation power (Holsen and Pasquier 2015). There are drawbacks to more coercive powers: first, oversight bodies with binding decision power require substantial investment of resources; second, qualified candidates for filling the position of transparency officers within each administration are discouraged from looking for the assignment which pose the risk of sanctions in case of non-compliance; third, granting the oversight body binding decision power would be too drastic a step forcing information disclosure by legalistic means. The latter are likely to reinforce public servants' resistance towards transparency, thus making implementation a matter of legal interpretation that risks triggering disruptive conflict between public bodies, requesters of information and oversight structures. To make it short, strong enforcement powers may appear as a quick fix for implementation problems but they overlook the evolutionary nature of transparency reform (Snell 2000). The latter is a process that should be accompanied by oversight bodies focused on regulatory and monitoring roles that help build capacity over time. It is also worth highlighting the relevance of appointment processes: information commissioners may well ensure effective enforcement by using the informal power to shame non-compliant administrative offices that rests on their strategic ability to develop and consolidate awareness and public support for transparency reform.

- *Transparency Ecosystem*

It is now widely acknowledged that transparency has functioned as an effective check only in those contexts where it has been part of an ecology that includes sound public management, independent judiciary, reasonably open opportunities to publish and share information, and a set of civil society actors capable of pursuing anticorruption campaigns (Kreimer 2008). This implies that transparency should be designed and evaluated by undertaking an holistic approach that targets not only

the disclosure of information but also the interdependencies between actors as suggested by the ecological metaphor. The latter highlights the multiple and varying interrelationships between data producers, users, material infrastructures, and institutions. It aims to provoke new thinking about the conditions necessary to actively cultivate development of contextual features to achieve the benefits of transparency (Harrison, Pardo and Cook 2012). First, it means that transparency should not be disentangled by broader public management reform since the capacity of public agencies is a necessary condition for good record-keeping and effective disclosure. Second, regulation should ensure that markets provide opportunities for media pluralism and innovative business. Third, education should equip new generation with a viable level of data literacy.

### *Conclusions*

Drawing on the expanding literature on anticorruption and open government, this contribution has tackled the gap between the benefits promised by the transparency rhetoric and the limited success of most reform initiatives that have been implemented so far. It has identified the main resistances to information disclosure that are neglected by the myths widely used as tales of progress associated to the current talk on transparency.

Placing transparency within an empirically-grounded perspective is the main policy recommendation that can be advanced in this conclusive section. This implies taking into account the many barriers that hinder the implementation of transparency by virtue of a focused approach, meaning an incremental and selective take on implementation that draws on a fine-grained assessment of contextual features. It also means focusing on capacity building issue not only within the public sector but also across those societal actors that are part of the ecology of transparency.

Another set of policy recommendations concern the relationship between transparency and accountability. First, complementary institutional arrangements like participatory mechanisms and interinstitutional oversight mechanisms are needed to sustain civic mindedness and propensity to engage in accountability efforts. Second, transparency and complementary institutional arrangements should attempt to encourage improved institutional performance rather than focusing on individual failures and transgressions. Most of the current anticorruption drive in corruption-prone countries suffers from legalism and capacity shortage resulting from the focus on individual

accountability (Fox 2007). By focusing on the details of the micro-management of public resources this approach to accountability overlooks more systemic flaws that pose the opportunity structure for corrupt behavior. A proper preventive approach on corruption should focus more on providing societal actors with the information that is needed to monitor a larger picture of government.

Finally, the crucial role for specialized bodies in the regulation and enforcement of transparency should not be understood as a replacement of political commitment. The latter is needed for setting a robust legal framework and funding transparency initiatives within a coherent and comprehensive national strategy that provides a clear direction to the entire government ensuring coordination and communication of the progress towards the measurable objectives agreed with stakeholders. Effective management of the national strategy therefore requires setting up responsibilities and capacities at the centre of government that are much needed to promote a shared vision across the public sector and towards the citizens.

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## Transparency and privacy as human rights

### *Introduction*

International human rights law does not protect a human right to transparency per se. However, transparency as an essential feature of a democratic and open government based on the rule of law, is essential for the effective guarantee of human rights and, conversely, some human rights, especially the right to freedom of expression and its corollary right to information, are recognized as instrumentally fundamental for promoting democracy and accountability, including the prevention of corruption (see Section I, below). The right to privacy as a component of the right to respect for private life can be a limitation to the exercise of the rights to freedom of expression and to information for the promotion of public transparency (Section II). However, privacy and transparency are also mutually supportive, especially in the field of electronic communications. Indeed, the protection of personal data in online communications is meant to safeguard privacy and to promote the free flow of information. Consequently, it requires transparency from the state on the regulation of online communications, also by private entities (Section III). This article aims at giving some basic and updated inputs as to the legal principles, criteria and guidelines developed within the universal and European human rights systems, in relation to these three points.

### *1. Right to access to government information as a human right*

At the universal level, the right to access to information held by public bodies or freedom of information (FOI) has long been recognized as a human right strictly linked to, or being a central component of, the right to freedom of expression. FOI was originally defined as a «fundamental human right implying the right to gather, transmit and publish news anywhere and everywhere without fetter» by the UN General Assembly in its

Resolution No. 59 (I) of 14 December 1946. The human right to FOI has been enshrined as a corollary of the freedom of expression in some major international instruments, such as the Universal Declaration of Human Rights (UDHR) of 1948 (Art. 19), the International Covenant on Civil and Political Rights (ICCPR) of 1966 (Art. 19) and, at the regional level, the American Convention on Human Rights of 1969 (Art. 13), inasmuch as the relevant provisions mention the freedom «to seek, receive and impart information and ideas of all kinds».

The UN Special Rapporteur on Freedom of Opinion and Expression has consistently asserted that the right to access information held by the public authorities is protected by Article 19 of the ICCPR, and entails a positive obligation for states to ensure access to that information (UN Doc. A/68/362 of 4 September 2013, para. 2; UN Doc. E/CN.4/2005/64, 2005, para 39). The Human Rights Council (HRC), in its General Comment No. 34 of 2011 on Article 19 of the ICCPR, expressly acknowledged that this provision embraces a right of access to information held by ‘public bodies’, regardless of the form in which the information is stored, its source and the date of production. As indicated in para. 7 of the GC, ‘public bodies’ are «[a]ll branches of the state (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local». Such bodies may, nonetheless, include also other entities that carry out public functions. The Council also stressed that «[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights» (para. 3). The fundamental importance of access to information «to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency» has also been stressed in the 2004 Joint Declaration on access to information and secrecy legislation by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

Within the Inter-American system of human rights, the right of access to information as enshrined in Article 13 of the American Convention of Human Rights (ACHR) has long and strongly been recognized as a crucial tool for controlling state affairs and public administration, as well as monitoring corruption, for guaranteeing transparency and a good public administration by the government and other State authorities, besides being a measure that allows the citizenry to exercise adequately their political rights (See Inter-American Legal Framework Regarding the Right to Access, Doc. OEA/Ser.L/V/II, 2011). The Inter-American Court of Human Rights

(IACtHR) has recognized, in its jurisprudence, that the right of access to information is considered a fundamental tool a) for the control by citizens of state affairs and the public administration (especially when it comes to controlling corruption); b) for citizen participation in politics through the informed exercise of political rights; and c) for the general fulfilment of other human rights, especially of the most vulnerable groups (Claude Reyes et al. v. Chile, Judgment of 19 September 2006, paras. 79-84).

Therefore, the protection of freedom of information as a human right is widely recognized as instrumental to the broader aim of transparency and accountability of government (Cannataci et al. 2016: 82-87; see also Hale 2008: 73, Klaaren 2013: 223). However, the grounding of FOI as a human right in the right to freedom of expression is not self-evident nor uncontested. Indeed, freedom of expression is rooted in the liberal theory which focusses on the right of the speaker to communicate without hindrances (Weeramantry 1994: 10), and this fact has long impacted on the definition of freedom of expression within the European region.

First of all, contrary to Article 19 of the ICCPR and Article 13 of the ACHR, Article 10 of the European Convention on Human Rights and Fundamental Freedoms of 1950 (ECHR) on freedom of expression, does not provide explicitly for a right to access to information. Until recently, moreover, the European Court of Human Rights (ECtHR) has held the view that the freedom to receive information in Article 10 basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him, without requiring states to grant access to information or imposing any positive obligations on them (see Judgments *Leander v. Sweden* of 1987, para. 74; *Társaság a Szabadságjogokért v. Hungary* of 2009, para. 36; *Österreichische Vereinigung Zur Erhaltung, Stärkung und Schaffung v. Austria* of 2013, para. 16).

Only in its seminal Judgment *Magyar Helsinki Bizottság v. Hungary* of 8 November 2016, the ECtHR recognized, for the first time, that Article 10 on freedom of expression entails a right to access public information, although a qualified one, i.e. to be interpreted in line with consolidated trends in international human rights law at the universal level and in other regional contexts. In this case the applicant NGO (*Magyar Helsinki Bizottság*) has complained that the refusal of police departments to disclose information on the appointment of public defenders upon their request represented a breach of its rights as set out in Article 10 ECHR (paras. 138-148). The Court observed that, since the adoption of the Convention, the domestic laws of the overwhelming majority of the Council of Europe's member states, along with the relevant international instruments, have evolved to the point that there exists a broad

consensus on the need to recognize an individual right of access to state-held information, so as to enable the public to scrutinize and to form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society. The Court, nonetheless, recognized that the aim of reinforcing transparency in the conduct of public affairs generally is broader than that of advancing the right to freedom of expression as such (para. 139). In this regard, the Court held that the denial of access to information may constitute an interference with Article 10 ECHR in circumstances where such right is instrumental to the exercise of the applicant's right to receive and impart information, as in the case at hand (para. 155). The ECtHR therefore recognizes access to information as a precondition to freedom of expression, and not as a self-standing right under the Convention. The ECtHR therefore recognizes access to information as a precondition to freedom of expression, and not as a self-standing right under the Convention (see Uitz 2016; McDonagh 2013: 25; Carpanelli 2017).

The Court identified four relevant criteria to assess whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom of expression. Firstly, the purpose of the person requesting access to information held by a public authority must be to enable his or her exercise of the freedom to "receive and impart information and ideas". In this regard, a difference has been noticed with the IACtHR, which in *Claude Reyes v. Chile* recognized a right to public interest information for everyone, without the necessity to state the reasons for which information is sought (see Schaap-Rubio Imbers 2016). Secondly, the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt the need for disclosure under the Convention. The ECtHR explained that «such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large». Thirdly, the seeker of the information must do so with a view to informing the public, acting as a public "watchdog" (*Magyar Helsinki Bizottság v. Hungary*, paras. 165-167). Fourthly, the readiness and availability of the information requested will count in order to assess whether a refusal to provide the information can be regarded as an "interference" (paras. 169-170).

The qualification of the right to access to information as instrumental to freedom of expression and the conditions identified by the ECtHR to grant protection under Article 10 ECHR to the requests to access public-held information, have been generally criticized by the doctrine as a missed opportunity to fully recognize the right to access to information within the

European system of human rights. However, it seems to us that the stance taken by the ECtHR leaves a margin to assess differently, in relation to different kinds of activities and claims and in different contexts, whether and to what extent claims to access to and disclosure of information should be protected, taking into account the special duties and responsibilities that characterize the activities of public and social watchdogs. The scope of application and the global aim of the freedom of expression, on one side, and the right to access to public information, on the other, are not fully coextensive, although the former can be used to foster and protect the latter, if necessary. The approach taken by the ECtHR is a useful contribution to a further debate on the need to develop different criteria for protecting and regulating human rights and freedoms when exercised for individual purposes (without neglecting the global value of such exercise) or in the public interest.

### *1.1 Promoting the “right to know” through whistle-blowers’ freedom of expression*

In the latest years, a growing attention has been devoted to the need for states to protect the right to freedom of expression of whistle-blowers (WBs), i.e. persons who bring to the public knowledge otherwise undisclosed information, thus making access to information possible. At the universal level, in his report of 8 September 2015 (UN Doc. A/70/361), the UN Special Rapporteur on the right to freedom of opinion and expression addressed the protection of sources of information and WBs under Article 19 of both the UDHR and the ICCPR.

The Special Rapporteur stressed that the legal protection of WBs, when they publicly disclose information, i.e. their right to information, rests on the public’s right to know “information of public interest”. It encourages participation in public affairs and accountability, increasing the costs for those who engaging in wrongdoing, and is reflected in international standards on the efforts to combat corruption, e.g. Article 13 of the United Nation Convention against Corruption (UNCAC) of 31 October 2003.

The Special Rapporteur identified some basic principles for the legal protection of WBs. Firstly, the adoption of a broad definition of WB is suggested, such as that of a person who exposes information that he or she reasonably believes, at the time of the disclosure, to be true and to constitute a threat or harm to a specific public interest. To limit the protection offered to those who blow the whistle only in a work-related context, although frequent in

national laws, is not recommended, in line with the UNCAC, which contains no employment limitation (para. 29). Secondly, the report of information on a reasonable-belief requirement based on thoughtful consideration of the facts known to a person at the time of disclosure should be protected even if it then turns out not to be correct, and without expecting the WB to provide precise analyses of whether the alleged wrongdoing merits penalty under existing laws (para. 30). Thirdly, the WB's motivations at the time of the disclosure should be irrelevant as to the assessment of his or her protected status, and in this sense no requirement of good-faith should be provided. The protection should rather focus on the public interest nature of the information reported (para. 31). Fourthly, it is suggested that some matters should be presumptively considered in the "public interest", such as criminal offences, human rights violations, violations of international humanitarian law, or issues relating to corruption, public safety and environmental harm, or the abuse of public offices (para. 10). Fifthly, regardless of the approach taken, the scope of protected disclosures should be easily understandable by a potential WB (paras. 32-33). Sixthly, as regards internal reporting mechanisms, states that aim to have working whistleblowing procedures which reduce public disclosure, must ensure the effectiveness and trust in the confidentiality and full independence of these processes from the organization in which they are embedded. If WBs reasonably perceive that an internal process does not guarantee effective redress and protection, they should have access to two other avenues of protected disclosure: either an external but not public entity, such as a government-wide ombudsman or oversight institution; or they should have the possibility to disclose the alleged wrongdoing to external entities, such as the media or other civil society organizations, or through self-publishing (paras. 34-37). Moreover, public whistleblowing should be protected regardless of the existence of effective internal or oversight procedures when an exceptionally strong right of the public to know about some kinds of information is at stake, such as in the case of serious violations of international human rights law or other fundamental rights in the constitutional or statutory framework of a state (para. 38).

Within the European human rights framework, whistleblowing seems actually defined and protected through Article 10 of the ECHR only as disclosure of wrongdoing in work-based relations. Good faith on the part of the WB is required, meaning that he or she must have reasonable grounds to believe that the information disclosed is true, and that he or she did not pursue unlawful or unethical objectives (Parliamentary Assembly of Council of Europe, Resolution 1729 and Recommendation 1916 of 2010 on the Protection of whistle-blowers). As to the definition of 'public interest' in

the context of whistleblowing protection, according to the Committee of Ministers of the Council of Europe it “should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment” (Recommendation CM/Rec(2014)7, para. 43). The ECtHR developed, in its case-law, six criteria for assessing whether the public disclosure of wrongdoings occurred at the workplace, by public or private employees, falls within the scope of the protected freedom of expression (see Judgments *Guja v. Moldova* of 12 February 2008; *Marchenko v. Ukraine* of 19 February 2009; *Heinisch v. Germany* 21 July 2011; *Bucur and Toma v. Romania* of 1 August 2013; *Soares v. Portugal* of 21 June 2016). Firstly, whether the WB had available any “competent authority” to which he or she could disclose information, or “any other effective means of remedying the wrongdoing”. Secondly, the public interest in the information, which can sometimes be so strong as to override even a legally imposed duty of confidence. Thirdly, the information’s authenticity, requiring a person to carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. Fourthly, the damage that the public institution may suffer by public disclosure, including whether it outweighs the public’s interest in knowing about the information. Fifthly, the motive and good faith of the WB, which could impact on the level of protection or redress available. And, sixthly, an evaluation of the proportionality of the penalty imposed upon the WB.

## *2. Privacy as a limit to transparency*

The freedom to impart information in order to promote transparency in public matters has a limit in the protection of the right to privacy or to respect of private life, as related in particular to the protection of personal data, with which it has to be balanced. Indeed, the right to privacy includes the protection of personal data, although privacy and protection of personal data are not coextensive (Focarelli 2015: 36-37; on different views concerning the relationship between privacy and data protection see also Solove 2008: 40; Rouvoy and Pouillet 2009: 45; Lynsky 2015: 102-103). At the European level, Article 8 of the ECHR spells that «[e]veryone has the right to respect for his private and family life, his home and his correspondence». Nonetheless, Article 10, para. 2, ECHR, sets forth that the exercise of freedoms related to the right to freedom of expression may be subject to such restrictions as are prescribed by law and are necessary in a democratic society, *inter alia*, for the protection of the reputation or rights of others.

Within the EU, Article 7 of the European Charter of Fundamental Rights, based on Article 8 of the ECHR, provides that «[e]veryone has the right to respect for his or her private and family life, home and communications»), while Article 8 requires protection of personal data («1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which have been collected concerning him or her, and the right to have them rectified»). According to Article 52, para. 3, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention.

In its most recent and relevant case-law, the ECtHR held that the right to privacy trumps on freedom of expression when the disclosure of personal data does not serve a specific public interest, and not every disclosing activity allegedly exercised in order to promote transparency can be deemed to be carried out in the public interest. In *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (Judgment of 27 June 2017), the Court established that the Finnish Supreme Administrative Court had struck a fair balance between freedom of expression and the right to privacy embodied in the data protection legislation when it decided to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies, since it did not contribute to a debate of public interest. These used, in fact, to publish en masse and almost verbatim, on a newspaper and through a service of text-messages, public accessible taxation data. The Supreme Administrative Court had followed a preliminary ruling from the Court of Justice of the European Union (CJEU) on the interpretation of the EU Data Protection Directive 95/46/EC, now replaced by Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. According to the CJEU, the decisive factor was to assess whether a publication contributed to a public debate, or was solely intended to satisfy the curiosity of the readers. Rejecting the arguments of third-party interveners (*Article 19, the Access to Information Programme and Társaság a Szabadságjogokért*), according to which the fact that the relevant information had been made public under national legislation implied that there was a public interest regarding access to it, and thus it could no longer be regarded as inherently private, the Strasbourg Court stressed that the existence of a public interest in providing access to large amounts of taxation data, did not necessarily or automatically mean that there was also a public interest in disseminating en

masse such raw data in in unaltered form, without any analytical input, considering also that the majority of the persons whose data were listed in the newspaper belonged to low-income groups (paras. 118-119; 195).

On the contrary, not all personal data deserves protection as private data. In the *Magyar Helsinki Bizottság* case, mentioned above, the ECtHR held that, although the information requested concerned personal data, i.e. the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions, their professional activities could not be considered to be a private matter and it was not proved that the disclosure of the information requested for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of their right to respect for private life within the meaning of Article 8 of the Convention (paras. 195-198).

When transparency is imposed by state or public institutions, in order to ensure the proper use of public resources, proportionality of measures requiring the disclosure of personal data has to be respected. In this vein, in *Volker und Markus Schecke GbR* of 2010 (cases Nos. C-92/09 and C-93/09), the CJEU held that the obligation imposed by EU regulations to publish on a website the data relating to the beneficiaries of aid from EU agricultural and rural development funds, including their names and the income they had received, constituted an unjustified interference with the fundamental right to the protection of personal data. According to the Court, the EU institutions had not properly balanced the public interest objective in the transparent use of public funds against the rights which natural persons are recognized as having under Articles 7 and 8 of the Charter, regard being had to the fact that it was possible to envisage measures which would have less adversely affected that fundamental right of natural persons (paras. 85-89).

### *3. Privacy, transparency and freedom of information mutually reinforcing*

Privacy is not only a limit to transparency. Especially in the digital age, transparency and privacy are also mutually supportive, improving each other's protection. The HRC has acknowledged that transparency and its promotion through the right of access to information foster and are instrumental to the right to privacy in relation to personal data, and that individuals must be granted access to and amendment of personal data stored in automatic data files, besides the right to ascertain what personal data is stored in automatic data files and for what purposes; and which public authorities or private individuals or bodies control or may control their files (GC No.

16 1988: para. 10; GC No. 34 2011: para 18). At the European level, the ECtHR in some cases established that a refusal by public authorities to grant access to information concerning the applicants amounted to a violation of their right to respect for private life (see Judgments *Guerra v. Italy* of 19 February 1988; *Roche v. United Kingdom* of 19 October 2005).

The fair processing principle of the EU data protection law requires transparency in data processing, including by providing sufficient information to the data subject, e.g. on data breaches. Transparency, in this sense, is an important instrument to ensure data privacy protection in data processing (Cannataci et al. 2016: 86). Data protection laws in many jurisdictions require data controllers to disclose sufficient information over the nature of their data-processing to data subjects, including instances of data breach, data re-use or change of purpose in use, so that data subjects may know if their personal data and data privacy have been protected according to the law.

On the contrary, the protection of privacy and confidentiality of electronic communications is fundamental in order to promote the free flow of communication on the internet, and this requires states, on the one side, to control and regulate the policies and activities of private internet companies and operators and, on the other side, to be transparent about their own interactions with internet corporations. In one of its latest reports, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stressed that freedom of expression on the internet requires transparency in internet regulation. The Special Rapporteur observed that, despite some improvements, transparency concerning government requests for content removal or access to user and customers data is still lacking. Furthermore, several states prohibit disclosures concerning such requests. The report stresses that state restrictions on private disclosures of relevant information can be a major obstacle to corporate transparency (UN Doc. A/HRC/32/38 of 11 May 2016). It is also important to promote an ethic of communication in the internet and a culture of individual responsibility in safeguarding privacy, which should be conceptualized and protected also as a vital public interest.

### *Concluding remarks*

This article has focused on the protection of individual human rights and freedoms in order to promote public transparency (i.e. the freedom of expression of social watchdogs and whistle-blowers, as a freedom instrumental to access public-held information in the public interest). The article

considered, moreover, the way in which transparency, legality and fairness in any operation of interception, storage, processing, disclosure and re-use of data, especially in electronic communications and in the use of digital devices, are essential in order to promote the right to privacy and the protection of personal data, which in their turn are fundamental to foster a free flow of communication and information.

At the European level, compared to the universal one, the legal regime for the protection of the freedom of expression as a means to promote access to information in the public interest, and thus transparency and accountability in democratic societies, seems to recognize greater relevance to the requirements of good faith, prudence and accuracy in any activity of reporting and disclosure in the public interest carried out by individuals or organizations acting as public or social watchdogs. While this stance might be criticized as limiting the protection accorded to freedom of communication and information, it seems to us that it rather offers a valuable contribution in stressing that any form of communication and information, especially (but not only) that provided in the public interest, entails responsibilities and duties and bears consequences at the societal level. Indeed, the promotion of a culture of transparency, legality and accountability in public administration as well as in the management of any powerful public or private organization is not independent from, or opposite to, the promotion of a culture or ethic of responsibility and good citizenship on the part of the administered ones.

Moreover, while using the language of individual human rights, and using them as legal tools to foster public transparency and an open society, we must not forget that the guarantee of 'goods' such as the access to information and privacy is not only a matter of individual rights and expectations but also a matter of avoiding or managing social control.

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## The struggle for a society of responsibility and transparency: the core question of education and culture

### 1. *The cultural question: awareness vs. hetero-direction*

*E*ducation is citizenship. Education is democracy. Democracy is complexity (Dominici, 1996-2017). The objective of this essay is to highlight the strategic relevance of educational processes in rethinking and rebuilding a new global citizenship within a culture of responsibility and transparency, indispensable “instruments”, not only for contrasting corruption, but also for creating truly democratic systems, fostering awareness rather than *hetero-direction* (Riesman, 1948). These complex instruments require long-term actions necessary for constructing cultural change and a culture of prevention. Currently, the politics/policies of the nation states, which have been thrown into a profound crisis by globalization, continue to fall back on short-term rationales and instruments. It is, therefore, crucial to underline the strategic role of schools and education in:

- the education, preparation and training of citizens who will not limit themselves to knowing their rights, but will participate in actions for the common good, based on a culture of legality and responsibility;
- the construction of a fully mature citizenship founded on a fully mature relationship, as symmetrical and transparent as possible, between state and citizen;
- the definition and construction of social, political, economic and cultural conditions – the complex “variables” of our discourse, which qualify the citizens in the exercise of their rights and which are the fundamental pre-existent prerequisites to the (equally important) issues regarding digital citizenship.

To put it very simply: there is/there can be – no such thing as “digital citizenship” unless the minimum conditions of “plain citizenship” are guaranteed – conditions which obviously and substantially precede the other and

which represent the most essential safeguards. At the same time, there is/ there can be no such thing as “real” innovation (meaning social and cultural innovation) without guaranteeing conditions of inclusion (which cannot be exclusive). And there can be no such thing as a fight against corruption without equality and inclusion. Thus we find ourselves back to the duo: inclusivity or exclusivity. Schools have always played a vital role in democratic regimes, and it was Piero Calamandrei himself, one of the spiritual fathers of the Italian constitution, in a historical speech made in 1950, who did not hesitate to speak in terms of “constitutional organs”.

«As you know (you will all have read our Constitution), in the second part of the Constitution, the part entitled ‘the branches of the state’, there is a description of the bodies through which the people express their will. These are bodies through which politics is transformed into rights, and our healthy and vital political battles are transformed into law. Now, when you are asked what these constitutional bodies are, the answers that will naturally come to mind to all of you are: the Houses, the House of Representatives, the Senate, the President of the Republic, the Judicial Authorities: but it will never occur to you to consider school among these bodies, which is, instead, a vital organ of democracy as we conceive of it. If we were to compare the constitutional organism to the human organism, we could say that school corresponds to those organs in the human body that have the function of creating blood [...] School, central organ of democracy, because it solves what, in our opinion, is the central issue of democracy: forming a ruling class. The forming of a ruling class, not only in the sense of a political class; that is, the class that sits in Parliament holding debates and speaking (and at times shouting) – which is at the head of the specifically political organs, but also the ruling class in a cultural and technical sense: those who head the offices and the companies, those who speak, teach, and write. Artists, professionals, poets...this is democracy’s problem: to create this class, which must not be a hereditary caste, closed off, an oligarchy, a church, a clergy, an order. No. In our idea of democracy, the ruling class must be open and continually renewed by the upward flow of the best elements from all classes, from all categories» (Calamandrei, 1950).

Words so clear and meaningful as to require no further comment, not even regarding their extraordinary pertinence today. Once the strategic relevance of school and education has been acknowledged and accepted (?), we must, however, ask ourselves: can we actually speak about “digital citizens”, about “participation”, about “inclusion”, if we do not begin by educating the “Person” to be a “citizen” in the first place? And – I repeat – it is the schools that are truly strategic, more than any other formal or informal in-

stitution. Certainly, in this fragile phase of change (paradigm shift, sharing economy, knowledge society, etc.), school takes on a further, even more crucial role of accompaniment, mediation, preparation and support regarding the mutations brought about by the digital revolution and by the *hypercomplex society* (Dominici, 2003). What is more, this aspect, which absolutely must not be underestimated, brings into focus the “ancient” but evergreen issue of *teaching the teachers*.

## 2. *The importance of “constructing” people and citizens socially and culturally*

The social and cultural construction of a Person in the first place, and subsequently a citizen, is a complex process that should – must – be activated /sparked off / accompanied from the earliest years of life on, without delay: we are speaking of fundamental prerequisites that could function to reinforce an extremely weakened social tissue, creating, in fact, the conditions, the empirical conditions, so to say, for battling the absence of civil-mindedness, and that vacuum of sense and ethics, which, aside from media representations and emotional flare-ups, appears to be spreading further and further, and not only among the new generations. These are the roots of that widely known “cultural question” that hinders the establishment of genuine (social and cultural) innovation and of more open and inclusive social systems. Issues and problematics that have profound implications even within the very conception/design/definition of any kind of model or exercise of citizenship and participation.

As you will have gathered, I hold that these questions are, to say the least, strategic, but at the same time I feel that it is fundamentally important to view them in the framework of a more complex discussion and, in general, of a reformulation of what I have defined a “new social contract” (Dominici, 2003, 2005). Not to speak of the very concept of citizenship (Marshall, 1950; Veca, 1990; Bellamy, 2008; Dominici, 2005; Norris, 2011; Balibar, 2012; see also Bobbio, 1984), a rethinking/reformulation that must lead, in turn, to an operational conversion, working towards the definition, design and implementation of educational proposals and strategies. Because this is the level of cultural change that is crucial for triggering and accompanying economic, political and social change. And as I always say, there is no room for improvisation or shortcuts: the strategic level concerns the educational process (first and foremost, schools) and the other agencies of socialization.

For this reason: the issue is a cultural one regarding education in the first place, and also freedom, which entails responsibility. Moreover, beyond the social, relational and ethical dimensions, our youth, from the earliest years of school onward, are more and more in need of learning, living, practicing and applying “logic” (by the time the university years are reached, it is truly difficult to modify the structure of a *forma mentis*, for instance by teaching students to use logic to develop/verify arguments). They are in dire need (allow me to repeat myself) of a method for thinking, reasoning, synthesizing, of rendering systemic the (overly?) enormous quantities of information received (philosophy). In dire need of being introduced to complexity and to critical thinking, of an education that teaches and trains them to individuate the connections between phenomena and processes, between knowledge and life-experience... that enables them, for example, to critically evaluate the socio-historical origins of norms and cultural models, to reflect upon and distinguish “nature” from “culture” and “convention” (dichotomy that should be left behind once and for all); to see diversity and pluralism as fundamentally valuable rather than dangerous.

Consequentially, a reformulation of thinking and of the fields of knowledge along open and multidisciplinary lines becomes even more urgent, which must, then, develop into concrete proposals and educational strategies working toward *the social construction of change*. We must remember, however, that when this kind of change is a top-down imposition, this means that it is (and will always be) an exclusive change, for a chosen few and for a fleeting moment. It is time to fully and irreversibly realize that the truly strategic factor of change and of innovative processes is none other than the cultural factor, a complex variable with the long-term capacity to trigger and accompany the economic, political and social processes. There is no room for improvisation; the albeit necessary communication campaigns, the continual, incessant reliance on event marketing, the more or less viral campaigns and the more or less inspired (or merely lucky) hashtags – are not sufficient. The strategic level concerns those educational processes which are – or should be – centered, above all, around the school as protagonist, schools and other agencies of socialization; this is the crucial level where it is possible to construct, besides “well-made heads” (critical thinking, systemic thinking, complex thinking), a culture of legality, of prevention, of responsibility, of respect, of non-discrimination, determining the socio-cultural conditions for reducing the hegemony of the individualistic and egoistic value systems that have significantly contributed to weakening social and community bonds, apart from having turned the so-called “cultural question” into “THE question” and not just

one of many. But what are we referring to when we say that “the question is cultural”? A question that closely regards *social hypercomplexity* (Dominici, 2005-2018) and is in fact an invaluable (and complex) indicator, which should not be underestimated when analyzing social systems and their *resilience* to change.

Once thing is certain: we are facing a social complexity which eludes the traditional systems of control and surveillance, and which, as I have said so many times in the past, requires a reformulation of thinking and a redefinition of the *fields of knowledge*, which should play a part in reducing exactly that complexity, or at least in defining the conditions of predictability regarding behavior within and without the organizations and the systems. It is in this sense that Edgar Morin speaks about “thought reform”: «Thought reform would require a reform of teaching (in primary school, secondary school, university), that in turn would require a reform of thought. Clearly, the democratization of the right to think would require a paradigm revolution which would allow complex thought to reorganize knowledge and connect the fields of knowledge that today are confined within the disciplines. [...] Thought reform is a key anthropological and historical problem. This implicates a mental revolution even more important than the Copernican revolution. Never before in the history of humanity have the responsibilities of thinking been so huge. The heart of the tragedy also lies in thought». (Morin – Kern, 1993, p.170-171).

It is, in any case, an extremely thorny topic, which is difficult to untangle owing to its many implications. We can certainly begin by assuming that, as we have said, *there is a close correlation between school/education and a truly active and participatory citizenship* (2005-2017). We have often spoken of this as the possibility for a less asymmetrical relationship, even more so in those social systems that are characterized by little (not to say nonexistent) vertical social mobility and by widespread (im)moral familism that still renders these societies firmly corporative and resistant to true and deep-reaching change and to social innovation. It is not by chance that, for many years now, I have been speaking of the “hegemony of a socially -- and culturally -- feudal model,” and above all, of an “asymmetrical society” (Dominici 2005, 2010, 2016). Not only in advanced societies have schools, education and training always represented the sole possibility for advancing socially or improving one’s starting conditions; but this possibility is/should be even more essential in rigidly structured societies. In other words, what we are looking at are our only “social elevators”, which, unfortunately, at this point in time have almost completely *broken down*, and therefore are no longer carrying out their vital function: the crisis of the welfare system is

yet another nail in an extremely problematic framework, which, in turning insecurity into an existential condition, has brought about a weakening of the mechanisms of solidarity, casting doubts on the rights of the people (citizens) – even the right to knowledge.

