The project is funded by
the European Union

University of Studies of Naples "Parthenope"
Department of Law

THE S.I.P.PA.S. PROJECT

EU TRANSPARENCY AND CORRUPTION PREVENTION POLICIES WITHIN PUBLIC ADMINISTRATION HANDBOOK OF INTERNATIONAL ANTI-CORRUPTION STRATEGIES AND PRACTICES IN PUBLIC ADMINISTRATION: THE COMPARATIVE APPROACH

CACUCCI EDITORE
BARI

Alberto De Vita

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Summary

Foreword

This book originates from the idea of creating a report of the results of the two-year experience of the S.I.P.PA.S. Project, in order to provide civil servants in Bosnia and Herzegovina (BiH) with some useful guidelines for creating an internal administrative system that is transparent, efficient and in accordance with the principles and policies of the European Union.

The project "Stabilization and Integration Policies for the BiH Public Administration System", best known as S.I.P.PA.S. Project, entirely funded by the European Union and implemented by the University of studies of Naples "Parthenope", lasted 27 months and had a budget of 500,000 euro.

EU selected "Parthenope" University of Naples (Italy) to support the Bosnia and Herzegovina Public System in the process of integration and pre-accession to the EU.

The project activities started in February 2019, when the Department of Law participated in the Call for Proposals published in the framework of the EuropeAid line and was awarded the contract.

The main objective of the Call was to find an EU Member State that could support and assist Bosnia and Herzegovina in the process of integration and pre-accession to the EU according to the Stabilization and Association Agreement (SAA) that came into force in June 2015.

In this perspective, the main aim of the Project is to support the Bosnian public system in adopting internal stabilization and integration policies that are in line with European principles and that facilitate the successful accession of Bosnia and Herzegovina to the European Union.

In the framework of the Project, this objective was pursued through the implementation of project activities aimed at providing Academic Training Courses for Civil Servants employed in the Bosnian public administration, with the perspective of creating the new class of civil servants and public managers able to ensure transparency and good functioning of the Bosnian public system and to spread the culture of legality among citizens.

The main activities of the S.I.P.PA.S. project for this purpose were the Short Intensive Academic Course (best known as Siac 2019) in "Transparency and legality of the civil servant activities: legislative and economic outlines from the EU anti-corruption experiences" which took place in Sarajevo in the Summer of 2019 and the one-year University Master Course in "EU transparency and corruption prevention policies within Public Administration" which, until the outbreak of the Covid-19 pandemic, was held in Italy, in the premises of the "Parthenope" University of Naples, and, during the Pandemic, it continued online, reaching its conclusion with excellent results and satisfaction of all those who collaborated in the course.

The S.I.P.PA.S. training courses, focused on the issues of anti-corruption and transparency in public administration, involved a total of 29 students for 436 hours of lessons to which must be added the practical activities of learning by doing. The Master course was completed in December 2020 and allowed 10 officials of different government levels of BiH to obtain a prestigious degree.

Scholars and experts from both Italy and Bosnia and Herzegovina provided high quality lectures to the course participants. As for the Italian contribution, experts from ANAC (National Authority for Anti-Corruption), Professors from various Italian Universities (University of Naples, Rome, Milan among the others) collaborated in the training courses; while, from Bosnia and Herzegovina, experts from APIK (Agency for the Prevention of Corruption and Coordination of the Fight against Corruption), Parco (Public Administration Reform Coordinator's Office), RAI (Regional Anti-Corruption Initiative) and DEI (Directorate for European Integration in BiH) and Professors from Universitiesof Sarajevo and Banja Luka were involved. The total

number of Academics and Lecturers involved in the Master course were 66; those involved in SIAC 2019 were 17.

Five representatives from CSAs of all levels in BiH cooperated synergistically with the SIPPAS Team and were members of the Evaluation Committee ofthe SIAC 2019 and of the Master's Course.

All the teachers of the S.I.P.PA.S. courses were accurately selected to provide the students with their high level of knowledge and skills, in order to develop the comparison of the Italian and Bosnian systems, as well as to make the students understand the reasons and principles behind the European policies. Some of them also collaborated in the realization of this final book of the Project.

Some of the most satisfactory results achieved through the S.I.P.PA.S. project activities include:

1. to have provided intensive, cutting-edge training in the fight against corruption in the BiH public system to 29 selected civil servants;

2. to have facilitate interactions and relations between BiH and Italian anti-corruption bodies, in the perspective of a future common fight against corruption in the public sector and improving the harmonization of the BiH public system with European standards;

3. to have established Academic Agreements between the Universities of Sarajevo, Banja Luka and the University of Naples Parthenope, which allowed the interaction between lecturers during the SIAC 2019 and the Master course lectures and which will be useful also for future cultural exchanges between lecturers and students of the two countries; exchanges that will continue beyond the Project deadline;

4. to have promoted the culture of transparency, legality and anti-corruption in the BiH society;

5. to have produced a manual for BiH civil servants that will be useful for the continuation of their training and for the dissemination of a culture of legality and transparency in the management of PA activities in line with European policies.

Hopefully, this book will be a useful tool for the BiH civil servants to continue the process of integration of the BiH public and administrative system in the direction of transparency and legality, as well as the starting point of a long-lasting and fruitful collaboration between our countries, also in supporting the Bosnian citizens in accessing the European Union.

Alberto De Vita

Corruption Prevention: a Risk Approach

When S.I.P.PA.S. Project started, centrifugal forces and populist movements seemed to be prevailing in Italy and Europe. In less than twelve months, the global pandemic has turned the tables, and now the European Union is stronger than it had been in recent years.

This happened because when people are living through very challenging times, as now, they quickly realize that they either stand together or go down alone: as the old saying goes, "strength lies in unity"[1].

Although this historical moment is tragic for the loss of many lives and the economic crisis resulting from repeated lockdowns, it is also full of opportunities for the future, when all of us will be called upon to rebuild, remake and reinvent our life together. It will then be important to create new instruments to foster civil society in terms of the rule of law, as otherwise there will be no real social development, but only the enrichment of the usual suspects.

Everybody will be asked to choose what their role is in the process of civil progress, and there are only two alternatives: "To be or not to be". To be citizens, or not to be citizens but merely subjects. Each of us will have to embrace a new mindset or to keep – or slide back to – old habits. Sometimes old habits can feel safer and more comfortable, but it won't be long before it becomes clear that to keep things as they are will be the worst possible option for national development and people's prosperity and well-being.

Today's globalized world is in continual evolution and affords us great opportunities, above all in the post-pandemic future. However, it is also filled with new risks and pitfalls. In this context, inaction is not

[1] Cfr. https://europa.eu/european-union/about-eu/symbols/motto_en.

a neutral stance but a deliberate choice to oppose change, withdraw from the community of the world's most advanced countries and turn back the clock of history. The hands of the clock will be pointing once again towards international economic integration and an extension of democracy.

Public Administration malpractices and corruption are factors that threaten to slow down or even reverse the process of economic development[2]. However, this is not only an economic issue. There can be no economic growth without recognition of civil rights and *viceversa*. Economic growth requires citizens to move forward.

If we wish to live as citizens and not as subjects, we must enforce the rule of law. But any system based on the rule of law has many enemies, both within and without. The non-transparent behaviours practised by Public Administration often make it its own worst enemy. European Union rules are a powerful weapon to keep in check the temptation to maintain the *status quo*.

For Italy too, the rules of the European Union have often been perceived as an "external constraint", but at the same time, they have prompted us to get rid of old habits and overcome lazy thinking[3].

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[2] Cfr. *inter alios* M. Habib-L. Zurawicki, *Corruption and Foreign Direct Investment*, in *Journal of International Business Studies* 2 (2002) 291-307; J. G. Lambsdorff, *How Corruption Affects Productivity*, in *Kyklos. International Review for Social Sciences* 4 (2003) 457-474; Id., *How corruption affects economic development*, in *Corporate Governance und Korruption. Wirtschaftsethische und Moralökonomische Perspektiven der Bestechung und ihrer Bekämpfung*, eds. D. Aufderheide-M. Dabrowski, Berlin 2005, 11 ff.; E. Ahmad-M. A. Ullah-M. I. Arfeen, *Does Corruption Affect Economic Growth?*, in *Latin American Journal of Economics* 2 (2012) 277-305. Those researches show how some dependent variables of GDP can be influenced negatively by corruption. These variables are productivity, perception, capital inflows. In extreme synthesis, this negative influence is mainly related to the idea that a corrupted public administration causes additional costs and inefficiencies to the economic activity of private investors.

[3] For a programmatic view, cfr. EU Commission, *Fighting Corruption in the EU*, *Communication from the commission to the european parliament, the council and the european economic and social committee*, in Brussels 6.6.2011 COM (2011) 308 final, eur-lex.europa.eu.

Anti-corruption strategies suffer from the presence of centrifugal forces, processes of regionalization and deadlock in internal integration; the transfer of tasks to sub-state levels destabilizes the fundamental functions of the state as well as national unification and internal pacification.

Bosnia and Herzegovina is at the heart of Europe, and it is in this area, first of all, that the European Union can earn greater credibility as a global actor. This country is home to extremely competent and capable women and men, and this will be a guarantee of the future affirmation of the rule of law in the Public Administration system.

This book brings together student theses from the Master's Degree in "EU Transparency and Corruption Prevention Policies within Public Administration", a number of lectures held during the course, and could be a 'handbook' to help solve some of the problems faced by public officials in their day-to-day activities.

Specifically, in outlining an anti-corruption strategy, the fight against illicit behaviours can be pursued in two main ways.

1) The first way is to reform legislation by improving the regulatory framework to better combat corruption:

1.1) Introducing rules for transparency in Public Administration, thereby empowering citizens to monitor the proper functioning and impartiality of public service officials[4];

1.2) Strengthening the system combatting crimes against Public Administration, by extending traditional criminal penalties to include

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[4] See J. Bröhmer, *Transparenz als Verfassungsprinzip. Grundgesetz und Europäische Union*, Tübingen 2004, in part. 372 ff.; F. Cingari, *I delitti di corruzione*, in *Trattato di diritto penale. Parte speciale*, ed. S. Moccia, 2. *Delitti contro la pubblica amministrazione*, ed. F. Palazzo, Napoli 2011, 141 ff.; M. Pelissero, *Introduzione*, in *Trattato di diritto penale*, eds. C. F. Grosso-T. Padovani-A. Pagliaro, *Reati contro la pubblica amministrazione*, eds. C. F. Grosso-M. Pelissero, Milano 2015, 1 ff.; M. Catenacci, *Considerazioni politico-criminali: il bene giuridico tutelato dagli artt. 314-335 c. p.*, in *Trattato teorico-pratico di diritto penale*, eds. F. Palazzo-C. E. Paliero, *Reati contro la pubblica amministrazione e contro l'amministrazione della giustizia*, ed. M. Catenacci, Torino 2016, 5 ff.; M. Romano, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*, Milano 2019[4], 13 ff.

the temporary or permanent removal of corrupt public officials and impaired asset measures[5].

This is a top-down activity, which is fundamental but not by itself enough to carry out the fight against corruption.

2) The second approach is to enhance institutional knowledge and to develop, promote and implement preventive anti-corruptive activities in the public sector, by providing relevant training to all stakeholders (both inside and outside public offices) on the importance – and also the economic advantages – of transparent administrative practices. Information technologies also provide new opportunities to reach this goal[6].

This bottom-up activity is more challenging, more time-consuming and less visible than the first, but no less important[7].

These two processes have to go hand in hand.

Our S.I.P.PA.S. Project implemented a bottom-up process based on the knowledge of civil servants and the relationship between civil servants and citizens. With this Project we aimed to increase the administrative competencies of public sector employees in preventing corruptive behaviours[8].

Corruption in Public Administration is a risk that must be avoided first of all by eliminating the breeding ground where corruption can flourish, and which is fed by: a) a widespread sense of in-group loyalty over citizenship; b) a lack of awareness of the importance and advantages

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[5] See V. Mongillo, *Il contrasto alla corruzione tra suggestioni del "tipo d'autore" e derive emergenziali*, in *Riv. it. dir. proc. pen.* 2 (2020) 966 ff.; Pelissero (nt. 4) 11-15.

[6] See G. Racca, encyclopedical entry *Corruzione (dir. amm.)*, in *Digesto delle discipline pubblicistiche. Aggiornamemto* 7, Torino 2017, 208 ff. This quote underlines the importance of the role of Administrative law in enhancing this culture of the behaviour as a public official.

[7] It is to underline that criminal law cannot subsitute the role of public ethics and cannot design the ordinary functioning of the public administration – being this latter function part of the role of Administrative law, as previously affirmed. About this theme, in the Criminal law literature see M. Donini, *Il diritto penale come etica pubblica. Considerazioni sul politico quale 'tipo d'autore'*, Modena 2014, 1 ff.; Pelissero (nt. 4) 17.

[8] Cfr. https://www.sippas.eu/project/.

of the rule of law; c) multiple levels of bureaucracy overcomplicating administrative procedures.

Changing the rules is only part of the process. Any change in the rules must be accompanied by a change in mindset at every level of the public sector from senior managers to junior employees.

It is the task of senior and middle managers to implement a continuous process of improvement within their departments using tools such as ethical risk analysis. In this way, public functionaries can be participants in profound social change.

Mapping processes, as well as risk analysis and risk assessment procedures, enhance knowledge of Public Administration, and both promote and improve decision-making processes through the continuous updating of available information.

When carrying out a risk management programme, it is good practice to avoid introducing new control measures but rather to systemically rationalize already existing controls, focusing on objectives and not just on formal processes *per se*.

The OECD says that "Traditional approaches based on the creation of more rules, stricter compliance and tougher enforcement have been of limited effectiveness. A strategic and sustainable response to corruption is public integrity. Integrity is one of the key pillars of political, economic and social structures and thus essential to the economic and social well-being and prosperity of individuals and societies as a whole"[9].

Risk management is a sequential and cyclical process that promotes the improvement of the internal control system.

The process has three key phases: a) context analysis; b) risk assessment; c) and risk treatment. These three phases are followed by two further cross-cutting steps: consultation and communication, and monitoring and review. Because the process develops in a 'cyclical' manner, it must take account of the results of the previous iteration at every restart, with a view to improving the system, exploiting accumulated experience and

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[9] Cfr. OECD, *Recommendation of the Council on Public Integrity*, in *OECD Legal Instruments* 3 (section *Background Information*) and 11 (section *Integrity for prosperity*) 2019. Online at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0435.

adapting to any internal and external changes. In any event, the proper functioning of the process requires that instruments of criminal law be used only as a last resort. If criminal measures are the only or the principal instruments employed to counter corruption, they amount to nothing more than a paper tiger.

All international conventions on corruption – Paris (OECD) 1997, Strasburg (Council of Europe) 1999, Merida (UN) 2003 – stress the importance of incentives provided by anti-corruption measures. Penalties should be imposed only if and when all other measures have failed to prevent and punish corruption. However, even in this case, criminal sanctions are only effective if they are embedded within a context that enforces their effectiveness and ensures legal certainty.

In his treatise *On Crimes and Punishments*, Cesare Beccaria wrote: «The certainty of punishment, even if moderate, will always make a greater impression than the fear of another more terrible punishment combined with the hope of impunity»[10].

For this reason, when criminal law is necessary to support other anti-corruption measures, it requires several tools for its enforcement. These include, firstly, whistleblower protection: encouraging employees to report wrongdoing (or "blow the whistle") and protecting them when they do is an important part of corruption prevention in both the public and private sectors.

Employees are usually the first to recognize wrongdoing in the workplace, so empowering them to speak up without fear of reprisal can help authorities both detect and prevent violations. In the public sector, protecting whistleblowers can make it easier to detect passive bribery, the misuse of public funds, waste, fraud and other forms of corruption. In the private sector, it helps authorities identify cases of active bribery and other corrupt acts committed by companies, and also helps businesses prevent and detect bribery in commercial transactions. Whistleblower

[10] See C. Beccaria, *Dei delitti delle pene*, Milano 1764, § 27 – *Dolcezza delle pene*. Translation by the Author. Original quote in Italian: «La certezza di un castigo, benché moderato, farà sempre una maggiore impressione che non il timore di un altro più terribile, unito colla speranza dell'impunità».

protection is thus essential for safeguarding the public interest and for promoting a culture of public accountability and integrity.

The second instrument for enforcing anti-corruption measures is the use of undercover agents: Art. 50 of the United Nations Convention of Merida reads: «In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom».

The third instrument includes spyware, Trojan Horses and other cyber-collectors for mobile devices: these investigative resources are very useful to empower corruption investigations. Yet at the same time, they are too intrusive and pose a considerable threat to citizens' privacy and freedom. Until just a few years ago, these tools were only permitted in Italy in trials relating to organized crime, terrorism, and people and drug trafficking. In 2017, their use was extended to investigations into many crimes of corruption[11].

International conventions on corruption very often draw parallels between corruption and organized crime, above all in terms of the use of investigative tools. In both types of crime, the corruptor and the corrupted engage in criminal acts for their mutual benefit, which makes investigations much more difficult. The last anti-corruption instrument is the so-called '*Pentitismo*': in investigations into bribery it is now possible to use the testimony of so-called '*pentiti*'. The practice of '*pentitismo*' first emerged in Italy during the 1970s, a period marked by escalating terrorist activity. After their arrest, some members of terrorist groups collaborated with the authorities by providing information in return for a reduced sentence, or for reasons of their own. In recent years,

[11] See, in a critical perspective, F. Camplani-O. Calavita, *L'estensione dell'utilizzo del captatore informatico ai reati di corruzione: una prima lettura*, in *Istituzioni Diritto Economia* 1 (2019) 170 ff.

it has become common practice for members of criminal organizations to become '*pentiti*', and special legislation has been introduced to provide for the sentencing and personal protection of these informants and their families[12]. This practice is now also allowed in trials involving corruption, as provided for in Article 323-*ter* of the Italian Criminal Code[13].

This article states that any person who has committed a corruption crime shall not be liable if they voluntarily provide useful and concrete information to secure the evidence of the crime and to identify other perpetrators involved.

The disclosure must be made before the offender is informed that investigations are being carried out against them in relation to the crime and, in any event, within four months of the crime being committed. Impunity is conditional upon the informant making available any material benefit or, where this is not possible, an equivalent amount of money, or any useful and concrete information to identify the actual beneficiary. Grounds for exemption shall not apply where, from the start, the informant commits the crime of corruption simply to self-report in order to involve a third party. Lastly, the article provides that grounds for exemption do not apply to undercover agents who instigate a crime. However, this is clearly a case of a cross between a '*pentito*' and an agent provocateur not under the direction and control of the public prosecutor[14].

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[12] See V. Mongillo, *Crimine organizzato e corruzione: dall'attrazione elettiva alle convergenze repressive*, in *Dir. pen. cont. Riv. Trim.* 1 (2019) 162 ff.

[13] Art. 323-*ter* c.p.: anyone who committed a bribery offense provided in the articles 318, 319, 319-*ter*, 319-*quater*, 320, 321, 322-*bis*, 353, 353-*bis* and 354 if CP can benefit from the newly introduced non-punishment clause in case he/she makes a voluntary disclosure and provides useful and concrete information to secure the evidence of the crime and to identify other offenders involved. To qualify for non-punishment, the disclosure should be made before the offender becomes aware of the investigation being carried out with regards to the committed offence and not later than four months from the date of the offense.

[14] See, in the literature before the last reform through art. 23 of the Law-decree 16.7.2020, n. 76, converted in the Law 11.9.2020, n. 120, A. Vallini, *L'abuso d'ufficio*, in S. Moccia (nt. 4) 257 ff.; G. Ruggiero, *Abuso di ufficio*, in Grosso-Padovani-Pagliaro (nt. 4) 345 ff.; M. Catenacci, *Abuso d'ufficio*, in Palazzo-Paliero (nt. 4) 131 ff.; Romano (nt. 4) 349 ff. After the reform G. L. Gatta, *Riforma dell'abuso d'ufficio:*

Our field is the law. We deal with rules and Institutions.

However, it is also true that – as the 2018 OECD 'Report on Public Integrity states'[15] – by focusing on systems and institutions we often overlook the human aspect of integrity. Yet integrity depends on people's choices.

We now know more about how corrupt networks function, how individuals are tempted to profit from corruption and how they react to the incentives provided by anti-corruption measures. Behavioural research provides great insights for policymakers to develop innovative and well-targeted integrity policies.

In this Project there was much at stake for all of us. Our Project Group and University of Naples *Parthenope* did their utmost, in extremely difficult conditions caused by the Covid-19 pandemic, to live up to their responsibilities. The task was demanding but our efforts were ultimately equal to the challenge.

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note metodologiche per l'accertamento della parziale abolitio criminis, in *Sistema Penale* 2.12.2020, https://www.sistemapenale.it/it/articolo/riforma-dellabuso-dufficio-note-metodologiche-per-laccertamento-della-parziale-abolitio-criminis.

[15] Cfr. OECD (nt. 8).

Alessandro Tomaselli*

The Acquis Communautaire

1. Introduction

The EU's *acquis* is the body of common rights and obligations that are binding on all EU countries, as EU Members. It is constantly evolving and comprises:

- the content, principles and political objectives of the Treaties;
- legislation adopted in application of the treaties and the case law of the Court of Justice of the EU;
- declarations and resolutions adopted by the EU;
- measures relating to the common foreign and security policy;
- measures relating to justice and home affairs;
- international agreements concluded by the EU and those concluded by the EU countries between themselves in the field of the EU's activities.

* Expert of European Union Law.

Applicant countries are required to accept the *acquis* before they can join the EU. Derogations from the *acquis* are granted only in exceptional circumstances and are limited in scope. The *acquis* must be incorporated by applicant countries into their national legal order by the date of their accession to the EU and they are obliged to apply it from that date.

EU LAW: Strictly speaking, EU law consists of the founding Treaties (primary legislation) and the provisions of instruments enacted by the European institutions by virtue of them (secondary legislation – regulations, directives, etc.).

In a broader sense, EU law encompasses all the rules of the EU legal order, including general principles of law, the case law of the Court of Justice of the EU, law flowing from the EU's external relations and supplementary law contained in conventions and similar agreements concluded between the EU countries to give effect to Treaty provisions.

2. Concept and meaning

Sooner or later, every novice in the field of European integration encounters the puzzle that is the *acquis communautaire*. Indeed, this elegant-sounding French phrase has become common parlance, without anyone appearing to know its exact definition and scope.

Unquestionably, *acquis communautaire* has become a seminal concept in the process of European integration, especially at a time of global EU constitutional reform and enlargement towards the East. The successful outcome of these processes requires a homogeneous understanding of the concept of *acquis communautaire*. For instance, the Laeken Declaration on the Future of the European Union acknowledges the importance of the *acquis communautaire* in revising the delimitation of competences between the EU and its Member States. The EU Constitutional Treaty emphasises the need for the 'continuity of the Community *acquis*'.

Furthermore, a uniform understanding of the *acquis communautaire* is imperative for the forthcoming simplification and codification of EU legislation Nevertheless, these tasks are not easy to achieve, since the nature and scope of the *acquis communautaire* are not yet fixed. One

can easilyquestion the uniformity of the manner in which the *acquis communautaire* is applied throughout the EU and abroad.

This situation is aggravated by the fact that the scope of the *acquis communautaire* is not identical for all EU Member States and third countries. In the former case, the *acquis communautaire* appears to be an *ex post* label mirroring EU achievements. Consequently, EU Member States are bound to follow and accept the specific legal heritage to fulfill their membership commitments. In the latter case, the *acquis communautaire* has more of a constitutive/dynamic nature. Candidate countries are expected to adhere to the *acquis communautaire* which is not yet binding for the present EU Member States. Besides, the scope of the *acquis communautaire* within an EC/EU external agreement can be revisited by either of the parties at any time to reflect a change in bilateral relations. Subsequently, one may argue that the EU *acquis* within the EU external agreements is a dynamic category that directly depends not only on the objectives of these agreements, but on the general political climate between the parties as well.

The Member States and certain third countries thus face the reality of being bound by a category which is neither precise in nature nor scope. Undeniably, candidate country negotiators ought to possess negotiating skills when discussing the *acquis communautaire* so that effective bargaining power is maintained during accession talks.

Much could be gained by the EU and candidate countries, if both sides competently applied elements of the *acquis communautaire*, an event which could potentially see the applicant country being awarded with a temporary or even permanent exemption. Conversely, much time would be wasted if the parties argued over elements of the 'fundamental *acquis*' which need to be accepted without question by candidate countries.

Furthermore, third countries willing to enhance their partnership with the EU need to possess a clear idea about the nature and scope of the *acquis communautaire* in order to pursue the 'voluntary harmonisation' of their national legislation to EU law standards, and thereby to enhance their level of co-operation with the EU.

This is why the conceptual focus in this article is placed upon the consideration of the nature and an analysis of the scope of the *acquis communautaire* as it is applied in relations with third countries either

through their accession process or through their bilateral agreements with the EU.

The legal obligation to harmonize domestic law with EU law exists, of course, only for legislators in the Member States of the European Union. However, there are other countries that have interest in harmonizing their legislation with that existing in the EU. The reasons could be different: the aspiration to become a Member State in the future or simply the realization that harmonized legal system is beneficial for trade and other trans-frontier economic activities, or for attracting foreign investments.

Whereas for the first group of non Member States, there is a kind of political obligation to harmonize, as harmonized legal order represents a condition for membership in the EU, the latter group entertains the harmonization exercise entirely voluntary.

This has important consequences for the task of domestic legislators. While the Member States' and candidate countries legislators must bring domestic law in complete conformity with the EU law, the countries that harmonize their laws voluntarily have much wider choice, as they may domesticate certain EU solutions while not harmonizing with other parts of EU law.

The legislators from the countries not aspiring to the EU membership have to take into consideration that for them, the room of manoeuvre is much wider.

3. National legislator in the EU legal order

The task of domestic legislator differs depending on what type of EU legal norms domestic norms are to be adjusted to. Thus, when explaining the harmonization requirements, it is first necessary to explain different types of EU legal norms.

The legal norms pertaining to the EU legal order are systematized in different ways by different authors, depending on the criterion used. All these systematizations were developed for easier explanation of EU law, and none of them is either correct or incorrect. This makes me free to choose adequate systematization for the purposes of this work.

Thus, I will divide all EU law into primary and secondary.

3.1. Primary EU Law

Primary law encompasses Founding Treaties and general (unwritten) principles of law.

One of the reasons to call these norms primary comes from the fact that they are formative for the EU legal order. They have created it, and they govern its nature (including its effects in the Member States). The second reason for calling these norms primary is hierarchical. Namely, all other norms which come into being in the EU owe their validity to primary norms. Thus, in order to be considered EU norms, all other norms need to have a legal basis in the primary Treaty norms. Likewise, all other EU norms need to be in conformity with primary norms to be legally valid norms.

3.1.1. Founding Treaties

Founding Treaties today (after coming into force of the Lisbon Treaty) are the following: Treaty on European Union (TEU), Treaty on the Functioning of the European Union (ToFEU), and the Euratom Treaty that was not included under the new common structure created by the Lisbon Treaty, but continues being a separate Treaty. Treaties, and all their amendments, are negotiated by Member States. In order for them to enter into force and become legally binding each Member State needs to ratify them according to the procedure envisaged by its own Constitution. Thus, the masters of the primary Treaty law are States.

3.1.2. General principles of EU law

General principles of EU law are cognizable through the case law of the European Court of Justice (ECJ). It is possible to think of them as an unwritten part of the Founding Treaties, or as something existing in parallel, but this is, for the purposes of their practical effects and meaning irrelevant. An important body of general principles – fundamental human rights recognized in the EU legal order – was codified and formally given legally binding force by the latest (Lisbon) amendments of the Treaties.

Before Lisbon entered into force, however, the fundamental rights have existed as legally binding norms in the EU legal order only by the way of their incorporation as general principles by the case law of the ECJ. The Lisbon Treaty incorporated the (previously legally non-binding) EU Charter on Fundamental Rights into the Founding Treaties.

3.1.3. Primary law and the task of national legislator

Legislation of Member States cannot run contrary to EU law. In that sense, primary EU law represents a constraint for national legislator. Any new legislation adopted within the EU Member State, whether the one adopted in the process of transposition of an EU norm (for example, a Directive), or independently of any requirement imposed by EU law, cannot run counter the Treaty or EU general principles.

Due to constitutional characteristics of the EU legal order, developed through the practice of the European Courts as well as national constitutional or supreme courts, EU law is directly applicable in Member States' legal orders (so called direct effect doctrine) and accorded precedence (so called supremacy doctrine). The consequence of these constitutional doctrines in practice is that national legal norm that is contrary to EU norm cannot be applied by the organs of the state, be they national courts or administration.

As explained by the ECJ in the 'Simmenthal' case: «direct applicability in such circumstances means that rules of community law must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force (...) these provisions are therefore a direct source of rights and duties for all those affected thereby, whether member states or individuals, who are parties to legal relationships under community law (...) it follows from the foregoing that every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule».

Even though, § 21 of the Judgment refers to the national courts, the same obligation, i.e. to set aside national law that is contrary to EU law exists also for national administration. Thus, even if a Treaty rule does not in itself require any action from national legislator, it always requires a sort of passive action – such rule should be taken into consideration in all other legislation adopted by national legislator. Thus, for example, all rules of negative integration in the internal market, limit the choices national legislator can make in any policy area, not only in the one related to trade.

Let see an example. Article 34 ToFEU prohibits quantitative restriction on imports and all measure having equivalent effect in trade between Member States. It does not require any positive action by national legislator. National legislator does not have to enact any law or bylaw in order to give effect to this provision (it might be required to remove inconsistent legislation, though).

However, when legislating for the purpose of consumer protection, for instance, national legislator has to take into consideration Article 34 ToFEU. Thus, it cannot set he minimum percentage of the alcohol necessary to call an alcoholic beverage a 'liqueur' if this will obstruct the importation of thus named products from other Member States (case 'Cassis de Dijon'); or, it cannot require that pasta is produced only from durum wheat (case 'Zoni').

Even though the national legislator might still be free in legislating for the sake of preventing confusion of consumers in its territory, the choice of the available measures it may use for that purpose is limited by the requirement not to create obstacle to the import of products from other Member States, or at least by the demand that chosen measure creates the minimal possible obstruction to trade.

This is so, even if creation of obstacle was not the intention of the legislator. Thus, Treaties narrow down the choices available to national legislators in efforts to achieve legitimate policy aims.

Primary law has to be observed also when the national legislator is making choices how to transpose other norms of EU law in the national legal order. As an example, we can use the recently decided case 'Mangold'. In this case, Germany adopted the Law by which it transposed Council

Directive 1999/70/EC concerning the framework agreement on fixed-term work.

German solution, however, discriminated older workers in relation to younger ones. Thus, the Court considered it contrary to the principle of non-discrimination in respect of age, which, according to the Court, exists as an expression of the general principle of equality in the EU legal order.

Thus, general principle of EU law limited the choice available to national legislator when deciding on appropriate solution for the transposition of Directive.

Finally, Treaty rules sometimes require national legislators to legislate. The example of such provision is Article 157 TFEU: «Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied».

3.2. Secondary EU Law

Secondary law encompasses all the acts which EU institutions may adopt on the basis of the competences transferred to the EU by Member States and described in the Founding Treaties. These are all the acts enumerated in Article 288 ToFEU and all international agreements that the EU may adopt on the virtue of the Founding Treaties. Besides, the ECJ recognized as EU acts any other acts (so called *sui generis* acts) which are adopted by EU institutions and produce legal effects.

These norms need to be in conformity with primary law in order to be valid, but the hierarchy among them is not clearly established. Even though, the Lisbon Treaty tried to introduce certain clarity in hierarchy between secondary norms by introducing notions of legislative and nonlegislative acts, this still does not allow for clear hierarchy. All three types of legally binding acts envisaged by the Treaty – Regulations, Directives and Decisions – might be used as both, legislative and non-legislative instruments. Furthermore, even if there are good arguments (based both on the text of the Treaties and the case law of the Court) to consider international agreements signed by the EU as superior in hierarchy to internal EU acts, this is not today yet so entirely clear.

The important feature of EU secondary law is that it is created by EU institutions, either in one of the decision-making processes envisaged by the Treaties, or in the process of negotiation and adoption of international agreements, also provided for in the Treaties. The rules of those processes are determined by the Treaties, and they describe the role of each institution in the process, and thus influence the inter-institutional balance which results out of it.

Legislative acts may be adopted in the form of either Regulations, or Directives, or Decisions.

The standard procedure for their adoption after the Lisbon Treaty is called the ordinary legislative procedure. Without entering into details, it suffices here to say that it happens with the participation of three principal institutions: the European Commission, the European Parliament and the Council of Ministers. The Commission exercises the sole right of initiative, which ensures its position of policy-maker, and the Parliament and the Council co-legislate, so that the Commission's proposal may not become law without both institutions giving their consents.

Another important feature of ordinary legislative procedure is that the Council, in which the States representatives sit, votes with qualified majority voting. Without the need to explain how such majority is achieved, is suffices to say that a State may vote against a proposed act, and still be legally bound by it, provided that necessary majority of other States have voted for the act. Some legislative acts are adopted in other, so-called special legislative procedures, which are all those which depart from certain important aspect of the just described standard procedure.

Non-legislative acts are also adopted in the form of either Regulations, or Directives, or Decisions.

They may be adopted by the Commission, or exceptionally by the Council (when the act is an implementing act). Procedure for adoption of such acts is not regulated by the Treaty, but the Treaty organises the mode of the supervision of the Commission by the legislative institutions. Until the Lisbon Treaty came into force, the supervision was organized through the committees composed of the Member States' representatives, in the so-called comitology procedure. The Lisbon Treaty, which introduced differentiation between implementing and delegated acts,

has also introduced the difference in the control of the Commission. Thus, when the Commission is implementing EU legislative acts, it is still supervised by the committees in the comitology procedure (the difference is that the Act regulating this procedure will now be jointly adopted by the European Commission and the Parliament).

On the contrary, when the Commission acts on the basis of delegated power, the control will be determined by the legislative act delegating the power to the Commission. This act will determine the objectives, content, scope and duration of delegated norms. The control may be organized so that the Commission's act may enter into force only if the Parliament or the Council do not express objections during the period of time envisaged by the legislative act, or the Parliament or Council may reserve for them the power to revoke the delegated act.

The difference between the control of delegated acts in comparison to control of implementing acts through comitology is in that in the former case the control is happening after the adoption of the act, rather than during its adoption as in the comitology.

For the purposes of the discussion about harmonization of domestic law with EU law, the difference between legislative and non-legislative acts is not that important. The Member States have to adjust to all EU acts. The difference, which will be explained in more details later, does, however, exist in relation to how EU law organises the participation of national Parliaments in the process of adoption of EU acts. Namely, the national Parliaments must be involved (even if only for the purpose of the control of the subsidiarity principle) in the adoption of legislative acts, but not in the adoption of non-legislative acts.

It is also important to notice that the EU distinction between legislative and non-legislative acts does not in itself give answer to whether the measures of harmonization have to be adopted domestically by the Parliament or the Government.

National legislators of the EU Member States do have interest in this stage of coming into life of EU law, and the level of their involvement at this instance might influence the success of later harmonization efforts. Thus, a study undertaken by Steunenberg and Voermans has shown that the countries (such as Denmark) that take into consideration the manner of future implementation of EU directives already in the phase of their

elaboration and enactment in the EU decision-making process, have better transposition results than the countries that do not do that. The envisaged problems in transposition influence the negotiating position of a Member State during negotiations about the final text of proposed legislation.

Unlike EU Member State legislators, legislators from countries that are not EU members do not have access to this phase of the harmonization process.

3.2.1. International Agreements signed by the Union and the task of national legislator

European Union has today extensive external powers. It is empowered, according to the so called doctrine of implied powers (the elaboration of which has started with the case 'ERTA'), to negotiate and sign international agreements in all areas for which it is internally competent. Additionally, in certain situations, it has completely taken over the pre-existing powers of Member States to undertake international obligations. Thus, as clearly explained today in the text of the Lisbon Treaty (Article 3/2 TFEU), the EU power to conclude an international agreement becomes exclusive: "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".

Once concluded by the EU institutions, international agreements have to be implemented by the existing organs of the Member States. EU, unlike many federations, does not have its own implementing organs. Thus, all EU law, including international agreements, has to be given life by Member States' bodies. Thus, upon the signature of an international agreement, national legislator might be under obligation to legislate in order to conform to the obligations undertaken by the EU in relation to a third country or an international organization.

This is sometimes expressly stated by the Treaties, as is the case with the development cooperation agreements. Thus, Article 208/2 TFEU provides, for example: «The Union and the Member States shall comply

with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations».

However, even if the action on the part of the Member States is not expressly demanded by the Treaties, it might still be required by an international agreement concluded by the EU.

3.2.2. Acts of EU Institutions

According to the TFEU, there are three types of legally binding acts which EU institutions may adopt (either as legislative or non-legislative acts). These are Regulations, Directives, and Decision. The Treaty often leaves open the choice of legal act to be deployed in the concrete situation. It is, then, up to the institutions to choose whether to use regulation, directive or decision. Sometimes, however, the Treaties specify which act institutions may use in certain policy area.

The definitions of EU acts are given in Article 288 ToFEU, reproduced below, but their effects for domestic legal orders were subsequently explained and elaborated in the case law of the ECJ.

Article 288 TFEU: «To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force».

3.2.2.1. Regulations and the tasks of national legislator

Regulations are usually complete regulatory measures, in the sense that they make all necessary regulatory choices and allocate rights and obligations to certain social groups or institutions. They are published

in the Official Journal of the EU in all official languages and become applicable norms in legal order of every Member State just on the basis of such publication. They, therefore, do not require any action on the part of the state legislators.

Even opposite, transposition of Regulations into the domestic legal orders of Member States is not allowed. Thus, in case 34/73 Variola, the ECJ held: «The direct application of a Regulation means that its entry into force and its application in favour or against those subject to it are independent of any measure of reception into national law. By virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in regulations and other rules of Community law. Strict compliance with this obligation is an indispensible condition of simultaneous and uniform application of Community regulations throughout the Community. More particularly, Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it».

Sometimes, however, a Regulation will require certain action on the part of domestic legislator in order to enable their implementation in the domestic legal orders. Frequently the Regulation itself will require that some national measures are adopted. In such case, national legislator will be under obligation to enact such measures.

In the EU Member States, thus, Regulations are directly applicable and are not transposed into domestic legal systems by their transformation into any type of norms existing internally. Thus, except when expressly demanded so, national legislators of EU Member States are not invited to act upon Regulation.

The situation is different in non-member States. In these States, Regulations are not directly applicable, as these States did not ratify the Founding Treaties. Thus, if they want to harmonize their legal orders with Regulations they have to introduce them via some type of domestic norm recognized by domestic Constitution. In other words, they have to transform them into the national legislation. As Regulations are,

in principle, complete legal norms, this act is formal in nature. It only requires national legislator to adopt proper form of act (law, regulation, decision, depending on internal order) which will transpose the entire and unchanged content of a Regulation. It does not require making any type of substantive policy choices.

Upon membership in the EU, the Regulations will acquire direct applicability in a state that has previously, during the accession period, transposed them into domestic law. This will create the obligation for legislator to repeal these norms. Thus, it is advisable that each Regulation is transposed by single act containing only its copy/pasted text, which can easily be removed from domestic legal system upon accession.

3.2.2.2. Directives and the tasks of national legislator

Directive, unlike a Regulation, is not meant to be complete normative act. It is described by the Treaty as the act which is binding, as to the result to be achieved, upon each Member State to which it is addressed, but which leaves to national authorities the choice of form and methods (Article 288 TFEU). Thus, directives impose on national legislators the regulatory result which they have to achieve, but leave them the choice how to achieve such result.

The choice left to national legislator might be substantive choice and a formal one. National legislator always has to make a formal choice. It encompasses a decision at which level of Government should a particular EU Directive be transposed, i.e. whether transposition legislation should be adopted by the Parliament or the Government, and whether it is to be adopted by central, regional or local government. That also means that Member State has to choose the proper form of act to transpose a Directive, or a combination of different types of acts. For example, Directive X may be transposed by enacting one new law, amending few existing laws, and adopting and/or amending several by-laws. Such choice will depend on the internal organization of a legal system of a transposing country. Thus, the same Directive 10, will in another state, be transposed by only one law, and in the third, no laws will be adopted, but only by-

laws. It is also possible not to adopt any new legislation, provided that the existing one already fully satisfies requirements imposed by a Directive.

Many Directives also leave to a national legislator a substantive choice. That means that they leave to domestic politics a space for making additional policy choices in a given policy area.

Thus, even if such Directives bind the States as to the regulatory result to be achieved, the way in which such result will be secured in different states might differ. In practice, Directives vary from those which do leave to national legislator wide space for making additional policy choices to those which are very detailed and leave no real, substantive choice, but only formal one.

Proper transposition of Directive requires from the legislative state to make choices which directive leaves open and build them in the transposing legislation.

Even when leaving no substantive choice, Directive always has to be transposed into national law. This means that there is no difference between the tasks of domestic legislator in a Member State and in non Member State (a candidate country, for example) regarding the transposition of Directives.

The Treaties did not explain what is understood under proper transposition of Directives. Thus, many issues had to be clarified in the case law of the ECJ.

Thus, it was clarified that, even if legislator has a formal choice, and can, in principle, choose a type of domestic measure by which a Directive is to be transposed, the transposition measure must be a legally binding domestic measure. Thus, using circulars, or relying on any other type of usual administrative practice is not good enough, if it is not backed by the legal obligation of administration to follow such practice.

Sometimes, the legislator is not even entirely free to choose the type of domestic legally-binding measure, but has to transpose a directive by the legal instrument having same legal force as the one that is used in similar domestic situations. Thus, the Court considered in a case 102/79 Commission v Belgium (tractors), that: «It is apparent from the whole of these provisions and from the nature of the measures which they describe that the directrives in question are meant to be turned into provisions of national law which have the same legal force as those which

apply in the member states in regard to the cheking and type-approval of motor vehicles or tractors».

In the same case, the Court has expressed its understanding of proper transposition of Directives in more general terms. Thus, adequate transposition measures must fully meet the requirements of clarity and certainty in legal situations which the directives seek (case 102/79 Commission v Belgium – tractors, § 11). In current case-law, the Court expresses this requirement in following wording: Implementing measure must «looking that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, [their] legal position ... is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts».

Even though, proper transposition of Directive usually demands the adoption of new legislation or, at least, amendments to the existing one, sometimes the existing law of a State would be satisfactory. Thus, the Court explained that general legal context may be sufficient if it ensures full application of the directive in sufficiently clear and precise manner.

This, however, means that existing legal framework guarantees that national authorities will fulfil the obligations envisaged by a Directive and, most importantly, that individuals will be in position to understand and enjoy the rights which Directive aims at creating for them.

The important result which national transposition measures have to achieve is, thus, the application of Directive's regulatory aims in practice and a guarantee that if the rights granted by a directive are breached, there is a legal remedy in front of a national court. Sometimes, securing the application of directive in practice will demand also the imposition of sanctions.

There are Directives which require states to impose sanctions, sometimes leaving the choice of sanctions to Member States, and sometimes specifying sanctions in more details. However, even if a Directive is completely silent about the sanctions, the proper transposition will require the imposition of sanctions if this is important for the application of measure in practice.

National transposition measures need not to transpose a Directive literally. In fact, copy/paste job is not an adequate method for proper transposition of Directive. This is so because a Directive is not a complete normative act. It only determines the normative aim, but it does not necessarily contain the solution on how the rights and obligation are to be distributed in the society in order for the aim to be achieved. That is left to Member States, in larger or lesser amount, depending on Directive. Thus, copy/pasting Directive's provision still does not accomplish the normative task imposed by a Directive. States often need to make substantive policy choices and build them in the domestic legislation transposing a Directive.

It is not necessary that national measures use the terminology or follow the structure of a Directive. This, however, may be useful, as it will more successfully keep the link between national legislation and a Directive. Namely, even after the adoption of transposition measures, the transposed Directive does not lose its purpose. National authorities (primarily courts, but also administrative authorities) are obliged to interpret domestic legislation in conformity with the Directive. This interpretative obligation concerns not only the transposition measures, but all domestic law.

3.3. The consequences of non-transposition or improper transposition of a Directive

If a Member State legislator does not transpose a Directive, or transposes it wrongly, there are several possible ways to act against that State under the EU law.

First, the European Commission has a possibility to initiate infringement proceedings against defaulting state. They may end up in the judicial phase, in which it will be for the European Court of Justice to declare whether the state has violated its obligation to transpose a Directive.

Secondly, thanks to certain constitutional qualities of EU law developed through the case-law o the ECJ and accepted subsequently by

member States and their courts, individuals can force the legislative state to apply Directive for their benefit even if not transposed.

Thus, they may firstly invoke a Directive directly in the court claiming to have rights against th state. This is, so called vertical direct effect.

Courts of a Member State are also obliged under EU law to try to interpret existing domestic law in conformity with the requirements of a Directive. Such interpretative obligation in understood by the ECJ rather widely, and requires from national courts more creativity in interpretation then most courts are used to in domestic legal order.

Finally, if due to non-transposition or improper transposition of a Directive, individuals sustain damage, they may sue in damages in domestic courts. Domestic courts are obliges to hear such actions on the basis of the EU law concept of state liability in damages, not the national one.

4. The EU social '*acquis*'

The EU's social objectives feature prominently in the Treaties: in the TFEU's preamble as the resolve to ensure the "social progress of their States by common action to eliminate the barriers which divide Europe", in the TEU's preamble in its reference to "fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers" and the promotion of 'social progress', and in the EU Charter of Fundamental Rights that recognises a wide range of social rights. Article 3 TEU conceptualises the EU as "a social market economy" aiming at full employment and social progress, and provides that it "shall combat social exclusion and discrimination, and shall promote social justice and protection". These objectives shall furthermore be mainstreamed across all EU policies, in accordance with Article 9 TFEU, which provides that «in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion».

More concretely, the EU boasts a rich body of legislation concerning *inter alia* non-standard employment, information and consultation of workers, health and safety at work, working time, protection of workers in the event of structural changes in a company, as well as maternity and parental leave and non-discrimination. These entitlements are distinct and usefully add to the *acquis* on the free movement of EU citizens and their families measures in favour of non-mobile workers. Some of these measures were adopted on the general internal market mandate (Article 114 TFEU) or the horizontal anti-discrimination legal base (Article 19 TFEU), but the bulk of this *corpus legis* has been developed on the basis of the now fully-fledged Social Title. This Title allows for the adoption of directives on a number of (employment-related) social issues in Article 153 TFEU, and for the conclusion of Social Partner Agreements that can be implemented by a Council directive in accordance with Article 155 TFEU.

This set of constitutional rights and principles, implemented by directives and given further shape in the Court of Justice of the EU (CJEU)'s case law, already constitutes an important floor of social rights protecting EU citizens against some of the most important vicissitudes of working life. However, two key priorities for completing and protecting this floor of social rights are apparent.

First, some people in the workplace risk missing out. The diversity of legal approaches to an increasingly complex network of economic activities creates uncertainties on the notion of 'worker' and thereby protection gaps. Recent years have seen an increase in particularly precarious employment relations such as 'zero-hours' contracts. Not only does the EU social *acquis* lack specific protection against abuse arising from the use of these types of contract, the *acquis* itself risks not being applied in such casual work situations. Furthermore, even where the *acquis* is relevant, it may be exceedingly difficult to enforce. Apart from the specific challenges that arise in the context of highly precarious atypical work, the scope of application and enforcement of the social *acquis* more generally leaves room for improvement.

Second, the floor provided by the social *acquis* is threatened by new unorthodox interpretations of other EU law sources. Such developments have damaged its solidity as a floor of social rights upon which the

member states are free to build. The integrity of the floor should be solemnly reasserted in the EU Pillar of Social Right.

Salvatore Guzzi*

A Brief Oveview on the Supranational Policies in Matters of Transparency and Anticorruption of P.A.

1. Corruption: the perception

The problem of the fight against the corruption in the Public Administration (P.A.) was perceived just like an international concern only in '70 of last century[1].

The topic "fighting against corruption" is strongly connected with the aim of the transparency and effectiveness of good governance[2].

We need to understand that no society is free by the corruption but there are many differences form one country to another in the levels of acceptance of corruption: it can be defined through specific angles: it can start from the philosophy arriving until an economic school of

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[1] M. Arnone–L. Borlini, *Corruption, Economic Analisys and International Law*, Chaltenham-Nothampton 2014, 104, 176 ff.; T. Widlack, *From International Society to International Community: the Constitutional Evolution of International law*, Gdansk 2015.

[2] C. Hood, *Transparency in Historical Perspective*, in *Transparency. The key to better governance?*, eds. C. Hood-D. Heald, Oxford 2006; J. E. Relly-S. Meghna, *Perception of Transparency Government Policymaking: a Cross National Study*, in *Government Information Quarterly* 26 (2009) 148 ff.

thought passing through a moral-ethical vision[3]. Surely one outcome of this phenomenon may be disorders, upheavals and more and more costly consequences also on the correct unrolling of the democratic debates inside a society and a State organization[4].

So we may understand the seriousness of the problem together with the awareness of a "genuine link" joining the transparency and anti-corruption strategies.

On one hand there are the multiple faces of transparency (i.e. inward observability, active disclosure, external assessability) and, on the other hand, the decision making process at government level which may be influenced by unclear external influences[5].

Especially in the decision making process the lack of transparency caused by corruption may affect the degree of openness about the taking decision steps and the rationale of the taken decisions.

All the angles underlined above are involved in building an anti-corruption legislation and laying out many legal instruments both at international and national level. The general stigma which accompanies the corruption and its effect, the lack of transparency, produced in many legal systems the prevision of the anti-corruption legislation.

2. Definition: national level

Surely the perception of the corruption in its multiple shapes is different: whatever was the accepted definition, i.e. «The abuse of public power to private benefit»[6] or «The abuse of entrusted power for private

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[3] A. Maijer-P. Hart-B. Worthy, *Assessing Government Transparency: an Interpretative Framework*, in *Administration and Society* 26 (2015) ass.sagepub.com.

[4] S. G. Grimmelikhlijsen-E. W. Welch, *Developing and Testing Theorical Framework for Computer-Mediated Transparency of Local Government*, in *Public Administration Law* 78 (2013) 562 ff.

[5] B. S. Ramzek-M. J. Dubnick, *Accountability in the Public Sector: Lesson from the Challenger Tragedy*, in *Public Administration Review* 47 (1987) 227 ff.; B. S. Ramzek, *Dynamics of Public Sector of Accountability in an era of reforms*, in *International Review of Administrative Sciences* 66 (2000) 19 ff.

[6] This definition issued by the World Bank is an output of a large discussion on the various possible definitions of corruption with an explanation on the settled definition.

gain»[7] not every country recognizes the same level of unlawfulness to the different forms of corruption[8].

The "international corruption" in this framework was not directly perceived as illegal in all the legal systems. For example not every country recognizes the private-to-private corruption, focusing the attention especially on private-to-public corruption.

So also perceiving corruption about the public service is not easy because sometimes the public officers may not have an economical gain when giving an advantage to someone while they could have another kind of advantage increasing their general consideration in the community[9].

As you can see corruption is more than bribes: for example in the trading of influence we may have an exchange of undue advantage

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See www1.worldbank.org. We may underline that the World Bank definition emphasises the relationship between the public sector and private interests. The focus here is on state actors – civil servants, functionaries, bureaucrats and politicians – that is, anyone with the discretion to decide how public resources are being spent.

[7] The definition has settled by Transparency International (TI), a global non-governmental organisation (NGO) that specialises in the fight against corruption. Its definition covers any abuse of entrusted power, and hence it also covers private-sector corruption, for example when a chief executive officer (CEO) abuses the trust placed in him/her by shareholders. This definition also may be referred to as private-to-private corruption.

[8] On an interesting overview about the cultural factor in the perception of corruption see: W. D. Savedoff, *Pay for Honesty? Lessons on Wages and Corruption from Public Hospitals*, (May 2008) at www.cmi.no. The Daily Telegraph, in spring 2013, analysed the long-term impact on public trust in politics four years after the scandal broke out: you may find it on www.telegraph.co.uk. Report by the Civil Chamber of the Russian Federation, 2011, *Report on the effectiveness of anti-corruption events and civil society participation in the implementation of the anti-corruption policy carried out by the Russian Federation*, at www.oprf.ru (in Russian).

[9] This is the case, for example, of the favouritism: a father using his influence to make *proteges* of his children and get them into good jobs: in some countries, this would be seen as not only legitimate, but even as his duty to his children. A special kind of favouritism is Nepotism involving kinsfolk or family members, as happened in the Balkans in Europe and some African societies. See Council of Europe, *Basic Anti-Corruption Concepts. A Training Manual*, January 2015, *passim.*

between a public official and a member of the public in which the official receives some benefit not necessarily money[10].

In many legal systems there was not a penalty for bribing public officers abroad and, sometimes, the payment of money was also deductible from tax dues: so to secure their business some international corporations are paying bribes all over the world[11]. As specified above, it is well known the corruption may evolve in many subtle ways and in many faces but there is a rising awareness of the high level of its destructive power, not only at the capacity to undermine good governance and cripple economic growth, but also to destroy trust in public institutions[12].

The great disaster of the upheaval generated by the corruption was perceived when the international bribes gave origin to sophisticated channels crossing with internal politic corruption in the '70 of the last century.

In this framework the perception of the need of an international strategy for fighting against corruption rose relatively recently at international level.

3. The international dimension: main international instruments; the role of OECD and of Council of Europe

The background of the international "attention" about corruption were the main scandals which involved multinational US companies in the seventies of last century.

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[10] We may think about the case of a person in a position of authority who recruits candidates to vacancies without following the correct recruitment procedures: he might want to be seen to be able to "move things". See *Basic Anti-Corruption* (nt. 9).

[11] It was the U.S.A. case: until the '80 of last century to pay "grease money" was a generally accepted practice in the business abroad. Bribes appeared in the books as fees to some consultant.

[12] See D. Kar-D. Cartright Smith, *Illicit financial flows from developing countries 2002-2006*, in *Executive Report, Global Financial Integrity* (2008) at www.gfintegrity.org.; G. M. Racca-R. C. Cavallo Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty*, in *Integrity and Efficiency in Sustainable Public Contracts*, eds. G. M. Racca-C. R. Yukins, Bruxelles 2014, 23 ff.

It was a general practice for some Companies which operated abroad to 'grease' the mechanism of the business in some countries[13]. Analysing the internal situation of illegal funding of some party the investigators discovered relevant amounts of money in a pattern of overseas bribery. Starting from Watergate investigation, it was discovered the practice used by Lockheed to sell aircraft abroad.

Another scandal involved United Brands, the main export operator of bananas: they paid a bribe to the government of Honduras to reduce the taxes on the bananas export from that country[14]. The discovery of the bribe led to the overthrow of the government in Honduras.

Starting from this new expansion of the corruption in its international framework, many countries, just like the U.S.A., pulled on the creation on an international anti-corruption framework through International Agreements promoted by international organizations.

Many factors contributed the adoption of an international strategy against corruption. It may point out at:

1) being finished the two blocks logic, there was no need to corrupt governments;

2) the free trade, increasing the competition among multinational companies, so as privatization of State companies, created a largest opportunity for the corruption;

3) the democratization around the world emphasized the attention about the corruption problem.

This last point is not secondary because the corruption is strictly linked to the transparency in the administration such as in the lawmaking process: so the corruption may undermine both the trust in public

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[13] It was well described in an interview collected by R. Lindsey of New York Times in which the vice chairman of Lockheed told «Some call it gratuities. Some call them questionable payments. Some call it extortion. Some call it grease. Some call it bribery ... I considered them a commission – it was the standard thing – if you were operating in the Far East ...» (3 July 1977) at select.nytimes.com.

[14] The scandal is well known as "Bananagate" and involved the United Brands which had a problem following the raise of taxes issued by Honduras on the bananas. Chiquita paid a US $ 1.25 million bribe to the Honduran President, followed by another US $ 1.25 million the next year. The money was to be put in a Swiss bank account. After the bribe, the Honduran tax was reduced from 50 (back) to 25 per box.

institutions and undermine not only good governance, but also the economic growth, with costly consequences for democracy.

At first the main concern in the U.S.A. was to build a national anticorruption law to prevent and to sanction the violation especially the international bribes[15]. It is central, in the Foreign Corruption Practices Act, the criminalization of bribery of a foreign public officer providing penalties for every U.S.A. citizen who offers a payment of money or other advantage to a «foreign official».

After, the awareness of the international dimension of the corruption led to promote some international disciplines in the International Organizations shaped on the U.S.A. national model.

The international strategy aimed by the FCPA (U.S.A.) is transposed in the international agreements.

3.1. (it follows) The OECD issues

We may appreciate the concern about this issue by the OECD and the Council of Europe considering the three main consequences of corruption: a) for democracy and the rule of law; b) for social services; c) for economic development.

The OECD, founded in 1960, includes the countries with democratic system and the market economy, with strongest companies, which concentrate the 2/3 of the world's production of goods and services. This organization aimed at the adoption of a convention signed in Paris the 17.12.1997 and come into effect 15.12.1998, with the specific scope to include the bribery of foreign public officer in international business transactions and only the liability of the bribers but not of the public officer who solicits or receives a bribe[16].

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[15] The FCPA passed at the US Congress in 1977: probably it was pulled out on the awareness that over 400 US companies admitted having paid bribes and 'grease money' in excess of $ 300 million to foreign government, officials, politicians and political parties, how resulted by the investigations of the 1970.

[16] This Convention traces a line in the sand considering the situation in Europe: European companies could still pay a bribe to foreign officials without fear of being punished in their own country. In Germany and France, for example, companies could even deduct bribes paid abroad from their tax obligations.

The OECD convention to fight the bribery was projected to have an universal application[17] and, starting by a definition of «foreign public official»[18], also provided some additional penalties for some topics of offences.

They are provided for the cases of: a) money laundering in connection with the bribery of a public officer; b) accounting offences for the purpose of bribing foreign public officers or of hiding such a bribery; c) liability of legal person for active bribery of a foreign and international public officer.

This convention also provides a surveillance process to monitor the compliance of the signatory nations in adopting their own legislations to make bribery illegal[19].

It also set up the elements of evaluation which are: 1) the preparation of the evaluation in working groups; 2) onsite visit to the country examined with preparation of a preliminary report on the country performance and evaluation by the working group; 3) adoption of a report by the working group including recommendations.

3.2. (it follows) The Council of Europe issues

The most complete strategy was set out by the Council of Europe.

This organization provided an integrated approach against corruption at first setting a convention with mandatory provisions and other provisions in which reservation is possible. The active bribery of a foreign and international public officer is included in a mandatory

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[17] Probably the US Government became a leading advocate of the creation of international standards to limit cross-border bribery, because the European Companies situation about foreign bribes, had a result, American companies lost contracts estimated US $ 45 billion in 1995 alone. The competitive disadvantage for US companies was obvious.

[18] «'Foreign public official' means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation».

[19] The reports about OECD Countries are available on line: www.oecd.org.

provision, while, i.e. for active and passive bribery in the private sector a reservation is possible.

The Convention of the Council of Europe[20], adopted in November 1998 and come into force 1 July 2002, is particularly interesting starting by the definitions: the «public official» is different by domestic laws. It covers also the cases of active and passive bribery of national and foreign jurors and of national and foreign arbitrators and provides additional penalties for the cases of money laundering and accounting offences[21].

But only if the offence is equally punishable in all involved legal systems a cross-border legal assistance is possible[22]. So it is strongly recommended an harmonization of the definition of dual criminality and it's called for the harmonization is made in the broadest sense including any public servant.

According to the model of cooperation designed by the Council of Europe Convention, the relevant international authorities may have a direct and swift communication.

To complete the anticorruption framework, the Council of Europe provided also a mechanism to monitor the compliance of the members with the anticorruption standards. The Group of States against Corruption (GRECO) was established in 1999[23] to monitor the States'

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[20] In September 1994, the Committee of Ministers of the Council of Europe assigned a Multidisciplinary Group on Corruption (GMC) to examine among others the possibility of drafting international conventions. By November 1997, the GMC had elaborated a first draft, which was adopted by the Committee of Ministers in November 1998.

[21] The Council of Europe convention was amended by a protocol, adopted on 15 May 2003, which came into force on 1 February 2005. In addition to the convention, it covers two extra categories of offence involving functionaries who are not regarded as public officials and hence do not fall under the corresponding bribery provision: a) active and passive bribery of national and foreign jurors; b) active and passive bribery of national and foreign arbitrators.

[22] Cross-border legal assistance often depends on the offence in question being equally punishable in the state requesting assistance and the state being requested ('dual criminality').

[23] In May 1998, the Committee of Ministers authorised the establishment of the 'Group of States against Corruption – GRECO' in the form of an enlarged partial agreement and on 1 May 1999, GRECO was set up by the following 17 founding

compliance with the anticorruption standards of the organization[24]. Its objective is to improve the capacity of its members to fight corruption by monitoring their compliance to the standards of the organization.

GRECO implements a dynamic process of mutual evaluation and peer pressure identifying the deficiencies in national anti-corruption policies, prompting the necessary reforms at every level and, also, legislative and practical reforms.

The membership is opened also to the States, which are no members of the Council of Europe, when they take part in the elaboration of the enlarged partial agreement[25].

Any State, which becomes party to the Criminal[26] or Civil Law[27] Convention on the Corruption, automatically accedes to GRECO and its evaluation procedures.

To prevent and to detect corruption, GRECO also provides a platform to share the best practice in this field. The mechanism ensures the scrupulous observance of the principle of equality and obligations among its members, which participate in and submit themselves to the mutual evaluation and compliance procedure.

The monitoring is based on a system of horizontal evaluation procedure involving all member States; a compliance procedure to assess

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members : Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden. Since, its membership has grown considerably.

[24] GRECO's statutory committee is composed of representatives on the Committee of Ministers of member states which have joined GRECO and of representatives specifically designated by other members of GRECO. Its competence includes adoption of GRECO's budget. It is also empowered to issue a public statement if it considers that a member takes insufficient action in respect of the recommendations addressed to it.

[25] Each member state appoints up to two representatives who participate in GRECO plenary meetings with a right to vote; each member also provides GRECO with a list of experts available for taking part in GRECO's evaluations. Other Council of Europe bodies may also appoint representatives (e.g. the Parliamentary Assembly of the Council of Europe).

[26] Convention on Combating Bribery of Foreign Public Officials, signed in Paris 17.11.1997.

[27] Civil Law Convention on Corruption, signed June 1999.

the measures is taken by member States. Every evaluation process follows a procedure which involves a team of experts to evaluate the examined member in the compliance procedure.

GRECO works in cycles, called evaluation rounds, covering specific themes. At first the independence, specialization and means of national bodies engaged in the prevention and fight against corruption[28].

The second round focused on the identification, seizure and confiscation of corruption proceeds, prevention and detection of corruption in P.A. and the prevention of the person from being used as shields for corruption[29]. The third round involves the criminal offences provided for in the Criminal Law Convention on Corruption and the transparency in party funding[30].

A special procedure is provided to deal with members which were found totally unsatisfactory to the recommendations of GRECO.

Some international standards are not binding and they are enforced through the monitoring mechanism underlined above. We may remember the Resolution (97) of the 24th November 1997 provides the «Twenty Guiding Principles for the fight against the corruption». Equally the provision of the recommendation (2003) of the 8th April 2003 containing «Common Rules against corruption in the Funding of Political Parties and Electoral Campaigns» are not binding and implemented by GRECO in its evaluation procedure.

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[28] GRECO's first evaluation round (2000-02) dealt with the independence, specialisation and means of national bodies engaged in the prevention of and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest and prosecution. The third evaluation round (launched in January 2007) addresses (a) the criminal offences provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding.

[29] The second evaluation round (2003-06) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons (such as corporations) from being used as shields for corruption.

[30] The third evaluation round (launched in January 2007) addresses (a) the criminal offences provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding.

4. Other international instruments

The awareness of the need to fight against corruption at international level also led other International Organizations to set up Conventions in which are provided the prevention of the corruption practices and mutual legal assistance and cooperation on this field.

They contain definitions and also provisions about specific criminalization of particular offences, so covering every shape of corruption.

We may remember the Inter American Convention against corruption by the OAS[31]; the Arab Convention to fight corruption promoted by the League of Arab States and the African Union Convention on Preventing and Combating Corruption[32].

This last Convention is interesting because it is unique providing mandatory rules referred to private-to-private corruption, to the transparency in party funding, to declaration of assets by public officers and the restrictions in immunity for public officers.

5. Conclusions

After this excursus about the International instruments to fight the corruption it is well acquired the awareness that the corruption and no transparency at public level as much as at private-private level may surely undermine the correct functioning of the Public Sector including the lawmaking process and so the correct democratic outcome debates.

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[31] We have a monitoring mechanism also in this Convention. The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) is an inter-governmental body established within the OAS. It supports the states parties in the implementation of the provisions of the convention through a process of reciprocal evaluation, based on conditions of equality among the states. For more see: www.oas.org.

[32] Also this Convention provides for a follow-up mechanism. Member states annually report on states parties' progress in implementing the convention to the African Union's Advisory Board on Corruption, which regularly reports to the Executive Council. For more see: auanticorruption.org.

Mariaconcetta D'Arienzo – Sara Pugliese*

Providing public services in a multilevel perspective: the public health case**

1. Introduction

In the last decades, both the idea and the management of public services have been the object of a relevant evolution in all the EU Member States, researching the right balance between the necessity to answer to the citizen needs offering them high quality and low cost performances and the exigence to reduce the wastes and over-costs generated by an

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organization scarcely oriented to a managerial perspective and often permeated by political interest.

Due to its strict interconnection with fundamental rights and with issues related to public order and community well-being, the public health is a significant example of the reform process of public services. Particularly in Italy, in the last three decades several normative interventions have been adopted aimed to increase the service effectiveness and efficiency while safeguarding the universal and accessible nature that is the distinctive character of the Italian Public Sanitary Service. After the reform of Title V, Part II of Constitution (Const.), Regions acquired relevant competences and autonomy in the organization of health services, with the effect of a progressive differentiation (and fragmentation) of the organization and management models, only partially reduced by the Central Government interventions aimed to assure service uniformity and coherence on the whole national territory.

Nevertheless, starting from the 2007 economic crises, budget austerity and reduction of sovereign debt caused significant cutting in the public health investments and stimulate the involvement of private operators in the health service providing, with cost growing for citizens and weakening of the controls on quality. The Covid-19 emergency outbreak showed all the limits of the austerity, fragmentation, and the necessity to better define the private operators' role and margin of manoeuvre. At the same time, it put in evidence the necessity to rethink the role of the European Union (EU) in the health sector, until now limited essentially to complete the Member States' action.

During the sanitary emergency, the EU played a relevant role not only providing financial funds, but also assuming a coordination role in the supply of medical devices, medicines, and vaccines. To overcome the competence limits, it resorted to instruments, as joint procurement, able to overpass the differences between the national administrative systems and procedures with the aim to assure effectiveness, equity, accessibility, and continuity in the supply of the goods necessary to face the pandemic.

The present contribution aims to assess, in a multidisciplinary perspective, the concrete effectiveness of service provision multilevel models, taking as a case-study the Italian health service. Analysing the process of decentralization, managerialization and privatization of the

Italian System, firstly the study put in evidence the system strengths and limits and the lacks and critical issues encountered by the Italian Sanitary System in facing the emergency. Secondly, the analysis focuses on the instruments elaborated by EU to overcome differentiation and limits of the national sanitary system, verifying the effectiveness of the joint procurement procedures in assuring availability and accessibility to medical goods.

Part I
The evolution of Italian public health system between managerialization, decentralization, and privatization: what perspectives after the Covid-19 emergency?

I.1. Administrative organization, actors, and competences in the health sector: an introduction

Public health organization aims to satisfy and protect individual rights of the public service users. For a long time, it has been the object of an institutional debate concerning the future of the Italian Sanitary Service (SSN) and the reforms which are necessary to its surviving.

Recently, it acquired new lifeblood from the reform project of the Title V, II Part, Const., aimed to redefine the competence framework between Central Government and Regions in the sector of 'Health protection' and 'Sanitary Governance' delineated by the Constitutional Law n. 3/2001[1] and still today not fully delineated.

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[1] On the framework of the competence relationship among Central Government, Regions, and local authorities in the public health sector after the Constitutional Law 3/2001, see *La riforma del rapporto Regione-istituzioni locali. Gli strumenti di raccordo alla luce dei nuovi indirizzi costituzionali*, eds. A. Piraino-F. Teresi, Soveria Mannelli 2004; *Regioni ed enti locali dopo la riforma del Titolo V della Costituzione*, eds. L. Chieffi-G. Clemente di San Luca, Torino 2004; F. Pizzetti, *L'ordinamento costituzionale italiano tra riforme da attuare e riforme da completare*, Torino 2003; C. Bottari, *La riforma del Titolo V, parte II della Costituzione*, Rimini 2003; *I servizi sanitari regionali tra autonomia e coerenze di sistema*, ed. R. Balduzzi, Milano 2005.

Indeed, there are several problems concerning the concrete application of the Article 32 Const., which protect the right to health as a fundamental individual right and collective interest. These problems come from the overlapping of 'health protection' competence attributed to the Regions by Art. 117, § 3 Const., where the Central Government reserve the establishment of fundamental principles, and the competences attributed to the Central Government by Art. 117, § 2 Const.