*3. Ethics and morals cannot be imposed: why it is necessary to teach and train citizens*

In other words, what we are pondering overall are not only the conditions which can make complex processes effective, such as those regarding inclusion and citizenship, but also the opportunity and the necessity of working within a systemic perspective and a network-logics, on the definition and construction of a “culture of citizenship and inclusion”. The very growth of any nation-state, which is a crucial issue that cannot be explained and managed utilizing solely economic paradigms (globalization has widely provided sufficient demonstration on this point), would derive great advantages from this. Our societies are marked by a “cultural question” that – I repeat – goes well beyond a normative, judiciary and deontological/professional framework, which invokes freedom and thus responsibility (related concepts) on the part of individual and collective social actors. Civic-mindedness, the teaching of citizenship, a shared ethics, a cultural model and a strong identity are the fundamental “devices” for the very survival of the social and organizational systems. Not only because – above all – ethics and morals cannot be imposed. These are processes which, as has been said, involve multiple variables and require profiles and skills developed through real-life experiences. These issues, furthermore, do not only concern themes of inclusion and citizenship; for example, I still believe that “real” prevention must be activated, must be constructed at school, hence long-term policies are needed.

The urgency of taking a different approach towards contrasting corruption and illegality is confirmed by the observation that often the most advanced modern democracies, despite having designed and realized complex, and more or less well-structured normative and legal systems, reveal themselves to be deeply tarnished by the dimension/question of irresponsibility. This is an extremely important indicator, concerning the hegemony of individualistic values and the weakening of social bonds. We are, in fact, passing through a lengthy transitional phase, which has become apparent in a moment of crisis that is only partially economic.

Most of these democratic systems have a multi-branched and complex set of norms and legislation: there are numerous laws (perhaps too many in some countries), professional codes, deontological charters, guidelines, formal regulations, systems of value-based and cognitive orientation. Yet these instruments continue to come across as necessary but insufficient conditions, precisely because there is a crucial core dimension, the dimension of responsibility: a concept that must be understood from a relational angle, a dimension that cannot be caged or otherwise controlled by any system or device, because it pertains to personal liberty – to the liberty of the people (another discourse which should be explored in depth, linked to the theme of emancipation in modernity: the concept of *generative liberty* is interesting here). From this point of view, one cannot help agreeing with this definition of the society of individuals: a society (ours) in which many *individuals* (fittingly) feel that they are free not to answer to anyone for their actions, much less answer to a “community” whose bonds have been severely weakened; (it is no coincidence that many have mentioned the concept of “the end of social ties”). A few years ago, I entitled one of my books *The Society of Irresponsibility* (Dominici, 2010) to indicate precisely this critical condition, only partially linked to the economic crisis (or to economic indicators); once again, the “cultural question” sheds light, not only on the crisis of educational institutions, but also on the weaknesses of traditional apparatuses and of the age-old logics of repression and control that have never tackled the problems at their core, that have always been short-term strategies (emergency culture vs. prevention culture), at all levels and in all sectors of praxes. There can be found within these modern democracies, some of which appear to be culturally founded upon the principle of irresponsibility, (in the case of Italy, for example, going beyond even paradoxical limits), (Dominici 2003, 2009), other than on rampant behavioral incoherence: an irresponsibility common to all sectors, including the communication and information sectors, vital -- to say the least – to democracy itself; a widespread irresponsibility which is an actual measuring stick of the “cultural question”, legitimizing those who overstep laws, rules and even shared social norms (a culture of cunning), a predominant irresponsibility that, not only in Italy, has found its ideal *ecosystem* in a historical context and a cultural climate which unfailingly rewards those who put *specific interests* before general interests and the “common good”. What comes to mind, in this sense, is the metastasis of corruption, which as crime news in the last ten years has brought to light, involves not only the so-called “elite caste”, but also large sectors of civil society who, in all probability, continue to believe, despite all, to be able to derive advantages from this same “caste”; an irresponsible atti-

tude that branches out into ethically reprehensible behavior and which takes no notice of the precautionary principle. Hence, a prevalent irresponsibility which renders the infringement of laws and norms socially acceptable, deeply rooted in a certain “culture of cunning”, that at times is unconsciously processed and diffused exactly in those sites which are in charge of the socialization and the education of the Person. What happens, therefore, is that the solution to the problem, in a certain sense inevitable (yet obviously, it is not the only route to take), is always the same: a continuous fall-back on stricter and stricter laws and norms: clearly in many cases these are necessary – even fundamental – conditions, but as amply demonstrated in social, political and economic history, these conditions/ factors are not sufficient. We must cope with the intrinsically problematic and complex “nature” of social systems (Parsons, 1951; Luhmann, 1984; Coleman, 1990; Luhmann – De Giorgi, 1991; Touraine, 2004; Diamond, 2005), no longer classifiable merely in the (significant) categories of risk, uncertainty, vulnerability, liquid modernity, etc. (Beck, 1986, 2007; Bauman, 1998, 1999, 2000). On top of all this, almost paradoxically, is the fact that never before as in these years (and days) have our discussions centered so much around ethics and responsibility in all fields of social action (from politics to culture, from information to technology and scientific innovation, etc.). This paradox could be simplified with the formula: the triumph of “etiquette over ethics”<sup>1</sup>. Again, in the case of Italy, a country of paradoxes and contradictions (not only on a cultural plane): on the one hand, for every “new” problem we immediately call for new laws, new deontological codes, new prescriptions, new prohibitions; on the other hand, culturally, we consider these same laws, norms and rules an obstacle to our self-realization and success/social status/prestige. What often seems to be missing is in fact behavioral coherence, which in communicative terms, would be (is!) much more effective than words and principles that use a more or less “politically correct” language. It seems obvious that we are facing an actual “educational emergency” – although I am not fond of this word -- which aptly represents that (still hegemonic) culture that can only deal with problems by applying occasional and exceptional provisions (regarding everything from security to work safety, from health issues

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1. N.B. In Italian the original expression used, “*Etica vs. Etichetta*”, has a slightly different meaning to the English expression, as the literal translation of “*etichetta*” is “label” or “labeling”, thus the exact translation would be “Ethics vs. Labeling”. Wishing to preserve the fluidity of the original alliteration, after considering “Morals vs. Mottoes” to be a bit too loosely translated, we decided on “Ethics vs. Etiquette”, as it likewise conveys a contrast to a correct behavioral code founded on solid human values, in this case as opposed to a set of prescribed manners that may well be devoid of the spirit of care and sharing.

to violence, from discrimination to bullying, from corruption to illegality) – tied to a great number of factors and variables, which have brought about a profound transformation of the processes of socialization as well as a crisis of the traditional agencies/institutions dedicated to the internalization of values and to the shaping of personality and identity (recognition-respect-altruism-civic mindedness – pro-active citizenship as opposed to hetero-directed passive citizenship). I am referring here to the concept of “formative polycentrism” and to the unfolding of a range of educational and formative offers. No country will be able to get off to a fresh start without seriously dealing with these problems. In other words, we are talking about “tomorrow’s citizens”, who are running a serious risk of continuing to grow and socialize within an (apparently?) dominant culture of cunning, mendacity, illegality and/or *amoral familism* (Banfield, 1958); and all of this within that culturally and socially “feudal” model we have spoken of, which has always left very little room for vertical social mobility.

The “cultural question” that we have mentioned several times is linked (as we have also said), in particular, to a communication gap/crisis between generations (a concept that needs to be uncaged and developed). Nonetheless, from this perspective in our analysis we cannot help noting how the media (old and new, not to mention the social networks), along with the renowned “peer groups” – have literally devoured the communicative spaces and fields of knowledge (?) which had been handled in the past by traditional institutions and educational and formative agencies.

On the subject of those social actors and professionals who are protagonists in the educational and formative process, I cannot refrain from taking a radical stance, notwithstanding the consideration that in some countries, schools and universities have been heavily penalized by funding cuts and excessive reforming. There are certain careers/professions that should be primarily chosen when one feels oneself to have a calling for them and not only for social prestige or because they allow one to exercise a form of micro-power over others. *Taking care* of a person (a complex concept), teaching, training, sharing and developing does not merely signify transmitting and/or imparting notions: our children, our students, and more in general, our youth are – as it were – “on” to us – what they observe is “how we behave”. In other words, what counts is what we “do” and not what we “say”. “Your” (our) credibility and prestige is based on our behavior and its coherence with respect to what we claim to do or be (a problem that also concerns politics). If you ask for courtesy, you have to show it yourself in the first place, and if you demand respect and a sense of responsibility, first of all

it is you who must respect the “Other” and behave responsibly etc., even if the relationship is asymmetrical, owing to roles and hierarchies.

#### 4. *What makes the difference is the human factor*

Consequently, we will be paying for the substantial inadequacy of our education for a long time, a near-sighted educational system in which a disastrous separation between the two cultures, scientific and humanistic, is still being designed and built, both on scholastic levels and at university. On a practical (and operational) level, we cannot refrain from reminding society of the urgency of long-term policies capable of engaging and supporting cultural change, and in this case as well, the strategic centrality of education – schools and universities – is undeniable! From this point of view, as far as what I have defined the “interconnected society” is concerned, the horizontal and democratic aspects of the procedures and of the systems cannot be guaranteed by technology in and of itself, since what makes the difference is/will always be the human factor, the quality of the social relations and of the bonds of interdependency, within and without the social systems, within and without the complex organizations.

Because *democracy* (Dewey, 1916; Popper, 1945; Arendt, 1951; Esposito, 1993; Rodotà, 1997, 2013; Dahl, 1998; Dahrendorf, 2001; Canfora, 2004; Nussbaum, 2010; Norris, 2011) is not merely procedure; it is not merely a system of legal norms to be recognized, applied and respected. *Democracy is complexity* (Dominici, 2003, 2005 and further works). It is a system of complex processes, involving numerous connections and levels of connection, whose reduction/simplification is always risky.

A (hyper)complexity that can be understood as:

- As a passage from linearity to complexity
- As a passage from simplicity to complexity
- As pluralism of principles, values e visions
- As reciprocity of totalities and multiplicities
- As a continual dialectics between liberty and equality
- As enhancement of heterogeneity and acknowledgement of deviance
- As recognition and mediation of conflict
- As contemporary presence of disorder and chaos (opportunity)
- As enhancement of multiplicity and diversity

- As a multiplicity of identities and subjectivities
- As unpredictability and vulnerability of people and systems
- As a new formative and educational paradigm
- As an epistemology of interdependency for the «hypercomplex society»
- As a reflection on complexity itself
- As organization of experiences and fields of knowledge
- As an interdisciplinary and transdisciplinary approach to problems
- As acknowledgement of error as a means of producing knowledge

From this perspective, the construction of a democratic *governance*, with the relative processes of citizen participation and engagement, is an extremely complex process characterized by ambivalence and open dialectics. In other words, democracy is the possibility of co-existing conflict and contradiction, of co-existing normality and deviance, held together yet at the same time left open, so that its dialectics need never undergo a process of (complex) synthesis.

##### *5. The illusion of a less asymmetrical relationship with power*

Technological innovation has always been a strategic factor of change in social systems and organizations, but without a *culture of communication*, without a *systemic view of complexity* (Wiener, 1948, 1950; Ashby, 1956; Bateson, 1972; Morin, 1973-2017; Foerster, 1981; AA.VV., 1985; Dominici, 1996-2018; Emery, 2001; Morin – Ciurana – Motta, 2003; Taleb, 2012), and on the level of political deciders, without social policies capable of sparking and upholding cultural change, it merely becomes a “would-be” innovation. Any analysis of the present-day challenges facing global citizenship, and specifically, digital citizenship, must, whilst maintaining awareness of the complexity and of the interdependency of the phenomena described, deal with certain premises regarding the new ecosystem (1995) and the myriads of implications produced by the so-called knowledge society/economy. Let us begin by attempting a possible definition:

The interconnected society is a hypercomplex society, in which the management and processing of information and knowledge have by now become our main resources, a kind of society where the exponential growth of opportunities for connection and information transmission that constitute the fundamental factors of economic and social development, do not yet correspond to an analogous

increase in the opportunity for communication, which we have defined as the social process of knowledge sharing that entails equality and reciprocity (inclusion). Technology, the social networks and more in general the digital revolution, despite having determined a paradigm shift in the setting up of the structural conditions, allowing the interdependency (and the efficiency) of the systems and organizations, and having intensified the intangible flow between social actors, have not yet been able to guarantee that the interactive networks that have been created will generate genuine communicative relationships, based on, that is, truly shared, symmetrical rapports. In other words, the network has constructed a *new ecosystem of communication* (1996) but, although it has designated a knowledge zone, it cannot by itself assure horizontality or symmetrical relationships. Again, the difference comes down to who and how: the people and the uses that they make of technology, beyond the potential interests at stake (Dominici, 1998 and 2014; see also Dominici, 2005, 2011).

All else aside, we are living along a socio-cultural horizon of prospects – of speech and action – but above all, of (short-term) strategies, which are still based on an unquestionably partial awareness of the multi-dimensionality, of the ambiguity, and of the unexpectedness that mark the processes of innovation and change. There is often a mere display of consciousness, leading to the diminution, at times to the trivialization, of the very concepts of communication, sharing, inclusion, citizenship or democracy. Running the risk, among many others, of rendering technological innovation an irreversible structural condition devoid of culture, another aspect we have pointed out many times before. Thus we will limit our discussion to understanding how speaking about inclusion, citizenship or digital democracy without making the effort to at least oppose those phenomena and processes that make them difficult to achieve (by hindering those innovations that are open and inclusive) is tantamount to legitimizing the mechanisms of a social historical connection that is more and more characterized by cognitive and cultural inequalities that clearly delineate social stratification on a global level as well. At the end of the day, the same can be said for the (absolutely crucial) “merit” issue, which must be centered around opportunity – in fact, if it is not intersected by other variables it risks being and regarding only the “merits” of those who have had the greatest head start regarding access to education, knowledge and culture. Take, for example, complex variables such as “educational poverty” and/or “functional analphabetism”, far too long underestimated, untold and invisible in the media. Until the day comes when the equality of starting conditions will be guaranteed for all, speaking about “merit” and “meritocracy”, as well as about “citizenship” and “inclusion”, will run the risk of being nothing more than pure rhetoric. Long before it became a “banner word”, we coined the expression “asym-

metrical society” (2003), exactly in the midst of an extremely fragile phase of upheaval in which the mainstream (hegemonic) narratives on the web and the digital revolution were painting a picture, practically in terms of a causal nexus, of the rapports between “digital” and “participation”, between “digital” and “trust” – which are still being confused with popularity, not only from a political standpoint, as well as with certain ideas/visions of “image” and “reputation” – between “digital” and “inclusion”; lastly, between “digital” and “citizenship”.

In acknowledging this cultural delay, we cannot avoid calling to mind – and strongly insisting on – one of our earliest formulas: connected citizens will not suffice; the citizens we need are those who have been educated and informed analytically, who have been taught critical thinking and complexity, who have been taught citizenship and not subjection. Citizens who have been taught citizenship (the same is true for the social construction of a *culture of legality and/or a prevention culture*: these have to *be constructed* at school) – which is -- let this be quite clear -- made up of rights, which they need to be aware of, (the strategic role of communication – almost always confused with marketing – which should be understood as simplification, sharing, access, transparency, services, inclusion etc.), but also of duties. In any case, it is necessary to act and intervene exactly where the structural conditions of this unequal society are being defined, at schools and universities, the “authentic” strategic resources of the new ecosystem. With core focus on educational and formative processes. Being free entails taking on significant responsibilities, which we must not fear. And in order to (at least attempt to) construct all of this, exclusively on a long-term basis, education and training must concentrate on teaching people (the person) and citizens to be capable of taking advantage of the opportunities offered by technological innovation, but also, and above all, of contributing to a social and cultural change that cannot overlook the need for dealing with “cultural issue” and with the lack of a shared ethics in the public interest.

#### *6. Citizenship without citizens: running the risk*

Then again, “real” citizenship, actively participating in initiatives of public interest and, in a more general sense, cultural change, are always complex products, generated, on the one hand, by bottom-up social processes and mechanisms, on the other hand, by the actions of that civil society and that public sphere, that are, at the moment, being absorbed and devoured by politics, which has taken away their authority. What are needed are long-

term policies designed and carried out from a systemic perspective (a missing dimension). Otherwise, inclusive processes, platforms and dynamics will not be of much use, even if they have been designed and actuated according to a rationale of participation, activated by a public administration which -- it is to be hoped -- in the meantime, has become more and more transparent and efficient. The risk we are running -- we repeat -- is that of building a citizenship/democracy without citizens, which will be able to include solely those who possess the instruments and are capable of producing/processing/ sharing knowledge.

Technological innovation has always been a strategic factor of change in social systems and organizations, but without a culture of communication (Dominici, 1996), without a systemic view of complexity, and on the level of political deciders, without social policies capable of sparking and upholding cultural change, it merely becomes a "would-be" innovation. The knowledge society and the new global ecosystem are destined to become more and more exclusive and inaccessible, even in those areas where it is not yet possible to put up walls and barriers to manage (?) diversity, inequality, corruption and conflict. The opportunities for inclusion and mobility guaranteed by the "asymmetric society", apparently so open and inclusive, are in reality, only theoretical and limited to a legal framework.

To put Adriano Olivetti's particularly meaningful words in a slightly (and perhaps arbitrarily) different manner, when he said: "I think of factories for men and not men for factories," we must truly begin to think about (and to design) cities, territories, ecosystems, webs, public administrations, services and so on, *for* (and *with*) the *citizens* and not vice-versa: services, social spaces and environments that are actually (beyond slogans) centered around the citizens (although I have always preferred to say: "centered around the Person"; whilst so often the sensation is that what they are centered around is something totally different... and I am referring not only to technology itself (opportunity), to the logics of power and/or of special interests, but also to an idealized image, still far from realistic, pertaining to the citizen-receivers of policies and services; citizens who, having been taught and "prepared" for citizenship, will become -- literally -- more and more involved in the decisional processes. At the moment, we are *stuck within the illusion of transparency, stuck within the illusion of having a less asymmetrical relationship with power.*

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# PART XI

European Union and national strategies to prevent corruption



## Procedural rules and controls to ensure integrity in using EU funds

### *1. Why is a general and effective control over the EU funds necessary?*

In democratic societies, complete, accurate and readily available information on budgetary and policy implementation is an essential condition for effective scrutiny and decision-making; these information, in particular, serves as a basis for accountability. Furthermore, protection of the financial interests of the European Union is a key element of the EU policy agenda to strengthen and increase the confidence of citizens and ensure that their money is used properly.

In fact, European citizens require guarantees of total integrity and transparency in public spending, especially given the current challenges arising from the economic crisis and the increasing distrust in the European Union (EU) institutions. Moreover, stronger coordination and cooperation among the domestic bodies involved in audit and financial integrity of the public budget is an element of primary importance to create a general trust amongst the Member States of the European Union which, especially now, are affected by a significant lack of reciprocal confidence.

Therefore, considering the importance of a real and effective control over income and expenditure of the EU budget, the European Union action in the field is centered around two principles: a) budgetary control; b) protecting the Union's financial interests and combating fraud. Our attention will focus on the second aspect.

### *2. EU funds: what are they?*

Besides the resources needed for the ordinary activities, EU policies are implemented through a wide range of programs and funds. They support hundreds of thousands of beneficiaries (member States, foreign States, towns, regions, farmers, students, scientists, NGOs, businesses, etc.).

Different actors have the power to allocate resources coming from the EU funds and programs.

The first category, that add up to the most part of the budget (almost 80%), is formed by resources allocated by EU institutions and national authorities (State, regions..). The most important fields of action of this group are: the so called structural actions (structural and investments funds), and the common and agricultural policy, that, together with the rural development programs, involves also the countries preparing to join the EU. The EU Institution, in cooperation with the authorities of member states and external countries, manages these resources. In case of suspicion of fraud, national authorities usually initiate investigations.

The second category is that of the direct expenditure, allocated and directly managed by EU institutions alone. These funds account for 14% of the EU budget and the beneficiaries are generally private and public entities located in EU countries.

Then we have the external aid (for subject acting outside the EU) that accounts for 2% of the EU budget. The beneficiaries are generally NGOs and public and private foreign entities.

Taking into account the funds and programmers financed within the Multi Annual Framework 2014-2020, these are the amounts – divided for categories of expenditure – allocated for field of intervention: sustainable growth and natural resources (total amount: 420.034 million); economic, social and territorial cohesion (total amount: 371.433 million); competitiveness for growth and jobs (total amount: 142.130 million); global Europe (total amount: 66.262 million); security and citizenship (total amount: 17.725 million); administration (total amount: 69.584 million).

### *3. What are the legal bases for the protection of the financial interests of the EU?*

All revenues and expenditures of the Union shall be examined, including those of bodies, offices or agencies set up by the Union to pursue specific aims. Also expenditures of EU funds carried out by national subjects shall be in accordance with the EU rules. For these reasons, a close and regular cooperation between Member States and the EU Institutions on a sound use of EU finances is requested; moreover, the obtainment of this goal allows specific measures to be taken in order to provide equivalent and effective protection of the EU's financial interests at national and sub-national level.

Due to the great importance of the safeguard of the financial interests of the EU, general principles and norms on the integrity in using EU funds are enshrined in the EU primary legislation.

First of all the article 325 of the Treaty on the Functioning of the European Union (TFEU) that open Chapter 6 of the Treaty dedicated to “Combating Fraud”. The article statutes that the Union and the Member States shall combat fraud and any illegal activities affecting the financial interests of the Union. In particular, the Member States assume the duty to counter fraud affecting the Union as well as they do respecting their own financial interests. Then, article 287 of the TFEU disposes that the European Court of Auditors examines the accounts of all revenue and expenditure of the Union, having care to verify if all revenue received and all expenditure incurred have been managed in a lawful and regular manner. Also article 86 of the TFEU deals with the EU financial interests; as we will see further on, it contemplate the establishment of an European Public Prosecutor’s Office to combat fraud against the Union.

Based on the Treaties, there are also many anti-fraud EU provisions of secondary legislation. Just to mention the most relevant ones it is possible to mention the Council Regulation No 1311/2013 of 2 December 2013 on the Multiannual Financial Framework 2014-2020; the Common Provisions Regulation No 1303/2013 of 17 December 2013 (CPR) on structural funds; the new Public Procurement Directives<sup>1</sup>.

But two are the acts of secondary law that present a special importance because they deal specifically on financial control. The first is the Regulation No 2015/1929 of 28 October 2015 on the financial rules applicable to the general budget of the Union. It creates the Early Detection and Exclusion System (EDES). The functioning of this System started on the 1<sup>st</sup> of January 2016 and it provides for an early detection mechanism, administrative sanctions, clauses of exclusion, publication of information, etc. At the same time it introduces simpler and more flexible EU financial regulations, strengthening rules on tax avoidance, and clarifying the duty to avoid conflicts of interest.

The second is the Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (PIF Directive). It harmonizes the definition of offences affecting the EU’s financial interests (fraud, corruption, money laundering and misappropriation) as well as the related penalties.

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1. Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, Directive 2014/23/EU on the award of concession contracts.

Finally, there are also some non-binding acts, which is worth mentioning. As is the case of the Anti-Fraud Strategy (CAFS) adopted by the European Commission on 24 June 2011<sup>2</sup>. It entrusts the European Commission with the EU annual Anti-Corruption Report and incorporates anti-fraud measures in the Commission's internal control systems. To implement the CAFS, all Commission departments (48 in total) have introduced sectoral Anti-Fraud Strategies. More recently, the representatives of the national police oversight bodies and anti-corruption authorities of the

Member States of the Council of Europe and the European Union adopted the Riga Declaration of the 17<sup>th</sup> of November 2016<sup>3</sup> calling on European decision-makers to strengthen the fight against corruption acting at national and international level.

#### *4. Who controls the integrity of the EU funds?*

##### *4.1 The European Parliament Budgetary Control Committee*

The European Union has set up a complex network of specialized bodies involved in controlling and sanctioning frauds and mismanagement of EU funds. This structure operates at different levels. For first, we find the European Parliament, in which the Budgetary Control Committee (CONT) operates as one of the twenty permanent committees of the Assembly. The Committee is composed of 30 full Members that have the responsibility to oversee the full cycle of the discharge procedure concerning the various EU institutions and bodies. This activity conduces a better control over the European Union's finances and increases the transparency and the accountability of the entire system. The Committee holds ordinary and extraordinary meetings, hearings, workshops, missions, joint committee meetings and organizes exchanges of views with the European Commission, mainly in the context of the discharge procedure. It also maintains special relations with Representatives of the Court of Auditors and with European Anti-Fraud Office (OLAF) representatives.

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2. COM(2011) 376 final.

3. Riga Declaration 2016, Adopted by the Annual Professional Conference and General Assembly of the European Partners Against Corruption (Epac/Eacn), Latvia, 15-17 November 2016 ([http://www.bak.gv.at/Downloads/files/Internationale\\_Uebereinkommen/EPAC/Riga\\_Declaration2016.pdf](http://www.bak.gv.at/Downloads/files/Internationale_Uebereinkommen/EPAC/Riga_Declaration2016.pdf)).

#### *4.2. The European Commission*

The European Commission also plays an important role in the context of the control over the EU funds. At this regard, all European Commission services (DG, Services, Executive Agencies) are about to work on an update of their Anti-Fraud Strategy that consists on: detect risks directly related to financial fraud; detect risks related to the reputation of the Commission; treatment of sensitive information<sup>4</sup>. A specific body that performs a pivotal position in this field is the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF). This body has been created in 1994 to increase cooperation between EU countries and the European Commission to prevent the prosecution of fraud. It is chaired by a representative of the Commission, and is composed of 2 representatives for each EU country that may be assisted by 2 representatives of the competent national authorities. It supports the work of the OLAF, and in agreement with the Commission, it may set up working-groups for tackling specific issues.

Another important instrument of the Commission is the Programme Hercule, that now has arrived to its third edition (2014-2020). Through this programme the Commission promotes activities to counter fraud, funding actions to strengthen in the Member States the operational and technical capacity, and finances training activities and conferences.

#### *4.3 The European Court of Audit*

A position of primarily importance surely stands to the European Court of Audit (Court). That according to article 13 of the Treaty on the European Union is a European institution, established as such in the 1993 with the Treaty of Maastricht.

The Court is composed of 28 Member, one from each Member State (appointed by the Council for a mandate of 6 years, after consultation with the European Parliament). At present time, Klaus-Heiner Lehne – German Member – is the chairperson of the Court.

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4. In 2016 sixteen Commission departments updated their Anti-Fraud Strategy.

Regarding the organization, there are five chambers<sup>5</sup> and two special sub-Committee<sup>6</sup> through which the Court accomplishes its multiple tasks linked to the scrutiny of all revenue and expenditure of the Union.

Amongst its activities, the Court sets out multi-year strategies (the current covers the period from 2018 to 2020 inclusive) and an annual work programme (presented to the Committee on Budgetary Control of the European Parliament). The aim of both documents is to support the political Institutions (European Commission, European Parliament, Council) and the Member States to oversee the management of the EU budget and, where necessary, make improvements.

The Court's audit cover a wide range of topics with a particular focus on issues related to growth and jobs, European added value, management of public finances, the environment and climate action. The Court delivers its actions in accordance with international standards on auditing issued by the main international organizations of audit worldwide, with which it maintains close relationships.

It is important to underline that the Court, to facilitate and improve audit performance, issues manuals and guidelines containing detailed instructions for European bodies and national authorities dealing with audit activity<sup>7</sup>. Yet, in general, all acts issued by the Court are not binding but form the basis for other EU institution to adopt their provisions.

#### *4.4 The European Anti-Fraud Office (OLAF)*

In the European Union net, there is only a body that has the exclusive task to deal with corruption, fraud and transparency, this is the European Anti-Fraud Office (OLAF).

It has been established with the Decision 1999/352 (implementing Regulation 1073/1999), conferring the Office the powers to carry out, on be-

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5. Chamber I – Sustainable use of natural resources; Chamber II – Investment for cohesion, growth and inclusion; Chamber III – External action, security and justice; Chamber IV – Regulation of markets and competitive economy; Chamber V – Financing and administering the Union.

6. Audit Quality Control Committee and Administrative Committee.

7. Very important are two audit manuals: Financial and Compliance Audit Manual (FCAM) (last version 2012) and the Performance Audit Manual (PAM) (last version 2015). Regarding Guidelines, we can mention: Guidelines on audit interview, Guidelines on issue analysis and drawing conclusions. Guidelines on developing the audit objectives, Guidelines on data collection, Guidelines on evaluation and Guidelines on risk assessment in performance audits.

half of the Commission, external administrative investigations for strengthening the fight against any illegal activity adversely affecting the Union's financial interests. This powers covers, as well, any other act or activity carried out by operators, in breach of Union provisions, notwithstanding if they are private or public, trans-national or national.

At present, the most important provisions ruling OLAF actions are contained in the Regulation No 883/2013 of 17 December 2013.

While OLAF has an individual and independent *status* in its investigative functions, it is also part of the European Commission, under the responsibility of Commissioner in charge of Budget and Human Resources.

As it has been already said, OLAF is the only EU body mandated to detect, investigate and stop fraud, fulfilling independent investigations into fraud and corruption involving EU funds. It can also investigate on serious misconduct by EU staff and members of the EU Institutions. The accomplishment of these duties allows OLAF to develop a better and sound EU anti-fraud policy.

Moving on to its organization, the Commission, after consultations with the European Parliament and the Council, nominates the Director-General of OLAF from a list of suitably qualified candidates, following a call for applications: this is to guarantee an effective independence of the functionary. Under the supervision of the Director-General, operate four Directorates<sup>8</sup>.

About its activity, OLAF concentrates its attention on some main spending categories. In particular: structural funds, agricultural policy and rural development funds, direct expenditure and external aid; and specific areas of EU revenue, mainly customs duties. Investigation includes all activities relating to safeguard EU interests against irregular conduct liable to result in administrative or criminal proceedings (eg. suspicions of serious misconduct by EU staff and members of the EU institutions).

A crucial aspect, that represent also a limit of the effective capacity of OLAF to face illegal behaviors in financial fields is that it must refer the results of any administrative investigations to the competent national au-

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8. Directorate A Investigations I (EU Staff; New financial instruments; Centralized expenditure; External aid); Directorate B Investigations II (Customs and trade fraud, Tobacco and Counterfeit Goods; Agricultural and Structural funds I; Agricultural and Structural funds II; Agricultural and Structural funds III); Directorate C Investigation Support (Investigation workflow; Information systems development; Operational analysis and Digital forensics; Legal advice; Information systems infrastructure); Directorate D Policy (Policy development and Hercule, Fraud Prevention, reporting and analysis; Inter – Institutional and External relations; Customs and Tobacco Anti-Fraud policy; AFIS).

thorities, which maintain the full discretion on whether or not initiate proceedings based on OLAF's findings.

However, OLAF can open on its own initiative an investigation when there is sufficient suspicion of fraud, corruption or any illegal activity on the financial interests of the EU; as well as it can conduct on-the-spot checks and witness interviews. Moreover, the Director-General has the power to adopt Guidelines on Investigative Procedures, in which special attention is posed on the respect of procedural guarantees and fundamental rights of the persons concerned.

Finally, the cooperation between OLAF and its domestic partners constitutes a central aspect in the fight against illegal financial behaviors. OLAF, in this regard, cooperates with national authorities (information exchange, on-the-spot checks, cross-check on suppliers and related businesses, coordination of forensic audits etc.), and for this the Member State must designate a service to grant support to OLAF (anti-fraud coordination service, "AFCOS")<sup>9</sup>.

##### *5. An Important News: European Public Prosecutor's Office (EPPO)*

To finish with this quick tracking, a novelty is looming that most likely is going to change in depth the entire European structure on anti-corruption and fraud: it consist in the establishment of the European Public Prosecutor's Office (EPPO).

This new European body stems from the launching of an enhanced cooperation procedure (2013), that finally, on the 12 of October 2017, led to the adoption of the Regulation 2017/1939 on the establishment of a European Public Prosecutor's Office (EPPO). The provision, as we have said, has given implementation to the article 86 of the TFEU, where it is prescribed that "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust."<sup>10</sup>

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9. In Italy, this duty was implemented with the creation of the "Committee for Combating Fraud in the European Union – COLAF. The Committee has functions of consultation and coordination of all the national and regional Administrations that fulfill activities against fraud and irregularities with particular attention to: business, common agricultural policy, and structural funds.

10. At present 20 Member States participate to the EPPO Regulation: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxem-

The institution of this body is a real important innovation because EPPO will be a decentralized prosecution office of EU with exclusive competence for investigating, prosecuting and bringing to judgment crimes against the EU budget. As we have seen, the existing EU bodies – OLAF, Eurojust and Europol – cannot conduct by themselves criminal investigations or prosecute fraud cases. Besides, national laws and the respective repressive actions are fragmented (today only around 50% of the judicial recommendations transferred by OLAF to the national prosecution authorities lead to an indictment). Moreover, the low number of prosecutions is accompanied by low recovery rates, so that frauds against the EU budget cost every year at least € 50 billion of revenues to national budgets. In some cases, national authorities may decide to only investigate ‘their’ national part of a crime, disregarding the potentially much wider implications of a fraud scheme. In front of this disappointing scenario, EPPO will improve the expertise and capacities of the national authorities fighting fraud and strengthen significantly the entire European system of control.

Concerning its structure, EPPO will have a Central Office directed by a European Chief Prosecutor (European Parliament and the Council will nominate the European Chief Prosecutor following an open call). The position will last seven years and is not renewable. The Central Office will be completed by two Deputies assisting the European Chief Prosecutor, and by European Prosecutors, chosen one per participating Member State. The Office will have its seat in Luxembourg, and will be supported by an Administrative Director and Technical and Investigative staff. At national level there will be one European Delegated Prosecutor for each participating Member State (but they will be integral part of the European Public Prosecutor’s Office).

Regarding powers and procedures, the EPPO will be competent for offences affecting the Union budget, as defined in the Directive on the fight against fraud to the Union’s financial interests by means of criminal law (PIF Directive 2017/1371). Prosecutors of the Central Office will carry out their investigations across all participating Member States in a coordinated manner. As a rule, the European Delegated Prosecutors will carry out the investigation and prosecution applying national law. However, when acting under the mandate of the European Public Prosecutor’s Office, the Delegated Prosecutors will be fully independent from their national authorities and the

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bourg, Portugal, Romania, Slovakia, Slovenia, Spain, Latvia, Estonia, Austria and Italy. In any case, non-participating Member States may join at any time after the adoption of the Regulation.

Central Office will supervise the investigations and prosecutions carried out at the national level. Legal safeguards will protect individuals and companies affected by investigations or prosecutions.

But some shortcoming in the common European fight against illegal conduct in financial management of EU expenditure and finance will still remain also with EPPO.

First of all, the EPPO will tackle only fraud of over €10.000 as well as complex cross-border VAT fraud cases, involving a damage above €10 million. Beside, only national authorities will be able to arrest people for offences within the European Public Prosecutor's Office competence, and the European Public Prosecutor's Office can only request the judicial authorities to arrest a suspect.

EPPO will assume the investigative and prosecutorial tasks on a date to be determined by a decision of the Commission on a proposal of the European Chief Prosecutor once the EPPO is set up. At this regard, the date to be set by the Commission shall not be earlier than 3 years after the date of entry into force of Regulation 2017/1939 (12 October 2017). Therefore, Prosecutor's Office could take up its functions between 2020 and 2021.

However, the institution of EPPO will represent an undoubted step forward an effective defense and control over EU financial resources and will improve the trust toward the integrity in using EU funds.

## “Licit economy” and protection of the European Union budget by means of criminal law

*1. Ideas to mark the adoption of the directive on the fight against fraud affecting the financial interests of the organisation*

*1.1 The phenomenon of fraud against the financial interests of the EU: numbers and procedures*

The events of recent months provide very conflicting information on the protection of the European Union budget from fraud committed to its detriment.

The Commission’s annual report on the protection of the European Union’s financial interests and the fight against fraud mentions 19,080 irregularities in relation to European revenues and disbursements, totalling 2.97 billion euros. Of these irregularities, 410 were reported as fraud, amounting to 391 million euros<sup>1</sup>.

For its part, when reporting over the last forty-two months on the application in Italy of Community law<sup>2</sup>, the Italian government has emphasised the positive progress that has characterised the fight against irregularities and fraud connected to the use of European funds, highlighting how, during this period, the country reduced the number of cases opened in relation to EU institutions from sixty-seven to twenty.

However, we cannot hide the gravity and pervasiveness of facts that arise from our national context: most recently, there was a series of fraudulent

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1. Report of the Commission on *Protection of the European Union’s Financial Interests. Fight against Fraud. 2016 Annual Report*, COM (2017) 383 final, 20 July 2017, 7.

2. Press conference of 31 July 2017 (graphics and data are available at [www.politicheeuropee.it/comunicazione/20365/conferenza-stampa-su-infrazioni-frodi-aiuti-di-stato-ue-2014-2017-tre-anni-e-mezzo-di-risultati-e-risparmi-record](http://www.politicheeuropee.it/comunicazione/20365/conferenza-stampa-su-infrazioni-frodi-aiuti-di-stato-ue-2014-2017-tre-anni-e-mezzo-di-risultati-e-risparmi-record)). For a summary of the contents of the press conference, see G. Latour, *Multe UE, frodi, aiuti: risparmiati 2 miliardi. Infrazioni UE a -46%*, in *Il Sole24Ore*, 1 August 2017, 7.

activities (totalling three hundred and twenty-four million euros) to obtain Community funds carried out by fifteen companies in the agricultural-oil, tourism-hospitality and property sectors, which involved the whole peninsula from Tuscany to Abruzzo and Calabria<sup>3</sup>. Lastly, with regard to European law, a goal (expected to be intermediate) has been accomplished in relation to the process of transforming the multilateral convention instruments concerning criminal law established in the EU during the 1990s to protect its financial interests<sup>4</sup> into a unilateral piece of legislation: ten years after signing the Lisbon Treaty, which established direct criminal jurisdiction for the EU<sup>5</sup>,

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3. This refers to the confiscation decree issued on 10 August 2017 by the Appeal Court of Reggio Calabria (confirming the measure proposed by the Anti-mafia Investigation Agency – *Direzione Investigativa Antimafia* – of the same city) for actions that involved not only private operators, but also Italian public sector managers and officials: see [www.direzioneinvestigativaantimafia.interno.gov.it/news/content/429851.pdf](http://www.direzioneinvestigativaantimafia.interno.gov.it/news/content/429851.pdf).

4. The Convention on the Protection of the European Communities' Financial Interests was adopted on 26 July 1995; it is supplemented by three Protocols: the first (27 September 1996) concerns the corruption of Community officials; the second (19 June 1997) makes provisions concerning the responsibility of legal entities and associated sanctions, money laundering and confiscation, cooperation between the services of the European Commission and Member States, as well as data protection; the third (29 November 1996) gives the Court of Justice the jurisdiction to interpret the Convention through a preliminary ruling. Italy implemented the Convention and the first and third Protocols following the authorisation upon ratification and the enforcement order established with Law no. 300 of 31 October 2000 (which also contains a mandate to the government for its complete implementation: see Legislative Decree no. 231 of 8 June 2001). The Second Protocol was authorised upon ratification and adopted with Law no. 135 of 04 August 2008. On the Convention, its Protocols and their impact on the legal systems of Member States, see among many others: S. Manacorda, *La corruzione internazionale del pubblico agente. Linee dell'indagine penalistica*, Naples, 1999; L. Salazar, *Genèse d'un droit pénal européen: la protection des intérêts financiers communautaire*, in *Rev. int. dr. pén.*, 2006, 39 et seq.; A. Venegoni, *La Convenzione sulla protezione degli interessi finanziari della Unione europea*, in L. De Matteis, C. Ferrara, F. Licata, N. Piacente, A. Venegoni (Eds.), *Diritto penale sostanziale e processuale dell'Unione europea*, [www.exeoedizioni.it](http://www.exeoedizioni.it), 2011, vol. I, 40-69; and vol. II, 10-56. On the difficulties encountered by the convention system in terms of effective harmonisation, see below, section 4.1.

5. This paper will not give a detailed discussion of the progressive expansion of the European Union's competences, including in relation to criminal law, first (with the Maastricht Treaty of 1992) through the creation of a "pillar" of inter-governmental cooperation intended to lay the foundations for the establishment of an area of "justice (including criminal) and home affairs" (JHA), concluded with the 1997 Treaty of Amsterdam; then with the identification of a new aim for the Union (the creation of an "area of freedom, security and justice") that involved the "communitisation" of the procedures applicable to the adoption of the Union's legislation and, therefore, the granting of direct criminal jurisdiction to the organisation. Please refer to contributions in relevant literature, which discuss the legal implications of this process with particular attention to the criminal context, starting with N. Parisi, D. Rinoldi (Eds.), *Giustizia e affari interni nell'Unione europea*, Turin, 1996 (with an updated appendix 1998); R. Sicurella, *Diritto penale e competenze dell'Unione europea*, Milan, 2005; B. Schünemann (Ed.), *Ein*

the so-called PFI Directive<sup>6</sup> was adopted (at the end of a difficult co-decision procedure, which began with a very different proposal from the Commission<sup>7</sup> in terms of its contents) by the European Parliament and the Council. This has been met with great interest from legal professionals and loaded with political expectations that are rather onerous, whether considered individually or as part of a developing legislative structure.

Many factors contribute to the complexity of protecting the Union's financial interests, which, furthermore, is symptomatically exemplary of the unsteady progress of the European integration process: we must consider the quality and variety of the legal instruments that have competed over time; their origins go a long way back to the first stages of the process of harmonising administrative law and, then, of the institutionalisation of cooperation in the area of criminal law, in both substantive and procedural terms; the sometimes equivocal legal dispositions that have at times established the exercise of the EU's powers to act; and the less specific implications that these are likely to have.<sup>8</sup>

A brief explanation of these individual problems and the solutions implemented can be found in the text of the PFI Directive, which can be used as a guide for a discussion that we believe has a more general scope.

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*Gesamtkompetenz für die Europäische Strafrechtspflege – A Programme for European Criminal Justice*, Köln-Berlin-München, 2006; Ch. Bassiouni, V. Militello, H. Satzger (Eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, Padua, 2008; E. Pistoia, *Cooperazione penale nei rapporti fra diritto dell'Unione europea e diritto statale*, Naples, 2008; D. Rinoldi, *Lo spazio di libertà, sicurezza e giustizia nel diritto dell'integrazione europea*, Naples, 2012; A. Veneconi, *La direttiva per la protezione degli interessi finanziari dell'Unione Europea attraverso il diritto penale (direttiva PIF): un ulteriore passo nel processo di sviluppo del diritto penale europeo o un'occasione persa*, at <http://ilpenalista.it>, 24.7.2017.

6. The acronym (derived from “protection of financial interests”), has its origins in the Convention of 1995 and its three protocols (*supra*, note 4), which laid the foundations for the fight against fraud affecting the financial interests of the European Union through the use of criminal law. The Directive (EU) 2017/1371 *on the fight against fraud to the Union's financial interests by means of criminal law* was adopted on 05 July 2017 and entered into force (pursuant to Article 19) on the twentieth day following its publication in the EU Official Journal (OJEU L 198, 28 July 2017, p. 29 et seq.). It must be transposed by each Member State within two years from the date of its adoption (Article 17): from the moment of its transposition the provisions of the directive will substitute those of the PFI Convention and its three Protocols. For a concise discussion on this, see A. Juszcak, E. Sason, *The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)*, in *EuCrIm*, 2017, 80 et seq.; in what follows reference will be made to other contributions on this issue, specifically in relation to individual aspects of the regulation.

7. COM (2012) 363 final.

8. All these implications are highlighted by D. Rinoldi, in *Lo spazio di libertà, sicurezza e giustizia*, *ibid.*, 222.

2. *The objective of protecting the Union budget: from administrative harmonisation to criminal defence, considering the principle of assimilation and support for European “agencies” as well as the Taricco case*

The very title of this essay indicates the importance of the directive as a key instrument in protecting Europe’s common assets (the EU budget) and as a strategic tool with which the Union<sup>9</sup> can take action, both internally and externally. This purpose is achieved by means of adopting “minimum rules concerning the definition of criminal offences and sanctions” in relation to the need to fight “illegal activities that affect the financial interests of the Union”<sup>10</sup>. This, explicitly, is part of a multi-faceted legal context, which, starting with the adoption of the treaty that founded the European Union (Maastricht, 1992), set out to protect against administrative irregularities and criminal offences affecting the Community’s budget, both in terms of revenues in relation to acquiring so-called own resources<sup>11</sup> and in terms of spendings when these resources are disbursed.

The pursuit of this objective has seen the implementation of different strategies, including in relation to the stage of development of the supra-national organisation’s competences.

During the first phase of the Treaty’s application, the need to protect the European Community’s budget was pursued through fighting irregularities of an administrative nature. Community legal instruments with direct effect provided Member States with a method of control, which included a system for supervision and investigation. On the one hand, this system involved (and still involves) the use of instruments for sharing information between national and European authorities, of collecting and transferring material useful for compiling evidence in legal proceedings of an administrative or even criminal nature; on the other hand, it provided (and still provides) for the use of administrative sanctions, which the Member State imposes in virtue of European Community acts of a general scope, such as Regulation (EC, Euratom) no.

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9. On the strategic scope of the Union’s budget in terms of consolidating the process of integration, see, among others, *Final Report and Recommendations of the High Level Group on Own Resources*, December, 2016; M. Bordignon, *Un bilancio per la nuova Europa*, in *Europa sfida per l’Italia*, Rome (LUISS University Press), 2017, 92 et seq.

10. Art. 1 PFI Directive.

11. On the origin and development of the Community finance system in the transition from the state contribution obligation to the organisation’s “own resources”, please refer to Parisi, *Il finanziamento delle organizzazioni internazionali*, Milan, 1986.

2988/95 of the Council adopted on the basis of Article 280 TEC<sup>12</sup>, or in virtue of sector-specific acts to protect individual industries<sup>13</sup>.

Furthermore, the Court of Justice, from 1989, had already set out to protect the integrity of the organisation's budget with case law that originated from the so-called "*Greek maize*"<sup>14</sup> judgment, which obliged Member States to observe two principles that are still in force today: the duty to protect the common budget based on the principle of assimilation, according to which each Member State must "ensure that infringements of Community law (in the context of the protection of the Union's financial interests) are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance"<sup>15</sup>; and the parallel duty to oversee said protection with "effective, proportionate and dissuasive penalties".

Both these methods of protecting the Union's financial interests are, however, innately fragile. Indeed, administrative harmonisation is not very effective, since it lacks the necessary level of deterrence compared to a criminal law instrument. The principle of assimilation is separate from harmonisation in the sense that it is based on the assumption of protecting the same asset using methods and effects that differ between one national legal system and another.

For this reason, along with the aforementioned methods, Member States used the legal basis provided by the Maastricht Treaty<sup>16</sup>, adopting (as Council of the Union) a set of instruments in the form of conventions<sup>17</sup> intended, once ratified, to impact the criminal law system of each country in order to fight harmful actions prejudicial to the Community's financial interests in relation to revenue and spending. The main elements constituting fraudulent activity<sup>18</sup> were defined and, using this definition, the protected legal interest was identi-

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12. The cited Regulation no. 2988/95 is supported primarily by Regulation no. 2185/96, no. 904/2010 and no. 883/2013.

13. Regulation no. 515/97 and subsequent amendments.

14. ECJ Judgment of 21 September 1989, Case 68/88, *Commission v. Hellenic Republic*, point 24; Order of the Court 06 December 1990, Case C-2/88 Imm., *Zwartveld and Others*, point 10.

15. This principle is now expressed in Article 325 TFEU (which contains some elements from the previous Article 209 TEC: *infra*, paragraph 3).

16. Article K.3, became Article 29.5 TEU with the Treaty of Amsterdam.

17. *Supra*, note 4.

18. Use or submission of false, inaccurate or incomplete declarations or documents; failure to communicate information in violation of a specific obligation; misuse (in relation to income) of an unlawfully obtained benefit and (in relation to expenditure) of funds for purposes other than those for which they were obtained: Article 1.

fied (the organisation's budget). It was established that Member States would be obliged to broaden their domestic criminal law provisions to safeguard the protected interest<sup>19</sup>. Specific procedural instruments were developed to identify jurisdiction criteria<sup>20</sup> and regulate certain methods of international judicial cooperation<sup>21</sup> and the application of the *ne bis in idem* principle<sup>22</sup>. At the time they were approved, these conventions represented significant progress in fighting fraud perpetrated against the organisation's budget.

Then a third phase rapidly took over, characterised by a strong European office specifically established for the purpose of working alongside the national authorities, which were entrusted with applying the law on fighting fraud that harms the Community's financial interests: in fact the Commission decided to transform the Unit for the Coordination of Fraud Prevention (UCLAF)<sup>23</sup> into its own department, equipped with investigative powers independent from those exercised by the national authorities<sup>24</sup>. Over time, these powers were strengthened by, on the one hand, better organisation of relations with the national authorities, and on the other, a more complete structure of rights for persons implicated in this activity<sup>25</sup>. This body gave a significant boost to the fight against fraud affecting the Union's financial interests. Consider that OLAF can exercise its investigative powers throughout the Union's territory (that is, the sum of the territories subject to the jurisdiction of Member States) against any business or national institution, as well as outside this territory on the basis of bilateral agreements between the Union and third countries<sup>26</sup>.

The current structure is based on the reforms to the Maastricht Treaty implemented with the Lisbon Treaty (2007, entered into force on 1st

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19. This seems clear from the provisions set out under Articles 1.2 and 3 (where fraud is classed as a criminal offence) and Article 2 (where States are obliged to adopt criminal sanctions that are "effective, proportionate and dissuasive", according to the formula expressed by the Court of Justice for the first time with its judgment of 21 September 1989, *ibid.*, establishing specifically that these sanctions must entail a custodial sentence for cases of serious fraud, or administrative sanctions for fraud that is minor in terms of amount and dangerousness).

20. Article 4.

21. For extradition, see Article 5 (with the associated rule *aut dedere aut iudicare*); for other methods of cooperation see Article 6.

22. Article 7.

23. Originated in 1988 by the Secretariat General of the Commission to provide coordination for national anti-fraud services and the assistance required at the international level also.

24. Decision of the Commission 1999/352, completed by Regulation (EC) no. 1073/1999.

25. Most recently, Regulation (EU, Euratom) no. 883/2013.

26. For details on the transnational dimension of OLAF's activities, see G. Venegoni, in <https://events.unibo.it/fight-against-tax-frauds-olaf-hercule3/workshop/venegoni.docx/@downloads/file/VENEGONI.pdf>.

December 2009). Article 325 TFEU identifies a specific basis for the fight against fraud and other activities likely to affect the financial interests of the Union: it obliges States and the Union to fight against these activities using dissuasive, effective instruments. The provision has earlier origins: it started out as Article 209A, introduced into the Treaty of the European Community by the Maastricht Treaty; it was then amended by the Treaty of Amsterdam (and renamed Article 280 EC) with the addition of what remain paragraphs 1, 4 and 5 of Article 325<sup>27</sup>.

Alongside this specific measure on fighting fraud, the Lisbon Treaty created a strong basis for criminal law provisions. The Treaty on the Functioning of the Union makes provisions on the following: legal cooperation on criminal offences between Member States, organised on the basis of a legal competence of the Union to direct both the application of the principle of reciprocal recognition of national legal decisions and the approximation of their laws and regulations (Art. 82); judicial cooperation between States and the Union within Eurojust (Art. 85) until the establishment of a European Public Prosecutor's Office is achieved (Art. 86); exercise of direct criminal jurisdiction by the Union based on approximation of the national measures on substantive criminal law (Art. 83) or to support and promote action by the states in preventing criminality (Art. 84); cooperation between national authorities tasked with applying the law reciprocally (Art. 87) and within Europol (Art. 88); identification of conditions and limits according to which

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27. The measure received many scientific clarifications, among which, in particular, we note (also for comparison with Art. 280 EC and with Art. III-415 of the "constitutional" Treaty of 2004): R. Sicurella, *Lo spazio penale europeo dopo Lisbona: le nuove competenze dell'Unione europea alla prova dei principi fondamentali dello Stato di diritto*, in N. Parisi, V. Petralia (Eds.), *L'Unione europea dopo il Trattato di Lisbona*, Turin, 2011, 122 et seq.; G. Grasso, *La "competenza penale" dell'Unione europea nel quadro del Trattato di Lisbona*, in G. Grasso, L. Picotti, R. Sicurella (Eds.), *L'evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona*, Milan, 2011, paragraph 8; R. Sicurella, *La "tutela mediata" degli interessi della costruzione europea: l'armonizzazione dei sistemi penali nazionali tra diritto comunitario e diritto dell'Unione europea*, in R. Grasso, G. Sicurella (Eds.), *Lezioni di diritto penale europeo*, Milan, 2008, specifically 389-390; G. Grasso, *Introduzione: diritto penale*, in op. ult. cit., 76 et seq.; R. Sicurella, *Diritto penale e competenze dell'Unione europea: linee guida di un sistema integrato di tutela dei beni giuridici soprannazionali e dei beni giuridici di interesse comune*, Milan, 2005, 292 et seq.; L. Picotti, *Il Corpus Juris 2000. Profili di diritto penale sostanziale e prospettive d'attuazione alla luce del Progetto di Costituzione per l'Europa*, in Id., *Il "Corpus Juris 2000". Nuova formulazione e prospettive di attuazione*, Padua, 2004, 3 et seq.; Id., *Possibilità e limiti di un diritto penale dell'UE*, Milan, 1999; and D. Rinoldi, *Art. 280 (Commento)*, in F. Pocar, *Commentario breve ai Trattati della Comunità europea e dell'Unione europea*, Padua, 2001, 933 et seq.

national authorities involved in cooperation (Arts. 82 and 87) can operate in the territory of a Member State other than their own (Art. 89).

With the entry into force of the Lisbon Treaty, the new institutional architecture (no longer organised as pillars) emphasises the connection between issues related to the “internal market” and the “area of freedom, security and justice” including in relation to criminal law: in this context, the adoption of the “package on the protection of the licit economy” must be understood, with the aim of shielding Europe’s economic fabric from criminal infiltration, by using a variety of instruments, including criminal law. The “package” consisted, at the time it was created, of the following initiatives: measures to strengthen the institutional framework through better cooperation between the main EU agencies involved (OLAF, Eurojust, Europol)<sup>28</sup>; incentives to Member States for fighting corruption<sup>29</sup>; a proposal for a directive on freezing and confiscating the proceeds of crime<sup>30</sup>; a proposal for the PFI Directive<sup>31</sup>.

Over the years, most of these proposals have been implemented, as has the directive under discussion and the directive on freezing and confiscating the proceeds of crime<sup>32</sup>. With regard to the strengthening of the fabric of institutional cooperation between the different law enforcement agencies involved in fighting the illegal economy, we have already mentioned the strengthening of OLAF<sup>33</sup>; Europol underwent a reform that mainly improved its investigative capacity by means of information technology<sup>34</sup>; while the reform of Eurojust is lagging behind because it is linked to the establishment of a European public prosecutor’s office<sup>35</sup>. The fight against corruption saw the adoption (on 06 June 2011<sup>36</sup>) of a programme that consisted of a Planning Communication<sup>37</sup>, a mechanism for periodic assessment of Member States on this matter<sup>38</sup>, a Report on the status of compliance with

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28. COM (2011) 293 final.

29. COM (2011) 308 final.

30. COM (2012) 85 final.

31. *Supra*, note 6.

32. Directive 2014/42/EU of 3 April 2014.

33. *Supra* under the entry for note 25.

34. Regulation (EU) 2016/794 of 11 May 2016.

35. In this context, see *infra* paragraph 5.2.

36. IP/11/678.

37. COM (2011) 308 final.

38. Decision C (2011) 3673 final. The periodic assessment was interrupted by a decision of the Commission: see the letter of 25 January 2017 written by Timmermans (first Vice President of the European Commission) to the President of the Commission for civil liberties of the European Parliament at <http://transparency.eu/wp-content/uploads/2017/02/2017130-Let->

Framework Decision 2003/568/JHA on corruption in the private sector<sup>39</sup> and another Report on the participation of the Union in the work of GRECO<sup>40</sup>.

The Lisbon Treaty has therefore cleared the way for the use of legal instruments as more effective tools for combating actions that are harmful to the financial interests of the Union. The directive with which we are primarily concerned and the associated regulation on establishing a European public prosecutor, which we will discuss in our conclusions, are the first of these tools. The European Court of Justice seems to be getting involved in this fight also, with courageous case law, which, like the previously mentioned *Greek maize* judgment, reminds Member States and European institutions to comply with the principles established by the Treaties concerning the protection of the Union's financial interests: reference to the *Taricco* judgment<sup>41</sup> is essential.

### *3. The controversial question of the legal basis of the so-called PFI Directive*

The legal basis of the PFI Directive must be identified in one of the aforementioned provisions, which govern the fight against fraud affecting the Union's budget. Among them, Art. 325 TFEU stands out, as does Art. 83, not so much for its first paragraph, which (making provisions on fighting offences classified under "areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis") does not include fraud in the list of offences to fight on a common basis (paragraph 2); but for its second paragraph, which includes as a subject for approximation of national laws, any area that "proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures": undoubtedly the organisation's budget and its protection from fraud is an area that has been subject to these measures.

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ter-FVP-LIBE-Chair.pdf.

39. COM (2011) 309 final.

40. COM (2011) 307 final.

41. Judgment of 8 September 2015, Case C-105/14, *Taricco and Others*: on its contents see also paragraphs 3.3 and 4.1.

### 3.1 *The choice of Parliament and the Council based on Article 83.2 TFEU*

In its preamble, the directive identifies its legal basis in Art. 83.2 TFEU and therefore, in a provision that gives the European Parliament and Council the power to adopt “by means of directives [...] minimum rules concerning the definition of criminal offences and sanctions” when the approximation of the laws and regulations of Member States on criminal offences is essential, as just mentioned above.

This choice of legal basis was very precise and using it subjected the legislative system of the Union to all the conditions, requirements and, ultimately, the limits on the basis of which legislative harmonisation of criminal law is based within the Union under the measure cited earlier.

These limitations would not exist if the legislative activity were undertaken based on Art. 325 TFEU: a Union provision adopted on this basis could take the form of a regulation rather than a directive; its scope could go further than establishing “minimum rules”; it could combine the effects of substantive and procedural law, since the Treaty’s provision does not limit intervention to either area; it would always be exempt from compliance with the “emergency brake” procedure, which is likely to be used whenever laws on fighting the forms of criminality contemplated under Art. 83 TFEU are adopted.

### 3.2 *The choice of the Commission: the legal basis formed by Article 325 TFEU*

The choice of the European Parliament and the Council deviates radically from the one made by the Commission, which, in its draft PFI Directive<sup>42</sup>, had identified its legal basis in Art. 325 TFEU.

From both the legal perspective and in terms of assessing the effectiveness of the Union’s actions, the Commission’s decision seems preferable. Firstly, the contents of Art. 325 TFEU contain some interesting points, dating back to an earlier period, which consider the provisions of the law that historically preceded it, introduced with the Amsterdam reform: at that point the subject of fighting fraud likely to harm the financial interests of the organisation became a matter of common interest and competence of the European Community and Member States (Art. 209.1 TEC), it being the responsibility of both parties to adopt effective and dissuasive measures.

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42. See also the *Communication of the Commission On the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers’ money*, COM (2011) 293 final, *passim*.

Secondly, with the Lisbon reform, the law assumed further significance. The protection it aims to provide, in fact, concerns not only the individual state context, but also the Union as a whole (paragraphs 1 and 4); and this must be done by using the principle of assimilation (paragraph 2) and through provisions of the Union adopted with the ordinary legislative process (paragraph 4), in accordance with the principle of subsidiarity, in exercising a shared competence such as this. Therefore, the objective is the attainment of effective and equivalent protection in both the Union and the Member States.

Furthermore, it is particularly significant that, in light of the Lisbon reform, the harmonisation intended for this purpose no longer has the limitation (established under the previous measure) of not covering “the application of national criminal law or the national administration of justice”<sup>43</sup>. The removal of this condition represents a significant change and is the result of the elimination of the distinction concerning the subjects and competences of the first and third “pillars” of the Union and, at the same time, it means that the provision may also be used as a legal basis for a measure concerning criminal offences. Under Article 280 TEC, the limit on the Union’s action (now removed) represented the division between Community law on fighting fraud and the competence of the Union to intervene in criminal law, as established under Art. 29 TEU: in that context, the objective of a “high level of safety in an area of freedom, security and justice” was pursued, “notwithstanding the competences of the European Community”, through “prevention and combating of crime, organised or otherwise, in particular [...] fraud”. Thanks to this division, included within the Community *acquis* were the legislative powers to fight illegal activities (including fraud) harmful to the financial interests of the Community<sup>44</sup>, without, however, the possibility of said powers being able to extend as far into the domestic jurisdiction of Member States as to directly intervene in matters concerning the application of national criminal law and the administration of justice. In short, directly effective Community law was not allowed to have such a penetrating impact on protecting the Union’s financial interests as the protection offered by criminal law. On the other hand, with regard to the Treaty

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43. Art. 325.2 TFEU.

44. The provision was not reflected in the ECSC or ECAE Treaties; however, the conference to amend the Treaty on European Union in Amsterdam, adopted Declaration no. 41, according to which the European Parliament, Council and Commission, even when they act “on transparency, access to documents and the fight against fraud” based on the powers to act granted by the two aforementioned Treaties they “should draw guidance from the provisions relating to the [...] fight against fraud in force within the framework of the Treaty establishing the European Community”.

on European Union, this had the task of approximating national laws “only for the specific implications [...] [of the third “pillar”] and, therefore, essentially for the aspects concerning police and judicial cooperation on criminal matters<sup>45</sup>, based on what was then Art. 31, letter e), TEU.

The Lisbon reform, which gave the Union competence in direct criminal law matters, led to the removal of this division and, moreover, gave substance to developments made by a few scholars already prefiguring before the current structure of the sector under discussion<sup>46</sup>. Even then, it was impossible to hide how the principle of assimilation was unable on its own to achieve equivalence between the measures adopted by different Member States, as the Treaty had intended; equivalence in itself contains a need for inter-state harmonisation, which assimilation does not necessarily entail; of course one can assume that each domestic system provides a high level of protection for its public funds, but this does not necessarily lead to an equivalent level of protection.

Therefore, in order to achieve this objective, the harmonisation of criminal law became a strategic activity.

The decision made by the Commission with its draft directive highlighted a possible peculiarity: it understood that with regard to fraud, the Treaty wanted to take a very different approach, in terms of the use of legal instruments for fighting fraud, from the decision taken in relation to other unlawful actions (even offences that were very alarming to society) identified in Art. 83.1, paragraph 2, TFEU. This different approach seemed (and seems to the author today) justifiable in light of the asset (the Union’s budget) protected by the law itself. We must conclude, therefore, that, according to the Commission’s interpretation, Art. 325 TFEU is a special provision compared to Art. 83 of the same Treaty.

The decision of the Commission (in choosing to consider certain offences such as corruption, money laundering and misappropriation as precursors to fraud<sup>47</sup>), therefore, took an approach intended to enhance the effectiveness of Union action to protect its budget, using the most effective legal instrument possible and discarding the aforementioned conditions, limits and restrictions to which the use of Art. 83.2 TFEU is subject.

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45. See A. Tizzano, *Il Trattato di Amsterdam*, Padua, 1998, 101.

46. On this issue, see the discussion by P. Fimiani, *La tutela degli interessi finanziari della Comunità nel nuovo art. 209A*, in A. Predieri, A. Tizzano (Eds.), *Il Trattato di Amsterdam*, Milan, 1999, 337.

47. *Infra*, paragraph 4.2.

### 3.3 *The position of the European Court of Justice*

The Court of Justice had the opportunity to offer an authoritative “perspective” on the Commission’s original decision.

The opportunity arose when, due to a preliminary ruling of the Preliminary Hearing Judge at the District Court of Cuneo<sup>48</sup>, it was asked to rule on the Italian limitation period regime in relation to a criminal case brought against some individuals accused of criminal conspiracy to commit VAT offences. The judgment, which takes its name from the principal defendant, Mr Taricco<sup>49</sup>, identified the provisions of Italian law to be disapplied in the measure established on limitation periods, which could negatively impact the Member State’s punitive capacity. The words of the Court of Justice, contained in the first paragraph of the ruling, are very clear: “A national rule in relation to limitation periods for criminal offences [...] is liable to have an adverse effect on fulfilment of the Member States’ obligations under Article 325(1) and (2) TFEU

if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union<sup>50</sup>.

To resolve the main issue, the Court considered certain implications concerning what was then only a draft PFI Directive; relevant in this context<sup>51</sup> is the part of the judgment that refers to Art. 325 TFEU as the basis for action by the Union and Member States on fighting, by means of criminal law, fraud affecting the Union’s financial interests. The judgment states, in fact, that “the national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations” under the provision of the Treaty<sup>52</sup>.

This position is not contradicted by the conclusions of Advocate General Yves Bot<sup>53</sup> in the preliminary proceedings brought by the Italian Constitutional

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48. Order of 17 January 2014 (in *Diritto penale contemporaneo*, 7 February 2014).

49. Judgment *Taricco and Others*, *ibid.*

50. Italics added.

51. See also paragraph 4.1.

52. Point 58 *Taricco* judgment. On this issue, see again A. Venegoni, *op. cit.*

53. Conclusions of 18 July 2017, Case C-42/17, *M.A.S., M.B.*

Court (*Corte Costituzionale Italiana*)<sup>54</sup> before the Court of Justice, as a result of the difficulties in applying the Taricco judgment within the domestic legal system encountered by both the Italian Supreme Court (*Corte di Cassazione*) and the Milan Appeal Court (*Corte d'appello di Milano*)<sup>55</sup>; and neither was it contradicted by the subsequent judgment of the Court of Justice<sup>56</sup>. The preliminary ruling concerns issues other than the matter of the legal basis of the Union's criminal competence in relation to fighting fraud that harms the Union's financial interests<sup>57</sup>. In fact, the Court was asked to make a ruling: on the possible conflict between the Taricco ruling mentioned above and the principle of *nullum crimen, nulla poena sine lege* as exists in the Italian system; on the Member State's discretion to enforce compliance with its level of protection for fundamental rights, when it is allegedly higher than the level guaranteed by European Union law (Art. 53 of the EU Charter of Fundamental Rights); and on the scope of the TEU provision, which protects the constitutional identity of each Member State (Art. 4.2 TEU).