As a consequence, the centralization at national level of legislation and execution is source of conflicts in sectors as, for example, the sanitary assistance, the establishment of service essential levels concerning civil and social rights to be assured on the whole national territory. Conflicts arise also in the sectors where the Central Government limits itself to establish rules and essential criteria which Regions have to respect in the organization of Regional Sanitary Systems (SSR) and in the adoption of detailed legislation in order to assure service uniformity on the whole national territory.

For a long time, Central Government and Regions relationship has been rather strained due to the difficulty to conciliate expense saving, health needs, expense autonomy, and responsibilities of each regional authority. Indeed, during the time the constitutional conflicts put in evidence serious lacks, deficiencies, and other essential difficulties in the service organization related to its politicized management, which caused the public model failure and showed the necessity to introduce the opportune corrections in the system reform.

In fact, even if the Law n. 833/1978 establishing the SSN aimed to realize a universal and global service able to assure uniform and free performances to all the people, or at least covered by low prices (ticket), it has been accused to offer low quality services and to be excessively bureaucratized, to generate losses and corruption due to an unwary management and to be submitted to political interests, to the extent that scholarship solicitated a radical change of the service model. So, the Legislative Decrees nn. 502/1992[2] e 517/1993 started the process aimed

[2] These Decrees have been anticipated by several reform efforts. See A. Romano Tassone, *L'azienda sanitaria tra tecnocrazia e democrazia*, in *Sanità pubblica* 7 (1997) 387 ff.; *Unità sanitarie e istituzioni*, ed. F. Merusi, Bologna 1982; N. Aicardi,

to apply a managerial organization of SSN, to allow the participation to accredited private operators and to the market culture, also considering the EU competition discipline. This model has been partially revisited by the Legislative Decree n. 229/1999[3] (and, recently, by the Law Decree n. 158/2012 converted in Law n. 189/2012[4]) which, in order to correct and integrate the precedent Decree, recuperated the traditional framework in the relationship between institutional actors and private operators as well as accelerated the process aimed to apply a managerial organization and to privatize the structures and activities[5].

La sanità, in *Trattato di diritto amministrativo*. *Diritto amministrativo speciale* 1, ed. S. Cassese, Milano 2003, 641 ff.; R. Ferrara, *Organizzazione e principio di aziendalizzazione del servizio sanitario nazionale: spunti problematici*. *La dirigenza sanitaria. Amministrativisti e lavoristi a confronto*, eds. C. Bottari-P. Tullini, Rimini 2004, 53 ff. The 1992/1993 Reform has been elaborated in a moment of economic and political-institutional crisis, that affirmed the idea to realize a radical intervention to subtract the health management to the political powers. Finally, the above-mentioned decrees introduced relevant novelties, as, for example: a) managerialization through transformation of the Local Sanitary Unities (USL) and of the most relevant hospitals in Local Sanitary Undertakings (ASL) or Hospital Undertakings (AO), with public legal status and great autonomy; b) separation of buyers and providers on the basis of market model, with the distinction between ASL and AO, their functions (respectively buying/specialistic service providing), their funding sources (the ASL are funded on the basis of the number of persons living in their territory, while the AO are funded on the basis of the service actually provided); c) regionalization, through the attribution to the Regions of organization power, territorial service funding, and ASL control through the Director appointment.

[3] The correctional intervention (so called 'Bindi reform') responded to the conservative positions of people requiring the respect of SSN fundamental principles and the public intervention in the health sector, abandoned the market exigencies and favoured the public planning and the public-private partnership.

[4] "Disposizioni urgenti per promuovere lo sviluppo del paese mediante un più alto livello di tutela della salute".

[5] Nevertheless, the reform anxiety did not arrive at satisfying results, leaving several problems unsolved. On the correctional intervention results, I. Cavicchi, *Sanità. Un libro bianco per discutere*, Bari 2005; Aicardi (nt. 2); *Il nuovo servizio sanitario nazionale*, ed. F. Roversi Monaco, Rimini 2000, and here, specifically, G. Sanviti, *Artt. 3 e 3 bis*, *d.lgs n. 502/1992 (Commento)*, 108 ff.; G. Cilione, *Diritto sanitario*, Rimini 2019.

The experimentation of (ostensible) new but ineffective solutions continued until today in the attempt to assure a higher level of health protection, challenged by the sanitary austerity and by spending review aimed to the waste reduction and sanitary expense rationalization.

If, from one hand, Regions progressively acquired broad autonomy spaces, from the other hand, they had to address the economic crisis that became sanitary crisis due to the rather strict budgetary burdens, that imposed the service providing revision, structure, staff, fund cutting as well as the ticket cost increasing.

Perduring reform process has been characterized by the proliferation of regulatory interventions aimed to solve the numerous public health problems and to the contrast to the Covid-19 emergency, strongly conditioned by the coordination difficulty between the governing levels and the application of the due cooperation to assure the better service to the community.

I.2. The SSN between Central Government and Regions

Since the '90 onward, in Italy and in the other European countries, the competence transfer from the Central Government to the Regions determined the acknowledgement of organization and management autonomy of health services, as well as the availability (and the use responsibility) of competence, financial and political instruments. Starting from that period, SSN fragmentation in several regional systems generated significant differences between the organization frameworks and services, from the quantitative and qualitative perspective, increasingly evident in all the country.

Undoubtedly, Art. 117, § 3 Const., on the same line of the previous text, confirming the competence shared framework in the sectors of health protection, hygiene, public sanitary system (before sanitary assistance), remarked the strategic position assigned to the Regions, at the end of the process started by the Legislative Decree n. 502/1992, consolidated by the Legislative Decree n. 229/1999 and completed by the above-mentioned Law n. 189/2012.

The disposal must be read jointly with Articles 117, § 2, 120, § 2 e 118, § 1 Const., taking into account the Constitutional Court interpretation, that, since 2003[6], elevated 'sectors' to the rank of 'values' intercepting national and regional competences, suggesting the adoption of a more flexible system, able to interpret the new multilevel governance exigencies in the perspective of the political and institutional supranational and European pressures[7], aiming to protect the right to health and the citizen expectations, whose the State and the sanitary policy and organization are servant[8].

Early, the organizational issue progressively lost importance in the political and institutional debate, concentrated on the problem of share competences ex Art. 117, § 3 Const., generating multilevel conflicts between Central Government and between the Regions.

Attribution conflicts between institutional actors, that is Regions and Central Government, charged to assure the care providing uniformity

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[6] Corte cost. 1 October 2003, n. 303.

[7] Cfr., Corte cost. 26 giugno 2002, n. 282. F. Pizzetti, *Le nuove esigenze di Governance in un sistema policentrico esploso*, in *Le Regioni* 29 (2001) 1153 ff.; M. Luciani, *I diritti costituzionali tra Stato e regioni (a proposito dell'art. 117, comma 2, lett. m, della Costituzione)*, in *Sanità pubblica* 12 (2002) 1025 ff. On the reasons of the exclusive competence attribution to the Central Government, that could be exercised also in the transversal sectors, see C. E. Gallo, *La potestà legislativa regionale concorrente. I diritti fondamentali ed i limiti alla discrezionalità del legislatore davanti alla Corte costituzionale (nota a Corte cost. 26 giugno 2002, n. 282)*, in *Foro amm. CDS* 1 (2002) 2791 ff.; V. Molaschi, *Livelli essenziali delle prestazioni e LEA sanitari: prime indicazioni della giurisprudenza di merito (commento a TAR Lazio, sez. III, 10 luglio 2002, n. 6252)*, in *Foro amm. TAR* 2 (2003) 181 ff.; G. Crepaldi, *Dai LEA ai livelli essenziali delle prestazioni concernenti i diritti civili e sociali*, in *La tutela della salute tra tecnica e potere amministrativo*, Milano 2006, 49 ff. This interpretation, related to the service essential levels, refers to sanitary assistance and could be extended to other sectors as the environment and ecosystem protection, with the following attribution to the Regions of organizational and managerial competences.

[8] In coherence with the constitutional disposals protecting unity in differentiation «la formula "servizio sanitario nazionale" deve essere (necessariamente) decodificata (nel senso che) sono ormai le singole regioni a dover delineare, nel concreto, il contenuto plurale del servizio, e pertanto della rete di prestazioni che, con carattere di effettività ed in regime di sostanziale eguaglianza, debbono essere erogate ai cittadini». See Ferrara (nt. 2) 135.

on the whole national territory and to verify the respect of health expense burden, consists essentially in the establishment of the assistance essential levels (LEA)[9] provided by the Regions and yearly monitored by the Ministry of Health as it concerns the adequacy, the timing, and the compliance with further criteria determining the amount of resources to devolve to the SSN (attracting several public and private interests, coming also from actors that stipulated conventions with the SSN). Due to the regional responsibility in managing the service providing, conflicts between virtuous and less performant Regions also concern the budget sharing[10].

The protests concerned the allocation criteria and the shortfall accumulated by some Regions to the detriment of those with more effective sanitary systems, reclaiming an acceleration of the fiscal federalism process.

Countermeasures adopted by the Government in the 2006 'Health Pact' consisted in the obligation to Regions presenting budget difficulties to sign a repayment plan and, in case of its non-accomplishment, the SSR putting under external administration. In most cases, these countermeasures were unable to lead the Regions outside the crisis establishing the financial equilibrium, with negative reflections on the service provision organization and quality, generating migration towards Regions with more effective and reliable sanitary systems.

In this situation, the maintenance of the health regional framework inspired to the solidarity is at risk because some Regions claim greater autonomy, in the perspective of differentiated regionalism.

Nevertheless, this model generates several perplexities due to the implications in terms of national and regional administration and fundamental right protections and, in particular, in terms of the right to health, making more difficult the multilevel cooperation, and putting in

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[9] It consists in a list of essential sanitary services divided in prevention and public health; territorial assistance and hospital assistance *ex* Decree of the President of the Council of Ministries 2017 defined and updated by the Ministry of the Health.

[10] Cfr. Corte dei conti, sez. contr. riun., *Rapporto sul coordinamento della finanza pubblica*, 2020. G. Urbano, *Equilibrio di bilancio e governance sanitaria*, Bari 2016.

evidence limits and difficulties in the realization of that reforms able to obstacle the objective pursuing[11].

I.3. Sovereignist tendencies and UE involvement in the health decision making process

While in Italy the debate about the reform of Title V, II Part, Const. goes on, mainly after the pandemic outbreak and developments, significant oscillations persist between the exigencies to centralize and decentralize competences, that is between national unity and regional differentiation. More specifically, recently some Regions exploited the opportunity offered by Article 117, § 8 Const. to stipulate agreements between Regions with the end to optimize the results coming from common bodies exercising joint functions for health protection. This solution is not convincing, as there is the actual risk that stipulating agreements could become a concrete possibility only for some Regions that did not stop to demand more autonomy also during the pandemic.

These perplexities increase if the problem is analysed in its supranational dimension, where right to health and its protection acquired great relevance after the sanitary emergency, that put in evidence several lack of the Italian SSN able to have repercussions on the social and sanitary warranties.

Contemporary evolutive and global society is facing well-known and new problems suggesting the adoption of a different approach to the health protection and sanitary governance and the identification of tools able to favour common objective accomplishment, also increasing the investments in the sustainability of health systems, as fundamental values and key elements of economic growth[12].

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[11] See R. Caridà, *Il processo di differenziazione regionale ex art. 116, terzo comma, della Costituzione: la natura delle funzioni e i vincoli costituzionali*, in *Nuove Autonomie* 29 (2020) 159 ff. A. Lucarelli, *Regionalismo differenziato e incostituzionalità diffuse*, in *Dir. pubbl. eur.* Rassegna on-line 2 (2019); L. Vandelli, *Il regionalismo differenziato tra peculiarità territoriali e coesione nazionale*, in *Astrid Rassegna* 11 (2018).

[12] See Corte dei Conti, *La mobilità sanitaria: l'assistenza transfrontaliera*, in www.corteconti.it.

As is well-known, service organization and quality discipline is traditionally reserved to the single Member States legislation, strongly defencing their competences and decisional autonomy in the planning and management of sanitary emergency (ex Art. 168, § 7 TFEU). UE has a share competence in the «common safety concerns in public health matters, for the aspects defined in this Treaty», and a competence to carry out actions to support, coordinate or supplement the actions on the «protection and improvement of human health»[13].

The drastic Member States' position against an EU competence enlargement in the health sector has been strengthened by the competence framework coming from the Lisbon Treaty that has been firmly criticized[14], even if the events following the pandemic outbreak and spread showed the necessity of an EU deeper involvement based on an integrated approach aimed to realize a more efficient cooperation able to assure a coordinated and coherent answer on the EU whole territory. This solution, justified by the need to assure a high protection level of human health, confirms the opportunity to acknowledge the EU broader initiative and intervention spaces, emancipating it of the secondary and residual role to complete, solicitate, and sustain the Member States' action, attributing it new responsibilities[15].

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[13] See Art. 168, § 3 TFEU, Articles 196 (Civil Protection) and 222 (Solidarity Clause). See Decision n. 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision n. 2119/98/EC.

[14] According to M. L. Tufano, *Il ruolo della Commissione nella governance europea: quali prospettive?*, in *DUE* 17 (2012) 133, 145 f., it appears «animat(o) più da un'esigenza di certezza del diritto che da un'ottica di efficacia (...) la quale ha finito col generare una serie di incongruenze». See also Ead., *Atti di organi e organismi dell'Unione europea, discrezionalità tecnica e sindacato giurisdizionale*, in *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino 2018, 993, 1005 ff.

[15] On the basis of a new paradigm founded on the multiform and polysense of "Europeanization". See M. Romaniello, *Beyond the Constitutiona 'Bicameral Blueprint': Europeanization and national identities in Belgium*, in *Democracy and Subsdiarity in the EU. National Parliaments, Regions and Civil Society in the Decision-Making Process*, eds. M. Cartabia-N. Lupo-A. Simoncini, Bologna 2013, 285 ff.; *Europeanization: New Research Agendas, Basingstoke*, eds. P. Graziano-M. Vink,

This awareness sinks its roots in the 2007 economic and social crisis coming from the degeneration of the economic globalization[16], a phenomenon overcoming the national borders to extend itself in a world space, whose collateral effects spread without stopping until now, as well as in the transborder mobility, that, mainly in Italy starting from the 2013, generated problems in the relationship between citizens and their "national contact points"[17] and relationship difficulties within the different networks as it concerns the identification of excellent structures in the different medicine sectors in the EU[18].

Furthermore, the disposal of Art. 168, § 5 TFEU establishes that

> «the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures

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London 2007; C. M. Radaelli, *Whither Europeanization? Concept stretching and substantive change*, in *European Integration online Papers (EIoP)* (2000) 8. On the Commission role and activity during the sanitary emergency to protect the common interest respecting the limits imposed by the Article 168 TFEU, see. A. Renda-R. J. Castro, *Towards stronger EU governance of health threats after the COVID-19 pandemic*, in *European Journal of Risk* 11 (2020) 1 ff.; A. M. Pacces-M. Weimer, *From diversity to coordination: A European approach to Covid 19*, in *Amsterdam Law School Research Paper* 10 (2020).

[16] See S. Battini, *La globalizzazione del diritto pubblico*, in *Riv. trim. dir. pubbl.* 56 (2006) 325 ff.; M. D'Alberti, *La crisi globale e la sorte dei diritti fondamentali*, in *Riv. it. sc. giur.* (2013) 195 ff.

[17] See Corte dei Conti (nt. 12) «A partire dagli anni Novanta, le disposizioni normative, che hanno modificato il SSN nella governance ma, soprattutto, il sistema di finanziamento assieme ai provvedimenti in materia di federalismo fiscale e alle misure intraprese per la razionalizzazione della spesa pubblica e per la riduzione dei disavanzi regionali in sanità, hanno prodotto un forte ridimensionamento dell'investimento statale». Investment reduction created problems to the sanitary budget management and «un significativo sbilanciamento finanziario dell'Italia con posizioni di debito che eccedono quelle di credito».

[18] *Ibid*. Court of Auditors underlined the need «di coordinamento normativo e di armonizzazione della disciplina europea sull'assistenza transfrontaliera contenuta nella direttiva 2011/24/UE e nel Regolamento 2004/833».

> concerning monitoring, early warning of and combating serious cross-border threats to health».

It puts in evidence the strict link between solidarity and right to health that urges to review the roles and relationship based on the principle of loyal cooperation, regardless of the formal competence sharing, overcoming the limits of an autonomist management.

The postponement of the launch of the Conference on the European future, previously fixed on the 9 May 2020, from one hand, pushes away the hypothesis of a Treaty revision ex 48 TEU[19], from the other hand, leads to review the competence framework to bridge the EU structural lacks and to confer a different and more incident action and reaction powers, overcoming Treaty strict limits[20].

Persistent tensions at national and European level could be overcome by attributing to the principles the authority that, especially in emergency situations, assure effectiveness in their application. The issue is not correctly addressed, and it is the result of a methodological mistakes that, concerning the health protection, leverages on the exigency of State unity and inseparability that is usually considered as prevalent on the territorial autonomy but that, on the contrary, should be considered a value to be defended and a fundamental wealth.

Unity and autonomy are not incompatible and contrasting values, but, on the contrary, one presupposes the other, as they are joint and teleological oriented to the citizen health, a value that they pursue together. As a consequence, sovereignty does not own exclusively to the State and has to be exercised in compliance with the fundamental principles and values during the emergency. It implies the necessity to redefine the State and political power role in the process of health

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[19] See V. Delhomme, *Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health*, in *European Journal of Risk Regulation* 11 (2020) 1 ff.

[20] See General Secretariat of the Council, Doc. 6038/20, Council Conclusions on COVID-19, 13 February 2020, point 15, lett. b); Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020.

governance, as it concerns both the organization and planning of sanitary system, and the application of the emergency management plan.

In a "liquid" society, dominated by the uncertainty of the risk seriousness threatening the public health, EU could become a change driver in a phase of heavy depression where the institutional equilibrium is at stake.

In this scenario, where the process of power reallocation and restructuring is realized through the valorisation of the inclusion/participation principle through the cooperation and coordination[21], focusing on the autonomy in a sector where multiple, inter-disciplinary and inter-dependent competences appear useful and must been shared by several institutional levels.

To overpass the sanitary crisis flexible, effective, and adequate solutions are necessary, together with the adaptability to the territorial needs and exigencies, that implies the adoption of a model of institutional governance conceived as

> «rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence»[22].

Solidarity assumed a fundamental weight in the debate at European level on the relationship between Member States, suggesting the adoption of an alternative model inspired to the principle of loyal cooperation and founded on the competence integration at all the institutional levels.

In this perspective, it is hoping that EU, Member States and Regions create a symbiotic community, aimed not only to contrast the pushing and endemic sanitary emergency, but also to protect the fundamental values shared by most of the Member States[23].

To overcome the opposition expressed by several Member States, enhanced cooperation could be a useful instrument if used as a measure

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[21] L. Hooghe-G. Marks, *Types of multi-level governance*, in *European Integration online Papers (EIoP)* (2001) 11; Delhomme (nt. 19) 8 ff.

[22] See COM (2001) 428 final/2, 25.07.2001 p. 8, foothnote 1.

[23] See COM (2020) 724 final, 11.11.2020, *Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats*.

of differentiated integration of last resort[24], exploiting the potentiality of this instrument that

> «offers solutions to common problems with the convenience of using the Union institutional and administrative support» but «... has not eliminated the pursuit of Member States for solutions outside the EU Treaties»[25].

To this aim, the European Parliament recommended that

> «the Commission play an active role in all stages of enhanced cooperation from the proposal through the deliberations to the implementation of enhanced cooperation»,

affirms that

> «the unity of EU institutions should be maintained and that enhanced cooperation should not lead to the creation of parallel institutional arrangements, but could allow specific bodies to be established where appropriate within the EU legal framework and without prejudice to the competences and role of the Union institutions and bodies»[26],

and especially stresses

> «the need for the Member States participating in enhanced cooperation to include those regions that have legislative powers in matters that affect them, with a view to respecting the internal division of powers and reinforcing the social legitimacy of such enhanced cooperation»[27].

The exaltation of the value and contribution of existent and new cooperation instruments could constitute an effective remedy to conciliate unity and differentiation and to eliminate territorial disparities,

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[24] European Parliament, *Report on the implementation of the Treaty provisions concerning enhanced cooperation*, (2018/2112[INI]), 28.1.2019, https://www.europarl.europa.eu/doceo/document/A-8-2019-0038_EN.html.

[25] *Ibid.* point 19.

[26] *Ibid.* point 20.

[27] *Ibid.* point 22.

acting as a stimulus to invest in the universalistic public health, since they aim to the identification of organization models and to the promotion of virtuous processes for the spread of the wellness culture[28].

Cooperation and sharing[29] are the basis of the global perspective leading to a role systematization and to a competence sharing, able to assure a uniform application of fundamental rights and liberties, favouring the elaboration of innovative and more effective models of social development which should be differentiated on the basis of the consistence and effectiveness of multilevel protection[30].

In this perspective, the proposal to establish an EU Health Emergency Preparedness and Response Authority (HERA) should be interpreted[31] as well as the scientific and factual data on the sanitary emergency, suggesting the necessity to invest globally to strengthen the ability to forecast of Governments and international Institutions in the health sector. In this perspective, it could be useful the creation of an EU 'task

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[28] S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Riv. trim. dir. pubbl.* 51 (2001) 601 ff. L. Torchia, *Sistemi di welfare e federalismo*, in *Quad. Cost.* 22 (2002) 274.

[29] L. Vandelli, *Riflessioni a dieci anni dalla riforma del Titolo V: quali prospettive per il regionalismo italiano?*, in *Le Regioni* 39 (2011).

[30] S. Cassese, *Concentrazione e dispersione dei poteri pubblici*, in *Studi in onore di Biscaretti di Ruffia* 1, Milano 1987, 155; R. Cavallo Perin, *L'organizzazione delle pubbliche amministrazioni e l'integrazione europea*, in *L'organizzazione delle pubbliche amministrazioni tra stato nazionale e integrazione europea*, eds. R. Cavallo Perin-A. Police-F. Saitta, Firenze 2016, 3 ff., referring to G. Tosatti, *Sicurezza pubblica, organizzazione centrale e periferica*, (all. B), in *Amministrare* 45 (2015) 91 ff.; R. Cavallo Perin-G. Racca, *Cooperazione amministrativa europea*, in *Dig. disc. pubbl.*, Agg., Torino 2017, 191 ff., underline that cooperation on issues of common interest aims to concretize the law and the good administration, that, overcoming Treaty strict limits, realises a «coesione tra il diritto e la realtà sociale» (so M. Macchia, *La cooperazione amministrativa come «questione di interesse comune»*, in *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona*, eds. M. P. Chiti-A. Natalini, Bologna 2012, 94; B. Nascimbene, *Unione europea tra unità e pluralità degli ordinamenti giuridici*, in *Attualità e necessità del pensiero di Santi Romano*, eds. R. Cavallo Perin-G. Colombini-F. Merusi-A. Police-A. Romano, Napoli 2019, 37.

[31] COM (2020) 724 final, 11.11.2020.

force'[32] that could steer the Member States' sanitary policies through effective methods and instruments.

Part II
Joint administrative procedures as an instrument to overcome the EU competence lacks: the case of "joint procurement procedures" before and after the Covid-19 emergency

II.1. Joint Procurements between Member States' Contracting Authorities within the Public Procurement Directives

As it has been analysed in the Part I, the principal obstacle to the EU acquisition of an effective coordination role in the health sector is lack and confusion of competences. One of the methods the EU resorted to in the effort to strengthen its role in the health sector is inducing the States to share or centralise the procurement procedures that are crucial to assure the service providing but also very onerous in terms of costs, time, and human resource to be involved. Join procurements were implicitly admitted by the Directive 2004/18/EU[33] and were experimented in the exploitation of some EU-funded projects[34].

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[32] P. De Paoli, *Guardare oltre il Covid-19: proposte per il rinnovamento del sistema sanitario nazionale*, in *www.giustiziainsieme.it*. Today, the European Centre on European Centre for Disease Prevention and Control (ECDC) has the function to collect and analyse data and of scientific advice, but not coordination functions.

[33] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, recital n. 9 «In view of the diversity of public works contracts, contracting authorities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly must be determined by qualitative and economic criteria, which may be defined by national law». See also Article 15.

[34] See, for example, the project Healthy Ageing-Public Procurement of Innovations (HAPPI) funded by the EU Commission (DG Enterprise) within the

The Directive 2014/24/EU[35] explicitly disciplines them to promote the aggregation of procurement procedures of goods, services, and works as well as to foster the innovation of procurement procedures, even using ICT tools[36]. More specifically, Recital 71 ff., after having clarified that the provisions concerning central purchasing bodies[37] should in no way prevent the current practices of occasional joint procurement[38], underlines that certain features of joint procurement should be clarified because of the important role that may play, not least in connection with innovative projects[39]. Recital 73 makes specific

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Call "Supporting Public Procurement of Innovative Solutions: Networking and Financing Procurement". The project aimed to establish a strategic cooperation among healthcare purchasing authorities of several Member States.

[35] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[36] S. Ponzio, *Joint Procurement and Innovation in The New Eu Directive and in Some Eu-Funded Projects*, in *Ius Publicum Network Review* 2 (2015) 1 ff.

[37] According to Article 2, § 1, n. 14 «'centralised purchasing activities' means activities conducted on a permanent basis, in one of the following forms: (a) the acquisition of supplies and/or services intended for contracting authorities, (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities». According to Article 37, Member States may provide that contracting authorities may acquire supplies and/or services from a central purchasing body offering the centralised purchasing activity. Member States may also provide that contracting authorities may acquire works, supplies and services by using contracts awarded by a central purchasing body (CPB), by using dynamic purchasing systems operated by a central purchasing body or by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity. Contracting authorities may, without applying the procedures provided for in the Directive, award a public service contract for the provision of centralised purchasing activities to a central purchasing body. In Italy, the CPB is Consip S.p.A., a society owned by Ministry of Economy.

[38] It refers, for example, to less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting authority and under its instructions.

[39] Recital 71 specifies that joint procurement can take many different forms, ranging from coordinated procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting authorities, each conducting a separate procurement procedure, to

reference to joint awarding of public contracts by contracting authorities from different Member States[40]. It underlines that new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting authorities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers market in terms of economies of scale and risk-benefit sharing.However, contracting authorities should not make use of the possibilities of cross-border joint procurement for the purpose of circumventing mandatory public law rules, in conformity with Union law, which are applicable to them in the Member State where they are located. Such rules might include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies. On these premises, while the Article 38

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situations where the contracting authorities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting authority with the management of the procurement procedure on behalf of all contracting authorities. Where several contracting authorities are jointly conducting a procurement procedure, they should be jointly responsible for fulfilling their obligations under this Directive. However, where only parts of the procurement procedure are jointly conducted by the contracting authorities, joint responsibility should apply only to those parts of the procedure that have been carried out together. Each contracting authority should be solely responsible in respect of procedures or parts of procedures it conducts on its own, such as the awarding of a contract, the conclusion of a framework agreement, the operation of a dynamic purchasing system, the reopening of competition under a framework agreement or the determination of which of the economic operators being party to a framework agreement shall perform a given task. C. Bovis, *The New Public Procurement Regime: A Different Perspective on the Integration of Public Markets of the European Union*, in *European Public Law* 12 (2006) 73 ff., 78; Id., *Public Service Partnerships as Instruments of Public Sector Management in the European Union*, in *Colum. J. Eur. L.* 18 (2012) 473 ff., 478 ff. On jointly controlled in-house entities, see Judgement of the Court of Justice of 13 November 2008, C-324/07, *Coditel Brabant SA v. Commune d'Uccle, Région de Bruxelles – Capitale*; 9 June 2009, C-480/06, *Commission c. Germany.* For an analysis of this case-law, C. Bovis*, Future Directions in Public Service Partnership in the EU*, in *EBLR* 24 (2013) 1 ff., 31 ff.; R. Caranta, *The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works*, in *CML Rev*. 52 (2015) 391 ff., 439 ff.

[40] According to the Recital 73 «... Directive 2004/18/EC implicitly allowed for cross-border joint public procurement ...».

disciplines the 'Occasional joint procurement'[41], the Article 39 concerns 'Procurement involving contracting authorities from different Member States'. The Article impedes a Member State to prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies (CPBs) located in another Member State. The provision of centralised purchasing activities by a CPB located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located[42]. According to § 4,

> «several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system»[43].

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[41] According to the Article 38 «Two or more contracting authorities may agree to perform certain specific procurements jointly. Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations pursuant to this Directive. This applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned. Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned, they shall be jointly responsible only for those parts carried out jointly. Each contracting authority shall have sole responsibility for fulfilling its obligations pursuant to this Directive in respect of the parts it conducts in its own name and on its own behalf».

[42] The national provisions of the Member State where the central purchasing body is located shall also apply to the following: (a) the award of a contract under a dynamic purchasing system; (b) the conduct of a reopening of competition under a framework agreement; (c) the determination pursuant to points (a) or (b) of Article 33(4) of which of the economic operators, party to the framework agreement, shall perform a given task.

[43] According to Article 33, a framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement. According to the Article 34, the dynamic purchasing system shall be operated as a completely electronic process and shall be open throughout the period of validity of the purchasing

Through this mechanism, a significant change in the procurement organizational models is pursued, based on the aggregation of the award procedures and managed by CPBs. Aggregation allows to share professional skills (legal, economic, technical, engineering) and favour the smarter use of the innovative contractual instruments, as framework agreements and dynamic purchase systems[44]. Furthermore, contracting authorities from different Member States could establish joint entities entitled to carry out the award procedure[45].

Cross-border joint procurements could represent a useful tool to reduce the competition between CPBs of different Member States, with divergent legal frameworks, in the procurement of essential goods and services. It could strengthen the professional competences of civil servants managing the procurement procedures and contrast phenomena as corruption and conflict of interests[46].

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system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed. Contracting authorities shall follow the rules of the restricted procedure. Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement that determines: (a) the responsibilities of the parties and the relevant applicable national provisions; (b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

[44] Ponzio (nt. 36) 11.

[45] The Directive explicitly refers to European grouping of territorial cooperation (EGTC). As is well-known, EGTC was created in the ambit of the cohesion and territorial cooperation as an instrument aimed to promote and facilitate cooperation manly about territorial authorities. See Regulation (EU) n. 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) n. 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

[46] Ponzio (nt. 36) 28 ff.

As health is a sector of limited cross-border dimension «provided within a particular context that varies widely amongst Member States, due to different cultural traditions»[47], the discipline established by the Directive 2014/24 provides for several exceptions to this sector[48]. As a consequence, excepting the EU funded projects, joint procurement procedures between States' contracting authorities have been scarcely used in the health sector.

Even if in the "Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis"[49], Commission encouraged public buyers to procure jointly, applying the Directive 2014/24 rules, Member States preferred to act unilaterally, in a sort of "sanitary souveranism".

II.2. Joint Procurement directly managed by the European Commission before the Covid-19 emergency

In some specific cases, European Commission manages directly joint procurement on the behalf of Member States. These procedures are specifically been experimented in the health sector after the 2009 A/H1N1 pandemic (swine flu), when the Council of European Union invited the European Commission to elaborate

> «a mechanism for joint procurement of vaccines and antiviral medication which allows Member States, on a voluntary basis, common acquisition of these products or common approaches to contract negotiations with the industry, clearly addressing issues such as liability, availability and price of medicinal products as well as confidentiality»[50].

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[47] Cfr. Recital 114 Directive 2014/24.

[48] Article 74 ff. and Annex XIV related to "Social and other specific services". Caranta (nt. 39) 426 ff.

[49] COM (2020/C 108 I/01), 1.4.2020, 3.

[50] 3032nd Council meeting General Affairs Brussels, Conclusions, 13 September 2010, doc. n. 12655/2010, 28.07.2010 "Lessons to be learned from the A/H1N1 pandemic"; 3053rd Employment, Social Policy Health and Consumer Affairs Council Meeting, Council conclusions *Innovative approaches for chronic diseases in public health*

In this perspective, Regulation n. 966/2012 on the Financial Rules Applicable to the General Budget of the Union, Article 104, established that

> «where a public contract or framework contract is necessary for the implementation of a joint action between an institution and one or more contracting authorities from Member States, the procurement procedure may be carried out jointly by the institution and the contracting authorities, in certain situations, which are to be specified in the delegated acts adopted pursuant to [the] Regulation. Joint procurement may be conducted with European Free Trade Area (EFTA) States[51], and Union candidate countries, if this possibility has been specifically provided for in a bilateral or multilateral treaty».

Decision n. 1082/2013/EU on serious cross-border threats to health, Article 5, establishes that

> «the institutions of the Union and any Member States which so desire may engage in a joint procurement procedure conducted pursuant to the third subparagraph of Article 104(1) of Regulation (EU, Euratom) n. 966/2012 ..., with a view to the advance purchase of medical countermeasures for serious cross-border threats to health»[52].

According to Article 5, § 3

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and healthcare systems, 7 December 2010. See also European Parliament resolution of 8 March 2011 on reducing health inequalities in the EU (2010/2089(INI)).

[51] EFTA States are Island, Norway, Liechtenstein, and Switzerland.

[52] According to the § 2 «The joint procurement procedure referred to in § 1 shall comply with the following conditions: (a) participation in the joint procurement procedure is open to all Member States until the launch of the procedure; (b) the rights and obligations of Member States not participating in the joint procurement are respected, in particular those relating to the protection and improvement of human health; (c) the joint procurement does not affect the internal market, does not constitute discrimination or a restriction of trade or does not cause distortion of competition; (d) the joint procurement does not have any direct financial impact on the budget of Member States not participating in the joint procurement».

> «the joint procurement procedure ... shall be preceded by a Joint Procurement Agreement between the Parties determining the practical arrangements governing that procedure, and the decision-making process with regard to the choice of the procedure, the assessment of the tenders and the award of the contract».

To apply this disposal, in 2014, the Commission adopted the "Decision on approval of the Joint Procurement Agreement to procure medical countermeasures" (JPA)[53]. In the document "Considerations on the legal basis and the legal nature of the Joint Procurement"[54], the Commission clarifies that

> «from the point of view of the Union law, the joint procurement agreement is intended to implement a provision of a legislative act, namely, Article 5 of Decision 1082/2013/EU. As it is concluded between the Commission and the participating states, it is considered by the Commission as a budgetary implementing measure of Decision 1082/2013/EU. Its unusual character is explained by the fact that it is a measure adopted in common by the Commission and the participating states. In line with the provision of Article 168 § 5, the Commission will implement the decisions taken by the Member States and coordinate the joint procurement procedure. The Joint Procurement Agreement is concluded pursuant to the Financial Regulation and Decision 1082/2013/EU, and falls entirely within the subject matter of the Treaties. These acts provide explicitly that they are governed by Union law (including principles common to the Member States), and any disputes are subject to exclusive jurisdiction of the Court of Justice. It is not an international treaty, in the meaning of the Vienna Convention on the Law of Treaties».

Today the JPA is specifically disciplined by the Regulation 2018/1046 on the financial rules applicable to the general budget of the Union

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[53] Commission Decision C(2014) 2258 final of 10.4.2014.

[54] European Commission, *Considerations on the legal basis and the legal nature of the Joint Procurement*, 10 April 2014, 1 ff., https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_legal_nature_en.pdf.

and repealing Regulation n. 966/2012. Article 165, § 2 of Regulation 2018/1046 specifies that

> «Where the share pertaining to or managed by the contracting authority of a Member State in the total estimated value of the contract is equal to or above 50 %, or in other duly justified cases, the Union institution may decide that the procedural rules applicable to the contracting authority of a Member State shall apply to the joint procurement, provided that those rules may be considered as equivalent to those of the Union institution. The Union institution and the contracting authority from a Member State, an EFTA State or a Union candidate country concerned by the joint procurement shall agree in particular upon the detailed practical arrangements for the evaluation of the requests for participation or of the tenders, the award of the contract, the law applicable to the contract and the competent court for hearing disputes».

As a consequence, the JPA could be considered as a 'partnership agreement', a 'contract' aimed to establish the practical arrangements of joint procedures among Commission and participating Member States. In the relationship between Member States the JPA remembers – in a 'quasi federal' perspective – the 'framework agreements' stipulated in Italy between States and Regions and between Regions[55].

As it concerns the JPA discipline, according to the Article 1, § 5 JPA is without prejudice to the right of the Contracting Parties to carry out procurement procedures outside this Agreement, even where such procedures involve the procurement of medical countermeasures which form the subject of a joint procurement procedure or a framework contract or involve economic operators or contractors who are tendering for, or have signed, a framework contract pursuant to a joint procurement procedure under this Agreement.

As it concerns the operative issues, the Article 13 establishes that a procurement procedure shall be started if at least five Contracting Parties, including the Commission, to assure to smaller Member States the availability to launch a procedure even if the greater States are not interested in purchasing medicines and vaccines.

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[55] See *supra* Part I § 3.

JPA management is attributed to the 'Joint Procurement Agreement Steering Committee' (JPASC)[56], composed of one representative of the Commission and one representative of each Contracting Parity. Management of single procedures and the elaboration of technical specifications and general allocation criteria are attributed to the 'Specific Procurement Procedure Steering Committees' (SPPSC o 'Steering Committees')[57], composed of one representative of Member States participating to the procedure[58].

The Commission is charged with the conduct of the joint procurement procedures, including the award of the framework or direct contracts, and the management of the framework contracts, including the signature of any amendment of a non-substantial nature[59] as well as with the adoption of the award decision, after approval by the Specific Procurement Procedure Steering Committee[60]. After the award decision is adopted, the participating Contracting Parties shall sign the contract[61], previously approved by the SPPSC. Framework contracts establish the supply general conditions, while specific contracts, concluded between individual participating Contracting Parties and the JPA contractors that are parties to these framework contracts[62], establish the details[63]. According to Article 17,

> «the frequency with which available amounts of medical countermeasures are allocated between participating Contracting Parties ('the generally applicable allocation criteria') shall be submitted to the SPPSC for

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56 Art. 5, § 1.

57 Art. 5, § 2.

58 Id., *Explanatory Note on The Joint Procurement Mechanism*, December 2015, 1 ff., https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_explanatory_en.pdf; see also *Flowchart on the implementation of the Joint Procurement Agreement by the different Steering Committees*, https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_flowchart_implementation_en.pdf.

59 Art. 4, § 2, lett. a).

60 Art. 21, § 1.

61 Art. 22.

62 Art. 27 ff.

63 Art. 4, § 2.

> approval[64]. The Contracting Parties shall receive the total quantity of the medical countermeasures that they have reserved or ordered, but the rate of delivery shall depend on the production capacity of the contractor and on the generally applicable allocation criteria ».

As it concerns the dispute settlement between Contracting Parties, JPASC shall be responsible for steering the process necessary to address any lack of compliance with JPA by a Contracting Party and the amicable settlement of disagreements between two or more Contracting Parties. According to Article 40, in the event of a failure to comply by any Contracting Party with JPA, the Contracting Parties shall use their best endeavours to promptly and jointly determine together in the JPASC the means to redress the situation as soon as possible. In the event of a disagreement between two or more Contracting Parties with regard to the interpretation or application of this Agreement, those Contracting Parties shall use their best endeavours to settle the matter directly. Should this not be possible, any of the Contracting Parties to the disagreement may refer the matter to the JPASC, where the Contracting Parties shall use their best endeavours to resolve the matter through mediation. If these processes do not remedy the lack of compliance or settle the disagreement, the matter may be referred to the Court of Justice. According to Article 41, any failure to comply with this Agreement, or disagreement with regard to the interpretation or application of this Agreement between the Contracting Parties, that remains unresolved within the JPASC, may be brought before the Court of Justice:

(a) by the Contracting Parties concerned, pursuant to Article 272 of the Treaty, where the unresolved matter is outstanding between the Commission and one or more Member States;

(b) by any Contracting Parties concerned that are Member States of the Union, against any other Contracting Parties concerned that are Member States of the Union, pursuant to Article 273 of the Treaty, where the unresolved matter is outstanding between two or more Member States.

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[64] Art. 7 establishes Steering Committees' procedures and voting rules.

The Court of Justice shall have exclusive jurisdiction to decide upon any failure to comply with this Agreement or disagreement with regard to the interpretation or application of JPA. As it concerns the dispute between Contracting Parties and third parties, Article 42, § 2

> «The law applicable to framework or direct contracts pursuant to this Agreement and the competent court for the hearing of disputes under these contracts shall be determined in these contracts».

If the applicable law should be the domestic law of a Contracting Party, every remedy offered by the domestic system could be resorted to. Nevertheless, according to Article 4, § 3-4

> «the Contracting Parties authorise the Commission to act as their sole representative in instituting or defending any legal proceedings brought by a contractor under a framework contract, except for any legal proceedings brought against a Contracting Party under a specific contract based on a framework contract ... The Contracting Parties hereby authorise the Commission to act as their sole representative in bringing any legal proceedings against a contractor under a framework contract, except for any legal proceedings under a specific contract based on a framework contract».

II.3. Joint procurement in Covid-19 emergency

During the emergency Covid-19, JPA is showing all its potentialities as well as its limits. Since February 2020, on the JPA basis the Commission published six tenders and framework contracts have already been signed for individual protection devices; ventilators; laboratory equipment; medicines used in intensive care units, and remdesivir, the only medicine with a conditional marketing authorisation in the EU for the treatment of Covid-19 patients needing oxygen supply. A tender has been opened for rapid antigen tests. In April 2020, the European Economic Area

(EEA) States[65] and six potential candidate countries[66] signed the JPA, bringing the total number of the signatories to 37.

On the basis of the "EU vaccine strategy"[67], the Commission has also stipulated the Advanced Purchase Agreements (APA) with individual vaccine producers on behalf of Member States. These agreements are partially different from those signed until now within the JPA because, in return for the right to buy a specified number of vaccine doses in a given timeframe and at a given price, the Commission has financed, through the Emergency Support Instrument[68], a part of the upfront costs faced by vaccines producers. This funding has been considered as a down-payment on the vaccines that have been purchased by Member States. This approach decreased risks for companies while speeding up and increasing manufacturing. While the JPA attributes to the Commission a role of mere coordination, within the APA framework the Commission invests EU funds in the procedure, even if these funds are used not to purchase vaccine doses but to support and accelerate their invention and

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[65] The countries that signed the EEA agreement with EC in 1994 are Island, Norway, Liechtenstein.

[66] Liechtenstein, Albania, Montenegro, North Macedonia, Serbia and Bosnia and Herzegovina, Kosovo.

[67] COM (2020) 245 final, 17.06.2020, *EU Strategy for COVID-19 vaccines*.

[68] See Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union and Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the Covid-19 outbreak, Article 4, § 5 «Emergency support under this Regulation may be granted in any of the following forms: (a) joint procurement with Member States as referred to in Article 165(2) of Regulation (EU, Euratom) 2018/1046 whereby Member States may acquire, rent or lease fully the capacities jointly procured; (b) procurement by the Commission on behalf of Member States based on an agreement between the Commission and Member States; (c) procurement by the Commission, as wholesaler, by buying, stocking and reselling or donating supplies and services, including rentals, to Member States or partner organisations selected by the Commission. In the event of a procurement procedure as referred to in point (b) of § 5, the ensuing contracts shall be concluded by either of the following: (a) the Commission, whereby the services or goods are to be rendered or delivered to Member States or to partner organisations selected by the Commission; (b) the participant Member States whereby they are to directly acquire, rent or lease the capacities procured for them by the Commission».

experimentation. On 18 June 2020, Commission adopted the Decision approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States and related procedures[69]. According to the Decision, the Participating Member States, and not the Commission, shall acquire vaccine doses from the manufacturers on the basis of the APAs unless otherwise agreed[70].All relevant vaccination policies shall therefore remain matters for the Participating Member States. In case a Participating Member State does not agree with the conclusion of an APA containing an obligation to acquire vaccine doses or its terms, it has the right to opt out by explicit notification to the Commission[71]. Once concluded, the terms of the APA shall be legally binding on the Participating Member States, except for those who have exercised their right to opt out[72]. By signing the Agreement, the Participating Member States confirm their participation in the procedure and agree not to launch their own procedures for advance purchase of that vaccine with the same manufacturers (exclusivity clause)[73].

To date, three safe and effective vaccines against Covid-19 have been authorised for use in the EU following positive scientific recommendations by the European Medicines Agency: BioNTech-Pfizer (21 December 2020), Moderna (6 January 2021), and Astrezeneca (29 January 2021)[74]. Three other contracts have been concluded that allow the purchase of a vaccine once proven safe and effective: Sanofi-GSK, Johnson & Johnson, CureVac[75]. Exploratory talks have been concluded with Novavax and Valneva.

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69 C (2020) 4192 final, 18.6.2020.

70 Decision (2020) 4192 Annex, Art. 2.

71 Art. 4.

72 Art. 5.

73 Art. 7.

74 To assure amount and timing transparency, on 29 January 2021 Commission published the text of the APA signed with Astrazeneca on 27 August 2020. See file:///C:/Users/Sara/Downloads/APA_-_AstraZeneca.pdf.pdf.

75 APA with Curevac, signed on 17 November 2020, is available on line at the link: https://ec.europa.eu/info/sites/info/files/curevac_-_redacted_advance_purchase_agreement_0.pdf.

Through instruments as joint procurements and APA, the Commission tries to assume the role of 'central purchasing bodies', offering to the States its expertise and competences to strengthen their contractual power against the suppliers, to assure transparency, procedure speediness and effectiveness and to avoid the competition in the supplying between Member States and their local entities[76].

Considering that the sanitary emergency is generating recurrent production stoppage, restrictions in people and good movements, and, consequently, shorter and more diversified supply chains, JPA and APAs could represent fundamental instruments aimed to assure solidarity and sureness, continuity and fair distribution of medical goods between States. Since the JPA also involves ESA and potential candidate countries, it could represent a useful cooperation tool besides the EU borders, in a macro-regional dimension.

Nevertheless, the application of joint procurement during the pandemic has shown several limits. Firstly, the JPA does not prescribe any Commission engagement in granting a financial support to the States participating to the joint procedure. This lack, able to significantly limit the relevance of Commission coordination role[77], has been partially overcome with the APAs as it concerns vaccine procurement procedures, but remains as it concerns the procedures aimed to purchase the other medical goods. Secondly, the participating State autonomy in stipulating, although in compliance with the framework contract, the specific contracts could determine differentiations in the clauses and conditions.

The problems generated by several vaccine producers delay in vaccine production and distribution, which caused serious slowdown in the EU countries' immunization schedule, urged the necessity to standardize the

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[76] G. Sdanganelli, *Il modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica*, in *DPCE on line* 4 (2020) 2323 ff., 2341; E. McEvoy-D. Ferri, *The Role of Joint Procurement (JPA) during the COVID-19 Pandemic: Assessing its Usefulness and Discussing its Potential to Support a European Health Union*, in *European Journal of Risk Regulation* 11 (2020) 1 ff., 5 ff.

[77] N. Azzopardi-Muscat e al., *The European Union Joint Procurement Agreement for cross-border health threats: what is the potential for this new mechanism of health system collaboration?*, in *Health Economics, Policy and Law* 12 (2017) 43 ff., 51 ff.

contract models applied by Member States to harmonize contractual commitments related to supply quantities, timing, and judicial remedies allowing both the Member States and the contractors to react to breaches of contracts.

In the "Proposal for a Regulation of the European Parliament and of the Council on Serious Cross-Border Threats to Health and Repealing Decision n. 1082/2013/EU"[78] joint procurements are object of a deep reform inspired by the APA experience.

Firstly, the Commission and any Member States may engage in a joint procurement procedure conducted pursuant to Article 165(2) of Regulation 2018/1046 of the European Parliament and of the Council «with a view to the advance purchase of medical countermeasures for serious cross-border threats to health». So, advance purchase and risk sharing between Commission, Member States and producers become the rule.

Secondly, the exclusivity clause is specifically expressed and generalized[79]. Furthermore, the joint procurement procedure shall allow participation to all Members States, EFTA States and Union candidate countries[80]. If approved, these reforms would confirm the Commission leadership in medical good supplying at a macro-regional dimension, with relevant effects in terms of strengthening of contractual power against medical good manufactures, procedure effectiveness and speediness, contrast to resource wastes, corruptions, and conflicts of interests.

2. Conclusions

In a globalized world, conceiving the issues concerning the public service providing as a 'domestic jurisdiction' and interpreting them in

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[78] COM (2020) 727 final, 11.11.2020, Art. 12.

[79] See Art. 12, § 2, lett. c) «Member States, EFTA States and Union candidate countries participating in a joint procurement shall procure the medical countermeasure in question through that procedure and not through other channels, and shall not run parallel negotiation processes for that product».

[80] See Art. 12, § 2, lett. a).

the classical framework of the competence conflicts between Central Government and territorial authorities appears highly reductive.

The Covid-19 emergency underlined the necessity to frame in a multilevel perspective the allocation of responsibilities as it concerns the decision making, the health service organization and management, and the procedures too. If national level has to assure the uniformity of fundamental right protection, and Regions could better respond to the specific territorial exigencies, giving the EU a relevant coordination role in combatting cross-border health scourges and threats to health could assure more effective and rapid reaction, balance of contrasting Member State interests, greater contractual power with medical good providers, application of a solidarity spirit in the sharing and allocation of resources necessary to overcome the emergency. In this perspective, joint procurement procedures are only an example of procedures that could be better realized in common between Member States or coordinated (and funded) at EU level.

However, increasing EU competences could fail the expected results if it is not matched with a deep reform of the SSN/SSR system aimed to establish not only the limits of the Central Government and Region competences, but also the minimum protection standards of the right to health, that has to be assured on the whole national territory and that have to be considered undeniable also in the event of sanitary emergencies.

Next generation programme, REACT EU and EU4 Health programme could represent a great opportunity to experiment methods of 'good multilevel governance' in the public health, offering both to the Central Government and to the Regions significant financial resources earmarked to pre-defined expense typologies.

It is hoping that Italian Central Government and Regions will be able to exploit adequately this opportunity, becoming a model also for EU candidates and potential candidates.

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Performance Measurement and Accountability: the Campania Regional Administration Case Study

1. Measurement of the performance of Public Administrations

Since the 1990s Italian legislators have issued several reforms, some of which were aimed at managing the performance measurement of Public Administrations (PA). These were mainly directed at answering the growing demand for transparency and accountability from stakeholders and the related complexity of quantifying public value, which immediately attracted the interest of scholars.

"Measurement" is only the first step of the performance cycle, but it represents an indispensable prerequisite for the following "evaluation" and "management" steps. According to Marcon[1], performance measurement leads to a forced learning process that increases the knowledge of the subjects involved. In particular, measurement allows to also verify the organizations' progress towards the planned objectives over time and to identify possible trade-offs; it also facilitates the comparison of performance within organizations and between companies with reference to estabilished standards[2].

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[1] G. Marcon, *Misurazione e valutazione della performance delle amministrazioni pubbliche*, Treviso-Venezia 2012.

[2] *Ibid.*

Italy is a country traditionally characterized by a system of "derivative finance", whereby the resources necessary to finance public activity are collected mainly at central level and then transferred to regional and local administrations. Lacking an adequate system of accountability and control of activities implemented by local public administrations, there has been an uncontrolled growth of public expenditure and, consequently, of public debt.

The entry into the European Union and the consequent reformulation of parameters and constraints on the growth of the public debt, determined for Italy the need to revise the principles that inspired public administration until that moment.

Therefore, a long season of reforms began which, starting from the 1990s, alternated in an almost schizophrenic way pushes towards the privatization or outsourcing of public services, with attempts at centralization and/or decentralization of powers and responsibilities, up to the introduction of standardized systems for measuring and evaluating results. The reforms of the last thirty years have made the issues of efficiency, effectiveness and economy a constant in the socio-political debate on administrative action, relying on performance measurement and accountability. A reform that is as factual as it is conceptual that has been implemented, driven by the growing need for accountability of the administrative action of the PA[3] (Public Administration), or of responsibility and responsiveness towards stakeholders, in an attempt to restore a relationship between citizens and the PA based on an inefficient delegation mechanism.

Since the 1980s, with the spreading of "New Public Management" (NPM) principles, performance measurement has become the central theme of political debate and the subject of constant study by the academy, since it is unanimously considered to be a solution to the inefficiencies of the PA. The NPM represents a movement that has its origins in neo-institutionalist theories and in the theoretical strands of public choice[4],

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[3] G. Fattore, *Trasparenza e valutabilità dell'amministrazione pubblica e governo sulla base dei risultati*, in *Management delle istituzioni pubbliche,* eds. E. Borgonovi-G. Fattore-F. Longo, Milano 2005.

[4] W. A. Niskanen, *Bureaucracy and Representative Government*, Chicago 1971.

transaction cost theory[5], agency theory[6], and the principles of the public sector managerialism of Merkle[7], Hume[8] and Pollitt[9]. The principles advanced by the NPM mainly concern greater attention to management professionalism, the definition of specific standards and measurement systems, a great focus on controls and mechanisms on the adoption of private sector's typical tools, such as, for example, the mechanisms of rewards and incentives for staff.

The reform processes that have drawn inspiration from those strands have had different paths and timing of implementation in the different countries. In Italy the first reform measures were introduced in 1990s and aimed at introducing managerial logics, tools and models (Law n. 142/1990, Law n. 241/1990, Legislative Decree n. 28/1993). These reforms, however, have in many cases failed to produce the desired effects, inducing the Legislator to intervene with further norms, characterized in some cases by contradictory guidelines. As repeatedly highlighted by the literature[10], the implementation of innovative tools within PA should take into consideration the existing conditions and peculiarities of the single administrations. Multiple empirical evidences revealed the inability of many innovative interventions to produce the desired changes, mostly because of the lack of knowledge about the internal and external characteristics and dynamics of public administrations.

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[5] O. E. Williamson, *Transaction-cost economics: the governance of contractual relations*, in *The Journal of Law and Economics* 22.2 (1979) 233 ff.

[6] M. C. Jensen-W. H. Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, in *Journal of Financial Economics* 3.4 (1976) 305 ff.

[7] J. Merkle, *Management and ideology: the legacy of international scientific management movement*, Berkley 1980.

[8] L. J. Hume, *Bentham and bureaucracy*, Cambridge 1981.

[9] C. Pollitt, *Managerialism and the Public Services: The Anglo American Experience*, Oxford 1990.

[10] E. Borgonovi, *Le nuove frontiere dei servizi pubblici tra soddisfazione dell'utente e tutela dell'interesse pubblico*, in *Sinergie* 41.1 (1996) 3 ff.; W. J. Kickert, *Public management of hybrid organizations: Governance of quasi-autonomous executive agencies*, in *International Public Management Journal* 4.2 (2001) 135 ff.; Id., *Principi e sistemi aziendali per le amministrazioni pubbliche*, Milano 2005[5]; C. Pollitt-G. Bouckaert, *Public management reform: A comparative analysis-into the age of austerity*, Oxford, 2017.

The absence of a systematic vision of the administrative realities within which innovations are introduced and the mere translation of principles and mechanisms typical of the private sector to the public sector have led many innovative interventions toward failure, stimulating scholars to the research and development of new theoretical constructs, aimed at remedying those failures and filling the gaps that the NPM had shown: from Public Governance to New Public Service, to Public Value[11].

Beyond the theoretical assertions of improving the effectiveness and efficiency of public sector, it emerges the need to redesign the public governance and to redefine the principles through which public management should operate, including equity, consensus, collaboration, and participation between all the actors involved. These new principles have merged into a new theoretical model, defined as Public Governance, characterized by new logics and tools for governing the system of relations between the actors involved; those include control of the outcome (rather than input or output), accountability, transparency, and stakeholders' participation[12]. In this new theoretical trend, public administrations

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[11] M. H. Moore, *Creating public value: Strategic management in government*, Harvard 1995; D. Kettl, *The Global Revolution in Public Management: Driving Themes, Missing Links*, in *Journal of Policy Analysis and Management* 16.3 (1997) 446 ff.; J. V. Denhardt-R. B. Denhardt, *The new public service: Serving rather than steering*, in *Public Administration Review* 60.6 (2000) 549 ff.; P. Dunleavy-H. Margetts-S. Barstow-J. Tinkler, *New Public Management is Dead Long Live Digital Era Governance*, in *Journal of Public Administration Research and Theory* 16.1 (2005); G. Stoker, *Public Value Management: A New Narrative for Networked Governance?*, in *American Review of Public Administration* 36.1 (2006) 41 ff.; B. Bozeman, *Public Values and Public Interest. Counterbalacing Economic Individualism*, Washington DC 2007; J. Alford-O. Hughes, *Public value pragmatism as the next phase of public management*, in *The American Review of Public Administration* 38.2 (2008) 130 ff.; S. P. Osborne, *The new public governance: Emerging perspectives on the theory and practice of public governance*, London 2010; J. M. Bryson-B. C. Crosby-L. Bloomberg, *Public value governance: Moving beyond traditional public administration and the new public management*, in *Public Administration Review* 74.4 (2014) 445 ff.; T. Fisher, *Public value and the integrative mind: How multiple sectors can collaborate in city building*, in *Public Administration Review* 74.4 (2014) 457 ff.

[12] M. Meneguzzo, *Ripensare la modernizzazione amministrativa e il New Public Management. L'esperienza italiana: innovazione dal basso e sviluppo della governance locale*, in *Azienda pubblica* 10.6 (1997) 587 ff.

are no longer considered as closed organizations governed by rules and procedures, but are seen as open systems, that interact directly with the environment to satisfy the needs of the administered communities, substituting the top-down with the bottom-up logic. The idea is to favor the consultation and consensus of all the actors involved in and to evolve the control procedure from output analysis to outcome analysis. This new approach focuses on four fundamental points: the creation of public value for community; a renewed role for the government, seen no longer as a mere executor, but a guarantor of public values; the management of PA for community interests, and the active participation and involvement of citizens in strategic decision making processes[13]. The centrality of public value creation is one of the key elements around which studies have been concentrated since the end of the 1990s[14]. These brought attention to the theme of measuring and enhancing public performance.

Regardless of the differences that the models proposed by the literature present, an important common trait can be seen in the unanimous confirmation of the multidimensionality of the public value referring to the the several interests that the public administration is called upon to satisfy, which should find a balance in the strategic choices of PA, determining "complementary" and "non-antithetical" positions.

2. The legislation on performance measurement and evaluation

The need to measure the value created by public administration, in order to manage, improve and report it has long been felt by scholars of Public Management, as well as by our legislator, who initiated a first process in this sense in 1999 with the Legislative Decree n. 289, aimed at introducing a series of tools addressed to measure results, such as management control, management evaluation, and strategic

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[13] Denhardt-Denhardt (nt. 11); T. B. Jørgensen-B. Bozeman, *Public values: An inventory*, in *Administration & Society* 39.3 (2001); Stoker (nt. 11); Osborne (nt. 11); Bryson-Crosby-Bloomberg (nt. 11) 354 ff.

[14] Moore (nt. 11); Bozeman (nt. 11); X. S. Briggs, *Democracy as Problem Solving: Civic Capacity in Communities across the Globe*, Cambridge 2008; A. Ziruolo, *Valore pubblico e società partecipate*, Milano-Roma 2016.

control. However, it will be with Delegation Law n. 15 of 4th March 2009, later merged into Legislative Decree n. 150/2009, better known as the "Brunetta Reform", which, to the already known principles of efficiency and effectiveness of administrative action, added those of labor productivity and transparency and accountability, which are the basis of the current performance measurement systems that are the object of this work. The main issues afforded by this reforms are:

- the entrusting of management evaluation function to the OIV, the Independent Evaluation Organism, which is responsible for evaluating the work of public managers and supervising the proper functioning of the performance system, from which the distribution of incentives derives;
- the clear definition of the concept of performance, as "the contribution that a subject (organization, organizational unit, group of individuals, a single individual) gives through his actions to the achievement of the PA's aims and objectives, as well as to the satisfaction of the needs for which the organization has been established";
- the detailed categorization of the performance cycle in three phases: a preventive phase, in which objectives and resources are defined, a concomitant phase, where ongoing actions are monitored, and a successive phase, where the individual and organization performance results are reported and communicated to stakeholders.

The process of implementing the provisions of the Brunetta reform was a long one and not free from delays. Many administrations were not be able to adapt their organization in time to the contents of the regulatory provisions. This also happened because the Law was modified by new emandaments, which modified and/or integrated Legislative Decree n. 150/2009, such as those introduced by the Delegation Law n. 124/2015, also known as the "Madia Reform" and its implementing decrees (above all the Legislative Decree n. 74/2017). This latest reform, establishing that the implementation of the performance cycle was a necessary condition for the recognition of economic rewards, progressions, and the conferral of assignments, has in fact obliged administrations to rapidly adopt the tools that have long been foreseen and ignored. In addition,

this reform has intervened by establishing that the annual determination of objectives and selection of indicators to use have to be based on the results achieved in the previous year, in a perspective of coordination between the performance cycle and the administration's economic-financial planning.

The performance monitoring activity, which consists in verifying the progress of the activity in order to detect any critical issues and deviations from the planned objectives, becomes an external control function assigned to OIV. The innovative scope of this transition from an internal to external control, aimed at a consistently improving of the effectiveness of the control activities, is often reduced in practice due to the lack of tools and mechanisms able to provide objective information, with the consequent use of self-referential mechanisms by the subinterested parties, potentially lacking in an adequate evaluation technique.

Finally, a further relevant aspect refers to the obligation for Public Administrations to establish forms of citizens participation in the performance measurement process. Citizen engagement has been considered a relevant issue in public management reforms since 1990s. However the introduction of participatory measures finds a first concrete configuration with Legislative Decrees 150/2009 (Art. 7, c. 2, let. C) and 74/2017, which outline the areas of involvement, such as customer satisfaction surveys, the judgment on the quality of the services provided, and the development of participatory and collaborative mechanisms. In this way, the emphasis is placed on the fundamental role of the PA, i.e. satisfaction of the interest of its primary stakeholders, the reference community, that represents the recipients of its activities and, at the same time, the primary source of PA's financial resources.

3. Campania Regional Council case study

In 2017 the Campania Regional Council adopted the Performance Measurement and Evaluation System for the first time. The redefinition of the existing organizational and dimensional structure started the year before. The operational structure of the organization was redefined with Regulation n. 12/2001, with the aim of favoring the streamlining and

speeding up of procedures, as well as the enhancement of skills through the creation of Departments (five specifically) divided into General Management Units, in turn divided into Managerial Operating Units.

In 2016 the regional government decided to abolish the Departments, redefining a more complex organic structure, which has 240 structures divided into:

– General Management Units;
– Special Offices;
– Mission structures;
– Staff Offices at the General Management and the Special Offices;
– Staff offices with particular autonomy;
– Managerial Operational Units;
– Secretariat of the Board;
– Audit Authority.

In fact, this new configuration has considerably reduced the number of structural units, but still presents factors of not negligible complexity, such as the flattening of decision-making levels, the tightening of coordination of the entire decision-making process, and the impossibility of a specific identification of any responsibility center.

The Performance Measurement and Evaluation System (SMiVaP) has been adopted by the Campania Region for the first time with D.G.R. n. 145 of 14 March 2017, while the Regional Council adopted the first 2017/2019 Performance Plan with D.G.R. n. 286 of 23/05/2017.

The Performance Plan contains:

– the strategic objectives and operational guidelines;
– the indicators for measuring and evaluating organizational and individual performance;
– the resources needed for achieving the objectives;
– the monitoring activities executed during the year;
– the reporting system of the results obtained to the competent political-administrative bodies;
– the reward systems for employees and managers.

The performance plan is the essential tool that assigns the objectives outlined by the political-administrative body to public managers, assigning them resources and responsibilities. This is a three-year planning document, divided into two sections: the first one outlines the economic

and political context in which the institution operates; the second section contains the annual and triennial strategic and operational objectives. In order to be consistent and coherent with the financial budget and economic planning, the elaboration of Performance Plan must converge with the Regional Economic and Financial Document (DEFR), and also with the contents of the Three-year Corruption Prevention Plan (PTPCT). In fact, the SMiVaP, in Art. 2, refers explicitly to the reconciliation of the measures and obligations regarding transparency and anti-corruption in the process of defining strategic, operational, and individual objectives.

In order to monitor and assess organizational performance, the Campania Regional Council has identified a system of indicators aimed at measuring the degree of achievement of both strategic and operational objectives. Five different types of indicators have been identified:

- ON/OFF, to indicate whether the target has been reached/ carried out or not;
- Volume indicators, which refer to measurable increasing or decreasing quantities of resources;
- Value indicators, which refer to target measured in euros;
- Time indicators, which are measured in days, useful for measuring the degree of timeliness of administrative action;
- Percentages of achievement, which indicate the progresses achieved for each objective.

In order to measure individual performance, in addition to the organizational performance of the unit, the skills, professional and organizational behavior of each employee are also considered. In addition, in the process of evaluating managers an important role is played also by their ability of assessing the performance of employees assigned to their units, assigning them differentiated scores.

The measurement process is divided into three phases: assignment of objectives, final assessment, and final evaluation.

The results obtained converge in the Performance Report, that represents the final phase of the performance cycle. The report describes the organizational and individual results achieved by any single unit and employees, compared to those planned and is the main tool through which the PAs answer to the accountability needs manifested by their

stakeholders. This document is subject to the approval of the political-administrative bodies and to the validation by the OIV. The data exposed summarizes the main results achieved by the PA, with reference to the regional policies and strategic objecties indicated in the DEFR, and from its reading it is possible to get some useful information on the administrative efficiency, the level of transparency and the anti-corruption policies.

4. Methodology

The empirical research was aimed at outlining the changes induced by the introduction of SMiVaP and the transparency obligations on the performance and accountability of the Campania Regional Government. The empirical research was developed as part of the project "Public Administration: simplifying decision-making processes, improving performance", funded by POR CAMPANIA FSE 2014-2020. The analysis had several key moments, each characterized by the use of specific techniques and tools, including a deductive phase, the planning of the data collection process, the processing of the data, and the interpretation of research results. The deductive phase aimed to outline the conceptual framework of reference. In particular, it focused on the review of national and international literature (monographs, articles, conference material) published on the public performance measurement, and a recognition of Italian norms on this issue. Moreover, all the documents produced by the Campania Regional Government for the measurement and evaluation of its performances, as well as the relevant deliberations and programming acts were analysed. As second step, a multiple-choice questionnaire was prepared. It included two sections: the first, consisting of nine questions, addressed to all the managers in the administration, aimed at establishing the degree of involvement of employees in the process of defining individual and organizational objectives, and the degree of involvement of external stakeholders; the second, consisting of 13 questions, addressed to the manager of the Financial Resources Department, aimed at understanding the degree of connection existing between financial planning and the SMiVaP, and the degree of

participation and involvement of citizens in drafting the budget. After data entry and processing, telephone interviews were conducted with a number of key players, including the Director of Financial Resources, the Officials and Managers responsible for coordinating activities relating to the drafting of the Performance Plan, and the Manager of the Technical Structure that supports the OIV. The interpretation phase of the data and information collected in these ways was carried out taking into account the exploratory nature of the empirical study conducted; in fact, the verification or refutation of the hypotheses underlying the research must be considered valid for the sample investigated. Therefore, the considerations that emerged from the survey must be read in the context of the chosen sample size and in terms of the "perception" and exploration of the phenomenon under study. After studying the literature and regulations, the model of analysis in which the key variables for governing performance and public accountability are highlighted is presented below. This study contributes to the scientific debate on public performance measurement, accountability and transparency, highlighting the strengths and weaknesses of the proposed model of analysis.

Table 1 provides a summary of the variables that governments should govern, as well as a list of the operational tools they should equip themselves with for an effective governance of performance and public accountability. These variables were examined in the case study of the Campania Region in order to identify the elements of weakness that do not allow for an optimal action of performance measurement and assessment.

Table 1 – Variables and operational tools for performance management in PA

Phases	Key Variables	Actors involved	Operational Tools
Plan definition			
Annual strategic objectives (OBSA)	Citizen participation for identification of needs	External Stakeholder	Context analysis Needs surveys Participatory tools
	Consistency between DEF, Performance Plan (PP) and economic and financial planning documents	Governing bodies Financial Resources Manager Performance Manager SPL Managers	Information tools that support the performance cycle and enable integration between the performance cycle and the budget
Annual Operational Objectives (OBOA)	Consistency with OBSA Process sharing Clarity, comprehensibility, measurability	SPL Managers SSL Managers	Meetings to share objectives and ways of achieving them
Target	Target setting consistent with objectives and time frame	SPL Managers SSL Managers	Historical performance analysis Benchmarking
Indicators	Consistency with objectives and targets Prevalence of outcome and output indicators	SPL Managers SSL Managers Head of Performance	Pre-testing of the effectiveness of the indicators Training meetings with stakeholders involved in measurement to standardize rules and procedures
Resources	Links, objectives, targets, and resources	Governing body Performance Manager Financial Resources Managers SPL Managers	Performance budgeting, RPP and management budget in which the Objectives defined in the PP are assigned to the units with the corresponding resources and targets

Monitoring during exercises	Process reviewability to put corrective tools in place Timeliness	Performance Manager Financial Resources Managers SPL Managers	Appropriate information tools to monitor performance. Analytical accounting (cost accounting)
Performance measurement	Objectiveness	Executives Management control	Adequate information tools linking the two cycles - Analytical cost accounting - Management control
Evaluation	Objectiveness	Governing body Performance Manager Financial Resources Managers SPL-SSL Managers	Joint analysis of results achieved and causes of deviation
		Citizens	Customer satisfaction surveys
		OIV	Independent evaluation
Awarding incentives	Consistency and proportionality with the results achieved Transparency	All managerial and non-managerial employees	Publication of results of each structure and incentives on the website
Reporting	Concise and clear documents Transparency Participation	Governing body Administration	Publication of accessible and comprehensible summary documents Participatory budgeting Active participation and social reporting tools

Source: G. D'Amore, *Le performance delle aziende pubbliche tra misurazione, trasparenza e accountability*, Milano-Roma 2019

5. Results

The questions in the first section of the questionnaire refer to those aspects that fall within the competence and responsibility of the functions of the managers responsible of the respective structures, for example: the degree of involvement of employees in defining the objectives to be pursued, the clarity of the indicators to be used, the degree of involvement of citizens, the resources in terms of human capital and time employed.

The results evidenced that mostly managers evaluate the performance achieved by their structures. A large proportion of managers (70%) declared that they had involved their staff in the process of defining the objectives of the structure they manage and that they use mainly (44%) quantitative output indicators. However, a sample survey carried out by the OIV on the total number of objectives revealed discrepancies connected both to an improper use of the indicators and to an incorrect assessment of performance. This is a clear criticality that undermines the reliability of the reports. About their perception of the usefulness of the SMiVaP the results were mixed: 50% of the managers interviewed considered it to be a mere regulatory requirement, while the other half considered it to be an incentive for employees and for improving services. This shows a scarce trust of public managers in these systems for the improvement of public performance. About the amount of resources employed for the implementation and functioning of SMiVaP, both in terms of human capital and time spent, show that the tasks related to the introduction of the system of measurement and evaluation of performance are very demanding. The 78% of employees are involved in performance measurement, spending 22% of their working time. This commitment is a positive aspect but it imposes the need to produce a substantial improvement in performance, in order to balance its costs and benefits. Moreover the 60% of respondents decared that the high number and the lack of clarity in the definition of objectives represent the main obstacle to their achievement and measurement.

The questions included in the second section of the questionnaire, addressed to the Director of Financial Resources, were aimed at understanding the actual degree of citizen involvement and participation to budget definition and the implementation of other tools for ensuring

the external accountability. From the answers obtained by the manager, it emerged that there is no real involvement of citizens in the process. In fact, the public is not involved in the formulation of the budget, neither they express their opinions on the indicators and targets defined or outcomes achieved. The Campania Regional Government has not implemented a policy of budget transparency and democratic participation in public decision making, neither the performance are reported and communicated to stakeholders in an easy and transoarent way. It is considered a formal fulfilment of legal obligations, without a prospective and strategic vision that takes into account the interests of citizens. However, from the interviews to key actors it emerged the willingness of adminsitration to improve its information system for supporting government and managers' decision-making processes and to reduce the self-referentiality of the performance evaluation. In particular, the Financial Resources Department was going to implement a new information system, capable to elaborated also analytical accounting data and not only financial and economic accounting information, allowing a more accurate estimate of costs and benefits, which is the starting point for an effective performance measurement system.

6. Conclusions

A performance measurement system is useful if it is able to guide and support the internal and external decision-making processes necessary to create value for the referring community. The same system should be able to monitor performance by analyzing inputs, processes, and output, thus providing information on its weaknesses to be improved. An analysis of the performance reported in 2018 showed that the measurement of strategic objectives still focuses on outputs and processes, rather than on outcomes. For example, the reduction in waiting times for health care is reported, but it is not clear what the average waiting times are and how this has facilitated the access to services; the number of companies receiving incentives is reported, but there is no indication of the number of companies that have applied for grants; expenditure in support of employment and tourism policies is reported, but there are no historical

data or data on the reduction of unemployment rate and the increase in the number of tourists and the benefits for the Campania Region's economy.

Another essential element for a proper performance assessment and reporting is the integration of the performance cycle with the economic and financial cycle. The Performance Plan analyzed contains a reference to the budget approved for the three-year period 2018-2020, with an exact indication of the overall total of revenues and expenses. The logic is to refer to the existing interconnection between the definition of strategic guidelines by the political body and the financial condition of the entity. However, the financial cycle and the performance cycle remain substantially separate. The procedure of objectives and related indicators definition, has been significantly improved through the years. The new structure of the Performance Plan, introduced with the 2018 Update to the SMiVaP, presents the following improvements: the articulation of objectives according to the different organizational levels; the tools provided for data collection; the indicators and targets for the measurement process; and coordination for the definition of strategies and objective.

This highlightes the awareness and the willingness of Campania Region Administration to improve its performance measurement system, but some critical issues relating to the implementation of an integrated (financial, economic and performance) measurement and evaluation system that is able to meet the accountability and transparency requirements of the various stakeholders persist. As first, the large number of "micro" objectives in the plan make the entire performance management and reporting extremely complex, as well as complicating the understanding of the document itself. Secondly, the absence of an information system dedicated to the performance cycle does not allow the monitoring and verification of data in connection with other planning documents and information systems. Thirdly, from the analysis of the answers to the questionnaires, some gaps emerge regarding the sharing of knowledge and approach to performance measurement and public accountability among managers. In particular, many of them still attribute scarce importance to citizens' active participation to decision making processes and consequently do not activate any tool for involving

citizens in the processes, confirming the absence of a culture aimed at the external reporting of the outcomes achieved and to accountability. The idea of engaging citizens in decision making processes and to be accountable about the way the resources collected are used for achieving the goals is still uncommon. Transparency and accountability of public action is not only required for the social consensus, but it is also an important lever for improving performance, since citizens are the most important evaluators of public outcomes. Otherwise the risk is that of reducing the entire system of performance measurement and assessment to a self-referential process that, compared to the huge resources it absorbs, answers exclusively to the purpose of regulatory compliance, necessary for the payment of bonuses to employees and managers. In order to ensure greater objectivity in the assessment and reporting of performance, in 2019 the administration established a verification activity to be conducted priorly to drafting the Performance Report. This activity is carried out by third parties (Head of Prevention of Corruption and Transparency, Head of the Directorate for Financial Resources, Managing Authority in conjunction with the Head of Unified Planning).

A further problem is related to the lack of a full connection between the two cycles, the financial cycle and the performance measurement cycle, which remain substantially separate, being connected only through the DEFR objectives reported in the Performance Plan. It would therefore be desirable for the full implementation and functionality of the information system dedicated to the performance cycle to include integration with the other planning and control tools of the regional government. This would improve the consistency, homogeneity and clarity of the reported results. In this sense, the use of voluntary disclosure tools, such as the social reports and the publication of documents characterized by greater clarity and conciseness appears indispensable.

One of the positive aspects is the attention paid by the government to the issue of transparency, which is achieved through the publication of all the formal acts produced by the administration in a dedicated section of the institutional website called "Casa di Vetro". In this regard, however, it should be noted that the mere publication of acts, without a selection of contents and recipients, is not able to achieve either a real transparency of information, or the so much claimed accountability. To

this end, the active participation of citizens, as the primary stakeholders of the authority, becomes necessary. Only in this way, and not through the mere publication of information on the institutional website, can transparency create a virtuous circle between the electoral preferences of citizens and the need for policy makers to control public spending. Effective transparency is a requirement of democratic accountability, because if the reporting tools are readily available, understandable and of interest to citizens, these latter are authorized and encouraged to make public officials accountable for the use they make of public resources[15].

There is still a long way to go, but the results of the analysis show positive signs of change. It is expected that the settling of administrative processes and the assimilation of the new procedures and tools introduced will provide the impetus for a deeper cultural change.

[15] J. B. Justice-F. J. Tarimo, *NGOs Holding Governments Accountable: Civil Society Budget Work*, in *Public Finance and Management* 12.3 (2012) 204 ff.

Fabrizio Rippa*

Fighting Corruption: from Criminological Assumptions to Legislative Strategies

Summary. Section one. The empirical studies. The 'numbers' of corruption. 1. – Statistics on corruption. A premise of method. 2. – Official data and real corruption: an inverse relationship. 3. – The perception of the corruption phenomenon and the other measuring tools of corruption. 4. – Initial findings. Numbers uncertain, but clear operations: less criminal law, more administrative prevention. Section two. From criminological investigation to political-criminal evaluations: the new offensive paradigms of corruption and the need for preventive contrast strategies. 1. – From numbers to forms: corruption and corporate crime. 2. – Corruption as a corporate crime. The insufficiency of criminal law. 3. – The fight against corruption in the era of globalization. 3.1. – Attempts of shared sovereignty: the role of private subjects in defining strategies against corruption: self-regulating powers, soft-law tools and corporate social responsibility. 3.2. – Beyond the state, before the state: the bodies of 'global governance'. 3.3. – The international instruments to fight corruption, the various corruption paradigms and the possible techniques for standardizing domestic legislation. 4. – Between self-regulation, international legislation and domestic law: the possible models of law enforcement.

Section one
The empirical studies. The 'numbers' of corruption

1. Statistics on corruption. A premise of method

Measuring corruption is not easy. And it is not, first of all, since the surveys are *qualitative*, in the sense that they have to deal with *definitional*

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problems: to measure corruption, in fact, we should primarily find an exact meaning of it[1]. Corruption in a broad sense, understood as the entire class of political-administrative crimes, is very different, for example, from corruption in a strictly legalistic sense, as defined by specific offences. And the legal definition of corruption is very different from the one's provided by the sociological or economic sciences. Each of these definitions will refer to different criteria for identifying the rules violated by the public agent: they may refer to moral or ethical rules; to very broad legal rules – such as the principles of correct administrative action –, or more detailed ones, which specifically concern the type of activity carried out by the public agent. One of the best known definitions of corruption is the one that refers to the so-called *agency model*: corruption can be understood as "the abuse of the entrusted power in order to obtain private gaine"[2]. Such a wide concept that it should include any form of corruption, both in the public and private sectors; both the business-related corruption and bureaucratic ones; the *grand* and the petty corruption (and the so-called 'street-level' one); both corruption in the technical sense and any other offense attributable to the abuse of public functions. This is the key point: depending on the type of corruption assumed, the ways of measuring it will change radically.

Moving on to the quantitative level, the surveys get even more complicated, cause detection of the corruption phenomenon can refer to three types of statistical measurements (and to some indirect indicators)[3]:

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[1] In argument F. Monteduro (collab. S. Brunelli-A. Buratti), *La corruzione. Definizione, misurazione e impatti economici*, Roma 2013, 23 (www.trasparenza.formez.it); in English literature, A. J. Brown, *What are we trying to measure? Reviewing the basic of corruption definition*, in *Measuring corruption*, London 2006.

[2] Definition used by Transparency International, see J. Pope, *Confronting Corruption: The Elements Of A National Integrity System*, Berlin 2000.

[3] Political sciences have highlighted the difficulties encountered in the analysis of corruption, so much so that they speak of a 'definitionial challenge' and a 'measurement challenge': «the problem of pinning down a definition of corruption led to a plethora of potential definiteos developing [...] One part of that definitional challenge is undoubtedly linguistic, on the one hand, this come from the way that the term corruption is used in public discourse [...] the second part of the linguistic challenge comes from the fact that the term exists in many languages, yet the nuances that shape and mold its precise meaning differ considerably»; nor, as we said, can it be satisfying

1) it is possible, first of all, to rely on the *official data*, that is to say on the number of known corruption cases, effectively prosecuted and definitively ascertained in the courts, which could give an apparently certain measure of the real spread of the criminal phenomenon, as well as some of its qualitative connotations (territory of verification; types of public administrations involved; relationship between public agent and citizen, etc.);

2) a second method of measurement refers to *perceived data*, that is to say to the opinion widespread in the population about the extent and methods of manifesting corrupt practices within public offices[4]. Survey based not on experiences actually lived or in any case verified, but formed through other information channels, such as the mass media or the statements of other subjects; and if here too we hasten to draw first summary conclusions, this kind of assessment should appear more equivocal, doubly subjected to the subjectivism of those who provide the information and that of those who receive it;

3) a third type of survey, finally, is based on direct experiences, even if not officially recognized through a judicial assessment: in this case the statistics would refer to a real and not merely perceived data (avoiding the ambiguities of that type of survey); and it would be able to refer not only to the manifest phenomenon, but to give a plausible dimension of the submerged one as well. In fact, not requiring the official nature of

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to start from the legal definition of corruption: «there are, however, a number of problems with using the law sas your starting points. First, the internationalization of anti-corrupting thinking has not prevented states from having very different sets of national legal provisions [...] second, many acts that could legitimately be understood as corruption are captured under pieces of legilsation that were not really made for that purpose»; on the side of the other 'challenge', that of measurement: «trying to discern how much corruption exists in nevertheless a task fraught with difficulty [...] there is still no agreement on what corruption precisely entails. Given that, what hope is there of reaching an agreement on how much of it exists?», see D. Hough, *Analyzing corruption*, Newcastle 2017, 33 ff., 49. On the problem of measuring corruption, R. Cantone (collab. E. Carloni), *Corruzione ed anti-corruzione. Dieci lezioni*, Milano 2018, 29 ff.

[4] In argument, E. Carloni, *Misurare la corruzione? Indicatori di corruzione e politiche di prevenzione*, in *Pol. Dir.* (2017) 445 ff.; B. A. Olken, *Corruption perceptions vs. corruption reality*, in *Journal of Public Economics* (2009).

the judicial one, this type of information could be detected more easily, since – in particular if able to guarantee anonymity of the questionaire – would not encounter any reluctance of the interviewee, well aware not to reveal a possible complicity in the corruptive fact.

Each of these indicators will provide different 'readings' of the phenomenon, and will be differently usable for the purpose of developing strategies to combat corruption. Not only the strictly repressive ones, but even those based on administrative prevention tools.

2. Official data and real corruption: an inverse relationship

In theory, official data should be the most reliable. In reality, this higher precision of the official data with respect to the perceived one is only hypothetical, and indeed, sometimes, refutable: this is due to the need to consider other orders of variables, which tend to complicate the 'calculation' and to relativize the results, or even overturn them[5]. When it comes to the collection of criminal statistics, the main (but not the only) factor that can affect the usability of official data is represented by the overall socio-phenomenal physiognomy of the class of crimes taken into consideration, in which reveal the *number*, *role* and *quality* of *active subjects*; the presence or absence of *determined* or *identifiable damaged persons*; the *type of interest* involved (private or public, individual or widespread); characteristics that involve an higher or lower capacity in tracing and then recording criminal behaviors, and therefore are reflected on the 'permeability' of the crime to be quantified by the dynamics of procedural assessment.

In our case, for example, the bilaterally illicit structure of corruption tends to develop a mutual defensive collaboration between the protagonists of the *pactum sceleris*, with a consequent decrease in the

[5] In criminological studies, it is indeed considered methodologically incorrect to correlate the statistical variations relating to recorded crime with the trend in real crime, see T. Bandini, *Criminologia*. 1. *Il contributo della ricerca alla conoscenza del crimine e della reazione sociale*, Milano 2003, 45-46.

chances of bringing out such criminal realities[6]. Even the absence (or only possible presence) of a person directly damaged by a corruptive practice, risks affecting the efficiency of the control systems: in the sense that, since an 'holder' of a direct interest in compulsory judicial authority may lack (unlike what happens in the criminal types of immediate aggression to the legal sphere of one or more well-defined subjects), the *notizia criminis* may never reach the attention of the competent authorities, significantly increasing the *hidden number* of episodes of corruptive crime[7].

The 'environmental' conditions in which such illegal behaviors can spread also affect the capacity of the official data to record them: level of *diffusion* of the *culture of legality* in public administrations and companies[8]; *business* or *bureaucratic character* of the existing corruption model[9], ecc. These are relationship dynamics between the public and private sectors that can greatly influence (and in a mutually inverse way) the extent and traceability of corrupt practices: if culturally structured in an anti-legal sense, for example, they tend to 'normalize' the business-contractual approach, intended as the only or most effective way of communicating with the public administration; consequently inspiring a sense of distrust in institutions; or, conversely, a parasitic interest in exploiting this cultural and social habit to the commodification of the

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[6] A. Vannucci, *La corruzione in Italia: cause, dimensioni, effetti*, in *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino 2013, 28.

[7] G. Forti, *L'insostenibile pesantezza della "tangente ambientale": inattualità di disciplina e disagi applicativi nel rapporto corruzione-concussione*, in *Riv. it. dir. e proc. pen.* (1996) 483.

[8] To explain the etiology of corrupt practices under a more markedly criminological profile, it is possible to recall the well-known theory of the so-called "criminal sub-cultures", developed by the American scholar A. K. Cohen, *The Sociology of the Deviant Act: Anomie Theory and Beyond*, in *American Sociological Review* 30 (1965) 5 ff.

[9] 'Bureaucratic' corruption is that in which the administrative act object of the illigal trade 'dominates', tending to be identified and inserted in a single and defined episode. 'Business' corruption is that in which the flow of money produced by an elastic and fairly indeterminate network of corrupt exchanges that tends to fade into sufficiently stable interpersonal relationships dominates, see F. Palazzo, *Le norme penali contro la corruzione, tra presupposti criminologici e finalità etico-sociali*, in *Cass. pen.* 10 (2015) 3390.

public function. In both cases, there is no incentive or convenience to activate control mechanisms, i.e. to report the existence of illegal forms of bargaining to the competent authorities, including judicial ones. In such a scenario, it is easy to conclude that while the factual data will tend to increase, the official one will decrease; and the latter, if severaly considered, would imply the erroneous conclusion that, contrary to its systemic diffusion, corruption would be registered as a regressive criminal phenomenon.

For what has been said so far, then, it does not seem risky to affirm that there is a sort of *inverse relationship* between the extension of the business-corruptive type of crime and the capacity of the (only) criminal system to counter it; a condition sufficient to deny or seriously undermine the validity of the attempts to map the aforementioned criminal phenomena operated through (only) official indicators. Which would be able to reveal a datum that is not only partial, but also 'liar' and compromising, since, as mentioned above, it would draw a decreasing, rather than an upward, trajectory in the statistical curve relating to the spread over time of corrupt practices[10].

This consideration explains why the public and private entities responsible who deal with the problem of measuring this sector of criminal deviance – especially those of a supranational nature – also make use of other statistical surveys, which mainly rely on the mere perception of corruption; the same, if crossed with official data, are able not only to explain the decreasing trend of the latter, but also to give us a more faithful representation of the real spread of these crimes against public administration. This is a fundamental implications from the point of view of the correct identification of the regulatory strategies to be adopted to stem its expansion: in fact, it is only through this type of empirical measurement of the 'magnitude' of corrupt practices, that we may be able to understand its real offensive charge.

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[10] See *La corruzione in Italia. Per una politica di prevenzione. Analisi del fenomeno, profili internazionali e proposte di riforma*, by the Ministry for Public Administration and Simplification, October 2012, 8 ff.

3. The perception of the corruption phenomenon and the other measuring tools of corruption

For a correct empirical-criminological approach, it is therefore necessary to integrate the official data on corruption with other elements of knowledge. We refer to: (a) the indicators that record the *perceived corruption*; (b) data provided by *non-judicial statistics*; (c) the so-called *indirect indicators*.

(a) These measurement tools – although implemented with methodological strictness – are more uncertain, since they refer to the 'the feelings' area. These indicators can then be grouped into two subsets, depending on whether the information is obtained: from surveys conducted on a representative *sample* of the *entire population*, and which refer to the opinions of *unskilled* individuals (a1); or by more specific investigations, based instead on the level of corruption percevied by *qualified people*, such as economic operators, institutional subjects, journalists, experts in specific geo-political areas, etc. (a2).

By their nature inaccurate and imperfect, they also risk falling into the well-known *Trocadero paradox*, for which the more criminal phenomena are fought (corrupt in this case), the greater is the perception that of them has the population[11]: it is a circular path in which the estimates on the deviant behaviors and the evaluations on the effectiveness of the system – also thanks to an opportunistic *criminal populism* that currently marks most of the political trends – remain engulfed in a perverse and vicious circle for which: (1) to satisfy the demand for containment of a criminal phenomenon perceived as particularly widespread by the population → (2) programs are implemented to strengthen sanctioning and preventive responses – administrative or criminal, main or accessory → (3) that generate a paradoxical increase in the perception of the phenomenon (the more a certain crime is fought, the more people are led to believe that that crime is widespread or is increasing) → (4) that is transformed into a demand for new and increasingly restrictive measures → (5) that is exploited to acquire/increase electoral consensus → (6) that generates

[11] The expression was coined a few years ago by G. T. Polcini, *Il paradosso di trocadero*, (www.dirittopenaleglobizzazione.it).

the conditions to promote and implement new legislative interventions. At this point it is possible to return to point 1. To be more precise, the trend, rather than cyclical, assumes a spiral trajectory, swelling from time to time the outer ring: each new legislative intervention, in fact, hardens the system more and more, eroding in this way also the guarantees related to the idea of *extrema ratio* inspired criminal law, and resulting in a real 'repressive terrorism'.

(a1) Returning to the measurement indices based on the perception of the corruption phenomenon, and examining them in more detail, the first type – the one based on the personal experiences of the interviewees – has a decidedly relative and (even) less scientific value, mainly due to its 'lay' nature: the unnecessary presence of a particular professional qualification or knowledge of the exact legal terms of the topic, together with the fact that the source of the information does not necessarily have to be verified, will obviously reflect on the validity and objectivity of the answers provided and of the related obtainable data[12]. Nonetheless, at least as regards a certain type of corruptive behavior, these are indications that are to some extent useful for recording the submerged part of the phenomenon and for obtaining some supporting information for defining or redefining preventive and repressive strategies; allowing, for example, to detect data relating to the different levels of 'contamination' in the specific sectors of activity of the public administration, or to the different diffusion of the aforementioned practices in the geographical areas or macro-areas of the reference country or the European context. But, we must inist on it, these data must always be filtered and verified further, because they are by their nature refractory to a scientific feedback, and sometimes lead to hyperbolic outcomes because of the idle mechanism previously analyzed.

[12] Furthermore, these are surveys carried out by subjects that are not always institutional, a circumstance which, due to the occasional frequency and the limited reference sample, makes the use of the data that can be obtained even more complicated, especially to trace trend lines or have a comparative overview. One of the most updated surveys (February 2017), carried out by SWG, is available in www.swg.it; another one, commissioned by institutional subjects, is the research carried out on behalf of the European Parliament by Eurobarometer, whose latest survey on the subject can be consulted at the page https: //ec.europa.

(a2) Much more meaningful, and practically the main and most quoted source of information used in the international field on the theme of corruption and its diffusion rates (despite the increasingly widespread skepticism in the national scientific community), are the surveys based on the perception of the phenomenon by qualified subjects, among which those carried out by Transparency International, a well-known international non-governmental institution that deals with corruption, not only political[13]. This organization annually prepares a world ranking of countries based on the Corruption Perception Index (CPI)[14], that is a tool for measuring the perception of corruption phenomena based on the opinions of experts[15]; they are not only able to observe the phenomenon from a 'privileged' point of view but, in a prognostic perspective, they are able to express evaluations destined to come true in socio-economic reality, becoming real expectations[16]: the CPI, in fact, although expressing a merely perceived figure, essentially reflects the opinion of

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[13] «The largest organization in the world that deals with preventing and fighting corruption. Founded in 1993, with headquarters in Berlin, it is widespread in over 100 countries around the world. Its mission is to give a voice to the victims and witnesses of corruption and collaborates with governments, companies and citizens to put a stop to the scourge of corruption», www.transparency.it.

[14] This index consists of a numerical vote that can vary from 0 – a value that indicates the maximum corruption – to 100 – which, on the contrary, signals its total absence –; for all detailed information and data consultation, including those of previous years, please refer to http://www.transparency.org/research/cpi/overview; for a detailed comparative analysis, based on the CPI, see Pope (nt. 2).

[15] Another international instrument to measure corruption is the Rating of Control of Corruption (RCC), commissioned by the World Bank, which, however, does not only refer to experts, but also to businesses and citizens; Transparency international itself actually creates rankings based on different indices, such as the Global Corruption Barometer (GCB), which also detects the direct opinions of citizens. Another fundamental analysis tool developed by TI is the Bribe Payers Index (BPI), through which is created a "ranking of corrupting countries among the main industrialized nations, in which, despite the adoption of laws that make the payment of bribes a crime to officers, the use of corruption to obtain contracts has not been eliminated"; on these topics, A. Hawken (collab. G. L. Munck), *Measuring corruption – A critical assesment and a proposal*, in *Perspective on corruption and human development*, Colombo 2009, 72 ff.

[16] See Vannucci (nt. 6) 35 ff.

strangers economic operators and investors (banks, companies, financial operators, etc.) on the degree of transparency and morality present in public administrations of a specific Country and the correctness of the decision-making procedures used to distribute their resources. It is clear, then, that this parameter will also influence the possible future behavior of these investors, who will decide if and how to interact with foreign countries on the bases of the position occupied in the reference ranking: medium-high positions will logically inspire greater confidence, and will convince of the convenience of investing in countries where the procedures for the allocation and distribution of public resources and the opportunities for do business are respectful of the criteria of transparency and legality, without additional costs or bureaucratic hassless due to the insinuation of corruptive mechanisms. Consequently stimulating a type of 'healthy' competition and higher competitiveness. While low positions in the rankings will cause a negative selection process, both in the sense that they will tend to remove 'clean' capital from the country (with all that follows in terms of balanced economic growth and social stability); both in the sense that they will attract investors accustomed to or incline to corruption, i.e. subjects who do not contribute to the development of the markets, but rather worsen the levels of competition and productivity[17]. Not to mention a further and not secondary negative effect, whereby even investors with tendency towards integrity, who nevertheless decide to operate in a country with high rates of corruption, will tend to interpret the equivocal behavior of public administrations (delays, irrational requests, misunderstandings, etc.) in line with the

[17] See J. S. You (collab. S. Khagram), *A Comparative Study of Inequality and Corruption*, in *American Sociological Review* 70.1 (2005) 136-157: «as income inequality increases, the rich have more to lose through fair political, administrative, and judicial processes. As inequality increases, the rich will also have greater resources that can be used to buy influence, both legally and illegally (Glaeser, Scheinkman, and Shleifer 2003). The rich as a class or interest groups can employ legal lobbying and political contributions or bribery (grand political corruption) to influence law-making processes. The rich, as interest groups, firms, or individuals may use bribery or connections to influence law-implementing processes (bureaucratic corruption) and to buy favorable interpretations of the law (judicial corruption)»; see also the report *Inclusive growth and development*, by the World Economic Forum, http://www3.weforum.org/docs/WEF_Forum_IncGrwth_2017.pdf.

culture of illegality perceived as dominant, consequently adapting to what they bekieve to be the real (albeit informal) rules of the game, and further stimulating corruption on the demand side.

The indicators based on the perceived data have suffered, especially in recent years, a severe attack by the Italian scientific and institutional community (but not only), which has questioned in general their validity as a method of detection and, consequently, the veracity of the negative data relating to our country. Another limitation of the indicators based on perceived data, and in particular the CPI of Transparency international, lies in the way in which the questionnaires are structured. As it has been pointed out, one of the main defects of the CPI is that it is a too much synthetic indicator: congenial to its flexibility and to its ability to compare experiences characterized by even very distant regulatory and institutional realities, at the same time it also limits its ability to accurately identify the types of criminally relevant behavior. Consequently, this type of detection cannot (should not) be adopted as the basis for carrying out an analysis on the feasibility of the criminal policies[18].

There is also a risk that should not be underestimated. We have already talked about it previously: the fact the qualified reference sample also includes subjects interested in capital investments or in any case able to influence them (banks, entrepreneurs, financiers, etc.), ensures that the information on the diffusion rates of corrupt criminals begin to circulate in that small community, with the risk of attracting illegal economic and financial resources. This circumstance is criminogenic, doubly capable of harming the assets connected to the public and private economy and to the performance of the public administration.

Nevertheless, there is no doubt that these measurements and the consequent evaluations have contributed to stimulating numerous reform processes, especially in Italy. It is also to be considered an established language, which for many years has put the entire international community in communication regarding a criminal phenomenon that knows no borders[19].

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[18] Cantone (nt. 3) 37.
[19] Cantone (nt. 3) 37.

(b) As alternative, there are other statistics that are based on more objective data, even if not as much as the official reports of judicial activities. These are the so-called victimization statistics: through a series of rather detailed questionnaires they tend to bring out direct experiences of corruption: on the one hand, they should have the merit of official statistics, namely that of referring to real episodes of crime, without all the distortions and inaccuracies that are inevitably linked to the mere perception of the phenomenon; on the other hand, they should be able to contain its limitations, due to the difficulty of judicial investigations to bring out a percentage of the corruptive phenomenon that is likely to reflect the actual trend of that type of crime.

It is clear that the possibility for these measuring instruments to be able to combine the merits of official statistics and perception indices, and at the same time to eliminate their defects largely depends on the extent of the reference sample: the greater it will be, the higher it will be the correspondence between the collected data and the real crime trend. Not only that: if enriched with as many variables as possible, it will also be able to differentiate the data by geographical area of reference, by type of activity and sector of the public administration involved (health, construction, law enforcement, etc.), by way of carrying out the corruption episode (forms of payment, methods of contact between public and private, type of advantage obtained, etc.). In theory, this characteristic makes it a useful tool not only from the point of view of developing strategies to combat corruption of a repressive nature, but also from that of drafting instruments to prevent the phenomenon on the administrative side.

The problem is that these kind of investigations are expensive, carried out according to deadlines that are not always precise and too far apart in time to be able to punctually verify the trend of criminal phenomena and the possible effectiveness of the actions taken. And obviously this type of verification is not even comparable with similar initiatives of foreign countries, due to its highly specific nature[20].

(c) The indirect measures of corruption, by definition, do not have the ability to accurately represent the quality and quantity of malpractice

[20] Vannucci (nt. 6) 33.

phenomena in public administrations. To understand how they work, an example will be useful: what distinguishes corruption from other practices of illicit exploitation of public authorities (such as abuse of office) is that it represents a 'cost' for the corrupter. And in some way these econim efforts should be 'spread' on the entire operation involved in the criminal practice, for example on public works obtained through the illicit interference of the corrupt public agent: so that, given the cost X of a certain activity or contracted operation, the exceeding of that value could indicate that there have been hidden costs (to be amortized) represented by the payment of a bribe. These indicators, indicated by statistical science as *proxies*[21], are certainly useful in defining policies to combat corruption, because they help to understand the harmful effects of corruption on public spending and on the regularity of the market; and, above all, because they are fundamental for the regulation of public activities, which represent a priority issue to be addressed even before any fighting strategy that aims exclusively at the repression of criminal phenomena. An indispensable tool, therefore, for anti-corruption policies in the broad sense, but decidedly more approximate if we want to refer to to the strictly criminal anti-corruption.

4. Initial findings. Numbers uncertain, but clear operations: less criminal law, more administrative prevention

In short, no single instrument seems to be able to decipher the numbers of corruption. There are too many variables to be considered: the peculiarities of this type of deviance make it necessary to refer now to the perceived data, now to the real data; now to a legal conception of corruption, now to a broader and more common sense one, which relies on ethical-moral norms; now to statistics on existing corruption, now to presumed corruption. And the results can assume completely opposite outcomes when they refer to only one of these parameters. The 'submerged' figure remains the great mystery of this survey, which can only be circumscribed within plausible statistic through and successive

[21] M. R. Wickens, *A Note on the Use of Proxy Variables*, in *Econometrics* 40.4 (1972).

approximations. The only certain fact is that, regardless of the greater or lesser precision of these numbers, there are strategies to contain the phenomenon that precede and, in a certain sense, should avoid recourse to instruments of a repressive nature: such activities are all those that tend to detect, within each single public administration – taking into account the specifics that characterize that sector of activity – suspicious behaviors, anomalous procedures, regulations that already originally contain the risk of pollution between interests of opposite natures and that, therefore, should be rethought. The Italian legislative movement is moving meritoriously in this direction, at least since the Severino reform of 2012, in order to implement the necessary administrative prevention of the risk of abusive behavior by public officials; trying, at the same time, to disseminate a culture of legality and efficiency, which guarantees transparency and meritocracy in public choices, without masking them behind an empty bureaucratic formalism. In these areas, all the indicators we have referred to, even the so-called indirect ones, assume an indispensable role in orienting regulatory choices, leaving the strict punitive instrument to intervene only at the outcome of these fundamental options. The greater the quality of administrative regulation will be devolped, the greater we will be able to reach a correspondence between real and perceived crime, with the submerged activities that should possibly regress, leaving that it is really only the official data to represent, with sufficient likelihodd, the spread of corruption.

Section II
From criminological investigation to political-criminal evaluations: the new offensive paradigms of corruption and the need for preventive contrast strategies.

1. From numbers to forms: corruption and corporate crime

The search for the real dimension of corruption provides indications not only on the concrete extension of the phenomenon but also on the nature of the interests involved, the more at risk the more there is an

environmental diffusion and a cultural internalization of those illicit behaviours. On a criminological level, this also allows us to understand through which etiological mechanisms that type of crime feeds itself, being able to demonstrate the existence of progressive and self-replicating deviant processes – of a 'tumour' type – for which the growing extension of the corruption phenomenon will correspond to its greater ability to perpetuate itself[22].

As we have verified from the statistics, in fact, in countries with a higher diffusion rate of corrupt behaviour there will be an inverse relationship for which, as the phenomenon grows – which will be duly recorded by economic operators, and which will tend to adapt to it – the official data will decrease, revealing not only the inability of the criminal system to cope alone with such a criminal reality, but rather the involuntary ability to feed it (if not supported by other control mechanisms).

What changes is also the morphology of corrupt practices, which break away from the classic sequence of negotiating activities centred on the purchase and sale of individual administrative measures and on the direct monetary remuneration of the same; to become structural and continuous interpersonal relationships, where what is commodified is not plus the single administrative activity, but the whole public function. Moreover, these relationships are also enriched by new protagonists in the role of mediation between the private and public part, with the involvement of fixers and brokers. The causes of corruption, then, can no longer be traced to the venality of unfaithful agents or the occasional opportunism of a private citizen. The factors that explain their genesis and structure become generalized and, in a sense, depersonalized, as they become corporate mechanismsin: a *strategic* process[23], in planning and carrying out business activities, if we look at the private part of the phenomenon; handling (and procrastination) of political and party

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[22] As we will see, corruption is increasingly inextricably linked to the typical paradigms of corporate crime; on the subject E. H. Sutherland, *White-collar criminality*, in *American Sociological Review* (1940) 3.

[23] R. N. Anthony, *Planning and control systems : a framework for analysis*, Boston 1965.

power, if we turn to the public one with all that it entails upstream and downstream of the corruption phenomenon.

The investigation into the reasons and methods of approach to corruption must therefore be re-measured taking into account the constant use of corruption by business organizations, with different implications from a criminological point of view.

2. Corruption as a corporate crime. The insufficiency of criminal law

The consequence that it is somehow more obvious, and therefore the one that scholars of the criminological and criminal disciplines have been observing for the longest time, is that of framing corruption and the phenomena of deviance related to it in the context of economic crime in the strict sense[24]. And moving in the field of economic activities, managed to a large extent in a corporate form, the unfair act froma 'behaviour' becomes rather a criminal 'phenomenon', a collective and depersonalized act not always immediately perceptible as a *contra legem* conduct and which in any case poorly fits into the rigid schematizations of the traditional criminal offence.

These different ways of configuring responsibilities and regulatory responses (both of a preventive and repressive nature; both strictly criminal and punitive-administrative) can easly be re-proposed in the field of corrupt practices, which have become a privileged tool of corporate criminality: in this perspective, it is necessary to overcome the exclusivity or in any case the absorbing idea of tracing this offence to the category of crimes against the public administration and abandon the illusory idea of being to manage the corruption 'problem' by acting only on the side of the regulation of the behaviour of public agents: if corrupt behaviours originate in the places where entrepreneurial and managerial choices are planned, where it is decided how to face the market and the competition and how to look for investment opportunities and obtain financing

[24] G. M. Flick, *Dalla repressione alla prevenzione o viceversa? Dalle parole ai fatti per non convivere con la corruzione*, in www.penalecontemporaneo.it, *passim*; A. Spena, *Il «turpe mercato»*, Milano 2003, 20 ff.

channels, it is in that context that efforts must be concentrated from the beginning, watching over all the possible 'sources' for feeding these illicit practices, mainly those that concern the management of monetary and financial flows within the company and the way of interacting with public administrations.

In particular, it is necessary to insist on the synergy between more markedly repressive disciplines (criminal or administrative-punitive) and legislative measures of a broader 'cultural scope', aimed at preventing the carrying out of illicit behaviour by promoting antagonistic virtuous behaviour, with consequent marginalization and isolation of unfair practices: measures aimed at increasing, also through *rewarding*, the quality standards of public administrations, in terms of transparency and efficiency; at the development of best practices and the diffusion of ethical codes; at the implementation of whistle-blowing; and, on the private side, the encouragement of voluntary systems of participation in programs for the diffusion of legality and professional ethics; and of mechanisms of submission to a judgment of evaluation by special supervisory authorities with consequent attribution to businesses and markets of reference of a legality rating.

As has been stated, the dissemination of such tools, perceived positively because they are followed on an increasingly spontaneous basis by both public and private administrations, must also be legislatively encouraged, since such solutions "are probably more effective and concrete than the proliferation of rules imposed from above and of the multiplication of only formal controls [...] they serve to express the development of the culture of participation in that of reputation and – in a symmetrical position to the latter – of shame. Social control through reputation and shame takes on fundamental intermediate importance, between personal conscience and institutional control, to prevent corruption"[25].

Secondly, and more specifically of criminal measures, it becomes inevitable to coordinate the discipline of crimes against the public administration with that of corporate crimes.

The seriality and the economic 'role' assumed by corruptive crime are factors that influence not only the legislative definition of the criminally

[25] Trad. from the orginal italian Flick (nt. 24) 2.

relevant cases, but also the overall contrast strategy prepared for what can be defined as a true 'social plague'; in full awareness, moreover, of further mechanisms that affect the causes of that phenomenon, and that derive from the close combination of malpractice and economic-entrepreneurial activities: economic studies, for example, relate the increase or decrease of corruption to the quality of the regulation prepared for the start-up of new businesses, the regulation of competition and markets, tax legislation as well as the level of sophistication and multiplication of public offices and the bureaucratization of related activities. Other factors are even less legally controllable (at least in the short and medium-term), and even less so through the 'toolkit' provided by criminal law: they relate to social factors (level of education of citizens, with the connected issue of public expenditure for education and research; degree of diffusion of legality and perception of criminal 'risk'), economic (level of investments, in particular, foreign ones), economic policy (level of public investments, dynamics of access to them). From these first indications, and beyond the specific contents of the possible legislative manoeuvres to combat corruption, a fact emerges clearly: the insufficiency – regardless of any imaginable modification of the single incriminating cases – of the intervention of criminal law alone.

3. The fight against corruption in the era of globalization

A second empirical-criminological implication due to the evolution of the corrupting phenomenology – which has become an expression (albeit pathological) of economic activities – is that it will adapt hitself to the geographical, political-institutional and legal context in which those activities now take place; and it is easy to realize how the advanced globalization of markets has necessarily involved all the dynamics relating to the movement of capital, whether legal or illegal. In reality, more than a simple 'international' scenario, what characterizes the current stage of evolution of the economy is the development in a 'transnational' sense of commercial activities and business[26]: even if allocated in a precise State

[26] A. Portes, *Globalization from below: The Rise of Transnational Communities*, Princeton 1997; in the Italian juridical literature, A. Galgano, *L'impresa*

context – which is the one in which the ownership of the company is generally located – many of the production, distribution and (above all) organizational structures of the companies are now spread over several foreign countries, such as to make them take on a 'reticular' structure. Consequently, the legal discipline of that activity is shattered, and every aspect of business life (tax regimes, labour law, administrative rules, jurisdictional control systems) ends up referring to its own and autochthonous regulatory structure.

This circumstance is inexorably eroding (while keeping it formally intact) the 'regulatory capacity' of the individual nation-states, entrusting the task of preparing the guidelines of the policies that regulate business activity to unprecedented 'law centres', capable of making decisions with immense economic and social impact, but with institutional and democratic characteristics, if not absent, in any case, in 'low definition'. As a result, sovereignty (that of institutions, including European ones) has weakened.

Returning to the specifics of corruption, it – driven by the unstoppable movement of globalization into which it flows – has ended up assuming an increasingly international character, ceasing to be a phenomenon that can even be defined (and even more so, regulable) at a domestic level; at the same time – also thanks to technological progress, which has facilitated communications and movements on a planetary dimension – its potential diffusivity has become 'pandemic', fueled by the opportunities offered by the demolition of space-time borders[27]: in a market now without limits, in fact, the opportunities for contact with

transnazionale e i diritti nazionali, in *Riv. it. dir. proc. civ*. (2005) 40 ff.

[27] The "compression of space and time" is in fact identified as the most identifying sign of globalization by Z. Bauman, *Dentro la globalizzazione. Le conseguenze sulle persone*, Roma-Bari 2001(tr. it.), 4; according to Portes (nt. 26) «what is new in the contemporary period are the modalities and intensity of the process, driven by technological improvements in communications and transportation. Today instantaneous investments and disinvestments are made in the bourses of remote Asian and Latin American countries and [...] a garment design conceived in New York can be transmitted electronically to a factory in Taiwan, and the first batches of the product received in San Francisco in a week's time. The advantages of the process seem to be entirely on the side of those best able to avail themselves of the new technologies, thus turning globalization into the final apotheosis of capital against its adversaries, be they

public officials and foreign governments, especially those of the so-called 'emerging countries', are exponentially increasing.

More specifically, the dynamics of corruption, when they are linked to business activity, are aligned with the dimensional and structural characteristics of the global market, exploiting the advantages it offers: if the competition is 'a game' that is played on a world-field, once the distances have been cancelled, what determines the choice of where and how to invest capital and start-up productive activities is determined above all by the opportunities offered by the different legal and institutional contexts, in what has been defined, with a reversal of roles and positions between economics and law, a real "market for legal orders"[28]. This, if on the one hand, determines a rational choice of companies towards countries that offer the best legal conditions (in terms of tax, labour law, corporate, financial, etc.) and which guarantee the lowest "criminal risk" (in terms of severity of the punitive response and efficiency of control systems), on the other hand, it pushes local institutions and conniving public subjects to obtain the favour of multinationals through the establishment of privileged channels, along which forms of lightening or overcoming of any possible administrative and bureaucratic 'burden' necessary for carrying out business activities. Often with serious repercussions on the social development of countries that are already very fragile from a democratic and institutional point of view[29].

Moving from empirical relief to a political-criminal perspective, the effects of the internationalization of corrupt practices are manifold, and, as far as we are concerned, they affect both the content aspects of law enforcement, which must adapt to the phases, places and tools that characterize the market at the time of the global village; and – from an even more genuinely political point of view – on that of the 'sources' that

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state managers or organized workers'»; on the subject, see also M. R. Ferrarese, voce *Globalizzazione. Aspetti istituzionali*, in *Enc. sc. soc.* (www.treccani.it).

[28] N. Irti, *Geo-diritto*, in *Enciclopedia del Novecento*. 3. *Supplemento* (2004), www.treccani.it.

[29] See Ferrarese (nt. 27).

those contents are called to specify, offering us a scenario that increasingly relegates the role of national parliaments and legislative bodies to the rear.

As regards the first aspect, the crossing of national borders has entailed the need to adapt criminal offences and other measures to combat corruption to the deep changes in behavioural patterns, where the forms of contact between the private and public actors of illicit bargaining are made even more sophisticated by the philosophy and technological potential of the global market: business practices are increasingly complicated and difficult to trace, with all that this entails in terms of classification by specific incriminating cases; and, even before that, the very possibility of recognizing the illicit nature of payments. Furthermore, the splitting of the *iter criminis* also weakens the jurisdictional competences and the possibilities of investigation and intervention of the prosecuting authorities. Thinking of constructing the criminal offences that involve the movements of public capital (including all those falling within the corruption family) without taking into account the profound evolutions of the capitalist system – which has not at all renounced the role of political institutions and the administrative apparatuses in economic and productive processes, but rather it has decided to exploit it on a worldwide basis – it means 'embalming' the figures of crime in an abstract and anachronistic 'mold', condemning them to ineffectiveness.

Under the second aspect, namely that of the bodies appointed to decide (or better, to direct) the legislative policies to be implemented in order to adapt the legal instrument to the new forms of manifestation of business-corruption crime, it is necessary to record the clear overcoming of the classic criminal-lawyers paradigms, who want national legislations jealously keeper of the choices about criminalization of the deviants phenomena: beyond the questions of *content* (which concern the merit of the choices), the problem is, then, also political-institutional, and requires reflection on the *method* through which these choices are implemented; and it concerns not only the selection of the regulatory instruments to be adopted to obtain forms of levelling of national legislation but, above

all, the degree of democratic legitimacy of these instruments and of the subjects that set up them[30].

Three, at least, are the actors of this vast and variegated regulatory *parterre*: 1) private subjects (companies), which are not only capable of self-regulating but are also able to influencing the definition of the political strategies related to economic phenomena in a very incisive way. And they can do this not only through more or less permitted forms of lobbying, that is, by interceding with institutional bodies (national or supranational); but also by participating directly in the decision-making processes of non-institutional subjects; 2) non-institutional supranational subjects; 3) the institutional supranational subjects.

Attempts of shared sovereignty: the role of private subjects in defining strategies against corruption: self-regulating powers, soft-law tools and corporate social responsibility

Beyond the more genuinely institutional dimension, which pertains to the collective and individual interests that gravitate around the functioning of the public administration, the assets that are involved in such malpractice – especially in their political-business expression (with less evidence of this type in the bureaucratic-administrative one) – they are always also of an economic and patrimonial nature, whether we look at the whole of entrepreneurial activities (therefore in a public measure of the economy and business activity), and in the perspective of individual interests of private subjects concretely or only potentially interested (as perpetrators or victims, direct or indirect) by episodes of a corrupt nature.

Consequently, it is the companies themselves and their associative forms that have an interest in the protection of assets endangered or damaged by corruption: they must stem selfish impulses through a shared regulatory front that dictates the 'rules of the game' for all, in a broader perspective that recognizes the protection of competition and the fairness of business practices as common – and convenient – legal goods. The role that entrepreneurs and private law subjects assume in policies to combat corruption is ultimately a consequence of the interest they have (should have) in reducing its spread as much as possible, and

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[30] S. Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino 2009, *passim* and especially 131 ff.;

of the possibility that is given to them through the reached planetary dimension of the markets[31].

This regulatory power of private subjects – albeit in a context of weakening traditional constitutional mechanisms and the loss of regulatory capacity of individual States[32] – must take into account an aspect that no phenomenon connected to globalization has been able to question: they do not possess 'imperative powers' in the strict sense, and therefore their ability to produce self-restraint norms is essentially confined to the instruments of private and civil law. Even on an extraterritorial basis, then, what usually happens in domestic legal systems takes place: the ability to self-regulate one's behaviour through the creation of legal norms is eminently private-commercial.

The thought goes mainly to the case of the *lex mercatoria*[33] – defined as "the most successful example of global law without a state"[34] – which in some ways performs or tries to perform a preventive function against corporate crime by using typically regulatory tools (albeit of soft law), such as collections of best practices, recommendations of trade associations, guidelines, ethical codes, etc.

Of course, we must not place excessive trust in this juridical instrumentation; but, on the extreme opposite, neither should be completely disillusioned: it is certainly a system of sources that reveals a modest capacity to perform a real preventive or repressive function, limited by the spontaneous adherence to it, and whose cogency is left to a simple attitude of voluntary responsibility; and it is therefore difficult for it to be entrusted with mechanisms for the protection of public interests

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[31] U. Beck, *Che cos'*è la globalizzazione: rischi e prospettive della società planetaria, Roma 1999 (tr. it.), 24.

[32] On the relationship between the globalization process and the crisis of modern constitutionalisms, G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalitation*, Oxford 2012, *passim* and especially 51 ff.; Id., *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory*, in *Storrs Lectures*, Yale 2003/04.

[33] On the subject, for all, F. Galgano, *Lex mercatoria*, Bologna 2001.

[34] G. Teubner, *The global Bukovina. Legal pluralism in world society*, in *Global Law Without A State*, ed. G. Teubner, Aldershot 1996, 3-28 (available at: https://ssrn.com/abstract=896478).

and fundamental rights. Nonetheless, these are forms of self-regulation that can reveal some potentiality in terms of contents of anti-corruption strategies and legislative measures to combat contact-crime between companies and public administration: indeed, this type of legislation 'prepares the ground' for the subsequent elaboration of mandatory rules; moreover, these 'ethical handbooks' are linked to the forms of internal organization that try to align themselves with the dictates of corporate social responsibility[35].

It must be understood, according to the definition provided by the European Commission, as a mechanism of "voluntary integration of social and environmental concerns in all commercial operations, in decision-making processes and the relations between the company and its interlocutors"[36]: more specifically, corporate social responsibility represents a system of values capable of qualifying the work of the company, of making its corporate governance 'ethically responsible' and, therefore, of strengthening its credibility in front of consumers and investors; therefore, a 'reputational' purpose (economically and commercially exploitable) is also linked to it, which transcends a necessary intimate and disinterested adherence to the declared ethical and social values, and this is all the more true the more the image becomes a productive factor within the global market. But it is not just about this: the CSR, in fact, is also an instrument aimed at reducing the inequalities and distortions that can be created through the regulatory asymmetries of the individual domestic systems that compete in the global market, and discourage dangerous phenomena of 'legal shopping'.

Therefore, in the case that it is not a mere 'facade' operation, corporate social responsibility can be inserted among the mechanisms

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[35] On the subject, P. Acconci, *La promozione della responsabilità sociale d'impresa sul piano internazionale e la sostenibilità del modello di sviluppo industriale italiano*, in *Fardelli d'Italia. L'Unità nazionale tra coesione e conflitti*, Napoli 2011, 248 ff.; G. Teubner, *Self-Contitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, in *Indiana Journal of Global Legal Studies* 18 (2011) 618 ff.

[36] Cfr. Commission of the European Communities, *Green Paper – Promoting a European framework for corporate social responsibility*, COM (2001) 366 final.

that try to guarantee standards of legality that are necessary to counter the spread of criminal behaviour from below; and anti-corruption and governance issues are certainly key elements in the implementation of this para-legal system. Moreover, the principles that inspire corporate social responsibility increasingly tend to become normativised: consider, for example, the European Union Directive n. 2014/95 (implemented in Italy with Legislative Decree n. 254/2016), which requires, starting from 2017, the obligation for large European companies to include a section relating to CSR in their management reports (the so-called "non-financial information").

Ultimately, the instrument of CSR, with its repercussions also in the field of anti-corruption, seems to respond to the new needs of compromise between opposing values at stake; which no longer concern only the company and the restricted community of workers, but the entire human society, be it global or national; a compromise which, instead of compressing the profit expectations of entrepreneurial subjects, is projected forward guaranteeing the sustainability and renewal of production and commercial activities.

3.1. Beyond the state, before the state: the bodies of 'global governance'

As it has been said, the anti-corruption political agenda is today essentially dictated by the international 'players'. The loss of centrality of the State in defining policies to combat public malfeasance is in this historical phase part of a more general movement of globalization of the productive dynamics of law[37]. In this new juridical order, called to implement a 'global governance', new political-institutional paradigms have been gradually defined, developed in parallel and independently of the prototype based on national sovereignty, and ended up imposing on it its choices.

Regarding the organs of this multifaceted inter-state legal system – the supranational and international institutions which originally had the

[37] See U. Beck, *Lo sguardo cosmopolita*, Roma 2005, 262; Id., *La società cosmopolita. Prospettive dell'epoca postnazionale*, Bologna 2003.

«purpose of governing globalization in its economic and commercial aspects», but which «soon had to extend the scope of operations also to criminal profiles linked to globalization itself»[38] – the first note to be made is that they represent a completely heterogeneous set, in terms of composition, legal nature, and spatial scope of reference[39]. This variety is also reflected, from an institutional and organizational point of view, in the tools they have at their disposal to fulfil their mission, which ranges from the usual and already composite category of soft-law, up to tools – more incisive and easier to classify under the juridical profile – of international hard-law (of treaty or Euro-community origin).

In the international scenario (and except in the case of the EU) there are in fact no subjects whose political-institutional characteristics are perfectly aligned with the democratic model with a representative basis[40]; nor, as a consequence, properly 'governmental bodies', prompting political scientists and legal publicists to talk about a "governance without government"[41], or, similarly, "a government without governing bodies"[42]. Nevertheless, and trying to schematize, they can first of all be divided into two sub-sets, according to their operation on a world level, or only on a regional-continental level:

– the first group includes various international organizations or inter-governmental subjects, among which take on a leading role both those responsible for controlling world financial flows (such as the World Bank and the International Monetary Fund – IMF); both those that govern, more generally, the dynamics of trade and international economic relations (The Organization for Economic Cooperation and

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[38] Trad. from A. De Vita, *Evoluzione e deriva del sistema transnazionale di lotta contro il riciclaggio*, in *Nuove strategie per la lotta al crimine organizzato transnazionale*, Torino 2003, 160.

[39] See S. Cassese, *Globalizzazione del diritto*, in *XXI Secolo* (2009), www.treccani.it.

[40] On the subject D. Held (collab. A. Mc Grew), *The Global Transformation Reader. An introduction to the globalization debate*, Cambridge 2000.

[41] According to the famous definition by J. E. Stiglitz, *Globalization and its discontets*, New York 2002.

[42] See J. N. Rosenau, *Governance, Order and Change in World Politics*, in *Governance without Government*, Cambrige 1992.

Development – OECD; and the World Trade Organization – WTO); over the decades these four organizations have seen their numerical consistency expand more and more, over time welcoming more or less evolved economies, developing or in crisis, of countries with a more or less developed democratic features; *de facto*, however, net of the various participation systems and the relative voting mechanisms envisaged by each of them, it is possible to affirm that it is above all the 'collegial will' of the G-7 countries that guides their functioning. It should be included in this list (also by virtue of its observer status at the United Nations and its presence in all the main trade and global economy *fora*) also the International Chamber of Commerce, although it is not an inter-governmental organization, since its members are not states but private companies.

It is through these institutions that the voices of those who speak the "language of capital" are collected and disseminated[43]. After all, globalization does not necessarily mean uniformity of civil progress, guaranteed instead only by the universalization of human rights[44]. In this sense, the role of the G-7 no longer seems to be sufficient: although it includes the most industrialized and advanced countries from the point of view of the rule of law and respect for the values of legal civilization, it certainly no longer represents the main world economies, today embodied by states not always in line with those principles of freedom and democracy[45].

There is no lack, then, of subjects chacterized by a more universalistic and humanitarian missin, given that corporate crime, as we have seen,

[43] The expression is taken from M. Santoro, *Giochi di potere. Pierre Bourdieu e il linguaggio del "capitale"*, preface to P. Bourdieu, *Forme di capitale*, Roma 2016 (tr. it).

[44] U. Beck, *Weltrisikogesellschaft. Auf der Suche nach der verlorenen Sicherheit*, Frankfurt am Main 2007 (tr. it. *Conditio Humana. Il rischio nell'età globale*, Roma-Bari 2008); A. Martinelli, *La democrazia globale*, Milano 2008.

[45] The financial crises at the turn of the millennia (the Asian one in 1997 and the one that started in the United States in 2008) and the rampant growth of the new economies (those of the BRICS countries – Brazil, Russia, India, China and South Africa, and those of the group MIKTA – Mexico, Indonesia, South Korea, Turkey and Australia), led to the expansion of the 'club' of leading countries and to talk, now also in a formal way (after the Pittsburgh summit, in 2009), of a G-20.

causes wider effects than those that occur in the market alone, and which indeed undermine the same institutional stability and the respect of fundamental human rights, especially true when it comes to corruption. In this regarde, the role of the UN is flanked by that of numerous other international organizations or specialized agencies and institutions within the United Nations itself (such as, for example, UNCTAD, the United Nations Conference for Trade and Development); as well as NGOs, which play a counterweight role in the global governance system, enhancing the "capital of human rights" in a complementary key[46], if not exactly in an antagonistic one, to the "capital of economic values";

– the second group of subjects refers to the smaller regional area, which includes both intergovernmental organizations and real supranational institutions: therefore, as regards our Continent, the European Union and the Council of Europe (to whome correspond, with structure and functions similar from an internationalist point of view, the bodies of other continental realities such as the Arab League, the African Union and the Organization of American States). Through specific agreements, other important bodies have been established within the Council of Europe, including the European Commission for Democracy through Law or the Venice Commission (also open to non-European countries), the Development Bank (CEB) and, above all, the Group of States against Corruption (GRECO).

Even in the regional-continental context, the discussion carried out on the role and institutional scope of the subjects that populate the world scenario, can be resumed, albeit with significant variations: in fact, the exception represented by the European Union must be taken into account, a singular institution of its kind as the only true supra-state structure of the Old Continent capable of entailing limitations of sovereignty to its members, through the forms of democratic representation (increasingly developed over time); and also of the dynamic role of the Council of Europe, through its most well-known treaty act, the ECHR, and of the judicial body responsible for ensuring compliance.

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[46] J. C. Alexander, *Real Civil Society: Dilemma of institutionalization*, London 1998.

In conclusion, the institutional scenario of the global community is heterogeneous and irreducible to the conceptual units typical of domestic constitutionalism; and the points of view on the globalization of law are the most varied and all – in their own way – legitimate, since they capture the revolutionary aspects of global governance: fusion of the national with the international sphere; increased role of non-state actors; arising of private governance; shift to a new way of achieving compliance through the use of non-coercive standards; and the growing complexity of the institutional horizon.

3.2. The international instruments to fight corruption, the various corruption paradigms and the possible techniques for standardizing domestic legislation

Regulatory power in the global legal order is non-treaty law-making[47], in which the law of international treaties constitutes only a first level of legislation, alongside the customary one. Below, there is a second level, made up of rules that do not derive from agreements, produced by public authorities endowed with regulatory powers by the treaties. This is also true for the implementation of international anti-corruption policies: if the reforming motion of internal legislation began essentially from the treaty-based right of origin, it was above all the "derivative" regulatory acts – that is, those produced by bodies that those international conventions they have established – to have made that work of implementation of domestic law assume a constant and unstoppable trend.

It should also be remembered that many of the initiatives to combat corruption (both domestic and international) have been carried out through instruments that fall within the orbit of international soft-law, such as codes of conduct, guidelines, recommendations.

[47] On the subject J. Alvarez, *International Organization as Law Makers*, Oxford 2006; R. R. Baxter, *International Law in her "Infinite Variety"*, in *The International and Comparative Law Quarterly* 29.4 (1980) 549 ff.; A. Algostino, *Diritto proteiforme e conflitto sul diritto: studio sulla trasformazione delle fonti del diritto*, Torino 2018; on the problem of the democratic legitimacy of international soft law, C. Rose, *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal Systems*, Oxford 2015, 27 ff.

As for the main international and regional-European regulatory texts, they are:

– the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed in Paris on 18 December 1997, and entered into force on 15 February 1999: the OECD's driving role mainly concerned the fight against *international corruption*, considered essentially as a factor of distortion of competition[48]. Therefore it is essentially the economic model to which it refers, with little or no attention to the publicistic model and its characterization in a bureaucratic-administrative sense. It also provides for the provision of periodic monitoring mechanisms, which are adopted to verify the implementation of the agreement text within the legislation of the member states; for this purpose, the Convention, pursuant to art. 12, has provided for the establishment of a special collegial body which has been entrusted with the task of periodically monitoring the actions undertaken by the member states, namely the Working Group on Bribery – WGB. It, at the end of the evaluation procedures it owns[49], may issue recommendations, which, joining other soft-law instruments adopted directly by the OECD, compose that complex network of conventional provisions and derivative acts which, in their continuous evolution, have required a feverish work of updating national legislation;

– the *U.N. Convention on the fight against corruption* of Merida, adopted by the General Assembly on 31 October 2003 (resolution n. 58/4) and entered into force on 14 December 2005[50]: the contents of the Convention and in general the anti-corruption policies of the UN reveal the conceptual distance between the dimension of the phenomenon accepted by this international organization and the one, seen above, adopted by the OECD: beyond the mere distorting effects on competition and the freedom of the markets, in the aspirations of the

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[48] On this document, *ex multibus*, Rose (nt. 47) 13 ff., 59 ff.; M. Pieth (collab. L. Low-P. Cullen), *The OECD Convention on Bribery: A Commentary*, Cambridge 2007.

[49] For a detailed analysis of this procedure, Pieth (nt. 48) 30-36.

[50] On this document, C. Rose (collab. M. Kubiciel-O. Landwehr), *The United Nations Convention Against Corruption – A Commentary*, Oxford 2019; Ead. (nt. 47) 97 ff.

United Nations there is the broadest will to counter the damage that corruption causes to the welfare state, as a reflection of an illicit diversion of public powers and resources to satisfy the opportunistic interests of corrupters. Therefore its idea of corruption is purely publicist, as it is in the national dimension and (as we will see shortly) in the European one, a circumstance that certainly creates less friction in the work of adapting internal systems to the obligations of a treaty nature and to other indications of a non-binding nature.

An absolutely important aspect of this Convention, which makes it a *unique* in its kind and reveals a spirit that is more aware of the strategies for containing the corruptive phenomenology (which are not only encouraged on the repressive side) is its multidisciplinary approach and its preliminary consideration, compared to the forms of *ex post* reaction[51], of the dissemination of a preventive culture of legality and correctness of public administrations. Decisive, according to this strategic vision, is the arrangement of an administrative prevention system of corruption: in articles from 5 to 14, dedicated to "preventive measures", are in fact indicated the initiatives that the States undertake to carry out for what should be the main counter strategy, since «the prevention of corruption is more effective in environments that encourage integrity, enable transparency, enjoy strong and legitimate regulatory guidance and jointly integrate the efforts of the public, private and societal sectors»;

– the *Convention against corruption involving officials of the European Communities or of the Member States of the European Union*, of 26 May 1997.

The Convention in question certainly represents the main instrument in the field of fighting public corruption adopted within the Union[52]

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[51] In general, on the principle of *extrema ratio* of criminal law, with limitation to the most recent contributions in Italian and foreign doctrine, N. Jareborg, *Criminalization as Last Resort ("Ultima Ratio")*, in *Ohio State. Journal of Criminal Law* 2 (2005) 521 ff.; C. E. Paliero, *Pragmatica e paradigmatica della clausola di "extrema ratio"*, in *Riv. it. dir. proc. pen*. (2018) 1447 ff.

[52] On the issues of the Europeanisation of criminal law and on the competences in this area of the EU, in a by now vast scientific production, we limit ourselves here to mentioning C. E. Paliero (collab. W. F. Viganò), *Europa e diritto penale*, Milano

and, in any case, the only one specifically dedicated to it[53]. A look at the main prescriptive contents of the Convention, in particular the analysis of articles 2 and 3, which describe the corrupt behaviour, confirm that the model taken into consideration from the perspective of EU protection is corruption structured according to the publicistic paradigm, centered on on the trading of a single act or a single omission of the official (therefore, on the classic mercantile model, and not on the 'payroll' of the corrupt public agent). The activity of the European Union aimed at strengthening anti-corruption policies then continued steadily even in the years following the entry into force of the Convention, although it took the form of less binding and more purely political initiatives; or by monitoring and collecting data on the dissemination of these practices within member countries and consequent evaluation of the effectiveness of the regulatory measures adopted: on 3 February 2014, for example, the first European Commission Report on fight against corruption has been released[54];

– the *Criminal Law Convention on Corruption of the Council of Europe*, open for signature by the States interested in joining it with effect from January 27, 1999[55]: preceded by the establishment in 1998 of the Group of States against Corruption (or, in French, Group d'Etats contre la Corruption, hence the acronym GRECO), the Convention in question, together with the OECD Convention of 1997, is among those that more have stimulated internal legislative reforms on corruption: this not only because chronologically they represented the first two instruments of treaty-nature aimed at harmonizing and spreading severe anti-corruption policies; but also because both provide for an

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2013; A. Klip, *European Criminal Law. An Integrative Approach*, Cambridge 2012; J. B. Banach-Gutierrez (collab. C. Harding), *EU Criminal Law and Policy*, Oxon-New York 2017.

[53] For private corruption, cfr. Framework Decision 2003/568/JHA on corruption in the private sector.

[54] See https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/ 2014_acr_italy_chapter_it.pdf.

[55] Criminal Law Convention on Corruption – ETS n. 173, available, in its Italian version, at https://www.admin.ch/opc/it/federal-gazette/2004/6253.pdf.

implementation mechanism, entrusted to specific bodies (the WTO and GRECO[56]). The forms of manifestation of corruption taken into consideration for the purposes of the obligations of indictment are the 'classic' ones, that is understood in a publicistic sense and released from any reference to connotations in an economic way[57].

4. Between self-regulation, international legislation and domestic law: the possible models of law enforcement

At the end of this brief and concise review of the many subjects that animate the global legal scenario, each with a role in many ways eccentric compared to the classic institutional paradigms of the nation-state; and the equally variegated legislative acts that move according to spatio-temporal deadlines that are difficult to predict; what we are witnessing is an order that manages to assume its coherence only if observed from a certain distance, in a minimalist vision of the legal system that does not fit into the 'particle' order that the 'Kelsen model' had imposed on the sources of law.

Having said this, in order to try to explain how that complex regulatory system was formed and is still developing, two evolutionary models have been proposed, both able to reveal only a partial truth of what the current law enforcement mechanisms are: the first is the so-called "pyramid" model, based on the theories of the well-known Australian criminologist John Braithwaite[58]; the second is that which adapts the concept of 'multilevel system' to the global scheme, already known in the field of juridical regionalism, both with reference to European[59] than

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[56] See https://www.coe.int/en/web/greco/about-greco/how-does-greco-work.

[57] Apart from the case of international corruption.

[58] See, among the numerous works of the author, which proposes this model essentially with reference to corporate crime, J. Braithwaite, *Enforced Self-regulation: a New Strategy for Corporate Crime Control*, in *Mich. Law Rev.* (1982) 1466 ff.; Id., *Reducing the crime problem: a not so dismal criminology*, in *The New Criminology Revisited*, Basingstoke 1998, 47-63; Id. (collab. B. Fisse), *Corporations, crime and accountability*, Cambridge 1993, 141-145.

[59] The concept of multilevel constitutionalism was first introduced by I. Pernice, *Multilevel constitutionalism and the treaty of Amsterdam: European constitution-making*

to that of a treaty nature (and, in the latter case, essentially linked to the relations of internal legal systems concerning the constraints deriving from the ECHR, therefore in the perspective of the multilevel protection of fundamental rights).

The pyramid model

According to the first perspective, the best form of harmonization and elevation of the standards of protection against corrupt practices would be achieved through a combination of 1) forms of private self-regulation; 2) mechanisms of moral suasion activated from above, that is through public regulation based on soft-law instruments; 3) imperative and mandatory hard law instruments.

More precisely, their combination should assume a progressive enforcement scalar procedure (hence the image of the pyramid), for which the priority form of regulation should start from the bottom, by the same subjects potentially authors of the criminal facts, and through persuasive and incentive mechanisms of good business practices and mutual fairness. That is, the rejection of illegality should be achieved through internalization of the opposite stimulus to legality. And this mechanism does not necessarily have to work by requiring an intimate adherence to ethical values: integrity is not only a reputational asset of the company, but it is an economically expendable value if that reputation is followed by the possibility of retaining its users; further upstream, transforming the value of legality into a business value is a symptom of a perspective intelligence with which the idea is spread that the correctness of one will benefit all the others, guaranteeing only in this way, in conditions of full and mutual respect for the rules, the democratic implications of the free market. In the model imagined by Braithwaite, in effect, at the bottom of the pyramid the rules work on the basis of the persuasive mechanism, aiming at the capacity building of its recipient and addressing the 'learning citizen'; as we go up along that system of rules of social control, and therefore pass from the sources of private self-regulation to public sources, the rules must become progressively more incisive by first relying on an intermediate level of control measures and

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revisited?, in *Common Market Law Review* (1999) 703 ff.

public intervention (ranging from the forms of warning – warning letters, to injunctions, also passing through the tools of negative publicity), and then through the application of real sanctions (the deterrence phase), where civil and administrative sanctions must precede criminal ones, the latter must be used "for particularly serious offences, or repeated despite the previous infliction of less afflictive measures" (adversarial model); this last stage can also provide for forms of invalidation through suspension and disqualifications from the performance of certain activities (incapacitation).

Adapted to the specific context of the fight against corruption, the pyramid model is fully compatible not only with the economic paradigm of corruption, which includes this form of full-fledged crime in the category of white-collar crimes; but also with the public-institutional one, managing to provide useful information also for the definition of strategies to combat administrative corruption.

In particular, the idea of an integration between self-regulation perspectives and public accountability mechanisms that are becoming more and more stringent and rigorous from the point of view of cogency and sanctioning consequences[60], works (it can work) both on the private side of corruption (in particular when business activity is involved); both on the public one, confirming the need for administrative legislation that stimulates the promotion of legality before intervening with the instruments of a punitive nature (administrative, disciplinary, criminal): punishing non-compliance presupposes, by definition, that the compliance must have been promoted, that the company has at least had the opportunity to develop it. In this type of sanctioning mechanism, the crime is not considered as the result of an individual choice, or rather not only: the crime was made possible also due to the absence of a legal and cultural orientation mechanism which, at the base, it could have oriented that single choice differently.

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[60] G. Forti, *Il crimine dei colletti bianchi come dislocazione dei confini normativi. "Doppio standard" e "doppio vincolo" nella decisione di delinquere o di 'blow the whistle'*, in *Impresa e giustizia penale. Tra passato e futuro*. Atti del Convegno, Milano 14-15 marzo 2008, Milano 2009, 225.