What matters here are not so much the solutions that the Advocate General and the Courts apply to each of the preliminary questions raised; what matters instead is that they do not cast doubt on the legal foundation of criminal law on fraud being located within Art. 325 TFEU<sup>58</sup>. In particular, a passage from the ruling of Advocate General Bot stands out and could suggest that everything has not been resolved in terms of the law, since the PFI Directive identified its legal basis in Art. 83 TFEU: the Conclusions (which were made after the approval of the directive and were certainly well known by the Advocate General) avoided mentioning it, always referring instead to the draft directive<sup>59</sup>. This approach could also be justified in light of the desire not to take sides on the matter at a time when all that was needed was an inter-

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54. Order of 26 January 2017, no. 24.

55. These courts raised the issue of constitutionality in relation to the law authorising ratification and execution of the Lisbon Treaty in the part where it implements Art. 325 TFEU with Order (III criminal) no. 28346/16 of 08 July 2015, Italian Supreme Court, and Order of 18 September 2015, Milan Court of Appeal (both published in *Diritto penale contemporaneo*, 15 July 2016 and 21 September 2015).

56. Judgment of 5 December 2017, Case C-42/17.

57. On the preliminary ruling, for opinions (shared by this paper) prior to the adoption of the conclusions of Advocate General Bot, see P. Mori, *La Corte costituzionale chiede alla Corte di giustizia di rivedere la sentenza Taricco: difesa dei controlimiti o rifiuto delle limitazioni di sovranità in materia penale?*, in *Rivista di diritto internazionale*, 2017, 407 et seq.; and L. Daniele, *Il seguito del caso Taricco: l'Avvocato generale Bot non apre al dialogo tra Corti*, at [www.europeanpapers.eu](http://www.europeanpapers.eu), 7 September 2017.

58. See for example, points 19, 83, 94 and 188 concl. ult. cit.

59. Point 94 concl. ult. cit.

pretation of the contents of Art. 325, perhaps leaving the hands of the Court of Justice free in the event of it being asked (by the Commission or another party authorised to act under Art. 263 TFEU) to decide an appeal on legitimacy intended to enforce the alleged incorrect legal basis of the PFI Directive.

#### 4. Elements covered under the Directive

##### 4.1 The notion of the “financial interests of the Union”

As clarified in the preamble of the PFI Directive, the protection of the financial interests of the Union concerns not only the management of budget allocations; it extends to any measure that negatively impacts or threatens to impact the assets of the organisation and the assets of Member States (to the extent that this is relevant to the Union’s policies), including financial transactions such as taking out and issuing loans<sup>60</sup>. The PFI Directive intervenes to provide clarification, stating that it extends to “all revenues, expenditure and assets covered by, acquired through, or due to: i) the Union budget; ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them” (Art 2.1, letter a). The law, apart from a few linguistic differences, is exactly the same as the one proposed by the Commission.

The notion of the financial interests of the Union had never been defined by the founding treaties and had long been inferred from common practice<sup>61</sup>. The PFI Convention of 1995 was silent on this issue also. The definition used implies that all own resources are covered under the notion of the financial interests of the Union, thereby doing justice to a somewhat bitter inter-institutional debate, which (as per the wish of the Council) tended to exclude the subject of VAT<sup>62</sup> from the PFI Directive’s scope of application, deviating from the solution offered by the Commission and the position assumed by the European Parliament. Lastly, it is considered that the decision to integrate VAT into the framework of the PFI Directive that was being

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60. Premise no. 1.

61. Regulation (EC, Euratom) no. 2988/95, *ibid.*, Art. 1, paragraph 2; see also the *Report of the Commission accompanying the proposal for a directive of the European Parliament and Council concerning the fight against fraud that harms the financial interests of the Union by means of criminal law*, COM (2012) 363 final of 11 July 2010, p. 7, point 3.1; and judgment CJEU 15 November 2011, Case C-539/09, *Commission v. Germany*.

62. A. Venegoni, *Il difficile cammino della proposta di direttiva per la protezione degli interessi finanziari dell’Unione europea attraverso la legge penale (c.d. direttiva PIF): il problema della base legale*, in *Cass. pen.*, 2015, 2442 et seq.

adopted was dependent on the very radical position of the Court of Justice: in the grounds for the previously mentioned Taricco judgment, it supported this solution<sup>63</sup>, stating that, “since the European Union’s own resources include, inter alia, as provided in Article 2(1) letter b) of Decision 2007/436, revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules, there is [...] a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second”<sup>64</sup>. However, the Directive is affected by a compromise solution: in fact, the affirmed principle is mitigated, since the directive is applicable “only to cases of serious offences against the common system of VAT”, intending that these should be considered as “intentional acts or omissions<sup>65</sup> [...] *connected with the territory of two or more Member States of the Union and [involving] a total damage of at least EUR 10,000,000*”<sup>66</sup>. The clarification on the cross-border dimension of the offence when VAT is involved also helps us to understand how, in the case of other offences, this requirement need not be satisfied in order for the same to be included within the scope of application of the PFI Directive.

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63. Point 36 judgment *ibid.*

64. Point 58 judgment *ibid.* The Court, on this issue, refers to its previous case law expressed in its judgment of 26 February 2013, Case C-617/10, *Åkerberg Fransson*, point 26.

65. The definition of intent is given under Art. 3.2, letter d).

66. Art. 2.2; italics added. The provision can be understood better if we consider the 4th premise of the Preamble of the Directive, which states: The notion of serious offences against the common system of value added tax (“VAT”) as established by Council Directive 2006/112/EC (the “common VAT system”) refers to the most serious forms of VAT fraud, in particular carousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation, which create serious threats to the common VAT system and thus to the Union budget. Offences against the common VAT system should be considered to be serious where they are connected with the territory of two or more Member States, result from a fraudulent scheme whereby those offences are committed in a structured way with the aim of taking undue advantage of the common VAT system and the total damage caused by the offences is at least EUR 10,000,000. The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties. This Directive aims to contribute to the efforts to fight those criminal phenomena”.

4.2 *The objective scope of application of the directive: actions likely to be prejudicial to the financial interests of the Union*

The material scope covered by the directive is much broader than the mere cases of fraud included in the technical sense. It intends to fight fraud that harms the financial interests of the Union (Art. 3) including by means of repressing certain so-called “related offences”, including money laundering (Art. 4.1), passive and active corruption (Art. 4.2), and misappropriation (Art. 4.3). In short, the fight against fraudulent activity is included within a wider context of action by the Union aimed at protecting the asset, which the Union itself defines with the expression “licit economy”, discussed in greater detail above. This protection is provided starting with a consideration of the negative impact of the offences on the functioning of the “internal market” and on the faith of European citizens in the institutions of the Union.

Moreover, this approach is not recent. Even before the time of the Lisbon reform, the Union’s action had extended to fighting a wide range of infringements against EU law that were considered connected to fraud: these included (as they are now under the PFI Directive) not only offences that directly create harmful consequences for the organisation’s budget (in terms of increases or decreases in revenues or misuse of expenditure)<sup>67</sup>, but also, more generally, offences that affect the essential function that the budget performs in terms of implementing common policies<sup>68</sup>. Consider, for example, the provision established with the first supplementary Protocol to the PFI Convention, which seeks to establish a uniform provision to deal with cases of financial fraud when these are connected with acts of corruption committed by and against national officials (of Member States) and the Union. This provision leads to the conclusion that the organisation handles the matter in a holistic manner, not only in terms of preventing and repressing fraud, but also in fighting other illegal activities likely to harm those interests: indicative is the expression used in Art. 325.1 TFEU – identical in this respect to the provision of the EC Treaty that preceded it – which, although not very clear from a criminal law perspective (moreover not the only one in which the provision is located) of *lex certa*, obliges states and the organisation to

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67. On this issue, see A. E. Vervaele, *La fraude communautaire et le droit pénal européen des affaires*, Paris, 1994.

68. See P. Fimiani, *op. cit.*, 339.

“fight against fraud and the other unlawful activities that harm the financial interests” of the same<sup>69</sup>.

Each of the offences covered under the PFI Directive deserves some clarification with regard to its legal definition.

#### 4.2.1 *Fraud affecting the financial interests of the Union*

Fraud that harms the Union’s financial interests is described under Art. 3.2, letter a), faithfully reproducing the contents of Art. 1 of the PFI Convention of 1995, referring to active behaviour and failure to act with regard to<sup>70</sup>:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
- non-disclosure of information in violation of a specific obligation, with the same effect;
- the misapplication of such funds or assets for purposes other than those for which they were originally granted.

The directive essentially adopted the definition of fraud set out under Art. 1 of the Convention and draft PFI Directive, in relation as much to expenditure as to revenues. What distinguishes the current provision from that of the Convention is that it now contains a distinction (between expenses pertaining to tenders and expenses not pertaining to this legal transaction) that has the effect of widening the material scope of the directive: the same offences identified under Art. 3.2, letter a), are in fact also penalised when they pertain to spending related to tenders carried out to generate profit for the perpetrator or third parties to the detriment of the Union’s financial interests. This reference must, therefore, be acknowledged as an important development compared to the Convention.

The directive also includes within the definition of fraud actions or failures to act in relation to revenues from its own resources obtained from VAT (within the limits detailed above<sup>71</sup>) through using or presenting false or incomplete statements or documents concerning VAT, or failure to commu-

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69. Italics added.

70. Art. 3.2 letter a).

71. Text under the entry for note 66.

nicate compulsory information about the same, or, also, by using accurate VAT statements to conceal a missing payment or the unlawful formulation of entitlements to VAT compensation (e.g. false invoicing)<sup>72</sup>.

Lastly, the Directive's definition of fraud also covers revenues other than those derived from VAT<sup>73</sup>, with a distinction compared to the regime established for this latter resource, since it is meant to be applied to cases of "misuse of legally obtained benefits"<sup>74</sup>.

#### 4.2.2 Money laundering of the proceeds of crime

Money laundering is defined *per relationem*: the PFI Directive refers to the classification used in directive 2015/849/EU<sup>75</sup>.

The law represents a step forward compared to the provision established by the PFI Convention system, of which the second Protocol states the intention of Member States to take "the measures required to make money laundering a criminal offence"<sup>76</sup> and, consequently, for a definition of the offence, it refers to the directive that was in force at the time, no. 91/308/EEC, which was much less detailed than the current law<sup>77</sup>.

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72. Art. 3.2 letter d).

73. Art. 3.2 letter c).

74. Art. 3.2 letter c) iii.

75. Art. 1.3 (similarly the 7th premise of the Preamble of the PFI Directive). The directive mentioned is the fourth directive designed to deal with the threat of money laundering, succeeding Council Directive 91/308/EEC (which defined the laundering of revenues from illegal activities in relation to crimes connected with the trafficking of narcotics and imposed obligations only on the financial sector); Directive 2001/97/EC of the European Parliament and Council (which extended the scope of application of Directive 91/308/EEC with regard to both the type of crimes and the professions that the activities involved); Directives 2005/60/EC of the European Parliament and Council and 2006/70/EC of the Commission (which took into consideration the recommendations of the Financial Action Task Force (FATF), which extend the framework previously established for terrorist financing, setting out more detailed obligations with regard to the identification and verification of the identity of clients, the situations in which a high risk of money laundering or terrorist financing can justify the application of stronger measures and those in which, on the other hand, a lower risk can justify the implementation of less rigorous controls).

76. Art. 2.

77. Art. 1, third indent, directive *ibid*. For the legislative developments that occurred in the meantime, see *supra*, note 74.

### 4.2.3 *Active and passive corruption*

Corruption, as a particularly serious threat to the Union's financial interests, is mentioned in the Preamble (premise no. 8) of the directive, with reference to bribery of public officials; it receives further technical clarification in the body of legislation. Therein, corruption is defined as an action by a public official, who directly or through an intermediary, solicits or receives benefits of any type, for himself or for a third party, or who accepts the promise of them to carry out or not carry out one of his duties or carry out his duties in a way that harms or could harm the financial interests of the Union<sup>78</sup>; and active corruption as an action by a person who promises, offers or provides to a public official, directly or through an intermediary, a benefit of any type for the official himself or for a third party, so that the same will carry out or not carry out one of his duties or will carry them out in a way that harms or could harm the financial interests of the Union<sup>79</sup>.

The definitions reproduce what was set out in the first PFI Protocol, under Articles 2 and 3.

### 4.2.4 *Misappropriation*

The crime of misappropriation is described as “the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests”<sup>80</sup>. The offence would seem, therefore, comparable to offences cited in the Italian Criminal Code, such as peculation (Art. 314 Criminal Code), abuse of office (Art. 323 Criminal Code) and misappropriation (Art. 646 Criminal Code).

This is a novelty for the European Union's legal system, since it is not present in the Convention or its Protocols.

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78. Art. 4.2 letter a).

79. Art. 4.2 letter b).

80. Art. 4.3.

#### 4.2.5 *Crimes of association*

Criminal organisations that carry out offences that are harmful to the Union's financial interests are covered under the scope of application of the PFI Directive in light of the provision set out under Art. 8 of the same, according to which "Member States shall take the necessary measures to ensure that where a criminal offence referred to in Article 3, 4 or 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA<sup>81</sup>, this shall be considered to be an aggravating circumstance". However, this situation must be considered in light of premise no. 19 of the same directive, where (in reproducing the contents of Art. 8) it specifies that there is no obligation on national judges to take said circumstance into account in order to increase the sentence, where their national legal system classifies the offences defined under the Framework Decision as separate crimes and this provision could lead to more severe sanctions than those provided for under the Directive<sup>82</sup>.

Then there is a reference to criminal organisations in relation to fraud committed to the detriment of the financial resource made up of VAT: the 13th premise – citing the frequent connection between crimes against the Union's financial interests and crimes of association (included in the list under Art. 83.1, paragraph 2 TFEU) – reminds Member States of the need to maintain consistency between the PFI Directive and the EU laws based on that provision.

The directive, therefore, differs greatly from the Convention, since it establishes that crimes of association must be punished more severely or be considered as an aggravating circumstance, whereas in the PFI Convention (particularly in its Preamble) there is one, generic reference to forms of organised crime; it is true that due indirectly to the provision established in the second Protocol, the scope of application of the Convention extends to money laundering, even when committed as an association, which is often the case.

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81. Framework Decision of 24 October 2008 *on the fight against organised crime*.

82. On the penalty regime see *infra*, paragraph 4.5.

### 4.3 *The subjective context*

The subjective indictment criterion established by the directive is intent, or rather the intentional character of the actions or failures to act of a natural person or legal entity.

#### 4.3.1 *The notion of national and European public official*

The directive obliges states to prosecute, primarily, natural persons responsible for the offences detailed above.

This is applicable to “public officials”, that is, to all those who, in relation to the legal system of the Union, exercise, by right or in fact, a public service: employees of the organisation, as well as public officials and those performing a public role at the national level, either from a Member State or a third country<sup>83</sup>. The meaning of the term used in the Union’s law is very broad: it is duly clarified.

A “Union official” is a person who holds the position of official or other servant hired under contract by the Union pursuant to the Staff Regulations of Officials<sup>84</sup>; who is seconded to the Union by a Member State or by any public or private body and who carries out functions equivalent to those performed by officials or other servants of the Union; or who is assimilated to Union officials: this refers to members of the Union’s institutions, bodies or agencies, set up in accordance with the Treaties and their staff to whom the Staff Regulations do not apply<sup>85</sup>.

A “national official” is defined as such in the national law of the Member State or third country in which he carries out his functions. It is interesting to note how the law specifies that a national official is someone who exercises an executive, administrative or judicial office at national, regional or local level; and any person holding a legislative office at national, regional or local level is assimilated to a national official<sup>86</sup>.

A national or Union official is any other person who is assigned (or who exercises) a public service function involving, in Member States or third countries, the management of or decisions concerning the Union’s financial interests<sup>87</sup>.

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83. Art. 4.4 letters a) and b)

84. Reg. (EEC, EURATOM, CECA) no. 259/68 of the Council.

85. Art. 4.4 letters a) and i).

86. Art. 4.4, letter a, ii.

87. Art. 4.4, letter b.

The directive does not differ, therefore, from the PFI Convention in terms of the definition of the position of (national or Union) official or in terms of the extension of the applicability of the law to officials from third countries<sup>88</sup>. Neither does it change anything with regard to the application of the assimilation principle; the only change is to the location of the provision: formerly located in the PFI Convention and Art. 209A<sup>89</sup> and now located only in Art. 325 TFEU, although it has been enhanced as described above. Also exempt are the relevant provisions of the Treaties that establish the European Communities, the Protocol on the Privileges and Immunities of the European Communities, the Statute of the Court of Justice, as well as the texts adopted to implement the same with regard to suppression of the immunities. In conclusion, what changes in terms of the subjective context is that the new directive removed any previous reference to the derogating law for the aspects concerning executive, legislative or judicial power, at any territorial level or degree, except for the provisions on the privileges and immunities set out under Protocols no. 3 and no. 7 of the Staff Regulations of Officials and the regime applicable to other servants of the European Union.

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88. Art. 1 of the first Protocol annexed to the Convention defines an official as: any official whether “Community” or “national”, including any national official of another Member State.

89. Art. 4.1 of the Protocol (under the “Assimilation” heading) specifies that each Member State must adopt the necessary measures to ensure its domestic criminal law contains descriptions of the offences constituting conduct of the sort referred to in Article 1 of the Convention, committed by its national officials in the exercise of their functions, which apply in the same way in cases where such offences are committed by Community officials in the exercise of their duties. The second paragraph of the same article specifies that, for the fraud offences set out in Article 1 of the Convention and for corruption as defined in the first Protocol, committed by or against government ministers, elected members of parliament, members of the highest courts or members of its Court of Auditors in the exercise of their respective functions, each Member State must adopt the necessary measures to ensure its domestic criminal law contains definitions of these offences that are applied in the same way to cases where offences committed by members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities in the exercise of their respective functions are punished. The third paragraph of the article makes an exception, in derogation, for special legislation enacted by individual states applicable to government ministers provided that “the Member State ensures that Members of the Commission of the European Community are covered by the criminal legislation implementing Articles 2, 3 and 4, paragraph 1”

### 4.3.2 *Liability of legal persons*

Article 6 is dedicated to the liability of legal persons. It states that “Member States shall take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3, 4 and 5 are punishable as criminal offences”, as well as “the attempt to commit” the same<sup>90</sup>, giving preceptive force to the 14th premise of the directive.

The conditions for the foundation of the liability are the benefit that the entity derives from committing the offence, when it is carried out – by an individual or by a natural person or as part of an organ of the legal entity – by someone who holds a leading position within the legal entity, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal entity.

Member States must also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control exercised by a person referred to above has enabled a person under its authority to commit one of the criminal offences referred to in the directive<sup>91</sup>. The directive clearly specifies that the liability of legal persons does not exclude the possibility of criminal proceedings against natural persons for the same offences<sup>92</sup>.

In part, the solution used by the directive represents progress with regard to the structure of the Convention. It is true, in fact, that the PFI Convention does not make explicit reference to the liability of legal persons, even though it obliges Member States to adopt the necessary measure to penalise cases of criminal liability pertaining to company managers, or anyone authorised to make decisions or exercise control within the company<sup>93</sup>. It is worth mentioning that according to the compromise solution achieved with difficulty during the PFI Convention negotiations, the type of liability introduced could have been criminal or administrative, provided that the sanctions applicable in each Member State were “effective, proportionate and dissuasive” pursuant to the previously mentioned case law of the Court of Justice. When the Convention was drafted, therefore, it did not follow the original proposal of the Commission, which had sought to create a purely criminal regime of liability; also discarded was the proposal to create a central register of fraud investigations or to develop a detailed mechanism for cooperation between

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90. Art. 5.1-2.

91. Art. 6.2.

92. Art. 6.2.

93. Art. 3.

en states and Commission services. However, the structure created by the Convention was then superseded by the second Protocol, which, with regard to the liability of entities, established a regime equivalent to the current one<sup>94</sup>, with only one difference worth mentioning: the PFI Directive also sets out provisions in relation to the liability of legal persons in cases of tax fraud.

#### 4.3.3 *Incitement, aiding and abetting*

The Directive states (as mentioned earlier) that “Member States shall take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences”, as well as “the attempt to commit” fraud and misappropriation<sup>95</sup>.

Reference had previously been made to voluntary abetting and incitement to commit fraud in the Convention among the criteria for determining jurisdiction<sup>96</sup>.

A further reference is present in the second Protocol, where it recognises the liability of natural and legal persons who are perpetrators, instigators or accomplices of fraud, active corruption or money laundering<sup>97</sup>. Attempted offences are mentioned, however, only in relation to legal persons. Therefore, the scope of the directive coincides with that of the Convention, with the only difference being in relation to the provision for attempted offences.

#### 4.4 *The limitation period regime*

The limitation period is finally<sup>98</sup> considered by European law under Art. 12: no provision was made on the subject in the Convention of 1995 or in its protocols.

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94. Art. 3.

95. Art. 5.1-2.

96. Art. 4.

97. Art. 3.3.

98. The difficulties experienced by the Italian legal system are well known with regard to the subject of limitation periods, considered as a substantive rather than procedural subject of criminal law, as was established instead by the other Member States of the European Union. These difficulties are also noticeable in relation to the obligation to comply with the European Convention on Human Rights and the case law of the associated court. For the sake of brevity, please refer to the *Taricco* case (ibid. *supra*, paragraphs 3.3 and 4.1), to the exhaustive work of P. Mori, op. cit., and N. D. Parisi, Rinoldi, *The Court of Justice of the EU*

However, the harmonising effect of the directive could have been more significant. The first paragraph of the provision concerned establishes that, in order to combat these crimes effectively, the limitation period established by the legislation of Member States, starting from the commission of the crime, must be “sufficient”. The term, therefore, remains rather vague; however, it is clarified somewhat by the provision established under paragraph 2 of the same article: referring to the contents of the 22nd premise, Member States are obliged to provide for a limitation period of at least 5 years from the commission of “serious” crimes set out under Articles 3, 4 and 5 of the directive.

Paragraph 3 allows a derogation from the last provision, establishing that the limitation period can never be less than three years and establishing that the period can be interrupted or suspended in the event of specified acts.

Lastly, paragraph 4 establishes that, following a final conviction of a penalty greater than one year imprisonment or any other final conviction of a custodial sentence for a crime cited under Articles 3 to 5, it may be applied “for at least five years from the date of the final conviction”.

#### 4.5 Harmonisation of criminal sanctions

The directive makes a significant contribution to the harmonisation of sanctions.

There is nothing new in the reaffirmation of the original legal principle of dissuasiveness, proportionality and effectiveness of the sanctions states choose to introduce in adjusting their domestic legislation to the law of the Union<sup>99</sup>.

However, to this first principle the directive adds a second one, which consists of the decision not to limit Member States to level of penalty when it involves sanctions against a natural person, the regime for whom is established under Art.7 of the directive. Behind this decision were different provisions contained in the Preamble of the directive, where it specifies that there is no obligation to punish the commission of crimes that are not considered serious, except for intentional offences, with imprisonment<sup>100</sup>; and it adds that it does not preclude the use (if effective and appropriate) of disciplinary

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*and Criminal Policy*, in *Eucrim*, 2015, no. 3, 111 et seq.

99. See Art. 7 of the Directive and premises 15 and 17.

100. Premise 12.

measures or sanctions other than those of a criminal nature, which could be combined with sanctions of a criminal nature<sup>101</sup>.

A third principle established by the directive regards the concept of seriousness and the consequent application of criminal sanctions: Member States are not prevented from considering, in order to determine the gravity of the offence, the advantage potentially obtainable or the hypothetical damage that may be caused<sup>102</sup>. However, the threshold of ten million euros for crimes against the common VAT system remains in place<sup>103</sup>.

Following the standard practice on this subject<sup>104</sup>, the directive even identifies the threshold for custodial sentences and identifies participation in organised crime as an aggravating factor. Considering the provision in greater detail: it prescribes the (maximum) penalty of imprisonment for fraud, money laundering, misappropriation and corruption<sup>105</sup>; this penalty must not be less than 4 years when the offences “involve considerable damage or advantage”<sup>106</sup>. Member States are entitled to identify other serious circumstances, defined as aggravating<sup>107</sup>; the commission of an offence as part of organised crime is, in any event, an aggravating circumstance<sup>108</sup>.

For the same offences, when the damage or advantage is less than ten million euros, then Member States can apply sanctions other than those of a criminal nature<sup>109</sup>.

With regard to legal persons, the type of sanctions (criminal and non-criminal) indicated by way of example in the directive<sup>110</sup> includes exclusion from entitlement to advantages and/or public assistance, as well as temporary or permanent exclusion from public tender procedures; temporary or permanent disqualification from the practice of commercial activities; judicial supervision measures, or temporary or permanent closure of the establishments involved in committing the crime; and judicial winding-up of the entity. In addition,

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101. Premise 17 and 31.

102. Premise 18.

103. Art. 2.2.

104. See the summary in D. Rinoldi, *Lo spazio*, *ibid.*, chapter III, paragraph 5.5.

105. Art. 7.2: the crimes are those set out in Arts. 3 and 4 of the directive.

106. Art. 7.3 (See premise no. 18): damages and advantages are defined as considerable if they exceed 100 thousand euros (Art. 7.3, second paragraph), with the exception (as per Art. 2.2: see *supra*, paragraph 4.1) of those committed to the detriment of the VAT system. Furthermore, damages are defined as “always considerable” if they pertain to the VAT regime (when this falls within the scope of the directive’s application: again *supra*, paragraph 4.1).

107. Art. 7.3, fourth paragraph.

108. Art. 8.

109. Art. 7.4.

110. Art. 9.

for both natural and legal persons, measures to enable the freezing and confiscation of instruments and proceeds of crime have been included<sup>111</sup>. These measures are located within the context of a process of legal harmonisation of criminal sanctions, implemented through reference to the principle of reciprocal recognition introduced by the Treaty of Amsterdam<sup>112</sup>. With regard, in particular, to the measures adopted to fight organised crime (a context which also includes the subject of offences that are harmful to the Union's financial interests) the European strategy identifies measures pertaining to assets as instruments of combat, which, along with seizure, should be able to deter the circulation of illegal revenues<sup>113</sup>. This strategy uses a coherent package of instruments, which include seizure and confiscation of assets, instruments and revenues from crime primarily to prevent money laundering<sup>114</sup>, but also for the more general fight against organised crime<sup>115</sup>; measures to freeze and seize assets for investigative purposes<sup>116</sup>; and decisions to confiscate<sup>117</sup>.

The greater effectiveness of the regime established by the directive can be measured if we consider, firstly, the fact that the PFI Convention is limited to establishing the obligation for Member States to punish natural persons with effective, proportionate and dissuasive sanctions, including custodial sentences at least in cases of serious fraud. In terms of dissuasive efficacy, the directive is significant in introducing the provision of explicit statutory minimums in relation to offenders who commit crimes that are considered "serious" and those who abet, incite or aid them. The fact that the quantitative parameter for evaluating the seriousness of the fraud is doubled by the directive in comparison to the provision of the PFI Convention (indeed it is taken from fifty thousand ECU<sup>118</sup> to one hundred thousand euros) is certainly not encouraging; it also specifies that for cases of fraud involving less than four thousand ECU and not possessing other elements of seriousness under the respective national laws, the sanction given does not have to entail a custodial sentence<sup>119</sup>. The

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111. Art. 10.

112. On the basis of Art. 31 TEU (in the version of the Treaty on European Union adopted in Amsterdam) the Commission adopted an initial Communication on the subject: COM (2000) 495 final, 26 July 2000.

113. On this point, see A. Damato, *Confisca e sequestro*, in A. Damato, P. De Pasquale, N. Parisi (Eds.), *Argomenti di diritto penale europeo*, Turin, 2014<sup>2</sup>, 275 et seq.

114. Framework Decision 2001/500/JHA, as partially amended by Directive 2014/42/EU.

115. Framework Decision 2005/212/JHA, as partially amended by the directive ult. cit.

116. Framework Decision 2003/577/JHA.

117. Framework Decision 2006/783/JHA.

118. Art. 2.1. Regulation (EC) 1103/97 established the conversion rate of 1 euro for one ECU.

119. Art. 2.2.

first Protocol extends the regime to cases of active and passive corruption<sup>120</sup>, as well as to cases of complicity and incitement<sup>121</sup>. Lastly, the convention regime, allows previous disciplinary sanctions to be taken into account in order to determine the penalty for the criminal offence<sup>122</sup>.

In relation to legal persons, the directive does not differ much from the second PFI protocol: the list of adoptable provisions contained in this act includes measures to exclude entitlement to public benefits or aid, as well as temporary or permanent disqualification from exercising a commercial activity; submission to judicial surveillance; and judicial winding-up<sup>123</sup>. The directive, on the other hand, includes a list of provisions, including temporary or permanent exclusion from public tender procedures and the temporary or permanent closure of establishments used to commit the crime. However, in the case of both the Convention and the directive, the two lists are purely indicative and, as such, are unlikely to exclude measures other than those specified therein.

#### *4.6 Associated procedural aspects*

Even though the legal basis chosen does not provide for it to be used to adopt criminal proceedings measures, the directive intervenes in this area by making a provision, first of all, on the solution of conflicts of jurisdiction. The regime differs considerably compared to the one established by the PFI Convention, including, in addition to the criterion of the nationality of the alleged offender, the place where the offence was committed (in whole or in part) and their presence in the territory of the state<sup>124</sup>. On the one hand, the directive reduces the scope of the provision since it does not include the third criterion<sup>125</sup>, but, on the other hand, it enhances it, because it gives a Member State (which in that case must inform the Commission) the authority to establish its criminal jurisdiction, including for crimes committed outside its territory, when they involve certain circumstances of fact or law, such as: the habitual residence of the offender or his position as an official who acts in the context of his official duties; and the benefit a legal person established in

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120. Arts. 2 and 3.

121. Art. 5.

122. Art. 5.2.

123. Art. 4.

124. Art. 11.

125. Art. 11.1, lett. a-b.

its territory derives from the offence<sup>126</sup>. Lastly, the directive prohibits Member States from only exercising their jurisdiction when a victim's report is made in the place where the offence was committed or when there is a denunciation from the state of the place where the offence was committed<sup>127</sup>.

With regard to offenders who are subject to the Staff Regulations of the Union, the Member State must set the rules for establishing its jurisdiction, also deciding whether to refrain from applying them or apply them only in specific cases or under specific conditions<sup>128</sup>.

Still with regard to the procedural context, the instruments attributable to forms of judicial cooperation in criminal matters are considered. In this case, the directive abandons the solutions set out in the PFI Convention, which lays down a specific measure in relation to extradition (Art. 5) and mutual judicial assistance in criminal matters (Art. 6), which are completely absent here. This should be no surprise if we consider the fact that the directive (contrary to the Convention of 1995) intervenes in a much more complex legislative context; a context that, in relation to judicial cooperation on criminal matters, includes framework decisions (for example on the European arrest warrant and the European investigative order) as well as convention provisions (such as those contained in the Convention on Mutual Assistance in Criminal Matters of 2000 and the Convention Implementing the Schengen Agreement) still not in force at the time and not part of Union law.

What we now have in the European Union, is a framework that also benefits from the operation of bodies, organisations and agencies of the Union itself, established in relation to the need to connect the national authorities assigned to apply criminal law, reciprocally and with the agencies themselves. Consequently, the PFI Directive, in clarifying the provision of Art. 325 TFEU, confirms the duty of cooperation between states and the Commission, particularly with the branch of the latter constituted by OLAF.

Neither does the directive still need to include a provision on the intervention of the Court of Justice with preliminary rulings (currently the subject of the third Protocol annexed to the PFI Convention, since this competence now fully extends to all sectors of the "area of freedom, security and justice" thanks to the reform implemented with the Lisbon Treaty.

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126. Art. 11.3, lett. a-c.

127. Art. 11.4.

128. Art. 11.2.

*5. Pros and cons of the future law, also in light of the prospects arising from the European Public Prosecutor regulation*

The provision established by the PFI Directive will come into force once all Member States have adjusted to its provisions, which they must do by 04 July 2019<sup>129</sup>. Until that date, the regime established by the Convention of 1995 and its Protocols will remain in force.

*5.1 On the harmonising capacity of the directive*

At this point, it is worth noting, firstly, the scarce capacity of this convention system to harmonise national provisions and approximate the legal systems of Member States in relation to provisions on fighting offences that are harmful to the Union's financial interests. Most recently, it has been authoritatively stated that this has “*de facto* created a multi-speed regime, culminating in a mosaic of different legal situations depending on whether or not that Convention has legal force in the particular Member State”<sup>130</sup>. The European Commission, on many occasions, has pointed out that the political priorities of each Member State, the different national definitions of the technical-legal expressions used therein and the lack of harmonisation in terms of the limitation period have negatively affected a uniform application of the Convention within national legal systems<sup>131</sup>.