Therefore the law enforcement system through hard law and its 'armed arm' of the punitive law (through which it also tends to impose a prevention strategy – see management and control models) is a system that does not develop (not should develop) regardless of one (compliance, which is the best preventive factor) or the other (national and international soft-law, which represents the first means of possible dissemination), but that is based on them, leaving them playing a 'frontier role': not under the illusion that they can work alone, but trusting in the fact that the more they are valued, the more one will be able to «benefit from the collaboration at least partly consensual (absent in the pure punitive model) by the same actors to check, with the possibility of exploiting the knowledge of the situation and the operational resources, generally much higher than those available to any "external" controller»[61].

It is not a novelty, moreover, that the concept of compliance is now used, in economic and business sciences, also regarding public and administrative structures, and this beyond the phenomenon of public companies or economic public bodies (in which, however, the State participates through its own capital). Concepts typically reserved for the private enterprise universe, have now entered full capacity also in the management of public structures, such as 'risk management', 'corporate policies', 'governance', 'performance cycle', etc. Administrative transparency is thus confronted with typically entrepreneurial judgment criteria, such as those of effectiveness, efficiency, economy (the "3 E")[62]. In this sense, mere regulatory compliance, understood as formal adherence to the rules on administrative action tends to be overcome, in an increasingly managerial perspective that leads «to think about the benefits for users-recipients of services and citizens, in terms not only of services made available or provided, but also of transparency, accountability, anti-corruption; the latter increase the positive perception of the public sector and can trigger improvement paths for

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[61] Trad. from Forti (nt. 60) 225.

[62] F. T. Attisano, *La performance delle pubbliche amministrazioni, oltre la compliance normativa*, in https://www.riskcompliance.it/news/la-performance-delle-pubbliche-amministrazioni-oltre-la-compliance-normativa/, 9 April 2020.

public organizations. The ultimate goal is always to increase the well-being and quality of life of the community»[63].

The multilevel model

The ideological adherence to the pyramid model, therefore, does not mean disinterest in the implementation of legislation through hard law instruments. Simply, it invites not to neglect the forms of bottom-up regulation or through soft-law instruments, which, if well integrated and understood in a logic of progressive use, end up guaranteeing a better functionality of the same 'hard legislation'.

It seems possible to grasp the demonstration of this assumption also in the contents of the various international sources, which underline the need to equip the internal legislation with articulated systems of a preventive nature and to accompany the management and organization activities of public and private entities through the development of soft-law tools (opinions, recommendations, guidelines, white papers, codes of conduct, collections of principles, etc.). In short, it seems that the regulatory acts that actually concretize and certify the multilevel structure of the sources in the field of combating corrupt crime, at the same time confirm the pyramid-type model and along with it the absolute compatibility and reciprocal capacity for strengthening of the two law enforcement paradigms. The idea of a multilevel structure, it can be said then, 'projects' the pyramidal model from the domestic to the regional and global context, and adds to the need for an integrated approach between self-regulation, prevention and repression the conviction that in that world-setting the assets for market and public insitutions protection must pass through a plurality of centers of legal production.

So that – understood that corruption, like any other form of transnational crime, requires strategies as common as possible that level the playing field in a space that now escapes the sovereign control of individual nation-states – «the preventive and repressive apparatus of domestic and international corruption has come articulated along with a

[63] Trad. from Attisano (nt. 62).

triple-level: a first internal or 'national' level, a second 'supranational' and 'regional continental', and yet another 'international world'»[64].

But we must be careful: the multilevel paradigm does not develop hitsefl in a vertically way, as we are accustomed to think when we reason in terms of a hierarchical system of sources: the difference in level is mainly referable to the spatial dimension of the rules that insist on each of the normative planes, but certainly not to a necessary superiority of degree capable of influencing, with binding force, the underlying level; the international source is certainly not superordinate to the regional one, and both are not so concerning the national one – unless a mechanism of international law is introduced which removes sovereignty from individual states (as in the case of the EU) or obliges them to respect 'exogenous' norms through a treaty. In any case, the democratic deficit still present in the institutions of global governance explains why it is always and in any case the States that have to intervene in the criminal law sector. In this context, therefore, no space of personal freedom can ever be compressed by under the direct application of a non-national source.

The image of the "network" is better suited to the model of regulatory integration on a global scale, as an organizational figure opposed to the traditional model of the sovereign and unitary State, governed according to a principle of rigid hierarchy and self-referentially closed: this idea immediately clarifies how the normative web of the global legal order develops not only (and not so much) in a vertical sense, but also (and rather) in a horizontal sense. And undoubtedly, that of the fight against corruption has been one of the sectors where we have most witnessed the development of this global network of rules; it represents almost the prototype.

The problem of the multilevel structure, however, is that the harmonization process it tends to must take into account that multitude of 'voices' that animate the global context, trying to synthesize them in a message that is unlikely to be able to reduce them to unity. And it is not just a problem of coordination between sources, or rather of the most varied

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[64] Trad. from V. Mongillo, *La corruzione tra sfera interna e dimensione internazionale*, Roma 2012, 24-25.

ways through which political instances are formulated (soft law and hard law instruments; conventional instruments and 'derivative' instruments); but essentially of contents, which reflect heterogeneous and sometimes contrasting cultural and social paradigms. This is especially true in the case of anti-corruption policies, that have to do with a phenomenon of deviance that by its nature is reluctant to be rigidly categorized and that can refer to different criminological models (economic, public, agency).

A series of questions then arise, which betray all the tensions of a non-hierarchical model but based on cooperation between subjects carrying such different ideologies: how can, for example, aspire to the harmonization of domestic legislation on corruption, if its definition already escapes a universally accepted conceptual and lexical context? Is it really necessary that a form of levelling be achieved not only from above, but upwards? Or it is sufficient that a minimum level of criminal protection is guaranteed, leaving any greater severity of a national system to remain a 'matter of State'? And again: assuming that an international 'compromise' can be reached, what guarantees that the content of that political decision does not conflict with the internal values drawn up by the individual Constitutional Charters or with the system principles, particularly rigid in the case of criminal law? Can there be any prosecution obligations? And if so, how can such constraints be acknowledged as a result, in the face of the reported lack of democracy in international institutions?

The worries are many and to some extent justified by practice: the most alarming aspect of the current multilevel structure of the fight against corruption is the fact that this form of deviance has been overloaded with so many messages of negative value that it is now accompanied by much more hateful and bloody forms of crime, such as terrorism or the mafia. We have witnessed and continue to witness an hyper-production of legislation in the field of criminal law, an accumulation of international sources that are not symmetrical from the point of view of content, but which are expected to be contextually and fully implemented: the outcome is legislation dense and disorganized, a real 'jungle' in which new and increasingly ferocious incriminating dispositions branch out.

Our reflection on the issue of law enforcement mechanisms, therefore, remains with a suspended judgment: the goodness of a multilevel system

is doubtless, since it definetily has produced significant results, if only think at the decisive stimulus that it represented for the start and the development of a series of administrative prevention legislation. At the same times, in many other respects it remains inadequate or dangerous: the world and local political class have enraged society against a certain form of delinquency (among other things difficult to define and measure) such as corruption – certainly deleterious for the correct stability of institutional structures and which therefore deserves to be at the top of the list in the national, supranational and global political agenda – but has consequently created for it a normative reality that is in many ways justicialist and illiberal.

Maria Ilia Bianco*

The Abuse of Office in the Italian Criminal System

1. The Crime of Abuse of Office: the Value protected by Law

The Abuse of Office is described in art. 323 of the Italian Penal Code (hereinafter c.p.), in the Chapter dedicated to the crimes of public officials against Public Administration. This crime was regulated for the first time in 1930, even before the birth of the Italian Constitution. In its original formulation, art. 323 c.p. punished the behavior of the public official who, by abusing her/his office, cast a bad light on and discredited the State Authority.

In particular, art. 323 is placed in a *Titolo* (in Engl. 'Title') of the Penal Code dedicated to the protection of Public Administration[1]. In the 'fascist period', Public Administration was considered the entity that represented the authority of the State.

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[1] More specifically, within the "*Libro II*" of the c.p., there is the "*Titolo II*" entitled: Crimes against Public Administration.

When the Italian Constitution came into force in 1948, the legislator provided a new vision of Public Administration through the art. 97 of the Italian Constitution (hereinafter Cost.).

In that period there was a transition from a conception of Public Administration understood in a 'static sense' – i.e. an entity hierarchically elevated with respect to the citizen, a symbol of prestige and strong authority – to a very different idea: Public Administration has become, in a 'dynamic sense', the whole of relations and interactions that connected on an equal footing the State and the citizen, putting them on the same level to better manage 'public affairs'.

This new vision of Public Administration led to a new interpretation of all provisions of Title II of the Criminal Code and the interpreters of law started to use new parameters to measure the criminal relevance of the 'distortions' and 'diversions' of public power committed by public officials at work[2].

The "*buon andamento della Publica Amministrazione*"[3] referred to in art. 97 Cost., and which replaced the old concept of prestige of Public Administration, is now considered as the relationship between "effectiveness of administrative action" and "adequacy of results": therefore, it is the "*efficienza*" of Public Administration[4].

As regards the second element mentioned in art. 97 Cost., it is the impartiality of administrative action. It has a distinct but complementary value with respect to good performance: impartiality consists in respecting the "*par condicio civium*" in the context of the "*agere publicum*"[5].

From the above considerations, it is possible to conclude that Public Administration protected as a legal asset by this c.p. title has a double

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[2] S. Fiore-G. Amarelli, *I delitti dei pubblici ufficiali contro la Pubblica amministrazione*, Milano 2018, 9 ff.

[3] In English this expression stands for "good performance of Public Administration".

[4] F. Nicotra, *I principi di proporzionalità e ragionevolezza dell'azione amministrativa*, in *Federalismi.it* 12 (2017) 8 ff. (https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=34155); R. Villata-M. Ramajoli, *Il provvedimento amministrativo*, Torino 2017, 668 ff.

[5] See A. Pagliaro, *Principi di diritto penale. Parte Speciale* 1, Milano 2008, 271 ff.

value: 1) if the *focus* is on the relations between public employees and Public Administration, the principle of 'good performance' prevails. According to this principle, public agents never act with the intention of causing undue favoritism and distortions of the public function that damage the final objectives, since, in this way, they would produce inadequacy and inefficiency of Public Administration; 2) on the other hand, if the *focus* is on the relations between private citizens and public officials representing the State, the criterion of the impartiality of Public Administration prevails: this means 'protection of individuals' who must not suffer discrimination or unjustified restrictions on their rights as a consequence of the abusive behavior of public employees.

The double interpretation of the protected legal assets confers a multi-offensive character to the category of the crimes of public officials against Public Administration. This means that the abusive conduct of public agents is capable of simultaneously causing a violation of the interests of Public Administration and a violation of the subjective situations of the private sector[6].

However, there is an authoritative Italian doctrine that thinks differently only with regard to the crime of abuse of office. This doctrine has argued that the legal asset protected in this case is only the 'impartiality' of the *agere publicum*. This doctrine is based on the assumption that the crime of abuse of office expressly refers to an event of unfair advantage for oneself or for others or of unfair damage to others, without mentioning the damage to Public Administration which, if foreseen, would refer to the criterion of good performance[7].

However, considering the good performance and impartiality of Public Administration as the two faces of the protected legal asset is undoubtedly the right premise to guarantee a reading of all the articles of Title II of the Criminal Code in compliance with the *ratio legis* and the objectives of the legislator.

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[6] See F. Grispigni, *I delitti contro la Pubblica Amministrazione*, Roma 1953, 147; S. Vinciguerra, *I delitti contro la Pubblica Amministrazione*, Padova 2008, 67; A. D'Avirro, *I nuovi delitti contro la pubblica amministrazione. Commento alla legge 6 novembre 2012, n.190*, Milano 2013, 41 ff.

[7] Pagliaro (nt. 5) 272 ff.

A subsequent transposition of these criteria is then necessary in the application phase of the rules, so that their discipline is understandable and too extensive interpretations of what is considered criminally relevant are avoided.

2. The History of the Crime: Constituent Elements in Continuous Reform

To fully understand the relationship between the criminal legislation protecting Public Administration and the persistent criticalities of the crime of abuse of office, it is useful to go back over time and recall the original article 323 of the Italian c.p. in its 1930 version.

The content of art. 323 c.p. was inaccurate, as it punished the abuse committed by the public official with the specific intent of «causing a damage to others» or «giving them an advantage».

It was a crime that only applied if the other rules governing the same matter were not applicable. In summary, the old article of abuse of office included all the illicit behavior of public officials which were not punished by the other articles provided for by the same Title of the code and which in any case consisted of 'deviations' (or abuses) of the public function.

After the Italian Law n. 86 of 1990[8], art. 323 c.p. was progressively reformulated in order to become more detailed and this also due to the intention of the reformer to give the article a more central and important role in the criminal liability system of public officials.

Therefore, since the new law on the abuse of office had to extend also to the old cases of «embezzlement for distraction of public resources» and

[8] The Law of 26 April 1990 n. 86 in art. 13 amended the text of art. 323 c.p. which said as follows: «A public official or person in charge of a public service, who, in order to procure an unfair non-pecuniary advantage for himself or others or to cause unjust damage to others, abuses his office, is punished, if the fact no longer constitutes a serious crime, with imprisonment of up to two years. If the offense is committed to procure an unfair financial advantage for oneself or others, the penalty is imprisonment from two to five years» (unless otherwise stated, all English translations are the author's). The crime was then further and profoundly reformed by art. 1 of the Law n. 234 of 16 July 1997, how soon it will be better explained.

of «private interest in official acts» (both crimes repealed in conjunction with the rewriting of article 323 of the criminal code)[9], Legislator has suppressed the part referring to other cases not specifically provided for and governed by other c.p. articles (on which the «absolutely residual character of the unnamed office abuse was based»[10]).

In this way the law excelled in the system, becoming subsidiary only with respect to abusive behavior, carried out by public agents, suitable for integrating a 'more serious' crime (and so much through the new reserve clause relating[11]).

After the 1990 Reform, however, art. 323 c.p. continued to be ambiguous and did not describe the specific modalities of the abusive conduct. It was the criminal judges who did all the interpreting work and also entered the area of administrative discretion, with the result that the c.p. article was applicable with too much uncertainty[12].

In 1997, following a new Reform[13], Legislator tried to describe more clearly the conduct of criminally relevant abuse of office: this was the «violation of laws or regulations» and the omission of the obligation of abstaining in the presence of (not better defined)[14] own interests or close relatives or «in other prescribed cases».

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[9] C. F. Grosso, *Condotte ed eventi del delitto di abuso d'ufficio*, in *Foro it.* 12 (1999) 329-342, where it is said that precisely for this reason the previous hypothesis of 'private interest in official documents' was abolished and the embezzlement for distraction was inserted in § 2 of the new art. 323 c.p.

[10] R. Rampioni, *I reati dei pubblici ufficiali contro la Pubblica Amministrazione*, in *Questioni fondamentali della parte speciale del diritto penale*, Torino 2013, 724 ff.

[11] *Ibid*.

[12] G. Fiandaca-E. Musco, *Diritto penale. Parte Speciale*, Bologna 1997², 236 ff.; V. Seminara, *Il delitto di abuso di ufficio*, in *Riv. it. dir. e proc. pen*. (1992) 562 ff.

[13] With Law n. 243 of 16 July 1997, the old art. 323 c.p. was replaced as follows: « – Abuse of office – Unless the fact constitutes a more serious offense, the public official or the person in charge of a public service who, in carrying out his duties or service, in violation of the law or regulations, or by failing to abstain in the presence of a personal interest or that of a close relative or in other prescribed cases, intentionally procures an unfair financial advantage for oneself or others or causes unjust damage to others is punished with imprisonment from six months to three years. The penalty is increased in cases where the advantage or damage is of significant gravity».

[14] Note that the observation in round brackets is an observation by the author of this paper.

Through this modification, the main objective of Legislator was to remove much of the matter inherent in the administrative discretionary activity from the criminal judge, to prevent him/her from entering the "choices of opportunity" of Public Administration[15].

However, even this change was not useful and the debates on the most controversial interpretations of abuse of office remained alive[16].

Even after the 2012 Legislative Reform[17], art. 323 c.p. remained unchanged in the core and said that: «Unless the fact constitutes a more serious crime, the public official or person in charge of a public service who, in the exercise of his/her functions or service, in violation of laws or regulations, or, failing to abstain in the presence of a personal interest or a close relative or in other prescribed cases, intentionally procures an unfair economic advantage for himself/herself or others or causes unfair harm to others, is punished with imprisonment from one to four years.

The penalty is increased in cases where the advantage or damage is of significant gravity».

Art. 323 c.p. has been more profoundly modified only by art. 23 of the so called "*Decreto Semplificazioni*" (i.e. Simplifications decree[18]), issued recently.

The Italian Decree changed the core of this article by replacing the words «violation of laws and regulations» with the following: «violation of specific rules of conduct expressly provided for by law or by acts having the force of law and from which there is no margin for discretion».

Article 323 c.p. remains unchanged in its following *comma* (or paragraph).

Through the analysis of the article, it can be understood that this is a crime that can only be committed by a "qualified perpetrator" (in this

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[15] Fiandaca–Musco (nt. 12) 236 ff.

[16] T. Padovani, *Commento all'art 1 della l. legge 16 luglio 1997 n. 234*, in *Legisl. Pen.* (1997) 742 ff.

[17] Article as amended by art. 1, co. 75, Law 6 November 2012, n. 190, only in the part relating to the sentence, which in the 1997 version was from three months to three years of imprisonment.

[18] This is the Law Decree n. 76 of 16 July 2020 "Misure urgenti per la semplificazione e l'innovazione digitale".

case, a public official or a person in charge of a public service), through two illicit alternative conducts (active or not active behavior) «functionally connected»[19] to the exercise of the public function or service.

These behaviors must be perpetrated with the intent of achieving a final event, consisting in obtaining an unfair economic advantage[20] or in producing harm or damage to others.

The current crime of abuse of office, therefore, is today a "crime of event" that is committed when an undue economic advantage[21] is actually achieved (for oneself or for others) or when unjust damage is caused to others[22].

These events are alternative consequences of behavior that violates specific rules of conduct expressly provided for by law or by acts having the force of law and from which there is no residual margin of discretion or in violation of an obligation to abstaining.

According to some criminal doctrines, for the purpose of integrating the crime in question, the necessary coexistence of an unlawful conduct

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[19] S. Fiore, *Abuso d'ufficio*, in *I delitti dei pubblici ufficiali contro la Pubblica amministrazione* (nt. 2) 228 ff.

[20] Art. 13 of the Law n. 86 of 1990, in amending art. 323 of the Criminal Code, did not require that the unjust advantage be of a patrimonial nature and therefore the crime was also configured in the presence of a non-patrimonial advantage, provided it was unfair. However, the article (in comma 2) provided for a greater penalty if the unfair advantage was also a pecuniary advantage. More specifically, if the unfair advantage was non-pecuniary, the envisaged sanction was imprisonment for up to two years; if the unfair advantage was patrimonial, there was imprisonment from two to five years.

[21] In this regard, it should be noted that the amendment introduced by Law n. 243 of 1997 (which eliminated the reference expressed to the non-equity of the unfair advantage) had prompted some authors to speak of a real abolition of the previous hypothesis of abuse of office. For further information see S. Aleo, *Istituzioni di diritto penale. Parte Speciale* 1, Milano 2017, 256 ff.

[22] F. Rigo, *Art. 323 c.p. Abuso d'ufficio*, in *Codice Penale* 1 (artt. 1-413), ed T. Padovani, Milano 2007, 1987 ff.; V. Macarì, *L'abuso d'ufficio*, in *I delitti contro la Pubblica Amministrazione*, ed. F. S. Fortuna, Milano 2010, 112-148; M. Catenacci, *Abuso d'ufficio*, in *Reati contro la Pubblica Amministrazione e contro l'amministrazione della giustizia*, Torino 2011, 119-131; Fiore (nt. 19) 223-248.

and an unjust fact would constitute a unitary requirement, namely the «double injustice»[23].

As for the methods of expressing the typical conduct, the various attempts to rewrite the law, to give it greater precision, testify the immanent genericity that is related to this crime and the difficulties, still persistent today, in giving it determinacy[24].

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[23] See C. Renzetti, *L'ingiustizia della condotta e dell'evento nel reato di abuso d'ufficio*, in *Cass. pen*. 10 (2010) 3402-3414; Fiore (nt. 19) 234, 239. The Italian prevailing jurisprudence also agrees on the necessary presence of this requirement for the integration of the crime in question: cfr. Cass. pen., sez. VI, sent. n. 17676 of 18.3.2016; Cass. pen., sez. VI, sent. n. 48914 of 11.11.2015; Cass. pen., sez. VI, sent. n. 1332 of 4.11.2015; Cass. pen., sez. VI, sent. n. 11394 of 29.01.2015; Cass. pen., sez. VI, sent. n. 36076 of 14.05. 2014.

[24] According to the legislator of the 1930s, the vagueness of the rule was justified by the fact that it was an article that completed the system of crimes of public officials. This crime was known as "unnamed abuse" and, in fact, applied to abuses committed by public officials that were not governed by the rules already expressly provided for by the legislator. With the subsequent reforms of 1990 and 1997, as will be illustrated hereinafter, the law has been modified and made more precise: precise methods of conduct have been established, it has been established that the crime can also be committed by the person in charge of a public service (with the 1990 Reform); the event has been specified in detail (consisting in obtaining an unfair financial advantage and/or causing unfair harm to others) and a clause has been inserted which states that the most severe rules apply to the most serious abuses. For further information on the crime of abuse of office in the 1990 version see Seminara (nt. 12) 562 ff.; A. Mazzone, *Bene giuridico e condotta nell'abuso d'ufficio*, in *Riv. it. dir. proc. pen*. (1994) 707 ff.; G. Tabasco, *Primi orientamenti interpretativi del reato di abuso d'ufficio*, in *Giust. pen*. 2 (1994) 473 ff.; V. Scordamaglia, *L'abuso d'ufficio*, in *Reati contro la Pubblica Amministrazione*, ed. F. Coppi, Torino 1993, 191 ff.; A. Pagliaro-M. Parodi Giusino, *Principi di diritto penale. Parte Speciale* 1, in *Delitti contro la Pubblica Amministrazione*, Milano 2008, 223 ff.; G. Contento, *Giustizia penale e Pubblica Amministrazione dopo la riforma*, in *Quad. del C.S.M.* 59 (1992) 174 ff. With regard to the 1997 post-reform crime of abuse of office see Aleo (nt. 21) 257-261; V. Manes, *Abuso d'ufficio e progetti di riforma: i limiti dell'attuale formulazione alla luce delle soluzioni proposte*, in *Riv. it. dir. proc. pen*. 4 (1997) 1202-1235; A. D'Avirro, *Abuso d'ufficio. La legge di riforma 16 luglio 1997 n. 234*, Milano 1997, 169 ff.; A. Chizzoniti, *Abuso d'ufficio. Il Senato volta pagina*, in *Queste istituzioni* 25 (1997) 95 ff.; E. Baffi, *Abuso d'ufficio*, in *I delitti dei pubblici ufficiali contro la Pubblica Amministrazione*, ed. C. Fiore, Torino 2004, 261 ff.; A. Di Martino, *Abuso d'ufficio*, in *I reati contro la Pubblica Amministrazione*, eds. A. Bondi-A.

In fact, despite the various reforms of this article, there are still many questions relating to its content and scope: issues that confirm the inherent difficulty of the legislator in accurately predicting all the possible conducts that make up the crime[25].

3. In detail: the Perpetration of the Abuse of Office through the Conduct performed «in Violation of specific Rules of Conduct expressly provided for by Law or by Acts with the Force of Law and from which there is no possibility of Discretion»

Article 323 c.p. has been reformulated several times during the 1990s in order to make it more precise and clear.

From the generic formulation «abuse of his/her office», the 1997 legislator moves on to the more stringent indication of two alternative conducts suitable for integrating the crime: the violation of laws or regulations and the omitted abstention in the presence of one's own interest or of a close relative or in other prescribed cases.

Finally, in 2020, the first conduct is again modified and replaced by a more specific wording, that is «in violation of specific rules of conduct expressly provided for by law or by acts having the force of law and from which there is no margin of discretion».

The effect of this latest amendment, as has already been noted by the most recent jurists[26], is to restrict the application of art. 323 of the Italian Criminal Code, preventing the criminal judge from deciding on the behavior of public officials who violate the rules contained in regulations

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Di Martino-G. Fornasari, Torino 2008, 242 ff.; C. Benussi, *Diritto penale della Pubblica Amministrazione*, Padova 2016, 411 ff.; S. Bernardi, *La Suprema Corte alle prese con il "principio di assorbimento" in una recente sentenza in materia di abuso d'ufficio*, in *Dir. pen. cont*. 6 (2017) 274 ff.

[25] Grosso (nt. 9) 329-342.

[26] Cfr. Cass. pen., sez. IV, sent. n. 442 of 8.1.2021: see the comment of A. Larussa, *Abuso d'ufficio: sottratto al giudice il sindacato sulla discrezionalità amministrativa*, in *Altalex.it* 19.1.2021 (https://www.altalex.com/documents/news/2021/01/19/abuso-d-ufficio-giudice-non-puo-sindacare-discrezionalita-amministrativa).

or in hetero-determined sources, as well as on a possible 'abuse' of the public function that does not respect the internal limits of the *agere publicum*.

The abuse must be committed «in the performance of the functions or service», therefore, there must always be a functional link between the activities and the service of the public agent.

As regards the first conduct, which is the «violation of specific rules of conduct expressly provided for by law», by law we mean the source coming directly from the Legislative power. Note that, in the light of the new wording of article, the old interpretation which included in the law any other regulatory act and which was issued by a competent authority, including administrative authority[27], is excluded by the legislator where the act is the result of exercise of a public authority discretion.

In the past, doctrinal debates had concerned the possibility of including in the term "law" sources of a constitutional nature such as art. 97, *comma* 2, of the Constitution.

Through this way, any behavior of a public agent in contrast with the duty of correctness, deriving from the constitutional principle of good performance and impartiality of the public administration, became punishable in accordance with the art. 323 c.p.[28].

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[27] V. Manes, *Abuso d'ufficio, violazione di legge ed eccesso di potere*, in *Foro it*. 2 (1998) 384; M. Gambardella, *Considerazione sulla violazione di norme di legge nel nuovo delitto di abuso di ufficio (art.323 c.p.)*, in *Cass. pen*. (1998) 2341 ff.; A. Manna, *Luci ed ombre nella nuova fattispecie di abuso d'ufficio*, in *Ind. pen*. (1998) 21 ff.; Grosso (nt. 9) 334 ff.; C. Cupelli, *Abuso d'ufficio e tipologia delle fonti: sulla rilevanza penale della violazione di un "sistema di norme"*, in *Cass. pen.* (2001) 1030 ff.

[28] Opposite doctrine: Fiore (nt. 19) 231; C. Benussi, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*, in *Trattato di diritto penale. Parte Speciale*, eds. G. Marinucci-E. Dolcini, Padova 2013, 952 ff.; Fiandaca–Musco (nt. 12) 253; A. Tesauro, *Violazione di legge ed evento abusivo nel nuovo art. 323 c.p.*, Torino 1999, 5 ff.; P. Pisa, *Abuso d'ufficio*, in *Enc. Giur. Treccani* (addendum of updating 1998) 1 ff., which defines «unlikely» the reference to the generic principle referred to in art. 97 of Constitution. In favor of an extensive interpretation of the concept of "legal provisions" pursuant to art. 323 c.p. (also including the principle referred to in art. 97, co. 2, Cost.): Manna (nt. 27) 20; G. Segreto-A. De Luca, *I delitti dei pubblici ufficiali contro la pubblica amministrazione*, Milano 1999, 497 ff.; A. Carchietti, *Abuso d'ufficio: anche la violazione dell'art. 97 Cost. può integrare il fatto tipico*, in

Jurists more inclined to consider the criminal availability of public employees to be configurable in the event of violations of the rule of constitutional rank[29], even if they deny that it directly binds public agents, have argued that it could bind the activity of public officials which must always be directed to guarantee good performance and impartiality of Public Administration.

Consequently, any behavior of the public officer that does not guarantee the protection of the guaranteed legal asset could integrate the crime of abuse of office if it causes damage to Public Administration, in violation of the constitutional principle referred to in art. 97 of Italian Constitution[30].

This is an arguable thesis[31], of course, but in any case not unfounded if we consider that in addition to conduct contrary to the principle of constitutional rank, it is always necessary that the judge also ascertains that the damage derives from this behavior (the Italian jurists call this the requirement of the "double injustice"[32]).

In the past, a very controversial issue concerned the possibility of considering behaviors consisting in the adoption of administrative

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Dirittoegiustizia.it 2008 (http://www.dirittoegiustizia.it/news/15/0000037126/Abuso_d_ufficio_anche_la_violazione_dell_articolo_97_Cost_puo_integrare_il_fatto_tipico.html?cnt=16).

[29] Grosso (nt. 9) 334 ff.; M. Gambardella, *Art. 323. Abuso d'ufficio*, in *Codice penale. Rassegna di giurisprudenza e di dottrina*, eds. G. Lattanzi-E. Lupo, Milano 2010, 314 ff.; Carchietti (nt. 28).

[30] Manes (nt. 27) 1218: the author hypothesizes that an abuse with omissive conduct may occur when, in the presence of a general legal obligation to prevent the event (pursuant to Article 40 paragraph 2 of the Criminal Code) of a member of a collegial body, he/she violates it, causing the adoption of an abusive act contrary to the principle of good performance and impartiality of the PA (so art. 97, co. 2, Cost.).

[31] C. Benussi, *Il nuovo delitto di abuso d'ufficio*, Padova 1998, 97 ff.; Tesauro (nt. 28) 5 ff.

[32] Grosso (nt. 9) 335 ff.; F. Coppola, *La persistente ambiguità dell'abuso d'ufficio. Alcune (amare) riflessioni a margine del caso "termovalorizzatore"*, in *Dir. pen. cont*. 4 (2017) 35-50, specifically 43 ff.; A. Tesauro, *I rapporti tra l'art. 323 c.p. e l'art. 97 Cost. tra disposizioni programmatiche e norme precettive*, in *Foro it.* 2 (2003) 483 ff.

acts invalidated by "excess of power"[33] or "incompetence"[34] capable of constituting abuse of office.

Since this is a 'borderland' between criminal and administrative matters, today, in the light of the 2020 Reform, this hypothesis no longer seems admissible: the interference of the criminal judge is not allowed in the discretionary activity of Public Administration.

However, with reference to Law n. 241 of 1990 on the administrative procedure, some behaviors previously falling within the "excess of power" have been disciplined in specific rules (such as art. 3 of Law n. 241/90 which establishes the obligation to motivate administrative acts) with the effect that their violation by the public official could integrate the abuse of office in terms of "violation of the law" – and, in this case, of violation of precise provisions contained in L. 241/90 –, provided that all the other essential elements of the typical event are also present[35].

Before the 2020 Reform, abuse of office could also occur in the case of conduct carried out «in violation of regulations».

The doctrine generally tended to include in the regulations all «sources of secondary regulation typical of public administration»[36], with the consequence that even the adoption of administrative acts in violation of the procedures prescribed in the municipal and provincial regulations[37], for example, in implementation of Legislative Decrees or

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[33] The "excess of power" is a typically Italian defect in the administrative act, which materialises when a purpose other than the typical purpose envisaged by the legal system is pursued through the administrative act.

[34] There is a lack of competence when an administrative act is produced by an administrative body other than the one that the law provides as competent to adopt it.

[35] Fiandaca–Musco (nt. 12) 253 ff., this doctrine believes that using Law 241 of 1990 as a general parameter to identify the typical traits of the conduct of office abuse could determine the unacceptable effect of including in the vice of violation of the law «also the possible inadequacy of the means used by the public official to achieve the objective of the administrative action, in terms of economy and effectiveness» (translated by the author of this paper).

[36] Fiandaca–Musco (nt. 12) 254 ff.; Benussi (nt. 28) 76 ff.

[37] Cfr. Cass. pen., sez. VI, 17 March 2009, sent. n. 26175, in CED 2009 where, with reference to Municipal Regulations adopted for the implementation of Legislative Decree 267/2000, the Court was in favor of admitting them among the regulatory sources whose violation can integrate the abuse of office.

University Regulations could integrate an illegitimate conduct suitable to configure the abuse of office according to art. 323 c.p.[38].

It was an excessive extension of the scope of art. 323 c.p. which today the legislator has eliminated by modifying the legislative text.

In the light of the considerations just examined and the uncertainties regarding the application of article 323 c.p., it is understandable why the 2020 Legislator decided to intervene and change the text of the abuse of office again at this point.

Note that the words «in violation of laws or regulations» have been replaced by the following: «in violation of specific rules of conduct expressly provided for by law or by acts having the force of law and from which there is no margin of discretion»[39].

Another highly doctrinal debated issue was related to the possibility of considering the crime of abuse to be configurable even in the case of 'non-doing' conducts integrating violations of the law or, as required by current legislation[40], violations of specific rules of conduct specifically provided for by law.

Therefore, it seems reasonable to believe that the non-doing conducts (lat. *non facere*) of a public official who is the recipient of a 'legal obligation to act' could configure the crime where intentionally aimed at pursuing undue economic advantages or causing unjust damage[41].

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[38] Gambardella (nt. 29) 335 ff.; Benussi (nt. 28) 76 ff.

[39] Part of art. 323 c.p.

[40] Cfr. the Italian Legislative decree of 16 July 2020 n. 76, converted into Law n. 120 of 11.9.2020.

[41] It should be noted that, already during the preparatory work for the 1997 reform, it is proposed to provide for an autonomous legal case of "abuse of office by omission" which should have been governed by art. 323 *bis* c.p. Failure to approve this proposal led to conflicts in doctrine between those who believed that the legislator did not want to consider the omissive conduct of abuse of office (see for example C. F. Grosso, *L'abuso d'ufficio*, in *Riv. it. dir. proc. pen*. [1991] 321) and those who, on the contrary, justified this choice by considering that art. 323 c.p. was already capable of including abuses by omitting public agents, so the creation of an autonomous legislative provision would have been useless (P. Pisa, *Abuso d'ufficio*, in *Enc. Giur. Treccani* [addendum of updating 1995] 9 ff. and Id. [nt. 28] 2, where the author illustrates the opposing theses and leans towards the second one).

This conclusion is not obvious as in the Italian criminal system there is art. 328 c.p.[42] which governs the crime of "refusal or omission of official acts", which in any case must coordinate with the new version of art. 323 c.p.[43].

The majority doctrine[44] has judged article 328 of the Criminal Code too restrictive (and with mild effects) in the case of omissive behavior other than the simple inaction of public agents and has deemed art. 323

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[42] Art. 328 c.p. ('Refusal of official documents. Omission'): «A public official or person in charge of a public service, who improperly refuses an act of his office which, for reasons of justice or public safety, or public order or hygiene and health, must be carried out without delay, is punished with imprisonment from six months to two years. Outside the cases provided for in the first paragraph, the public official or the person in charge of a public service who, within thirty days of the request of those who have an interest does not carry out the act of his office and does not respond to explain the reasons for the delay, is punishable by imprisonment for up to one year or a fine of up to 1.032 euros. This request must be made in writing and the term of thirty days starts from the receipt of the request» (tr. by the author of this paper).

[43] Doctrine accepted by I. Ciarniello, *Sulla configurabilità dell'abuso d'ufficio mediante omission*, in *Cass. pen.* (2000) 3286-3298, where the author specifies that, after the Reform of 1997, the coexistence of Articles 323 and 328 in the Criminal Code was a fact that «raised doubts about the possibility of the existence of an 'abuse of office made by omission' capable of falling under the new art. 323 c.p., and this for two reasons: a) firstly, because, in the presence of a criminal provision that expressly indicated the type of omissive conduct that can be carried out in the context of criminally relevant crimes against Public Administration, to extend the applicability of art. 323 c.p. to the omissive conduct other than those included in Article 328 c.p. it seemed a forced interpretation of the legislative text, and also a disrespectful solution to the legislator choices; b) in addition, other concerns were related to the risk that the extensive application of art. 323 c.p. could cause the implicit repeal of the less serious hypothesis referred to in art. 328 c.p., with the consequence of misrepresenting the real intentions of the legislator» (3296 ff.). On the relationship between art. 328 and 323 of the criminal code see also A. De Vita, *Successione di leggi penali. Silenzio dalla PA e configurabilità dell'omissione di atti di ufficio*, in *Giurisprudenza Italiana* 2 (1997) 2240 ff.

[44] D'Avirro (nt. 6) 85 ff.; M. Leoni, *Il nuovo reato di abuso d'ufficio*, Padova 1998, 79 ff.; A. Pagliaro, *Principi di diritto penale. Parte Speciale. Delitti contro la Pubblica Amministrazione* 2, Milano 1998, 253 ff.

c.p. in cases of conduct of use of the public office for private purposes and for the purpose of causing damage[45].

It seems more consistent with the *ratio legis* to conclude that, since the advantage or damage can also be realised through non-doing behavior, they must be considered capable of falling within the *focus* of art. 323 c.p. even those *inertia* of public agents who are committed in violation of specific rules of conduct prescribed by law, imposing an obligation to act, and with the intention of producing one of the events described by the legislator.

In addition, since art. 323 c.p. is a "*reato di evento*"[46], a typical conduct must always be in causal connection with the damage to the protected legal asset[47].

4. The Obligation of Abstaining in Case of one's own Interest or that of a Relative or in other established Cases

Three types of violation of the duty of abstention were selected which should always be considered criminally relevant as they are attributable to violations of authoritatively imposed obligations, namely:

1) the violation of a duty of abstention originating in the law or regulations;

2) the violation of a duty arising from internal rules of the public administration (i.e. circulars, instructions, orders and disciplines) or contractual provisions and administrative practices deriving from legal

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[45] Solution for these reasons strongly opposed also by Pisa (nt. 41) 10 ff.

[46] This strategy of the legislator in line with that part of the doctrine which, already before 1997, had stated that transforming the abuse of office into an event crime was the useful tool to define more clearly the application criterion of the article: see A. Pagliaro, *Contributo al dibattito sull'abuso d'ufficio*, in *Il diritto penale fra norma e società. Scritti 1956-2008*, ed. A. Pagliaro, Milano 2009, 207 ff., where the Author, even before the reform, suggested remedying the excessive indeterminacy of the rule of abuse of office through the provision of two alternative events, namely, the harm of others and the advantage for oneself or for others.

[47] G. Fiandaca-E. Musco, *Diritto penale. Parte speciale* 1, Bologna 2012[5], 250; V. Patalano, *Amministratori senza paura della firma con i nuovi vincoli alle condotte punibili*, in *Guida al Dir.* (2 August 1997) 18 ff.

sources (as the omitted abstention assumes criminal relevance where a legal prohibition to act that the public agent violates with their own active behavior)[48];

3) the violation of an obligation of abstaining genetically linked to the existence of an incompatibility between an interest relating to the personal sphere of the public official and the interest of public nature which the public official is required to satisfy due to his/her qualification[49].

We are faced with a balanced solution but, in the event of non-compliance with the obligation of abstention by the public official, this solution entrusts to the judge the hard work to identify the type and nature of the precise obligation that he/she has violated or the ways in which the so-called "conflict of interest" occurred[50] (with all the critical issues related to the limits of interference by the criminal judge on discretionary administrative activity)[51].

Moreover, it is possible that the original intention of Legislator was to give the nature of "elements of the crime" also to the interests of the public agents or of other individuals in contrast with the primary public interest and with «other prescribed cases». This, not only to avoid extensive interpretations of the regulatory prohibition, but also to allow the interpreter a better understanding of art. 323 c.p. and an easier recognition of the external sources to which to refer in the development of his/her hermeneutical analysis.

For the purposes of the existence of the crime, the role of the interpreters was to identify in the specific case both their own interests and those of others of a "suspicious" nature and, more precisely, the type of interactions between these interests and the public one, in order to assess whether, in the event of a conflict, a certain behavior implemented by the public agent (aimed at satisfying the personal interest rather than the public one) can become *contra ius*.

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[48] Fiandaca-Musco (nt. 47) 255.

[49] N. Curci-C. Curreli, *Mancata astensione e abuso d'ufficio*, in *Quest. Giust.* 1 (1998) 57 ff.

[50] A. Manna, *Abuso d'ufficio e conflitto di interessi nel sistema penale*, Torino 2004, 34 ff.; M. Catenacci, *I delitti dei pubblici ufficiali contro la Pubblica Amministrazione*, Torino 2017, 134 ff.

[51] Fiore (nt. 19) 235.

In this perspective, jurist must consider both the type of activity that the public agent carries out (for example, the judge could also consider the final provision or act that the public official should issue), and the type of conflict generated between interests of a different nature[52], since these are the premises (or bases) on which the criminal liability of a public agent can be based who, in the face of the onset of a conflict between his/her own interest and the public interest, by not refraining from acting, satisfies his/her interest with a damage to Public Administration interest[53].

In Criminal Law, the conflict of interest is never considered *sic et simpliciter* an event, it is rather the logical pre-requisite for the production of an offense event (in this case, the preference for an individual advantage with the detriment of the public interest) which, in the presence of the additional legal elements of the crime, it contributes to integrate the abuse of office (or also other crimes of a similar but more serious nature, such as the corruption crime)[54].

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[52] C. Buonauro, *La nuova disciplina del conflitto di interessi dei pubblici funzionari. Corso COA 5. Modulo 2. L'azione amministrativa*, 2-9 February 2015, 6ff.: (https:// daitformazione.interno.gov.it/ alboform/mod/data/view.php?d=1&perpage= 10&search= +Buonauro+&sort=0&order= DESC&advanced=0&filter=1&advanced=1&f_1=&f_2= Buonauro%2 C+Carlo&f_3%5B%5D=Coa +5&f_8=). The Author highlights the existence of three categories of conflicts of interest: a) "real" or actual conflicts, which occur in the imminence of the decision-making phase, that is when the subject is faced with the choice whether to pursue the public aim or prefer the individual conflict; b) "potential" conflicts, which are generated in a phase prior to the performance of the activity or the issue of the provision and which can be managed by the public official, for example, precisely through his due abstention; c) and, finally, the "apparent" conflict that is "suspect" at first sight but which then, in practice, does not harm the primary public interest.

[53] C. Marchetta, *La legislazione italiana sul conflitto di interessi. La legge 20 luglio 2004 n. 15. Orientamenti applicativi, criticità e prospettive di riforma*, Milano 2013, 88.

[54] Buonauro (nt. 52) 6 ff. defines the conflict of interest as «a set of circumstances that create or increase the risk that primary interests may be compromised by the pursuit of secondary ones» (tr. by the author of this paper): while, however, the conflict of interest signals the presence, even if only potential or apparent of multiple interests in contrast and the possibility of the violation of a «socially acceptable balance between the private interest and the duties and responsibilities of an individual», in corruption

With regard to the characteristics of the "conflict of interest" relevant to the integration of the abuse of office, it should be noted that the simultaneous existence of several interests of a different nature compared to the interest that the public official must satisfy is a proof not sufficient to ascertain the existence of a conflict capable of blocking the activity of the public official.

In fact, in the presence of several different interests, the 'non-abstention' of the public official does not always constitute illegal behavior.

In order for the behavior to be illegal there must also be an 'ontological incompatibility' between the specific interests at stake: it must be demonstrated that the pursuit of a personal interest actually damages or compromises the achievement of the public interest[55].

Abuse of office consists in the manipulation or distortion of the powers that the public official holds for the exercise of his/her function and during the management of his/her office.

The existence of the abuse of office does not depend only on the job qualification of the agent, nor, as already mentioned, can it be configured in the event of conduct unrelated to public office.

The distortion or manipulation of the public function must be intentionally aimed at the satisfaction of an interest of a personal nature[56] and, this interest, in addition to constituting the final purpose of the public official[57], also connotes the conduct of non-abstention perpetrated by the public agent as a unlawful conduct.

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or abuse there is always the loss of the primary interest and the prevarication of the personal or, in any case, secondary one.

[55] Curci-Curreli (nt. 49) 63.

[56] A. Pagliaro, *Principi di diritto penale. Parte speciale. Delitti dei pubblici ufficiali contro la pubblica amministrazione*, Milano 1986, 264 ff.: the author in this regard says there is an «abuse of office for personal benefit».

[57] M. De Bellis, *La prova del dolo nel reato di abuso di ufficio: gli indici sintomatici dell'intenzionalità della condotta e le possibili discontinuità interpretative in tema di errore sulla norma extrapenale*, in *Cass. pen.* (2007) 3670 ff.; A. De Vita, *Il caso "De Magistris – Why not": non convince la configurazione del dolo intenzionale. Equivoci e contraddizioni su dolo di condotta e dolo d'evento nell'abuso d'ufficio*, in *Penalecontemporaneo.it*, 23 october 2014 (https://archiviodpc.dirittopenaleuomo.

A further limit to the legitimate exercise of the office (and therefore a further source of an obligation to abstain) consists in the «other prescribed cases»[58] referred to in art. 323 c.p.

Therefore, the structural affinities between this *formula* and the formulas normally used in the «*norme penali in bianco*»[59] have led part of the oldest doctrine to say that art. 323 c.p. it could consider a «new extreme hypothesis of blank criminal law»[60] making a reference to any future cases of abstention "not yet regulated"[61].

Without evaluating the validity of this thesis, it is true that, just like a blank criminal law, the last part of art. 323 c.p. it must be filled with content to avoid that the reference to «other prescribed cases» remains an empty formula or expands the operation of the standard beyond measure. This effect would conflict with the objective of the 2020 Reform to delimit the operational field of art. 323 c.p.

Therefore, in compliance with the requirements of regulatory precision and guarantees of the offender, it is clear that the referral must be made to additional and different sources than those already listed in art. 323 c.p.

However, these sources also need to be normative, consequently[62] the internal rules of Public Administration (which are instructions, orders and regulations) seem to be included in the «other prescribed cases» referred to in art. 323 of the Italian Criminal Code, (also) due to the fact that they are dictated in implementation of rules of higher rank[63].

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org/d/3359-il-caso-de-magistris---why-not-non-convince-la-configurazione-del-dolo-intenzionale).

[58] The literal translation of this part of the art. 323 c.p. is provided by the author of this paper.

[59] «*Norme penali in bianco*» means "blank or empty penal norms" that are criminal norms constructed in an anomalous way with respect to the usual penal norms: the blank penal norms have an indefinite part called *precetto* (which is the precise explicit prohibition usually included in the norm) and contain only the sanction. For the *precetto* they refer to external sources. An example of a blank penal norm is art. 650 of the Italian Criminal Code.

[60] Patalano (nt. 47) 20.

[61] *Ibid.*

[62] *Ibid.*

[63] Curci-Curreli (nt. 49) 57.

It is interesting to note that often also according to internal regulations of public bodies, if a conflictual relationship is generated between the position of the public official and the public interest to be satisfied, the conflict is resolved by providing that public official, in addition to an obligation to abstain, also has the obligation to report the situation of incompatibility to his/her boss.

At that point, the hierarchical superior (i.e. his/her boss) must entrust to others or claim the power to act in place of the 'compromise public official'. These rules can be considered as falling within the «other prescribed cases» referred to in the provisions of art. 323 of the criminal code, because they represent an objective limit to the activity of the public official[64].

5. Psychological Link and causal Link in the Crime of Abuse of Office

The will of the public agent in committing the crime must consist in an "intentional fraud". More specifically, it is necessary to ascertain concretely that there is the precise intention to cause two alternative events: the undue patrimonial advantage for oneself or others and the unjust damage to others[65].

The unjust nature of the events has caused open disagreements in doctrine between those who considered it a pleonastic and redundant reference to the illegality of conduct, not relevant to the specification of

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[64] Buonauro (nt. 52) 10. Among the reference regulatory sources see also art. 13 D.P.R. n. 62/2013; art. 6 *bis* of the L. 214/90 according to which: «The person in charge of the procedure and the heads of the offices competent to adopt the opinions, the technical assessments, the endoprocedimental acts and the final provision, must refrain in case of conflict of interest and report any conflict potential» (tr. by the author of this paper); art. 2, comma 2, and art. 5, comma 2, of the Ministerial Decree n. 28 of November 2000, in *G.U.* April 14 (2001) n. 84, "Codice di comportamento dei dipendenti pubblici"; art. 78, comma 2, of Legislative Decree n. 267/2000 "Testo unico delle leggi sull'ordinamento degli enti locali".

[65] Coppola (nt. 32) 40.

the crime[66]; and those who, in an attempt to differentiate the injustice of damage from the injustice of the conduct, illustrated different solutions (sometimes too extensive, but still interesting[67]) that considered the injustice of effect, unlike conduct, «measurable» according to legal parameters and principles of law, and never related to ethical, social or political assessments[68].

The express mention by the legislator of the «unjust nature of events» must be understood as a 'warning' to the judge about the need to ascertain, for the purposes of the application of the case, in addition to the fact that the person acted in violation of the law, which was also animated by the will to pursue a scope contrary to the law (and, in particular, in order to make a particular interest prevail over the public interest, being at the time required by the regulation the specific intent)[69].

The judge must make a "double evaluation" of the specific case: first he/she must evaluate the unlawfulness of the behavior in relation to the specific rules violated; and then he/she must assess the opposition to the public interest of the result pursued with the abusive behavior[70].

The necessary coincidence between the purpose of the public agent and the unjust events of damage or advantage (which, since 1997, is an advantage that has a patrimonial nature) must exist in consideration of the text of Article 323 of the Italian Criminal Code which, through the adverb «*intenzionalmente*» (in Engl. 'intentionally'), connotes the generic *dolus* of greater intensity.

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[66] Seminara (nt. 12) 579; G. Fiandaca-E. Musco, *Diritto penale. Parte Speciale*, *Appendice*, Bologna 1991, 33.

[67] A. Pagliaro, *Principi di diritto penale. Parte Speciale. Delitti dei pubblici ufficiali contro la pubblica amministrazione*, Milano 1995[7], 249 ff., the non-patrimonial advantage was interpreted in a restrictive sense (thus granting greater guarantees to the offender) for which, for example, abuses perpetrated by "elective" public officials for the satisfaction of "zonal" interests (i.e. linked to the political management of a given territory) were not considered suitable to integrate the crime.

[68] Grosso (nt. 41) 322; Segreto-De Luca (nt. 28) 507 ff.

[69] Grosso (nt. 41) 322 ff.

[70] Cass. pen., sez. V, 5 April 1994, on which Presutto, in *Giust. pen*. 2 (1995) 748 ff., cited by Pisa (nt. 41) 14.

The fraud is classified by art. 323 of the Italian Criminal Code as *dolo intenzionale* (in Engl. 'intentional fraud') and, consequently, the assessment of the psychological connection must be very thorough.

Issues arise in practice if it is found that the public official has proposed and acted with the intention of producing as many alternative events as possible or, not uncommonly, if one notes the coincidence between the pursuit of a personal advantage and the satisfaction of the public interest.

In this case, the coexistence of multiple possible alternatives and multiple possible objectives in the intentions of the public official mitigates the intensity of the fraud and does not constitute the crime.

In fact, the offence cannot take place in the presence of a fraud other than intentional.

To avoid preventing the configuration of the crime in the presence of a different willful misconduct, more elastic doctrinal trend, prevalent today, says that, in the presence of several different and antithetical purposes, judge must concretely evaluate the prevailing purpose for the public official.

Consequently, it is not the simultaneous presence of two opposing purposes (the individual one and the public one) and their simultaneous prosecution that mitigates the intensity of the fraud: it is always necessary to ascertain which scope was the prevailing purpose envisaged, pursued and achieved by the public agent[71].

This interpretative rule is called "*criterio della prevalenza*" (in Engl. 'criterion of prevalence').

In this regard, Supreme Court[72] has clarified that the adverb of art. 323 of the Italian Criminal Code «*intenzionalmente*» does not mean «for the unique purpose of» and therefore intentional fraud may also be

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[71] Gambardella (nt. 29) 356; Benussi (nt. 28) 1013; Coppola (nt. 32) 41; A. Aimi, *Un problematico arresto in tema di elemento psicologico del reato di abuso di ufficio*, in *Penalecontemporneo.it*, 2 January 2011 (https://archiviodpc.dirittopenaleuomo.org/d/299-un-problematico-arresto-in-tema-di-elemento-psicologico-del-reato-di-abuso-d-ufficio).

[72] Constitutional Court, 21 June 2006, n. 251, Pres. Marini, ed. Mazzella in reference to a question of the constitutional legitimacy of art. 323 c.p. in the part in which, through an extensive interpretation, Articles 97 and 3 of the Constitution were considered violated.

present in cases in which, in the coexistence of a public and an individual purpose, it can be ascertained that the private purpose has prevailed over the public one and is becoming the main purpose of the public agent.

Therefore it is concluded that for intentional *dolus* in the crime of abuse of office, personal interest must be precisely the reason why the subject acted[73].

Jurisprudence has gradually developed some kind of "guidelines" to facilitate the interpretation of the article by jurist.

Here it is said that the interpreter must take into account all the violations that may have characterized the administrative activity actually carried out.

In brief, it should be noted whether, for example, 1) conducts have been carried out repeatedly; 2) if public official has attempted to remedy the illegalities caused by further and subsequent violations of the law; 3) if the public agent is really competent to adopt the final act and if he/she has provided to motivate it; 4) it is also necessary to ascertain the nature and type of the relationships between the parties involved (i.e. the characteristics of the conflict of interest); 5) and, finally, the presence of any discrepancies in the public official final provision or act must be noted[74].

Obviously these are only 'guiding criteria' that, although useful to the interpreter, cannot guarantee the infallibility of his/her work. These guidelines mostly have the function of filling the gaps in the law while waiting for a future legislative reform to resolve them definitively and more effectively.

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[73] De Vita (nt. 57) 2.

[74] *Ibid*.

Dario Franzin*

Embezzlement in Recent Case Law of the Italian Corte di Cassazione

Crimes against the Public Administration (from now on PA) have been subjects of numerous reforms in recent years. The crime of embezzlement has not been spared by regulatory interventions and jurisprudential interpretations that have changed its application boundaries[1].

Also with reference to art. 314 of the Criminal Code, the interpreter's navigation must proceed with the utmost caution and possibly 'on sight', taking into account various guidelines that come gradually from

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[1] See M. Romano, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*, *Art. 314-335-bis cod. pen. Commentario sistematico*, Milano 2013[3], 20; G. M. Flick, *Il delitto di peculato, presupposti e struttura*, Milano 1971, *passim*, 149 ff.; A. Pagliaro, *Il peculato prima e dopo la riforma*, in *I delitti dei pubblici ufficiali prima e dopo la riforma. Il nuovo codice di procedura penale ad un anno dalla riforma*, Napoli 1991, 64; A. Pagliaro-M. Parodi Giusino, *Principi di diritto penale. Parte speciale.* – 1. *I delitti contro la pubblica amministrazione*, Milano 2008[10], 47, 66; R. Rampioni, *Bene giuridico e delitti dei pubblici ufficiali contro la P.A.*, Milano 1984, 260 f.; M. Catenacci, *I delitti di peculato*, in *Reati contro la pubblica amministrazione e l'amministrazione della giustizia*, ed. M. Catenacci, Torino 2011; V. Scordamaglia, *Peculato*, in *Enc. dir.* 33, Milano 1982, 606 ff.; G. Cocco, *Il Peculato come delitto di evento dalla dogmatica alla pratica*, in *Resp. civ. e prev.* (2019) 374 ff.

the legislator and from the application practice, as well as the possible impact of the insertion of the crime in question in the so called Catalog of the offenses that might drive to the liability of companies referred to in Legislative Decree 231/01.

In particular, what interests us here is how the extension of the case is gradually enlarged by the interpretative activity of the judges (see lastly the communication of the *Sezioni Unite* of the Supreme Court which affirm the applicability of the embezzlement to the sub-concessionaire for the management of online games) and restricted, through a specific regulatory intervention, by the legislator with reference to the cases relating to the payment of the tourist tax for hotel operators. There is no doubt that the question of the applicability of the embezzlement to hypotheses not strictly attributable to the classic case law paradigm of the qualified subject who appropriates public money, but to a less 'structured' hypothesis in the link between active subject and public assets, raises particular interest, especially in light of the non-tender legal framework that goes from 4 years to 10 years and six months of imprisonment, plus the set of accessory penalties, as well as, last but not least, the exclusion from any related benefits due to 'inclusion' of crimes against the PA in the category of so-called '*reati ostativi*' (impedimental offenses).

1. The problematic notions of possession and availability for service reasons

The concepts around which these updates of the area of application of the embezzlement revolve concern precisely those prerequisites of the conduct that are referred to the relationship that must exist between the agent of the money or «other mobile thing».

The notion of possession in the crime of embezzlement, in compliance with the principle of autonomy of criminal law, transcends the boundaries set by the civil law, going to coincide with that of detention, given the possibility to dispose of it and easily operate on money or assets public.

This broad definition of possession is however tempered by the reference to the «reason for office or service» that must characterize the relationship between the agent and the object of the conduct; it is clearly

a clause, aimed at circumscribing the applicability of the case, not only to the hypotheses in which the agent has the qualification, but that it is linked to the material object of the conduct through a functional link between money and the office or service performed.

Ultimately, the possession or availability of the asset to be relevant for the purposes of protecting the impartiality of the PA, must arise from the office or service performed by the agent who, qualifying it, specifies it and differentiates it from other cases of unfaithful abuse of possession. Precisely this link between *munus* and possession of the asset determines the possibility that the conduct is actually detrimental to the '*Rechtsgut*' of the impartiality of the PA and not of other legal entities having a different connotation more strictly, for example, patrimonial.

This structure, nevertheless, has been gradually modified over time through, on the one hand, the structural modification of the concept of public service and, above all, a redefinition in an expansive and dematerialized sense of ownership the qualification of public service officer.

Precisely because of this peculiar normative-interpretative conjuncture, as already mentioned above, the sphere of applicability of the embezzlement has widened, incorporating different situations with common characteristics that have experienced different fates and provoking different reactions at the legislative and jurisprudential level.

The definitive certification of the difference between civil possession and criminal possession, i.e. that particular relationship that must arise in the head of the agent, appears to be a consolidation of an interpretative approach to be welcomed in a positive way, since it firmly reaffirms the autonomous nature of criminal law with respect to other branches of the legal system, thus escaping any temptation to reduce criminal law to a mere sanctioning instrument devoid of definitions coined ad hoc for the persecution of its aims and ends.

That said, in the case of embezzlement, however, the extension of the notion of possession has caused, in some cases, interpretative disputes within or within the Supreme Court itself, as already mentioned, or even opened a dispute between the power and the judiciary and executive whose developments they still seem indeterminate in terms of outcomes.

2. The hypothesis of embezzlement in the event of non-payment of the tourist tax: a legislative-interpretative short circuit

One of the events that affected the scope of the embezzlement crime relates to the case of withholding the tourist tax by the owner of the accommodation facility[2]. The jurisprudence of the Supreme Court has in fact for some time already attributed to the hotel entrepreneur the qualification of public service officer, triggering, in the event of failure to pay, the punishment of embezzlement. The issue was the subject of a very controversial legislative intervention, in the so-called 'Restoration decree'.

In fact, a newly minted administrative offense was introduced in order to exclude the case in question from the application focus of the embezzlement. The intent of the legislator, beyond the controversies for the presumed nature of *ad personam* intervention of the article of the decree, was clearly motivated by criminal policy intentions aimed at subtracting a few cases from the contestation of a particular case from the penalty charge severe as embezzlement, plus all the consequences of the sentence including confiscation[3].

The choice to remove the hotelier from the area of punishment by way of embezzlement can be understood as a corrective, however it was

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[2] See F. Schippa, *Nuovi confini del peculato nelle dinamiche legate all'imposta di soggiorno. L'omesso o ritardato versamento dell'imposta a seguito del cd. "dl rilancio"*, in *Giurisprudenza Penale Web* (2020) 6 e Id., *Interviene la Cassazione sull'omesso o ritardato versamento dell'imposta di soggiorno a seguito del c.d. Decreto Rilancio. Autentica interpretazione di una papabile interpretazione autentica*, in *Giurisprudenza Penale Web* (2020) 11.

[3] For *abolitio criminis* M. Gambardella, *Il "decreto rilancio" e la degradazione della condotta di omesso versamento dell'imposta di soggiorno da peculato ad illecito amministrativo*, in *www.penaledp.it*; *contra* G. L. Gatta, *Omesso versamento della tassa di soggiorno da parte dell'albergatore e peculato: abolitio criminis dopo il decreto rilancio?*, in *www.sistemapenale.it. p. 3589 ss.n.ti'ge uesto intervento normativo v. N. Pisanisititativirtante, l'intervenire in maniera frettolosa ed altrettanto Contra* of *abolitio* cfr. Cass. pen., Sez. VI, 30 october 2020 (ud. 29 september 2020), n. 30227, *contra* Trib. Roma, Office of the Judge for Preliminary Investigations, 10 november 2020 (ud. 2 novembre 2020), n. 1520.

rejected by the jurisprudence of the Cassation immediately following the entry into force of the decree that immediately denied the nature of *abolitio criminis* to the new law.

At present, however, the situation does not appear to be pacified from an interpretative point of view, with substantive measures that, all over Italy, take a position in one direction or another, increasing the sense of uncertainty around the issue.

3. The question of the concessionaire of online games and the crime of embezzlement

In addition to the intricate issue relating to the payment of the tourist tax, another "disputed" borderland around embezzlement concerns the applicability of the crime of embezzlement to the sub-concessionaire of online games who does not pay the single tax levy (c.d. Preu).

Also with regard to this case law, the jurisprudence of legitimacy was divided, giving rise to a twofold interpretation with opposite signs: the first favourable to the punishment by way of embezzlement of the concessionaire's conduct, the second more restrictive in extending so much the qualification of person in charge of public service and, consequently, the scope of the crime referred to in art. 314 c. p. For the first orientation, the telematics games sub concessionaire must be considered in charge of a public service and the qualification would derive from the contract stipulated with the concessionaire administration for which he would assume the role of 'accounting agent' (and not, for example, a substitute for tax) and, therefore, the money that would be held following the collection would already be directly and immediately attributable to the PA, any use of that sum would therefore be a *uti dominus* behavior similar to the appropriative conduct typical of the objective element of the embezzlement crime.

On the contrary, a second and opposite orientation, always internal to the Sixth Section of the Supreme Court, has denied the public nature of the part of the sum of the stake due to the Treasury, recognizing in the omitted payment of the sub-concessionaire a fraud aggravated to the

state damages, given the absence of the typical conditions of the qualified crime.

The existence of the interpretative contrast has determined, as mentioned, the referral to the *Sezioni Unite penali* (most important chamber of the Supreme Court) which, pending the filing of the reasons, have nevertheless given an affirmative opinion on the configurability of the embezzlement for the hypothesis just mentioned, still demonstrating once how, in the matter of embezzlement, the interpretative tendency of judges is to extend the boundaries of the law more and more, using it as a case against the wide-ranging PA, capable of intercepting conducts of abuse not of a qualification, but of a situation of 'proximity' to the public *munus*[4].

4. Reflections on the recent jurisprudence: extension of the embezzlement and misrepresentation of the selective function of the crime at the time of the so-called criminal populism

The cases that we have presented allow us a series of brief reflections on the direction that the jurisprudence is taking in the matter of embezzlement. The tendency to extend the boundaries of embezzlement to hypotheses where the connection with the activity of the public administration is more nuanced, in our opinion, seems to be a rewriting of the paradigm of the '*reato proprio*' (offences committed under colour of authority) and its selective function of the circle of active subjects of the crime. The notion of public service officer, although abstractly attributable to subjects without a formal connection with the PA (as also recently recalled in the order of remission to the joint Sections in the case of the sub-concessionaire of online games), however in the cases cited it is brought back to subjects whose activity can only be considered

[4] Cfr. Order of referral of VI Sez. pen. n. 997 of 2020. Cfr., *ex multis*, Cass. pen., 5 octoberp. 3 2017, n. 49070589 ss.n.ti'ge uesto intervento normativo v. N. Pisanisititativirtante, l' intervenire in maniera frettolosa ed altrettanto p. 3589 ss.n.ti'ge uesto intervento normativo v. N. Pisanisititativirtante, l' intervenire in maniera frettolosa ed altrettanto ; Cass. pen., Sez. VI, 5 april 2018, n. 2318.

of a private nature, thus creating an emptying of the character of the embezzlement crime.

Cui prodest this trend?

There is no doubt that in this historical period, crimes against the PA are assuming a particularly significant role in criminal politics, having been elevated to a punitive symbol of the contrast to widespread forms of malfeasance that must be repressed with the utmost rigor. These are the recognizable features of the so-called criminal populism that has recently animated the intentions of the legislator. If, however, it is decided to entrust a sector of the criminal law with a particularly significant value in the fight against forms of crime through increases in penalties, aggravation of the load of accessory sanctions and even, as following the introduction of crimes against the PA in the catalogue of c.d. '*reati ostativi*' (impeding offenses) pursuant to art. 4 *bis* referred to in the penitentiary system, it is also necessary to carefully evaluate the possible effects deriving from the interpretative activity of the judges which, where permitted by broad legislative texts such as that referred to in art. 358 of the Italian Criminal Code, on the subject of a person in charge of public service, tends to expand the application boundaries of the cases beyond the wishes of a legislator animated by repressive tendencies.

What emerges, therefore, is the result of the distorting effects of an uncoordinated and criminalistically bulimic legislation, which ends up providing repressive tools that go beyond the confines abstractly conceived by the reformer and forces him, having ascertained the compression of the principle of proportionality of the sanction (as in the case of the embezzlement of the hotelier) to intervene with "patch" rules which, instead of solving the problem, end up complicating it even more, adding, moreover, suspicions of creating pockets of privilege, rules of favor that, in response, end up stiffening and distancing the "law in the books", from that "in action", with all due respect to the guarantees of citizens and the effective allocation of criminal responsibility.

Ultimately, the interpretative effects of excessively severe legislation can be governed up to a certain point and, often, we find ourselves having to intervene in a hasty and equally uncoordinated manner, with all due respect to systematicity.

Anna Papa – Giacomo Palombino*

Public Administration and Abuse of Rights**

1. Introductory Considerations

The configurability of a constitutionalist declination of the institution of the abuse of right[1] has been the basis of relevant scientific reflections for years, which have been developing in many directions[2]. Among these, analysing this subject from the perspective of the principle of solidarity protection appears particularly evocative.

The present work is to be collocated in the latter stream and aims at investigating to what extent the principle of solidarity, enshrined in art. 2 of the Constitution, can be used as a prerequisite to assess the existence

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** Despite being the result of a common reflection, §§ 1, 4, 5 and 8 are written by Anna Papa, while §§ 2, 3, 6 and 7 are written by Giacomo Palombino.

[1] See, among others, S. Romano, *Abuso del diritto*, in *Enc. dir.* 1, Milano 1958, 168 ff.; P. Rescigno, *L'abuso del diritto*, Bologna 1998; D. Messinetti, *Abuso del diritto*, in *Enc. dir.*, *Aggiorn*. 2, Milano 1998, 1 ff.; N. Lipari, *Ancora sull'abuso del diritto. Riflessioni sulla creatività della giurisprudenza*, in *Quest. giust*. 4 (2016) 3 ff.; G. Silvestri, *L'abuso del diritto nel diritto costituzionale*, in *Rivista AIC* 2 (2016) 6 ff.

[2] Refer to D. Bifulco, *L'abuso del diritto costituzionale. Un'ipotesi di lavoro*, in *Costituzionalismo.it* 2 (2018) 55 ff.

of a duty of current generations not to depreciate their rights to the detriment of future generations.

More precisely, the question is whether public decisions can be taken today, for the benefit of certain and current categories of subjects, of which (although it cannot be certain) a burden on future generations is substantially foreseeable. It should also be noted that the reference to the concept of "burden" is intended here to be understood as a whole, in order to limit the area of interest only to those choices that show substantial irreversibility of the effects and therefore without affecting the right of any generation to characterize one's own time.

Hence the choice to focus on spending decisions, strongly characterized by the "longevity" of their effects, to the extent that they produce a deficit, an imbalance that cannot be settled in the short term and is therefore destined to inevitably impact the future generations. In this perspective, asking whether the Constitution has safeguards in this sense, and in particular whether the constitutional provision on balanced budget, in the current formulation, can be set today as a parameter also for the (to be defined) protection of the principle of intergenerational solidarity has to be done.

In this sense, the recent jurisprudence of the Constitutional Court which – using the parameter of art. 81 of the Constitution – is censoring those recent legislative provisions that display their positive effects in the present while postponing the consequences, in terms of recovering the deficit, in subsequent years or even decades.

2. The origin of the abuse of right

The expression "abuse of right" has its origin in ancient Rome, thanks to the elaborations of the *praetores* of the Republican era[3]; even then, an action called *exceptio doli generalis* was allowed; this was a defence

[3] See M. Rotondi, *L'abuso del diritto*, in Id., *L'abuso del diritto – Aemulatio*, Padova 1979, 5 ff.; U. Natoli, *Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano*, in *Riv. trim. dir. proc. civ.*(1958) 37 ff.

instrument placed in the hands of the debtor as a protection from credit actions not in accordance with equity[4].