This legislative fragmentation must be attributed to the expectation borne by the approval of the new directive, which (though not courageous, as is immediately made clear if nothing else by the choice of legal basis<sup>132</sup>) presents certain improvements compared to the current convention regime, along with some setbacks. To summarise the points discussed above:

- the first positive aspect is that the directive defined the notion of the financial interests of the Union (paragraph 4.1);
- with regard to the objective scope of application: there is an explicit reference to “procurement-related expenditure”, which enables the directive to achieve the objective of also sanctioning offences when they are committed in the context of a public tender procedure where

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129. See *supra*, note 6.

130. Conclusions of Advocate General Yves Bot, *ibid.*, 24, note 40.

131. For simplicity, please refer to the praxis appropriately and exhaustively cited by the same Advocate General, *op. loc. cit.*, notes 41 and 42.

132. *Supra*, paragraph 2.

the offender or third parties are seeking to obtain profit to the detriment of the Union's financial interests (paragraph 4.2.1); the crime of money laundering is defined in light of the last directive and no longer in light of the 1991 directive and is, therefore, more effective in fighting the offences concerned (paragraph 4.2.2); the directive is also applicable to cases of misappropriation (paragraph 4.2.4); it sets out a binding provision on crimes of association (paragraph 4.2.5); on the negative side, there is a clear step backwards with regard to the scope of application of the directive on VAT fraud, which is subject to the PFI Convention regardless of its size and cross-border nature, while the directive is applicable beyond certain thresholds of value and only to offences characterised by a cross-border scope (paragraph 4.1);

- with regard to the subjective scope of application, the directive removed any previous reference to the derogating law for the aspects concerning executive, legislative or judicial power, at any territorial level or degree (paragraph 4.3.1), and extends the definition of public official to any person who is assigned or who exercises a public service function (paragraph 4.3.1); it also addresses the offence of attempted fraud (paragraph 4.3.3); establishes the liability of legal persons with greater clarity and extends it to tax fraud (paragraph 4.3.2);
- the directive makes provisions on the limitation period, even though they do not require strict harmonisation: moreover, this results from the legal basis chosen, which, as mentioned earlier, allows merely minimal harmonisation (paragraph 4.4);
- this introduces a penalty regime for natural persons that benefits from greater effectiveness derived from having established a minimum statutory period, as well as some objective criteria for distinguishing between serious and non-serious offences, which provides a better guideline for states in terms of identifying offences that merit criminal sanctions and those that do not (paragraph 4.5);
- the jurisdiction criteria regime is much more detailed than the convention regime, extending the capacity of the state to more effectively "reach" those responsible for fraud offences, but introducing the risk of more than a few positive conflicts of jurisdiction (paragraph 4.6), which the functioning of the European Public Prosecutor should, however, be able to obviate (paragraph 5.2).

The time frame and methods for each Member State to adjust to the directive remains an unknown factor: the effectiveness of the directive rests largely on the speed of national adjustments and the compliance of domestic

provisions with the objective of an even minimum approximation of the national provisions permitted by the legal basis used for the directive.

### *5.2 Opportunities arising from the establishment of a European Public Prosecutor's Office*

Among the opportunities presented by the adoption of the directive is the fact of being part of a broader framework: in fact, its approval has facilitated the adoption of the Union's regulation on establishing a European Public Prosecutor, which must contribute towards protecting the Union's financial interests.

A few remarks, although brief, on the context in which these acts are located seem necessary. The Lisbon Treaty assumed the task of gathering all the representations that for a long time had expressed a pressing need to establish a European Public Prosecutor tasked with finding, prosecuting and bringing to judgment those who commit or assist in committing particularly serious crimes. The debate in the literature and within institutions goes back to a research initiative launched (again it was in 1995!) by the Director General for financial control of the European Commission, aimed at evaluating the methods by which the financial interests of the organisation could be better protected from the consequences of fraud and other illegal activities. The granting to the Union of competence to coordinate the Member States within the Council on criminal matters, which happened with the Maastricht Treaty, and the subsequent acknowledgement of the need to review the latter to improve the Union's structure (an objective achieved with the Treaty of Amsterdam), provided the premises for the supersession of the methods of protecting the legal interest of the "Union's budget" only through techniques of assimilation and adoption of administrative sanctions with Community acts. The study, entrusted to a group of experts coordinated by Mireille Delmas-Marty, was presented in a report entitled "Corpus Juris" *portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*<sup>133</sup>. The years that followed saw an intense debate on the solutions proposed and their implications for the legal systems of the then fifteen Member States<sup>134</sup>, with the objective of proposing a catalogue of

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133. Paris, 1997.

134. M. Delmas Marty, J. A. E. Vervaele (eds.), *La mise en oeuvre du Corpus Juris dans les Etats membres*, Antwerp-Groningen-Oxford, 2000 and 2001, vol. 4. The study was republished and updated with the objections, clarifications and supplements that emerged from the debate sparked by the text: the Italian version is in G. Grasso, R. Sicurella (eds.), *Corpus Juris*

fundamental principles on protecting the Union's financial interests through criminal law, essential to the creation of a European area of criminal justice, including through the establishment of a European Public Prosecutor and identifying the legal basis needed for the same<sup>135</sup>.

From the conceptual stage, the debate moved on to considering institutions: the Commission (in the context of the procedures for revising the Community Treaties) adopted an opinion in which its suggestion was to "supplement the current provisions relating to protecting the Community's financial interests by a legal basis in view of setting up a system of rules relating to criminal proceedings in cross border fraud, notably by the establishment of a European Public Prosecutor"<sup>136</sup>. In this and subsequent documents<sup>137</sup>, the fight against offences likely to harm the Union's financial interests combines European and national legal instruments, both administrative and criminal, with a strong point in the establishment of a European Public Prosecutor.

After a series of institutional vicissitudes<sup>138</sup>, the provision on the European Public Prosecutor was established by the Lisbon Treaty. Article 86 TFEU

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2000. *Un modello di tutela dei beni giuridici comunitari*, Milan, 2003.

135. On this subject, see COM (2001) 715 final

136. COM (2000) 34 of 26 January 2000, point 5b) later completed by a *Supplementary Contribution*, entirely focused on introducing a European Public Prosecutor to defend European financial interests (COM (2000) 608, of 29 September 2000). In fulfilment of the 2001-2003 Action Plan for the protection of the financial interests of the European Community (COM (2001) 358 of 28 June 2000), the Commission proposed a series of specific measures, including a return to the debate on the establishment of a European Prosecutor (COM (2001) 254 final, point 4.1); it later adopted a *Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor* (COM (2001) 715 of 11 December 2001), which was followed by a public consultation the results of which were published in the *Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor* (COM (2003) 128 of 19 March 2003).

137. COM (2011) 293, point 4.

138. The European Council, at its meeting in Nice (7-9 December 2000), in initiating a new reform of the Treaty on European Union, ignored the draft, which was instead considered at its meeting in Laeken (14-15 December 2001) on the occasion of the granting of the mandate to the *Convention* for the preparation of the "constitutional" Treaty: the provision on the establishment of the European Prosecutor was set out under Art. III-274 of the version of the Treaty dismissed by the Inter-governmental Conference (which was much more limited compared to the text proposed by the *Convention*, limiting the competences of the Prosecutor to mere protection of the Union's financial interests). The setback caused by the negative results of the referendums in France and the Netherlands (2005) was followed (on 23 June 2007) by the Inter-governmental Conference being assigned to reform the Treaties on European Union and the European Communities, with a detailed and precise mandate to use the essential part of the institutional reforms approved in 2004, abandoning any constitu-

states that its establishment will start “from Eurojust”; it sets the area of competences to primarily focus on the fight against offences that are harmful to the Union’s financial interests, but they can be extended to serious criminal offences that have a cross-border dimension (paragraphs 1-2 and 4); leading to a future framework of general rules on the conditions governing the exercise of its functions, the procedural rules applicable to its activities, those governing the admissibility of evidence and rules applicable to the judicial review of procedural measures taken by it (paragraph 3). Article 86, therefore, represents only the legal basis for the establishment of the European Public Prosecutor, which must be done through a Union regulation.

The duties assigned by the Treaty to the Public Prosecutor relate to a very important stage of legal proceedings, that is the investigative and preliminary phase, which involves identifying, prosecuting and bringing to judgment those who commit offences that damage the Union’s financial interests, as well as those who incite, aid, abet or merely attempt these offences. In addition to these duties, there is also the task (as mentioned earlier) of prosecuting these offences before the national courts<sup>139</sup>. All of the above establishes the judicial nature of the Public Prosecutor’s Office, which can exercise its duties independently of both the Union’s institutions and national authorities.

The offences are identified by the Treaty in very vague terms, referring to the regulation to determine which offences are likely to be classified as crimes that are harmful to the financial interests of the Union. The underlying definitions (such as “financial interests of the Union” and offences capable of harming these interests) were resolved by the PFI Directive, to which the regulation refers.

The draft regulation had been presented by the European Commission on 17 July 2013<sup>140</sup>; since it had not received the unanimous support of the twenty-five Member States of the area of freedom, security and justice<sup>141</sup>,

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tional implications especially in the terminology used.

139. On the benefits of this role, see COM (2011) 293, paragraph 4.3. For a detailed and instructive discussion regarding the different aspects arising from the establishment of a European Prosecutor, see, in a context of *de iure condendo*, *La protezione dei diritti fondamentali e procedurali. Dalle esperienze investigative dell’Olaf all’istituzione del procuratore europeo*, Rome, Fondazione Lisli e Lelio Basso, 2014; and, in a context of *de iure condito*, L. Salazar, *Habemus EPPO! La lunga marcia della Procura europea*, in *AP*, 2017, no. 3, 1 et seq.; Id., *Definitivamente approvato il regolamento istitutivo della Procura europea (EPPO)*, in *Diritto penale contemporaneo*, 13 October 2017; A. Venegoni, M. Mini, *I modi della nuova Procedura europea*, in *Giurisprudenza penale Web*, 2017, 12.

140. COM (2013) 534 final.

141. According to the TFEU, if the proposal of the Commission does not obtain the

from its ashes an enhanced cooperation project was developed in which twenty Member States participated: the regulation was approved by the European Council and Parliament on 12 October 2017<sup>142</sup>.

The Public Prosecutor is one of the instruments used to achieve the objective concerning the construction of the aforementioned area (Art 3.2 TEU): an objective which involved the performance of concurrent competences of the Union and Member States under Art. 4.2, letter j, TFEU<sup>143</sup>.

We should not underestimate the dangers that arise from the uniform application of Union law by the establishment of a Public Prosecutor that does not operate for all Member States: the current fragmentation of the European area of criminal repression is, in fact, a reason for the poor efficacy of certain European actions to fight criminality and, consequently, is at the heart of the need to equip the Union with such an institution. However, the area of freedom, security and justice is already very segmented<sup>144</sup>. The

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unanimous consent of the Member States in the Council, then work in the Council will be suspended and the European Council will deliberate (within four months) on the draft regulation. If there is consensus, then the European Council will refer the draft back to the Council for adoption. In the event of disagreement, at least nine Member States (within the same time limit, informing the European Parliament, Council and Commission) can initiate an enhanced cooperation: compared to the procedure generally established for this (Art. 20 TEU; Arts. 326-334 TFEU), in the event of the establishment of the European Prosecutor (as in the hypothetical case in which some Member States use the so-called “emergency brake”: Arts. 82.3, paragraph 2; 83.3, paragraph 2; 87.3, TFEU) the specified procedure for obtaining the Council’s authorisation to proceed is substituted by the presumption that it is granted.

142. OJEU no. Law 283 of 31 October 2017.

143. In relation to the type of competence, Protocol no. 25 annexed to the Treaties specifies that (when the need arises) “the scope of this exercise of competence only covers those elements governed by the Union act in question”. Also contributing towards the area of freedom, security and justice are certain powers to act in order to coordinate, support or supplement the actions of the Member States; this type of competence cannot be used to harmonise national legislative provisions and regulations (Art. 2.5 TFEU). These competences (in relation to the area of freedom, security and justice) pertain to administrative cooperation between the competent services of the Member States and between those services and the Commission (Art. 6, letter g, TEU and Art. 74 TFEU) as well as to the prevention of criminality (Art. 84 TFEU).

144. Under Protocols nos. 19 to 22 and Declaration no. 56: the United Kingdom and Ireland participate under the *opting in* formula (declaring, that is, as the need arises, that they want to participate in adopting and applying individual measures, including those related to the Schengen *acquis*); Denmark is excluded (*opting out*), but retains the power to decide whether to agree, in the context of the Union on inter-governmental matters, with the other Member States in compliance with individual provisions of the Schengen *acquis*. Even the efficacy of the Charter of Nice-Strasbourg (certainly fundamental for criminal matters) is limited for the United Kingdom, Poland (Protocol no. 30 and Declaration nos. 61 and 62) and in future perhaps also for the Czech Republic (Conclusions of the European Council of 29-30

establishment, therefore, of a Prosecutor following enhanced cooperation, although less than ideal in some ways, does not represent the collapse of a shared context of cooperation, and in any event, creates an important operative instrument, which is shared by the majority of Member States of the Union and is essential in fighting cross-border criminal offences that harm the Union's financial interests.

The creation of a European authority competent to prosecute crimes, such as the European Public Prosecutor, could thus contribute to determining the application of equal treatment for those responsible for fraud offences against the Union's financial interests, applying the rules contained in the PFI Directive in a consistent and uniform manner, investigating, prosecuting and bringing to justice offenders and their accomplices, and resolving any positive conflicts of jurisdiction, which the rule contained in the PFI Directive tends to determine<sup>145</sup>.

The solution adopted by the Lisbon Treaty uses the reasons adopted in the *Corpus juris* and the *ratio* underlying it. However, this now has a very different potential, since based on the reform introduced by the same Lisbon Treaty, the institutional framework, competences and methods of performing them have changed dramatically, even when they affect the area of criminal law within which the Prosecutor is destined to operate<sup>146</sup>.

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October 2009, DOC 15265/09 Concl. 3). Lastly, the control of the Court of Justice does not extend to acts on criminal matters within the framework of the now extinct third "pillar" of the Union when these pertain to the United Kingdom even after the end of the transition period established by the Lisbon Treaty (30 November 2014). In relation to all the elements of fragmentation that compromise an efficient European area of criminal repression, see COM (2011) 293 final, 4 et seq. All this is overlapped by the "Brexit process", in relation to which, see N. Parisi, V. Petralia, *Elementi di diritto dell'Unione europea. Un ente di governo pr Stati e individui*, Mondadori Educational, 2016, set of four updates (December 2016).

145. *Supra*, paragraph 4.6. See also COM (2001) 293, point 4.3.

146. D. Rinoldi, *Il pilastro resistente. Contrasto al terrorismo e competenze dell'Unione europea in materia di "politica estera e di sicurezza comune": "liste nere" e spazio di libertà, sicurezza e giustizia*, in G. Grasso, L. Picotti, R. Sicurella (Eds.), *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, Milan, 2011, 219 et seq.



ANNEX:  
National reports on anticorruption

This section includes national reports on anticorruptions  
produced by the Winter School participants



## Agency for the prevention of corruption and coordination of the fight against corruption of Bosnia and Herzegovina

### *Bosnia and Herzegovina*

**D**ayton Agreement established Bosnia and Herzegovina as a state consisting of two Entities, each with a high degree of autonomy: The Republika Srpska (RS) and the Federation (FBiH) and Brcko District of BiH (BD BiH). There are ten Cantons in the Federation of BiH. Brcko District of BiH functions as a single administrative unit under the sovereignty of Bosnia and Herzegovina.

From the viewpoint of the constitutionality, the current system has the characteristics of a much decentralized federal system in which each Entity has its own constitution, president, government, parliament and judiciary.

Criminal legislation and criminal procedure legislation were adopted at the level of BiH, Entities and Brcko District. The laws of Entities and Brcko District apply exclusively in the courts of the Entities and Brcko District. The legislation at the state level applies in the BiH State Court.

Bosnia and Herzegovina belongs to the group of countries in which the civil law is applied, and court decisions are binding for all its citizens.

Model of criminal proceedings in Bosnia and Herzegovina is of a mixed character. There are elements of both the inquisitorial and adversarial proceedings. An investigation is carried out at the request of an authorized prosecutor, by the order to conduct an investigation, and has three phases: investigation, proceedings before the court (the main trial, presenting the evidence of prosecution and defence, additional evidence, etc.) and the appellate procedure.

The Council of Ministers of Bosnia and Herzegovina, at its 6th session held on May 7, 2015, adopted the Anti-Corruption Strategy for 2015 – 2019 and the Action Plan for the Implementation of the Anti-Corruption Strategy<sup>1</sup> for 2015 – 2019.

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1. <http://apik.ba/zakoni-i-drugi-akti/strategije/default.aspx?id=806&langTag=bs-BA>.

“The Strategy and Action Plan are aligned with the appropriate processes, as well as with the development and sectoral strategies at both national and other levels of government in Bosnia and Herzegovina.”<sup>2</sup>

In the outlining of the Strategy, special attention was paid to the specifications of the political and social structure of BiH, due to the existence of several levels of government, as well as to the ability for the “Entities, Brcko District and Cantons to develop their own strategies to combat corruption and action plans in accordance to the general principles set forth in the National Strategy for the Fight against corruption.”<sup>3</sup>

In order to avoid negative overlap with the responsibilities of the entities, BD and the cantons, the Strategy and Action Plan are not oriented towards the sectors, considering the fact that these levels of government have specific responsibilities in the sectoral areas (home affairs, justice, health, education, etc.).<sup>4</sup>

Anticorruption strategies were also adopted in Republika Srpska, Federation of BiH, Tuzla Canton, West Herzegovina Canton, Central Bosnia Canton, Zenica-Doboj Canton, Herzeg-Bosnia Canton, Herzegovina-Neretva Canton, Posavina Canton, Una-Sana Canton, Sarajevo Canton, The Brcko District of Bosnia and Herzegovina.

The laws that directly regulate the field of fight against corruption in Bosnia and Herzegovina are as follows:

- Law on the Agency for the Prevention of Corruption and the Coordination of the Fight against Corruption;
- Law on Whistleblower Protection in the Institutions of Bosnia-Herzegovina;
- Law on the protection of people who report corruption;
- Law on Conflict of Interest in the Institutions of B&H;
- Law on conflict of interests in the governmental institutions of Federation of Bosnia and Herzegovina;
- Law on conflict of interests in the institutions of Brcko District of Bosnia and Herzegovina;
- Law on prevention of conflict of interests in governmental institutions of Republika Srpska;
- Law on Freedom of Access to Information in B&H;

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2. <http://apik.ba/zakoni-i-drugiakti/strategije/default.aspx?id=806&langTag=en-US>.

3. Provided for under Article 22 of the Law on the Agency, (“Official Gazette of BiH,” No 103/09, 58/13).

4. <http://apik.ba/zakoni-i-drugi-akti/strategije/default.aspx?id=806&langTag=bs-BA>.

- Election Law of B&H;
- Law on Financing of Political Parties;
- Law on financing political parties from the state budget, cities and municipalities;
- Law on Public Procurement B&H.

Bosnia and Herzegovina (BiH) has signed the 2005 United Nations Convention against Corruption which requires setting up specialised bodies responsible for preventing corruption and for combating corruption through law enforcement. Agency for the Prevention of Corruption and Coordination of the Fight against Corruption (APIK) was established by Law on the Agency for the prevention of corruption and coordination of the fight against corruption<sup>5</sup> as an independent and autonomous administrative organisation, which reports to the BiH Parliamentary Assembly, in accordance with Article 6 of UNCAC.

APIK is responsible for drafting the Anti-Corruption Strategy, and drafting the Action Plan for the prevention of corruption, coordination and supervision of the implementation of the Strategy and Action Plan; coordination of the work of public institutions in preventing of corruption and conflicts of interest; monitoring of conflicts of interest; prescribing a uniform methodology for collecting data on the financial status of public servants; acting on applications filed with the indications of corrupt behaviour; monitoring the effects of the application of laws and regulations aimed at the prevention of corruption; cooperation with scientific and professional organizations and nongovernmental organizations on the issue of prevention of corruption; cooperation with international organizations, institutions, initiatives and bodies; the development of educational programs on the prevention of corruption and the fight against corruption; informing the relevant institutions and the public about the obligations on the basis of international legal acts; prescribing a uniform methodology and guidelines for drafting of integrity plans and other activities regarding the prevention of corruption. For more efficient implementation of the Anti-Corruption Strategy, institutions and agencies at all levels, public agencies and other bodies of public authority are obliged to cooperate with this institution and to submit all the necessary data and information at the request of the same.

The Agency as the only body in the country which is professionally engaged in the prevention of corruption and coordination of the fight against

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5. [http://apik.ba/zakoni-i-drugi-akti/Zakoni/Zakon\\_o\\_Agenciji/default.aspx?id=397&langTag=en-US](http://apik.ba/zakoni-i-drugi-akti/Zakoni/Zakon_o_Agenciji/default.aspx?id=397&langTag=en-US), "BiH Official Gazette", number: 103/10.

corruption, has initiated the establishment of bodies at other levels of government in BiH, and created recommendations for their formation. In addition to these bodies, whose role is of a preventive nature, there are institutions with anti-corruption responsibilities in BiH that have repressive powers (police agencies, prosecutors, courts, etc.).

The Agency is financed from the budget. APIK's budget is a part of the budget allocated for BiH institutions and international commitments. Salaries and allowances of APIK's employees are determined in accordance with the Law on Salaries and Allowances in the Institutions of BiH.<sup>6</sup> The budget is based on experiential consumption and consists of funding for salaries and wages, allowances for employees, material costs and capital investments for the basic operations of the Agency.<sup>7</sup> The Agency does not have the available budget funds for the organization of events, the implementation of projects in the implementation of the Anti-Corruption Strategy 2015-2019 and the Action Plan for its implementation.

There are currently two laws on the protection of whistleblowers in Bosnia and Herzegovina: one at the national level (the Law on the protection of persons who report corruption in the institutions of Bosnia and Herzegovina<sup>8</sup>) and one in Republika Srpska (the Law on the protection of people who report corruption).<sup>9</sup> The first applies to the employees of the institutions of Bosnia and Herzegovina and to the legal persons that are their founders; the second to all persons, both physical and legal, who report in good faith corruption in the public or private sector in Republika Srpska. Both laws assume that reporting should be made with good intentions, that is, in good faith, so as not to protect whistleblowers who act for other reasons.

At the end of 2013, the Law on Protection of persons who report corruption in the institutions of Bosnia and Herzegovina was adopted, according to which the key drivers of the implementation are The Agency for the Prevention of Corruption and Coordination of the Fight against Corruption and Administrative Inspectorate of the Ministry of Justice, and thereafter bylaws were also adopted.

In relation with the BiH Law on Whistle-Blowers the Agency is central point for the implementation and is authorised to issue certificate for those who qualify as whistle-blowers.

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6. Official Gazette of BiH, No. 50/08, 35/09, 75/09, 32/12, 42/12 and 50/12.

7. See: Articles 3 and 7(3) of the Law on Financing of the Institutions of BiH (Official Gazette of BiH, No. 61/04, 49/09).

8. <http://rai-see.org/wp-content/uploads/2015/08/LAW-ON-WHISTLEBLOWER-PROTECTION-IN-THE-INSTITUTIONS-OF-BiH-en.pdf>.

9. <http://www.narodnaskupstinars.net>.

The Agency took actions upon received submissions that contain indications of a corruptive conduct and carried out the analysis of data contained in each individual case.

Law on Protection of Persons Reporting Corruption in institutions of Bosnia and Herzegovina regulates the following: a status of a person reporting corruption, procedure of reporting, obligations on the side of institution related to reported corruption and procedure for protection of a person who reported corruption. This way, all persons who notice or report on corruption will be protected from firing, threats and blackmails.

According to the Law, Agency shall assign a status of a whistleblower to a person reporting corruption within 30 days from the date of report being filed. In case that employer endangers the status of a whistleblower in any way (firing, suspension, transfer to a lower work position), he would be fined with 10.000 to 20.000 KM. Fine in range of 1.000 – 10.000 KM is prescribed for a whistleblower who deliberately report false corruption.<sup>10</sup>

Implementation of the Law would be supervised by the Administrative inspection office, at the Ministry of Justice BiH, while Agency is obligated to publish annually a special list of institutions in which corruption was reported at, what damage occurred and which corrective measures were proclaimed.

Bosnia and Herzegovina, is the first country in region which in 2000 adopted Freedom of Access to Information Act, at first on the State level and then in 2001 in both of its entities.<sup>11</sup> The Law on Freedom of Access to Information in Bosnia and Herzegovina is aimed to facilitating and encouraging the maximum and prompt disclosure of information in the control of public authorities at the lowest reasonable cost. According to the laws, all citizens and legal entities have the right to information under the control of government agencies, unless publishing it could endanger state security, invade personal privacy, or imperil commercial records. If an agency does not have the information requested, it has must forward the request to the agency that does have it. There is no obligation to collect the data just to satisfy a request. To get information, citizens must ask the agency that has it in writing. The request must make clear precisely what is being sought and in what format and where it should be sent. Citizens do not have to reveal why they want information or what they are going to do with it. Agencies and public companies are supposed to appoint information officials to deal with

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10. <http://rai-see.org/wp-content/uploads/2015/08/LAW-ON-WHISTLEBLOWER-PROTECTION-IN-THE-INSTITUTIONS-OF-BiH-en.pdf>.

11. [http://www.mpr.gov.ba/web\\_dokumenti/zakon\\_o\\_slobodi\\_pristupa\\_informacija\\_ma\\_28\\_00\\_eng.pdf](http://www.mpr.gov.ba/web_dokumenti/zakon_o_slobodi_pristupa_informacija_ma_28_00_eng.pdf).

requests, and to publish on their web sites a list of the information it has and the process for requesting access to it. Institutions are required to respond to information requests within 15 days. If they fail, citizens may complain of administrative silence to inspectors. If a request asks for information that contains personal or confidential commercial data or records that could harm the state, institutions are supposed to pass on as much of the information asked for as possible or to reject the request after fully explaining why. However, before that final decision, agencies are required to carry out a so-called “test of public interest.” They must consider the circumstances of a request and the exemption that may apply. The agencies are supposed to override the exemption when the public interest in releasing the information is greater than in withholding it. The Ombudsman for Human Rights in BiH monitors access of information.<sup>12</sup>

Taking into consideration the complex constitutional structure in Bosnia and Herzegovina the area of conflict of interest is characterized by divided competences, and currently, there are four laws on conflict of interest<sup>13</sup>.

Conflict of interest is defined as a situation in which elected officials, an executive officer or advisor have a personal interest affecting or potentially affecting lawfulness, transparency, objectivity and impartiality in performing their public function. Principles of treatment of elected officials, executive officers and advisors, including integrity, transparency and ethics are set out by law.

In order to implement the state law the Commission for Deciding on Conflict of Interest has been formed, consisting of nine members, three from the House of Representatives, three from the House of Peoples of the Parliamentary Assembly BiH, and the CEO and two deputies from the Agency for the Prevention of Corruption and the Coordination of the Fight Against Corruption, who are members of the Commission in accordance to their function. Members of the Commission, parliamentary representatives, are appointed by the Parliamentary Assembly BiH and their mandate is as long as the convening of the Parliamentary Assembly of BiH.

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12. [http://www.ombudsmen.gov.ba/documents/obmudsmen\\_doc2013041705283799eng.pdf](http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2013041705283799eng.pdf).

13. Law on Conflict of Interest in Governmental Institutions in Bosnia and Herzegovina (‘The Official Gazette of BiH’, No. 16/02, 14/03, 12/04, 63/08, 18/12, 87/13, and 41/16); Law on Conflict of Interest in Governmental Institutions in the Federation BiH (‘The Official Gazette of the FBiH’, No. 70/08); Law on Prevention of Conflict of Interest in the Government Institutions of the Republika Srpska (‘The Official Gazette of the RS’, No. 73/08 and 52/14); Law on Prevention of Conflict of Interest in the Institutions of the Brcko District (‘The Official Gazette of the BD BiH’, No. 43/08, 47/08, and 3/15).

The Law of the Republika Srpska is implemented by the Republic Commission for Determining Conflict of Interest appointed by the General Assembly of the Republika Srpska for the period of four years.

Laws in the Federation BiH and the Brcko District BiH are currently not being implemented by anyone.

Officials at the level of BiH, in accordance with the Article 12 of the Law on Conflict of Interest in Governmental Institutions in BiH, and articles 5 and 6 of the Rules of Procedure ('The Official Gazette of BiH', No. 56/14), must submit regular financial statements with the purpose of helping preventing conflict of interests, and identifying potential conflict of interests. At the request of the Commission for Deciding on Conflict of Interest, they must submit extraordinary financial statement in case of determining deciding facts on potential conflict of interest. Financial statements are submitted to the Commission as follows:

- within 30 days from the day when they assumed the office of the elected official, executive officer or advisor;
- regular annual reports before 31 March, for the previous year;
- after the expiry of the six-month period following the termination of the mandate of an elected official, executive officer or advisor.

The officials at the level of the Republika Srpska submit regular financial statements in accordance with the Article 12 of the Law on Prevention of Conflict of Interest in the Government Institutions of the Republika Srpska. The Commission receives reports on income and property of officials, their spouses or life partners, children, adoptive parents, adoptees, and children of a spouse (stepson/stepdaughter) in accordance with the Article 33 of the Rules of Procedure before the Republic Commission for Determining Conflict of Interest in Government Institutions in the Republika Srpska and the manner of control of financial statements ('The Official Gazette of the RS', No. 31/09, 33/09, and 13/15). The report is submitted within three months from the day of taking over the mandate and three months before the end of the mandate, as well as at the request of the Commission.

The APIK is run by the Director<sup>14</sup>, who is appointed by the Parliamentary Assembly of Bosnia and Herzegovina based on the recommendations of the

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14. According to Article 9 of the Rulebook on Internal Organization of APIK, Director has managerial powers defined under the Law on APIK and other laws governing powers of managerial staff in administration bodies. Director of APIK (Article 21 of the Rulebook on Internal Organization of APIK) manages and directs the activities falling under the Agency's jurisdiction, represents the Agency, prepares the annual work plan and proposal of the Agency's budget and forwards them for adoption, ensures lawfulness of Agency's operations and

Committee for Election and Monitoring over the Work of the Agency for Prevention of Corruption and Coordination of Fight against Corruption. It is done by way of open competition, as provided by the Law on Ministerial Appointments, Appointments of the Council of Ministers and Other Appointments of Bosnia and Herzegovina, following the actions of scrutiny undertaken during the appointment of the members of the Council of Ministers of Bosnia and Herzegovina. The Director's mandate is five years with option for one additional reappointment. The Director has two deputies. The proposal to dismiss the Director, in accordance with law, will be submitted by the Selection and Operational Monitoring Committee of the Agency.<sup>15</sup>

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spending of funds, decides on the rights, duties and obligations of employees in line with the law and performs other duties under the law.

15. [http://apik.ba/zakoni-i-drugi-akti/Zakoni/Zakon\\_o\\_Agenciji/default.aspx?id=397&langTag=en-US](http://apik.ba/zakoni-i-drugi-akti/Zakoni/Zakon_o_Agenciji/default.aspx?id=397&langTag=en-US).

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## Conflict of interests and Freedom of information legislation

### *Italy*

A public administration body should pursue public interest with *integrity*, through an honest conduct guaranteeing citizens' rights: that is the meaning of impartiality in the context of public and administrative administration law and that should be the lens for reading Article No. 97 of the Italian Constitution, namely the base for the impartiality principle in the Italian legal system<sup>1</sup>. In order to fight maladministration law No. 241/1990 established under Article 6 *bis* the "obligatory abstention" according to it, public officers cannot take part to the administration process such as actions and procedures involve their personal interests. So, it established the duty for public officers to communicate to the Responsible Anticorruption and Transparency of the authority all job experiences or work relationships they recently had with private companies, as well as political and government functions, even if they seem just potentially in conflict with the actions and procedures the officers are involved in. This rule aims to respect the directive of serving the Italian Nation with "*discipline and honour*" as stated under Art. No. 54 of the Constitution<sup>2</sup>. Moreover, Art. No. 98 of the Constitution states: "*Civil servants shall be exclusively at the service of the Nation*". In case of an illegitimate action is committed, the officers are punished with disciplinary sanctions, while their personal responsibility can include the criminal

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1. Cit. Nigro M., in Casetta E., *Manuale di diritto amministrativo*, Giuffrè, 2017; Art. 97, part 2 and 3, of the Constitution: "*Public offices shall be organised under the law and so has to ensure smooth and impartial operation. Civil service rules shall establish the jurisdiction, duties and responsibilities of civil servants. Access to the civil service shall be through competitive examinations, except in the cases established by law.*"

2. Art. 54 of the Constitution: "*All citizens have the duty to be loyal to the Republic and to uphold its Constitution and laws. Those citizens to whom public functions are entrusted shall have the duty to fulfil such functions with discipline and honour, taking an oath in those cases established by law.*"

dimension, administrative procedures and the final deed they made can be closed and invalidated too. The rule providing for a proper conduct of public officers has been strengthened by the Italian anticorruption legislation since it is now part of the National Anticorruption Plan. The latter is also composed by a Code of Conduct, and the Responsible of the Anticorruption and Transparency of each authorities is in charge of the internal control while the external overview is made by National Anticorruption Authority. The duty of declaring eventual personal interests can also partially be found within the National Code of Conduct. Moreover the public employ regulation establishes that everyone must make such declarations also at the begging of its work as public officer (see Law Decree No. 165/2001, which also specifies the declaration does not only involve strictly personal interests but also those of family members until the second degree).

The above mentioned National Code represents a minimum standard: it must then be adopted and integrated at all the other levels of regulation by each administrative authority and organization through a Triennial Anticorruption and Transparency Plan (i.e., in many other countries the Integrity Plan)<sup>3</sup>.

The “obligations of abstention” is one of the solutions to fight concrete problems of conflict of interest: however, there are some others important rules to fight corruption through preventive strategies, such as imposing limitations to the access to public roles. Some important innovations have been introduced recently by Decree No. 39/2013 that frames a new *regime* regarding *impartial status* of civil servants, mostly for officers at top positions with a public manager role. This results from distinction between political and managing functions, aimed at rendering the latter truly independent from executive power<sup>4</sup>.

The law No. 39/2013 sets a system of prevention of conflict of interest based on incompatibility and unfitness as to say unsuitability for an office

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3. “The PNA ensures the coordination of national and international strategies for the prevention of The PNA is structured as a programmatic tool subjected to an annual update with the inclusion of indicators and targets in corruption in public administration, order to make the strategic objectives measurable and to ensure the monitoring of the possible divergences from these targets arising from the implementation of the PNA. The PTCP within each public administration identifies, on the basis of the PNA, the specific risks of corruption in individual administrations and the measures deemed necessary to prevent them” cit. Cantone R., The New Italian Anti-Corruption Authority: Duties and Perspectives, in 24 Dig.: Nat’l Italian Am. B. Ass’n L.J. 83 (2016) and see also Carloni E., *Fighting corruption through administrative measures. The Italian Anti-Corruption Policies*, in Italian Journal of Public Law, Vol.9, 2017.

4. C.f. Cantone R. e Carloni E., *La prevenzione della corruzione e la sua Autorità*, in Diritto pubblico n. 3/2017 pp. 919 ss.

(so called *inconferibilità*). Thus, according to this regulation, it is impossible to obtain public functions in certain circumstances and a “cooling period” is necessary to access public roles. To sum up, there are three main cases when the prevention system is enforced: (i) when politicians or civil servants are involved in criminal offences; (ii) when civil servants operated in a private sector or other public institution controlled or funded by the public authority where now they is involves in, and vice-versa; (iii) when the potential officers fulfilled political roles and would have top manager position in their new administrative appointment. Furthermore, if cases (ii) (iii) take place after job appointment, the officers must decide between one of the two different functions within fifteen days<sup>5</sup>.

According to ANAC and other international organization<sup>6</sup>, transparency is considered form lawmakers the best way to contrast corruption (so called: *disinfectant*). Moreover, guaranteeing an easy access to public information, data and documents to everyone as introduced by Law Decree No. 33 of 2013 is useful for the accountability of the institutions: democratic participation would increase the legitimacy of the institution trough transparency and openness<sup>7</sup>. In this sense the important reform made under Decree No. 97/2016, known as the “Freedom of information legislation” should completely change the paradigm of secrecy and discretionary public power to a paradigm of transparent power, recognizing a new universal right to access to information<sup>8</sup>. The reform overturned the previous system that, since

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5. There are critics to the lack of the conflict of interest for politicians that are mostly let out the ethic code of conduct. C.f. Merloni F., *inconferibilità e incompatibilità degli incarichi*, in Enciclopedia Italiana, Roma, Treccani, 2015. [http://www.treccani.it/enciclopedia/inconferibilita-e-incompatibilita-degli-incarichi\\_\(Il-Libro-dell'anno-del-Diritto\)/](http://www.treccani.it/enciclopedia/inconferibilita-e-incompatibilita-degli-incarichi_(Il-Libro-dell'anno-del-Diritto)/); C.f. Carloni E., *Fighting corruption through administrative measures. The Italian Anti-Corruption Policies*, pp. 276 ss. For a comment of d.lgs. n. 39/2013 see also: Merloni, F., *Il nuovo regime delle inconferibilità e incompatibilità nella prospettiva dell'imparzialità dei funzionari pubblici*; Sirianni, G., *Incompatibilità ed inconferibilità: la necessaria distanza tra cariche politiche e incarichi amministrativi*; Ponti, B., *Il d.lgs. n. 39 del 2013. Vigilanza e sanzioni*, tutti in *Giornale di diritto amministrativo*, 8/9 2013. To an overall overview in ANAC, *Relazione annuale 2016*, Roma, Camera dei deputati, 2017. [https://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/Pubblicazioni/RelazioneParlamento/\\_relazioni?id=171fb3f40a77804206046c16b2056dc5](https://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/Pubblicazioni/RelazioneParlamento/_relazioni?id=171fb3f40a77804206046c16b2056dc5).

6. Open Government Declaration, UE Constitution: Art. 41 ECHR; art. 1, 10, 11, and 298 TUF; art. 15 and 298 TFUE. Transparency International; GRECO. See also COM 2003, 317 “*On a comprehensive EU policy against corruption*”.

7. “It dictates that administrations create an area on their websites called “transparent administration”, containing easy-to-find information on the most important facts concerning institutional bodies, executives, managers and activities carried out” in Cantone R., *The New Italian Anti-Corruption Authority: Duties and Perspectives*, p. 87.

8. Art. No 7 of decree 97/2016 dictates that freedom of information through the right of access of date and documents held by public authorities, should be granted to anyone,

1990, dictated for the citizen the right to solely defend those private interests that are involved in some authorities' procedure, under the "due process of law"<sup>9</sup> principle, moving toward the principle of the "right to know" providing it a judicial protection as a human right<sup>10</sup>. Following the inputs of some international organizations, Italy begun to adopt rules for the digitalization of public administration in 2005 (when Digital Administration Code was enacted) and more an "open data policy" through organized institutional website. Following this trend, in 2009 a bill for increasing the efficiency of public administration bodies was enacted: it also included transparency obligations through measures like publicity and the dissemination of information. The main goal of this first regulatory intervention was to improve the quality of the services offered to the citizens (customer satisfaction) increasing the efficiency of the authorities through a system of internal evaluation and performance monitoring. The second important moment for the development of such policies was in 2013, with the above-mentioned Law Decree 33/2013: it imposed to authorities to publish a long list of information in the "Transparent Administration" website, an institutional tool used to disclose relevant information about organization and activities of public administration bodies (e.g. expenditures for public procurement)<sup>11</sup>. Decree No. 97/2016, as said above, introduces the right to know of any person (not only citizens) to access any information, requiring no specific motivation: the real change is represented by the introduction of a "transparency- on request approach", although maintains some limits to protect specific private and public interest.<sup>12</sup> Similarly to other FOIAs elsewhere, the Decree provides a long list of exemptions and limits for the protection of public order, national security, defence and military, international relationship, financial and economic stability, investigation and prosecution of crimes, private interest

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regardless of ownership of a legally protected situation.

9. Concept well explained by Researcher F. Mannella, lessons titled, *Corruption and the right to good government*, third day of winter school.

10. The applicant should demonstrate a direct, concrete, and actual interest to have information from Public authority, and article 24 of decree 241/1990 prohibited the access just to monitor public bodies", see Galetta D. U., *The Italian freedom of information act 2016. Why Transparency- on- request is a better solution*, in Italian Journal of Public Law, Vol. 8, 2016. Pp. 269 ss.

11. Decree no. 50/2016 also added some very important provisions in the public procurement matter, summary: disclosure of all programmatic acts, procedures, public contracts signed, information of Jury Commission, all documents about public procurement. All the publications have legal effect.

12. As above Galetta D. U., *The Italian freedom of information act 2016. Why Transparency- on- request is a better solution*, p. 278.

as privacy and personal data, intellectual property, copyright and corporate secrets. Since they are large limits and include broad and vague concepts, the practical effect of the new regulation has been criticized by some analysts because a great discretionary are left in the hands of the public authorities<sup>13</sup>. Because of these reasons, the role of ANAC is fundamental since it can impose a better application of the rule of law through guidelines: in fact the Bill recognised to ANAC the power to indicate good practises and to define limits and exclusions in accordance with the Privacy Authority. A lot of questions are still open: the biggest one is about the real relationship between transparency and combating corruption, as some scholars question<sup>14</sup>. There are some other critics about the possibility for people to concretely know the information they took: in this regard, the concern is to have an effect of “*opacity for confusion*”, because the *data* should be intelligible and understandable while they rarely are. A big issue is then open in case of conflict between the public interest to the dissemination of information and private interests, even if Bill favours transparency<sup>15</sup>. Furthermore, the absence of a proper “public interest test” has been underlined: such test would balance the necessity of disclosure with public and private interests, the interest to keep secrecy on some information and thus deny disclosure totally or just partially. However, in case of disclosure’s denial, as added in ANAC’s guidelines (December 2016), an “actual prejudice” should be pointed out: a clear damage to the interest involved should be identified, as well as the casual link between the dissemination of information and such damage.<sup>16</sup>

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13. Therefore, part of scholarship has criticized some decisions and even the Consultative section of Council of State over the scheme of the Decree too Article 24 d.lgs 241/1990 and 5 bis 33/2013. See *Ivi*, p. 283 and Carloni E., *Il nuovo diritto di accesso generalizzato e la persistente centralità degli obblighi di pubblicazione*, in *Diritto Amministrativo*, 2017.

14. The spirit of the rule is to recognize a proper good relation between transparency and fighting corruption as expressed also by ANAC, determination n. 1310 del 28 December 2012, *Ivi*, p. 27; and Galetta D. U., *The Italian freedom of information act 2016. Why Transparency- on- request is a better solution*, she criticized the over role recognized to ANAC and the straight relation between transparency and anticorruption, pp. 284- 285.

15. As stated in Decree No. 97/2016 and affirmed by ANAC’s guideline. Although: “the law likewise has a high degree of formalization, and provides internal recourse procedures (though subject to the possibility of appeal to a court), in which the Privacy Authority is involved, but not the Anti-Corruption Authority” in Carloni E. Giglioni F. *Three transparencies and the persistence of opacity in the Italian government system*, *European Public Law*, 2017. P. 14.

16. Some other concerns have been expressed to the absence of proper enforcement system and may the over role of the Privacy Authority rather than ANAC. See Carloni E., *Fighting corruption through administrative measures. The Italian Anti- Corruption Policies*, p. 287.

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## The Italian National Anti-Corruption Authority

### *Italian anticorruption national strategy and the Italian National Anti-Corruption Authority*

The pervasive nature of the corruptive phenomenon and its transnational implications, brought the States and therefore also Italy to act in a united and proactive way through the formulation of proposals of *government policies*, intended to contrast the effect of corruption and limit its implications on global economies.

In the beginning, in Italy, fight against corruption was often conducted through the introduction of control methods and costs management on the administrative action exercised mainly by the Court of Auditors.

Thought the introduction of the *New Public Management* principles, in the 80s, a new series of interventions aiming at reforming the control system and increasing transparency in the administration to contain corruption amongst administrators, takes place also in Italy.

In the 90s, the requirement to curb public expenditure is bound to the reform of the public administration through the adoption of monitoring and management control mechanisms, intended to make the Public Administration “held responsible” at all levels.

Following these measures, the introduction of the Legislative Decree No. 150/2009 introduced mechanisms of results and performance measurement intended to promote transparency and prevent the misuse of power with the ultimate goal of improving efficiency in Public Administration. The law provides control measures according to the following steps: “*Three-years programme for transparency and integrity*”, “*Performance plan*”, “*Report on performance*”.

Law 190 of 6 November 2012 (*Severino Law*) constitutes the first is the main reference point for policies aimed at fighting corruption on a preventive and repressive level in the public sector.

In execution of art. 6 of the UNCAC, the Law n.190 establishes an independent body aimed at preventing corruption: the Italian AntiCorruption

Authority (A.N.AC.) substitutes the Independent Commission for Evaluation, Transparency and Integrity (C.I.V.I.T.), in charge of the activities of controlling, prevention and fight against corruption and illegality in the public administration. The Law No. 190/2012 puts into effect a complex institutional and organisational plan which refers to models mainly based on prevention.

The same way, the idea of transparency changes and become a value and instrument which would grant the right of the participatory democracy. In this context, together with the “regulations concerning the obligations of publicity, transparency and diffusion of information by public administrators”, the Legislative Decree No. 33/2013 states generalised right to access data held by public agencies.

As a result of the implementation of article 5, 3 of Law No 125 approved on 30 October 2013, CIVIT changed name in A.N.AC, “*National AntiCorruption Authority for evaluation and transparency of public administrations*”. Its duty being of promoting anti-corruption policies and promote transparencies among public administrators.

The Law Decree No. 90 of 24 June 2014, article 19, subsequently enacted into Law No. 114 of 11 August 2014, introduces new and impacting measure in the anticorruption system and in A.N.A.C. activities<sup>1</sup>.

Among the most significant interventions intended to strongly affect the fight against corruption in Italy, there is the Legislator’s choice of anchoring the supervision on public contracts already performed by the Authority for the Supervision of Public Contracts (A.V.C.P.) in the system of corruption prevention outlined by Law No. 190/2012. Therefore, Art. 19 of this Law settles the suppression of A.V.C.P. as well as the transfer of its functions and resources to A.N.AC<sup>2</sup>.

The new Code of contract according to the Law Decree 50/2016, subsequently followed by the revised Law Decree No. 56 of 19 April 2017 recognised the *soft regulation* power of A.N.A.C..

This regulation activity is carried out not only in the sector of public contracts, but also to provide interpretative guidelines for the general regulations on corruption prevention and on the strengthening of integrity in the public sector<sup>3</sup>.

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1. <http://www.anticorruzione.it/portal/public/classic/Autorita/ChiSiamo>.

2. <http://www.anticorruzione.it/portal/public/classic/Autorita/Organizzazione>.

3. <http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/Delibere>.

In the field of public contracts the Authority undertakes paralegal tasks, providing a binding opinion on litigation on public procurement. In addition, A.N.A.C. monitors beforehand to prevent illegality and corruption with the support of the Guardia di Finanza (GDF), Court of Auditors, MISA, AGENAS, Public Prosecutors, ISTAT, UNIONCAMERE, Universities, and Transparency International Italy.

The new institutional mission of A.N.A.C. consists of three main “pillars”: 1) the prevention of corruption in the Public Administration and in subsidiaries and State-controlled companies; 2) the implementation of transparency in all aspects of public management and the supervisory activity in the field of public contracts and in every area of the Public Administration; 3) the orientation of the behaviour and activities of public employees by means of advisory, also through regulatory and sanctioning powers.

In the respect of the duties attributed by the law to A.N.A.C, its organisation is governed by a council, independent and impartial from the political power, comprising a president<sup>4</sup> and four councillors<sup>5</sup> (with mandate of six years, non-renewable), with coordination duty in different function. Subsidiary bodies are the Arbitration Chamber<sup>6</sup>, the OIV – Independent evaluation body.

The structure of the Authority is articulated in 27<sup>7</sup> departments, in addition to the Spokesperson of the president, the Expert in International relations, the GDF and special task-force<sup>8</sup>. The latter supports the President in his functions of high surveillance of public procurement of major events (EXPO 2015; Giubileo, etc.)<sup>9</sup>.

The Secretary General, in the performance of his duties as head of the administration, coordinates all the departments of the Authority, thus guaranteeing the implementation and administrative management.

The departments are management structures coordinated by the personnel with management qualification. The department’s responsible is in charge of the functioning of the unity of duty, for which he manages, rules and controls the activity.

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4. <http://www.anticorruzione.it/portal/public/classic/Autorita/Presidente>.

5. <http://www.anticorruzione.it/portal/public/classic/Autorita/Composizione>.

6. <http://www.anticorruzione.it/portal/public/classic/Autorita/CameraArbitrale>.

7. Delibera ANAC numero 206 del 13 marzo 2019.

8. <http://www.anticorruzione.it/portal/public/classic/Autorita/UnitaOperativaSpeciale>.

9. [http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/\\_Atto?id=6becf4350a77804269089005d932af2a](http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?id=6becf4350a77804269089005d932af2a)

The operating expenditures of ANAC are at the charge of the market of competence, for the part uncovered by the funding under the state's budget<sup>10</sup>.

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Law 11 August 2014 n. 114 *“Conversione in legge, con modificazioni, del decreto legge 24 giugno 2014 n.90, recante misure urgenti per la semplificazione e la trasparenza amministrativa e per l’efficienza degli uffici giudiziari”*;

Legislative Decree 12 April 2006 n. 163 *“Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle Direttive 2004/17/CE e 2004/18/CE”*;

DPR 5 ottobre 2010 n. 207 *“Regolamento di esecuzione ed attuazione del decreto legislativo 12 aprile 2006 n. 163;*

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<http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/Delibere>

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10. <http://www.anticorruzione.it/portal/public/classic/AmministrazioneTrasparente/BilanciRendiconti>.

[http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/\\_Atto?id=6becf4350a77804269089005d932af2a](http://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?id=6becf4350a77804269089005d932af2a)

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[www.anticorruzione.it](http://www.anticorruzione.it)



## The Administrative corruption

The so-called “*Administrative corruption*” is a phenomenon that involves Public Administrations and investee companies, or, better said, the relationships between people, as citizens, and public offices. It’s so rampant as to undermine the very foundations of the State/Citizens system with a social cost that is difficult to measure but which, according to various estimates, could affect between 3% and 5% of GDP.

Very interesting as stated by Dr. Nicoletta Parisi, during the Winter School, about the commitment of the A.N.A.C. in the study of a set of indices that can better “*quantify*” the phenomenon of corruption, today entrusted mainly to the corruption perception index (CPI), an index that offers the measurement of corruption in the public and political sector of 168 countries in the world, for the purpose to steer international business investment decisions (Italy has occupied a position between 61st and 68th in recent years).

Precisely to combat this “*disaffective*” drift of citizens towards the Public Administration system, Law no. 190 of 2012 was created and all that has been achieved. This law, which contains the “*Provisions for the prevention and repression of corruption and illegality in the public administration*”, is born above all as a preventive tool. Prevention is, from my personal point of view, the most effective weapon to put in place against that corruption that acts as a “*fluid blob*” penetrating into the wide meshes of P.A. It is precisely this one of the levers of prevention that public officials will have to operate, only by tightening these meshes, in fact, it will be possible to counter this *blob*. After the law no. 190, which outlines the overall system and introduces the anti-corruption plans, are born Legislative Decree no. 33 of 2013 on administrative transparency and Legislative Decree no. 39 of 2013 on the incompatibility and non-transferability of offices. In this temporal context the National Anti-Corruption Plan (PNA) also emerges, which contains essential elements of the overall corruption prevention plan.

In this design, the Responsible for the Prevention of Corruption (henceforth RPC) plays a central role according to article 1, paragraph 7 of Law no. 190, as amended by art. 41, co. 1, lett. f, Legislative Decree No. 97/2016, must be identified as “*normally between the permanent managers in service*” and “*arranging for any organizational changes necessary to ensure suitable functions and powers for carrying out the assignment with full autonomy and effectiveness*”.

The figure of the RPC has been affected by the changes introduced by Legislative Decree 97/2016 which unifies the task of manager responsible for preventing corruption and transparency (RPCT). Among its main tasks are those of:

- to propose to the governing body the approval and amendments of the three-year Corruption Prevention Plan (PTPC) verifying its effective implementation and suitability;
- defining the appropriate procedures for selecting and training employees intended to operate in sectors of activity particularly exposed to corruption;
- to verify the effective rotation of offices in the offices responsible for carrying out the activities for which the risk of corruption crimes is higher;
- to publish a report containing the results of the activity carried out on the administration’s website and send it to the governing body;
- to report to the governing body on the activity carried out;
- to ensure that the provisions of Legislative Decree 39/2013 on the non-transferability and incompatibility of offices are complied with in the administration.

In the amendments made by Legislative Decree 97/2016, the intent to strengthen the powers of interlocution and control of the RPCT against the entire structure of the Entity is clear. It emerges more clearly that the RPCT must have the possibility to actually influence the administration or the body and that the responsibility of the RPCT is accompanied by greater decision those of the subjects who, according to the planning of the three-year anti-corruption plan, are responsible implementation of prevention measures. The same document “*pushes*” for a synergistic “*network model*” that facilitates a proactive cooperation with the other Control Bodies (OIV or ODV in the case of the in-house companies of the P.A.).

For reasons of space, the sanctions to which the RPCT would be subject should not be enumerated, but suffice it to say that the same is subject to

management responsibility and answers the failure to implement the measures to prevent corruption unless it proves that it has made the necessary communications to the offices and to have supervised the observance of the PTPC.

We have seen that the appointment of the RPTC is up to the Governing Body (Article 1, paragraph 7 of Law 190/2012) of the Entity and that the RPTC:

- has adequate knowledge of the organization and functioning of the administration;
- is possibly chosen from the role managers in service (the appointment of an employee with non-managerial qualifications and the appointment of an external manager must be adequately motivated);
- is chosen among executives not assigned to offices that carry out management and active administration activities and that carry out activities in the sectors most exposed to the risk of corruption (eg the contract office);
- be a person who has always maintained an unadulterated conduct.
- We have also seen that the same RPTC, for the performance of its duties, must be put in a position to carry out the task in full autonomy and with any organizational changes if these become necessary. The revocation of the RPCT assignment deserves a final note.

The law does not identify the duration of the appointment, but the same should be established taking into account the non-exclusivity of the function, this also in order to safeguard the necessary “*independence*” of the RPCT with respect to any conditioning and/or retaliation.

The Law provides that the acts of revocation of the RPCT must be motivated and communicated to the ANAC, which may request a re-examination within 30 days. After this deadline, the revocation becomes effective, unless the ANAC finds that it is related to the activities carried out in the field of prevention of corruption. A similar power has been attributed to ANAC in the case of reporting of discriminatory measures against the RPCT.

Article 1, paragraph 51, of the law no. 190/2012 above, in relation to Legislative Decree no. 165/2001, “*General rules on the regulation of employment employed by public administrations*”, introduces, after article 54, a new provision, article 54-bis (renewed by Law No. 179 of 30 November 2017), entitled “*Protection of the public employee who reports offenses*”. Therefore, for the first time in Italy, a rule specifically aimed at the regulation of whistleblowing in the public sector, as is customary in the Anglo-Saxon countries: employees who, in the interests of the integrity of the public administration,

report to the RPCT, to the ANAC or report to the competent authorities conducted unlawful of which they have come to know (because of their employment relationship), cannot be sanctioned, demoted, dismissed, transferred, or subjected to other organizational measures having negative, direct or indirect, on working conditions following their report. Paragraph 2 of article 54 extends the concept of public employee that can report illicit events, including the employees referred to in Article 3 of Legislative Decree 165/2001, employees of public economic entities or employees of private law entities under public control. The same paragraph also specifies that the regulation applies “*also to workers and collaborators of companies supplying goods or services and carrying out works in favor of public administration*”.

Paragraphs 3 and 4 of the aforementioned art. 54-bis of Legislative Decree no. 165/2001, on the other hand, provide for the protection of the whistleblower’s identity. In particular, paragraph 3 states

The identity of the reporter cannot be disclosed. As part of the criminal proceedings, the identity of the reporting person is covered by the secret in the manner and within the limits provided for by article 329 of the criminal procedure code. In the context of the proceedings before the Court of Auditors, the identity of the whistleblower cannot be disclosed until the end of the preliminary phase. As part of the disciplinary procedure, the identity of the notifier cannot be disclosed, where the contestation of the disciplinary charge is based on separate and further findings with respect to the report, even if consequent to the same. If the complaint is founded, in whole or in part, on the signaling and knowledge of the identity of the signaling is essential for the defense of the offender, the report will be used for the purposes of the disciplinary procedure only in the presence of consent of the person reporting the disclosure of the his identity.

Finally, paragraph 4 includes whistleblowing between the hypothesis of exclusion from the right of access provided for by the law regarding the administrative procedure.

The result of the first legislative intervention on whistleblowing, according to many distinguished commentators, appeared to be rather limited and partial for a subject as complex as the one in question. The legislator had chosen, in fact, not to create complete and independent legislation, opting for the inclusion of the matter within the labor law in force for the public employment sector (Legislative Decree 165/2001). One of the main criticisms was even moved by the ANAC, which defined the protection measures in favor of the reporting entity as “*general and abstract*”, considering them insufficient.

This *vulnus* was remedied with the law n. 179 of 2017 which intervened on art. 54 bis of Legislative Decree 165/2001 (Consolidated Law on Public

Employment), already introduced ex novo by law n. 190 of 2012, replacing it in full.

In addition to strengthening the protection of the reporter (as seen above) with the prohibition of any provision from which they can directly or indirectly derive negative effects on the relationship and working conditions of employee, as a further reinforcing element of the protection granted, the law adds the so-called “*inversion of the burden of proof*”. In other words, it is up to the administration to which it belongs to show that the discriminatory or retaliation measure, if any, taken against the reporting party, was motivated by reasons not related to the report itself and not vice versa. Among the latest news on whistleblowing, to report the online platform of the ANAC, available from February 8, 2018, suitable for reporting the offenses at <https://servizi.anticorruzione.it/segnalazioni/#/>, also usable on the TOR network at the link <http://bsxsptv76s6cjht7.onion/>, a total guarantee of the anonymity of the reporter and to access it will be necessary to have a special browser available at the link <https://www.torproject.org/projects/torbrowser.html.en>.

Finally, from the annual monitoring published on the site of the ANAC, it is clear how with the passing of time both the trust of the employees towards the new whistleblowing institution is increasing.

We will also be waiting with curiosity for the first monitoring of the involvement in the use of the new ANAC information tool.

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3) Decreto legislativo 25 maggio 2016, n. 97 Revisione e semplificazione delle disposizioni in materia di prevenzione della corruzione, pubblicità e trasparenza, correttivo della legge 6 novembre 2012, n. 190 e del decreto legislativo 14 marzo 2013, n. 33, ai sensi dell’articolo 7 della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche;

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1) Decreto Legislativo 30 marzo 2001, n. 165. “ Norme generali sull’ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche”;

2) LEGGE 30 novembre 2017, n. 179. Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato; 3) <http://www.anticorruzione.it/portal/public/classic/Servizi/ServiziOnline/SegnalazioneWhistleblowing>

## Kosovo\* Agjencia kundër Korrupsion/Kosovo\* Anti-Corruption Agency

### *Kosovo\**

**K**osovo\* since the establishment of the Anti-corruption Agency since 2007 already has the anti-corruption strategy for the second time and is in the final phase for approval of the new anti-corruption strategy 2018-2022.

Anti-corruption Agency, in cooperation with Government and other government and non-government institutions drafts strategy against corruption. The Agency through the Government submits for approval the Strategy against Corruption in the Kosovo\* Assembly, a document which contains policies against corruption that must be implemented by the responsible institutions of Kosovo, as in the central level also in the local one.

On Implementation of the Strategy against Corruption, the Agency drafts the Action Plan against Corruption in cooperation with the responsible institutions of Kosovo\*, a document that contains concrete measures against corruption that must be implemented by institutions as in the central level also in the local one.

The agency monitors the implementation of the Action Plan against Corruption by the Kosovo\* institutions as in the central level also at the local level. For the implementation of measures against corruption, the responsible institutions report to the Agency periodically once in six (6) months and whenever required by this Agency.

The main anti-corruption laws in Kosovo\* are:

- The Law on the Anti-Corruption Agency<sup>1</sup>
- The Law on Prevention of Conflict of Interest in Discharge of Public Functions<sup>2</sup>

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1. Law on Anti-corruption Agency in this link: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2662>.

2. Law on Prevention of Conflict of Interest in Discharge of Public Functions in this link: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2768>.

- The Law on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of All Public Officials<sup>3</sup>
- Law on the Prevention of Money Laundering and Terrorist Financing<sup>4</sup>
- Kosovo\* has already fulfilled almost the entire legal basis both for fighting corruption and in terms of preventing corruption, also Kosovo\* has other relevant laws related to this matter.

There is National Anti-Corruption Council, The President of Kosovo\*, Mrs. Atifete Jahjaga, has established the National Anti-Corruption Council (hereinafter the Council) on February 14, 2012. The Council in conformity with the Constitution of Kosovo\* and the Laws in force aims the coordination of the works and activities of institutions and agencies, within their competencies and scope, to prevent and combat corruption.

The Functions of the Council:

- To coordinate activities in preventing and combating corruption,
- To identify and coordinate activities in support of the implementation of the national strategy in fighting corruption,
- To determine the priorities and policies for the implementation of the legislative agenda in increasing effectiveness in the fight against corruption,
- To coordinate the work and activities of the responsible institutions in strengthening existing mechanisms to fight corruption,
- To raise the awareness of the society for the prevention and fighting of corruption.

Members of the Council (The heads of the following institutions)<sup>5</sup>:

- The Anti-Corruption Agency
- The Auditor General of Kosovo\*
- The Parliamentary Committee for Legislation
- The Parliamentary Committee for Budget and Finance
- The Parliamentary Committee for the Oversight of Public Finances

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3. The Law on Declaration in this link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=9445>

4. Law on the Prevention of Money Laundering in this link: <https://gzk.rks-gov.net/Act-Detail.aspx?ActID=2715>.

5. The rules of procedure for the national anti-corruption council, in this link: [http://www.president-ksgov.net/repository/docs/the\\_rules\\_of\\_procedure\\_for\\_the\\_national\\_anti-corruption\\_council.pdf](http://www.president-ksgov.net/repository/docs/the_rules_of_procedure_for_the_national_anti-corruption_council.pdf).

- The Kosovo\* Judicial Council<sup>1</sup>
- The Kosovo\* Prosecutorial Council<sup>2</sup>
- The Supreme Court of Kosovo\*
- The Consultative Council for Communities
- The Ministry of Justice
- The Ministry of Internal Affairs
- The Ministry for European Integration
- The Ministry of Local Government Administration
- The Kosovo\* Police
- The Unit of the Financial Intelligence Centre

The meetings of the Council will be held at least four times per year. The meetings of the Council shall be convened by the Head of the Council. The Council members can propose in writing to the Head of the Council the gathering of the Council not less than 15 working days prior to the meeting. The Head of the Council issues recommendations on the future steps after each meeting of the Council, based on the discussions of the Council.

### *1. Main Functions (Prevention, Investigation, Forensic, Policy)*

The main functions of the Anti-Corruption Agency are fighting corruption and preventing corruption.

Fighting Corruption (Law Enforcement):

- Law Enforcement is one of the three main pillars that support the strategy work of the Agency. Law Enforcement means the investigation of suspected cases of corruption and proceeding criminal charges on the criminal acts of corruption to the competent Public Prosecutor of Kosovo\* in cases where no criminal proceedings are initiated, and the drafting of new laws to change and amend the legal framework in this field.
- Department of Investigations among other priorities has investigating cases of alleged corruption, as those reported, as well as investigating cases ex officio when the agency comes to grounded information on alleged corrupt actions.
- Investigation Department has continuously studied and followed the positive trends of development of anti-corruption legal framework in

the region and Europe, with a view to amending the anti-corruption legal framework in Kosovo\*.

- In this regard the Department of Investigations is actively engaged regarding the amendment of the Anti-Corruption Law, the Law on Prevention of Conflict of Interest in Exercise of Public Function, taking part in inter-governmental working groups and has provided valuable input during examination of the laws at the Parliamentary Commission on Legislation and Judiciary, in all stages of its review until their final approval.
- These two laws were approved by the Assembly of Kosovo\* and the same are promulgated by the President of Kosovo\*. It has also participated in preparing the Draft Law on Declaration, Origin and Control of Assets and Gifts of Public Senior Officials taking part in inter-governmental working groups and the Parliamentary Commission on Legislation and Judiciary. This law was approved by the Assembly of Kosovo\* and promulgated by the President of Kosovo\*.
- Investigations Department in order to implement the statutory mandate and greater functionality of ACA, has conducted an important activity in terms of preparation of internal acts, contributing professionally in the development and issuance of internal decisions.
- Department of Investigation has given its contribution through professional feedback, specific recommendations and participating in working groups during the amendment of the Criminal Code, especially in regard to crimes against official duty, by proposing the change of current offenses, the addition of new offenses as well as stricter criminal sanctions for such offenses.
- ACA officials have actively participated in the meeting of the governmental subgroup on anti-corruption within the Public Administration Reform in Kosovo\* organized by the Ministry of Public Administration.
- Department of Investigation has offered considerable legal advice to different citizens who came to the Agency to file their complaints for these cases.
- Department of Investigation not being competent to resolve these cases itself, has guided various entities to address their complaints to the competent institutions.