However, despite the ancient origins, it's not easy to figure out today a general theory of the abuse of right; European legal systems, while following in the footsteps of the teachings of Roman law and providing for contractual remedies that refer to the *exceptio doli generalis*, don't offer the shape of a homogeneous framework in the field of abuse of right[5].

On the constitutional level, European States don't provide an explicit recognition of this instrument, while that is the case in the European Convention on Human Rights[6] and in the Charter of Fundamental Rights of the European Union[7].

On the other hand, European civil law offers a different approach. France is considered the modern "homeland" of the abuse of right, for having carried out an important reconstruction by case law, while its civil code doesn't mention that. Germany provides the abuse of right in § 226 of the BGB through the prohibition on the exercise of the right whose only purpose is to harm others – but this definition is still not enough to include all possible characteristics of the phenomenon[8]; this latter is also expressly provided by Spanish law, in particular by art. 7 of the Civil code preliminary provisions[9].

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[4] See A. Guarino, *Diritto privato romano*, Napoli 2001.

[5] See *Diritto privato comparato. Istituti e problemi*, eds. G. Alpa-M. J. Monell-D. Corapi-L. Moccia-V. Zeno Zencovich-A. Zoppini, Bari 2012.

[6] Art. 17: «Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention».

[7] Art. 54: «Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein».

[8] See A. Gambaro, *Abuso del diritto. II. Diritto comparato e straniero*, in *Enc. giur*. 1, Roma 1988.

[9] Art. 7: «Los derechos deberán ejercitarse conforme a las exigencias de la buena fe. La ley no ampara el abuso del derecho o el ejercicio antisocial del mismo. Todo acto u omisión que por la intención de su autor, por su objeto o por las circunstancias en que se realice sobrepase manifiestamente los limites normales del ejercicio de un derecho,

On the contrary, the 1942 Italian civil code doesn't provide the abuse of right. However, doctrine, according to which the instrument constitutes a consequence of the principle of good faith[10], affirms its legal basis because of a general clause called to inspire the relationship between individuals[11]. In this sense, the interpretation that the Supreme Court, applying the article 1375 of the Civil Code, defined this principle as «reciproca lealtà di condotta, che deve presiedere all'esecuzione del contratto, così come alla sua formazione ed alla sua interpretazione ed, in definitiva, accompagnarlo in ogni sua fase»[12].

3. Abuse of right: general aspects

It's essential to introduce the analysis about the abuse of right by starting from civil Law. It is clear, indeed, that the abuse of right expression finds – and can only find – its "natural" beginning in the legal exchange between private subjects, because this shows its effects – or rather, its consequences[13] – especially in the economic dynamics characterizing private relationships[14]. This position is suggested because of the subjective right concept, a legal situation that places the respective owner in a position of advantage (or claim) as a function of the pursuit of an interest considered worthy of protection by the legal system[15].

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con daño para tercero, dará lugar a la correspondiente indemnización y a la adopción de las medidas judiciales o administrativas que impidan la persistencia en el abuso».

[10] See Messinetti (nt. 1) 1 ff.; C. Salvi, *Abuso del diritto. I. Diritto civile*, in *Enc. giur*. 1, Roma 1988.

[11] See Romano (nt. 1); S. Patti, *Abuso del diritto*, in *Dig. disc. priv*., Torino 1987; Rescigno (nt. 1).

[12] Cass. civ., Sez. III, 18 september 2009, n. 20106.

[13] See Rescigno (nt. 1) 13 ff.

[14] See R. Sacco, *L'esercizio e l'abuso del diritto*, in *Il diritto soggettivo. Trattato di diritto civile*, eds. G. Alpa-M. Graziadei-A. Guarnieri-U. Mattei-P. G. Monateri-R. Sacco, Torino 2001; see Gambaro (nt. 8).

[15] The definition of subjective right is still the subject of numerous studies today. The acceptance that is accepted in the text has a purely illustrative value, useful for a more effective identification of the circumstances that make it possible to configure an abuse of right, above all according to the declination in the public sector of the category – object of the following §§. For a more accurate analysis – and an analytical

In the civil Law theory, the concept of abuse, on the other hand, must necessarily refer not only to a subjective right, but to an available subjective right. To be more precise, it is argued the "availability" of the right must be identified, as well as through an exclusion criterion based on the identification of its opposite (the unavailable or inalienable right), also thanks to the general rules of the Law system[16], among which doctrine and jurisprudence include, obviously, the principle of solidarity.

In this sense, the Italian Supreme Court has repeatedly stated that the «buona fede oggettiva» is an autonomous legal duty, an expression of a general principle of social solidarity[17]; the «buona fede», therefore, constitutes an expression of the mandatory duties referred to in art. 2 of the Constitution, requiring each party to the contractual relationship to act while preserving the interests of the other party. It is believed, in fact, that «il contenuto del diritto soggettivo sia determinato dall'interesse concreto del titolare, nel senso che il potere è attribuito a questo per la tutela non di un certo tipo d'interesse, ma fin dove con l'interesse astratto coincida l'interesse concreto; nonché dal principio di solidarietà fra i due soggetti del rapporto, come partecipi entrambi della stessa comunità, nel senso che la subordinazione di un interesse all'altro interesse concreto è consentita fin dove essa non urti con quella solidarietà, che non si realizza

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identification of the problems underlying the definition – of the subjective right, see, among others, G. Gorla, *Commento a Tocqueville. "L'idea dei diritti"*, Milano 1948; V. Frosini, *La struttura del diritto*, Milano 1968; M. La Torre, *Disavventure del diritto soggettivo. Una vicenda teorica*, Milano 1996; M. Graziadei, *Diritto soggettivo, potere e interesse*, in *Il diritto soggettivo. Trattato di diritto civile* (nt. 14).

[16] As is well known, typical contracts – a concept to be understood from both a legal and a social point of view – are considered as such in that the legal system, originally from a managerial point of view and later supporting a consolidated negotiating practice, recognizes them as an expression of an interest worthy of protection. And it is precisely merit that traces that limit beyond which, by overwhelming or debasing the rights of others, we speak of abuse of the right. It is for this reason that according to some scholars who derive the abolition of law from the good faith clause, the institute, as described, finds legitimacy under the broader and more general coverage of the solidarity principle. See F. Santoro Passarelli, *Dottrine generali del diritto civile*, Napoli 2012, 76 ff.

[17] Cass. civ., Sez. III, 15 february 2007, n. 3462.

nella comunità senza prima realizzarsi nel nucleo costituito dai soggetti del rapporto giuridico»[18].

4. The principle of solidarity and the abuse of right in the public-law sphere

The text of art. 2 of the Constitution – and the related provision of the duties of social solidarity – represents the useful "link" to decline the abuse of right within the public and constitutional law[19]. According to an eminent author, precisely the reference to art. 2 of the Constitution from a part of the doctrine and civil jurisprudence which dealt with this field, leads to a common view in the studies on the subject[20].

Indeed, through the interpretation of art. 2, the solidarity principle[21], "true leitmotiv"[22] of the Charter, became a useful tool for building a "fair society"[23]. In this perspective, the expression adopted by the Constituent Assembly draws a circular and prospective tension between the rights of

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[18] See Santoro Passarelli (nt. 16) 76 ff.

[19] See A. Barbera, *Commento all'art. 2*, in *Commentario della Costituzione. Art. 1-12. Principi fondamentali*, ed. G. Branca, Bologna-Roma 1975, 50 ff.; G. Bongiovanni, *Commento all'articolo 2. Diritti inviolabili e libertà*, in *Le basi filosofiche del costituzionalismo*, ed. A. Barbera, Bari 2000, 67 ff.; P. Caretti, *I diritti fondamentali. Libertà e diritti sociali*, Torino 2011.

[20] As mentioned by Silvestri (nt. 1) 2 ff., the unity of the category, beyond the distinction between private law and public law, had already been affirmed by S. Romano, *Frammenti di un dizionario giuridico*, Milano 1947, who defined the excess of power and emulative acts as "special forms" of the abuse of right.

[21] The principle of solidarity is «posto dalla Costituzione tra i valori fondanti dell'ordinamento giuridico, tanto da essere solennemente riconosciuto e garantito, insieme ai diritti inviolabili dell'uomo, dall'art. 2 della Carta costituzionale come base della convivenza sociale normativamente prefigurata dal Costituente». Cfr. sentences nn. 75/1992 e 409/1989 of the Constitutional Court.

[22] See P. Barile, *Diritti fondamentali e garanzie costituzionali: un'introduzione*, in *Studi in onore di Leopoldo Elia*, ed. A. Pace, Milano 1999.

[23] See D. Florenzano-D. Borgonovore-F. Cortese, *Diritti inviolabili, doveri di solidarietà e principio di eguaglianza: un'introduzione*, Torino 2011.

the individual and those of the rest of the community, since the claim of the individual finds a limit in the rights of others or the general interest[24].

However, moving on the publicist level, it should be noted how the terms of reference change with respect to how they have been and are expressed in the private sector.

Indeed, in the first place, the active position of the relationship is no longer, as a rule, held by a private subject but by a public subject (or a person in charge of a public service); secondly, the latter is no longer the holder of a subjective right, but of a power.

It follows that the subjective situation of reference changes, because it is linked not to an individual interest recognized by the legal system as worthy of protection, but to a general interest that makes the respective behaviour or activity a duty.

In this perspective, the category of the abuse of right can be interpreted according to different declinations[25]. The constitutional doctrine has indeed identified various suitable hypotheses, such as, for example, and without claiming to be exhaustive: the adoption of regulatory measures or constitutional revisions aimed at undermining the principle of separation of powers[26]; or the exercise of fundamental rights that may

[24] See M. Fioravanti, *Art. 2 – Costituzione italiana*, Roma 2018. The author describes a particularly suggestive image to the interpreter in order to understand with greater awareness the function that the constitutional provision tries to fulfill through the text of art. 2; in particular, the A. re-reads the constitutional text recalling the figure of the ellipse, describing the tension between rights as a continuous transfer of constitutional guarantees from one focus to another of the geometric figure adopted as a model. If one extreme, in fact, is inhabited by the individual, understood as single and free, the other extreme is occupied by his fellow man, equally free, or by the entire community, bearer of interests and in any case the center of charge of legal situations.

[25] See G. Palombino, *La "manutenzione" della democrazia tramite il divieto dell'abuso di diritto,* in *Giurisprudenza italiana* 12 (2020) 2610 ff.

[26] See Silvestri (nt. 1) 6, where it's affirmed «abuso del diritto costituzionale ogni atto o comportamento di un organo di vertice dell'ordinamento che possa rompere, o anche soltanto turbare, non solo l'equilibrio sotteso al principio della separazione dei poteri, ma anche quello tra sfera della politica e sfera delle garanzie. Solo il mantenimento dei due equilibri – diversi ma collegati – consente una efficace ed effettiva tutela dei diritti fondamentali dei cittadini, fine ultimo del costituzionalismo contemporaneo». This thesis, which refers to the distinction, posed by Paolo Barile and recalled by the author, between majority political orientation and constitutional

not only be infringed but at the same time the source of abuse of right of others[27]; or the abuse of one's position as a public official or a public service officer[28].

political orientation, frames the excess of legislative power in the context of the abuse of right if this the latter is used to introduce implicit modifications or violations of the Constitution. See P. Caretti, *L'abuso del potere legislativo o del problema dei limiti del legislatore*, in *Diritto privato* 3, *L'abuso del diritto*, ed. G. Furgiuele, Padova 1998.

[27] See Bifulco (nt. 1) 55 ff., according to which it is conceivable that there is, in the social body, a widespread expectation and an implicit consent that no one abuses their fundamental rights so that everyone can continue to exercise them regularly, even in the absence of an explicit constitutional provision that gives shape to this expectation. The Author affirms «È lecito, cioè, supporre che esistano non soltanto quelle "aspettative di comportamento istituzionalizzate e attualizzate nelle situazioni concrete", denominate da Luhmann 'diritti fondamentali come istituzioni', ma altresì un'aspettativa che nessuno abusi di tali diritti (dove l'auspicio sociale ultimo, potremmo dire con Häberle e Luhmann, è quello della stabilità)».

[28] Among these, art. 323 of the Italian Criminal Code, dedicated to abuse of office. The rule clearly outlines the category of abuse according to the change in the terms of reference set out above: the nature of the subject changes, to be identified in the public official or in the person in charge of a public service (it is therefore a proper crime); the nature of the legal situation changes, considering that the offense is completed when the unfair advantage – or the unfair damage – is a consequence of the exercise of the functions attributed to the public official or to the public service officer who exercises them. See F. Antolisei, *Manuale di diritto penale*, Milano 2016; G. Fiandaca-E. Musco, *Diritto penale – Parte speciale*, Modena 2012. It should be noted, however, that the rule does not allow to uniquely identify the case described. Doubts remain, for example, with regard to the legal property protected: according to some, the latter would be the good performance of the public administration, qualifying the third party not as a subject offended by the crime but merely damaged; according to others, it would be a plurioffensive case and the third, harmed in his patrimonial integrity, would be considered an offended person. See C. Benussi, *Diritto penale della pubblica amministrazione*, Padova 2016. Cfr. also Cass. pen., Sez. VI, 9 december 2014, n. 52009. See A. Manna, *Luci ed ombre nella nuova fattispecie di abuso d'ufficio*, in *Ind. pen.* (1998) 21 ff., according to which it would be possible to resort to art. 97 of the Constitution since the legislator has not added the term "specific" to the violations of laws or regulations. Furthermore, even if the code limits the offense to cases of "violation of laws or regulations", some have hypothesized that there could be a hypothesis of abuse even if the behavior of the public official or the person in charge of a public service is spoiled in terms of excess power. In fact, while accepting the thesis, mainly of a jurisprudential nature, according to which the indication of art. 323 of the "violation of rules" would have the clear intention of limiting the review of the

Last but not least, since it is central in the perspective of this work, there is also the hypothesis that current public decision-makers can adopt binding acts destined to a negative impact on future generations, whose needs are already reasonably foreseeable, and consequently harming the principle of intergenerational solidarity, still to be written but increasingly felt.

5. The Italian Constitution and the responsibility towards future generations

It has been a while since the Italian constitutional doctrine has been trying to recognize, albeit showing different orientations, an autonomous legal relevance to the so-called 'generational solidarity'[29]. Thus, alongside a strong appreciation of the theme, there are studies from which a substantial scepticism emerges, showing the difficulty in determining the nature and content of a category with very uncertain borders.

From its perspective, the constitutional jurisprudence has repeatedly made use, as will be pointed out below, of the concept of 'solidarity' – sometimes in terms of equity, sometimes in terms of 'generational-mutuality', in its double meaning of 'inter-generational' and 'intra-generational solidarity', finding out in the fundamental Charter the necessary parameters to give constitutional coverage to the category.

It is not possible here to analyse all the constitutional provisions which looking to the future, using terms such as development and promotion, not from a programmatic point of view but to underline the need for wide protection of rights and, above all, of the development of the individual personality from public authorities.

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criminal judge with respect to the discretionary activity of the public administration – consequently denying the value of identifying the vice of excess power as a symptom of the abuse of office – the reference to excess of power determines further reflection on the possibility that we can speak of excess of power even when the public administration, while formally complying with the provisions of the law, violates "the spirit" (Cons. stato, Sez. IV, 23 june 2015, n. 3153).

[29] See R. Bifulco, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Milano 2008.

The subject of this analysis is instead a specific constitutional provision, enshrined in Article 81 of the Constitution, reformulated in 2012 following the Italian ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (so-called. Fiscal Compact[30]), which appears more and more as a tool by which to balance the needs of present generations with the well-being expectations or at least of equal chances of the future ones.

As is known, art. 81 of the Italian Constitution was amended with the constitutional law of 20 April 2012, n. 1 (also defined as "silent reform"[31])[32] which introduced the concept of balanced budget and entrusted to a reinforced law the function of identifying the mechanisms by which to ensure the balance between income and expenditure of budgets and public debt sustainability.

Two elements immediately emerge from the constitutional reform and the implementation law: firstly, the reformed constitutional article does not require the achievement of an accounting balance in a "static" sense but adopts a connotation in a "dynamic" sense. The legislator, taking into account the possibility of adverse and favourable phases occurring, identifies the balance sheet as a result at the end of an economic cycle. Secondly, the balance became an objective of the system, to the pursuit of which the whole Republic must contribute, and, in particular, those entities, primarily territorial ones, which have budgetary autonomy.

Hence the doubt whether in the provision of art. 81 the search for equilibrium is an objective to be pursued in the context of economic cycles, which therefore have a reasonably defined duration, or whether

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[30] The Treaty was signed at the European Council held in March 2012 and was ratified by Italy with law n. 114/2012.

[31] It was highlighted "the lack of legal debate", as well as political, in the phase immediately preceding and in the one following the constitutional amendment made under L. cost. 1/2012, so to drive the constitutional doctrine to name it as a silent reform. See M. Bergo, *Pareggio di bilancio all'italiana. Qualche riflessione a margine della legge 24 dicembre 2012, n. 243 attuativa della riforma costituzionale più silenziosa degli ultimi tempi*, in *Federalismi.it* 6 (2013) 2 ff.

[32] In addition to the art. 81, the 2012 reform introduced changes to articles 97, 117, and 119 of the Constitutional Charter.

today's balanced budget can then defer its burdens over a period and a generation far away in the time.

6. The Court of the Auditors order on 28 February 2018

This latter consideration appears to be at the basis of the order 28 February 2018 with which the Campania control section of the Court of Auditors raised the question of constitutional legitimacy with reference to art. 1, § 714, law 28 December 2015, n. 208[33], which allows local administration in "pre-failure" status to present a thirty-year plan to cover their deficit.

Before analysing the content of the order, it's important to pay attention to the mechanism of "pre-failure" mechanism. Regulated by art. 243 bis TUEL, it is an intermediate procedure, which local authorities in decline conditions can activate, in order to avoid financial distress, that corresponds to the total inability to carry out their functions and provide essential services. The main feature of the procedure is that the access to the same is approved by local authorities without a prior authorization or the participation of third parties or independent bodies. And it is precisely as a function of this "self-determination" that the Law maker

[33] The Law provides «gli enti locali che nel corso del 2013 o del 2014 hanno presentato il piano di riequilibrio finanziario pluriennale o ne hanno conseguito l'approvazione ai sensi dell'articolo 243 bis del testo unico delle leggi sull'ordinamento degli enti locali, di cui al decreto legislativo 18 agosto 2000, n. 267, possono ripianare la quota di disavanzo applicato al piano di riequilibrio, secondo le modalità previste dal decreto del Ministero dell'economia e delle finanze 2 aprile 2015, pubblicato nella Gazzetta Ufficiale n. 89 del 17 aprile 2015. Entro sei mesi dalla data di entrata in vigore della presente legge, i medesimi enti, ferma restando la durata massima del piano di riequilibrio come prevista dall'articolo 243 bis, comma 5, del citato testo unico di cui al decreto legislativo n. 267 del 2000, possono provvedere a rimodulare o riformulare il precedente piano in coerenza con l'arco temporale di trenta anni previsto per il riaccertamento straordinario dei residui attivi e passivi di cui all'articolo 3 del decreto legislativo 23 giugno 2011, n. 118. La restituzione delle anticipazioni di liquidità erogate agli enti di cui ai periodi precedenti, ai sensi degli articoli 243-ter e 243-quinquies del citato testo unico di cui al decreto legislativo n. 267 del 2000, è effettuata in un periodo massimo di trenta anni decorrente dall'anno successivo a quello in cui viene erogata l'anticipazione».

has expressed a substantial favour over the use of this instrument. As has been pointed out, indeed, while «la dichiarazione di dissesto determina una responsabilità di carattere politico/amministrativo a carico degli amministratori che abbiano cagionato lo stato di dissesto dell'ente», al contrario il «piano pluriennale di riequilibrio non comporta effetti sanzionatori per i soggetti responsabili dello stato di pre-dissesto»[34].

It is then envisaged that, within ninety days following the resolution to use the rebalancing procedure, the Municipality is required to approve a multi-year rebalancing plan complying with a maximum duration of ten years; in essence, the deficit is broken down and distributed over a time span which makes this procedure strongly provisional, because, while not falling into a situation of definitive failure, the entity is close to a real "failure"[35]. It is for this reason that, at a later time, the rebalancing plan must be submitted to the control of the Court of Auditors[36], which is called upon to ascertain that the plan is suitable for settling the contracted debt and is such as to allow the entity to use a fund to draw useful resources in order to realize its activities and the essential services[37].

It's clear that this procedure seeks to satisfy different interests and needs but, at the same time, can also lead, as highlighted by the Court of Auditors in its order, to a shift in time of the responsibility about the adoption of spending decisions implemented at a specific moment in time.

The Court of Auditors has spotted this criticism by analysing the rebalancing plan of a municipality that was in pre-failure status and which, through a first resolution, had made use in 2013 of the multi-annual financial rebalancing procedure as provided for by art. 243-bis, legislative decree 18 August 2000, n. 267 ("Testo unico delle leggi sull'ordinamento degli enti locali"). In particular, local authorities had adopted a ten-year plan for the recovery of the deficit. In 2016, this plan was approved by the

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[34] See E. De Gregorio, *Le procedure di riequilibrio finanziario degli enti*, in *www.contabilita-pubblica.it* (2018) 26 ff.

[35] See M. Fratini, *Contabilità di Stato*, Roma 2017.

[36] See D. Morgante, *I nuovi presidi della finanza regionale e il ruolo della Corte dei conti nel d.l. 174/2012*, in *Federalismi.it* 1 (2013) 2 ff.

[37] See E. Caterini-E. Jorio, *Il predissesto nei comuni*, Rimini 2013.

Court of Auditors, the regional section for the control of Campania[38]. In 2017, the Municipality had modified that recovery plan, taking advantage of the provisions of art. 1, § 714, law n. 208/2015 which allows, in fact, a reformulation of the plan – quantitatively and temporally – in the event that, at the date of presentation or approval of the rebalancing plan, the institution has not yet carried out the extraordinary re-assessment of active and passive residuals pursuant to art. 3, § 7, Legislative Decree n. 118/2011. Specifically, in accordance with the provisions of the rule, the settlement of the debt was decided over a period of thirty years.

Called to reiterate the legitimacy-regularity check on the new plan set by the authorities, the Court of Auditors, with the aforementioned order of 28 February 2018, decided to appeal to the Constitutional Court, disputing the constitutional legitimacy of such a long delay of the deficit settlement.

First of all, the judge *a quo* believes that it's impossible to resolve the particular case by a constitutionally oriented interpretation due to the "incontrovertible textual value" of the contested provision. In this perspective, the appeal envisages a constitutional question on two different bases.

On the one hand, the contrast of the provision with Articles 81 and 97 of the Italian Constitution, autonomously and combined with Articles 1, 2, 3 and 41 of the Constitution, considering that the provision of such a measure to safeguard the balance sheet, expanding the normal three-year cycle, produces the effect of expanding the spending capacity of the entity in conditions of evident imbalance; the consequence would be that the provision «non assolverebbe il dovere di solidarietà nei confronti delle generazioni future, su cui lo squilibrio non tempestivamente risanato sarebbe destinato a riverberarsi in ragione del principio di continuità dei bilanci»[39].

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[38] Cfr. resolution 14 march 2016, n. 53/2016/PRSP.

[39] The Court affirms «la disposizione censurata, insuscettibile di interpretazione costituzionalmente orientata in ragione dell'incontrovertibile dato testuale, violerebbe gli artt. 81 e 97 Cost., autonomamente e 'in combinato disposto' con gli artt. 1, 2, 3 e 41 Cost., in quanto, in assenza di una valida ragione giustificatrice, prevederebbe una misura di salvaguardia dell'equilibrio di bilancio destinata a dipanarsi in un arco temporale dilatato ben oltre il ciclo triennale di bilancio, così ampliando la capacità di

On the other hand, the judge has pinpointed a contrast with Articles 24 and 117, § 1, of the Constitution, in relation to arts. 6 and 13 of the ECHR, as well as art. 1 of the Additional Protocol to the ECHR. Indeed, the choice of modifying the rebalancing plan may determine "a status of legal uncertainty" which affects both the local entity's right to appeal before an impartial judge and the right of creditors, whose reasons would be sacrificed in the light of a total indeterminacy of the completion times of the recovery procedures.

7. The Constitutional Court's sentence

The Constitutional Court accepted the appeal. First of all, it's interesting to examine the reasons that confirm the legitimacy of the Court of Auditors to appeal to the Constitutional Court.

That's important because, at the time of the 2012 revision, the doctrine had examined the reason for the failure to provide, within the Constitutional Law n. 1, the control exercised by the Court of Auditors on the public finances. On the other hand, it was noted that, probably, «la novella avesse dato per scontato che in quel procedimento la Corte dei conti (ndr) dovesse entrare pienamente»[40]; this is in light of the relevant position attributed to it by art. 100 of the Constitution and according to art. 20, § 1, of the reform, that declares «la Corte dei conti svolge il controllo successivo sulla gestione dei bilanci degli enti di cui

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spesa dell'ente in condizioni di conclamato squilibrio. In tal modo, inoltre, la disciplina in questione: a) sottrarrebbe gli amministratori locali al vaglio della loro responsabilità politica nei confronti dell'elettorato; b) non assolverebbe il dovere di solidarietà nei confronti delle generazioni future, su cui lo squilibrio non tempestivamente risanato sarebbe destinato a riverberarsi in ragione del principio di continuità dei bilanci; c) non consentirebbe di supportare con risorse effettive le politiche volte a rimuovere gli ostacoli di ordine economico e sociale che limitano di fatto la libertà e l'uguaglianza dei cittadini; d) pregiudicherebbe il tempestivo adempimento degli impegni assunti nei confronti delle imprese, potenzialmente determinandone la crisi».

[40] See M. Luciani, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, in *Il principio dell'equilibrio di bilancio secondo la riforma costituzionale del 2012*, Atti del Convegno, Corte costituzionale, 22 novembre 2013, *cortecostituzionale.it*.

agli articoli 9 e 13, ai fini del coordinamento della finanza pubblica e dell'equilibrio dei bilanci di cui all'articolo 97 della Costituzione».

Despite the original scepticism that emerged from the interpretation of the renewed constitutional text, the Constitutional Court has frequently recognized for the Court of Auditors the right of soliciting the judgment of legitimacy in the context of auditing the budgets of local authorities. It depends on several elements: the control is exercised by a "real" judge, such by composition and impartiality; and the function of this judge is to safeguard the budget, which is a public good. Indeed, this legitimacy-regularity check justifies its genesis «nel rafforzamento, in Costituzione, del precetto dell'equilibrio di bilancio» and this determines «conseguenze giuridiche specifiche, ossia, nella fattispecie, il passaggio dal regime del piano di riequilibrio finanziario a quello del dissesto»[41].

Finally, the appeal states that denying this control would mean placing the contested provision in a "grey area", making it "impossible" to identify another subject, other than the Municipality, who owns a subjective legal situation useful in order to establish a judgment of this nature before the Constitutional Court.

It is interesting to note that the judges accept the question also taking into account the specific character of the judgment on the acts subjected to control; in fact, the Court emphasizes how this determines a «funzione di garanzia dell'ordinamento, di "controllo esterno, rigorosamente neutrale e disinteressato (...) preordinato a tutela del diritto oggettivo"»[42].

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[41] Cfr. sentence n. 18 of 2019 of the Constitutional Court.

[42] «Va da sé che il controllo di costituzionalità non coinvolge aspetti di politica economica perché il parametro di giudizio non implica, in questo caso, un sindacato sulle leggi di tipo diverso da quello istituzionalmente proprio di questa Corte. L'art. 81, quarto comma, della Costituzione, costituisce il parametro di riferimento per valutare l'attendibilità delle deliberazioni di spesa anche di lunga durata e non solo per garantire l'equilibrio dei bilanci già approvati. Specie quando, come nel caso della legge in esame, gli oneri che vanno a gravare sugli esercizi futuri siano inderogabili, l'esigenza imposta dalla costante interpretazione dell'art. 81, quarto comma, della Costituzione, lungi dal costituire un inammissibile vincolo per i Governi ed i Parlamenti futuri, tende anzi proprio ad evitare che gli stessi siano costretti a far fronte, al di fuori di ogni margine di apprezzamento, ad oneri assunti in precedenza senza adeguata ponderazione

The Court, with sentence n. 18 of 2019, declares strictly motivated the question of legitimacy with reference to art. 81 and art. 97 of the Constitution. In particular, the judges of the Council believe that art. 1, § 714, of Law n. 208, doesn't respect the principles of budget balance and financial management and other principles that the Court defines as "interdependent" with respect to the former: that of multi-year coverage of expenditure and that of responsibility in the exercise of the electoral mandate.

While recalling the protection of distinct constitutionally relevant interests, the judges underline that, in reality, there is a substantial coincidence between these principles at the time of their concrete application – an idea that also emerged during the work of the Italian Constituent Assembly. That's why «il principio dell'equilibrio di bilancio – che in passato la stessa Corte ha trattato alla stregua di una vera e propria clausola generale[43] – non corrisponde ad un formale pareggio contabile, essendo intrinsecamente collegato alla continua ricerca di una stabilità economica di media e lunga durata, nell'ambito della quale la responsabilità politica del mandato elettorale si esercita non solo attraverso il rendiconto del realizzato, ma anche in relazione al consumo delle risorse impiegate».

Therefore, it emerges from the pronouncement that the deficit must necessarily fall within a time prior to the expiry of the electoral mandate during which it matured. Furthermore, if on the one hand it's considered necessary to remedy the deficit in order to avoid the financial failure of the entity, on the other hand it is required that this happens within

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dell'eventuale squilibrio futuro. L'obbligo di una ragionevole e credibile indicazione dei mezzi di copertura anche per gli anni successivi è diretto ad indurre il legislatore ordinario a tener conto dell'esigenza di un equilibrio tendenziale fra entrate e spese la cui alterazione, in quanto riflettentesi sull'indebitamento, postula una scelta legata ad un giudizio di compatibilità con tutti gli oneri già gravanti sugli esercizi futuri»: Sentence n. 384 of 1991 of the Constitutional Court.

[43] «La forza espansiva dell'art. 81, quarto [oggi terzo] comma, Cost., presidio degli equilibri di finanza pubblica, si sostanzia in una vera e propria clausola generale in grado colpire tutti gli enunciati normativi causa di effetti perturbanti la sana gestione finanziari e contabile»: Sentence of the Constitutional Court n. 184/2016.

the appropriate time to allow the directors to present themselves in a transparent manner for the electorate at the end of their mandate.

Well, the Council believes that admitting a long delay in the deficit ends up in conflict with "elementary principles of intergenerational equity". More specifically, it is emphasized that perpetuating the structural deficit over time ends up damaging the principle of intra-generational equity as well as that of inter-generational equity. So, on the one hand, the future administrators will have to provide not only for the coverage of a previous deficit, but also for the repayment of those loans authorized by the provision criticized during the repayment procedure; on the other hand, they will present themselves, to the voters' judgment, burdened by the consequences of poor financial management carried out by their predecessors[44].

8. Conclusion

The recent jurisprudence of the Constitutional Court analysed in this work represents a significant sign of the relevance that the principle of intergenerational responsibility is been assuming. Similarly, it is important that the Court connects this commitment to a very specific constitutional principle, the balanced budget, from which it is possible to derive not only current but also future indebtedness. In fact, it seems reasonable to believe that the constitutional provision related to the concept of "balance" recalls the idea that budget policies, but more generally the whole public spending, cannot and must not be based solely on responding to current challenges, but must balance the present of the community with its own future[45].

In recent decades, a tendency of the public policies to live in an eternal present there has certainly been, also due to the close succession

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[44] See G. Palombino, *La configuración jurídica del principio de imparcialidad generacional: ¿hacia una democracia sostenible?*, in *Revista de Derecho Constitucional Europeo* 33 (2020) 1 ff.

[45] See G. Sciacca, *La giustiziabilità della regola del pareggio di bilancio*, in *Rivista AIC* 2 (2012) 2 ff.; N. D'amico, *Oplà: il pareggio di bilancio non c'è più*, in *Istituto Bruno Leoni* 107 (2011) 2 ff.

of elections that are inevitable in a multi-level dimension of political representation (European, national and regional competitions, but without ignoring the political importance of elections for mayors of large cities)[46]. However, it does not appear feasible to pursue the idea that spending decisions, adopted today for the benefit of the current generation, will end up weighing more heavily on the rulers and ruled of the coming years or even more so of the coming decades[47].

The jurisprudential orientation analysed in this paper does not lead to affirm that the Court goes already so far as to consider the rights of future generations as "real rights"[48]. However, reading them in the perspective of equity promotion, and, therefore, of the prohibition of abuse of rights, it is possible to glimpse in these recent sentences the prelude of a growing interest of the Judge of Laws in the "rights of tomorrow" as a parameter for evaluating the "reasonableness of legislative choices"[49], in order to make them sustainable and equitable, in a proper sense of the term[50].

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[46] See R. Dickmann, *L'atto politico questo sconosciuto*, in *Forum di quaderni costituzionali* (2012) 1 ff.; F. Bilancia, *Ancora sull'atto politico e sulla sua pretesa insindacabilità giurisdizionale. Una categoria tradizionale al tramonto*?, in *Rivista AIC* 4 (2012) 2 ff.

[47] See G. A. Ferro, *Chiarezza dei conti pubblici e democrazia rappresentativa (Osservazioni a prima lettura su C. cost. n. 49 del 2018)*, in *www.ambientediritto.it* (2018) 5 ff.

[48] See M. Luciani, *Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali*, in *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*, eds. R. Bifulco-A. D'Aloia, Napoli 2008; C. Pinelli, *Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario*, in *La motivazione delle decisioni della Corte costituzionale*, ed. A. Ruggeri, Torino 1994, 551 ff.

[49] See G. Arconzo, *La sostenibilità delle prestazioni previdenziali e la prospettiva della solidarietà intergenerazionale. Al crocevia tra gli art. 38, 81 e 97 Cost.*, in *Osservatorio AIC* 3 (2018) 644 ff.

[50] See G. Palombino, *La tutela delle generazioni future nel dialogo tra legislatore e Corte costituzionale*, in *Federalismi.it* 24 (2020) 242 ff.

Valentina Spagna*

Access to Administrative Documents in the Italian Legal Order

1. Introduction

The Italian process of democratisation of the administrative legal order, characterising the policies of the 90s, transformed radically the traditional features of administrative power. Until that time, in fact, it was strongly authoritarian and unilateral, based on the principle of secrecy of the administrative activity; heritage of a totalitarian State.

The democratisation of the administrative system responds, basically, to two different reasons: the economic crisis and the consequent need for the State to encourage private investments in order to face the difficulties of the public bodies to provide services to citizens; the rise and growth of the European Market, which imposes the principles of fair competition, liberalization, transparency and non-discrimination.

In this scenario, it becomes necessary to abandon the principle of secrecy of administrative action to ensure the visibility, transparency and comprehensibility of the administrative organisation, activities and acts, to compensate the lack of a democratic legitimacy of the administrative bodies, and to ensure a control upon administrative activities.

Therefore, principles such as publicity and transparency have been included among the main principles inspiring the administrative activity, as stressed by art. 1 Law n. 241/1990 (Law on administrative

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proceeding). Therefore, nowadays, public authorities are required to comply with duties of publicity and transparency aiming at making their activities visible and controllable externally.

Albeit publicity and transparency are often treated as synonymous, these two principles can only be partially overlapped, being publicity just one of the different elements of transparency. In fact, whilst transparency refers to the action of public administration as a whole, publicity concerns a formal element of transparency. Indeed, the fact that a document is publicly accessible does not necessarily ensure that its content is clear, nor that it has been adopted in a transparent manner within the proceeding phases[1].

Furthermore, transparency aims at ensuring the principles of good performance and impartiality (established by art. 97 of the Italian Constitution), preventing corruption[2] and ensuring the accountability of public officers.

Even though the reference to transparency has been expressly introduced in the Law on administrative proceeding only in 2005 (by Law n. 15), and only recently widely applied, this principle was not completely unknown in the Italian administrative system, being already

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[1] About transparency principle: A. Simonati, *La ricerca in materia di trasparenza amministrativa: stato dell'arte e prospettive future*, in *Dir. Amm.* 2 (1/6/2018) 311 ff.; M. C. Cavallaro, *Garanzie della trasparenza amministrativa e tutela dei privati*, in *Dir. Amm.* 1 (1/5/2015) 121 ff.; D. U. Galetta, *Trasparenza e governance amministrativa nel diritto europeo*, in *Riv. it. dir. pubbl. comunit*. 2 (2006) 265 ff.; S. Foà, *La nuova trasparenza amministrativa*, in *Dir. Amm*. 1 (1/3/2017) 65 ff.

[2] Transparency and access represent a means of fighting corruption. They have been envisaged as measures to combat illegality in the public administration through Law n. 190/2012, so-called anti-corruption law. On this topic, see V. Varone, *La trasparenza amministrativa: analisi dei più recenti interventi legislativi e delle prospettive future*, in *Corruzione e Pubblica Amministrazione*, ed. M. D'Alberti, Napoli 2017, 357 ff.; A. Pajno, *Il principio di trasparenza alla luce delle norme anticorruzione*, in *Sicurezza e scienze sociali* 2 (2016) 19 ff.; N. Rangone, *Quale trasparenza per rendere il cittadino consapevole*, in *Combattere la Corruzione*, ed. M. D'Alberti, Napoli 2016, 195 ff.

strongly present in some specific sectors, such as public procurement[3], public employment[4] and environmental procedures[5].

The most significant expression of transparency principle in the Italian administrative legal system is the right of access to administrative documents[6], together with the duty for public authority to motivate the administrative acts and the multiple rights of participation in the administrative proceedings granted to private people by Law n. 241/1990.

The right of access is, in fact, a mean to ensure the transparency of the administrative activity. This principle was firstly embedded in art. 42 of the European Chart of Fundamental rights, and was then introduced in the Italian legal order as general principle by Law 241/90 (art. 22 and

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[3] Public procurement has been a field where transparency always played a key role. This is due to the circumstance that this sector is one of the most sensitive to collusive behavior. That is the reason way public procurement procedures have always complied with the principles of publicity and transparency (public call, public competition, publication of the ranking ...). The development of the European market has further influenced this sector, expanding the obligations of publicity and transparency in order to guarantee the maximum openness of the public procurement procedures to all EU undertakings, avoiding any possibility of national market protectionism. On this topic, A. Cancrini, *Concorrenza, anticorruzione e trasparenza nei contratti pubblici: le radici diverse*, in *Corruzione e Pubblica Amministrazione* (nt. 2) 619 ff.

[4] On this topic, see A. Marra, *I pubblici impiegati tra vecchi e nuovi concorsi*, in *Riv. Trim. Dir. Pubb*. 1 (1/5/2019) 233 ff.

[5] On this topic, see L. Di Giovanni, *Il diritto di accesso in materia ambientale tra normativa nazionale e sovranazionale*, in *Il diritto dell'economia* 3 (2015) 713 ff.; M. Calabrò, *La prevenzione della cattiva amministrazione attraverso l'esercizio dei diritti di accesso e partecipazione: il caso dei procedimenti in materia di ambiente*, in *Semplificare e liberalizzare. Amministrazione e cittadini dopo la legge 124 del 2015*, ed. S. Tuccillo, Napoli 2017, 123 ff.; A. Contieri-G. Di Fiore, *L'accesso alle informazioni ambientali*, in *Codice dell'azione amministrativa*, ed. M. A. Sandulli, Milano 2017, 1248 ff.

[6] On this topic, see A. Simonati, *I principi in materia di accesso*, in *Codice dell'azione amministrativa* (nt. 5) 1209 ff.; Id., *L'ambito di applicazione del diritto di accesso*, in *Codice dell'azione amministrativa* (nt. 5) 1279 ff.; F. Manganaro, *L'accesso agli atti ed alle informazioni degli enti locali*, in *Codice dell'azione amministrativa* (nt. 5) 1271 ff.; P. Alberti, *I casi di esclusione dal diritto di accesso*, in *Codice dell'azione amministrativa* (nt. 5) 1290 ff.; M. Calabrò-A. Simonati, *Le modalità di esercizio del diritto di accesso e la relativa tutela*, in *Codice dell'azione amministrativa* (nt. 5) 1320 ff.

ff.), inspired by an idea of public administration meant as a "glass house", wished by Turati already in 1908[7].

In its very first formulation the access was granted to anyone and it was addressed to any kind of administrative act, but, already in 2005, the right of access was limited, by Law n. 15/2005, only to those subjects capable to demonstrate to carry a differentiated interest: having to prove that the access request is designed to protect, even though only potential, a legal situation protected by the legal system.

The principle of transparency has gradually evolved up to assume, nowadays, a primary role in our legal system. This is demonstrated by the circumstance that currently, our legal order, recognises three different kinds of access: documentary/ordinary access, simple civic access and generalized civic access. Each typology of access has its own specific discipline, regulating the peculiar subjective and objective requisites legitimising the access[8]. This circumstance leads to exclude the existence of a single and general right that allows private people to have access to administrative documents through different paths. The Italian legal order, therefore, presents a "triple track" system in which these three different kinds of access, all together, aim at ensuring the full transparency of the administrative activity.

2. Documentary access

Pursuant to art. 22, Law n. 241/1990, documentary access represents the first kind of access introduced into the Italian legal system and it consists of the right to view and to extract copies of administrative documents. Whilst in its first formulation the documentary access was allowed to everyone, precisely to grant the transparency of the administrative activity, already through the amendments introduced by

[7] The reference is to F. Turati, in *Atti del Parlamento Italiano*, Camera dei Deputati, sessione 1904-1908, 17 giugno 1908, 22962.

[8] M. Calabrò-A. Simonati, *L'accesso dei privati alle informazioni e agli atti amministrativi: la multiforme applicazione del principio di trasparenza*, in *Studi in memoria di Antonio Romano Tassone* 3, eds. F. Astone and others, Napoli 2017, 1330 ff.

Law n. 15/2015, the reference to transparency was removed from art. 22 § 1 and its application is now limited to all those private subjects who have a direct, concrete and current interest, corresponding to a legally protected situation, connected to the document object of the application for access. Although the legislative provision has always referred to the "right of access", the question about its legal nature has raised a passionate debate[9].

In this regard, the Plenary Assembly of the Council of State, in its ruling n. 16/1999, recognised its nature of "legitimate interest", stating that the term "right of access" is used in a non-technical manner, aiming at emphasising the constitutional and the substantial dignity of the juridical position of those who formulate an application for access. To confirm this thesis, the Court stress how the conflict triggered by a request for access, between the need for publicity and transparency and the privacy protection of third parties, finds its balance through an evaluation of prevalence, which gives rise to an authoritative measure[10], corresponding to a position of "legitimate interest" of the applicant. Furthermore, the judges underline how the short deadline (30 days), for challenging the administrative decision on the request for access, would not be compatible with a "subjective right" position.

After the modifications approved by Law n. 15/2005 and by Law Decree n. 35/2005, the question related to the nature of documentary access was submitted to the Plenary Assembly again. This time the Court, in the ruling n. 6/2006, did not take any position about this, considering that in order to identify the rules applicable for the jurisdictional procedures against the administrative determinations concerning the requests for access, it is not useful to determine the subjective position involved.

According to the Plenary Assembly, in fact, documentary access constitutes a legal instrument that, instead of providing final utilities, offers to the private applicant procedural powers instrumental to the

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[9] P. Algieri, *L'accesso agli atti amministrativi*, in www.ildirittoamministrativo.it.

[10] Cons. Stato, Ad. Pl., 4/2/1997, n. 5; Cons. Stato, Ad. Pl., 28/4/1999, n. 6; Cons. Stato, Ad. Pl., 22/3/1999 nn. 4 and 5, in www.giustizia-amministartiva.it.

protection of a relevant legal interest (which can be both a "subjective right" or a "legitimate interest"), and it grants the stability and certainty of legal situations[11].

Therefore, according to art. 22, Law n. 241/90, the power to access to documents held by the public administration, is not attributed to everyone, but only to those demonstrating to have a differentiated and qualified position, linked to the document the access is request for[12].

The possibility that the interest of the applicant may come into conflict with other fundamental interests made it necessary to specifically provide for cases of exclusion of documentary access. For this reason, art. 24 § 1 gives priority, among others, to documents covered by State secret, cases of secrecy or prohibition of disclosure expressly provided for by law, tax proceedings, as well as general regulatory or administrative acts. These concern absolute exclusions, but, according to art. 24 § 5, the prohibition of disclosure of such documents cannot be considered beyond their actual connection with the need for secrecy, and it must be limited to that part of the document which may effectively prejudice the interests underlying the prohibitions[13].

Another issue concerns the balance between the right of access and the privacy protection. About this, art. 24 § 7 establishes the prevalence of the documentary access, when it has a defensive function, over the confidentiality of ordinary personal data, stating that the access to administrative documents, whose knowledge is necessary to protect or defend a personal legal interests, must always be granted[14]. On the other hand, when the access request relates to sensitive or judicial data, the access is allowed only if strictly necessary, with the consequent need for the public administration to make a comparison between the interest of the applicant for access and those of the counter-interested parties concerning data confidentiality. Finally, access to highly sensitive data

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[11] M. Santise, *Coordinate ermeneutiche di diritto amministrativo*, Torino 2018, 396 ff.

[12] On this topic, R. Leonardi, *The right of access to administrative documents: players for a polite administrative action*, in *Foro amm. TAR* 6 (2012) 2155 ff.

[13] Cons. Stato, Sec. V, 2/12/1998, n. 1725, in www.giustizia-amministrativa.it.

[14] Cons. Stato, Ad. Pl., 4/2/1997, n. 5; Cons. Stato, Ad. Pl., 28/4/1999, n. 6; Cons. Stato, Ad. Pl., 22/3/1999 nn. 4 and 5, quoted.

(such as those suitable for revealing the state of health and sexual life of third parties) is only possible if the legal relevance of the situation that is intended to protect through the request for access has, at least, equal rank of the interest concerning the protection of such sensitive data.

A further limit to the documentary access is settled by art. 24 § 3, which excludes the admissibility of instances for access preordained for a generalised control on the administrative activity. Speaking of which, the Council of State clarified that it must be excluded that the legislator introduced, through the documentary access, a general power aiming at controlling the administrative activity; this is because the interest of knowing administrative documents needs to be balanced with other relevant interests, also recognised at constitutional level, including the one aiming at avoiding excessive obstacles in administrative activity[15]. In this regard, it was also remarked that, where the request for access requires an evaluation and processing of the data held by the administration, its acceptance is precluded, since it reveals a purpose of general control over the administrative activity that does not respond to the purpose of this legal instrument[16].

3. Simple and generalized civic access

Legislative Decree n. 33/2013 (also known as transparency-decree) marked the first significant step towards a system in which the right of access becomes an instrument for controlling administrative activity, introducing civic access, pursuant to art. 5 § 116. This evolutionary path was completed by Legislative Decree n. 97/2016[17], which partly modified and partly innovated the transparency-decree, introducing generalised civic access, now provided for by § 2 of art. 5.

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[15] Cons. Stato, Sec. V, 25/09/2006, n. 5636, in www.giustizia-amministrativa.it.

[16] Cons. Stato, Sec. IV, 12/07/2005, n. 4216, in www.giustizia-amministrativa.it.

[17] About this topic, see D. U. Galletta-P. Provenzano, *Sul D.lgs. n. 97/2016 recante modifiche alla disciplina sulla trasparenza e sulla prevenzione della corruzione*, in *Le nuove regole della semplificazione amministrativa. La legge n. 241/1990 nei decreti attuativi della "riforma Madia"*, ed. M. A. Sandulli, Milano 2016, 7 ff.

Whilst e documentary access, pursuant to Law n. 241/1990, is inspired by the "need to know", with the consequence that access is allowed only to those people who need to know the document in order to protect a personal interest/right, legally recognised by the legal order as worth of protection, the transparency-decree, on the other hand, is inspired to the "right to know", so that all citizens have the full right to access all documents, data and information held by the administrative authorities, without the need to demonstrate to bear a differentiated interest [18].

According to art. 5 § 1, which regulates simple civic access, anyone can require all "documents, information or data", which the public administration is obliged to publish on its own internet website, without having to demonstrate to have a specific interest on them. Therefore, the request for civic access has no legal limit neither on the subjective legitimacy of the applicant, nor on the motivation for access, as the applicant does not have to demonstrate any specific interest. It is for free and it must be addressed to the transparency manager of the administration obliged to publish the document/data/information requested.

The documents subject to compulsory publication are provided for by articles 12 and ff. of Legislative Decree n. 33/2013. This obligation concerns: the acts regarding the use of public resources, the services offered and provided to citizens, the acts concerning the organization of the public authorities, including those regarding political and managerial positions, the cost of the employees, the information related to competitions, including the evaluation criteria and the traces of written proofs, and some administrative measures as the concession of grants, contributions, subsidies and attribution of economic advantages to individuals and public or private entities.

The main goal of this legal instrument is contrasting the corruption phenomena in public bodies. It is a legal institution which, rather than providing the applicant a right of access to documents, guarantees a

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[18] Santise (nt. 11) 421 ff.; G. Auriemma, *Le diverse forme di accesso nell'ordinamento italiano: il rapporto tra accesso ordinario e accesso civico generalizzato in materia di contratti pubblici*, in www.rivistagiuridicaeuropea.edicampus-edizioni.it 1 (2020).

specific compliance action, which can be considered as a sanction for the public administration for the non-fulfilment with publication obligations[19]. The Anticorruption Authority (ANAC)[20] has supervisory powers on compliance with the publication obligation and the hypotheses of non-publication or rejection of the requests for civic access[21].

Generalised or universal civic access[22], pursuant to art. 5 § 2 of Legislative Decree n. 33/2013, constitutes an instrument inspired by the Anglo-Saxon model of the Freedom of Information Act. This legal institute introduces free access for all data and documents held by public authorities, assuring widespread forms of control[23] over the administrative activities, aiming at preventing corruption, arising the conscious participation of citizens to public debate and assuring the legitimacy of the public administration. Its introduction signs the final recognition of the transparency principle as a general rule of the administrative legal order, relegating confidentiality and secrecy as an exceptions[24]. However, the extent of generalized civic access is tempered by a series of exclusions and limitations aiming at guaranteeing, on the one hand, the respect of confidentiality and secrecy for specific kind of public/private interests, as provided for by art. 5-*bis* §§ 1-2; on the other hand, the compliance

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[19] D. U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle modifiche alle disposizioni del Decreto Legislativo n.33/2013*, in www.federalismi.it.

[20] On this topic, see B. Neri, *I controlli dell'autorità nazionale anticorruzione in materia di prevenzione della corruzione e di trasparenza*, in *Corruzione e Pubblica Amministrazione* (nt. 2) 801 ff.

[21] The lack of compliance with those obligations can be take into account among the relevant elements for the evaluation of managerial responsibility, for the assessment concerning the production of a damage to the image of the public administration, for the purpose of measuring the individual managers performance.

[22] On this topic, see A. Moliterni, *La natura giuridica dell'accesso civico generalizzato nel sistema di trasparenza nei confronti dei pubblici poteri*, in *Dir. Amm.* 3 (1/9/2019) 577 ff; E. Carloni, *Il nuovo diritto di accesso generalizzato e la persistente centralità degli obblighi di pubblicazione*, in *Dir. Amm.* 4 (1/12/2016) 579 ff.

[23] R. Bonfanti, *Il diritto di accesso: un arcipelago in continua evoluzione*, in www.dirtto.it. (10/9/2919).

[24] Cons. Stato, Sec. III, 15/05/2018, n. 2890 and Sec. V, 16/05/2018, n. 2899; TAR Campania, Napoli, Sec. VI, 28/02/2018, n. 1308; TAR Abruzzo, Sec. I, 16/07/2018, n. 298, in www.giustizia-amministrativa.it.

with rules containing specific exclusions, as provided by art. 5-*bis* § 3. About this issue, ANAC stressed that from art. 5-*bis* of transparency-decree, two different types of exceptions can be distinguished: the absolute ones, which oblige public authorities to refuse the access, and the relative ones, which allow public authorities to refuse generalized access. Absolute exceptions exclude general civic access when the law, on the basis of a preventive and general assessment, clearly establishes the non-ostensibility of data, documents and information, in order to protect primary and fundamental interests, or allows it according to particular conditions and limits. Indeed, only a source having legislative rank can justify a compression to the "right to know", that inspires our legal system. These exclusions resort in case of State secrecy and other cases of prohibition of access or disclosure required by law, including cases in which access is, by the regulations in force, subject to compliance with specific methods or limits, including those provided for by art. 24 § 1 Law n. 241/1990. In these cases, public administration does not have any evaluation power, as these are kind of restricted public activities. However, this does not exempt the authority from carrying out an accurate assessment verifying whether the data/document/information requested actually fall in a legislative exception. Only on the basis of this assessment, it is possible for the addressed authority to reject the request, however the authority has to clearly explain the reasons of the denial[25].

Relative exceptions, on the other hand, may apply beyond the cases indicated above, such as limits settled to protect public and private interests having a particular juridical relevance. In these cases, however, law attribute to the public authority a discretionary power, so that the administration can balance, case by case, the public interest in generalized disclosure with the protection of interests considered of equal value by the legal system. In this regard, the first and necessary assessment the administration have to make is the "harm test", to verify whether the disclosure of the documents requested could concretely affect the other protected interests; once it has been assessed that there is no risk of any prejudice, it is possible to fully accept the request for generalized civic

[25] Auriemma (nt. 18); M. Filice, *I limiti all'accesso civico generalizzato: tecniche e problemi applicativi*, in *Dir. Amm.* (2019) 861 ff.

access. Therefore, with reference to the relative exceptions, the principle of total accessibility is tempered on the basis of an evaluation concerning the prejudice that the other protected interests could suffer from a generalized disclosure of information[26].

Therefore, Legislative Decree n. 97/2016 added to the pre-existing "proactive" – transparency, achieved through the mandatory publication of all data and information settled by Legislative Decree n. 33/2013, on the public administrations' institutional websites, a new kind of transparency, "reactive" – transparency, in response to private requests for generalized civic access.

Having regard to the application for access, it must allow the addressed authority to identify the data, documents or information requested, therefore generic requests are not admissible. In the event of a request for a manifestly unreasonable number of documents, the administration can weigh the interest in accessing the documents with the interest in the smooth running of the administrative activity.

The request can be addressed both to the public administration holder of the data, information or documents requested, and to the public relations office, or even to another office indicated by the administration in its institutional website ("Transparent Administration" section), as well as to the Manager of prevention for corruption and transparency.

4. Similarities and differences

The Council of State, in a recent ruling, clarified that, nowadays, the right of access to documents held by public administrations is divided and declined in three different disciplines, each one characterised by its own conditions, limits, exceptions and remedies. These three kinds of access represents three legal institutes autonomous and different among them[27], assuring different level of protection of the private interest for

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[26] Filice (nt. 25).

[27] About the differences among the various kinds of access to administrative documents provided for by the Italian legal order and on the diversity of the conditions for requesting access: TAR Lazio, Roma, Sec. II *bis*, 2/07/2018, n. 7326, in www.giustizia-amministrativa.it.

transparency, as it emerges by art. 5 § 11, Legislative Decree n. 33/2013, which, without prejudice to the discipline provided by Law n. 241/1990, admits the coexistence of multiple forms of access.

In the first place they differ in terms of purposes: while ordinary/documentary access is functional to the protection of private interests/rights, intended to guarantee the defence in a trial or proceeding, and, more properly, it is aimed at granting the exercise of the participatory and opposition powers in the procedure, through a complete knowledge of the documents held by the public administration; on the other hand, simple and generalized civic access aiming at promoting widespread forms of control over administrative activity and public resources.

They also diverge with regard to the subjective and objective field of application. In fact, as already analysed, while for documentary access, legitimated to ask for access are only those people who demonstrate to have a concrete and current interest, instrumental to the defence of a personal situation, recognized worthy of protection by the legal order, and connected to the document object of the request for access; entitled to apply for civic access (simple or generalized) is anyone, regardless of a real and concrete interest in knowing the requested document. Consequently, while the application for documentary access must be adequately motivated, applications for civic access does not require any motivation supporting the request[28].

With regard to the objective field of application, while civic access concerns only administrative documents, generalized civic access also includes data, and simple civic access also includes both data and

[28] About this topic, the Regional Administrative Court of Lazio (Tar Lazio, Roma, Sec. II *bis*, n. 7326/2018 quoted) underlines that even if the law does not require the explanation of the reasons of the request for access, the request need, even implicitly, to be aimed at satisfying an interest having public value, and not an exclusively private, individual or selfish cognitive need. The Regional Court of Campania, on the other hand, stated that, dissimilar to other States' experiences concerning FOIA, the Italian legal system don't provide for any "public interest test", but only an "harm test", in order to assess when a request for access referred to an excessive number of documents can affect the correct work of the public administration. TAR Campania, Napoli, Sec. VI, 9/5/2019, 2486, in *Diritto & Giustizia* 90 (2019) 5, commented by G. Milizia.

information (but, obviously, only for those documents/data/information the administration is obliged to publish).

The proceedings also present differences, this is because cross-examination is compulsory only for documentary access. A further difference concerns the implementation of the right of access, as in documentary access it is carried out by displaying and extracting copy of the documents concerned; for civic access it is achieved through the publication of the requested data/documents/information.

Also referring to the remedies provided for denial of access or for the hypothetical, but not unusual, cases of inaction of public administration, the legal system settles different regimes according to the kind of access concerned. While for documentary access, law provide for the "silent-denial" rule, as after 30 days from the submission of the application the request must be considered as rejected, and the applicant can appeal the tacit rejection before the administrative judge on the basis of the dispositions stated by art. 116 c.p.a. With regard to civic access, if the addressed authority fails to reply within the terms established by law, since it is not provided the "silent-denial" rule, the citizen can activate a special internal administrative claim before the Manager of prevention for corruption and transparency, submitting a request for re-examination, which must be replied to in the terms settled by law. Since the hypothesis of silence of the administration to this latter request is not contemplated by law, the applicant has the burden to contest the silence of the administration by activating the specific procedure settled for "silence-default" by art. 117 c.p.a., whilst in case of the public authority rejecting totally or partially the request for access, the applicant can claim against the administrative decision through the legal action pursuant to art. 116 c.p.a. [29].

Furthermore, also with regard to the exclusions established by law, the three kinds of access differ. Whilst for civic access the existence of a case of exclusion totally forbids the document disclosure, for documentary access the prohibition is limited to that part of the document whose disclosure

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[29] TAR Lazio, Sec. II *bis*, 2/07/2018, n. 7326, quoted. About this topic, M. Calabrò, *Diritti di accesso e profili rimediali: spunti di riflessione per l'introduzione di una ipotesi di giurisdizione condizionata*, in *Nuove autonomie* 27 (2018) 63 ff.

can affect those interests protected by the legislative exception[30]. It is for example the case of State secret, since it represents an exclusion that cannot find any temperament for civic access, while, for documentary access it is possible to allow the disclosure of those parts of the document not covered by State secret and not harmful for this particular interest. Regarding the relationship with confidentiality interests, on the other hand, while for documentary access public administration can weight and balance the opposed interests, allowing defensive access to prevail, in narrow limits, even when very sensitive data are involved; with regard to generalized civic access, ANAC clarified that the disclosure prohibitions provided for by law (art. 5-*bis* § 3, Legislative Decree n. 33/2013), refer to the protection of highly sensitive data and, therefore, the requests for access must be always rejected whenever concerning data suitable for revealing a person's sexual life or state of health[31].

About this topic, the Plenary Assembly of Council of State, in the ruling n. 10/2020, clarified that the absolute exceptions envisaged for generalized civic access (documents covered by State secrecy; other cases of prohibitions envisaged by law, including cases where access must comply with specific conditions, methods and limits; the hypotheses contemplated by art. 24 § 1, Law n. 241/1990) cannot be interpreted in the meaning of exempting entire fields of subjects from generalized civic access, only because they provide for cases of limited and conditional access, including those referred by Law n. 241/1990. A different interpretation would imply that, according to the specialty principle, the access, in these particular subjects, would always be excluded, with the unreasonable consequence that the special discipline (or even the general one of documentary access, as recalled "*per relationem*") would completely absorb the right of access.

In the same ruling n. 10/2019, the Plenary Assembly established that a request for documentary access can coexist with that one for generalized civic access, as no normative provisions impede the application for access to refer, contextually, to both forms of access. Furthermore, in the event

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[30] N. Vettori, *Valori giuridici in conflitto nel regime delle forme di accesso civico*, in *Dir. Amm.* 3 (1/9/2019) 539 ff.

[31] Bonfanti (nt. 23).

that the request refers only to the requisites provided for documentary access, the public administration is not precluded from examining the request also having regard to the discipline provided for generalized civic access, if the application substantially contains all the elements necessary to assess the admissibility of universal access[32].

According to the Plenary Assembly, faced with a request for access formulated in a generic or cumulative manner, without any reference to a specific discipline, the public administration has the "power-duty" to respond having regard to both disciplines of access, but only if the requisites provided by the specific regulation are, however, substantially represented in the application. On the other hand, in case the applicant makes exclusive and unequivocal reference to the discipline provided for documentary access, the public authority have to examine the application referring only to the prevision settled by Law n. 241/1990, and in case of claim, pursuant to art. 116 c.p.a., the administrative judge cannot modify the title of the access as defined in the original request and in the consequent denial adopted by the public administration at the outcome of the proceeding[33].

Therefore, according to the Supreme Court, the relationship between the two general disciplines of documentary access and generalized civic access, and the relationship between these two general disciplines and the sectorial ones, cannot be interpreted solely and abstractly according to a specialty criterion, and, therefore, in the meaning of mutual exclusion, but according to a hermeneutic canon of completion/inclusion, since the "*ratio*" underlying the relation between the two disciplines is based on the integration of the different regimes of access, aimed at assuring a preferential protection to the cognitive interest.

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[32] On this topic, see L. Iannotta, *I rapporti tra accesso tradizionale ed accesso civico generalizzato: la riqualificazione dell'istanza di accesso in corso di giudizio*, in *Foro Amm*. 7-8 (2020) 1373 ff.

[33] Auriemma (nt. 18).

5. Public procurement and right of access

With specific reference to public procurement field, art. 53 § 1, Legislative Decree n. 50/2016 (public procurement code), provides that, excepting for the provisions expressly provided for by the code, the right of access to the proceedings documents, concerning the assignment and execution of public contracts, including candidacies and offers, is governed by artt. 22 and ff., Law n. 241/1990.

According to the Plenary Assembly, in the quoted ruling n. 10/2019, to the competitors of a tender, it must be recognised a concrete and current interest, pursuant to art. 22 Law n. 241 of 1990, and, therefore, the consequent legitimacy to apply for access to the documents concerning the executive phase of a public contract, whenever those are related to events that could imply the termination of the contract due to non-fulfilment and, therefore, the scrolling of the ranking or the reissue of the tender, as long as the request does not result to be motivated by a generic will of the applicant to verify the correct execution of the contractual relationship.

With regard to the issue related to the possibility to apply the institute of generalized civic access in public procurement sector, the question comes from the circumstance that, while, as just analysed, art. 53 § 1 of public procurement code, expressly refers only to the discipline of documentary access, art. 29 § 1, identifies the tender documents subject to mandatory publication which, if not publicized by the public authority, entail anyone to make a request for access, pursuant to art. 5 § 1, Legislative Decree n. 33/2013[34]. Indeed, the code does not mention generalized civic access for tender documents, nor did the legislator in the many opportunities he had to do it. In fact, the Legislative Decree n. 97/2016, introducing generalized civic access, did not coordinate it with the sectorial disciplines provided for public contracts. Likewise, Legislative Decree n. 56/2017, corrective of Legislative Decree n. 50/2016, did not add any reference to generalized civic access for tenders.

[34] About the right of access in public procurement field: L. Minervini, *Accesso agli atti e procedure di affidamento ed esecuzione di contratti pubblici*, in *Foro amm.* 5 (2019) 949 ff.

However, despite the lack of an express provision, generalized civic access has been requested several times in tender proceedings. Therefore, it arose the issue concerning whether art. 53 § 1, Legislative Decree n. 50/2016, stating that access to documents concerning tender proceedings is regulated by the ordinary discipline, pursuant to Law n. 241/1990, implies the exclusion of generalized civic access, pursuant to art. 5-*bis* § 3 Legislative Decree n. 33/2013, which provides it is excluded in those cases, among others, in which it has to comply with specific conditions, methods or limits provided for by the regulations in force[35].

Therefore, it becomes necessary to understand whether the reference made by art. 53 to the discipline provided by Law n. 241/1990, for documentary access, can be considered as specific conditions, methods or limits, aimed at excluding absolutely generalized civic access in the field of public contracts. The jurisprudence demonstrated to have different positions about this issue[36], so that the Council of State had to address the question to the Plenary Assembly[37].

In the quoted ruling n. 10/2020, the Plenary Assembly highlighted that, in public procurement field, the needs related to generalized civic access take on a particular and more meaningful connotation, because they constitute the physiological consequence of public evidence, since what is publicly evident by definition need to be publicly available too. In fact, the need of transparency, meant as a widespread control over the administrative activity, is particularly relevant in public procurement and concessions fields, above all with regard to the executive phase of public contracts, in which the phenomena of bad administration, corruption and mafia infiltration often lurk, provoking inefficiencies and bad governance for the public works or services provided by the public administration and serious organizational defaults. According to the Supreme Court, therefore, it is no longer possible to affirm that access to

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[35] G. Gagliardini, *L'accesso civico generalizzato alle procedure di affidamento dei contratti pubblici*, in www.giutizia-amministrativa.it (2019).

[36] In the meaning of the admissibility of generalized civic access in the public contracts field, Cons. Stato, Sec. III, 5/6/2019 n. 3780; on the contrary, Cons. Stato, Sec. V, 2/8/2019, nn. 5502 and 5503, in www.giutizia-amministrativa.it.

[37] Cons. Stato, Sec. III, 15/12/2019, order n. 8501, in www.giutizia-amministrativa.it.

documents related to public procurement tenders constitutes a complete regulatory microcosm, while a unitary and integrated interpretation must be extended to all kinds of access, including the civic one, both simple and generalized.

With particular reference to the execution of public contracts, after having clarified that the execution of the contract is not a "no man's land" left to the discretion of the contractors and the indifference of third parties, the Council of State clarifies that generalized civic access must be guaranteed even in the executive phase. Indeed, according to the judges of the Plenary Assembly, each citizen can exercise a widespread control in the field of public contracts alongside and in support of the institutional supervisory role played by ANAC.

In conclusion, according to the Plenary Assembly, an interpretation both literal, teleological and systematic, leads to conclude for a total accessibility of the tender documents, therefore, the discipline of generalized civic access applies also to tender proceedings and particularly to the execution phase of public contracts, without impeding the absolute exceptions provided by art. 5-*bis* § 3, Legislative Decree n. 33/2013, in conjunction with art. 53, Legislative Decree n. 50/2016, and with the provisions settled by Law n. 241/1990, which does not fully exclude generalized civic access from this particular field, implying an assessment about the compatibility of access with the exceptions, of relative nature, provided for by art. 5-*bis* §§ 1-2, Legislative Decree n. 33/2013, aimed at balancing the value of transparency and of confidentiality[38].

6. Concluding evaluations

Having regard to the relationship between the various forms of access, as underlined by ANAC, documentary access settled by Law n. 241/1990 certainly continues to remain in force, also after the introduction of Legislative Decree n. 33/2013, but it must be coordinated with civic access (simple and generalized) on the basis of specific rules and assumptions, which place civic access as a general rule and documentary access as a residual hypothesis, for those cases in which civic access is excluded.

[38] Auriemma (nt. 18).

Therefore, it is necessary to keep the various hypotheses of access clearly distinct, in order to guarantee a correct balance of the interests at stake[39].

The weight and the balancing of the relevant interests, in fact, is quite different in Law n. 241/1990 and Legislative Decree n. 33/2013. In the first hypothesis, as documentary access is more intense, also involving more sensitive interests, but less extensive, as subjective legitimacy is limited in the meaning already examined, it is necessary to weight and balance in a deeper way the relevant interests. On the contrary, with regards to civic access, especially to generalized one, as it is more extensive, responding to widespread control needs on the administrative activity, it is guaranteed to anyone and, in addition to documents, it concerns also data (and information), but less intense, since, as already analysed, the limitations provided by law do not find any temperament, therefore the need for balancing the interests is less strong, and it is implemented directly by the legislator.

Following the above considerations, it is possible to state that the Italian legal system is now evidently marked by a clear preference for the transparency of the administrative activity, so that the generalized knowledge of documents/data/information can be now considered as a rule, and it can be mitigated only by specific legislative provision of exceptions aiming at protecting particular interests that could be compromised through a widespread disclosure[40]. In the latter circumstances, it can be guaranteed only documentary access, pursuant to art. 22 Law n. 241/1990, to those applicants who demonstrate to have a concrete and current interest in knowing the required document, in order to protect a personal situation considered worth of protection by the legal order.

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[39] About this topic, see Moliterni (nt. 22).

[40] Resolution n. 1309, 28/12/2016, quoted.

Emilia D'Avino*

Italian Tools to Prevent Corruption Practices Within Work Relationship

Summary. 1. – Italian constitutional framework about the 'anti-corruption duties' of civil servants. 2. – The role of the code of conduct according to the anti-corruption legislation: some problematic issues. 3. – The traditional Italian ways to prevent corruption: Incompatibility, ineligibility and '*pantouflage*'. 4. – The so called '*Rotazione*'. 5. – The protection of whistleblower under the Directive (EU) 2019/1937. 6. – The whistleblowing in Italy. 7. – The law n. 179/2017 and the rights of the whistleblower private workers. 8. – The 'just cause' of disclosure of news covered by the obligation of secrecy.