## 2. *Prevention of Corruption*

Prevention of conflict of interest:

- The legal basis on which the ACA supports its work on preventing conflict of interest is the Law on Prevention of Conflict of Interest in Exercise of Public Function no. 02/L-133 approved by the Assembly in November 2007 and Law on Amending the Law no. 02/L-133 on Prevention of Conflict of Interest in Exercise of Public Function, no. 03/L-155. ACA for preventing conflict of interest has conducted its activity that aimed the identification, examination, analysis, warning and avoidance of conflict of interest cases.
- For the prevention of conflicts of interest ACA uses all available resources as the declaration forms, media and other sources that can serve us identify conflicts of interest.
- Cases identified as potential conflicts of interest were handled by collecting all necessary information about the relevant cases and collaborating with other institutions of Kosovo\* to gather information about specific cases.
- When ACA proved facts of the existence of conflicts of interest, it informed in written the official persons investigated for conflict of interest situation and in conformity with law the proceeding was closed to the public and concerned officials were given an opportunity to bring their own arguments to prove the contrary.  
Also within the competence of the prevention department is also is Preventing corruption in public procurement, Oversight of assets, Oversight of gifts and catalogue form.

The total number of employees in the agency is 40, among them 10 (ten) are high investigators in the Department for Fighting Corruption, while 15 other officials are in the Department of Prevention of Corruption.

The agency is an independent and specialized body responsible for implementation of state policies for combating and preventing corruption in Kosovo\*. With the proposal of the Agency, the Kosovo\* Assembly approves the annual budget of the Agency. Agency decides independently to use the budget.

Officials of the Agency, any person employed by the Agency, as well as all persons that are aware for official secret during the cooperation with the Agency, are obliged to keep as secret any information they have learned while performing their official duty which is considered secret information.

In terms of this Law secret information are considered: information regarding personal data of individuals that are or have been object of investigation by the Agency, personal data of reporters of corruption cases if this is required by the reporter; and other information publication of which may damage the investigation process.

The Agency is obligated to preserve received data, information and documentation on the basis of this Law and in accordance with the provisions of applicable Law.

The employees of the Agency are protected only by the Code of Criminal Procedure, like every officials of other Institutions, which foresees some measures in such cases. While with the Law on the Agency are not protected, but the Law on the Anti-Corruption Agency has already begun drafting, and the new law provides for such protection for Agency officials.

Kosovo\* also has the law on Protection of Informants<sup>6</sup> (which is similar to whistle-blowing law).

Kosovo\* has completed this issue through legislation. The Law on Access to Public Documents<sup>7</sup>, this law shall guarantee the right of every natural and legal person to have access, without discrimination on any grounds, following a prior application, to official documents maintained, drawn or received by the public institutions. Any applicant of document shall have the right of access to documents of the public institutions, complying with principles, conditions and limitations established under the Law. Documents shall be made accessible to the public based on a direct request, either following a written application or in electronic form with exception to information restricted by Law.

Applications of the applicants for access to public documents, submitted in any way permitted with the provisions of previous paragraph of thi Article, by the public institution to which the applicant addresses, shall be treated as equal and official. Public documents received from the applicant cannot be used for denigration, propagandistic and commercial purposes. Then this issue is also regulated through other regulations or guidelines.

As I have emphasized above, Kosovo\* has the Law on Prevention of Conflict of Interest in Discharge of Public Functions<sup>8</sup>.

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6. Law on Protection of Informants, in this link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2763>.

7. Law on Access to Public Documents, in this link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2724>.

8. on Prevention of Conflict of Interest in Discharge of Public Functions in this link: this link: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2768>.

This law defines conflict of interest as: “the conflict of interest is a situation of incompatibility between official duty and private interest of a senior official, when he/she has direct or indirect private personal or property interests that may influence his/her legitimacy, transparency, objectivity and impartiality during the discharge of public functions”.

Criminal Code of Kosovo\* defines conflict of interest as: An official person who participates personally in any official matter in which he or she, a member of the family, or any related legal person, has a financial interest shall be punished by a fine or imprisonment up to three (3) years. When the official matter is a procurement action or public auction, the perpetrator shall be punished by imprisonment of one (1) to five (5) years. For purposes of this Article, “participates” means exercising official authority through decision, approval, disapproval, recommendation, rendering advice, investigation, or otherwise exercising influence over an official matter.

Does your country have a financial disclosure system to help prevent conflicts of interest?

Agency (Anti-Corruption Agency) is central responsible authority to monitor the implementation of the Law on Prevention of Conflict of Interest in Discharge of Public Functions. Kosovo\* also has a Financial Intelligence Unit with which there is a good cooperation in this regard, at any moment of suspicion of any conflict of interest, this Institution transmits the information to the Agency for further treatment. Then every institution is obliged to notify the Agency of this matter, especially in suspect financial matters.

Who appoints the head of your agency and who can remove him/her? (if Applicable).

This issue is regulated by the law on the anti-corruption agency;  
Procedures for the election of director:

1. The Commission<sup>9</sup> six (6) months before the expiration of the mandate of the Director of the Agency informs the Assembly of Kosovo\* in order to commence the procedure to appoint the new Director.
2. The Assembly of Kosovo\*, according to its the Rules of Procedures, selects the Director for the Agency based on the open competition.
3. Candidate for Director of the Agency must meet the following conditions:
  - 3.1. To be citizens of Kosovo\* and have permanent residence in Kosovo\*;

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9. The Parliamentary Supervisory Committee.

- 3.2. To have at least a four (4) year University diploma or Master diploma;
- 3.3. Not have been convicted of a criminal offence;
- 3.4. To have high moral integrity;
- 3.5. To have at least five (5) years professional work experience.
4. The Commission manages the procedures of selection of the best candidates, by submitting two of them to the Assembly of Kosovo\* for voting.
5. Kosovo\* Assembly by secret voting and simple majority votes chooses one of the proposed candidates.
6. Director is elected for five (5) years mandate and can be re-elected only for one more mandate.

Completion of the Mandate of the Director:

1. The function of the Director of the Agency is completed:
  - 1.1. with the completion of the mandate as foreseen by Law;
  - 1.2. by permanent loss of ability to perform his/her function;
  - 1.3. by resignation;
  - 1.4. if, by the court's final decision he/she has been sentenced for criminal offence, which by the Law is punishable more than six (6) months of imprisonment;
  - 1.5. if exercises functions which are in contrary with his function according to the applicable Law;
  - 1.6. if dismissed by the Assembly of Kosovo\* because of failure to complete the legal mandate.
  - 1.7. by death.

### *Conclusions*

During the drafting of this document, I tried to refer to your instructions and tried to answer each question with the available information, and referring to the English language laws that are accessible online.

*Used links*

Anti-Corruption Strategy, in this link: [http://www.akk-ks.org/repository/docs/Final\\_Strategy\\_ENG\\_2013-2017\\_475122.pdf](http://www.akk-ks.org/repository/docs/Final_Strategy_ENG_2013-2017_475122.pdf).

Law on Anti-corruption Agency in this link: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2662>.

Law on Prevention of Conflict of Interest in Discharge of Public Functions in this link: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2768>.

The Law on declatation: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=9445>.

The Law on the prevention of Money Laundering: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2715>.

The rules of procedure for the national anti-corruption council, in this link: [http://www.president-ksgov.net/repository/docs/THE\\_RULES\\_OF\\_PROCEDURE\\_FOR\\_THE\\_NATIONAL\\_ANTI-CORRUPTION\\_COUNCIL.pdf](http://www.president-ksgov.net/repository/docs/THE_RULES_OF_PROCEDURE_FOR_THE_NATIONAL_ANTI-CORRUPTION_COUNCIL.pdf).

ü \_Law on Protection of Informants, in this link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2763>.

The Law on access to public documents: [\\_https://gzk.rks-gov.net/ActDetail.aspx?ActID=2724](https://gzk.rks-gov.net/ActDetail.aspx?ActID=2724).



*Republic of Macedonia*

The main anti-corruption laws in the Republic of Macedonia are the Law on Prevention of Corruption and Conflict of Interest, the Criminal Code, the Law on Whistle-blower Protection, the Law on Public Internal Financial Control, the Law on Free Access to Public Information and the Law on Lobbying.

*1. National anti-corruption strategy*

The State Commission for Prevention of Corruption (hereinafter: SCPC), in accordance with its competencies stipulated by the Law on Prevention of Corruption and Conflict of Interest, adopts a 5-year national strategy for prevention of corruption and conflict of interest, with related action plan, drafted based on previously conducted corruption risks analysis.

The Law requires the national strategy to be prepared in a broad consultative process in which representatives of state bodies, public institutions, civil society organisations, private sector and media will participate.

SCPC submits annual and final reports informing the National Assembly about the implementation of the national strategy. The national strategy may be amended during implementation period, based on a decision of the SCPC adopted to address needs indicated in annual reports. The amendments to the national strategy must be prepared in the consultation process required for the preparation of the national strategy.

The National Assembly adopts the national strategy and its amendments.

The adopted national strategy with the related amendments and reports must be published on the SCPC web-page.

SCPC, established in 2002<sup>1</sup>, is the main coordinating body competent to monitor and evaluate the implementation of the national anti-corruption strategy and to promote the realization of the foreseen anti-corruption measures. The monitoring and evaluating methodology of the latest national strategic anti-corruption document<sup>2</sup> is described in the text the State Programme 2016-2019<sup>3</sup>. Information about implementation of the state programme is collected from relevant authorities via specially developed web-application.<sup>4</sup>

In accordance with the Law on Prevention of Corruption and Conflict of Interest, SCPC has the following main competences:

- adopts national strategy for prevention of corruption and conflict of interest, with action plan for its implementation;
- acts upon cases of conflict of interest and reports on suspected cases of corruption and conflict of interest;
- submits initiatives to competent authorities for instigating procedures determining accountability of official persons and initiatives for criminal prosecution related to cases of its competence;
- monitors the legality of the funding of political parties and election campaigns;
- checks the statements of assets and interest;
- conducts anti-corruption assessment of laws, bylaws and other regulations;
- keeps the Register of elected and appointed persons and the Register of authorised persons for receipt of whistleblower reports;
- prepares and published catalogue of gifts received in accordance with law;
- prepares corruption risks analyses for different sectors;
- exchanges information with other national authorities, as well as with foreign state authorities and international organisations and institutions, based on obligations deriving from ratified international agreements;

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1. Based on the Law on Prevention of Corruption, adopted in April 2002.

2. Adopted in accordance with the Law on Prevention of Corruption and the Law on Prevention of Conflict of Interest, both of which are out of force following the adoption of the new Law on Prevention of Corruption and Conflict of Interest (“Official Gazette of the Republic of Macedonia”, No. 12/19).

3. See State Programme 2016-2019, page 23, Strategic objective 5.

4. <http://drzavnaprograma.mk/>.

- undertakes educational activities regarding prevention of corruption and conflict of interest.

All draft laws undergoing regulatory impact assessment, as well as adopted laws of significance to combating corruption and conflicts of interest are subject to SCPC's review. In September 2015, SCPC adopted Methodology on Anti-corruption Assessment of Legislation.

In accordance with the Law on Lobbying, SCPC is competent to check complaints against lobbyist and to impose measures against the lobbyist for violation of provisions of the Law.

The political parties and organisers of election campaigns are obliged to submit to SCPC the reports on funding prepared as required in accordance with the Law on Financing of Political Parties and in accordance with the Election Code.

In accordance with the Law on Prevention of Corruption and Conflict of Interest, political parties and the organisers of election campaigns are also obliged to submit other data requested by SCPC for the purposes of its competencies to monitor the legality of the financing of the political parties and election campaigns. In a case of raised suspicion for violation of the rules on financing of political parties, SCPC, ex officio or upon initiative of state authority, political party, association of citizens or foundation, initiates procedure for examination of the funding of the political party. In a case of raised suspicion for violation of the rules on financing of election campaigns, SCPC, ex officio or upon objection made by organiser of election campaign or accredited election observer, initiates procedure for examination of the funding of the election campaign.

Although, it doesn't have investigative or prosecutorial functions, SCPC is competent to perform administrative investigations.

Instruments that SCPC implements for the purposes of efficient implementation of its competencies include access to databases of 17 institutions and the possibility, in accordance with law, to obtain data and information from legal entities and individuals who have the necessary data.

For the misdemeanours determined by the Law on Prevention of Corruption and Conflict of Interest, the misdemeanour procedure is conducted, and misdemeanour sanctions are imposed by the Misdemeanour Commission formed within SCPC.

SCPC is composed of a president and 6 members, selected and appointed by the National Assembly. The selection procedure starts with an open call for candidates published by the Assembly. The procedure is conducted in a transparent manner with participation of representatives of the

Ombudsman, members of the National Assembly (with equal representation of parliamentarians in opposition and position), NGOs, academia, media and foundations. The SCPC deputy-president is elected from one of the SCPC members, by the SCPC members majority and in accordance with rotation principle every 6 months. The work of SCPC is supported by its Secretariat in which the employees have status of civil servants. The president and members of SCPC serve 5-year terms of office professionally and may not be reappointed.

Besides mandatory regular conditions for employment and completed university education in relevant areas for the position, as one of the specific condictions for appointment of SCPC president and members it is required that the candidate has not been a member of the National Assembly or the Government, has not made donation to a political party nor has performed a function in a political party body in the last 10 years.

SCPC president and members are accountable before the National Assembly. SCPC submits annual reports on its performance and extraordinary reports per request of the Assembly. Informatively, the annual reports are sent to the President of the Republic, the Government and to the media.

The function of the SCPC president and member ceases before expiry of the mandate upon his/her request, upon final court judgment imposing effective penalty of imprisonment of at least 6 months, or permanent loss of ability for performance of the function.

The National Assembly shall dismiss SCPC president or member before the expiry of the term of office on the proposal of the Assembly's Commission on Election and Appointments, if the SCPC president or member:

- does not fulfil the criteria for appointment,
- does not submit a statement of assets and interest, or data presented therewith are false,
- violates the rules related to conflict of interest,
- without justified reasons violates the deadlines for undertaking certain actions in accordance with the Law or
- is unjustifiably absent from the work of SCPC for more than 6 months.

SCPC's budget is presented as a special section within the National Budget. Higher coefficients for calculating the salaries of the SCPC president and the members are determined<sup>5</sup>. The employees of the Secretariat

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5. The salary of the SCPC president is determined by the coefficient for determining the salary of the Vice-president of the National Assembly, and the salary of a SCPC member is determined by the coefficient for determining the salary of a member of the National Assembly.

have right to a salary supplement for special working conditions, high risk and confidentiality. The SCPC president, and in his absence the deputy-president, participates in the sessions of the working bodies of the National Assembly that are considering the proposal for the National Budget, in order to present and explain the needs for funds for the performing of the SCPC's functions.

### *3. Whistle-blower protection*

In accordance with the Constitution of the Republic of Macedonia, article 24, a citizen cannot be called to account or suffer adverse consequences for attitudes expressed in petitions, unless they entail the committing of a criminal offence.

Many laws, such as the Law on Prevention of Corruption, the Criminal Code, the Law on Labour Relations, the Law on Protection from Harassment on Workplace and the Law on Public Sector Employees, contain fragmented provisions that prohibit retaliation for reporting a crime or misconduct. The Republic of Macedonia has a comprehensive legal framework that provides a wide range of protections that can be provided for persons who give a statement of witness in a criminal procedure.

The Macedonian anti-corruption legal framework is upgraded with the Law on Whistle-blower Protection, adopted in November 2015. This Law defines the term “whistle-blower” and prescribes protected reporting channels (internal, external and public) and protection for whistle-blowers in public and private sector. The legislator paid particular attention to the Council of Europe Recommendation on Whistle-blower Protection CM/Rec (2014)7. The term “public interest” for the purposes of this Law is broadly defined to cover the fundamental values of the constitutional order of the Republic of Macedonia.<sup>6</sup>

Whistle-blowers are not obliged to prove their good faith and the veracity of the information disclosed. Also, they are guaranteed confidentiality, up to the degree and a period which is requested by them. The right to confidentiality may be limited only by a court order in which case the whistle-blower concerned is immediately informed. Whistle-blowers and persons close to them shall be provided with protection against any type of violations of their rights, against any detrimental activity or against any threat of detrimental activity in retaliation for protected disclosures made. The right to

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6. Article 8 of the Constitution of the Republic of Macedonia.

protection also covers the persons for whom there is a suspicion that they are possible whistle-blowers. This law is one of the strongest whistle-blower protection laws in South East Europe.<sup>7</sup> In direction to further alignment with international standards, especially regarding protected public disclosure, amendments to the Law were adopted in February 2018.

The application of the Law on Whistle-blower Protection and the related bylaws started in March 2016.

#### *4. Access to public information*

The Law on Free Access to Public Information, adopted in 2006, regulates the conditions, the manner and procedure of exercising the right to free access to public information disposed by the holders of public information – the state administration bodies and other bodies and institutions established by law, bodies of local self-government units, public institutions and services, public enterprises, legal and natural persons performing public competences and activities of public interest determined by law. The obligation for public sector authorities and institutions to create and publish data in open format is regulated by the Law on Public Sector Data Use, adopted in 2014. In order to further strengthen the mechanisms for implementation of the right to free access to public information, a new Law on Free Access to Public Information is proposed, currently undergoing parliamentary procedure.

#### *5. Financial disclosure system*

In accordance with the Law on Prevention of Corruption and Conflict of Interest, every elected and appointed person, responsible person in public enterprise, public institution or other legal entity disposing of state capital, every notary public, enforcement agent, state secretary or secretary general, as well as cabinet administrative servant and special adviser must, no later than 30 days from the date of election/appointment/employment, as well as within 30 days after termination of term of office, fill in and submit to SCPC a statement of assets and interest.

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7. Public Attitudes to Whistleblowing in SEE - Data Analysis of Opinion Survey about Whistleblowing and the Protection of Whistleblowers, page 29, paragraph 1.

The aforementioned persons also have the obligation to report within 30 days any increase in own assets or assets of a family member in the amount equal to or higher than 20 average net salaries in the last 3-month period.

Based on corruption risk assessment, a law regulating performance of activities in the field of defence, internal affairs or finances may introduce and stipulate obligation for persons with special authorizations to submit statements of assets and interest.

SCPC may request from an official person who is not obliged to submit a statement of assets and interest according to the Law on Prevention of Corruption and Conflict of Interest, to submit such statement. Examination procedure for the assets of such official person may also be conducted when acting upon cases in which the person is involved.

Data from the statements of assets and interest and the reported changes are public information and are published on the SCPC web-page, apart from personal data protected by law.

When acting upon a specific case or based on its annual plan, SCPC checks the authenticity of the data entered in the statements of assets and interest, by collecting, comparing and analysing data obtained from legal entities and individuals who have the necessary data.

If there is a reasonable suspicion that the assets of a person who is obliged to submit a statement of assets and interest are disproportionately increased in comparison with his/her regular income or the income of his/her family members, SCPC shall initiate assets examination procedure.

When examining the assets situation, SCPC invites the person for whom the procedure is being conducted to present data on the grounds for acquiring the assets. The state bodies, the bodies of the units of the local self-government, the payment operations carriers and other natural and legal persons, upon a request of SCPC are obliged to provide all the information necessary for examination of the assets.

If the examination procedure fails to demonstrate that the assets are acquired or increased as a result of reported and taxed revenues, SCPC shall submit to the competent public prosecutor's office initiative for instigating criminal procedure against the person for which the examination procedure was conducted.

If there is evidence that a family member or another close person to an official person has acquired significant property during the performance of the public authorizations or duties of the official person that exceeds his/her regular income, and there is a reasonable suspicion that the official with the intention to conceal the origin of the property transferred assets to that fa-

mily member or close person, SCPC will initiate a procedure examining the grounds for acquiring the property of that family member or close person.

In the course of the examination procedure, SCPC implements its instruments of administrative investigation.

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Law on Prevention of Corruption (“Official Gazette of the Republic of Macedonia”, No. 28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010, 97/15 and 148/15).

Law on Prevention of Conflict of Interest (“Official Gazette of the Republic of Macedonia”, No. 70/2007, 114/2009, 6/12 and 153/15).

Criminal Code (“Official Gazette of the Republic of Macedonia”, No. 37/96, 80/99, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15 and 97/17).

Law on Whistle-blower Protection (“Official Gazette of the Republic of Macedonia”, No. 196/15 and 35/18).

Law on Free Access to Public Information (“Official Gazette of the Republic of Macedonia”, No. 13/2006, 86/2008, 6/10, 42/14, 148/15 and 55/16).

Law on Public Internal Financial Control (“Official Gazette of the Republic of Macedonia”, No. 90/2009, 188/13 and 192/15).

Law on Lobbying (“Official Gazette of the Republic of Macedonia”, No. 106/2008 and 135/11).

Law amending the Election Code (“Official Gazette of the Republic of Macedonia”, No. 196/2015).

Law on Public Sector Data Use (“Official Gazette of the Republic of Macedonia”, No. 27/14).

Regulation on protected internal whistleblowing within the public sector institutions (“Official Gazette of the Republic of Macedonia”, No. 46/16),

Regulation on protected external whistleblowing (“Official Gazette of the Republic of Macedonia”, No.46/16).

- Regulation on directions for adopting internal acts managing the protected internal whistleblowing within the legal entities in the private sector (“Official Gazette of the Republic of Macedonia”, No. 46/16).
- Decree on checking the contents of Statements of Interest “Official Gazette of the Republic of Macedonia”, No. 42/2012).
- Decision on formation of the Inter-agency body for coordination of the activities against corruption (“Official Gazette of the Republic of Macedonia”, No. 44/2006).
- Methodology on Anti-corruption Assessment of Legislation, State Commission for Prevention of Corruption, September 2015.
- State Programme for Prevention and Repression of Corruption and Prevention and Reduction of Conflict of Interest, with Action Plan 2016-2019, State Commission for Prevention of Corruption, December 2015
- Council of Europe Recommendation on Whistle-blower Protection CM/Rec (2014)7.
- Public Attitudes to Whistleblowing in SEE - Data Analysis of Opinion Survey about Whistleblowing and the Protection of Whistleblowers, Regional Cooperation Council, 2017.
- Regulatory Impact Assessment Report on the Draft - Law amending the Law on Whistle-blower Protection, Ministry of Justice, 17.10.2017 and 12.12.2017.



*Romania*

*1. National Anticorruption Strategy*

*a) General aspects*

National Anticorruption Strategy (NAS) 2016 – 2020 was adopted through the Government Decision no. 583/2016. This is the basic tool that encourages the prioritization of preventive measures adopted by the public administration at both national and local levels.

NAS addresses to all public institutions representing the executive, legislative and judicial authorities, local public authorities, the business sector and civil society. For each type of intervention, general and specific objectives are identified. All these are developed by assuming decisional transparency and open governance as a corollary of this strategic document, coupled with the trichotomic approach of strategic intervention in the field of fighting corruption: prevention, education and combating.

The strategy aims to increase the level of knowledge and understanding of integrity standards by employees and beneficiaries of public services, as well as to strengthen the fight against corruption through criminal and administrative means, but also to increase the asset recovery, following the best practices of other EU Member States and the consolidation of judicial practice, through the National Agency for Managing Seized Assets.

Thus, the NAS provides for the following general objectives, which set out the main actions to be taken by the competent authorities in order to prevent corruption:

- Development of a culture of transparency for open governance at central and local level;
- Increasing the institutional integrity by including the corruption prevention measures as mandatory elements of the managerial plans and

- their periodical evaluation as integral part of administrative performance;
- Strengthening integrity, reduction of vulnerabilities and corruption risks in priority sectors and fields of activity (the healthcare system, the national education system, the activity of the members of Parliament, the judiciary, the financing of political parties and electoral campaigns, public procurement, business environment, local public administration);
  - Increasing the level of knowledge and understanding of the integrity standards by employees and the beneficiaries of the public services;
  - Strengthening the performance in the anticorruption field by criminal and administrative means;
  - Increasing the level of implementation of anticorruption measures by approving the integrity plan and the periodic self-assessment at the level of all central and local public institutions, including the subordinated and coordinated institutions, as well as of public enterprises.

*b) The monitoring process of the implementation of NAS 2016-2020*

The implementation of the NAS is performed under the authority and coordination of the minister of justice who reports to the Government. The Ministry of Justice annually submits to the Romanian Parliament a summary of the NAS implementation stage.

The Crime Prevention Department of the Ministry of Justice provides the Technical Secretariat of the NAS, monitoring the implementation of the measures envisaged by the strategy.

The cooperation platforms developed within the NAS 2012-2015 which support the monitoring process are: platform of the independent authorities and anticorruption institutions; platform of the central public administration; platform of the local public administration; platform of the business environment; platform of the civil society.

The Technical Secretariat, with the support of the institutions represented at the level of the platforms, conducts activities of monitoring and institutional support for the implementation of the strategy which include:

- collecting information and periodical updating the stage of implementation of the inventory of the measures of institutional transparency and corruption prevention (annex 3 to the NAS), based on the self-assessment reports;

- creation of a score of the type *index of institutional integrity* for the vulnerable sectors identified in the strategy, by aggregating the indicators concerning integrity incidents, self-assessment of the implementation of the inventory of the measures of institutional transparency and corruption prevention, evaluation of the quality of the public services, institutional transparency;
- documentation and dissemination of good practices identified;
- organization of thematic missions;
- performance of annual surveys and continuation of forensic studies;
- entering into cooperation protocols with public institutions and authorities which have relevant information concerning integrity incidents;
- development of an institutional mechanism of *ex-post* evaluation of integrity incidents and of endorsement of the preventive adapted measures; publishing the list of integrity incidents and remedial measures.
- In the process of implementing NAS 2016-2020, public authorities are required to submit to the Technical Secretariat:
  - declarations of adherence to the fundamental values, principles, objectives and monitoring mechanism of the NAS;
  - integrity plans;
  - assessments of risks and vulnerabilities.

NAS 2012-2015 has generated a good international practice by establishing thematic missions of assessment at the level of public institutions, involving evaluation visits by expert teams made up of representatives of the five cooperation platforms. The thematic mission has allowed evaluators to obtain a profound picture of the assessed institutions. Evaluation reports have also served as an important reminder to public authorities that integrity incidents are failures, the risk of which should be limited by appropriate management actions.

Therefore, annually, based on the proposals made by the cooperation platforms, the themes of assessment missions in public institutions are approved, among those set out in Annex 3 of the strategy. Each thematic assessment is organized at the level of at least a quarter of the public institutions represented in the platforms.

The stage of implementation of the strategy will be evaluated based on monitoring reports drafted annually by the Technical Secretariat and will include evaluations of the stage of implementation of the strategy, the defi-

cits identified and recommendations for remedy. The reports drafted by the Technical Secretariat will be presented at the level of the five platforms and will be discussed in the Annual Anticorruption Conference.

*2. The main anticorruption norms or which concern integrity in public office are contained in the following normative acts*

- Law no. 286/2009 on the Criminal Code;
- Law no. 78/2000 for the prevention, detection and sanctioning of corruption;
- Decision no. 583/2016 on the approval of the National Anticorruption Strategy for 2016-2020, the sets of performance indicators, risks associated with objectives and measures of the strategy and the sources of verification, the inventory of institutional transparency and corruption prevention measures, evaluation, as well as public disclosure standards;
- Law no. 176/2010 on integrity in the exercise of public functions and mandates and to amend and supplement Law no. 144/2007 on the creation, organization and operation of the National Integrity Agency, as well as to amend and supplement other legislative acts;
- Law no. 161/2003 on certain measures to ensure transparency in the exercise of public mandates, public functions and in the business environment, the prevention and sanctioning of corruption, as subsequently amended and supplemented;
- Law no. 251/2004 on some measures concerning goods received as gifts on occasion of some protocol actions during the exercise of the mandate or function;
- Law no. 52/2003 on transparency within the decision making process in public administration, with subsequent amendments and supplements;
- Law no. 544/2001 on the free access to information of public interest, with subsequent amendments;
- Law no. 571/2004 on the protection of the staff within the public authorities, public institutions and other entities who report breach of law cases;
- Normative acts on code of ethics and deontology (as example: Law no. 7/2004 on the Code of conduct of public servants, republished;

- Law no. 477/2004 on the Code of conduct of contractual staff within public authorities and institutions; Government's Decision no. 991/2005 on the approval of the Code of ethics and deontology of police workers; Decision of the Superior Council of Magistracy no. 328/2005 on the approval of the Code of ethics and deontology of judges and prosecutors);
- Law no. 303/2004 on the status of judges and prosecutors, republished, as subsequently amended and supplemented;
  - Law no. 188/1999 on the status of the public servants, republished, as subsequently amended and supplemented;
  - Order of the Government's General Secretariat no. 600/2018 on the approval of the Code of internal managerial control of public entities.;
  - Government Emergency Ordinance no. 66/2011 on the prevention, detection and sanctioning of irregularities in obtaining and using European funds and / or national public funds related to them.

### *3. Protection of whistleblowers*

In Romania, the law on the protection of whistleblowers came into force in 2004 (Law no. 571/2004 on the protection of the staff within the public authorities, public institutions and other entities who report breach of law cases).

The provisions of this law apply to the public authorities and institutions within the central public administration, the local public administration, the apparatus of the Parliament, the working apparatus of the Presidential Administration, the working apparatus of the Government, the autonomous administrative authorities, the public institutions of culture, education, healthcare and social assistance, national companies, autonomous regions of national and local interest, as well as national state-owned companies. This law also applies to persons appointed to scientific and advisory councils, specialized commissions and other collegiate bodies organized within the structure or attached to public authorities or institutions.

Warnings in the public interest are defined as a referral made in good faith concerning any act involving a violation of law, of professional ethics or of the principles of good administration, efficiency, effectiveness, economy and transparency. Whistleblower means a person who makes a referral un-

der the above conditions and is assigned into one of the public authorities, public institutions or other entities mentioned above.

The referral may involve a wide range of offenses or violations of deontological rules, including corruption offenses, forgery, service offenses, preferential or discriminatory treatment, incompatibilities, conflicts of interest, misuse of material or human resources, incompetence or negligence in service, etc.

The law has the same broad approach regarding the person to whom the referral is addressed, the addressee being both internal (hierarchical chief, head of the institution, disciplinary committee) and external (judicial bodies, parliamentary committees), including the private sector (media, trade unions, NGOs).

The protection recognized by law to civil servants, contractual staff and other categories of staff implies: the relative presumption of good faith, inviting the press or the trade union to meetings of the discipline committee, hiding the identity of the whistleblower, applying *ex officio* provisions on the protection of witnesses in case of warnings related to some offenses, the annulment in court of the disciplinary sanction imposed on a whistleblower if the sanction was applied as a result of a warning in the public interest.

Concerning the fear of whistleblowers of possible interference in labor relations, the law provides, as a protective measure, that in disputes of work or in relation to service, the court may order the annulment of the disciplinary or administrative sanction imposed regarding a whistleblower, if the sanction was applied as a result of a warning in the public interest made in good faith. The court verifies the proportionality of the sanction applied to the whistleblower by comparing with the practice of sanctioning or other similar cases within the same public authority, public institution or budget unit, in order to eliminate the possibility of subsequent and indirect sanctioning of public-interest warning acts.

#### *4. The free access to information of public interest*

Regarding the free access to information of public interest, it is regulated by Law no. 544/2001, as subsequently amended, in force since December 22, 2001, and by Government Decision no. 123/2002 approving the Methodological Norms for the application of Law no. 544/2001 on free access to information of public interest.

According to this normative act, the free and unrestricted access of the person to any information of public interest, defined by this law, is one of

the fundamental principles of the relations between persons and public authorities, in accordance with the Romanian Constitution and international documents ratified by the Parliament of Romania.

Law no. 544/2001 defines information of public interest as any information concerning the activities or resulting from the activities of a public authority or public institution, regardless of the support or the form or way of expressing the information.

Insurance by public authorities and institutions of the access to information of public interest is made *ex officio* or upon request. Everyone has the right to request and obtain from public authorities and institutions, under the present law, information of public interest.

The following information is exempt from free access of citizens:

- information in the field of national defense, safety and public order, if it is part of the categories of classified information, according to the law;
- information regarding the deliberations of the authorities, as well as those regarding the economic and political interests of Romania, if they are classified information, according to the law;
- information on commercial or financial activities, if their publicity infringes intellectual or industrial property rights and the principle of fair competition, according to the law;
- information on personal data, according to the law;
- information on the procedure during the criminal or disciplinary investigation, if the outcome of the investigation is jeopardized, if implies the disclosure of confidential sources or endangering the life, bodily integrity or health of a person following the investigation carried out or in progress;
- information on court proceedings, if their publicity prejudices the assurance of a fair trial or the legitimate interest of any party to the proceedings;
- information the disclosure of which prejudices measures for the protection of young people.

Law no. 544/2001 also contains special provisions on access to the information of public interest by the media. According to this normative act, the access of media to information of public interest is guaranteed. The activity of collecting and disseminating information of public interest, carried out by the mass media, constitutes an embodiment of the right of citizens to have access to any information of public interest.

The explicit or tacit refusal of the designated employee of a public authority or institution to enforce the provisions of this law constitutes a misconduct and entails disciplinary liability. Against the refusal, a complaint may be lodged with the head of the respective authority or public institution within 30 days from the date the injured person was informed. If, after the administrative investigation, the complaint is found to be well founded, the response will be sent to the injured person within 15 days of the filing of the complaint and will contain both the information of public interest originally requested and the disciplinary sanction taken against the culprit.

Also, if a person is considered injured in his rights provided by the present law, he/she may lodge a complaint at the administrative litigation section of the tribunal in whose territorial jurisdiction has his/her domicile or in whose territorial jurisdiction the headquarters of the public authority or institution is located. The court may oblige the public authority or institution to provide the information of public interest requested and to pay moral and/or patrimonial damages.

### *5. Conflicts of interest*

Law no. 161/2003 on certain measures to ensure transparency in the exercise of public mandates, public functions and in the business environment, the prevention and sanctioning of corruption, as subsequently amended and supplemented, regulates the conflict of interest and the regime of incompatibilities in the exercise of public dignities and public functions.

According to this normative act, the principles underlying the prevention of conflicts of interest in the exercise of public dignities and public functions are: impartiality, integrity, transparency in the decision-making process and the supremacy of public interest.

A conflict of interest means the situation in which a person exercising a public dignity or a public function has a personal interest of a patrimonial nature that could influence the objectively fulfilling of his / her duties under the Constitution and other normative acts.

The law expressly regulates conflicts of interest regarding the following categories of persons:

- The person who acts as a member of the Government, Secretary of State, Undersecretary of State or functions assimilated to them, prefect or sub-prefect is obliged not to issue an administrative act or not to conclude a legal act or not to take or not to participate in taking a

decision in the exercise of a public office of authority that produces a material benefit for herself / himself, for her /his husband / wife or for her / his first-degree relatives. These obligations do not concern the issuance, approval or adoption of normative acts.

- The mayors and deputy mayors, the mayor and the deputy mayors of the municipality of Bucharest are obliged not to issue an administrative act or not to conclude a legal act or not to issue a provision in the exercise of the function, which produces a material benefit for himself / herself or for his / her spouse or his / her first-degree relatives.
- The conflicts of interest for the presidents and vice-presidents of the county councils or the local and county councilors are provided by the Local Public Administration Law no. 215/2001, as amended and supplemented.

A civil servant is in a conflict of interest if he / she is in one of the following situations:

- is called upon to resolve requests, to make decisions or to participate in decision-making regarding natural and legal persons with which he / she has patrimonial relations;
- participate in the same commission, established according to the law, with civil servants who have the status of spouse or first degree relative;
- his / her patrimonial interests, the patrimonial interests of his / her spouse or first degree relatives may influence the decisions he / she has to take in the exercise of public office.

In the case of a conflict of interest, the civil servant is obliged to refrain from resolving the request, from taking the decision or taking part in the decision-making process, and immediately inform the hierarchical superior to whom he/she is directly subordinated. The hierarchical superior is obliged to take the necessary measures in order to ensure the impartial exercise of the civil service, within maximum 3 days from the date of becoming aware. Infringement of these provisions may, as the case may be, entail disciplinary, administrative, civil or criminal liability, according to the law.

In the cases mentioned above, the head of the public authority or institution, at the proposal of the hierarchical superior to which the civil servant concerned is directly subordinated, shall designate another public official who has the same training and level of experience.

A person who considers himself/herself to be injured in a right or a legitimate interest due to the existence of a conflict of interest may apply to the competent court, under the law, according to the nature of the act issued or concluded.

- The provisions on conflicts of interest shall also apply to other categories of persons expressly provided by law, such as members of the Court of Accounts, the president of the Legislative Council and section presidents, the Ombudsman and its deputies, members of the Competition Council, members of the National Security Commissions, the governor, the first deputy governor, the deputy governors, the members of the board of directors and the employees with leading positions of the National Bank of Romania, the director of the Romanian Intelligence Service, his prime deputy and his deputies, the director of the Foreign Intelligence Service and his deputies, members of the National Council for Audiovisual, the members of the boards of directors and of the governing committees of the Romanian Broadcasting Society and the Romanian Television Society, the members of the National Council for the Study of the State Security Archives, the general director and members of the board of directors of the National Press Agency ROMPRES; presidential councilors and state councilors from the Presidential Administration.

Persons exercising public dignities and public functions must submit a declaration of interests, under their own responsibility, on the functions and activities they carry out, except those relating to the mandate or the public office they exercise.

The functions and activities to be included in the declarations of interest are:

- the quality of associate or shareholder in companies regulated by Law no. 31/1990, republished, as subsequently amended and supplemented, national companies, credit institutions, economic interest groups, as well as members of associations, foundations or other non-governmental organizations;
- membership in the management, administration and control bodies of the companies regulated by Law no. 31/1990, republished, as subsequently amended and supplemented, autonomous regies, national companies, credit institutions, economic interest groups, associations or foundations or other non-governmental organizations;
- membership in professional associations and/or trade unions;

- membership in the management, administration and control bodies, paid or unpaid, held within the political parties, the position held and the name of the political party.

Those who do not perform other functions or are not engaged in activities other than those related to the mandate or function they exercise shall make a statement to that effect.

Law no. 176/2010 on integrity in the exercise of public functions and mandates and to amend and supplement Law no. 144/2007 on the creation, organization and operation of the National Integrity Agency, as well as to amend and supplement other legislative acts also provides the category of persons who are required to declare their assets and interests. To this normative act are attached the forms according to which the declarations of assets and interests must be completed.

In addition to the persons who have the obligation to submit declarations of assets and interests, this normative act also includes provisions regarding the implementation of regulations on declarations assets and interests, the procedures before the National Integrity Agency, as well as the sanctions applicable in the case of non-compliance with the applicable provisions in the field of the declaration of assets and interests.

The activity of the assessment of the declarations of assets, data, information and patrimonial changes, interests and incompatibilities is carried out within the National Integrity Agency, established by Law no. 144/2007. For the president and vice-president of the Agency, as well as for its staff, the activity of the assessment of assets, interests and incompatibilities is carried out within the National Integrity Council. Rules on conflicts of interest are also contained in Chapter VIII – Interest Register of Law no. 393/2004 on the status of local elected representatives.



*Romania*

*1. Romania's National Integrity Agency National Report*

The Romanian anti-corruption legislative framework could be described as almost complete, dealing with the complex phenomenon of corruption through civil, administrative and criminal codes/laws, in which can be found an assortment of civil, administrative and criminal penalties, such as: civil fine (civil code), a three years interdiction to hold a public office (administrative laws) and, of course, imprisonment (criminal code).

Moreover, those above, inter alia, such as national anti-corruption strategies in which can be found sets of performance indicators, risks associated with objectives and measures, along with explicit deadlines to achieve substantial and irreversible results in the matter of fight against corruption, consolidated the legislative and institutional framework in Romania.

With the emphasis being put on principles like impartiality, legality, right to defense and the presumption of lawful acquisition of assets, among others, Romania has laid the foundation for 2001 – 2004 National Anticorruption Strategy, followed by 2005 – 2007 National Anticorruption Strategy, 2008 – 2010 National Anticorruption Strategy, 2012 – 2015 National Anticorruption Strategy and 2016 – 2020 National Anti-corruption Strategy.

That being said and taking into consideration the *acquis communautaire*, Romania harmonized the national anti-corruption legislative framework by adopting National Anti-corruption Strategies, Law 115/1996, Law 188/1999, Law 78/2000, Law 215/2001, Law 161/2003, Criminal code and Civil code. Therefore, Romania developed a mature legislative framework with emphasis on preventing and fighting corruption.

In accordance with the legislative framework aforementioned and in order to properly apply the anti-corruption legislation, the National Integrity Agency and the National Anti-corruption Directorate were established to

fight against corruption but, more important, to disseminate the results of their activity to the open public.

Moreover, in order to properly disseminate the results of their activity and taking into consideration that citizens would want to know specific information regarding public entities, Romania adopted, back in 2001, Law 544/2001 regarding the free access to information of public interest, based on which, every single private or public person, can easily obtain information of public interest, thus being assured the right to public information.

Focusing on the fight against corruption through administrative measures, the European Commission urged Romania to establish an autonomous administrative authority which made

Romania, back in 2007, the first EU country specialized in verifying wealth, as well as the legal regime of conflicts of interests and incompatibilities.

Therefore, back in 2007, the European Commission set up the Cooperation and Verification Mechanism (C.V.M.) which laid the foundation for the establishment of the National Integrity Agency, that became fully operational in 2008 with the single goal of ensuring integrity in the exercise of public positions and dignities and preventing institutional corruption through exercising responsibilities in wealth assessment / conflicts of interests and incompatibilities.

The Agency is an autonomous administrative authority, led by a President appointed by the Senate, after passing an open competition organized by the National Integrity Council. The President of the Agency has a 4 year mandate, which cannot be renewed.

Moreover, the President is helped by a Vice-president, appointed by the Senate for a four-year term, which cannot be renewed, following a competition organized by the National Integrity Council.

The main tasks of A.N.I.1: collecting, archiving and evaluating asset and interest statements; providing public access to asset and interest disclosures; controlling the submission of the statements within the legal terms provided by Law 176/2010; enforcing penalties provided by Law; providing guidance on demand for individuals who have the obligation to submit asset and interest statements; notifying prosecutors in cases of misconduct which may constitute criminal offenses and organizing prevention and awareness activities, to promote integrity in the exercise of public positions and dignities.

The Agency staff consists of integrity inspectors, civil servants and contracted staff and the maximum number of A.N.I. employees is limited by law to 200, but this threshold has never been reached.

Integrity inspectors are civil servants with special status, appointed following an exam and they enjoy autonomy and operational independence.

According to the last principle, integrity inspectors do not request to conduct investigations, or follow the request of any public authority, institution or person.

Law 571/2004 regarding the protection of personnel within public authorities, public institutions and other establishments, who report infringements properly apply to integrity inspectors and A.N.I.'s personnel. (Whistle-blower act)

Moreover, for a person to become an integrity inspector, he / she must be a graduate of higher legal or economic studies, as well as fulfill a number of minimum conditions provided by law.

As for the financial policy, the Agency is fully funded by the state budget, the draft budget being submitted to the Parliament. In 2007, the budget was about 3.8 million lei ~ 1 million euros and,

over the years, in relation to the activities and needs of the Agency, it has followed an upward trend, fluctuating between 11 and 33 million lei, while the peak was in 2016.

To complement its budget, A.N.I. accessed post-accession non-reimbursable EU funds for projects, totaling 68.918.055 lei.



*Republic of Serbia*

*1. The Anti-Corruption Agency of the Republic of Serbia*

The National Anti-Corruption Strategy had foreseen the establishment of the the Anti-Corruption Agency. Bearing in mind the complexity of corruption, which is a phenomenon that penetrates all state and social systems, as well as the number, scope and contents of competences related to the implementation of the Strategy, it was not justified to entrust this competence to any existing entity, but it was necessary to establish a body which would deal exclusively with these affairs.

The Anti-Corruption Agency was established by the Law on the Anti-Corruption Agency, which was adopted in October 2008, with full implementation as of January 2010.

The Anti-Corruption Agency is autonomous and independent state body, that is accountable for its work to the National Assembly of Serbia, and thus, to the citizens of Serbia. Every year on March 31, the Agency submits its Annual Report to the National Assembly through the Committee for Judiciary and Public Administration, in line with Article 26 of the Law. The Report also includes the Report on the Implementation of the National Anti-Corruption Strategy in the Republic of Serbia for the 2013-2018 period and the Action Plan for its implementation.

Pursuant to Article 8, paragraph 1 of the Law on the National Assembly (“Official Gazette of the RS”, No. 9/10), the National Assembly of the Republic of Serbia adopted at the 7<sup>th</sup> extraordinary session in 2013, held on 1 July 2013, the National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018.

## *2. The competencies of the Agency are envisaged in the Article 5 of the Law*

The Law on the Anti-Corruption Agency confers upon the Anti-Corruption Agency a range of competences, a number of which, by their nature and character, belong to the sphere of preventive anti-corruption activities. Prevention activities comprise the identification of occasions and situations which offer incentives for corrupt behavior. Such incentives do not necessarily lead to corrupt acts; nonetheless, their existence is a constant form of temptation for those working in such corruption-inducing environments. Besides identification, prevention activities comprise the design and establishment of mechanisms aimed at eliminating corruption-inducing conditions before they lead to corrupt actions. The Agency is also conferred with the competences intended for the establishment and implementation of monitoring and oversight of the correct and appropriate exercise of public authority given to public officials so they would ensure the protection of public interest in the sphere of their responsibilities. The objective of the monitoring and overseeing competences is to examine whether the existing environment already contains irregularities with regard to exercising public authority susceptible to developing into corrupt conduct, and, should the examination outcome turn out to be positive, to undertake measures to eliminate those irregularities and their consequences, as well as to institute proceedings in order to determine responsibility and sanction the persons who have caused or contributed to them.

The Agency is also responsible for revealing irregularities which are fundamentally corrupt in character, or represent instances of corruption in its classical form. Given that the nature of these irregularities requires that they be carried out in a small circle of immediate participants, the knowledge of the persons prepared to indicate corrupt practices in their working environment for the sake of public interest is of paramount importance to the fight against corruption, and therefore the possible effects of this competence are substantial. Moreover, the implications of the cases reporting corrupt practices have a significant role in public policy development, both in the area of prevention activities, and in the supervision and overseeing functions of the Agency.

The Agency:

- supervises the implementation of the National Strategy for Combating Corruption, the Action Plan for the Implementation of the National Strategy for Combating Corruption and sector action plans;

- institutes proceedings and pronounces measures in case of a violation of this Law;
- deals with issues concerning conflict of interest;
- performs tasks in accordance with the law governing the financing of political parties, i.e. political entities;
- issues opinions and directives for enforcing this Law;
- launches initiatives for amending and enacting regulations in the field of fighting corruption;
- gives opinions related to implementing of the Strategy, Action Plan and sector action plans,
- monitors and organises coordination of the state bodies in the fight against corruption;
- keeps a register of the officials;
- keeps a register of property and income of officials (Property Register);
- extends expert assistance in the field of combating corruption;
- cooperates with other state bodies in drafting regulations in the field of fight against corruption;
- issues guidelines for developing integrity plans in the public and private sector;
- co-operates with research organisations and civil society organisations in implementing corruption prevention activities;
- introduces and implements education programs concerning corruption, in accordance with this Law;
- keeps separate records in accordance with this Law;
- acts on complaints submitted by legal entities and natural persons;
- acts on reports by civil servants, i.e. employees in organs of the Republic of Serbia, autonomous province, local government and bodies of public enterprises, institutions and other organisations the founder of which is the Republic of Serbia, autonomous province or local government, i.e. bodies of companies the founder of which or member is the Republic of Serbia, autonomous province or local government and employees of state organs and organisations;
- organises research, monitors and analyses statistical and other data on the state of corruption;

- in collaboration with competent state bodies monitors international cooperation in the fight against corruption;
- performs other tasks set forth by law.

The competences entrusted to the Agency by the Law are aimed at the accomplishment of the following goals:

- Public Spending Oversight, on account of which the Agency is responsible for:
  - resolving incompatibility of public offices, and conflicts of interest;
  - monitoring of public officials' assets, and keeping the register of public officials,
  - assets, and gifts;
  - monitoring the financing of political entities;
- Disclosure of irregularities committed by individuals and/or groups, regardless of status, on account of which the Agency is to act on complaints and charges by legal and natural persons;
- Education of public sector representatives and other target groups, including the general public, regarding issues significant to anti-corruption action;
- Providing mechanisms for the establishment and improvement of integrity in the institutional and regulatory framework, on account of which the Agency is responsible for:
  - coordinating the process of introduction and overseeing the implementation of
  - integrity plans in the public sector;
  - overseeing and reporting on the implementation of the National Anti-Corruption
  - Strategy;
  - corruption risk analyses of regulations, and launching initiatives for amending and
  - adopting regulations so as to eliminate corruption risks;
  - conducting research and analysis in order to provide empirical knowledge needed to develop anti-corruption public policies;
- Establishing and strengthening connections with the environment it operates in, on account of which the Agency is responsible for:

- cooperating with international community representatives and international authorities;
- cooperating and coordinating its operations with other independent public and regulatory bodies;
- cooperating with civil society organizations;
- conducting anti-corruption campaigns;
- Ensuring its accountability to the public, on account of which the Agency is to enable and guarantee:
  - lawful and efficient action in the issues within its purview;
  - transparency of its activities and accessibility of the information in its possession;
- Strengthening of its capacities, so as to efficiently manage its competences.

### *3. The Agency's bodies are the Board and the Director*

The Board appoints and dismisses the Director of the Agency, decides on appeals against decisions of the Director pronouncing measures in accordance with this Law, adopts the annual report on operation of the Agency which it submits to the National Assembly, performs supervision over the work and property status of the Director. The President and the Deputy President of the Board are appointed by the Board members, for a period of one year. The Director is selected on the basis of a public recruitment procedure, announced by the Agency Board, for a five year mandate, with the possibility to be reelected twice to this function. The Law stipulates the requirements concerning education and work experience that a candidate for the position of Director must meet. At the session that was held on January 17, 2018, the Anti-Corruption Agency Board unanimously elected Dragan Sikimic, as a Director of the Anti-Corruption Agency, for a five-year mandate.

The position and role of the Agency Director are stipulated by the Law both from an individual and institutional point of view. From the individual's perspective, the Agency Director represents the Agency, manages the professional service and is held accountable for his/her work by the Agency Board, i.e. the Director is responsible for timely and lawful performance of

affairs that fall within the Agency's competences. In an institutional sense, the Director is a body of the Agency, which means that the decision that the Director makes are administrative acts of first instance against which it is possible to file a complaint, i.e. in those cases when the Director's decision is final, it is possible to initiate judicial review of individual administrative acts.

The Law stipulates that the Board has nine members who are appointed for a period of four years, and they can be reappointed for a maximum of two terms. The mandate of the Board members lasts for four years, and the same person may be appointed as member twice. The Board members are appointed by the National Assembly, based on proposals by the authorized proposers: the Administrative Committee of the National Assembly; the President of the Republic; the Government; the Supreme Court of Cassation; the State Audit Institution; the Ombudsperson and Commissioner for Information of Public Importance, through joint agreement; the Social and Economic Council; the Bar Association of Serbia; the Associations of Journalists of the Republic of Serbia, in mutual agreement.

According to the Law on the Anti-Corruption Agency the funds for the operation of the Agency is provided in the Budget of the Republic of Serbia at the proposal of the Agency, and from other sources, in accordance with the Law.

With regard to the issue of resolving the conflict of interest, the Serbian national legislation makes a difference between resolving the conflict of interest of public official that is regulated by the Law on the Anti-Corruption Agency and the conflict of interest of the public servants that is regulated by the Law on Civil Servants and the Code of Conduct. Also, some other laws, such as the Public Procurement Law contains the articles about conflict of interest in this area.

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The Constitution of the Republic of Serbia addresses the freedom of media, as well as the people's right to be informed, in quite a detail. The Constitution also guarantees the right to thought and expression. Following the Constitution as the supreme legal act, the next level of providing guarantees for freedom of the media are laws, that is, the most general media law among them – the Law on Public Information and Media (LPIM) which, at the very beginning, through its principles and its very aim, stipulates that public information is free and is not subject to censorship, that the public

has the right and the interest to be informed on issues of public interest, that monopoly in the media is not allowed, that information on the media is public. Serbia also has the Law on Free Access to Information of Public Importance that governs the rights of access to information of public importance held by public authorities, with a view to exercising and protecting the public interest to know and attain a free democratic order and an open society. There is also the Law on Personal Data protection that sets out the conditions for personal data collection and processes, the rights and protection of the rights of persons whose data are collected and processed, limitations to personal data protection, proceedings before an authority responsible for data protection, data security, data filing, data transfers outside the Republic of Serbia and enforcement of the Law. In 2014, Serbia adopted the Law on the Protection of Whistleblowers. This Law governs whistleblowing; the whistleblowing procedure; the rights of whistleblowers; the obligations of state authorities and other bodies and organizations and legal entities and other natural persons in relation to whistleblowing; as well as other issues of importance for whistleblowing and the protection of whistleblowers.



## National report-the case of Slovenia the commission for the prevention of corruption of Republic of Slovenia

### *Slovenia*

The Commission for the Prevention of Corruption of the Republic of Slovenia (hereinafter CPC) is an independent state body with a mandate in the field of preventing and investigating corruption, breaches of ethics and integrity of public office. To strengthen its independence, the law provides a special procedure for appointment of the leadership of the CPC.

Chief Commissioner and two deputies are appointed by the President of the Republic of Slovenia following an open recruitment procedure and nomination by a special selection board. Candidates which must meet high professional and integrity standards are interviewed and screened by a selection board comprising a representative of the Government, the National Assembly, non-governmental organizations, the Independent Judicial Council and the Independent Council of Officials. The Chief Commissioner's term of office is six years, the deputy's five. They can serve up to two terms in office. Prior to the expiration of the mandate, they can only be dismissed from office by the President (on his/her own motion or on the motion of the Parliament) if they act in breach of the Constitution or the law. The budget of the CPC is determined yearly by the Parliament and the CPC is autonomous in allocating and organizing its financial and human resources and priorities.

#### *1. Field of work and jurisdiction*

The CPC has a wide mandate in the field of preventing and investigating corruption, breaches of ethics and integrity of public office. Its tasks, among others, include:

- conducting administrative investigations into allegations of corruption, conflict of interest and illegal lobbying;

- protection of whistleblowers;
- monitoring the financial status of high level public officials in the executive, legislature and judiciary through the assets declaration system;
- maintaining the central register of lobbyists;
- adopting and coordinating the implementation of the National Anti-corruption Action Plan;
- assisting public institutions in development of integrity plans (methodology to identify and limit corruption risks) and monitoring their implementation;
- designing and implementing different anti-corruption preventive measures (awareness raising, training, education etc.);
- serving as a national focal point for international anti-corruption cooperation on systemic level (GRECO, OECD, UN, EU etc).

The CPC is not part of the law enforcement or prosecution system of Slovenia and its employees do not have typical police powers. There are currently eleven employees working in Oversight and Investigation Bureau.<sup>1</sup> They do, however, have broad legal powers to access and subpoena financial and other documents (notwithstanding the confidentiality level), question public servants and officials, conduct administrative investigations and proceedings and instruct different law enforcement bodies (e.g. Anti-money laundering Office, Tax Administration) to gather additional information and evidence within the limits of their authority. The CPC can also issue fines for different violations (sanctions can be appealed to the Court).

## *2. Legislative framework with a historical perspective*

The predecessor of the CPC was Government's Office for the Prevention of Corruption established in 2002 on the recommendation of the Council of Europe Organization GRECO (Group of States against Corruption EC). In 2004 the National Assembly of Republic of Slovenia passed The Prevention of the Corruption Act in the Republic of Slovenia (ZPKor). On 5th of June 2010, the Integrity and Corruption Prevention Act (ZIntPK) was adopted, while old act ZPKor expired. The Act has retained the name of the CPC, but significantly expanded its mandate, functions and powers. The amendments

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1. There are fifteen in Secretariat and six employees in Center for the Prevention and Integrity of Public Service.

to the Act adopted in June 2011 further strengthened the powers of the CPC to subpoena financial documents for the public and private sector and to hold accountable magistrates, officials, public servants, management and boards of public enterprises for corruption, conflict of interest or breach of ethics. A new legislative framework is in the parliamentary procedure since January 2018.

### *3. Prevention and Integrity<sup>2</sup>*

Slovenian model of corruption prevention is designed to – by taking into account conventional standards and basic principles of integrity, transparency and accountability of the public sector for effective prevention of corruption – transcend institutional framework. Act on Integrity and Corruption Prevention (ZIntPK) as a fundamental law in this field systematically and comprehensively incorporates the international concept of a global approach to corruption prevention into practice of the national public sector.

### *4. Integrity Plan*

Integrity plan is a tool for establishing and verifying the integrity of the organization. The Slovenian model of integrity plan has been developed on the basis of a compulsory inclusion into and application of international conventions, standards and principles for corruption prevention into national law doctrine. Integrity plan is devoted to:

- identifying relevant corruption risks in different working fields of an individual organization;
- assessment, what danger corruption risks may pose to individual organization;
- determining measures to reduce or eliminate corruption risks.

In the sense of implementation, the integrity plan is basically a systematic and documented process in which all employees are actively involved. They identify risks, analyze and evaluate them and propose appropriate measures, meanwhile they constantly debate and communicate with each other. In the creative process of communication and finding a consensus on possible best solutions all the individuals and organization spontaneously learn togeth-

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2. <https://www.kpk-rs.si/en/prevention>

er. Moreover, in this way they create and enhance a common (institutional) knowledge and integrity, which is particularly important when solving complex problems, which require cooperation and balanced activity, which is also a characteristic and a necessity of effective prevention of corruption.

### *5. Oversight and Investigation Bureau*

The activities focus on oversight and investigation of alleged corruptive acts and other violations under the jurisdiction of the ZIntPK. Besides that its duties are also: protection of the whistleblowers, oversight of incompatibility of office, prohibition and restriction on receipt of gifts, restrictions of operation/business and supervision of assets of persons under obligation. Investigation and Oversight Bureau is also a generator for administrative and misdemeanor procedures.

The tasks, among others, include:

- conducting administrative investigations into allegations of corruption, conflict of interest, illegal lobbying and other violations under the jurisdiction of the CPC;
- protection of whistleblowers;
- collecting and monitoring the financial status of high level public officials in the executive, legislature and judiciary through the assets declaration system;
- maintaining the central register of lobbyists;
- operational cooperation with law enforcement and prosecutorial bodies (police, public prosecutors, courts and other state authorities)
- enforcing the conflict of interest rules.

The Investigation and Oversight Bureau is also responsible for adopting decisions in misdemeanor procedures, monitoring matters of international corruption and for this purpose coordinating communication with state organs, performing tasks, regarding legal obligation of the use of anti-corruption clause, preparing and proposing opinions in principle, positions, recommendations and explanations in relation to suspected corruption in specific or systemic issues etc.

## 6. *Whistle-Blowing and Protection of Whistleblowers*

The Integrity and Prevention of Corruption Act adopted a two-tier approach to reports made by public servants. An official person who has reasonable grounds to believe that he has been requested to engage in illegal or unethical conduct, or has been subject to psychological or physical violence to that end, may report such practice to the superior or the person authorised by the superior. If there is no responsible person, or if the responsible person fails to respond to the report in writing within five working days, or if it is the responsible person himself who requests that the official should engage in illegal or unethical conduct, the report falls within the competence of the CPC.

The safety and security of public servants who submit the report are crucial elements for enabling further communication and cooperation. Offering and guaranteeing confidentiality reassures public officials and guarantees that the focus remains on the substance of the disclosure and not on the individual who made it. The protection of the reporting person's identity is one of the basic measures in the fight against corruption and the CPC protects the identity of all reporting persons, regardless if they request it or not. Both during and after the proceedings, the identity of the reporting person is not considered public information and doesn't fall under the Access to Public Information Act. The said measure also applies in cases that were forwarded to other competent state bodies. The law clearly states that it is forbidden to reveal the identity of a reporting person that submitted the report in good faith and had reasonable grounds to believe the submitted information was true. The individual who acts against this provision could be subjected to misdemeanour proceedings and issued a fine in the range of 400 to 4000 EUR. Only the court can rule that the identity of the reporting person be disclosed, if it is strictly necessary in order to safeguard the public interest or the rights of others. If the reporting person requests special protection regarding his identity, he gains the status of a "concealed reporting person", who is given a codename/pseudonym in his first contact with the employee of the CPC (usually the employee that handles his report). This way, the identity of the reporting person is known only to the employee (not to his colleagues or his boss), which ensures a relationship of trust, necessary for cooperation in further proceedings.

The Integrity and Prevention of Corruption Act doesn't differentiate between reporting persons on the grounds of their employment status, so the CPC doesn't record special statistics for the number of reports made by public officials. However, since the inception of the said Act in 2010, the

CPC provided constant education of public officers and conducted several workshops and lectures on the topic of reports of corruption and the protection of reporting persons.

### *7. Example Of Good Practice: Erar Application*

ERAR is an online application that provides information to users on business transactions of the public sector bodies – direct and indirect budget users. The application indicates contracting parties, the largest recipients of funds, related legal entities, date and amount of transactions and also purpose of money transfers. It also enables presentation of data using graphs as well as printouts for specified periods of time and other. The application enables insight in financial flows among the public and the private sector not only to the public, the media and the profession, but also to other regulatory and supervisory bodies. ERAR represents an important step towards a more transparent financial flows among the public and the private sector.

Transparency of financial flows among the public and the private sector achieved through this application increases the level of responsibilities of public office holders for effective and efficient use of public finance, facilitates debate on adopted and planned investments and projects as well as decreases risks for illicit management, abuse of functions, and above all, limits systemic corruption, unfair competitiveness and clientage in public procurement procedures.

### *8. Systemic Principled Opinion: Regarding Appointments And Dismissals Of Members Of Supervisory Boards And Management Boards Of Predominantly State-Owned Enterprises<sup>3</sup>*

Senate of the CPC delivered a systemic principled regarding the situations involving a conflict of interest:

- in most cases, the procedures for the appointment and dismissal of members of supervisory boards and management boards of predominantly state-owned enterprises are compliant with the (inadequate) legislation, but are often totally unacceptable in terms of transparency,

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3. <https://www.kpk-rs.si/upload/datoteke/systemic%20principled%20opinion%20regarding%20appointments%20and%20dismissals%20of%20members%20of%20supervisory%20boards%20and%20management%20boards.pdf>.

- ethical standards and the principle of reducing risks leading to situations involving a conflict of interest;
- for this reason, the following activities need to be performed in all procedures for the appointment and dismissal of member of supervisory boards and management boards of predominantly state-owned enterprises: (1) enhancement of the transparency of all stages of the procedure; (2) strict compliance with the provisions relating to the avoidance of circumstances involving a conflict of interest; and (3) setting additional or specific terms and conditions for appointment to important positions, such as membership in supervisory boards and management boards of predominantly state-owned enterprises;
  - high standards of disclosure, competency and the general suitability of members of supervisory boards and management boards of predominantly state-owned enterprises should become an objective, not a pre-prepared excuse that the high standards would result in a lack of competent individuals. Moreover, the high ethical and transparency standards should be given absolute priority over quick selection in all stages of the selection procedure.

#### *9. Freedom Of Information Legislation<sup>4</sup>*

Information Commissioner is an autonomous and independent body, established on 31. December 2005 with the Information Commissioner Act (ZInfP). The body supervises both the protection of personal data, as well as access to public information. The Office of the Information Commissioner is led by the Commissioner.

Competencies of the Information Commissioner based on the Information Commissioner Act are:

- deciding on the appeals against the decisions by which another body has refused or dismissed the applicant's request for access, or violated the right to access or re-use public information; in the context of appellate proceeding the Information Commissioner is also responsible for supervising the implementation of the Act governing access to public information and regulations adopted within the framework of appellate proceedings;

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4. <https://www.ip-rs.si/en/about/competences/>.

- exercising inspection supervision of the implementation of act and other regulations which regulate processing and protection of personal data and transfer of personal data from Republic of Slovenia;
- exercises other tasks defined by these provisions;
- deciding as appellate body on individuals' complaints when controller of personal data refuses his request for access to data relating to him or request for extract, list, examination, confirmation, information, explanation, transcript or copy in accordance with provisions of the act governing personal data protection;
- as offence body the Information Commissioner supervises implementation of Information Commissioner Act, Access to Public Information Act in the context of Appellate proceeding and Personal data protection Act (Art. 2 of Information Commissioner Act and Art. 32 of Access to Public Information Act).
- Access to Public Information Act defines additionally also the competency of the Information Commissioner to keep records of all granted exclusive rights to re-use information (Art. 36a(5) of Access to Public Information Act).

The IC may file a request to the Constitutional Court of the Republic of Slovenia to assess the constitutionality of statutes, other regulations and general acts issued to exercise public powers if the question of constitutionality and lawfulness arises in connection with a procedure it conducts (in cases regarding access to public information and personal data protection).

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## *Afterwords*

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The Winter school was supported by the European Union Programme Hercule III (2014-2020) and was organized by the Department of Political Science of the University of Perugia, in collaboration with the Regional Anti-corruption Initiative (RAI), European Anti-Fraud Office (OLAF), Italian National Anticorruption Authority (ANAC) and Villa Montesca.

The Winter School was directed by Prof. Enrico Carloni.

The Winter School was designed as an intensive programme for professionals looking to consolidate their experience and enlarge their competences on curbing corruption, with particular attention to the misuse of European funds. Interdisciplinary in nature, it addressed trends and practices on the international anti-corruption arena and promoted culture of prevention. The Winter School aimed to provide training on the administrative enforcement actions, the sharing of good practices and the development of regional networks of experts and public officials. Prevention, public procurement, public ethics, transparency were some of the issues addressed by the speakers during the Course.

The winter school involved professionals from Albania, Bosnia and Herzegovina, Bulgaria, Croatia, France, Italy, Kosovo\* Macedonia, Moldova, Romania, Serbia, Slovenia. By integrating theory and practice, the Winter School equipped participants with a deeper understanding of the intricacies of corruption, tools to assess best practices and cross-sectoral challenges,

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

and frameworks to devise durable anti-corruption strategies. Participants were exposed to the latest insights from Europe-leading experts and had the opportunity to develop a strong network with peers in the same field.

The Winter School consisted of approximately 80 lecture hours, roundtable discussions, group work, teambuilding activities and social events.

The experience represented an useful training/debating path among experts and officers involved in managing anti-corruption policies and it also promoted positive network of professionals and competences.



FIG 1 Winter School's Participants at Villa Montesca, Città di Castello (Pg, Italy).



FIG 2 Winter School's Participants at ANAC conference room, Rome, Italy.