1. Italian constitutional framework about the 'anti-corruption duties' of civil servants

Italian ways to prevent corruption practices within work relationship are the result of an immediate dialogue between the Constitution, the public employment law and anti-corruption legislation. In fact, there are several sources that impact directly on the legal framework of the public employee relationships and that are intertwined. In this regard, it is necessary to go step by step.

First of all, the main rule that conditions the entire framework in this area is the Article 97 of the Italian Constitution, that introduces the principle of the s.c. '*buon andamento*', 'good performance' of the public administration, 'good administration'[1]. It is a programmatic value and it represents a target for citizens, legislator and workers; so, for all.

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Good administration, as established by the Article 41 of the Charter of Nice and as codified by the Universal Declaration of Human Rights, is a right of every person. R. Cantone, *Preface*, in *Preventing corruption through administrative measures*, eds.

This principle establishes that "in accordance with European Union law, Government agencies shall ensure that their budgets are balanced and that public debt be sustainable. Public offices shall be organised under the law and so as 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". In other terms, to guarantee a good performance it is necessary to ensure debt sustainability and smooth and impartial operations.

There are still many doubts about the meaning and the contents of good administration[2], but, of course, it has been mainly linked with the issues of corruption, so much that there has been talk of a «new triad of public ethics, focused on administrative transparency, anti-corruption and code of conduct»[3]. For this reason, there is a close link between the good performance of the public administration and the duties of civil servants, which constitute the human resources to pursue good performance. In fact, the law 190/2012 and the lgs. d. 33/2013, are aimed at the strengthening the civil servants' duties to ensure transparency, as a method of fighting corruption. The reinforcement of workers' duties is the result of a traditional approach, linked also to the art. 98 of the Italian Constitution, that establishes that Civil servants shall be exclusively at the service of the Nation. Specifically, a civil servant should pursue the public interest with integrity, through honest behaviors: this is the meaning of impartiality in the context of public administration. As a

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E. Carloni-D. Paoletti, Perugia 2019, 8; Id., *Il sistema di prevenzione della corruzione*, Torino 2020.

[2] J. Ponce, *Preventing corruption through the promotion of the right to good administration*, in *Preventing corruption* (nt. 1) 61. See also I. Carr-D. Lewis, *Combating Corruption through Employment Law and Whistleblower Protection*, in *ILJ* (2010) 52; M. Martone, *Rapporto di lavoro e corruzione*, in *LPA* 5-6 (2016) 575 ff.

[3] P. Tullini, *L'inadempimento e la responsabilità disciplinare del dipendente pubblico: tra obblighi giuridici e vincoli deontologici*, in *WP CSDLE "Massimo D'Antona".IT* 229 (2014) (www.csdle.lex.unict.it).

consequence, this also means that civil servants are considered principal actors of corruption[4].

In this perspective, despite the administrative procedure reforms aimed at introducing private logics into the public circuit in the nineties and despite the civil service was 'privatized'[5] in 1993 essential features of civil service are preserved. In fact, it can be said that good administration includes some other principles that must characterize the administrative activity: as the principles of impartiality, reasonabless, fairness, objectivity, consistency, proportionality, and absence of discrimination[6]. More particularly, civil servants should pursue public interest with "integrity", through an honest conduct and with "discipline and honour" as stated under art. 54 of the Constitution.

The need to ensure the respect of constitutional duties of diligence, loyalty, impartiality, as well as the exclusive service to the care of the public interest[7], has led the legislator – by the law 190/2012 – to start a 'forced' proceedings of ethical awareness[8]; especially by recognizing the government's power to unilaterally prepare a code of conduct with

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[4] U. Gargiulo, *Il codice di comportamento dei dipendenti pubblici: atto terzo*, in *LPA* 2 (2012) 751 ff.

[5] G. Gardini, *Impartiality, independence of managers and the reforms of civil service in Europe*, in *Preventing corruption* (nt. 1) 202.

[6] F. Mannella, *Corruption and the right to good administration*, in *Preventing corruption* (nt. 1) 137.

[7] These duties are established by lgs. d. 39/2013. E. Carloni, *Il nuovo codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, in *Istituzioni del federalismo* 2 (2013).

[8] See the National Anticorruption Plan (11 September 2013) and art. 54, p. 3, lgs. d. 165/01. C. Cester, *Brevi osservazioni sul c.d. codice di comportamento dei dipendenti delle pubbliche amministrazioni*, in *RGL* 1 (1994); M. Esposito, *Pubblica amministrazione: la difficile convivenza fra i codici disciplinare e di comportamento*, in *LI* 17 (1994); S. Mainardi, *Il potere disciplinare nel lavoro privato e pubblico*, in *Comm. Schlesinger*, Milano 2002; B. G. Mattarella, *L'etica pubblica e i codici di condotta*, in *LD* (1994) 525 ff.; G. Oliviero, *La fonte di emanazione del codice di condotta dei pubblici dipendenti*, in *LI* 2 (1994); A. Vallebona, *Il codice di condotta dei dipendenti pubblici ed i pericoli di una incontrollata ansia di moralizzazione*, in *RGL* 1 (1994); A. Riccardi, *Il codice di condotta nel sistema del lavoro pubblico contrattualizzato*, in *LPA* 1 (2002); R. Nunin, *I codici di comportamento*, in *Il lavoro nelle pubbliche amministrazioni*, eds. F. Carinci-L. Zoppoli, Torino 2004, 827 ff.

disciplinary value[9]. Furthermore, other tools to prevent corruption on the workplace were introduced and modified by the same law, in particular the 'ineligibility', 'incompatibility', and the so-called '*pantouflage*' (we'll see what it is). Moreover, on the other hand, this law introduced the s.c. 'whistleblowing', to protect the workers who reports irregularities that have come to their knowledge in the context of an employment relationship.

2. The role of the code of conduct according to the anti-corruption legislation: some problematic issues

The codes of conduct are a concrete part of the anti-corruption policy. Of course, as international and supranational organizations always stress, the ethical rules and behavioural duties laid down in codes have a fundamental role. The codes are a key instrument to enhance public official's integrity and to develop effective anti-corruption policies[10].

According to the Italian system, the purposes of the national code are to "ensure the quality of services, the prevention of corruption, respect for the duties of diligence, loyalty, impartiality and exclusive service for the care of the public interest" (art. 54, § 1, lgs. d. 165/2001). The code is a source of disciplinary liability and of production of 'duties' deriving from unilateral sources, for the purposes of civil, administrative and accounting liability. This is evident from the Article 54 lgs. d. 165/2001, as amended by the L. 190/12, that attributes the power to issue a code of conduct directly to the Government which applies to disciplinary matters.

The Italian behavioural codes system consists of two levels: the national and the decentralized level. The national code includes traditional ethical standards required from public officials, while

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[9] Art. 1, p. 42 ff., l. 190/2012. U. Gargiulo, *La prestazione lavorativa tra prescrizioni etiche e obblighi contrattuali. Fonti e contraddizioni nella delimitazione dell'aria di debito del dipendente pubblico*, in *LPA* 1 (2014) 17 ff.

[10] UN 1996; Council Europe 2000; UN 2003; European Commission 2017. M. Falcone, *Codes of ethics as a tool for preventing corruption*, in *Preventing corruption* (nt. 1) 266 ff.

performing their duties. 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 behavioural duties, such as the one on donations and gifts, in order to avoid potential harm to the administration's reputation. The second level, indeed, is the decentralized one. All public administrations must adopt their own codes of conduct, with all the behavioural 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 behavioural codes to guarantee each administration 'personalized' ethical standards, at all levels and in all administrative sectors.

It is important to stress that these are minimum duties and that compliance with the duties provided by the codes of conduct cannot be confused with the achievement of goals of performance; in the first case, we are dealing with contractual duties. The second case, instead, regards the formation of the conditions in relation to which matures the right to rewards. Undoubtedly, however, there is a link between codes and performance evaluation. This clarification is necessary because some provisions concerning disciplinary power could lead to the failure to achieve performance, with recourse to dismissal, for repeated breaches of own obligations (art. 55 *quater* lgs. d. 165/2001 and art. 3, p. 5 *bis*, lgs. d. 150/2009, introduced by lgs. d. 74/2017).

In this way, dangerous overlaps could arise between different areas of responsibility, confusingly intertwining non-fulfilment, infractions and the achievement of certain performance levels. To dispel such confusions, it is appropriate to specify the different areas of the contractual fulfilment.

However, this aspect does not exclude that can be established suitable and useful synergies between the performance system and the codes of conduct. In this regard, as already mentioned in the Anac guidelines approved in February 2020 and in the D.P.R. 62/13, with a correct binary logic that combines codes and performance, it is entirely possible that improvements in the regulation and effectiveness of codes of conduct are envisaged as specific objectives; in addition, it is always possible that the observance of the duties established in the codes are a part of the performance indicators with which the performance evaluation system is

normally structured. This implies that when defining objective measures to prevent corruption, at the same time, it is necessary to identify the duties of conduct that can contribute, from a subjective point of view, to the full realization of the aforementioned measures. The administration can draw similar indications, *ex post*, from the evaluation of the same measures implementation, trying to understand if and where it is possible to strengthen the system with duties of conduct. Therefore, it could be possible that in the performance evaluation systems non-compliance with the codes of conduct is configured as an obstacle to the achievement of rewarding. Obviously, to reward those who do not comply with the minimum of behavioural duties it may appear contradictory. In the latter regard, however, it would seem necessary that such situations were considered only after the verification of some disciplinary responsibilities deriving from the violation of the codes of conduct.

Despite the importance of the code of conduct, there are some problems.

First, as also highlighted by the Anac guidelines of February 2020, by duplicating the disciplinary sources, the fragmentation of the rules has increased. Consequently, the workers who want to know all his obligations, must integrate different sources, as if it was in a 'Chinese box': laws, codes of conduct, disciplinary codes, individual contracts. In this regard, it's important to say that the national code of behaviour does not establish specific sanctions. In fact, the Presidential Decree 62/2013 about sanctions was limited to referring to laws, regulations, and collective agreements, expressly foreseeing the cases in which they can be applied to expulsive sanctions (art. 16 § 2). Anyway, it specified that the violation of the codes "is a source of disciplinary responsibility ... in respect for the principles of graduality and proportionality of the penalties", i.e. art. 2106 c.c. (art.16 c. 1).

Furthermore, the Article 55-quater lgs. d. 165/01 about disciplinary sanctions, introduced by l. 75/2017, recalls the Article 54, p. 3, lgs. d. 165/2001 and the code of behaviour, as an infinite circle[11].

[11] L. Zoppoli, *Buon andamento della pubblica amministrazione e diritti e doveri dei lavoratori*, in *LPA* 2 (2019) 1 ff.

Concluding, the collective agreements establish explicit dismissal in the cases provided for the art. 16, p. 2 of Presidential Decree 62/2013. So, there is also a synergistic relationship between collective agreements and the code of conduct. Moreover, taking into account the innovative provisions on the value of the code of conduct, the Anac in the guidelines of February 2020 highlights that, given the current situation and the uncertainties of interpretation of the relevant regulations, and in particular of Articles 40, 54 and 55 of lgs. d. 165/2001, the relations with the national code must be adequately assessed in collective bargaining, that must move in the "limits established by law". In this perspective, it would be appropriate to rethink the relationship between the national code and the rules of collective agreements that establish duties for employees in order to mark them with the prevalence of the unilateral source and, only in a residual or supplementary way, of the contractual source. The national code should define the duties of public employees in general, while collective agreements should deal with identifying the duties left at the contractual source and concern themselves with the disciplinary part, also considering the duties of the national code. In this sense, Anac hopes that the administrations that have competence in collective bargaining, and in particular DFP and ARAN, will work to make the necessary corrections to the national sector contracts in force and promote, for the new contracts, adequate criteria that take into due account the area of competence of the national code of conduct in defining the duties of conduct. Similarly, given the current state of current legislation which provides that the penalties applicable in the event of violations are those defined by the disciplinary code of collective agreements, it would be important to evaluate a different formulation of the parts of the collective agreements that concern the correspondence between duties and sanctions, in order to expressly recall the duties of the national code, thus overcoming the current general clauses of reference. This is in order to give autonomous substantive disciplinary relevance to violations of the code.

This aspect helps to clarify that public employment law differs from the private workers law and from the logic of civil code (art. 2106 c.c.), based on the link of the disciplinary power to the exact contractual

fulfilment[12]. Particularly if we considered that in the area of public employment there is a duty to activate disciplinary proceedings for the manager. So, it is not a power, but a duty[13]. Supervision is primarily carried out by the managers in charge for each structure (art. 54, co. 6, of lgs. d. 165/2001, Articles 13 and 15 of d.P.R. 62/2013) and in relation to the nature of the assignment and the related levels of responsibility.

Furthermore, we have to say that the internal codes of public administrations often are only a reproduction of the national code. For this reason the Anac, in the guidelines of February 2020, recommends administrations not to reproduce mechanically what is written in the national code and to deepen in their codes those values considered important and fundamental in relation to their specificity; particularly, in order to help the subjects to whom the code applies to understand what behaviour is desirable in a given situation. Moreover, considering the risk that the code is seen only as a legal obligation and an 'abstract' and 'pre-packaged' document, the guidelines highlight that it is necessary to enhance the principles of graduality and participation by administrations. Therefore, according the Anac, it is important that the public administrations, in the process of forming the code, promote the maximum participation of the employees, favouring an adequate understanding of the context and of the purpose of the codes.

Anyway, the internal code could not introduce further duties in order to the liability for the treatment of dates, if these are not covered by copyrights or are not reserved. Instead, they were deemed to be integrable the contents of the national code as regards the limits i.s.e.: the freedom of opinion of the public employee through information duties of the manager, as long as reasonably understood as ... information in principle ... without personal references exceeding the purpose of the

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[12] On the topic Gargiulo (nt. 9) 27.

[13] S. Mainardi, *Profili della responsabilità disciplinare dei dipendenti pubblici*, in *RGL* 4 (2010) 615 ff.; S. Mainardi, *Il "dovere" del dirigente di sanzionare il demerito: il procedimento disciplinare*, in *GI* 12 (2010) 2717 ff.; E. Villa, *Il fondamento del potere disciplinare nel lavoro pubblico alla luce delle più recenti riforme*, in *LPA* 6 (2013) 967 ff. See also G. Gargano, *La "cultura del whistleblower" quale strumento di emersione dei profili decisionali della pubblica amministrazione*, in *Federalismi* 1 (2016) 37 (www.federalismi.it).

disposition (editor's note: on the subject of relations with the press), which in some case potentially proving to be detrimental to other values of constitutional rank; participation in conferences, debates, training courses and publications in terms of the obligation to specify opinions possibly expressed in a personal selected nature; about to acquire private life that harms the public image administration and public employee.

Finally, there is another problem of the codes of conduct: the need to provide for each administration an adequate supervisory system on the implementation of the measures for an effective corruption prevention strategy.

Concluding, it can be said that the enforcement of the code of conduct, being much more than an 'etiquette' (manners)[14], devalues the important ethical value of the provisions contained therein. The final feeling is that with the attribution of the disciplinary value to the code of conduct the Government tried to keep together organizational efficiency, quality of service, prevention of corruption; distinct profiles, whose amalgam appears really complex[15] and confused. An important value in this confused scenario is assumed by the guidelines: which are essentially a 'bridge' to the codes of conduct of each public administration[16].

3. The traditional Italian ways to prevent corruption: incompatibility, ineligibility and 'pantouflage'

Moving, now, from the level of sources to that of the individual duties of employees, it must be pointed out that much is invested – in terms of prevention – in the institutions regarding the refrain of obligations in case of conflict of interests. Even if these kinds of obligations are not new in the Italian system, the anti-corruption law modified the art. 53 lgs. d. 165/2001 and, particularly, the institutes about ineligibility, incompatibility, incandidability, and the so called '*pantouflage*'[17].

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[14] Esposito (nt. 8); Gargiulo (nt. 4) 751 ff.; M. Rusciano, *Utenti senza garanti*, in *LD* 1 (1996) 39 ff.

[15] Gargiulo (nt. 9) 32.

[16] About this topic s. Cons. Stato 24/03/2020, n. 615.

[17] Art. 53 lgs. d. 165/2001. The legislation was integrated by lgs. d. 39/2013.

The law 190/2012 determines some duties of abstention for the civil servants: they 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 public offices, due to the regulation based on mere incompatibilities was not considered adequate for the purpose[18].

The lgs. d. 39/2013 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 subject coming from private corporate bodies regulated or financed by the P.A.; the prohibition to confer managerial charges to political officers or members of representative chambers or assemblies. It's important to highlight that the regulation is not limited to incompatibility among positions, but it also concerns the access to public management. The anti-corruption law does not 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 rules, while the prohibitions of conferment refer only to those who had played regional and political roles.

Above all, in the lgs. d. 165/2001 there is a specific procedure of authorization for activities for which there is no absolute incompatibility[19] (art. 53, p. 9, lgs. d. 165/2001). Authorization is required in order not to compromise the impartiality in the exercise of the assigned functions and to avoid a conflict of interest, even if it is 'apparent'. The notion of

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[18] V. Tenore, *Le attività extraistituzionali e le incompatibilità dei pubblici dipendenti*, in *LPA* 6 (2007) 1097 ff.; M. D'Aponte, *L'autorizzazione dei dipendenti pubblici allo svolgimento di incarichi esterni dopo la Riforma Brunetta*, in *LPA* 6 (2011) 969 ff.; A. Giacoia, *Le attività extraistituzionali e le incompatibilità dei dipendenti comunali e regionali*, in *Rapporto di lavoro e gestione del personale*, eds. P. Monea-M. Mordenti, Santarcangelo di Romagna (RN) 2013; B. Ponti, *La regolazione dell'accesso agli incarichi esterni da parte dei dipendenti dopo la legge 190/2012: evoluzione del sistema e problemi di applicazione agli enti territoriali*, in *Istituzioni del Federalismo* 2 (2013) 410 ff.; A. Olivieri, *Incompatibilità e inconferibilità del pubblico dipendente tra esclusività, imparzialità ed eticità: (non) si possono servire due padroni?,* in *VTDL* 2 (2020) (www.dirittolavorovariazioni.com).

[19] Court of Cassation 20/05/2020, n. 9289.

'appearance' in the assessment is contained in the codes of conduct and is strongly linked to the public ethics of the worker.

The rule about the incompatibility, among other things, is not limited to full-time employees. This is a particular relevant aspect because it significantly differentiates public employment from the private sector[20].

In any case, the legislator, by the law 190/2012, merely 'refreshes' old concepts, such as that of the decorum of public administrations and of its employees. Consequently, the legislator moves away from the prohibition of competition as in the civil code (art. 2105), that establishes "The worker must not deal with business, on his own behalf or on behalf of third parties, in competition with the entrepreneur, nor disclose information relating to the organization and production methods of the company, or make use of it in such a way that it can harm him".

The legislator determines in pre-established behaviour the cases of incompatibility or ineligibility, limiting the workers' autonomy even after the termination of the employment relationship. This is shown in the light of art. 53 lgs. d. 165/2001, so in the case of the s.c. '*pantouflage*'. This Article establishes that: "The employees who, in the last three years of service, have exercised authoritative or negotiating powers on behalf of the public administrations referred to in Article 1, § 2, not can carry out, in the three years following the termination of the public employment relationship, work or professional activity with the private recipients of the activity of public administration carried out through the same powers. The contracts concluded and the assignments conferred in violation of the provisions of this paragraph are null and it is forbidden for private individuals who have concluded or conferred them to contract with public administrations for the next three years with the obligation to return the any fees received and ascertained relating to them".

The risk assessed by this Article is that during the period of service the civil servant shall establish advantageous work situations and thus exploit his position and power within the administration for his own purpose, in order to obtain an attractive job for him at the company or private entity with which it comes into contact.

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[20] Court of Cassation 25/05/2017, n. 13196.

The legislator therefore provides for a limitation of the employee's freedom to negotiate for a defined period, following the termination of the public service relationship, in order to eliminate the economic stimulus to enter into fraudulent agreements.

To verify when there is *pantouflage*, the Anac, with Resolution n. 917 of 2 October 2019 provides useful clarifications: it starts from the legal nature of the entities of origin and destination, as well as the performance of activities of an authority or negotiating directly in favour of the entity in which the subject takes office. The prohibition is excluded when the entity is not a private entity but is a public economic entity.

Anyway, it's important to question if the prohibition of the Article 2015 c.c. had not been enough, characterized by the general rule of no negotiate business in competition with the entrepreneur. The flexibility deriving from the generality of this clause is, in fact, mainly suitable for protecting compliance, rather than the rigid predeterminations provided by the legislator that are not automatically detrimental to impartiality.

Effectively, the 'contractualization' of the public service depends on the need to ensure more flexibility and more efficiency.

4. The so called 'Rotazione'

Art. 1, co. 5, lett. b) of the l. 190/2012, provides that public administrations must define and transmit to Anac appropriate procedures for selecting and training employees called upon to operate in sectors particularly exposed to corruption, providing the rotation of managers and officials.

Furthermore, according to the provisions of art. 1, co. 10, lett. b) of the l. 190/2012, the Responsible for prevention of corruption must verify, in agreement with the competent manager, the actual rotation of workers in the offices responsible for carrying out the activities in which the risk of corruption is higher. Moreover, art. 1, co. 4, lett. e) of l. 190/2012 provides that Anac defines the criteria that administrations must follow to ensure the rotation of managers in sectors particularly exposed to corruption.

The institute of ordinary rotation is different from the extraordinary rotation, provided for by the Article 16, § 1, letter l *quater*, of the lgs. d. 165/2001, that establishes the managers of the general management offices have to provide with a motivated provision, the rotation of personnel in cases of initiation of criminal or disciplinary proceedings for conduct of a corrupt nature[21].

Anyway, the 'rotation' of the civil servant is considered a macro-organization act[22] and it is a very important tool to prevent corruption. This institute can be perfectly harmonized with the recent reforms which are aimed at spreading the mobility of the worker as an ordinary tool for managing personnel and improve of the efficiency of the public service[23]. However, it could be possible that there are problems for the change of tasks and the protection of expertise[24]. It is not considered the risk of the dispersion of technical competencies[25]. Neither the employee is protected by virtue of the possibility of achieving transversal skills and to acquire, therefore, dynamic professionalism[26]. In fact, the acquisition of new skills would be guaranteed only if accompanied by training paths.

On the other hand, there are difficulties if the employee is irreplaceable. As detached in the Anac Resolution n. 980/2019, the rotation has led to administrative discontinuity, critical issues and inefficiencies, due to the lack of staff in all sectors of the administration which, together

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[21] Resolution Anac n. 215, 26 March 2019.

[22] Court of Cassation, Joint sections, 13/03/2020 n. 7218.

[23] About this topic, lastly, F. Laus, *La tecnologia nella pubblica amministrazione: algoritmi e processi decisionali nei procedimenti amministrativi. Il caso della procedura di mobilità*, in *LPA* 3 (2020) 49 ff.

[24] See National Anticorruption Plan.

[25] A. Garilli, *Profili dell'organizzazione e tutela della professionalità nelle pubbliche amministrazioni*, in *WP CSDLE "Massimo D'Antona".IT* 6 (2003). About the assignment, Court of Cassation, 16/01/2019, n. 976.

[26] A. Buja, *La rotazione nelle mansioni: un nuovo istituto per la tutela della professionalità dinamica*, in *LG* 10 (1998) 829 ff.; C. Alessi, *Professionalità e contratto di lavoro*, Milano 2004; U. Carabelli, *Organizzazione del lavoro e professionalità nel nuovo quadro giuridico*, in *DLRI* 101 (2004) 1 ff.; U. Gargiulo, *L'equivalenza delle mansioni*, Catanzaro 2008; M. Meucci, *Considerazioni sulla c.d. «professionalità dinamica»*, in *Riv. Crit. Dir. Lav.* 1 (2008) 63 ff.; F. Pantano, *Il rendimento e la valutazione del lavoratore subordinato nell'impresa*, Padova 2012.

with the presence of skills professional non-fungible, effectively makes it impossible to apply rotation. In this cases alternative measures are needed, such as mechanisms of 'double signature' of the proceedings, where both the investigating subject and the holder of the power of adoption of the final act sign, as guarantee of correctness and legitimacy; identification of one or more subjects outside the competent office, impartial, with functions of minutes secretary, in addition to those who take decisions in the context of procedures tenders or negotiated or direct assignments.

Furthermore, there are problems concerning the methods of implementing the geographical mobility of the employee. The forms through which the employee's transition from one administration to another should be implemented may not be very clear, given the particularly chaotic scenario regarding the mobility profiles of the public employment[27] and since the rotation methods are established by the anti-corruption plan. This is a different aspect, but no less relevant, since it currently constitutes a useful tool for achieving rotation between specific professional figures, in particular in smaller entities[28]. An interpretative key aimed at allowing the implementation of temporary movements for the purpose of rotation could be found in art. 4 d.l. 90/2014 which, by amending art. 30, co. 2 of lgs. d. 165/01, seems to allow a temporary transfer of the employee, in derogation of the rule that requires the employee's consent. Certainly, the geographical mobility would be able to justify the derogation from worker's consent in the light of the interest of both administrations that enter into the agreement to take appropriate measures to prevent corruption. This interpretation, undoubtedly, would facilitate its use, to make it a more effective tool in the fight against corruption. However, looking at the other side of the coin, it is evident the need to introduce appropriate limitations so that it does not become a pretext to 'get rid' of unwelcome employees, moving them from a workplace to another. This logic is the same as that of the transfer due to environmental incompatibility[29].

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[27] *La mobilità del lavoro: prospettive europee e internazionali*, eds. L. Calafà-D. Gottardi-M. Peruzzi, Napoli 2012.

[28] As hightlights the National Anticorruption Plan.

[29] Art. 55 D.P.R. 335/1982.

Obviously, the legitimacy of the rotation and of the transfer due to environmental incompatibility must also be considered in relation to the protection of the whistleblower: it must not be retaliatory.

5. The protection of whistleblower under the Directive (EU) 2019/1937

The protection of whistleblower is another important point in the anti-corruption law[30]. In fact, as said in the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of people who report breaches of Union law, people who work for a public or private organisation or are in contact with such an organisation in the context of their work-related activities are often the first to know about threats or harm to the public interest which arise in that context. By reporting breaches of Union and Italian law that are harmful to the public interest, such individuals act as 'whistleblowers' and thereby play a key role in exposing and preventing such breaches and in safeguarding the welfare of society. However, potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. In this context, the importance of providing a balanced and effective whistleblower protection is increasingly acknowledged at both Union and international level[31].

Workers need specific legal protection where they acquire the information they report through their work-related activities and therefore run the risk of work-related retaliation, for instance, for breaching the duty of confidentiality or loyalty. As stated in the Directive, the underlying reason for providing such individuals protection is their position of economic vulnerability *vis-à-vis* the person on whom *de facto* they depend for work.

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[30] G. Maria-V. Cortellazzi, *Corporate governance note in tema di whistleblowing*, in *Riv. Dott. Comm.* 2 (2019) 217 ff.; F. Kain, *Whistleblowing and labour law: The Whistleblower Directive-development, content and obstacles*, in *ILLJ* 2 (2020) 131 ff.

[31] The directive is not general but has a sectoral material scope and it is limited to reports concerning violations of Union law listed in the art. 2.

According the European Directive, protection should, firstly, apply to person having the status of 'worker', within the meaning of Article 45(1) TFEU, as interpreted by the Court, namely individuals who, for a certain period of time, perform services for and under the direction of another person, in return for which they receive remuneration. Protection should, thus, also be granted to workers in non-standard employment relationships, including part-time workers and fixed-term contract workers, as well as individuals with a contract of employment or employment relationship with a temporary agency, precarious types of relationships where standard forms of protection against unfair treatment are often difficult to apply. The concept of 'worker' also includes civil servants, public service employees, as well as any other person working in the public sector. Protection should also be extend to categories of individuals, who, whilst not being 'workers' within the meaning of Article 45(1) TFEU, can play a key role in exposing breaches of Union law and may find themselves in a position of economic vulnerability in the context of their work-related activities. For instance, as regards product safety, suppliers are much closer to the source of information about possible unfair and illicit manufacturing, import or distribution practices concerning unsafe products; and as regards the implementation of Union funds, consultants providing their services are in a privileged position to draw attention to breaches they witness. Such categories of individuals, which include self-employed, freelance workers, contractors, subcontractors and suppliers, are typically subject to retaliation, which can take the form, for instance, of early termination or cancellation of a contract for services, a licence or permit, loss of business, loss of income, coercion, intimidation or harassment, blacklisting or business boycotting or damage to their reputation. Shareholders and persons in managerial bodies can also suffer retaliation, for instance in financial terms or in the form of intimidation or harassment, blacklisting or damage to their reputation. Protection should also be granted to person work-based relationship has ended, and to candidates for employment or person seeking to provide services to an organisation, who acquire information on breaches during the recruitment process or another pre-contractual negotiation stage, and who could suffer retaliation, for instance in

the form of negative employment references, blacklisting or business boycotting.

Effective prevention of breaches of Union law requires that protection is granted to individual that provide information necessary to reveal breaches which have already taken place, breaches which have not yet materialised, but are very likely to take place, acts or omissions which the reporting person has reasonable grounds to consider as breaches, as well as attempts to conceal breaches. For the same reasons, protection is justified also for him who do not provide positive evidence but raise reasonable concerns or suspicions. At the same time, protection should not apply in case of report information which is already fully available in the public domain or unsubstantiated rumours and hearsay. This Directive should not apply to cases in which workers who, having given their informed consent, have been identified as informants or registered as such in databases managed by authorities appointed at national level, such as customs authorities, and report breaches to enforcement authorities, in return for reward or compensation.

Effective protection of whistleblower as a means of enhancing the enforcement of Union law requires a broad definition of retaliation, encompassing any act or omission occurring in a work-related context and which causes them detriment.

The Directive should not, however, prevent employers from taking employment-related decisions which are not prompted by the reporting or public disclosure.

Protection against retaliation as a means of safeguarding freedom of expression and the freedom and pluralism of the media should be provided both to them who report information about acts or omissions within an organisation ('internal reporting') or to an outside authority ('external reporting') and to person who make such information available in the public domain, for instance, directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions, or professional and business organisations.

For the effective detection and prevention of breaches of Union law, it is vital that the relevant information reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible. As a principle, therefore, whistleblowers should

be encouraged to first use internal reporting channels and report to their employer, if such channels are available to them and can reasonably be expected to work. That is the case, in particular, where whistleblowers believe that the breach can be effectively addressed within the relevant organisation, and that there is no risk of retaliation. As a consequence, legal entities in the private and public sector should establish appropriate internal procedures for receiving and following up on reports. Such encouragement also concerns cases where such channels were established without it being required by Union or national law. This principle should help foster a culture of good communication and corporate social responsibility in organisations, whereby whistleblowers are considered to significantly contribute to self-correction and excellence within the organisation.

For legal entities in the private sector, the obligation to establish internal reporting channels should be commensurate with their size and the level of risk their activities pose to the public interest. This Directive should be without prejudice to Member States being able to encourage legal entities in the private sector with fewer than 50 workers to establish internal channels for reporting and follow-up, including by laying down less prescriptive requirements for those channels than those laid down under this Directive, provided that those requirements guarantee confidentiality and diligent follow-up. The exemption of small and micro enterprises from the obligation to establish internal reporting channels should not apply to private enterprises which are obliged to establish internal reporting channels. It should be clear that, in the case of legal entities in the private sector that do not provide for internal reporting channels, whistleblowers should be able to report externally to the competent authorities and such persons should enjoy the protection against retaliation provided by the Directive.

To enjoy protection under the Directive, reporters should have reasonable grounds to believe, considering the circumstances and the information available to them at the time of reporting, that the matters reported by them are true. That requirement is an essential safeguard against malicious and frivolous or abusive reports as it ensures that those who, at the time of the reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection.

At the same time, the requirement ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake. Similarly, whistleblowers should be entitled to protection under the Directive if they have reasonable grounds to believe that the information reported falls within its scope. The reasons of the whistleblowing in reporting should be irrelevant in deciding whether they should receive protection.

The reporting system – without differences between the public and private sector – is envisaged on three levels: internal reporting channels; reporting to the competent authorities (if the internal channels do not work or it could reasonably be assumed that they do not work, or when the use of internal channels could compromise the effectiveness of the investigative actions by the responsible authorities); public reporting through the media, if no appropriate action is taken after reporting through other channels, or in the event of imminent or obvious danger to the public interest or irreversible damage. The reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case. Moreover, it is necessary to protect public disclosures, taking into account democratic principles such as transparency and accountability, and fundamental rights such as freedom of expression and the freedom and pluralism of the media, whilst balancing the interest of employers to manage their organisations and to protect their interests, on the one hand, with the interest of the public to be protected from harm, on the other, in line with the criteria developed in the case law of the ECHR.

Authorities and companies will have to respond and follow up on whistleblower reports within a certain period (it seems different depending on whether the channels are internal or external)[32].

Of course, the Directive provides for a wide range of protective measures for whistleblowers, for example the reversal of the burden of proof (it is the organization that must demonstrate that they are not retaliating against whistleblowers), and protection in judicial

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[32] A. Sitzia, *La protezione del "whistleblower" nel settore privato: la legge 179 del 2017 nella prospettiva europea*, in *LDE* 2 (2019) (https://www.lavorodirittieuropa.it).

proceedings, in particular through exemption from liability for the disclosure of information.

Member States shall designate the authorities competent to receive, give feedback and follow up on reports, and shall provide them with adequate resources. The reports are made pursuant to specific procedures that aim to guarantee the anonymity of whistleblowers to protect their physical integrity. These procedures are distinct from the reporting channels provided for under the Directive.

Anyway, Member States shall ensure that the identity of the reporting person is not disclosed to anyone beyond the authorised staff members competent to receive or follow up on reports, without the explicit consent of that person. This shall also apply to any other information from which the identity of the reporting person may be directly or indirectly deduced. The identity of the reporting person and any other information referred to in § 1 may be disclosed only where this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings, including with a view to safeguarding the rights of defence of the concerned person[33].

Furthermore, Member States shall ensure that legal entities in the private and public sector and competent authorities keep records of every report received, in compliance with the duty of confidentiality. Reports shall be stored for no longer than it is necessary and proportionate to comply with the requirements imposed by the Directive, or other requirements imposed by Union or national law[34].

According the Directive, Member States shall take the necessary measures to prohibit any form of retaliation against whistleblower and they shall ensure that workers have access, as appropriate, to support measures, in particular the following: comprehensive and independent information and advice, which is easily accessible to the public and free of charge, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned; effective assistance from competent authorities before any relevant authority involved in

[33] Art. 16 of the Directive.
[34] Art. 18 of the Directive.

their protection against retaliation, including, where provided for under national law, certification of the fact that they qualify for protection under this Directive; and legal aid in criminal and in cross-border civil proceedings in accordance with Directive (EU) 2016/1919 and Directive 2008/52/EC of the European Parliament and of the Council (48), and, in accordance with national law, legal aid in further proceedings and legal counselling or other legal assistance.

Furthermore, Member States shall ensure individuals fully enjoy the right to an effective remedy and to a fair trial, as well as the presumption of innocence and the rights of defence, including the right to be heard and the right to access their file.

Competent authorities shall ensure, in accordance with national law, that the identity of whistleblower is protected for as long as investigations triggered by the report or the public disclosure are ongoing.

Concluding, according to the Directive, Member States may introduce or retain more favourable provisions to the rights of whistleblowers than those set out in the Directive.

6. The whistleblowing in Italy

In Italy, the legislation on whistleblowing was introduced even before the European Directive. In fact, Italian regulatory framework is provided by the Law 190/2012[35]. Due to some fundamental gaps of the law 190/2012[36], the law 179/2017 containing "Provisions for the protection

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[35] M. Danza, *La tutela del dipendente pubblico che segnala gli illeciti. L'istituto del whistleblowing nell'art. 54 bis del testo unico del pubblico impiego*, www.laprevidenza.it, 30 october 2013.

[36] See E. D'Avino, *L'imperfetta contrattualizzazione del lavoro pubblico nel prisma della disciplina anticorruzione*, in *LPA* 2 (2015) 285 ff. and the bibliography therein referred to. See also M. T. Carinci, *Whistleblowing in Italy: rights and protections for employees*, in *WP CSDLE "Massimo D'Antona" INT* 106 (2014) (www.csdle.lex.unict.it); A. Riccio, *La tutela del whistleblower in Italia*, in *GDLRI* 53 (2017) 28 ff.; D. Bolognino, *Spunti di riflessione sui chiaro-scuri della formulazione della nuova normativa di tutela del dipendente che segnala l'illecito di cui alla l. n. 179 del 2017*, in *Amministrazione in cammino*, 13 march 2018 (www.amministrazioneincammino.luiss.it).

of authors of reports of crimes or irregularities that have come to their knowledge in the context of a public or private employment relationship" now redefines the existing legal framework in the public sector and traces that for the private sector[37].

First of all, it's important to say that in Italy, as in the European perspective, whistleblowing is considered a process that aims at supporting the reporting of activities deemed illegal or otherwise incorrect, such as violations of company policies and laws, threats to the public interest as well as fraud or corruption.

With reference to the public sector, l. 179/2017 modifies art. 54 *bis* lgs. d. 165/2001, extending the scope of the rule to employees of public economic bodies and private-law entities subject to public control, as well as to workers and to collaborators of companies supplying goods or services and that they carry out works in favour of public administrations.

The core of the provision provides that the public employee who, in the interest of the integrity of the public administration, reports unlawful conduct that has come to his knowledge due to his employment relationship, cannot be sanctioned, demoted, fired, transferred, or subjected to another organizational measure having negative effects, direct or indirect, on the working conditions established by the report. To reinforce this provision, it was also stated that the adoption of measures deemed retaliatory is communicated to Anac or by the interested party, or by the trade union organizations most representative in the administration in which the measures themselves were implemented. The Anac, in turn, informs the Department of Public Service of the Prime Minister's Office or the other guarantee or disciplinary bodies for the activities and any relevant measures[38].

Any discriminatory or retaliatory act adopted by the entity is void and the relative burden of proof lies with the public administration itself; the latter will then have to demonstrate that the discriminatory or

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[37] A. Riccio, *La tutela del lavoratore che segnala illeciti dopo la l. n. 179 del 2017. Una prima lettura giuslavoristica*, in *Amministrazione in cammino*, 26 march 2018.

[38] About the power of Anac and the right to access to acts G. Milizia, *Il whistleblower può accedere alle proposte degli uffici sull'archiviazione delle sue segnalazioni?*, in *DG* 209 (2020) 12 ff. (T.A.R. Roma, sez. I, 23/10/2020, n. 10818).

retaliatory measures taken against the reporting party are motivated by reasons unrelated to the reporting.

Likewise, the public employee has the right to be reinstated in the workplace in the event of dismissal due to the report made.

The law also defines the possible recipients of the report, identifying them with the person in charge for the prevention of corruption and transparency of the entity, the Anac, the ordinary judicial authority or the accounting authority. In any case, the law establishes the possibility of making the report directly to the Anac. In fact, the employee may not believe it is appropriate to report to the person in charge of prevention and corruption, who is normally an apical figure of the administration.

The procedures for submitting and managing reports must follow the guidelines issued by Anac, after hearing the Guarantor for the protection of personal data.

As regards the protection of anonymity, it has been introduced the prohibition to reveal the identity of the reporting person, with some limitations[39]. The prohibition, in the context of criminal proceedings, is limited to the preliminary investigation period only, by referring to art. 329 of the criminal procedure code. A special regulation is foreseen for the sanctioning measures, where the identity of the reporting person cannot be revealed, if the contestation of the disciplinary charge is based on separate and additional assessments with respect to the reporting, even if consequent to the same. On the contrary, if the identity of the reporting person is essential for the defence of the accused, the report will be usable only with the explicit whistleblower's consent to the revelation of his identity.

The anonymous disclosure case remains without a response from the legislator. The protections provided for by art. 54 *bis* will not cover the anonymous informant, as, to take advantage of those protection, the identification of the employee is a preliminary condition[40]. So,

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[39] About this topic Italian authority guarantor of privacy, resolution n. 9269618, 23/01/2020.

[40] A. Avio, *La tutela del dipendente pubblico che segnala illeciti nella l. 30 novembre 2017, n. 179*, in *La riforma dei rapporti di lavoro nelle pubbliche amministrazioni*, eds. M. Esposito-V. Luciani-A. Zoppoli-L. Zoppoli, Torino 2018, 311; A. Piovesana, *Il*

there is a different approach to reporting anonymously, with respect to the European Directive. In Italy, the Anac assumes identification of the reporting entity for the public sector, while in the private sphere anonymous reports are admitted in practice. The European Directive establishes, instead, that without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, it should be possible for Member States to decide whether legal entities in the private and public sector and competent authorities are required to accept and follow up on anonymous reports of breaches. However, workers who anonymously reported or who made anonymous public disclosures fall within the scope of the Directive and it is necessary enjoy protection under this Directive if they are subsequently identified and they suffer retaliation. It is assumed that these activities and measures are those aimed at keeping the worker harmless from the prejudicial consequences of the discriminatory behaviour suffered.

As regards the protection of the employee against the adoption of retaliatory measures, it's important to say that the reporting of the adoption of these measures is communicated to Anac in any case. Anac is expected to inform the civil service department or the other bodies necessary for them to carry out the activities and the relevant measures.

Furthermore, Anac – without prejudice to all other liability profiles – ascertained the adoption of discriminatory measures in the context of the investigation conducted by the Agency itself, it applies to the manager who has adopted these measures an administrative penalty of 5.000 to 30.000 euros. It is an administrative sanction. There are sanctions for whom that does not start the proceeding necessary to forward and manager reports, too. Certainly, it will be necessary to ascertain which real autonomous capacities, also in terms of expenditure, the manager had to introduce the procedures. Furthermore, in case of failure to adopt procedures for forwarding and managing reports or adopting procedures that do not comply with the provisions of the Guidelines that Anac itself is required to issue.

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diritto di denuncia del lavoratore tra giurisprudenza e legge, in *VTDL* 1 (2019) (www.dirittolavorovariazioni.com).

To strengthen the protection of the worker against possible retaliatory measures, the legislator establishes the burden on the public administration to demonstrate that the discriminatory or retaliatory measures adopted against the reporting party are motivated by reasons unrelated to the reporting itself.

Anyway, protection in cases of slander or defamation is excluded, but the loss of guarantees cannot take place before ascertainment by a first instance sentence. The need for the report to be made in good faith by the reporting party is also guaranteed. Thus, a labile border is created between lawfulness and non-legality of the report, so as not to understand within what limits the protection pursuant to art. 54 *bis* or, on the other hand, it should be considered legitimate – even for just cause – a possible dismissal imposed following a complaint of a fact that did not improve. There is, therefore, a thin border line between dutiful denunciation and slander and defamation that, instead, art. 54 *bis* expressly keeps out of its scope. It is obvious that the consequences arising from one or the other hypothesis are not insignificant, contrasting two extreme consequences: 'absolute' protections for the employee or, conversely, legitimacy of a possible dismissal. In this sense, a precise jurisprudence of the European Court of Human Rights could serve as an address; in particular in the Heinisch v. Germany case of 21 July 2011 – concerning the dismissal of a whistleblower – the applicability of the protections was recognized for the complainant worker whenever the employee made an assessment of the accuracy of the accusations made or, at least, of their validity in the light of a sufficient factual basis[41].

It is clear that in the event of an assessment of the legitimacy of the complaint, it is not possible to ignore the subjective element and the primary will to damage the employer through false accusations, or even to overcome, with wilful intent or with gross negligence, the threshold of respect for objective truth in reporting to the judicial authority facts, as well as by the conduct of the employee who by spreading the news inside

[41] ECHR *Heinisch c./Germania*, 21/07/2011, n. 28274/08.

or outside the company has caused offense to the honour and reputation of the employer[42].

Obviously, it is different if the worker refers to an offense already perfected. However, in this hypothesis the institution would not have any preventive function since its effectiveness is deployed purely on a repressive-sanctioning level.

7. The law n. 179/2017 and the rights of the whistleblower private workers

Before the 2017 reform, only civil servants were within the scope of the law on the whistleblower. Law 179/2017 intervened on the regulation of corporate liability, going to integrate art. 6 lgs. d. 231/2001 with three new §§ (2 *bis*, 2 *ter* and 2 *quater*). The updated version of art. 6 states that the organization, management and control models must provide for: one or more channels that allow top subjects and workers subject to the direction or supervision of them, to present, for the protection of the entity's integrity, detailed reports of illegal conduct relevant pursuant to lgs. d. 231/2001. These reports must be based on precise and concordant factual elements. The channels are structured in such a way as to guarantee the confidentiality of the identity of the reporting person in the reporting management activities, and that at least one channel is suitable for guaranteeing confidentiality with IT methods. Furthermore, the art. 6 establishes prohibition of retaliatory or discriminatory acts, direct or indirect, against the whistleblower for reasons connected, directly or indirectly, to the report.

It's important to highlight that while the Italian legislation applies, in the private sector, only to companies that have adopted the model 231/01, the European Directive concerns private workers, regardless of the adoption of the model. The field of subjects protected includes the shareholders of the companies, the subjects that assist whistleblowers, former employees and those who have known the offenses in the selection

[42] Court of Cassation, 7/04/2014, n. 8077; Court of Cassation, 16/02/2000, n. 1749; Court of Cassation, 16/10/2000, n. 13738; Court of Cassation, 14/03/2013, n. 6501.

phase to be hired. In other terms, the subjective scope is different because is referred, in the Italian system, only to internal workers[43].

The adoption of discriminatory measures against the subjects who make the reports can be reported to the National Labour Inspectorate, for the measures within its competence, as well as by the reporting person, also by the trade union organization indicated by the same.

Also, the retaliation or discriminatory dismissal of the reporting party is void. Any change in duties as well as any other retaliatory or discriminatory measure adopted against the reporter are also null.

In case of disputes related to the imposition of disciplinary sanctions, or to demotions, layoffs, transfers, or submission of the reporting person to another organizational measure having negative effects, direct or indirect, on the working conditions, subsequent to the presentation of the report. The employer has to demonstrate that these measures are based on reasons unrelated to the report itself.

From a subjective point of view, it's important to notice that the possibility of using the tool is offered to only internal workers.

The recipient of the report could be the internal evaluation body (s.c. oiv) but not necessarily.

The protection gives a particular labour law status in favour of the subject who reports crimes and, on the other hand, promotes more incisive forms of contrasting corruption[44].

In any case, there is no possibility of recognizing economic incentives in favour of the one who denounces the illegal conduct[45].

8. – *The 'just cause' of disclosure of news covered by the obligation of secrecy*

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[43] P. Novaro, *Principali criticità della disciplina italiana in materia di whistleblowing alla luce della nuova direttiva europea: limitato campo di applicazione e scarsi incentivi*, in *RIDPC* 5 (2019) 737 ff.; A. Boscati, *La disciplina del whistleblowing nel settore privato nella prospettiva dell'attuazione della direttiva comunitaria*, in *ADL* 5 (2020) 1056 ff.

[44] Court of Cassation, criminal division V, 26/07/2018, n. 35792; L. Piras, *L'adempimento di un dovere giustifica un accesso abusivo del dipendente ad un sistema informatico di una PA?*, in *DG* (27 july 2018) (www.dirittoegiustiziaonline.it).

[45] M. Vitaletti, *Il lavoratore "segnalante" nell'impresa privata. Il perimetro della tutela del "whistleblower"*, in *DRI* 2 (2019) 492 ff.

Before the reform, according the original legislation, there was the risk that reporting could lead to problems with reference to the possible disclosure of professional secrecy, scientific and industrial secrecy, sanctioned respectively by Articles 326, 622 and 623 of the Criminal Code; as well as the breach of the obligation of loyalty to the entrepreneur by the employer (art. 2105 of the civil code)[46], in relation to which the employer cannot disclose information relating to the organization and production methods of the company, or make use of it so as to be able to harm it.

In other terms, there was a latent problem. In fact, it seemed difficult to guarantee worker protection and the fight against maladministration at the same time because the art 54 *bis* lgs. d. 165/2001 did not establish the necessary and sufficient requirements for a complaint to be considered founded even when the offense has not yet been finalized.

Anyway, in the era prior to the introduction of law n. 179/2017, the abstractly rigorous scope of this obligation was mitigated in light of the guarantee pursuant to art. 21 of the Constitution, as implemented by art. 1 of the law n. 300 of 1970 (so-called Workers' Statute), which establishes the employee's freedom to express their thoughts in the places where their performance took place. On the basis of this assumption, the jurisprudence had expressed on several occasions in the sense of considering legitimate the public complaints made by the workers in the context of a correct exercise of the right of criticism, that is in respect (a) of substantial continence (understood as not overcoming objective

[46] With regard to the confidentiality obligation envisaged for employed workers in private companies, it is as peaceful as the provision of art. 2105 of the Italian Civil Code, prohibiting the employer from dealing with business, on his own behalf or on behalf of third parties, in competition with the entrepreneur, to disclose information concerning the organization and production methods of the company or to use it in so that it can be prejudicial to it, must extend to all the information however learned by the employee in the company, regardless of whether they relate to the organization and production methods of the company (...), or that they are news related in any case to the activity carried out.

truth), (b) formal continence (understood as correctness and civilization of the language used) and (c) the existence of a legally relevant interest[47].

The new provision of the art. 3 of the law n. 179/2017 avoids any doubts about the existence of a just cause for disclosure of information covered by corporate secrecy, establishing that the whistleblower is not liable in case of disclosure covered by secrecy. In fact, this Article establishes that "The pursuit of the interest in the integrity of public and private administrations, as well as in the prevention and repression of embezzlement/malpractice, constitutes a just cause for the disclosure of information covered by the obligation of secrecy pursuant to Articles 326, 622 and 623 of the penal code and to the 2105 of the civil code".

For this provision, in the cases of reporting according to 54 *bis* lgs. d. 165/2001 and 6 lgs. d. 231/2001, there is not liability for the crimes established by artt. 326 c.p. ("Disclosure and use of office secrets"); 622 c.p. ("Disclosure of professional secrecy") and 623 c.p. ("Disclosure of scientific and industrial secrets"); as well as for the violation of the loyalty obligation pursuant to art. 2105 c.c.

In hindsight this hypothesis of non-punishment does not constitute a right of the worker to denounce to the media and social media the incorrect behaviour of the administration or by the private companies. There is a just cause for disclosure only if the reporting channels and compliance systems prepared by the employer are respected. The reporting, anyway, must be detailed and the exposure based on precise factual elements and concordant.

The element that must pertain properly to the narration concerns certainly its circumstantial character; while the profiles of precision and concordance relate rather to the assessment that the function within the entity must do of the report itself.

In conclusion, we can say that the reform has undoubtedly made progress. Anyway, some critical issues could persist, particularly related to the application of the institution. There are still problems, as example,

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[47] About this topic E. D'Avino, *Quando ad esercitare il diritto di critica è un dirigente pubblico. Nota a Cass. Sez. V Pen., 13.10.2017, n. 52578, Pres. Bruno, Est. Fidanzia, P.M. Aniello (conf.) – C.L. e C.V. (Avv. Sper) e P.M. (Avv. Vergine)*, in *RGL* 2 (2018) 152 ff.

due to the improper use of whistleblowing for reports referring to matters not within the authority's competence, the poor quality of the reports, the lack of trust in the institution, the difficulty of the institution to take root in working contexts, especially in small ones[48].

[48] A. Corrado-L. Valli, *Anac e il whistleblowing: qualche dato*, in *LDE* 3 (2019) (www.lavorodirittieuropa.it).

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Anti-corruption in Germany, among the public and private sector. The contribution of (and to) European law

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1. Introduction. Why a comparison with the German legal system?

Fighting against corruption requires an effort that cannot be limited to a single national legal system. In an economic and political system that necessarily displays a strong degree of interrelation between different national systems, it is essential, for this fight, to be brought on a super-national level, or at least to be done with similar instruments and set of norms within systems that appear politically and legally close[2].

Such an assumption finds some very strict limits in the field of Criminal law. This subject is still characterised by the central role – if not exclusive – of the national State and its organs in the legislation and application of the incriminating norms.

This question appears particularly harsh concerning the legal system of the European Union. On one side, the fundamental Treaties do not attribute any competence on Criminal law to the Union itself. On the other side, corruption is among the matter expressly mentioned by Article 83 § 1 1st comma TFEU: this means, the Union can require the approximation of criminal laws mentioned by Article 67 § 3 TFEU. This approximation can be realised through the legal source of the directive, as well as in the past were used also the nowadays abolished framework decision[3].

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[2] Cfr. M. Punch, *Key Issues*, in *Coping with corruption in a borderless world: proceedings of the 5th international anti-corruption conference*, Den Haag-London 1993, 15 ff., in particular 18-19. More recently, P. Szarek-Mason, *The European Union's Fight Against Corruption. The Evolving Policy Towards Member States and Candidate Countries*, Cambridge (UK) 2010: the Author underlines, at the pp. 11 ff., the serious problem of corruption in the post-communist countries in eastern Europe that entered the EU after 2005, where the social State was particularly 'tentacular' and where each manager had strong powers of decision; at the pp. 21 ff., she focuses on the 'internationalisation' of corruption in parallele to the increment of international cooperation.

[3] Cfr. S. White, *Protection of the financial interests of the European Communities: the fight against fraud and corruption*, Den Haag-London 1998, 154 ff. The evolution of the norms and the methods of the EU in fighting corruption is clearly shown also by Szarek-Mason (nt. 1): at p. 2, the Author expresses six thesis, the first one of is about the lack of direct competence of EU about corruption, and the fourth one – particularly present in the idea of SIPPAS policies – enlights the necessity of requiring

This aim has been in part realised. For another part, it is still to realise. To this purpose, it is important to compare and contrast the different legal systems that need to be approximated, to understand the differences and to underline strengths and weaknesses that can be 'synthesised' in the European directives or reform proposals across the different Member States.

In this European frame, the legal system of the Federal Republic of Germany (*Bundesrepublik Deutschland*) can be regarded as an interesting and particularly prominent model of law[4], even if not exempt by any criticism.

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to Candidate States to comply with high anti-corruption standards; at the pp. 49 ff., the Author divides the history of the Anti-corruption EU Law in three phases – (i) anti-corruption as part of the protection of EU's financial interests (pp. 73-82), synthetised ad a "danger to the Community budget" (p. 82), until the 1990s; (ii) anti-corruption beyond EU's financial interest, particularly in the sight of economic development (pp. 82-83), after Maastricht; (iii) a comprehensive, focused policy against corruption, after Amsterdam (1997). The approximation of Criminal law is mentioned at p. 98.

[4] Cfr., between the German most affirmed Criminal law theory books, H. Blei, *Strafrecht II. Besonderer Teil*, München 1978[11], 394 ff.; H. Otto, *Grundkurs Strafrecht. Die einzelnen Delikte*, Berlin-NY 2002[6], 537 ff.; R. Rengier, *Strafrecht Besonderer Teil II. Delikte gegen die Person und die Allgemeinheit*, München 2020[21], 557 ff. To this books we can add the case law book H. Blei, *Strafrecht. Besonderer Teil/2*, München 1990[5], 257 ff. Between the most important German commentaries of the *Strafgesetzbuch*, cfr. *Münchener Kommentar Strafgesetzbuch*, eds. W. Joecks-K. Miebach, *Band 5-§§ 263-358*, eds. R. Hefendel-O. Hohman, München 2014[2], 2166 ff.; A. Schönke-H. Schröder, *Strafgesetzbuch*, München 2019[30]; B. von Heintschel-Heinegg, *BeckOK StGB*, on *beck-online.beck.de*, München 2020[48]; T. Fischer, *Strafgesetzbuch mit Nebengesetze*, München 2021[68], 2500 ff. The online commentaries will be mentioned with reference to the website, the paragraph (e. g., sub § 331) and per "margin number" (*Randnummer*). For a monographic literature on this topic, cfr. F. Geerds, *Über den Unrechtsgehalt der Bestechungsdelikte und seine Konsequenzen für Rechsprechung und Gesetzgebung*, Tübingen 1961; H. R. Claussen-E. Ostendorf, *Korruption im öffentlichen Dienst*, Köln-Berlin 2002, *passim*; Ph. Horrer, *Bestechung durch deutsche Unternehmen im Ausland*, Frankfurt a. M.-Berlin 2011, 19 ff.; M. Meyer, *Korruption in kommunalen Verkehr*, Wiesbaden 2017, *passim*. A collective and multi-disciplinary work on this theme is *Zwischen Kooperation und Korruption*, eds. A. Benz-W. Seibel, Baden-Baden 1992, *passim*. Both economic and legal papers are contained in the collective work *Corporate Governance und Korruption. Wirtschaftsethische und Moralökonomische Perspektiven der Bestechung*

It is first necessary to dispel a stereotype by our discussion. In the common way of thinking, it is possible to find a quite radicated convincement about Germany being an uncorrupted State. This stereotype gains also some relevance in the field of social science if we think of the implications of social surveys like the Corruption perception index provided by Transparency International, which usually inserts Germany between the 'cleanest' States in Europe and the World[5].

From the point of view of a jurist, social perceptions are often misleading. The German Federation is surely a well-functioning political and administrative system, like many other objective indicators display, but this does not mean that corruption is absent or so low that can be considered as negligible. Corruption has always been present in Germany; some very notorious cases of public and private corruption raised some very huge scandals in German public opinion[6].

An example of bribery was the case of the frankfurter city administration, discovered in the Eighties: many of the officials working for the building office or the garden service were found guilty of accepting

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und ihrer Bekämpfung, eds. D. Aufderheide-M. Dabrowski, Berlin 2005, whose single contributions are going to be cited in this work; B. Bannenberg, *Korruption in Deutschland und ihre strafrechtliche Kontrolle. Eine kriminologisch-strafrechtliche Analyse*, Neuwied 2002. In the panorama of the German criminal law reviews, the presence of *Bestechungsdelikte* is quite limited. A useful reference is D. Dölling, *Die Neuregelung der Strafvorschriften gegen Korruption*, in *ZStW* 128 (2016) 173-193.

[5] Cfr. https://www.transparency.org/en/cpi#.

[6] Cfr. the historical work of J. I. Engels, *Alles nur gekauft?, Korruption in der Bundesrepublik seit 1949*, Darmstadt 2019. The Author analyses particularly the problem of political corruption in the *Bonner* (1949-1990, 23 ff.) and *Berliner* (1990-2012, 221 ff.) Republic. He underlines the political premises of the afterwar German political class, that presented corruption as a prerogative of the National-Socialist regime and democracy as an uncorrupted alternative (33 ff.). Despite that, the whole history of the *Bundesrepublik* displays all the typical problems of economic and industrial groups that attempt to bring their proper interest within legislation and administration without a political debate about a possible coincidence with general interests and by rewarding those officials who cooperated with them. In the conclusions of his work (345 ff.), Engels presents the problem of the debate on anti-corruption as result but also "self-cannibalism" of democracy, because of its critical function combined with the effect of decrease of trust in the political institutions.

supplementary loans for doing their work[7]; more recently, even a Federal President (*Bundespräsident*), this means the titular of the highest representative charge in the German federal State, has been accused – but later found innocent – of accepting loans by a private bank[8].

The private corruption became particularly evident, on its side, with the Siemens-case, coming just after some very famous cases in the USA (e.g. Exxon): a manager of the well-known hi-tech firm used his possibility of disposing of non-limited quantities of funds for personal affairs with banks in Liechtenstein; then he and his abetters were held guilty for patrimonial infidelity (§ 266 *StGB*), being the private corruption at the time not foreseen[9].

If on one side it is necessary to acknowledge that corruption in Germany exists and gains also a problematic dimension, it is on the other side possible to observe that the legal instruments used to prevent, fight and punish corruptive phaenomena work well enough to let the economic[10], administrative and legal system to progress constantly despite corruption.

It is also essential to mention the fact that the German *Strafgesetzbuch* is among the most careful penal codes in Europe concerning the problem of German citizens corrupting foreign officials, also in consideration of the prominence of the German export sector in the European economy. This brings the German anti-corruption criminal law very near to the

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[7] Cfr. Claussen-Ostendorf (nt. 3) 6-7.

[8] About the case of Christian Wulff cfr. Engels (nt. 5) 333 ff.

[9] Cfr. F. W. Schneider, *Untreue durch Unterhalten schwarzer Kassen*, note to the decision oft he Federal Supreme Court *BGH*, Urt. v. 29.08.2008 – 2 StR 587/07, in *RechtsprechungsÜbersicht* 1 (2009) 30 ff.

[10] Cfr. J. G. Lambsdorff, *How corruption affects economic development*, in *Corporate Governance und Korruption* (nt. 3) 11 ff. The Author does not focus exclusively on the German economic system. After an introduction about the principal-agent-model, he focuses on those dependent variables of GDP that can be influenced by corruption (16 ff.): productivity, perception, capital inflows. All those indicators, still in the last year before Covid-19-pandemic, are among the best ones in the European Union, as analysed by European Commission, *Country Report Germany 2019*, Brussels, 27.2.2019 SWD (2019) 1004 final, at *ec.europa.eu*, 8 ff. This gives the idea of a system that can manage and resist its corruption problems, that even exist and can be considered as relevant.

American model represented by the Foreign Corrupt Practices Act (FCPA)[11].

For all these reasons, and in addition to the influence of German legislation on the legal system of the European Union, it is possible to regard the German legal system as a possible alternative model for reforms in this peculiar sector.

2. Systematic of the anti-corruption offences in the German Strafgesetzbuch (StGB) and the protected legal goods

The initial statements we can make to provide a frame to our analysis are related to the systematic of the anti-bribery offences in the German Criminal code, this means the *Strafgesetzbuch* – abbreviated as *StGB* – in its version of 1975. To this purpose, we need to consider at least four groups of norms: two of them are focused on the public sector, the other two on the private sector or a mixture like the healthcare system.

These four groups are going to be analysed deeply. In this paragraph, we should just mention one further group of offences. It is related to the crimes of violence against public officials, contained in the 6th title, §§ 113-115. In the Italian *codice penale*, those crimes fall under the section dedicated to the offences against public administration, whereas in the German *StGB* it is classified under the offences against the State's power (*Straftaten gegen die Staatsgewalt*). In our opinion, this is the correct classification. Those crimes do not distort the public office with a perspective of advantages for the officer but try to avoid with violence a presumably legitime exercise of public authority: in this measure, they damage a 'broader' function of public order and could influence the

[11] The resarch published by Horrer (nt. 3) analyses deeply the problem of Germany as a "corruptive power" in relation to its huge export sector. At the pp. 19-27, the Author introduces his work presenting the case of illegal trafficking between German corporations and Russian officials. At the pp. 36-38 the Author mentions the Lockheed-affair as a case that involved many different officials all around the NATO-Alliance, because of the prominence of USA in the world. The prominence of Germany in Europe gives the idea of the importance of an anti-corruption sector specifically dedicated also to the external relations.

behaviour of other subjects in their relationship with persons acting in their role of public officials.

2.1. Focus on the Public Administration

1) The first norms we need to consider are those that define the subjective profile of a public official and all other law subjects that can be held responsible for corruption crimes. § 11 *StGB* contains two major definitions – the articulated concept of public official (*Amtsträger*), commas 2-3, and the "residual" concept of the person entrusted with a public service (*für den öffentlichen Dienst besonders Verpflichteter*), comma 4 – that identify the relevant categories of subjects. These definitions are extended by § 335a *StGB* to the officials of international organisms[12].

2) The offences related to the corruption of public officials are contextualised in the last title of the special part of the Criminal code (*Besonderer Teil*), the Thirtieth one (*Dreißigster Abschnitt*). This title is named "Offences committed in the exercise of a public office" (*Straftaten im Amt*), and contains §§ from 331 to 358 of the *StGB*. All the most important offences against the public service and a part of the offences against the exercise of *justice* by the judges are involved. We will focus particularly on the first eight paragraphs of the title, which are those most related to bribery (*Bestechung*), and on § 357, providing a special liability for those superiors that abuse their authority bringing their subordinates to commit offences against the public administration[13].

2a) In our opinion, it is possible to classify as a bribery crime also the offence foreseen by § 108e *StGB*, corruptibility and corruption of elected

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[12] Cfr. *Münchener Kommentar Strafgesetzbuch* (nt. 3) *Band 1-§§ 1-37*, ed. B. von Heintschel-Heinegg, München 2011², in particular H. Radtke, *sub § 11 StGB*, 282 ff. Cfr. also the further literature in the forthcoming footnotes.

[13] A similar limitation is operated by Geerds (nt. 3) 1-5, in order to focus on the executive power; Horrer (nt. 3) 28-29; Rengier (nt. 3) 565 ff. All those offences, in the context of *Münchener Kommentar. Band 5* (nt. 3), are commented by M. Korte, *sub §§ 331-338*, 2166 ff. Our reference will be to Korte in *Münchener Kommentar. Band 5* (nt. 11). In the commentary entitled to Schönke and Schröder (nt. 3), cfr. G. Heine-J. Eisele, *§§ 331-337 StGB*.

officers (*Bestechlichkeit und Bestechung von Mandatsträgern*). This norm is inserted among the crimes against constitutional organs (*Straftaten gegen Verfassungsorgane*), but from the analysis of the language, of the *ratio legis* and the objective of the legal protection it will be possible to infer the relatedness of this offence to the fight against corruption.

These norms are characterised by the aim of protecting the same legal good, this means – very briefly – i.e. the same «condition or chosen end, which are useful either to the individual and his free development within the context of an overall social system based on this objective or to the functioning of this system itself» and that are "adopted" as subjective rights or objective of the State (*Staatsziel*) by the constitution[14].

Concerning the offences we are dealing with, the legal good is traditionally indicated in the correct and efficient functioning and the impartiality of the Public Administration, or like some Authors say "the legal order of the State by the inside" and the correctness of the behaviour of public officials and similar figures. In those welfare systems – like also Germany and the main part of the EU's Member States – where the activity of the public sector appears to be very relevant in the frame of the economic system, it is fundamental for the activity of public officials to be efficient, impartial, serving the generality of

[14] The concept of legal good, central in the dogmatic of the Euro-continental criminal law, dates back to the essay written by J. M. F. Birnbaum, *Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens*, in *Archiv des Criminalrechts* (1834) 149-195. Birnbaum's concept has been integrated by the idea of the pre-legal dimension of the legal good through the doctrine of F. von Liszt, *Rechtsgut und Handlungsbegriff im Bindingschen Handbuche. Ein kritischer Beitrag zur juristischen Methodenlehre*, in *ZStW* 6 (1886) 663-698 and Id., *Der Begriff des Rechtsgutes im Strafrecht und in der Encykolpädie der Rechtswissenschaft*, in *ZStW* 8 (1888) 133-156. The definition we adopted is provided by C. Roxin-L. Greco, *Strafrecht Allgemeiner Teil. Band I – Grundlagen. Der Aufbau der Verbrechenslehre*, München 2020[5], 26 and integrated by the teories about the constitutionalisation of Criminal law expressed by the prominent Italian scholar F. Bricola, encyclopedical entry *Teoria generale del reato*, in *Nuovissimo Digesto Italiano* 14 (1973) 7-93. The translation in English of Roxin's definition is almost literally the one proposed by M. D. Dubber, *Theories of Crime and Punishment in German Criminal Law*, in *The American Journal of Comparative Law* 53 (2005) 679 ff., particularly 685-686.

citizens and not particular interests and trustworthy for the citizens themselves[15].

The constitutional provisions about the Federal Administration (*Bundesverwaltung*) are contained in the 8th Title of the Grundgesetz, Articles 87 and followings, whereas the entire Title (Articles 83 ff.) contains also provisions about the administration of every single State (*Land*) forming the German Federal Republic. Article 28, then, contains also the affirmation of the independence of the communal administrations, requiring the application of the same principles and the recognition of the same legal good also for them.

Another requirement, introduced as a legal principle to be applied and an element of the legal good by the European Union Law, is transparency, this means openness in the statal processes. A transparent administration should ensure the possibility of external control of the processes that

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[15] Cfr. Blei (nt. 3) 394-395: the Author says «... die staatliche Ordnung, aber in ihrer Richtung nach Innen». Cfr. also Otto (nt. 3) 537, that explains the legal good with the help of two concepts that are surely powerful, but in our opinion rather reductive: «das Vertrauen in die Unkauflichkeit von Trägern staatlicher Funktionen» (the trust in the impossibility of buying officials) and «die Sachlichkeit staatlicher Entscheidungen» (the objectiveness of administrative decisions) as precondition for a good functioning of administration. More recently, Bannenberg (nt. 3) 18-19, Dölling (nt. 3) 335-337, Rengier (nt. 3) 566, insists on the trust of the citizenship in the unserviceability of the public officials: «Dieses liegt nach der zutreffenden h. M. in dem Vertrauen der Allgemeinheit in die Integrität und Unbestechlichkeit von Trägern staatlicher Funktionen und damit zugleich in die Sachlichkeit staatlichen Handelns. Dieses Vertrauen wird schon durch den „bösen" Anschein der Käuflichkeit der Dienstausübung erschüttert». With reference to the multi-level administration of the EU comprehensive system, cfr. E. Pache, *Verantwortung und Effizienz in der Mehrebenenverwaltung*, in *Bundestaat und Europäische Union zwischen Konflikt und Kooperation*, Berlin (DeG) 2007, 106 ff. It is interesting to mention the fact that the Author, at the pp. 115-116, discusses the actuality of the role of efficiency as a relation between aim and instrument (*Zweck-Mittel-Relation*) in the European system. The conclusion is affirmative, as the multi-level administration requires the maximization of the result through resources and efforts that need to be employed and divided through all those levels, particularly in order to join them in the view of a common result.

bring to the adoption of an administrative decision[16]. This can have a tradeoff with the celerity and the efficacy of the decisions themselves. But the possibility of controlling the acts of the administration appears to be central in a democracy and contributes to preventing opacities of single officials in favour of private interests[17].

2.2. – *Focus on the private sector and the healthcare system*

The other two groups of norms do not have a focus on the corruption problems that affect (mainly) the public sector. In both cases, the legal good concerned is different than the protection of the State in its internal efficient, correct, impartial and transparent functioning. This gives the idea of the dimensions that the problem of corruption gains: it is not limited to the public sector, but invades directly the economic system also in its form of the productive sector and healthcare system.

3) Differently from the Italian legislator and others, the German legislator decided to insert in the *StGB* also the corruptive offences related to the private economy and to competition[18], and particularly those crimes that offend a juridical person through the corruption to its corporate officials. These offences are contained in the 26th title of the special part, dedicated to the offences against the competition (*Sechsundzwanzigster Abschnitt-Straftaten gegen den Wettbewerb*) §§ 299 and 300 *StGB*[19].

4) In the same context of the offences against the competition, the German legislation provided some norms against corruption in the healthcare sector (*Gesundheitswesen*), §§ 299a, 299b and 300 *StGB*. This appears to be strictly related to the peculiarity of the German healthcare system itself: it is prevailingly public but based on public obligatory insurance and with an important co-participation of private healthcare.

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[16] Cfr. J. Bröhmer, *Transparenz als Verfassungsprinzip. Grundgesetz und Europäische Union*, Tübingen 2004, 372 ff. The definition we adopted is contained in the first proposition that the Author poses in conclusion of his work: «... größere[r] Offenheit in allen staatlichen Prozeβen».

[17] Cfr. Bröhmer (nt. 15) 376-378.

[18] Cfr. K. Tiedemann, *Wirtschaftsstrafrecht. Besonderer Teil*, München 2011[3], 138 ff.

[19] Cfr. Horrer (nt. 3) 28-29.

3. Legal definitions about public officials, between administrative accessoriness and subsidiarity

It is important to focus first on those norms that encompass the subjective profiles of those subjects that assume essential importance in the criminalisation of the offences committed in a public office: they cannot be committed by anyone, in consideration of the relevance of alterations in the correct functioning of the public administration.

To this purpose, § 11 *StGB* provides three central definitions of roles related to administration: the national (comma 2-3) and European Union's (comma 2a) public official or civil servant, *Amtsträger* (literally 'bearer of the public office') and the person entrusted with public service (*für den öffentlichen Dienst besonders Verpflichteter*, comma 4). The definition of national public official contains also the position of the judge (*Richter*)[20].

Before analysing each figure in its detail, we can affirm that this kind of legislative policy is very expressive. The German legislator is usually very careful in providing special definitions to the purposes of Criminal law, though if paying big attention to the profiles of coherence between Administrative law's and Criminal law's concepts in those matters that are 'physiologically' regulated by the first one, needing the intervention of the second one for 'pathological' cases.

However, the need for independent concepts for Criminal law is underlined by the necessity of punishing those subjects that effectively can violate the object of criminal protection, even if they do not formally correspond to the Administrative law's definition or, on the other side, if they correspond but are not entrusted with the powers that are needed to realise the prohibited result[21].

In other words, this legislative policy is the result of the encounter of the concept of 'administrative accessoriness' (*Verwaltungsakzessorietät*) with the principle of subsidiarity, whose importance is strongly

[20] Cfr. Radtke (nt. 11) 291 ff.

[21] As an analysis in the field of Administrative law, cfr. E. Treutner, *Ausprägungen und Grenzen informalen Verwaltungshandeln*, in *Zwischen Kooperation und Korruption* (nt. 3) 65 ff. At p. 67, the Author underlines how the factual conduct as a public official can open to the "flexibility" or "illegality" of the conducts.

underlined by the German scholars in defining the sense and the limits of Criminal law.

3.1. The national public official

The "national" definition of public official opens the catalogue of the subjective positions related to corruption. It is possible to describe this choice as natural for the national legislators, as the national public officials are those that directly depend on the State and its 'specialised' or local articulations[22]. This subjective figure is regulated at the second comma (*Absatz*) of § 11 *StGB*:

[§ 11 Abs. 2 *StGB*] Amtsträger: wer nach deutschem Recht

a) Beamter oder Richter ist,

b) in einem sonstigen öffentlich-rechtlichen Amtsverhältnis steht oder

c) sonst dazu bestellt ist, bei einer Behörde oder bei einer sonstigen Stelle oder in deren Auftrag Aufgaben der öffentlichen Verwaltung unbeschadet der zur Aufgabenerfüllung gewählten Organisationsform wahrzunehmen;

[Translation by the Author] Public official: any person who, in conformity with German law,

a) is a civil servant or judge,

b) has a particular employment relationship under public law

c) is otherwise appointed to perform functions at a public authority, or a particular agency or has been commissioned on their behalf to perform tasks of the public administration, without regard for the organisational form chosen for their fulfilment;

The figure of the public official designed by this norm is a broad one, involving the executive and the judiciary power and excluding only the legislative branch, from their very high charges, like the Federal President and the Government, to the most common employees[23].

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[22] Cfr. von Heintschel-Heinegg (nt. 3) *§ 11*, Rn. 13-40; Rengier (nt. 3) 558.

[23] Cfr. Blei (nt. 3) 395; Dölling (nt. 3) 338; Rengier (nt. 3) 559.

However, the concept is not limited to the public administration in its stricter sense of federal (*Bundesverwaltung*) or statal administration (*Landesverwaltung*), or even communal administration. It rather includes also judiciary officials and, in general, all employees assumed based on public labour regulation also in peripheric and specific articulations – like the Federal railroad patrimony[24] – of the German public sector. Even persons exercising private activities that express a public function, like e. g. the notary public[25], are involved.

On the other side, those members of moral persons having "peculiar" relations with the State, e. g. catholic priests, are excluded, but then they can be involved in the definition when they work also for the State, e. g. teaching religion in the schools[26].

It is important to note that the soldiers of the army are excluded because of the special regulation of the crimes committed by them in the Military Criminal code (*Wehrstrafgesetz*)[27]. Also, for this reason, it is possible to observe that their category is expressly recalled in some of the provisions of the 30th Title, next to the public officials and other subjective qualifications[28].

The appointment of a public official is a formal passage, expression of the administrative accessoriness of the subject. In general, it would be possible to describe the public official as any person that voluntarily accepts a formal call by an entity of the public sector, established, funded and controlled by the State or its articulation to protect the citizens or realise social purposes[29].

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[24] Cfr. the Act about the Reorganisation of the Railroad (*Eisenbahnordnungsgesetz*) of 27.12.1993, in *Bundesgesetzblatt* I part. (1993) 2378 ff., § 7 comma 1: «Die Beamten, Angestellten und Arbeiter des Bundeseisenbahnvermögens stehen im Dienst des Bundes. Die Beamten sind unmittelbare Bundesamte» (translation by F. Camplani: "The officers, the employees, and the workers of the Federal railroad patrimony are at the service of the Federation. The officers are direct Federal public officials").

[25] Cfr. Radtke (nt. 11) 293-295; Rengier (nt. 3) 560-563; Fischer (nt. 3) 60 ff.

[26] Cfr. Blei (nt. 3) 395; Radtke (nt. 11) 295-296; Fischer (nt. 3) 60, 62; Rengier (nt. 3) 564.

[27] Cfr. Radtke (nt. 11) 319.

[28] Cfr. Blei (nt. 3) 396.

[29] Cfr. Radtke (nt. 11) 297; Fischer (nt. 3) 61.

On the other side, the charges as a public official "survive" to the retirement for the acts committed before the retirement itself, or for those activities in which the past charge can be relevant on the conduct of someone else[30].

We could observe that the resulting concept of public administration, to the purpose of Criminal law, is much closer to the constitutional concept of "obligation of all the power of the State" (*Verpflichtung aller staatlichen Gewalt*) mentioned by Article 1, comma 1 of the *Grundgesetz* (lit. "Basic Act") of the Federal Republic of Germany, than to the concept of "Federal administration" (*Bundesverwaltung*) mentioned by the Article 87 of *Grundgesetz*.

Based on this very general profile, other 'collateral' or more specific profiles have been conceived through the evolution of the legislation and on the international relations of the Federal Republic of Germany. In the forthcoming paragraphs, we will analyse the European and International officials as equalised subjects, the judge (*Richter*) as a subcategory of the *Amtsträger* and the other categories of persons entrusted with public functions, despite not being part of the public administration.

3.2. The European public official

In the system of § 11 *StGB*, the definition of the European public official, this means the public official that has to respond to the organs of the European Union, has been inserted through an Anti-corruption Act in 2015[31].

It has been introduced in the text so that it directly follows the general national definition:

[§ 11 Abs. 2a *StGB*] Europäischer Amtsträger: wer

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[30] Cfr. Radtke (nt. 11) 297-300.

[31] Cfr. Article 1 comma 3 of the *Gesetz zur Bekämpfung der Korruption* (Act for combating corruption) of November 20th 2015, in *Bundesgesetzblatt* I part (2015) 2025 ff.; cfr. also the Lexetius service on the evolution of legal provisions, https://lexetius.com/StGB/11,5. Cfr. Fischer (nt. 3) 67. For a comment cfr. von Heintschel-Heinegg (nt. 3) *§ 11*, Rn. 35-36.

a) Mitglied der Europäischen Kommission, der Europäischen Zentralbank, des Rechnungshofs oder eines Gerichts der Europäischen Union ist,

b) Beamter oder sonstiger Bediensteter der Europäischen Union oder einer auf der Grundlage des Rechts der Europäischen Union geschaffenen Einrichtung ist oder

c) mit der Wahrnehmung von Aufgaben der Europäischen Union oder von Aufgaben einer auf der Grundlage des Rechts der Europäischen Union geschaffenen Einrichtung beauftragt ist;

[Translation by the Author] European public official: any person who

a) is member of the European Commission, of the European Central Bank, of the Court of Auditors or one of the Tribunals of the European Union;

b) is a civil servant or another kind of employee of the European Union, or of one of the institutions founded on the base of the European Union Law, or

c) is encharged of the fulfilment of tasks of the European Union or institutions founded on the base of European Union law;

This attention given by the German legislator to the European public official appears to be quite peculiar. Around the legislations of EU member States, it is not frequent to have such an "equipollence clause" between national and union officials, whereas it is much easier to find correspondent clauses or provisions for judges and prosecutors of supernational Courts[32].

In our opinion, this can be related to at least two aspects of the German constitutional and legal system. The first one is the explicit acknowledgement of the European Union among the aims whose pursue is imponed to the central State (*Staatszielbestimmungen*). The German constitutional legislator inserted in *Grundgesetz* a complex and articulated constitutional norm primarily dedicated to the European Union, Article

[32] The Italian Criminal code, e. g., does not contain such an equipollent definition for the European public official. The employees of the public institutions of the European Union are recalled in some provisions, like art. 322-bis cod. pen., for the application of the recalled provisions. Similarly, the most part of the offences against the administration of justice, as well, needs to expressely recall the judicial officers of the European courts.

23. It is possible to observe a 'mutual contribution' between Germany and the European Union: the former requires the application of principles of liberal, social and democratic State, on one side; on the other side, the human rights, the legal goods and the fundamental principles of latter are integrated into a constitutional level.

On the other side, *Grundgesetz* puts also some evident counter-limits, related to the principle of subsidiarity, that can be enforced in front of the European Court after a vote of both chambers of the Parliament, *Bundestag*, the effective lower Chamber, and *Bundesrat*, the upper representative Chamber. From this second aspect descends directly the frequent intervention of the German Federal Constitutional Tribunal (*Bundesverfassungsgericht*) to "protect" the core of German constitutional law from European law.

It is possible to observe that the express relevance recognised to the European public office appears as an expression of this 'equal exchange' between the German and the European institutional and legal systems. On its side, the *Bundesrepublik* attributes to the European public function the same importance given to the national correspondent; on the opposite side, the German criminal legislator claims his jurisdiction on European public officials that are found guilty of offences, on the base of the *aut-aut* criminal conflict rules indicated in the §§ from 3 to 7 of the *Strafgesetzbuch*.

3.3. The judge as a species of the public official

As we saw in the analysis of the second comma of § 11 *StGB*, the judge is presented, to the purposes of corruption crimes, as a species of the public official, in contraposition to the civil servant (*Beamte*). The corruption of judiciary official is a problem to which the German legal culture has been sensible since a quite ancient time[33], and that concerning corruption is particularly connected to the idea of the judge expressing

[33] Cfr. H. Siems, *Bestechliche und ungerechte Richter in frühmitteralterlichen Rechtsquellen*, in *La giustizia nell'alto medioevo (secoli V-VIII)*, Spoleto 1995, 509 ff.

one of the three highest powers – *potestas iudicandi* – in the State and the society[34].

At any case, the third comma of § 11 *StGB* provides also a more specific definition of the judge:

[§ 11 Abs. 3 *StGB*] Richter: wer nach deutschem Recht Berufsrichter oder ehrenamtlicher Richter ist;

[Translation by the Author] Judge: who, in conformity with German law, is a professional or honorary judge;

The norm, referring to the legal system, indicates to the reader the necessity of a more substantial definition of the judge in other acts of law. The primary reference in this field is the Act on the Constitution of the Courts, *Gerichtsverfassungsgesetz* (*GVG*), and the German Act on Judges, *Deutsches Richtergesetz* (*DRiG*). Both professional and honorary judges are included; on the other side, judiciary assistants and arbitrators are excluded[35].

This means that, concerning the judge, the administrative accessoriness is stronger than for the superordinate concept of the public official[36]. The reason is easily understandable: the judiciary role presents functional and technical peculiarities that require an exact recognisability of the officials exercising it. It is important also to consider that every single judge fully expresses the judiciary power of the State, even if the German judiciary system recognises the possibility of revision of decisions released by territorial courts.

This definition helps the interpreter in defining the civil servant as well. The judge, on its side, expresses the judiciary power of the state, whereas the civil servant expresses mainly the executive power. On their side, then, not all civil servants can express definitively the administrative power of the State, being part of hierarchic structures, whereas each judge fully expresses the judiciary power.

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[34] Cfr., in an historical perspective, Siems (nt. 32) in particular 538. In a juridical-positive perspective, cfr. Radtke (nt. 11) 329 ff.; von Heintschel-Heinegg (nt. 3) *§ 11*, Rn. 33-34.

[35] Cfr. Blei (nt. 3) 395; Radtke (nt. 11) 329-330; Fischer (nt. 3) 67.

[36] Cfr. Radtke (nt. 11) 329.

From the point of view of an Italian jurist, it is fundamental to underline that also the public prosecutor, in Germany named "State attorney" (*Staatsanwalt*), has to be considered as a civil servant and not as a judge, being part of an administrative structure called *Staatsanwaltschaft* (Office of the State attorney), depending on the Federal Ministry of Justice and hierarchically organised.

3.4. The other subjective figures that can be held liable for bribery crimes

At the last place, we find those subjective figures that cannot be considered as a public official, but that is effectively encharged of functions and tasks related to the public service:

[§ 11 Abs. 4 *StGB*] für den öffentlichen Dienst besonders Verpflichteter: wer, ohne Amtsträger zu sein,

a) bei einer Behörde oder bei einer sonstigen Stelle, die Aufgaben der öffentlichen Verwaltung wahrnimmt, oder

b) bei einem Verband oder sonstigen Zusammenschluß, Betrieb oder Unternehmen, die für eine Behörde oder für eine sonstige Stelle Aufgaben der öffentlichen Verwaltung ausführen, beschäftigt oder für sie tätig und auf die gewissenhafte Erfüllung seiner Obliegenheiten auf Grund eines Gesetzes förmlich verpflichtet ist;

[Translation by the Author] Other person entrusted with public service: any person who, without being a public official,

a) assumes the functions of the public administration at a public authority or another agency, or

b) is occupied or acts for an association or another type of entity, firm or corporation fulfilling tasks for a public authority or another public agency, and who is formally obliged to the conscientious fulfilment of her duties on the base of an act;

The definition under lit. a) can be considered as residual. It involves, as well, all the "collaborators" to the activity of public entities, this means persons that cannot express the will of the administration they

are working for, but that cooperate in the public service[37]. The judiciary assistant we mentioned in the previous paragraph is a perfect example of this subjective category: they do not express any judiciary power, but they administrate the organisation of the activity of the offices of the court.

For the lit. b), the entities whose officers can be involved in this extended definition of public officials are all those entities that work as a "long-arm" of the public administration, cooperating in the realisation of protection or welfare purposes[38]. Under this second category, we can anticipate some observations about the arbitrators[39]: these last professionals cannot be considered part of any public administration according to administrative law or judiciary law, as they normally work privately, in form of firms or professional associations; but their decisions – the arbitration awards – are in many legal systems equalised to Courts' decisions and can be directly appealed.

As a final observation, we can observe that this last legal provision expresses at the highest level the principle of effectiveness that is valid in Criminal law, even for those sub-matters that are accessory to administrative law. On one side, it is natural that persons that are formally public officials or persons entrusted with a special public service can commit the forbidden conducts. On the other side, it is necessary to punish in the same way those cases in which the public quality is not formally provided but materially exercised.

3.5. The 'international' public officials in the definition of § 335a StGB

The last provision we should consider for this first group of norms is § 335a *StGB*. This norm extends the quality of public official also to the employees of international, comma 1 n. 1, n. 2 lit. b; comma 2 about

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[37] Cfr. Radtke (nt. 11) 332-333; von Heintschel-Heinegg (nt. 3) *§ 11*, Rn. 37-40; Rengier (nt. 3) 564; Fischer (nt. 3) 67.

[38] Cfr. Radtke (nt. 11) 332-333; von Heintschel-Heinegg (nt. 3) *§ 11*, Rn. 37-40; Rengier (nt. 3) 564; Fischer (nt. 3) 67.

[39] *Infra* § 4.5, paragraph (iv).

the international criminal tribunals – and foreigner organisations – comma 1 n. 2, lit. a and c. The subjects indicated by comma 1 can be held liable for almost all four 'major' offences. The one indicated comma 2, because of the particularity related to international criminal justice, can be held liable only for the offences of accepting advantages (§ 331 *StGB*) and grating advantages (§ 333 *StGB*), limited to the figures that can be committed by judges[40].

Comma 3 mentions the soldiers and the collaborators of the non-German armies working for the N.A.T.O. on German soil as international public officials, equalising them to the soldiers and the collaborators of the Federal army (*Bundeswehr*). This equalisation is linked to the offence of granting advantages (§ 333 commas 1 and 3 *StGB*) committed by the private person, this means for a case of passive corruption[41].

Like for the European public official, also the International public official expresses the importance that the German legal system attributes to the system of alliances that Germany formed after the Second world war and to the common aims and interests they represent. Furthermore, this legal provision contributes to the realisation of one of the aims imposed by the OSCE anti-bribery convention, the 'universalisation' of the contrast to corrupted officials. For this reason, the Federal republic recognises to those officials a level of protection, but also of duties and intervention of the German State, on those persons working for these organisation[42].

3.6. The problem of cooperation between public officials and 'common' coauthors

One last problem we need to deal with to analyse properly the subjects of bribery offences is the multi-personal commission of an actus reus, in the case of one or more of the authors being public officials or persons entrusted with special public service and other authors not having this particular qualification[43].

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40 Cfr. Fischer (nt. 3) 2538.
41 Cfr. Fischer (nt. 3) 2539.
42 Cfr. Fischer (nt. 3) 2538.
43 Cfr. Rengier (nt. 3) 557-558; Fischer (nt. 3) 2500.

This is a problem that is quite present almost all over the criminal codes in Europe. On one side, it could seem theoretically inappropriate punishing, for an offence requiring peculiar qualities for its commission, a person that does not have this quality. On the other side, a person cooperating with a public official or person entrusted with special public service that commits a crime in the exercise of his or her functions, violating the legal goods linked to the public administration[44], acts 'accessorily': this means, this 'common' person can at any case contribute to a more serious result of the violation of the public official and aspire to eventual advantages that the corrupted official shares with him or her[45].

The German *Strafgesetzbuch* foresees this case through § 28. In a system dominated by a principle of "autonomy of the liability of each cooperator in the commission of an actus reus" (*Selbständige Strafbarkeit des Beteiligten*), expressed at § 29 *StGB*, the solution is punishing this person, but with a milder sanction, commeasured by the judge discretionally (§ 49 *StGB*). The Italian *codice penale* adopts a similar solution at art. 117, especially through the second comma of the provision.

The two commas of § 28 *StGB* differentiate among the two cases. The first comma is dedicated to the case of the offence foreseeing as necessary some particular qualities, that can be called in English "functional crimes" (*Straftaten in Amt*, *reati propri*)[46]. In this case, it is logically necessary that the "principal offender" (*Haupttäter*) has the required qualities, as he or she should be a subject that can effectively violate the protected legal good.

The second comma is dedicated to those circumstances that act exclusively on the commensuration of punishment, by aggravating or attenuating the total amount of the indicated sanction. In this case, the principle of autonomy requires that those elements are applied exclusively to their 'bearers'. This application is rational, as the protected legal good, in those offences, can be violated by everyone. An eventual peculiar personal quality, in this context, has the only effect of aggravating the

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44 Cfr. W. Joecks, *sub § 28 StGB*, in *MüKo-1* (nt. 11) 1288; Fischer (nt. 3) 22.

45 Cfr. Joecks (nt. 43) 1285; Fischer (nt. 3) 282.

46 Cfr. Joecks (nt. 43) 1288 ff.; Fischer (nt. 3) 284-285.

violation with more serious harm of the legal good, eventually bringing also to a stricter judgement of the duties of the offender[47].

Concerning the four major bribery offences, we are now going to analyse more in-depth two functional figures and two common figures that can be combined to punish both parts of a corruptive pact. Eventual collaborators can participate in the fact of bribery on one side or both: in this latter case, the collaborations can be 'totalised', because, as the analysis will show, active and passive corruption are different acts, on different contractual sides[48].

4. Anti-bribery and Public Administration in the last Title of the Special part of StGB

4.1. The collocation of bribery offences in the Strafgesetzbuch

As we remembered before, the bribery offences are inserted by the German legislator in the last title of the special part. This happened since the first approbation of the *Strafgesetzbuch* in 1871: this means, the collocation of these offences is not an expression of an 'ideological' choice that can be considered as the opposite of the one made by the Italian legislator in 1930, postponing public-statal interests to a well-functioning, correct and efficient public administration to individual interests like personal integrity and patrimony, as well as to collective interests like the general safety and the environment.

This choice is rather connected (i) to the idea of a 'qualification' of other common offences or (ii) of conducts that could be considered as criminally irrelevant, in both cases due to the particular personal elements (*besondere persönliche Merkmale*) of the authors of the actus reus. In the first case, the conduct is at any case criminally relevant as actus reus, but this latter can be considered grosser if committed by the

[47] Cfr. Joecks (nt. 43) 1295-1296; Fischer (nt. 3) 284-285.
[48] Cfr. Rengier (nt. 3) 581-582; Fischer (nt. 3) 2512.

public officials identified by § 11 *StGB*. In the second case, the typed conducts are criminally relevant only if committed by public officials.

4.2. Internal systematic of bribery offences. Analysis of the conducts of the four 'major' offences and the violation of duties

The legal theory, based on the definitions contained in the European Anti-Corruption Convention of 1997, identifies at least two 'axes of coordinates' that can be used to organise and categorise the subject of bribery offences[49]. This scheme can be the initial point for analysing, in the first moment, four bribery offences that can be considered as 'paradigmatic'. Then the other figures of the Title can be examined on the bases of the acquisitions related to them.

a) On one axis, it is possible to consider the modality of obtaining the bribe, namely related to the type of conduct maintained by the person that has an interest in distorting the exercise of administrative power. It is at any case important to take into account that the fact of a public official receiving adjunctive sums of money for his/her work, normally rewarded with a salary, is considered al least as a danger for the impartiality of the public administration, even if the official him/herself does not formally violate his duties. The conducts need to be described differently, depending on the position of the author.

(a1) Some offences can be committed passively: this means, the public official requires a bribe by the private person[50]. This requirement can have very different strength, as many dispositions suggest through using three different verbs: 'demands' (*fordert*), 'makes someone promise' (*sich versprechen läßt*) or 'accepts' (*annimmt*). This means that the public official, even if receiving a salary by the Public administration for the exercise of his/her function, asks for the bribe as an adjunctive consideration (*Gegenleistung*) for the exercise of the office, whether violating duties or not. It is also very different if the public official

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[49] Cfr. Szarek-Mason (nt. 1) 99 ff. About German law, cfr. Claussen-Ostendorf (nt. 3) 28-29; Bannenberg (nt. 3) 17-18.

[50] Cfr. Szarek-Mason (nt. 1) 99; Claussen-Ostendorf (nt. 3) 29.

concludes an illicit contract with the private person, or if the prior puts the latter under pressure.

(a2) Some other offences are committed actively: these are the cases of the private part offering a bribe to the public official[51]. As being bribery a kind of 'illegal' contract, it is in any case necessary that two parts are involved in the corruptive agreement. This cannot lead to forgetting the problem that the public official has a different, formally more authoritative position than the private person, even if we are considering a wealthy and prominent individual or corporation. It s in this frame that the private person activates herself to propose an illegal agreement. For the same reason, however, it is necessary to foresee also the case of a private person put under pressure, that cannot be punished in the same way as a 'contracting' private person.

b) On the other axis, we have to consider whether there is a formal violation of administrative duties or not, this means the contrariety to the obligations that a public official assumes after its appointment.

(b1) A bribery offence can be committed in violation of public service's duties (*mit Verletzung von Dienstpflichten*)[52]. This means that the administrative act released in the context of a fact of bribery violates the administrative principles and norms that regulate the exercise of the administrative power in general, or more specifically regulating the kind of position that the involved public official is entrusted with.

(b2) The bribery offences can also be relevant even if it is not possible to assume a violation of the duties of the service (*ohne Verletzung von Dienstpflichten*), or at least if the fact can be relevant even without this formal violation[53]. As an element that underlines the danger for the activity of the public administration, it remains the fact that the exercise of administrative power is rewarded with payments by one or more private physical or juridical persons. The idea at the base should always be the danger related to the conduct of requiring or accepting bribes for the exercise of duties.

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51 Cfr. Szarek-Mason (nt. 1) 99; Claussen-Ostendorf (nt. 3) 29.

52 Cfr. Claussen-Ostendorf (nt. 3) 29; Bannenberg (nt. 3) 18.

53 Cfr. Claussen-Ostendorf (nt. 3) 29; Bannenberg (nt. 3) 18.

On the base of this scheme, we can now classify at least the four major offences representing the meeting point of the coordinates, following the order of the figures opening the 30th Title of the *Strafgesetzbuch*. All these offences can be classified as *Vergehen* (delicts) and not as *Verbrechen* (crime) because of the lack of a statutory minimum – according to § 12 *StGB* – an offence can be classified as a crime if the statutory minimum is fixed in at least one year[54]. All offences are punished with a statutory maximum of three years, with exception of § 334 (five years).

1) The opening offence of the 30th Title, § 331 *StGB*, named as acceptance of advantages (*Vorteilsannahme*), is an offence of passive bribery (a1) without violation of duties (b2). The Author of the offence is identified in the National or European public official or the person entrusted with public service and requires 'advantages' in exchange for the exercise of his or her duties (*für die Dienstausübung*)[55].

2) The following paragraph, § 332 *StGB*, is entitled *Bestechlichkeit*, which can be translated with corruptibility. This figure crosses passive bribery (a1) with violation of duties (b1): the author of the offence is always the public official or the person entrusted with public service. For the integration of the actus reus, it is necessary that he or she asks a reward to commit a fact that integrates a violation of the duties related to the office (... *daß er eine Diensthandlung vorgenommen hat oder künftig vornehme und dadurch seine Dienstpflichten verletzt hat oder verletzen würde*)[56].

3) The offence that follows, § 333 *StGB*, is the opposite of the previous one. It is the case of *Vorteilsgewährung*, grating advantages, and it is a case of active bribery (a2) without violation of the office's duties (b2), this is the passive version of the *Vorteilsannahme* (§ 331). The offer for the bribe is granted by the private citizen, that as a consideration asks the public official or person entrusted with a public service to commit an act that is legally related to their office (*für die Dienstausübung*)[57].

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54 Cfr. Fischer (nt. 3) 70 ff.; Roxin-Greco (nt. 13) 375 ff.

55 Cfr. Korte, *sub § 331* (nt. 12) 2188; Fischer (nt. 3) 2506-2507.

56 Cfr. Korte, *sub § 332* (nt. 12) 2239 ff.; Fischer (nt. 3) 2526-2527.

57 Cfr. Korte, *sub § 333* (nt. 12) 2258 ff.; Fischer (nt. 3) 2531.

4) The fourth 'major' offence, contained in § 334 comma 1 *StGB*, displays a scheme that can be considered as the 'opposite' of the first offence analysed. Its name, *Besetchung*, is similar to the one of § 332 and represents a case of active corruption (a2) with the offer for the bribe coming from the private person. At the same time, like for the *Bestechlichkeit*, the public official or person entrusted with a public service violates his or her duties or promises to violate them (b1)[58].

The impact that we can have by this first part of the analysis is one of a very rational criminal system for contrasting bribery, that organises the relevant conducts based on exterior and objective elements like those two we identified as the 'axes' of the system, and not – like in the Italian *codice penale*, especially after the reform of 2012 – on more interior elements like the level of pressure exercised by the public official. However, this observation puts the basis for further analysis, intending to understand the object of the exchange and the differences between the relevant conducts.

4.3. The 'compensation' required for the integration of bribery crimes. The case of the arbitrator

In the description of the offences, the German legislator mainly uses the word advantage (*Vorteil*) as an element that conceptualises the exchange between the private person and the public official, or person entrusted with public service. This is to underline that the actus is integrated even if the public official or person entrusted with a public service does not ask for money, credits, contracts[59] or items, that have a certain market value that goes over a criterium of social adequacy – but not integrating the aggravating circumstance of § 335 *StGB* – indicated through the custom or internal regulations of the administration, and that each public official is called to read according to his or her professional ethics[60].

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[58] Cfr. Korte, *sub § 334* (nt. 12) 2269 ff.; Fischer (nt. 3) 2533 ff.

[59] Cfr. von Heintschel-Heinegg (nt. 3) § 331, Rn. 20.

[60] Cfr. Korte, *sub § 333* (nt. 12) 2262-2263; Heine-Eisele (nt. 12) *§ 331*, Rn. 40 about the *Sozialadäquanz*; Fischer (nt. 3) 2513-2514.

Other kinds of non-economic advantages can be also regarded as compensation[61] – like sexual performances[62], or honorary charges – when they can satisfy an immaterial exigence or even a voluptuousness of the public official or person entrusted with public service acting illegally[63].

It is important to emphasise the provision of the possibility that the advantage can be enjoyed also through third persons. It is immediate to think to relatives or friends of the official, but eventually also persons bounded with the corrupted officials by more indirect relationships – e. g. a private creditor of the public official – could become the material receiver of advantages[64]. This provision is necessary to prevent a systematical use of 'figureheads' for receiving bribes and remain unpunished.

4.4. Corruption as an illicit contract. The graduation of the punishment on the strength of the 'influence' exercised by the official or on the degree of freedom of the private person

In each offence of passive corruption, the German legislator describes three conducts maintained by the public official or person entrusted with public service, with different degrees of strength. Correspondently, on the side of the private person, in the offences of active corruption, there conducts define different levels of freedom in offering the advantage or not.

The ratio of those provisions is the idea that corruption can be an 'agreement about an injustice' (*Unrechtsvereinbarung*), becoming similar

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[61] Cfr. Fischer (nt. 3) 2508.

[62] Cfr. Bundesgerichtshof, 6th Criminal chamber, Decision 7.4.2020 – 6 StR 52/20, from the Landgericht Braunschweig, in *juris.bundesgerichtshof.de* – a manager of the Police promised to a subordinate a promotion in change of sexual performances and has been condemned for corruptibility (*Bestechlichkeit*, § 332 *StGB*).

[63] Cfr. von Heintschel-Heinegg (nt. 3) § 331, Rn. 19; Fischer (nt. 3) 2508-2509.

[64] Cfr. von Heintschel-Heinegg (nt. 3) § 331, Rn. 21; Fischer (nt. 3) 2510-2511.

to a contract that has an illicit cause[65]. However, it is not a contract between equal private parts or even between unequal private subjects (e. g. corporation-consumer), but a contract among two subjects, one of them – theoretically – having a public and therefore authoritative position above the other. This latter sometimes has the possibility of choosing to offer the advantage, some other times could be almost constricted by the circumstances. The conducts of both sides need to be analysed.

a) On the side of the public official or person entrusted with a public service, the German legislator uses in §§ 331 and 332 *StGB* a triad, in order from the most serious to the mildest conduct.

The most serious conduct is demanding (*fordern*) the bribe. In this case, the public official is pressing his or her private counterpart, that presumably had originally not any intention of giving the advantage. Considering the position of authority that the public official has, at least formally more authoritative than the private person – even if we are considering a wealthy and prominent individual or corporation – this pressure can have the effect of a constriction[66].

In the middle, there is the conduct of the public official that 'makes the private person promise' (*sich versprechen läßt*) an advantage. The level of pressure is lower – the public official or person entrusted with a special public service accepts a promise, without direct pressing to obtain it – as the public official 'brings' indirectly, and not always voluntarily, the private person to formulate an offer by his or her side. It is possible to think to the case of an official denying an authorisation, being then 'convinced' by the promise of an amount of money. The offer itself, then, is not completely spontaneous but there is at least the space for a choice and, eventually, for setting conditions. The commitment of the private person for giving the advantage is directed to the future, instead of the present. The scheme is, in fact, the one of a contractual declaration of

[65] Cfr. Bannenberg (nt. 3) 20; Dölling (nt. 3) 343; Fischer (nt. 3) 2512 about § 331: 'the agreement about an injustice' should be «Seiner (zumindest angestrebten) Übereinkunft zwischen dem Amtsträger und dem Vorteilsgeber», "in the sense of an agreement (at least seeked) between the official and the briber"; then p. 2527 about § 332.

[66] Cfr. Otto (nt. 3) 539; Heine-Eisele (nt. 12) *§ 331*, Rn. 25; von Heintschel-Heinegg (nt. 3) *§ 331*, Rn. 22; Fischer (nt. 3) 2511.

intent – the *Willenserklärung* of the German private law theory – and does not necessarily require the later fulfilment of the illegal commitment[67].

The acceptation (*Annahme*) of advantages is the weakest form of pressure and the mildest of these three conducts. It consists of a factual acceptation of the material or immaterial good offered by the private counterpart[68]. On one side, it is evident that the level of pressure exercised by the public official is very low or even absent, as the advantage is spontaneously offered by the private person. On the other side, it is possible to observe that the fulfilment of the illegal contract is contextual with the 'declaration of intent'[69]. This suggests how the factual exchange of goods is not a central matter of the bribery crimes: at the contrary, it is fundamental the idea of a public official or person entrusted with a public service distorting his or her exercise of power in the expectation of a good that goes beyond his public-contractual salary.

b) Also the conducts of the private person and 'advantage giver' (*Vorteilsgeber*) are organised, in the §§ 333 and 334 *StGB*, in a triad that according to some Authors sounds somehow specular to that one foreseen for the public official or person entrusted with public service[70]. However, constrictive conducts are not foreseen and the public official has the full possibility of not accepting the 'negotiation' with the private person; this means, in our opinion, that the parallelism cannot be considered as perfect. The 'climax' adopted by the legislator is the opposite of the one in §§ 331 and 332, from the mildest to the most serious conduct.

The first conduct, the offering (*anbietet*) of advantages, indicates the beginning of a negotiation that is still at the stage of a declaration on one side, brought to the knowledge of the public official. It is important to underline that, at this level, it is still possible to assume that the public official him/herself could not accept any further contact with the

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[67] Cfr. Otto (nt. 3) 539; Heine-Eisele (nt. 12) *§ 331*, Rn. 26; von Heintschel-Heinegg (nt. 3) *§ 331*, Rn. 23; Fischer (nt. 3) 2511.

[68] Cfr. Otto (nt. 3) 539; Fischer (nt. 3) 2511.

[69] Cfr. Heine-Eisele (nt. 12) § 331, Rn. 26; von Heintschel-Heinegg (nt. 3) *§ 331*, Rn. 23.

[70] Cfr. Fischer (nt. 3) 2530: «Die Tathandlungen entsprechen denen des § 331 spiegelblidlich».

counterpart[71]. According to some Authors, there is a correspondence between offering on the side of the giver and demanding on the side of the pubic official or person entrusted with special public service[72], as the offer should be a quasi-passive response to pressure. We share the view of these authors that find this correspondence reductive, as the offer can be an independent initiative of the giver[73].

Already the promising (*verspricht*) of advantages is a step forward towards the conclusion of an 'agreement about an injustice'. It is discussed, on one side, if this moment of the negotiation necessarily involves the conclusion of the agreement – *Vereinbarung*, or the *sich versprechen lassen* we already analysed on the side of the official – with the acceptation of the promise by the receiver of the advantage, with eventually only the transfer (*Übergabe*) to be done[74]. On the other side, it is assumed that the promise is still a unilateral declaration of intent, enforced in comparison with the offering by a more concrete identification of the advantage that could be granted in a second moment, and that can be accepted as a promise, or not. We share this second point of view, as we think that a promise of advantages does not need a correspondence with an acceptation[75] and that nothing would differentiate a promise by an offer if it would be only a unilateral declaration. This would also mean that only concluded agreements of injustice could be punished.

At the end of the scale, granting advantages (*gewährt*) indicates that an agreement has been reached and concluded with the coincidence of two 'contractual' wills (*Willensübereinstimmung*) and also the transfer (*Übergabe*) has been ensured. This transfer can be effected by the giver personally or through third persons[76]. The same authors assuming the specular correspondence between the three conducts affirm that granting by the giver is to read as a strict *pendànt* with the acceptation

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71 Cfr. Korte, *sub § 333* (nt. 12) 2259; Fischer (nt. 3) 2530.

72 Cfr. Heine-Eisele (nt. 12) *§ 331*, Rn. 3.

73 Cfr. Korte, *sub § 333* (nt. 12) 2259.

74 This is *inter alios* the position of Fischer (nt. 3) 2530, but also of Heine-Eisele (nt. 12) *§ 331*, Rn. 3 and von Heintschel-Heinegg (nt. 3) *§ 333*, Rn. 2, that postulate the strict corrensponde among *versprechen* und *sich versprechen lassen*.

75 Cfr. Korte, *sub §§ 333* (nt. 12) 2260.

76 Cfr. Korte, *sub §§ 333* (nt. 12) 2260-2261; Fischer (nt. 3) 2530.

by the receiver[77]. If this is the only conduct that effectively requires correspondence with the receiving of the public official, we do not share the view of a strict correspondence with the simple acceptation, as the grant could have been urged by the public official or person entrusted with a special public service.

c) On both sides, it is possible to observe that all the graduated conducts are at any case "unified" in the same figures and not divided, like in the Italian *codice penale*, in two (until 2012) or three different offences. In our opinion, this conformation of the actus reus helps the judge, at the same time, in not doubting the provision that has to be applied to the concrete case and, consequently, to graduate differently the judgement about the conducts of both parts without having the problem of choosing among different accuses.

Moreover, the 'imperfect parallelism' among the two triads of conducts gives to both parts the opportunity of denouncing unilateral attempts of corruption, on one side, or undue pressures, on the other. A public official could be effectively interested in demonstrating his or her loyalty to the function by denouncing an offer of a bribe he or she did not accept, as well as the private person has a better possibility of proving his or her innocence after an undue consideration by demonstrating that he or she acted under direct or indirect pressures towards obtaining an administrative act he or she had right to.

As we already stated, the result seems to be a highly rational system of criminal contrast to the corruption in the public administration. It is, in our opinion, more rational of the 'unpacking' in different offences of the different levels of pressure exercised by the public official or person entrusted with a special public service, like the tripartition between concussion (*concussione*), undue induction (*induzione indebita*) and corruption (*corruzione*) adopted by the Italian *codice penale*. On this base, we will formulate our conclusions.

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[77] Cfr. Fischer (nt. 3) 2530; Heine-Eisele (nt. 12) *§ 331*, Rn. 3; von Heintschel-Heinegg (nt. 3) *§ 333*, Rn. 2.

4.5. The legal provisions completing the system of the criminal response to bribery in the StGB

The system is then closed by five further norms – one of them is the § 335a already analysed – that in some way 'strengthen' the effects of these four major norms: to the §§ 335-337, it is also necessary to add the offence foreseen by § 357 *StGB*. Besides those five norms, it is useful at least to mention the abolished § 338 *StGB* about the confiscation of the profit related to bribery. This abolition is part of a general policy that broadens the systematic role of confiscation[78]. Now the discipline of § 73d *StGB* about the enlarged confiscation (*erweiteter Verfall*) is applicable[79].

(i) First of all, it is useful to analyse § 335 *StGB*. This figure contains some specific aggravating circumstances for §§ 332 and 334 *StGB*, this means for the offences that foresee a violation of duties. The elements of the actus reus that aggravate the punishment for those bribery figures (comma 2) can be related:

– to the dimension of the advantage (n. 1), to be parametrized on the base of the act or omission required to the public official or person entrusted with public service; this means, there is not a certain sum above which the advantage becomes particularly relevant[80];

– to the acceptance of advantages in many different "instalments" (n. 2), at least three: this case suggests a public official or person entrusted with a public service having a "parallel employment" by his or her corruptor[81];

– to quasi-professional or associative conduct of the public official or person entrusted with public service: this gives the idea of a person acting in its private interest, or even in the interest of groups of people –

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78 Cfr. the Act for the reform of the criminal confiscation of 13.4.2017, *Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*, in *Bundesgesetzblatt*, part I n. 22 (2017) 872 ff.

79 Cfr. von Heintschel-Heinegg (nt. 3) § 338, Rn. 3.

80 Cfr. Korte, *sub §§ 334* (nt. 12) 2284-2285; Fischer (nt. 3) 2535.

81 Cfr. Korte, *sub §§ 334* (nt. 12) 2285-2286; Fischer (nt. 3) 2535-2536.

even criminals (*eine*[*r*] *Bande*) – whose interest could conflict with the collective interest that the public administration should serve[82].

The technique for aggravating the punishment is the elevation of the statutory minimum, up to two years. This circumstance does not affect the classification between *Verbrechen* and *Vergehen* (§ 12 comma 3 *StGB*)[83] but restricts the possibility of a "clement" judgement.

(ii)-(iii) After the already analysed § 335a, § 336 foresees an equivalence clause among the commitment to active conduct and the one to omissive conduct – since the word used is *Diensthandlung* instead of *Dienstausübung* – by the public official or person entrusted with public service[84]. This clause is useful because the bribery facts that are punished do not necessarily need an event that has to be avoided to be integrated like in the case of § 13 *StGB*, as they are – concerning the legal good of the correct and efficient functioning of the public administration – abstract danger offences (*abstrakte Gefährdungsdelikte*) based on promises that, as we already stated, do not need to be fulfilled[85].

(iv) As we affirmed in the analysis of the relevant qualifications for the bribery crimes, the arbitrators (*Schiedsrichter*) cannot be equalised to the judges, even if their work is solving cases. They do not belong to the judiciary system or the public administration in general and have to be encharged with a case through a specific contract. Moreover, they are often private professionals, particularly lawyers, working for private organisms in the form of legal firms, professional associations or corporations.

However, their activity gains a public relevance through the arbitration award (*Schiedspruch*), that in many judiciary systems – also the German one – can substitute the Court's decision in the lower instances and can be directly appealed[86]. For these reasons, § 337 *StGB*, which extends the relevance of the conducts of bribery to the acts committed by the

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[82] Cfr. Korte, *sub § 334* (nt. 12) 2286; Fischer (nt. 3) 2536.

[83] Cfr. Fischer (nt. 3) 72.

[84] Cfr. Fischer (nt. 3) 2539.

[85] Cfr. Geerds (nt. 3) 72; Otto (nt. 3) 537: «... auch das (vergangene oder künftige) Unterlassen der Handlung gleichsteht».

[86] Cfr. the German Civil Procedure Ordonnance, *Zivilprozessordnung* (*ZPO*) §§ 1029 ff.

arbitrators, does not just foresee a simple subjective extension, like § 335a *StGB*.

As the arbitrators are normally paid by the parts of their quasi-trials for their quasi-judiciary work[87], it is necessary to characterise their conduct in a way that indicates a distortion of the exercise of their mandate. It is then necessary to identify those judges as accepting benefits and disadvantaging the counterpart of their briber "behind their back", *hinter dem Rücken*[88].

(v) The system of the punished conducts is closed by the norm of § 357 *StGB*, containing the offence of "inveiglement of a subordinate into an offence" (*Verleitung eines Untergebenen zu einer Straftat*). The legal provision contains, in fact, at least three different conducts[89]:

- the direct inveiglement, when the superior presently presses the subordinate to the commission of an offence ("*Ein Vorgesetzter, welcher seine Untergebenen zu einer rechtswidrigen Tat im Amt verleitet …*");
- the indirect or future inveiglement, when the superior undertakes to press the subordinate to the commission ("… *oder zu verleiten unternimmt …*");
- the omissive or conniving inveiglement[90], when the superior, despite his or her powers, does not obstacle a subordinate committing an offence and lets him or her complete the anti-juridical conduct ("… *oder eine solche rechtswidrige Tat seiner Untergebenen geschehen läßt …*").

The second comma of the legal provision extends the criminal liability to the subjects that receive a delegation by the superior for the functions of vigilance (*Aufsicht*) and control or surveillance (*Kontrolle*) over the subordinates. Both concepts are meaningful, in the language of German criminal law. In particular, the second one postulates also in

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[87] Cfr. Otto (nt. 3) 537: «… stellt klar, dass der sich gegen beide Parteien richtende Vergütungsanspruch des Schiedsrichters nicht als Vorteil i. S. der §§ 331-334 anzusehen ist». See more *supra* § 4.4 of this contribution.

[88] Cfr. von Heintschel-Heinegg (nt. 3) *§ 337*.

[89] Cfr. R. Schmitz, *sub § 357 StGB*, in *MüKo-5* (nt. 3) 2545-2546; Fischer (nt. 3) 2592.

[90] Cfr. Fischer (nt. 3) 2592: «Konnivenz».

the public administration the presence of a specific guarantor position (*Garantenstellung*), usually applied to corporate entities, consisting of the duty of preventing danger to 'external' legal goods, in this case, the offences committed by the subordinate. The 'vigilance' describes a weaker position, consisting of the possibility of reporting to a superior that can act to prevent offences[91].

In both cases, the punishment is measured on the offence committed by the subordinate him or herself, as it is considered the essential role of the superior in determining the agent to the crime or in not diverting him or her by a manifest purpose in this sense.

The *ratio* of this provision appears quite similar to the one of § 336 *StGB*. Yet in fact the general part of the *Strafgesetzbuch* foresees the legal institution of the *respondeat superior* or vicarious liability at § 14 (*Handeln für einen anderen*, to act for another person), as well as the commission of a fact through another person (§ 25 on the authorship, *Täterschaft*) and the commission of an offence through the omission of due conduct (§ 13 *StGB*, *Begehen durch Unterlassen*).

It could be possible to affirm that the active conducts 'synthesise' the content of those provisions and adapt it to the peculiar situation of hierarchic offices, where the superior has juridical and – even more important – publicistic powers of imposing conducts and assignments to the subordinates. In such a context, it would probably be inappropriate to just apply general clauses that are mainly foreseen for corporative environments.

5. The recent reform about private corruption: some observations

The importance of combating those corruptive phenomena that affect not only the correct and efficient functioning of the public administration but also the regular functioning of market and competition in the private sector – recognising also this element of the reality as an object

[91] About the guarantor positions, cfr. C. Roxin, *Strafrecht Allgemeiner Teil. Band II – Besondere Erscheinungsformen der Straftat*, München 2006, 712 ff.; Fischer (nt. 3) 96 ff., particularly 110-111.

of juridical protection, this means as legal goods – is still quite recent. It is in any case very important in every legal system that balances the aspect of a welfare State together with a dimension of a liberal State that encourages, protects and regulates the free market, productive activities and investments[92].

The environment of private corruption is thus the sector of private entities as corporations, this means organised structures that are oriented to the production of material goods or in providing 'immaterial' services – like e. g. financial advice – and that need, to this purpose, to manage corporate patrimonies and material items that can be summed up in the firm, on one side, and a multi-personal company – associates and employees – on the other[93].

These persons should physiologically be bound to the corporate scopes, as they assume an obligation to this aim. But some of them could act against the corporation if the advantages related to this infidelity overcome the income related to the association or employment to the corporation[94].

Being the legal good and the economic and legal sector different, it is of course necessary to foresee different subjective profiles as receiver of the advantages of corruption. The role of the public officials or persons entrusted with public service is then assigned to the corporate officers, individuated as "employees" (*Angestellte*) or "agents" (*Beauftragte*). The first position indicates all those persons that have an employment contract with the corporation, mainly those that influence the policies and the business of the corporation. The second position is related to external professionals that receive a mandate to realise some corporate interests[95].

It is possible to observe that the structure of the subsector of the *StGB* dedicated to private corruption closely reflects the more traditional sector of the offences in the office. The legal provision of the § 299 'sums up' in

[92] Cfr. Tiedemann (nt. 17) 138-139; von Heintschel-Heinegg (nt. 3) *§ 299*, Rn. 5-9.

[93] Cfr. Tiedemann (nt. 17) 140-141; von Heintschel-Heinegg (nt. 3) *§ 299*, Rn. 17-30.

[94] Cfr. Tiedemann (nt. 17) 143.

[95] Cfr. Tiedemann (nt. 17) 141.

two different commas all the four legal provisions of §§ from 331 to 334, by foreseeing, on one side, the punishment of passive corruption in case of demanding, making someone promise and accepting advantages; on the other side, the punishment of active corruption in case of an offering, promising and granting advantages[96].

Those agreements, that can advantage other corporations or damage the company the receiver is acting for, represent a danger for the company itself and a correct and loyal competition in the economic system as a whole. In this measure, the parallelism with corruption appears to be very centred: the 'agreement of injustice' between the giver and the receiver of the advantages, based on private illicit aims, endangers an entire system of interests protected by the law[97].

6. The "mixed" focus on corruption in the healthcare system: some observations

The norms focused on the corruption in the healthcare system are a peculiarity of the German *Strafgesetzbuch*. The German healthcare system is not the only one in Europe based on a cooperation between the public and private sector, but not many other legislators gave a similar relevance to this peculiar form of corruption within the criminal code.

It is in effect decisive, in such a mixed system, to carefully regulate the competition among different healthcare services and to prevent all those offensive conducts that could bring some professionals in accepting exchanges with subjects that could offer them huge advantages – like e. g. pharmaceutical corporations – in the change of accepting some kind of 'performances' and therapeutic decisions that could damage the individual health of patients and the correct, efficient and transparent functioning of the economic and administrative system below healthcare[98].

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[96] Cfr. Tiedemann (nt. 17) 142; von Heintschel-Heinegg (nt. 3) *§ 299*, Rn. 37-44.

[97] Cfr. Tiedemann (nt. 17) 144 ff.

[98] Cfr. von Heintschel-Heinegg (nt. 3) *§ 299a*, Rn. 1-9; Fischer (nt. 3) 2280-2283.

It is then important to avoid the maximisation of profits through such conducts, that also in the view of the medical ethics are judged unethical, and that in a juridical perspective could offend fundamental (meta)-individual and superindividual legal goods.

With these aims, both legal provisions of §§ 299a and 299b *StGB* 'specialise' the elements of the offences in the exercise of an office, especially under two profiles.

(i) The first one is the identifications of the categories under whose colours the offences could be committed. Corruption is confirmed to be a 'particular' criminal conduct (*Sonderdelikt*) whose 'officials' are "persons belonging to a healthcare profession that requires for its exercise an education regulated by the State": this is surely the case of medical doctors, but also many other subjective figures like nurses, physiotherapists etc., that, according to German law, do not need to graduate at a university but that have nonetheless to attend preparatory courses that are strictly regulated, to assure that each professional has a minimum standard of competences[99].

(ii) The second one can be identified in the objects of the conducts. As these latter are almost the same as the public bribery and private corruption crimes – demanding, making (someone) promise and accepting on the passive side; offering, promising and granting on the active side – the distinction should focus on the 'contractual object' of the 'agreement of injustice'. This is reconducted into the field of healthcare and imposes an integration of the three conducts recalled. There are three possible objects of corruptive offences in the healthcare system: prescribing to the patients, buying for a healthcare structure or directly applying for therapeutical purposes pharmaceutical products or research materials[100].

These offences cannot be applied to those legal systems based on public healthcare, but they witness in any case the validity of a model of

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[99] Cfr. von Heintschel-Heinegg (nt. 3) *§ 299a*, Rn. 13-15; Fischer (nt. 3) 2283.

[100] Cfr. von Heintschel-Heinegg (nt. 3) *§ 299a*, Rn. 16-28b; Id. (nt. 3) *§ 299b*, Rn. 1-4; Fischer (nt. 3) 2283-2284.

gathering the three different levels of pressure in a unitary offence. This is the model that will help us in identifying a possible conclusion.

7. Final observations and de jure condendo perspectives

It is now the moment for summing up the lesson that can derive from the German legal system for the contrast against corruption. It is quite obvious to observe that a 'perfect' legal system does not exist, but the observation of the strengths and even of the weaknesses of the system can contribute to exposing some proposals for the future developments of the National and European law.

On one side, the position of the public bribery offences seems to be excessively 'postponed' in the system of the German *StGB*, being also separated by the remaining part of the offences against public legal goods. It is almost the opposite of the Italian *codice penale*, where the same offences are among the first ones in the Special Part because of the importance that the legislator of 1930 gave to the sphere of public life, also in comparison with some central 'private' legal good like life and integrity.

However, assuming a correlation between the 'ideological' importance recognised to the collocation of the thematic groups of offences – the 'Titles'– and the political criminal 'priority' recognised to the legal good[101], it is our convincement that public corruption should at any case gain a very high 'position' in the organisation of criminal codes. This idea should no more be related to a quasi-sacred conception of the State and the public sphere, but to the importance that the functioning of a public administration at any case has in the view of the social life and the economic development. Since the figures of private corruption are in any case 'derivates' of the public ones: for this reason, it is also correct that the offences of public bribery anticipate the other ones.

On the other side, for every other element of the system that we analysed, the 'lesson' of the German *StGB* appears to be particularly

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[101] Cfr. F. Mantovani, *Diritto penale. Parte Generale*, Padova 2015[9], 201; C. Fiore-S. Fiore, *Diritto penale. Parte Generale*, Torino 2016[5], 180; D. Pulitanò, *Diritto penale*, Torino 2015[6], 122-124.

interesting. These system witnesses that it is not necessary to divide the offences on the base of the level of pressure exercised by the public official, as it happens in the Italian *codice penale*, but that it is rather possible to gather those different levels of pressure in unitary offences. In the view of judging such similar conducts, whose difference is not entirely objective and appears related also to the singularity of each negotiation, it is surely more rational the application of the same legal frame[102].

For an eventual subdivision of the bribery offences, we think it is preferable to use a distinction between conducts whose difference is based on elements that appear objectively measurable yet based on administrative law, like the violation of duties or not, and on the base of the 'contractual side' of the subjects that conclude the 'agreement of injustice'.

The German model probably indicates a way that could be successfully implemented at the level of the European Union, to provide some rational and efficient contrast to a phenomenon that is transversally present all over Europe, but that can be more efficiently contrasted in those legal systems that rationalise the legal provisions instead of 'spreading' them.

[102] Cfr. F. Rippa, *L'induzione del pubblico agente. Un'indagine fra tradizione giuridica e nuovi modelli normativi*, Rome 2020, 442 ff.

Bojan Vlaški*

The Anti-Corruption Policies in Bosnia and Herzegovina – Administrative-Legal Perspective

1. Introduction

Corruption is a widespread phenomenon and there is no country in the world that is immune to corruption. Moreover, corruption is a very dangerous like a 'virus' (similar to COVID-19) that threatens to public budgets, economy, social welfare, as well as overall development of contemporary society. According to calculations by the World Bank, every person in the world loses an average of 7% of their wages due to corruption and its consequences. Some estimations from 2017 show that each EU citizen lost 350 euros per year because of corruption. Systemic corruption decreases investments as it creates so called tax on investments in the form of bribes that make the investments more expensive. Moreover, systemic corruption erodes the population's confidence in the state, which can result in decisions of citizens to passivize and vote with their feet (leave their homeland and live abroad). Finally, systemic corruption can produce social unrest or armed conflicts, with devastating human and economic consequences.

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If you look at the Corruption Perceptions Index (hereinafter: CPI)[1], created by the Transparency International in order to measure public sector corruption worldwide, you will notice that even the most developed countries are vulnerable to corruption, although the level of corruption in these countries is by far smaller than in less developed countries. Level of corruption in some of less developed countries is so high that they can be labeled as kleptocracies, which means governments of thieves. Bosnia and Herzegovina (hereinafter: BiH) is ranked 101 among 198 countries and it is in the middle of this global corruption survey, with its position worsened by 12 places since the previous survey, which is the worst score since 2012, when the CPI is based on the existing methodology, thus ranking among the countries that globally they are continuing to decline the most. Although countries that are ranked high by the Transparency International are less vulnerable to so called internal corruption, some of their government officials and companies tend to 'export' corruption at the cost of less developed countries in which they invest they capital or exploit their natural resources. Some of them pay billions of bribes to government officials in less developed countries in order to realize their geopolitical or business interests there and gain high profits. That means that corruption is a truly global challenge and any successful response to it has to be also global.

In this paper, I will thoroughly explain preventive and repressive anti-corruption mechanisms in BiH from the perspective of public law and especially administrative law. The first chapter introduces the general insight to the problem of corruption and the structure of Anti-Corruption system in BiH. The second chapter is completely devoted to the anti-corruption policies and regulations at the level of BiH, while the subject of the third chapter are anti-corruption policies at the level of entities – Republic of Srpska (hereinafter: RS) and the Federation of Bosnia and Herzegovina (hereinafter: FBiH), as well as anti-corruption system in Brcko District of Bosnia and Herzegovina (hereinafter: BD BiH). Finally, in the fourth chapter the positive and negative aspects of anti-corruption policies at all levels of government in BiH are analyzed and discussed. In

[1] *Corruption Perceptions Index* (https://www.transparency.org/en/cpi, accessed on 21st of December 2020).

conclusion, I try to identify good elements of anti-corruption system in BiH and give some suggestions for its future development.

2. Corruption as an object of the Anti-corruption system in Bosnia and Herzegovina

Although no generally accepted definition of corruption has emerged, the most widely used definition of political corruption is the one that consider corruption as a «misuse of public office for private gain», although there are a number of problems associated with this definition[2]. According to Article 2 of the Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption[3]: «Corruption means any abuse of power entrusted to a public official or a person in a political position at the state, entity, cantonal level, the level of BD BiH, the city or municipal level, which may lead to private gain. Corruption may in particular include the direct or indirect solicitation, offering, giving or accepting of bribes or any other undue advantage or possibility thereof, which impairs the proper performance of any duty or conduct expected of the recipient of the bribe».

Another definition of corruption in BiH is given in the BiH Strategy for the fight against corruption 2015-2019[4]: «Corruption is any abuse of power entrusted to a civil servant, employee, advisor, elected or appointed official, which may lead to the private benefit of that person, domestic or foreign natural or legal person. Corruption may in particular include the direct or indirect solicitation, offering, giving or acceptance of a bribe or any other undue advantage or its possibility, thereby undermining the proper performance of any duty or conduct expected of the recipient of the bribe. Corruption is also a violation of the law, other regulations,

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[2] O. Kurer, *Definitions of Corruption*, in *Routledge Handbook of Political Corruption,* ed. P. M. Heywood, London 2015 (https://www.routledgehandbooks.com/doi/10.4324/9781315739175.ch2, accessed on 4th of January 2021).

[3] *Official Gazette of BiH* 103 (2009) and 58 (2013).

[4] *Strategy for the fight against corruption 2015-2019* (http://www.apik.ba/zakoni-i-drugi-akti/strategije/default.aspx?id=412&langTag=bs-BA, accessed on 4th of January 2021).

as well as irregularities in work and fraud that indicate the existence of corruption».

We can simply define corruption as an "abuse of entrusted power for private gain". There are different classifications of corruption, such as the following that differentiates: 1) Corruption in public sector and 2) Corruption in private sector; as well as another one on: 1) Grand corruption, 2) Petty corruption and 3) Political corruption.

Apart to being a widespread phenomenon, corruption is historically rooted phenomenon. According to PhD dissertation entitled *Development of spiritual life in Bosnia under the influence of Turkish rule*, written by ex-Yugoslavian only Nobel Prize Winner – Ivo Andrić – corruption in BiH was so widespread that it created mistrust towards the Ottoman State by its citizens and indifference towards the common good[5]. As an example of the corruption under Ottomans, Andrić mentions the case of Franciscan Kreševo Monastery, which was burnt in 1765. The cost of its rebuilt was 3.313 groats (medieval coins), but Franciscans also had an enormous cost of 8.973 groats to corrupt Ottoman and local officials in order to gain permissions to rebuild the Monastery[6].

Corruption is also socially entrenched. We can witness corruption in everyday life. These are examples of citizen's interactions with the police or inspection bodies, the use of healthcare services, higher education system, court system and local community services. On the one side there are enormous levels of corruption in contemporary world, on the other side there is a lack of prosecuted cases and very few convictions for corruptive behavior. This is particularly the case in BiH as it has been stated by the European Union in its Reports on European integration process of BiH[7]. Overall, corruption in BiH is linked to

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[5] I. Andrić, *Razvoj duhovnog života u Bosni pod uticajem turske vladavine (Development of spiritual life in Bosnia under the influence of Turkish rule)*, Beograd 1995, 49-50.

[6] Andrić (nt. 5) 39-40.

[7] According to the EU Report on European Integration Process of BiH from 2020 – BiH is at an early stage has some level of preparation in the fight against corruption. No progress was made in addressing the Opinion key priority 7 and 2019 recommendations, which remain outstanding. The authorities and the judiciary have not taken action to address the findings of the Expert Report on Rule of Law issues

public procurement, obtaining licenses to operate in the health, energy and transport sectors, infrastructure and education. Corruption is also present in the private sector. Research on corruption in BiH shows that most of this type of crime takes place through the abuse of power in the public sector in the interaction between the public sector, on the one hand, and the private sector or citizens on the other. Due to the weakness and insufficient competitiveness of the economy in BiH, the deals concluded with the authorities are of disproportionate importance for the financial operations and sustainability of many parts of the private sector, which motivates corrupt behavior.

Having all this in mind, since the end of the 20th century, various mechanisms to fight corruption have been created by the governments, international organizations, private entities and NGOs. Some of these mechanisms are basically repressive, such as mechanisms of criminal law and criminal procedural law, although these fields of law are also familiar with some preventive measures. These legal fields regulate criminal offences related to specific forms of corruptive behavior, prescribe criminal procedural measures that are applied by the police and prosecutors in order to reveal and process corruptive behavior and set sanctions that are adopted by the courts for such behavior. Other mechanisms are preventive in their substance, such as mechanisms inherent to public law and in particular to administrative law. Therefore, corruption is not just a form of illegal conduct, nor can activities to oppose it be reduced to criminal legal sanctions.

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on the fight against corruption. Corruption remained widespread and all levels of government show signs of political capture directly affecting the daily life of citizens. There has been no progress on effective implementation of anti-corruption strategies and action plans. Lack of harmonization of legislation across the country and weak institutional cooperation and coordination continued to hamper the fight against corruption. The track record on prevention and repression of high-level corruption remains very limited, due to operational inefficiency and political interference. The authorities need to ensure appropriate legislative and institutional follow-up to the outstanding GRECO recommendations, notably on political party financing and conflict of interest. *Bosnia and Herzegovina 2020 Report* (https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia_and_herzegovina_report_2020.pdf, accessed on 2nd of January 2021).

It is important to notice that preventive anti-corruption mechanisms do not have a long tradition in the legal system of BiH. In former Yugoslavia, dominant anti-corruption mechanisms were repressive ones, as it was ideologically unacceptable to recognize the existence of corruption in the public sector and create preventive measures to fight it. Similar situation remained in BiH after the end of the Civil war (1992-1995), up until the adoption of the Law on Conflict of Interest in Government Institutions of BiH from 2002 and particularly the Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption from 2009. These laws became a cornerstones of anti-corruption preventive system at the level of BiH, although there are other legal and political acts that have been adopted in the entities, cantons and BD BiH[8]. The first Strategy to fight organized crime and the corruption was adopted by the Parliamentary Assembly of BiH in June 2006, for the period from 2006 until 2009. Implementation of part of the Strategy for fight against organized crime and corruption 2006-2009, which refers to corruption, has shown very limited results. Insufficient implementation of the legal framework and problems in inter-entity coordination were a problem of the first decade of the 21st century and those problems continued to exist during the last ten years.

Anti-corruption policies in BiH are formulated at four levels of government and they are influenced by the constitutional system and particularly by the division of competences between BiH and entities, including the existence of BD BiH. The Constitution of BiH explicitly states all competences of the institutions of BiH, while all other competences belong to entities (Article III, 3.a). The Constitution of BiH obviously do not accept the doctrine of implied powers, because competences of BiH institutions must be explicitly regulated by the Constitution[9]. Therefore, we can distinguish anti-corruption policies

[8] It is important to bear in mind that BiH is a member state of the GRECO and part of the Stabilization Pact Anti-Corruption Initiative.

[9] The doctrine of "tacit authority" was developed by the US Supreme Court, starting with the famous decision of *McCulloch v. Maryland*, 17 U.S. 316 (1819), relying on the clause in Article 1, Section 8 of the US Constitution, according to which the US Congress is competent «to enact all laws necessary and appropriate for the exercise of the given powers (...)», which enables the federal government to expand

at the level of institutions of BiH on the one side and at the level of entities – the RS and the FBiH on the other side. Having in mind that the FBiH consists of ten federal units – cantons, in this entity anti-corruption policies are also formulated and implemented at the level of cantons. Finally, BD BiH as a local self-government unit that represents a condominium between two entities under sovereignty of BiH has created its own anti-corruption regulations.

Apart from legal acts and policies whose main subject is prevention of corruptive behavior, there are also other legal acts, adopted at all levels of government in BiH, which contain preventive anti-corruption measures. Some of these laws are: the Law on public procurements, the Law on the system of indirect taxing, laws on freedom of access to information, Electoral law, laws on financing of political parties etc. In the context of public administration, particularly important are legal norms contained in laws on civil servants at all levels of government, then codes of conduct for civil servants, as well as regulations on administrative inspections. Although these laws should be important puzzles of anti-corruption mosaic in BiH, ambiguous legal norms in these laws as well as in many

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its powers. Moreover, although this possibility was later limited by Amendment X to the US Constitution, which stipulates that «powers that are not delegated by the Constitution to the United States, nor are they prohibited by states, are reserved for states, i.e. the people», the doctrine of tacit powers was used in the future, whereas in the text of Amendment X the word 'explicitly' is omitted. In this regard, Judge Marshall considered that an extension of U.S. jurisdiction was possible because the word 'explicitly' was omitted from the text of the U.S. Constitution (17 U.S. 406). Unlike the 1789 U.S. Constitution, the Articles of Confederation and Perpetual Union of 1777 provided in Article II that «Each State shall retain its sovereignty, freedom, and independence, and all powers, jurisdiction and law, which this confederation did not *explicitly* (italics – BV) delegate to the United States gathered in Congress». Given that Article 3, 3.a of the BiH Constitution contains the term 'explicitly', the application of the doctrine of tacit powers in BiH is inappropriate and unconstitutional. See Ђ. Тасић (Dj. Tasić), Прилог *питању о техници поделе надлежности у савезним државама – теорија о 'прећутним властима' и колизија надлежности (A Contribution to the Question of the Technique of Division of Competences in Federal States – The Theory of 'Silent Authorities' and the Collision of Competences*), in *Архив за правне и друштвене науке (Archive for Legal and Social Sciences)* 5 (1939) 387 ff.

bylaws provide a fertile soil for corruption – take the Law on public procurements as an example.

The anti-corruption system in BiH is based on adequate prerequisites: 1) normative (legal and political acts), 2) institutional and 3) social.

Normatively, we can distinguish two types of acts on which the anticorruption system in BiH is based on – legal acts and political acts. There are two kinds of legal acts that represent basis for the anticorruption system – the anticorruption acts in narrow sense and the anticorruption acts in wider sense. These acts are legal sources of public law, predominantly criminal law and administrative law. Due to the existence of several levels of government, the normative framework for the fight against corruption in BiH is complex, because there are a large number of laws at all levels of government that regulate this area, in which, in addition to the Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption. These laws regulate, for example: public procurement; conflict of interest; financing of political parties; free access to public information; election processes; prevention of money laundering; protection of persons who report corruption.

In addition to the laws, the fight against corruption at various levels of government in BiH is determined by existing or future anti-corruption strategies and action plans for their implementation, which based on the Law on the Agency should be in accordance with the general principles set out in the Strategy.

Due to the existence of a large number of institutions with competencies at the appropriate level of government, the institutional framework for the fight against corruption in BiH is also complex and includes the following institutions: Parliamentary Assembly of BiH; Council of Ministers of BiH and other institutions at the level of BiH; Agency for Prevention of Corruption and Coordination of the Fight against Corruption; Anti-corruption bodies at the level of entities (RS and FBiH), BD BiH and cantons in FBiH; Parliament of the FBiH and the National Assembly of the RS; Entity governments and institutions; Assembly of BD BiH; Government and institutions of BD BiH; Legislative bodies of the cantons; Cantonal governments and institutions; Public companies and institutions in BiH.

Out of a total of 146 local self-government units, 83 stated that they have certain commissions/bodies whose competencies are related to the prevention of corruption, while 63 stated that they do not have commissions/bodies with such a description of work.

All other segments of society that are, or should be, interested in reducing the harmful effects of corruption have a very important role in the fight against corruption and in wider sense can be regarded as parts of Anti-corruption system in BiH. Those are: Political parties; Private sector and other forms of its association; the media; Universities and other academic and educational institutions; Associations and civil society organizations; Citizens.

A successful fight against corruption requires, as far as possible, a higher level of cooperation and coordination between all these institutions and social actors, and their role in this process is discussed in more detail in the relevant strategic objectives of the Strategy for the fight against corruption 2015-2019.

3. Anti-corruption policies and regulations at the level of Bosnia and Herzegovina

Having in mind the subject of this paper, in this chapter are discussed only anti-corruption regulations that are considered as sources of public law and administrative law, excluding sources of criminal law – material and procedural. Among the legal acts that regulate anticorruption in narrow sense at the level of BiH, can be considered various laws and bylaws[10], such as: 1) Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption, *Official Gazette of BiH* 103 (2009) and 58 (2013); 2) Law on Protection of Persons

[10] Some of the bylaws are: Rulebook on the procedure, manner of recording the delivery and storage of received gifts whose value exceeds 200.00 KM, *Official Gazette of BiH* 95 (2008); Decision on the Form, Content and Title of the Personal Data Form of Elected Officials, Holders of Executive Functions and Advisors, *Official Gazette of BiH* 93 (2012); Rules of Procedure of the Commission for Deciding on Conflict of Interest, *Official Gazette of BiH* 51 (2014); Rulebook on Procedure, *Official Gazette of BiH* 56 (2014); Rulebook on the Manner of Keeping the Register, *Official Gazette of BiH* 56 (2014).

Reporting Corruption in the Institutions of BiH, *Official Gazette of BiH* 100 (2013); 3) Law on Conflict of Interest in Government Institutions of BiH, *Official Gazette of BiH* 13 (2002), 14 (2003), 63 (2008), 18 (2012), 87 (2013) and 41 (2016) (Law prescribed by the High Representative for BiH), Law on Conflict of Interest in Government Institutions of BiH, *Official Gazette of BiH* 16 (2002) and 12 (2004) (the law was adopted by the Parliamentary Assembly of BiH); 4) Law on public procurements, *Official Gazette of BiH* 39 (2014); 5) Law on Freedom of Access to Information, *Official Gazette of BiH* 28 (2000), 45 (2006), 102 (2009), 62 (2011) and 100 (2013); 6) Law on Civil Service in the Institutions of BiH, *Official Gazette of BiH* 19 (2002), 35 (2003), 4 (2004), 17 (2004), 26 (2004), 37 (2004), 48 (2005), 2 (2006), 32 (2007), 43 (2009), 8 (2010), 40 (2012) and 93 (2017) and 7) Code of Civil Servants in the Institutions of BiH, *Official Gazette of BiH* 49 (2013).

Among the political, strategic anti-corruption acts at the level of BiH one can distinguish the following: 1) The Strategy for fight against corruption 2015-2019 (hereinafter: the BiH Anti-corruption Strategy) and 2) The Action plan for implementation of the Strategy for fight against corruption 2015-2019 (according to the BiH Anti-corruption Strategy).

The Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption (hereinafter: the BiH Anti-corruption Law)[11], is directly devoted to the prevention of corruption. It established institutional and functional prerequisites for prevention of corruption at the level of BiH. Also, this law set principles of coordination in the anticorruption system of BiH.

The Agency for Prevention of Corruption and Coordination of the Fight against Corruption (hereinafter: the Agency) is an independent administrative organization responsible to the Parliamentary Assembly, which is financed from the budget of institutions of BiH. Its headquarters are in East Sarajevo (Republic of Srpska), according to the Decision on the headquarters of the Agency for Prevention of Corruption and Coordination of the Fight against Corruption[12]. The Agency, as well as

[11] *Official Gazette of BiH* (2009) and 58 (2013).
[12] *Official Gazette of BiH* 25 (2010).

the Administrative Inspectorate of the Ministry of Justice of BiH, are competent to implement the BiH Anti-corruption Law.

The Agency is managed by the director who is appointed for a term of five years, with the possibility of another re-election. The director has two deputies. The Director represents the Agency, manages and directs the performance of tasks within the competence of the Agency, ensures the legal functioning and spending of the Agency's funds. The Director of the Agency is appointed by the Parliamentary Assembly of BiH, at the proposal of a special Commission for selection and monitoring of the Agency[13], through a public competition, in accordance with the Law on Ministerial Appointments, Appointments of the Council of Ministers and other appointments of BiH. Employees of the Agency have the status of civil servants, to which the Law on Civil Service in the Institutions of BiH applies. Other employees in ancillary and technical jobs are employees to whom the Law on Labor in the Institutions of BiH applies[14].

According to the Article 22 of the BiH Anti-corruption Law, the entities, cantons and the BD BiH shall adopt and develop an anti-corruption strategy and action plan in accordance with the general principles set out in the BiH Anti-Corruption Strategy. In that

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[13] Commission for Election and Monitoring of the Agency is appointed and dismissed by the Parliamentary Assembly of BiH and has nine members: three representatives from the House of Representatives of the Parliamentary Assembly of BiH, three representatives from the House of Peoples of the Parliamentary Assembly of BiH, two representatives of the academic community and one representative of the non-governmental sector. The Commission has the following competencies: a) monitors the work of the Agency; b) initiate the procedure of appointing the Director and Deputy Director of the Agency in accordance with the Law; c) initiate the procedure of dismissal of the Director and Deputy Director of the Agency; d) review reports on the work of the Agency at least twice a year or as needed; e) review reports on the audit of the financial operations of the Agency. The Commission may not interfere in the daily work of the Agency, nor may it request information on individual cases. For monitoring purposes, the Commission may request special reports. The Agency shall submit reports to the Commission in accordance with the regulations on the protection of personal and confidential data, on activities within the scope and competence of the Agency. Once a year, the Commission shall submit to the Parliamentary Assembly of BiH a report on its work. The sessions of the Commission are open to the public.

[14] *Official Gazette of BiH* 26 (2004), 7 (2005) and 48 (2005).

regard, entities, cantons and BD BiH may designate a new or existing administrative structure that will be in charge of anti-corruption, development and implementation of anti-corruption strategy and action plans in that entity or the BD BiH. Such structures are due to cooperate closely with the Agency to ensure the timely and effective implementation of coordinated anti-corruption policies. Moreover, in performing tasks within its competence, the Agency is obliged to cooperate with other institutions and agencies at all levels, public services and other bodies with public authority. On the other hand, institutions and agencies at all levels, public services and other bodies with public authority are obliged to cooperate with the Agency, and submit all necessary data and information at the request of the Agency.

In performing its tasks and duties, the Agency shall continuously inform the public about all aspects of corruption. The Agency shall publish its reports, analyzes and other acts on the Agency's website or otherwise inform the public (Article 25 of the BiH Anti-corruption Law).

In performing its scope determined by the Law, the Agency shall adhere to the following anti-corruption principles (Article 8 of the BiH Anti-corruption Law): a) Legality-measures for prevention of corruption shall be implemented in accordance with the Constitution and laws of BiH, human rights and fundamental freedoms; b) Transparency and public control – the work will be transparent and subject to public control; c) Equal treatment and non-discrimination – everyone has the right to equal access to public interest activities and equal treatment by public officials, without corruption; d) Interaction-effectiveness of measures for prevention of corruption will be ensured through coordination of activities of all bodies, exchange of information between them, and mutual cooperation; e) Continuity – establishing and implementing effective measures for the prevention of corruption through their continuous monitoring and review. In addition to the principles above, the Agency shall apply the principles of efficiency, economy, accountability and consistency in its work.

In performing activities within its competence, the Agency is entitled to adopt anti-corruption measures, recommendations and instructions, as well as to give opinions and initiate initiatives.

The Law on Protection of Persons Reporting Corruption in the Institutions of BiH[15] (hereinafter: the BiH Law on Whistleblowers) regulates the status of persons reporting corruption in the institutions of BiH and legal entities establishing institutions of BiH, the reporting procedure, reporting obligations of institutions corruption, the procedure for the protection of persons who report corruption and prescribes sanctions for violations of the provisions of this law.

The Agency is entitled, on the basis of a whistleblower report submitted in good faith, to grant whistleblower status to a person within 30 days of applying to the Agency. The whistleblower shall not be held materially, criminally or disciplinary liable for the disclosure of a trade secret in the case of reporting corruption to the competent authority. The Agency informs the whistleblower about the decision to grant the status of whistleblower.

In case the whistleblower informs the Agency that some harmful actions have been taken against him, the Agency shall request relevant documentation from the institution or request the Administrative Inspection of the Ministry of Justice of BiH to examine the allegations and establish the facts, and to take legally prescribed measures and submit the minutes to the Agency (Article 8 of the BiH Law on Whistleblowers)[16]. If, based on the documentation obtained from the institution and/or the minutes from the Administrative Inspection, it is determined that some harmful actions were taken against the whistleblower, the Agency is empowered to issue instructions to the head of the institution. The head of the institution is obliged to take a corrective measure with the aim of eliminating the committed harmful action within three days from the day of receiving the instruction from the Agency. Supervision over the implementation of the BiH Law on Whistleblowers is performed by the Administrative Inspection of the Ministry of Justice of BiH and the Agency, each within its competence.

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[15] *Official Gazette of BiH* 100 (2013).

[16] If the administrative inspector during the inspection determines the existence of a misdemeanor referred to in Article 12 of the BiH Law on Whistleblowers, he shall issue a misdemeanor order in accordance with the Law on Misdemeanors of BiH.

Although the BiH Law on Whistleblowers came into force on 1st of January 2014, from then until today, the Agency has received only 22 applications for the status of protected whistleblower and granted eight applications to applicants, and rejected 14 «precisely for essential reasons because this law did not apply to persons seeking such status». These numbers show that protection of whistleblowers is often not used as a mechanism for the fight against corruption and that legal framework and institutional capacities should be improved.

Conflict of interest is a phenomenon in which elected officials[17], executive officeholders, advisors and/or other officials with public authority, have a private interest that affects or may affect the legality, transparency, objectivity and impartiality in the performance of public duties, or in which the private interest harms or may harm the public interest.

The implementation of the Law on Conflict of Interest in Government Institutions of BiH[18] (hereinafter: the BiH Law on conflict of interest) is entrusted to a commission consisting mainly of members of parliament[19], while the office of the Agency performs administrative tasks for the commission.

The Commission has nine members, three of whom are from the House of Representatives and another three from the House of Peoples of the Parliamentary Assembly of BiH, and the Director and two Deputy

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[17] Elected officials are considered: directors, deputies and assistant directors of BiH administration bodies, agencies and directorates, and institutions appointed by the Council of Ministers of BiH or the Parliamentary Assembly of BiH or the Presidency of BiH.

[18] Law on Conflict of Interest in Government Institutions of BiH, *Official Gazette of BiH* 13 (2002), 14 (2003), 63 (2008), 18 (2012), 87 (2013) and 41 (2016) (Law prescribed by the High Representative for BiH), Law on Conflict of Interest in Government Institutions of BiH, *Official Gazette of BiH* 16 (2002) and 12 (2004) (the Law was adopted by the Parliamentary Assembly of BiH).

[19] The amendments of the Law on Conflict of Interest in Government Institutions of BiH from 2013 deprived the Central Election Commission of BiH of its responsibilities in the field of conflict of interests. As a result of these amendments, the Central Election Commission is no longer responsible for law enforcement and monitoring implementation in FBiH and BD BiH, which created a loop hole in the anti-corruption system.

Directors of the Agency by their position. Members of the Commission are appointed by both houses of the Parliamentary Assembly of BiH on the proposal of the Joint Collegium of both houses of the Parliamentary Assembly of BiH. At least one third of the members of the Commission shall consist of deputies and delegates from opposition parties, of which at least one member shall be a delegate from the House of Peoples and at least one member a deputy from the House of Representatives.

Decisions of the Commission are taken by a majority vote of all members, which shall include the votes of at least two members from each constituent people. The Commission issues opinions, issues instructions, prescribes forms and the manner of keeping the register. The Commission also makes a decision on whether a certain action or omission violates the provisions of this Law. The decision of the Commission must be reasoned. No appeal is allowed against a decision imposing a sanction on an elected official, executive office holder or advisor, but an administrative dispute may be initiated before the Court of BiH. The Commission submits a report on its work to the Parliamentary Assembly of BiH once a year.

The Commission for deciding on conflicts of interest at the level of BiH became operational in mid-2016. Since then, it has been checking property cards submitted by public officials and civil servants. Sanctions were imposed in only 10 cases, which shows that the Commission is still not fully operational.

Article 45 of the Law on public procurements[20], forbids bidders who have been convicted for corruption to participate in public procurement procedure, while Article 52 § 2 of the same law regulates that the bidder is obliged to submit a special written statement that he did not offer a bribe nor did he expect in any actions that is the goal of corruption in the public procurement in question. Although it contains these anticorruptive legal norms, the Law on public procurement opens up the possibility of corruption, especially when it comes to negotiation procedures that are less transparent than open procedures. Legal protection in the public procurement procedure is realized in administrative procedure through an appeal to the Appeals Commission as well as in administrative dispute before the administrative department of the Court of BiH. All these bodies

[20] *Official Gazette of BiH* 39 (2014).

are obliged to inform competent prosecutor office or the police if they get any information about corruptive behavior in public procurement.

One of the goals of the Law on Freedom of Access to Information[21] (hereinafter: the BiH Law on Freedom of Access to Information) is to increase transparency and responsibility of public bodies. It empowers every natural and legal person to access information under the control of a public authority, and every public authority has an appropriate obligation to publish such information. This right of access is subject only to formal actions and restrictions as set out in this law. The requests to access information of public importance are processed in an administrative proceeding and all decisions (positive and negative) must be adopted in the form of an administrative act. Legal remedies against such administrative acts include an appeal in an administrative proceeding, a lawsuit in an administrative dispute and extraordinary legal remedies, according to Article 14 § 4 and Article 26 § 2 of the BiH Law on Freedom of Access to Information. Therefore, administrative procedures related to the requests to access information serve as a tool to fight corruption with increased transparency of public authorities. According to the Special Report on experiences in the application of laws on Freedom of Access to Information in BiH from December 2019 adopted by the Ombudsman of BiH, the application of legal framework is not satisfactory and there is also a need to adopt completely new laws that will be harmonized with international standards in this field. Poor application of these laws has negative consequences on fight against corruption, as many information of public importance are not available to the public.

The Law on Civil Service in the Institutions of BiH[22] (hereinafter: the BiH Law on civil servants) regulates obligatory suspension of civil servants that are suspected for corruption or criminal offenses against official duty (Article 58). Moreover, corruptive behavior is implicitly

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[21] *Official Gazette of BiH* 28 (2000), 45 (2006), 102 (2009), 62 (2011) and 100 (2013).

[22] *Official Gazette of BiH* 19 (2002), 35 (2003), 4 (2004), 17 (2004), 26 (2004), 37 (2004), 48 (2005), 2 (2006), 32 (2007), 43 (2009), 8 (2010), 40 (2012) and 93 (2017).

forbidden in Article 14 of the same law[23]. In addition, Article 16 of the same law regulates incompatibilities with the duties of a civil servant and conflict of interest. Particularly vulnerable to corruption are public competition employment procedures in public administration, especially in regard to the composition of the selection committees (Article 24). The Agency for civil service of BiH is entitled to appoint special selection committees that are independent and impartial in conducting the public competition. In the manner determined by bylaws, the selection committee consists of five members, two of whom are civil servants from the institution to which the public competition refers and who have academic and professional experience in the areas covered by the public competition process, while the other three members are appointed from the list of experts determined by the Agency for civil service of BiH.

Code of Civil Servants in the Institutions of BiH[24] contains anticorruptive provisions, such as prevention of conflicts of interest (Article 6), handling entrusted funds (Article 7), handling a gift (Article 8), use of the institution's property for private purposes (Article 9) and handling information (Article 10 § 3). If civil servant is requested to break the Code, he or she is obliged to inform the head of institution about that. Citizens can also submit complaints on civil servants behavior that is contrary to the Code. Every violation of the Code is considered as a violation of official duty and can result in commencement of disciplinary procedure towards the civil servant.

The Strategy for fight against corruption 2015-2019 is the most important political acts that represent the basis for the anticorruption

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[23] If a civil servant receives an order which is presumed to be illegal, he shall proceed as follows: a) draws the issuer's attention to its illegality; b) if the issuer of the order repeats the order, the civil servant shall request a written confirmation stating the identity of the issuer of the order and the precise content of the order; c) if the order is confirmed, the civil servant informs the immediate superior of the issuer of the order and is forced to execute it, unless the order is a criminal offense. In that case, the civil servant refuses to execute it and reports the case to the competent authority. A civil servant shall be impartial, and in particular does not seek or accept for himself or his relatives any gain, benefit, compensation in money, services and the like, except those permitted by this law.

[24] *Official Gazette of BiH* 49 (2013).

system at the level of BiH. At its 6th session held on 7 May 2015, the Council of Ministers of BiH adopted the BiH Anti-Corruption Strategy 2015-2019 and the Action Plan for the Implementation of the Anti-Corruption Strategy 2015-2019. Contrary to previous Anti-Corruption Strategy that obliged the Agency for too many tasks, this Strategy is created with inclusion and wide support of institutions from all levels of government in BiH, institutions of BiH, entities (including cantons in FBiH) and BD BiH, as well as with participation of civil society organizations.

In order to avoid negative overlap with the competencies of the entities, BD BiH and cantons, the Strategy and the accompanying Action Plan are not sector-oriented, given the fact that these levels of government have specific competencies in sectorial areas (internal affairs, justice, health, education and others). This shows that successful policies in BiH has to respect its constitutional structure and include all levels of government in the processes.

The Anti-Corruption Strategy identifies fight against corruption as a long and complex process. Therefore, strategic approach is needed and strategy has to be complementary to other strategies and reform processes (for example Public Administration Reform) at all levels of government. Furthermore, the Anti-Corruption Strategy adopts integral approach, while it considers all important anti-corruption issues – prevention, repression and coordination. It sets general anticorruption principles, by providing a strategic, uniform and sufficiently broad framework for coordinating anti-corruption strategies and action plans at all levels in BiH.

4. Anti-corruption policies at the level of entities – Republic of Srpska and the Federation of BiH – and in Brcko District of BiH

4.1. Anti-corruption policies in the Republic of Srpska

The Government of the RS recently made a decision on the formation, organization and competencies of the Commission for the Implementation of the Anti-Corruption Strategy, to monitor

the implementation of tasks from the Strategy for the Fight against Corruption from 2018 to 2022. The commission will consist of 17 full members. The president of the commission will be the Minister of Justice, and its members will also be representatives of institutions which are competent in risky areas identified in the strategy.

Apart from the Strategy for the Fight against Corruption from 2018 to 2022 as a political act, normative framework for the fight against corruption in the RS is composed of the following laws and bylaws[25]: 1) Law on Suppression of Corruption, Organized and Serious Forms of Economic Crime, *Official Gazette of RS* 39 (2016) and 91 (2017); 2) Law on Protection of Persons Reporting Corruption, *Official Gazette of RS* 62 (2017); 3) Law on Prevention of Conflict of Interest in the Government Bodies of the RS, *Official Gazette of RS* 73 (2008) and 52 (2014); 4) Law on freedom of access to information, *Official Gazette of RS* 20 (2001); 5) Law on civil servants, *Official Gazette of RS* 118 (2008),

[25] Some of the bylaws are: Instructions on dealing with reports of corruption and ensuring the protection of persons who report corruption in the Ministry of Justice of the RS, *Official Gazette of RS* 86 (2017); Instructions on dealing with reports of corruption and ensuring the protection of persons who report corruption in the Securities Commission of the RS, *Official Gazette of RS* 5 (2018); Instructions on dealing with reports of corruption and ensuring the protection of persons who report corruption in the Republic Commission for Determining Conflicts of Interest in the Government Bodies of the RS, *Official Gazette of RS* 74 (2018); Rules of Procedure and Organization of the Republic Commission for Determining Conflicts of Interest in the Authorities of the RS, *Official Gazette of RS* 31 (2009), 33 (2009) and 96 (2017); Rules on the procedure before the Republic Commission for Determining Conflicts of Interest in the Authorities of the RS and the Manner of Control of Financial Statements, *Official Gazette of RS* 31 (2009) and 33 (2009), 61 (2009) and 13 (2015); Rules on the handling of cases and other actions provided by the Law on Prevention of Conflicts of Interest in the Government Bodies of the RS, *Official Gazette of RS* 31 (2009) and 33 (2009); Instructions for the application of Article 2 of the Law on Prevention of Conflicts of Interest in the Authorities of the RS, *Official Gazette of RS* 31 (2009) and 33 (2009); Instructions for the application of Article 3, item 7 of the Law on Prevention of Conflicts of Interest in the Authorities of the RS, *Official Gazette of RS* 31 (2009) and 33 (2009); Rules of Procedure on the Organization and Work of the Appeals Commission, *Official Gazette of RS* 75 (2009) and 74 (2017); Code of conduct for civil servants of the RS, *Official Gazette of RS* 83 (2002) and 83 (2009).

117 (2011), 37 (2012) and 57 (2016) and 6) Code of conduct for civil servants of the RS, *Official Gazette of RS* 83 (2002) and 83 (2009).

Law on Suppression of Corruption, Organized and Serious Forms of Economic Crime[26] regulates the establishment, organization, jurisdiction of special organizational units of the public prosecutor's office, court and other bodies in the RS, the powers of authorized officials and regulates the conditions for efficient detection and prosecution and trial of perpetrators of corrupt crimes, organized crime, the most serious forms of economic crime and other criminal offenses determined by this law. As this law is not a source of administrative law, it will not be thoroughly analysed in this paper.

Law on Protection of Persons Reporting Corruption[27] (hereinafter: the RS Law on Whistleblowers) regulates the protection of persons who report corruption, the procedure for reporting corruption, the obligations of the responsible person and the competent authorities regarding the reporting and protection of persons who report corruption and other issues important for persons who report corruption.

The RS Law on Whistleblowers prescribes two types of applications by whistleblowers (they should be submitted in good faith): 1) internal application, 2) external application. By an internal report, the applicant informs the responsible person about the facts on the basis of which he suspects that corruption has been attempted or committed at work or in connection with work with the entity managed by the responsible person. By an external report, the applicant informs the internal affairs bodies, the prosecutor's office or civil society organizations dealing with the protection of human rights and the fight against corruption of the facts on the basis of which he suspects that corruption has been attempted or committed. The provisions of the Law on Civil Procedure apply accordingly to issues of judicial protection procedure that are not regulated by the RS Law on Whistleblowers.

According to the Law, the rights of a whistleblower are: 1) the right to internal protection, 2) the right to external protection, 3) the right to free legal aid of the body responsible for providing that assistance, 4) the right

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[26] *Official Gazette of RS* 39 (2016) and 91 (2017).
[27] *Official Gazette of RS* 62 (2017).

to ensure and protect anonymity and personal data protection of the responsible person and competent bodies to which he reports corruption, in accordance with the provisions of the law governing the protection of personal data, unless the applicant explicitly allows the disclosure of his identity, 5) the right to be notified of activities and measures taken after the report, 6) the right to be notified of the outcome procedure upon application, 7) the right to compensation for damages according to the rules on liability for compensation for damages.

The Republic Administration for Inspection Affairs supervises the performance of the obligations of the responsible person in the procedure of internal and external protection, upon application or *ex officio*. The authorized inspector initiates a misdemeanor procedure in accordance with the provisions of the Law on Misdemeanors of the RS when he determines a misdemeanor prescribed by the provisions of this law. The provisions of the Law on Misdemeanors of the RS apply accordingly to issues of the procedure for determining misdemeanor liability that are not regulated by the RS Law on Whistleblowers.

Responsible persons and competent courts are obliged to submit a report to the Ministry of Justice by the end of January of the current year on the number and outcome of received reports and procedures for protection of whistleblowers, which are conducted and completed in the previous year. The Ministry of Justice is obliged to publish these data on its website and submit them to the Commission for the Implementation of the Anti-Corruption Strategy of the RS. The Commission for the Implementation of the Anti-Corruption Strategy of the RS is due to submit to the National Assembly of the RS and the Government of the RS an annual report on the number and outcome of received reports and procedures for the protection of whistleblowers.

Law on Prevention of Conflict of Interest in the Government Bodies of the RS[28] regulates the special obligations of elected representatives, holders of executive functions and advisors in the authorities of the RS and local self-government units in the performance of public functions, in order to prevent conflicts of interest.

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[28] *Official Gazette of the RS* 73 (2008) and 52 (2014).

The procedure for determining conflicts of interest is conducted by the Republic Commission for Dissemination of Conflicts of Interest in the Authorities of the RS (the RS Conflict of Interest Commission), as an independent body. The RS Conflict of Interest Commission is formed by the National Assembly of the RS. It has a chairman and six members. The President and members of the RS Conflict of Interest Commission are elected by the National Assembly of the RS, at the proposal of the competent parliamentary body, for a period of four years, with the possibility of re-election.

An appeal against the first instance decision of the RS Conflict of Interest Commission may be lodged with the Appeals Commission. The Appeals Commission has a chairman and four members who are appointed by the National Assembly of the RS for a period of four years. The Appeals Commission makes decisions by a majority of the total number of members. The final decision of the Appeals Commission may be an object to administrative dispute initiated before the competent district court.

Although the Law on freedom of access to information[29] gives every natural and legal person the right of access to information which are under the control of a public authority, and each public authority has an appropriate obligation to publish such information, this right is not adequately protected in praxis. There are several reasons in support of the thesis that the legal framework for freedom of access to information in the RS should be reformed.

First, certain terms used in the Law on freedom of access to information lead to difficulties in applying the Law in practice. An illustrative example is the term 'letter', which denotes both non-meritorious and meritorious decisions of a public body in the process of access to information. Given that this procedure is a special administrative procedure, in which the provisions of the Law on general administrative procedure are applied in a subsidiary manner, it is necessary to replace the term 'letter' with the term 'decision' when it comes to decisions on the merits, and the term 'conclusion' when it comes to non-meritorious decisions in the proceedings. This would more clearly emphasize the connection of

[29] *Official Gazette of RS* 20 (2001).

the Law on freedom of access to information with the Law on general administrative procedure and improve the legal protection of the parties in the administrative procedure.

Second, the system of legal protection of applicants for access to information is not precisely regulated by the Law on freedom of access to information. Amendments to this Law should explicitly prescribe the right to legal protection in second-instance administrative proceedings and judicial protection in administrative disputes. Judicial protection of the right of access to information is one of the modalities provided by relevant documents of the Council of Europe, which is one of the arguments to this proposal. In addition, the case law of the European Court of Human Rights, in relation to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, takes the view that judicial review provides the best guarantees of independence, impartiality and due process.

Third, it is necessary to regulate in more detail the procedure for deciding on the request for access to information in cases where there are grounds for applying exceptions to the right of access. In the absence of established administrative and judicial practice on this issue in the RS, we propose the application of appropriate international criteria, with relevant legal solutions and mandatory implementation of the so-called public interest test in any particular procedure of this kind.

Fourth, having in mind that the Law on Personal Data Protection of BiH entered into force in 2006, and that this law regulates the issues that are the subject of the Law, it is necessary to harmonize these two legal regulations.

Finally, the analysis of statistical data by the BiH Ombudsman shows that the low level of application of the Law on freedom of access to information is one of the basic problems in practice. Therefore, it is important that public authorities meet the organizational and personnel requirements for the implementation of the Law on freedom of access to information, and that a high degree of accountability of public authorities is achieved. In this regard, the penal provisions should be prescribed by law. Furthermore, it is necessary to prescribe special provisions on supervision over the application of the Law, where the main role should be played by the institution of the BiH Ombudsman, given that the

institution of the Ombudsman of the RS has ceased to operate. Finally, it is necessary to legally regulate the obligation of public authorities to publish information of public importance on their own initiative.

Law on civil servants[30] (hereinafter: the RS Law on civil servants) contains provision similar to the BiH Law on civil servants. According to Article 21 § 2 of the RS Law on Civil servants «A civil servant shall be obliged to refuse the execution of an order if it would constitute a criminal offense and shall notify the head of the body in writing, i.e. the body supervising the work of the republic administration body, if the order was issued by the head of the body». Also, Article 22 of the RS Law on civil servants regulates a question of Conflict of interest in details. Finally, the Article 34 regulates the procedure for the selection of a civil servant through a public competition, and the Agency for civil service of the RS appoints a commission for the selection of candidates (the Commission consists of five members, of which three members are civil servants from the republican administrative bodies to which public competition applies and who have at least the same level of education as prescribed for the position to be filled. Two members of the commission are appointed from the list determined by the Agency and published in the *Official Gazette of RS* after the procedure of election of members of the commission, based on the criteria determined by the Government). This solution leaves greater space for political interference in public competition and it should be changed in a manner that would decrease number of the Commission members from the republican administrative bodies and include independent experts or members of the syndicate.

The Strategy for the fight against the corruption of the RS maintains the "three-pillar" approach to fighting corruption from the previous Strategy, which includes: 1. education (education and raising awareness of corruption and the fight against corruption), 2. prevention (various measures and activities aimed at preventing corruption) and 3. repression (detection and investigation of criminal offenses of corruption, prosecution and punishment of perpetrators of these criminal offenses, and confiscation of proceeds from the commission of these criminal offenses). Based on the general analysis of the situation and the identified

[30] *Official Gazette of RS* 118 (2008), 117 (2011), 37 (2012) and 57 (2016).

needs and weaknesses in the defined risk areas, the following strategic goals have been identified: 1) Strengthening the institutional and legal framework for the fight against corruption; 2) More effective use of existing capacities and improvement of cooperation in detection, prosecution and punishment of corrupt acts; 3) Strengthening the transparency and integrity of the public sector; 4) Ensure adequate use of information and communication technologies in order to reduce the possibility of corruption; 5) Raise the awareness of citizens and the public. A more detailed elaboration of these goals, through operational measures in the Action Plan for the implementation of this Strategy, for each of the defined risk areas, will determine the manner of their implementation, the main carriers of implementation, implementation deadline and expected results and performance indicators.

In addition to judicial institutions, the RS Ministry of the Interior, the Republic Administration for Inspection Affairs, the Agency for Management of Confiscated Property and the Main Audit Office of the Public Sector of the RS are of exceptional importance for the fight against corruption. The institutional framework for the fight against corruption in the RS was further strengthened by the establishment and work of the Commission for the Implementation of the Anti-Corruption Strategy of the RS. Administrative and technical support to the Commission is provided by the RS Ministry of Justice, which is the coordinator of anti-corruption activities in the RS. The Commission directs the activities and coordinates the entities responsible for the implementation of the Strategy, reporting to the Government twice a year on the implementation of measures from the Action Plan. The Government is obliged to inform the National Assembly every year on the results of the implementation of the Strategy and Action Plan.

4.2. Anti-corruption policies in the Federation of Bosnia and Herzegovina

Anti-corruption system in the FBiH is consisted of two layers: 1) the level of the FBiH and 2) the level of cantons. These two layers are supposed to be complement and coherent. Apart from the Strategy,

normative framework for the fight against corruption in the FBiH is composed of the following legal acts: 1) Law on Suppression of Corruption and Organized Crime in the FBiH, *Official Gazette of the FBiH* 59 (2014); 2) Law on freedom of access to information in the FBiH, *Official Gazette of the FBiH* 32 (2001) and 48 (2011); 3) Law on conflict of interest in authorities in the FBiH, *Official Gazette of the FBiH* 70 (2008) and 4) Law on Civil Service in the FBiH, *Official Gazette of the FBiH* 29 (2003), 23 (2004), 39 (2004), 54 (2004), 67 (2005), 8 (2006), 4 (2012) and 99 (2015). The protection of whistleblowers is still not legally regulated in the FBiH. The draft law on the protection of persons reporting corruption in the FBiH is currently in the legislative procedure and it contains quality solutions that meet key international standards and assumptions to be enforceable and effective throughout the FBiH.

Law on Suppression of Corruption and Organized Crime in the FBiH[31] came into force in February 2015 and it formally established the Special Department of the Federal Prosecutor's Office of the FBiH for the Suppression of Corruption, Organized and Inter-Cantonal Crime. This Law also formally established the Special Department of the Supreme Court of the FBiH. These departments are still not fully operational, which prevents successful fight against corruption in the FBiH.

Law on freedom of access to information in the FBiH[32] grants natural and legal persons the right to access information of public importance. Comparing to the similar law in the RS, this Law has provided solid legal protection to the dissatisfied party who has the right to file an objection against the decision to the head of the body within eight days from the day of receipt of the decision. The decision rendered on the complaint is final in the administrative procedure and against it the dissatisfied party may initiate an administrative dispute with the competent court.

In order to prevent conflicts of interest, the Law on conflict of interest in authorities in the FBiH[33] (the FBiH Law on conflict of interest) regulates special obligations of elected officials, holders of executive functions and advisors in government bodies in the FBiH, cantons and

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31 *Official Gazette of the FBiH* 59 (2014).
32 *Official Gazette of the FBiH* 32 (2001) and 48 (2011).
33 *Official Gazette of the FBiH* 70 (2008).

local self-government units in performing public functions. However, the Central Election Commission of BiH is no longer responsible for the implementation of this law, as the BiH Law on conflict of interest deprived the Central Election Commission of BiH of its responsibilities in the field of conflict of interest, the FBiH Law on conflict of interest cannot be implemented anymore. Therefore, Draft Law on amendments In the Law on Conflict of Interest in Authorities in the FBiH in Article 13, replaced the words: «Central Election Commission of Bosnia and Herzegovina» by the words: «Commission for deciding on conflicts of interest». Proceedings before the Commission should be initiated and conducted in accordance with the Law on Conflict of Interest in the Institutions of Bosnia and Herzegovina.

Law on Civil Service in the FBiH[34] contains provisions regarding conflict of interests and incompatibility with civil service similar to those from the BiH Law on civil service and the RS Law on civil service. In regard to the selection of civil servants, the Agency for civil service of the FBiH appoints special selection commissions that are impartial in conducting the public competition. The Selection Committee is composed of at least three members, two of whom are civil servants from civil service bodies, one of whom is a representative of the trade union to which the public competition refers and who has academic and professional experience in the areas covered by the public competition process. Members are appointed from a list of experts determined by the Agency. Although this Law do not presupposes maximum number of the Selection Committee's members, it still leaves space for political patronage in cases where administrative bodies delegate majority of those members.

Anti-Corruption Strategy for fight against corruption of the FBiH 2016-2019 (hereinafter: the FBiH Anti-Corruption Strategy) is the first strategic document in the field of anti-corruption that is being prepared for the public sector of this entity. The Anti-Corruption Strategy 2016-2019 of the FBiH refers to the entire society in the FBiH as well as all its institutions, economic entities and other organizations registered in

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[34] *Official Gazette of the FBiH* 29 (2003), 23 (2004), 39 (2004), 54 (2004), 67 (2005), 8 (2006), 4 (2012) and 99 (2015).

the FBiH, for which it is necessary to coordinate and cooperate from the federal to the cantonal and municipal level. The basic orientations of the Strategy are prevention, repression, developing awareness of the harmfulness of corruption and cooperation with civil society[35]. Within the scope of the Strategy, it is necessary for the Anti-Corruption Team of the Government of the FBiH to establish coordination with the Agency and other institutions in the FBiH.

The Anti-Corruption Strategy 2016-2019 of the FBiH should be implemented by the cantons, not only in an advisory and coordinating sense, but also during the creation and implementation of strategic plans, as well as reporting on the results achieved in the fight against corruption at the cantonal authorities. Outside of these formal mechanisms, the cantons are obliged to adopt and develop their own anti-corruption strategies in accordance with the principles set out in the state Anti-Corruption Strategy, and if they do not have an anti-corruption policy until they adopt it, they should adopt the Federation Anti-Corruption Strategy 2016-2019. Almost all cantons adopted their Anti-corruption strategies and action plans, as well as established their anti-corruption bodies.

4.3. Anti-corruption policies in Brcko District of Bosnia and Herzegovina

Administrative legal framework for the fight against corruption in BD BiH is composed of the following laws: 1) Law of the office for the prevention of corruption and coordination of activities to combat corruption, *Official Gazette of the BD BiH* 25 (2018); 2) Law on the protection of persons reporting corruption, *Official Gazette of the BD BiH* 25 (2018) and 3) Law on civil service in the public administration bodies of the BD BiH, *Official Gazette of the BD BiH* 9 (2014), 37 (2015), 48 (2016), 9 (2017), 50 (2018), 14 (2019) and 15 (2019) – corrected.

[35] Action plan for implementation of the Strategy for fight against corruption 2016-2019 of the FBiH follows strategic goals that are set by the Strategy and elaborates concrete measures and indicators for its realization.

Law of the office for the prevention of corruption and coordination of activities to combat corruption[36] prescribes anti-corruption principles and establishes the Office for Prevention of Corruption and Coordination of Activities on Combating Corruption in the BD BiH (hereinafter: the Office). The Office is independent and accountable for its work to the Assembly of the Brčko District of BiH[37]. The Office has the following competences: a) development of the Strategy for Fighting Corruption in the District, as well as development of the Action Plan and implementation of the Strategy in accordance with general principles set out in the BiH Anti-Corruption Strategy; Cooperation with Anti-Corruption bodies at all levels; b) protection of persons who report corruption in accordance with the Law on Protection of Persons Reporting Corruption. The Office adopts anti-corruption measures, recommendations and instructions, give opinions and initiate initiatives. On the other hand, public administration bodies, institutions, public enterprises, public institutions and other legal entities established by the Brcko District are obliged to designate a person who will be in charge of communication and cooperation with the Office for the purpose of preventing corruption, development and implementation of Anti-Corruption measures.

Law on the protection of persons reporting corruption[38] contain provisions similar to the laws on whistleblowers at the levels of BiH and the RS. Supervision over the implementation of this law is performed by the Administrative Inspection of the District Government.

The law on civil service in the public administration bodies of the BD BiH[39] has similar provisions on conflict of interest and incompatibility as laws at other levels. Slight difference is evident in Article 31, which regulates the Employment Commission, as a body that selects candidates

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[36] *Official Gazette of the BD BiH* 25 (2018).

[37] The report on the work of the Office shall be considered by the BD BiH Assembly at least twice a year. Before consideration at the Assembly, the report shall be submitted to the BD BiH Government for a statement.

[38] *Official Gazette of the BD BiH* 25 (2018).

[39] *Official Gazette of the BD BiH* 9 (2014), 37 (2015), 48 (2016), 9 (2017), 50 (2018), 14 (2019) and 15 (2019) – corrected.

for admission to public administration bodies. The commission is appointed by the mayor and consists of three members[40].

5. Conclusion

The strategic and legal framework for the fight against corruption has mostly been established in BiH, but political will to address this issue and improve institutional capacity remains weak. According to numerous EU Reports on European Integration process of BiH political patronage networks are widespread and affect all levels of government. Moreover, the implementation of existing legislation is insufficient. Corruption in public procurements is the main problem together with corruption in judiciary and police, but there is also corruption in employment procedures for public servants, as well as in public services such as health and education. Corruption still creates negative effects in various spheres of life, it prevents economic development and undermines the rule of law. What has to be done?

Fight against corruption is a very complex process and requires: a strong judiciary, a comprehensive legal framework, modern technologies and the involvement of citizens. BiH, at all levels of government, needs: 1) Independent judiciary; 2) Public access to the government budget information, so that citizens can see where the public money comes from and how it is spent; 3) High level of press freedom and transparency in public sector; Transparency of activities in public administration is threatened by political pressure on public institutions and limited implementation of the Law on Free Access to Information; 4) Adopt anti-corruption polices, i.e. Strategies to fight corruption, but what's more important in BiH – implement them; 5) The state needs to conduct a detailed analysis of its anti-corruption regulations, identifying and addressing gaps and weaknesses in a coherent legislative roadmap towards meeting international and European standards; 6) Invest in IT

[40] Members of the Employment Commission are: 1) one member of the Employment Committee who comes on a rotating basis and b) two members proposed by the competent head of the public administration body, one of whom is a managing civil servant, i.e. a managing public servant from that public administration body.

technologies as a prevention through the application of information and communication technologies, particularly considering the impact of networking with information systems of other bodies on the effectiveness of preventive anti-corruption activities.

Corruption is a phenomenon that no country in the world has been able to eradicate. However, the obligation of each state is to work on combating, preventing and punishing corruption, by strengthening the institutional and legal framework in the fight against corruption in accordance with international recommendations in this area, providing mechanisms for active participation of the entire community in the fight against corruption. Particularly important is internal cooperation in the fight against corruption with special emphasis on cooperation between the governmental and non-governmental sector, but also by establishing and developing international cooperation in the field of preventing and combating corruption, and ensuring greater transparency of the public sector, as one of the strongest tools in the fight against corruption.

Milijana Buha*

The Criminal Procedural Measures in the Fight Against Corruption

1. Corruption in Bosnia and Herzegovina

Corruption is possible in all social activities: education, health and justice. If corruption is present in the judiciary, then the mechanisms for the fight against corruption in a society are lost. Corruption is related to the abuse of public or political position for private gain. The most common instances of corruption are in the field of public procurement, freedom of access to information and the election process. The corruption is the oldest form of organized crime, and it is in the service of organized crime, because public officials who are supposed to work on detecting and proving organized crime are often guilty of receiving money from those who engage in organized crime. This makes public officials corrupt and their hands are tied in the fight against organized

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crime[1]. It is not possible to put a sign of equality between organized crime and corruption because corruption "helps" organized crime. There is no corruption without the support of the authorities.

1.1. Some of the claims related to the fight against corruption

Criminal procedure view on the fight against corruption is that the fight against corruption is a step by step process, which takes time. A healthy society is the only way to fight against corruption, independent judiciary and political will are necessary in the fight against corruption. What does all this mean? Political bodies appoint officials in public positions who are in a position to abuse power. It is not enough to have a good law if there is no independent judiciary and the political will to fight against corruption. Corruption is the abuse of a public or political position for personal benefit. Corruption is the oldest form of organized crime, because public officials who are supposed to work on detecting and proving organized crime often received money from members of organized crime[2].

1.2. Jurisdiction to prosecute corruption

In Bosnia and Herzegovina (BiH) there are four levels of government for the fight against corruption.

At the BiH (state) level, the Court of BiH[3] and the Prosecutor's office of BiH have the jurisdiction to prosecute corruption[4].

For entity level of the Republic of Srpska and Federation BiH – jurisdiction to prosecute corruption have district or cantonal prosecutors

[1] M. ŠKULIĆ, *Organizovani kriminalitet: pojam i krivičnoprocesni aspekti (Organized crime: concept and criminal procedure aspects)*, Beograd 2003.

[2] See *Analiza rizika u istraživanju i procesuiranju korupcije, Jačanje kapaciteta policije i pravosuđa u borbi protiv korupcije u Srbiji*, (*Risk analysis in the investigation and prosecution of corruption, Strengthening the capacity of the police and judiciary in the fight against corruption in Serbia*), Savjet Evrope, kancelarija u Beogradu, 2015.

[3] The Court of Bosnia and Herzegovina, http://www.sudbih.gov.ba/.

[4] The Prosecutor's Office of Bosnia and Herzegovina, http://www.tuzilastvobih.gov.ba/.

and basic or district courts depending on the sentence imposed for the committed crime. The Law on Suppression of Corruption and Organized Crime at the Entity[5] prescribes the establishment of special departments at the entity level to fight corruption. The Republic and the Federal Prosecutor's Office have special departments for the suppression of corruption, organized and the most serious forms of economic crime. In the Brčko District of BiH, the Basic Court of BDBiH and the Court of Appeals of BDBiH have jurisdiction over all criminal offenses under the Criminal Code of BDBiH[6].

2. The most important international documents in the prevention of corruption

Successful fight against corruption is conditioned by international cooperation. Why is international cooperation necessary in the fight against corruption? "Because corruption serves organized crime, and organized crime does not know borders, it is a cross-border crime". International cooperation in the European Union also improved the framework decision on the European Arrest Warrant. European Arrest Warrant eliminates the principle of citizenship and double criminality as an obstacle to the surrender of a suspect person to a state which issued an arrest warrant. When we talk about European Arrest Warrant, each state has jurisdiction to prosecute the suspect person who committed a crime. The fight against corruption is long-standing and painstaking and necessitates a step by step approach

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[5] Law on Suppression of Corruption, Organized and the Most Serious Forms of Economic Crime, "Official Gazette of Republika Srpska", nn. 39/16, 91/17. Law on Suppression of Corruption and Organized Crime in the Federation of Bosnia and Herzegovina, "Official Gazette of the Federation of Bosnia and Herzegovina", n. 59/14.

[6] Criminal Code of the Brčko District of Bosnia and Herzegovina, "Official Gazette of the Brčko District of Bosnia and Herzegovina", nn. 33/13, 47/14, 26/16, 13/17, 50/18.

The most important anti-corruption standards are contained in the United Nations Convention against Corruption[7] and in the Council of Europe Convention on Corruption with accompanying documents[8] and the Council of Europe Convention on Laundering, Search and Seizure of the Proceeds from Crime and on the Financing of Terrorism[9].

2.1. The United Nations Convention against Corruption

The UN Convention expresses concern over the fact that corruption is a transnational phenomenon that is a threat to the stability of the state because it violates the moral values of justice and the rule of law. The fight against corruption is impossible without an independent judiciary. This convention obliges signatory states to incriminate the following as criminal offenses: illegal mediation, abuse of position, illicit enrichment, bribery in the private sector, embezzlement in the private sector, concealment. Convention prescribes longer deadlines for the statute of limitations for criminal prosecution and punishment. An important instrument in the fight against corruption is the confiscation of proceeds of corruption, in order to facilitate the implementation of this measure.

The UN Convention against Corruption also prescribes a procedural rule that the defendant is obliged to prove that they acquired the property legally. In order to facilitate the detection and proof of corrupt criminal offenses in criminal proceedings, witnesses and experts as well as relatives of witnesses and experts must be protected from retaliation or intimidation. So it is best for the witness to testify without a physical presence, using telecommunications services. Deviation from the classical model of testimony in the presence of all obligatory subjects in criminal proceedings

[7] UN Convention against Corruption, entered into force in relation to BiH on October 26, 2006, published in the "Official Gazette of Bosnia and Herzegovina" – international agreements, n. 5/06.

[8] Council of Europe Convention against Corruption, entered into force in relation to Bosnia and Herzegovina on 1 November 2003, published in the "Official Gazette of Bosnia and Herzegovina" – international agreements, n. 26/01.

[9] *Krivičnopravna konvencija o korupciji* (*The Criminal Law Convention on Corruption*), https://ti-bih.org/wp-content/uploads/2016/10/Krivi%C4%8Dnopravna-Konvencija-o-korupciji-Vije%C4%87a-Evrope.pdf, 22.12.2020.

is a violation of the principle of immediacy in criminal proceedings, but such deviations are in the interest of the principle of fairness.

2.2. Criminal law convention against corruption of the Council of Europe

Many issues are regulated in the same way as in the aforementioned convention. The criminal law convention of the Council of Europe prescribes a new criminal offense-trading in influence. This convention prescribes the protection of cooperating witnesses. Because of that, in some criminal legislations a lesser form of the criminal offense of abuse in the field of public procurement is prescribed, for a person who is guilty of abuse, if they reveal under what conditions and in which way in the field of public procurement they acted contrary to the law. This privileged form of crime reminds us of an institute of criminal procedural law, is it an informant or an undercover investigator? These are special investigative actions: an undercover investigator is a police officer who infiltrates a criminal group under a changed identity, a false identity and the informant is a member of a criminal group who decides to cooperate with the police to detect illegal activities. The Criminal Law Convention against Corruption calls on signatory countries to facilitate the implementation of special investigative actions.

What does it mean to facilitate the application of special investigative actions? Article 8 § 2 of the European Convention for the Protection of Human Rights and Freedoms prescribes when it is possible to restrict the right to privacy and family life.

8 (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

According to this § of Article 8, when is it justified to interfere in the private and family life of the suspect by applying special investigative actions? Pursuant to this §, interference in private and family life would

be justified only for the purpose of detecting criminal offenses that are a danger to human life and health, security of the state and economic stability of the state.

The Criminal Law Convention against Corruption stipulates that it would be recommendable for the successful fight against corruption for states to facilitate the extradition of suspects. Extradition, exactly international cooperation, is one of the key elements of a successful fight against corruption. Facilitations in the procedure of extradition of suspects for corruption offenses are: not insisting on the existence of an extradition treaty between the requesting State and the requested State, extradition of citizenship or tried citizens is a criminal offense that is the subject of an extradition request, acting in accordance with international customary rule *aut dedere aut judicare* – this is a principle of customary international law (extradited or tried)[10].

3. Detecting and proving corruption

The mentioned international conventions, which regulate detecting and proving corruption, also refer to the application of special investigative actions. Why special investigative actions? Because corruption is in the service of organized crime, there is no evidence of a crime committed and evidence can be found if the perpetrator of corrupt behavior is caught in the act.

We use special investigative actions to detect and prove corruption and organized crime. Forms of organized crime include: drug trafficking, human trafficking, corruption, arms trade, cyber-crime, money laundering. We have several special investigative actions such as: supervision and technical recording of telecommunications, for all forms, access to computer systems and computer data comparison (for example cyber-crime), supervision and technical recording of the premises, secret surveillance and technical recording of persons, means of transport and objects that are in them, the use of undercover investigators and informants, simulated and controlled purchase of items and simulated

[10] M. LEPIR, *Ekstradicija u savremenom pravu* (*Extradition in modern law*), magistarski rad, Pravni fakultet Univerziteta u Banjoj Luci, Banja Luka 2013.

bribery (receiving and giving bribes, influence trade), supervised transport and delivery of items (drug trafficking, arms trade).

Which of these special investigative actions are most suitable for detecting and proving corrupt behavior?

3.1. What are special investigative actions?

Special investigative actions are the ultimate means of proof that is used only if evidence cannot be obtained in any other way. What is the basic condition for the application of special investigative actions? If evidence cannot be obtained in any other way. We say that special investigative actions are the ultimate means of proof, because by applying special investigative actions we interfere in the private and family life of the suspect. We have two conditions for the use of special investigation actions (SIA): 1) material and 2) formal conditions. Material condition for the application of SIA are the nature of the offense and inability to collect evidence in any other way. Formal conditions for application of SIA are the order of court and prosecutor's recommendation. One similarity between SIA and detention lies in restricting basic human rights to liberty and the right to private and family life. Detention is a procedural measure against a suspect person and we can also say that SIA is a procedural measure through which evidence is collected by force. One of the material conditions for the use of SIA is a type of crime and it is important to fulfill conditions prescribes in article 8 § 2 of the European Convention on Human Rights (ECHR). The second material condition is the inability to collect evidence in any other way. When we talk about a court order for the use of SIA, it is crucial to explain reasons for the use of SIA, pursuant to the Code of Criminal Procedure and also to the ECHR case law in Dragojevic and Basic judgment. When we talk about special investigation action it is important to mention one decision of the Constitutional Court of BiH about unconstitutionality of SIA. This decision is controversial, because the court based it on the fact that it is possible to apply special investigative measures for a large number of criminal offenses, regardless of the sentence which can be imposed. The basic condition for the application of special investigative actions

is not the type of criminal offense or the number of offenses, but the fact that the evidence cannot be collected in any other way, and it is also important to explain the nature of crime pursuant to § 2 article 8 ECHR. All of these conditions (material and formal) have to be cumulatively fulfilled. The changes in the Code on Criminal Procedure pursuant to the decision n. U 5/16 of 1.6.2017 of the Constitutional Court of Bosnia and Herzegovina, were not drastic, because the legislator in BiH only listed the criminal offenses for which a special investigative action can be applied and recognized that in future, SIA can also be used for crimes for which the imprisonment of three years is prescribed. At the end, we can conclude that this decision of the Constitutional Court on the unconstitutionality of special investigative actions BiH, stopped the use of special investigative actions in practice and thus slowed down the fight against corruption in BIH.

By applying special investigative actions on order of the court, police interfere in the private and family life of the suspect, with an aim of preventing the commission of a crime that threatens the life and health of people, the security of the state and the economy and economic stability. The interference of police officers in the private and family life of the suspect with the purpose of detecting corruption and organized crime is justified, because interfering in the suspect's private and family life is a lesser evil than corruption or organized crime. So we notice a similarity between special investigative actions in criminal proceedings and the institute of necessary defense in substantive criminal law. The evil we do is lesser than the evil that threatens (interference in private and family life and detection of corruption and organized crime). However, there is also an important difference, because the danger in self-defense arises exclusively from the unlawful attack of a man[11].

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[11] M. BUHA, *Izmjene odredaba Zakona o krivičnom postupku BiH – RS o posebnim istražnim radnjama u svjetlu odluke Ustavnog suda BiH* (*Amendments to the provisions of the Criminal Procedure Code of BiH – RS on special investigative actions in the light of the decision of the Constitutional Court of BiH*), in *Posebne istražne radnje*, Pravosudni forum za Bosnu i Hercegovinu, Banja Luka 2018, 123-135 ff. M. BUHA, *Posebne istražne radnje između efikasnosti krivičnog postupka i prava na privatnost* (*Special investigative actions between the efficiency of criminal proceedings and the right to privacy*), in *Pravni život* 9, I, Udruženje pravnika Srbije, Beograd 2017, 771-782 ff.

4. Material and procedural preconditions in Bosnia and Herzegovina for the fight against corruption

Criminal law of Bosnia and Herzegovina[12] has a special chapter that defines criminal offenses of corruption and criminal offenses against official duty. Trading in influence is not defined as a separate criminal offense of abuse in the field of public procurement. We have the same solution in the criminal law in the Federation of Bosnia and Herzegovina[13]; they do not define acts of trading in influence and public procurement as a special crime. On the other hand, the Republic of Srpska Criminal Code[14] does not mention corruption, but defines trading in influence and abuse in the field of public procurement as separate criminal offenses. When we talk about the Brcko District, we have the criminal offense of abuse in the field of public procurement, but trading in influence is not defined as a separate criminal offense.

In Bosnia and Herzegovina, as we can see, not all formal and material conditions for the fight against corruption are fulfilled, because the material criminal legislation at all levels of government in Bosnia and Herzegovina has not been modified in accordance with the international conventions which we mentioned earlier.

4.1. Penal policy and corruption

Penal policy is more often focused on the imposition of a suspended sentence. In the fight against corruption, it has not been noticed that the courts impose a sentence of confiscation of the proceeds of crime or of the confiscation of illegally acquired property by criminal offense.

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[12] Criminal Code of Bosnia and Herzegovina, "Official Gazette of Bosnia and Herzegovina", n. 03/03, amendments to the same law on http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=40&jezik=s, 22.12.2020.

[13] Criminal Code of the Federation of Bosnia and Herzegovina, "Official Gazette of the Federation of Bosnia and Herzegovina", n. 36/03, with amendments available at http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=42&jezik=s, 22.12.2020.

[14] Criminal Code of Republika Srpska, "Official Gazette of Republika Srpska", n. 64/17.

The issue of fulfillment of procedural preconditions for the fight against corruption in Bosnia and Herzegovina, under Criminal procedure laws in Bosnia and Herzegovina, is the following – there is no prescribed application of special investigative actions in relation to criminal acts of corruption, abuse of official position and organized crime, as has been done in Serbia.

Thus, in Serbia, it is clearly prescribed that a special investigation of an undercover investigator[15] may be used only in the prevention of corruption and organized crime, but not in relation to other criminal offenses. International documents stipulate that states should facilitate the implementation of special investigative actions in relation to corruption offenses. We know that the basic condition for the application of special investigative actions is the impossibility of collecting evidence in any other way, which is why international documents say that the fight against corruption is difficult. Many provisions in the criminal procedure of Bosnia and Herzegovina at any level of government are not in the function of preventing corruption and organized crime; they are not in line with international standards.

Bad sides of criminal proceedings in our country include, but are not limited to, the following: the criminal investigation is not subject to any judicial review, the injured party has no procedural rights in criminal procedure, there is no principle of truth in criminal proceedings, application of plea agreements and the imposition of lenient sentences for the most serious crime on the other hand.

In our criminal proceedings, the role of the injured party in the criminal proceedings is very poorly regulated. Pursuant to the draft of Criminal Procedure Code (2020), it is possible for an injured party to object to a prosecutor's decision to halt investigation. However, it is the office of the Republic Prosecutor which decides about that objection that is the same body, not some independent body, and only immediate higher body to the body which decided to halt investigation. An injured party has a right according to the draft Criminal Procedure Code of 2020 to represent prosecution but not to make an indictment. In fact, the injured

[15] Article of 183 to 187 Serbian Criminal Procedure Code, https://www.paragraf.rs/propisi/zakonik_o_krivicnom_postupku.html, 22.12.2020.

party is representing the indictment of the public prosecutor and not their own indictment. This is not a good solution because the injured party does not have the opportunity to participate in the investigation and suggest collecting some evidence[16].

Provisions on the establishment of special specialized bodies and the fight against corruption are satisfactory, as in the prosecutors' offices we have special departments for the fight against corruption and economic crime.

5. Justice in the fight against corruption

Enrico Ferri (Italian criminologist) says «Laws are worth as much as the people who are called to enforce them». The objective circumstances that affect the successful fight of the judiciary against corruption are: the number of prosecutors and judges engaged in the fight against corruption and the number of criminal cases (the question is whether a sufficient number of prosecutors and judges are engaged in detecting and proving corruption). The efficiency of criminal proceedings is influenced by circumstances of a subjective nature, such as the expertise and commitment of judicial officials in the fight against corruption. Publication of final court decisions is significant in preventing corruption, because the final court decision is a message to citizens about how the state reacts to corruption and what punishments they (court, states) imposes for corruption. The punishments have the function of special and general prevention and it is important to inform citizens about final judgments, at least when it comes to cases in which the public

[16] M. BUHA, *Procesna pravna oštećenog prema Zakonu o krivičnom postupku Republike Srpske iz 2020* (*Procedural rights of the injured party according to the Criminal Procedure Code of the Republika Srpska from 2020*), in *Jedanaesta međunarodna naučno-stručna konferencija, Krivično zakonodavstvo i prevencija kriminaliteta (norma i praksa)*, Srpsko udruženje za krivičnopravnu teoriju i praksu Ministarstvo pravde Republike Srpske, Trebinje 2020, 479-491 ff. M. BUHA-R. JUKIĆ, *Marginalizovani položaj oštećenog u krivičnom postupku Republike Srpske* (*Marginalized position of the injured party in the criminal proceedings of the Republika Srpska*), Oštećeno lice i krivičnopravni instrumenti zaštite (međunarodno pravni standardi, norma i praksa), Srpsko udruženje za krivičnopravnu teoriju i praksu, Intermex 2020, 625-636 ff.

is interested. An important step in preventing corruption in the judiciary is to prevent abuse of the norm, for example when some of the subjects in the criminal proceedings propose evidence that is not relevant to the criminal proceedings, all with the aim of delaying the proceedings. The court may refuse to present evidence that is not relevant for establishing a significant fact in criminal proceedings about the nature of the criminal offense and the responsibility of the perpetrator of the criminal offense. Also abuse of norm exists when some of the subjects in the criminal proceedings withhold evidence to present it during legal remedy proceedings, although that evidence is important for establishing the truth in the first instance proceedings. Corruption crimes belong to the so-called crimes without a victim, i.e. consensual crimes, where there is no typical passive subject of the crime. For example, in bribery, there are two crimes: receiving and giving bribes. An active participant, or the one who gives a bribe, commits one criminal offense (giving a bribe), and the passive subject, who receives a bribe, commits another offense (receiving a bribe). These crimes are committed without witnesses, which is the main reason why the use of special investigative actions is allowed in detecting, clarifying and proving criminal acts of corruption. In our criminal procedure legislation the provisions on special investigative actions have not been changed. The criminal procedure law does not prescribe the use of special investigative actions in the prevention of corruption.

6. Corrupt criminal offenses and incitement to commit a criminal offense

Can we induce someone to commit a crime, how do we prove that someone committed a crime? According to an explicit legal provision, an undercover investigator does not be in the role of the so-called inciting agent. Sometimes in practice we apply certain actions that are similar to the institute of an inciting agent. This is the case when we want to detect and prove crimes of receiving and giving bribes through the use of a special investigative action of simulating business. An action of handing over a "bribe" with marked banknotes is organized, with organized

surveillance, so that in later criminal proceedings the bribe-giver is not prosecuted, but appears only as a witness in criminal proceedings.

Such conduct in practice is not in accordance with the law, for in this case the recipient of the bribe is induced to take the bribe. The use of special evidence is justified in detecting and proving corruption in the judiciary, political officials, and corruption in the economy.

7. Conclusion

The corruption crimes belong to the so-called crimes without a victim, i.e. consensual crimes, where there is no typical passive subject of the crime.

The corruption does not know borders and is in the service of organized crime. A successful fight against corruption is possible by strengthening international cooperation. It is necessary to implement standards from anti-corruption regulations in national legislation. Many provisions in the criminal procedure laws in Bosnia and Herzegovina at any level of government are not in the function of preventing corruption and organized crime, and they are not in line with international standards. Bad sides of criminal proceedings in our country are, for example: the criminal investigation is not subject to any judicial review, the injured party has no procedural rights in criminal time, and there is no principle of truth in criminal proceedings, application of plea agreements and the imposition of lenient sentences for the most serious crimes.

Pursuant to our criminal law and criminal procedure law, it is not allowed to induce the commission of a criminal offense. Sometimes in practice we engage in certain actions that are similar to the institute of an inciting agent. This is the case when we want to detect and prove crimes of receiving and giving bribes through the use of a special investigative action of simulating business. An action of handing over a "bribe" with marked banknotes is organized, with organized surveillance, so that in later criminal proceedings the bribe-giver is not prosecuted, but appears only as a witness in criminal proceedings.

At the end, we will present one of the usual examples from case law on corruption in Bosnia and Herzegovina. All cases of medium corruption

are the same or similar in BiH (all levels of government). Example is a person who stands accused of the abuse of position (the mayor) for giving money from the city or municipality budget to transport members of one political party to attend a political meeting in another city. On the financial report the accused shows taking money from the budget as a payment for transportation of elementary school pupils. The accused admits to the court that he abused his official position. The court imposes a suspended sentence. In some cases the court decides to impose a prison sentence, up to 1 year in prison, but in subsequent legal proceedings the court imposes a suspended sentence almost always.

Haris Halilović*

Criminal Offences of Corruption in Bosnia and Herzegovina Legislation(s) and Procedural Rules of Investigation: an Overview

1. Introduction

In Bosnia and Herzegovina – hereinafter BiH – the fight against corruption is one of the most challenging tasks that criminal justice system faces. If the legislative and institutional capacities available to BiH criminal justice bodies are taken into account, it could be expected that the judiciary adequately deals with this issue. Unfortunately, judging by the views of various independent sources, especially the non-governmental sector, but international organizations and different professionals as well, the criminal justice system in BiH still never met the expected standards of prosecution of this type of crime. According to

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European Commission Report BiH is at an early stage in the prevention and fight against corruption and organised crime, a country where corruption remained widespread and is of serious concern[1]. In its Arc Report OSCE Mission in BiH concludes that the judicial response to corruption in BiH is still insufficient, in particular with regard to the processing of medium and high-level cases, suggesting a reality of *de facto* impunity for these crimes[2]. Needless to say, the governments' ability to run the country for the benefit of its citizens is largely measured by its effectiveness in fighting corruption. A government that is capable of removing from its ranks those who are prone to corrupt behaviour is a government that can also bring prosperity to its citizens.

Criminal offenses of corruption in BiH are defined by criminal substantive law at all legislative levels. These definitions mostly correspond, but there are also certain differences, so that within certain jurisdictions there are crimes of corruption or their special forms that are not known to other jurisdictions. Also, there are certain differences in the field of prescribed criminal sanctions, which ultimately in practice can lead to legally conditioned different punishment outside the defined framework of individualization of punishment and taking into account the circumstances that affect the punishment to be higher or lower in each case.

In the field of procedural criminal law, legislation at all levels defines a vast array of different measures for gathering evidence, including special investigative measures. Despite the fact that the conditions for determining special investigative measures under all legislation in BiH are very rigorous, these measures are very effective tool in detecting and proving corruption and other serious crimes. In addition to the above, regulations in the field of criminal property forfeiture are also important in the fight against corruption in BiH. This is especially taking into

[1] See Bosnia and Herzegovina 2020 Report, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Commission, 2020, 5.

[2] See Assessing needs of judicial response to corruption through monitoring of criminal cases (arc), Trial monitoring of corruption cases in BiH: second assessment, OSCE Mission to Bosnia and Herzegovina, 2019, 5.

account that corruptive criminal offenses are mostly aimed at gaining material benefit, and this measure is not only repressive in terms of forfeiture of the proceeds of corruption, but it also has preventive nature in deterrence of possible perpetrators from commission of corruption offences as they will be warned about what they can expect.

Finally, not less important are the special laws on the fight against corruption and organized crime, and laws on the protection of persons reporting corruption. These regulations establish institutional capacities for the fight against corruption, such as special departments of the prosecutors' office or the court, and special framework for the protection of whistle-blowers as one of the main prerequisites for successful detection of this type of crime.

2. Criminal justice system in BiH: organization of courts, prosecutors' offices and law enforcement agencies

The system of criminal justice, and thus the legal framework for the fight against corruption in BiH is quite complex and reflects the complexity of BiH political organization. In that sense, the criminal justice system of BiH consists of four distinct criminal justice jurisdictions, those of BiH state, as well as entity of the Federation of BiH – hereinafter FBiH –, entity of Republic of Srpska – hereinafter RS – and Brčko District BiH – hereinafter BD BiH. Every jurisdiction has its own material and procedural criminal laws including a whole range of additional laws related to organizations of courts, prosecutors' offices and police agencies as well as other laws needed for proper functioning of criminal justice system. That means that every jurisdiction has its own legislation related to: incriminations (criminal offence legal definitions), criminal liability, criminal sanctions, investigation, trial rules, legal remedies, penitentiary provisions, criminal property forfeiture provisions, and correspondent organization of courts, prosecutors' offices, police agencies and other institutions and bodies involved in achieving goals of criminal justice system. There are few exceptions, so there are no *lex specialis* laws related to prosecution and protection of juveniles as a perpetrators or victims of criminal offences at the BiH state level, no *lex specialis* laws related to

criminal property forfeiture at BiH state level as well. Some jurisdictions have no corresponding correctional facilities as is the case with BD BiH so persons convicted by Court of BD BiH serve their prison punishments inside correctional facilities of other jurisdictions e.g., FBiH or RS.

In the comparison of these jurisdictions, it is possible to notice a number of differences, but also many similarities. The differences are noticeable in the first place on the field of legislation but in institutional capacities and organization, as well. Some of them are expected, as is different approach to catalogue of criminal offences at BiH level in comparison to other levels in BiH, different court, prosecutors' office and police organization, and similar. In that sense, some groups of criminal offences are not defined by BiH state laws as are criminal offences against life and body, against sexual freedom and integrity and others. Those criminal offences are part of entities and BD BiH criminal codes exclusively. On the other side, there are criminal offences which are not defined by entities or BD BiH criminal codes and are exclusively part of state criminal code regulation, e.g., criminal offences against the integrity of BiH.

On the other side there are differences which are not expected and are considered to contribute to ineffectiveness in the achieving of rule of law in BiH. Those differences are manifested in the first place on the field of criminal substantive law and legal definitions of criminal offences but in the field of criminal procedure and other fields of criminal justice as well. There are criminal behaviours which are recognised as criminal offences in one criminal jurisdiction but not in another and we are not referring here at aforementioned expected different approach to catalogues of criminal offences; different jurisdictions have different legal definitions of apparently the same criminal offence or additional form of specific offence which have not been recognised in other jurisdictions; different criminal sanctions for the perpetration of legally identical criminal offence prescribed by criminal codes. We will discuss these more closely later.

Unfortunately, the more time passes the more differences can be perceived. There are new criminal offences which are not recognised on all levels e.g., Budget misuse which is exclusive only for RS. There are laws which can be found only in some jurisdictions as is the Law on the

special register of persons convicted for criminal acts of sexual abuse and child exploitation of RS[3]. Differences are also noticeable on the field of criminal investigation as specific investigation and proving rules can be found in one, not on the other levels e.g., rules related to initiation of investigation, witness privilege, and similar.

2.1. Courts and prosecutors' offices in the framework of criminal justice system in BiH

2.1.1. BiH state level

In BiH there is no supreme court with appellate jurisdiction in criminal matters on state level so the court organization system on that level is presented only with Court of BiH. However, it needs to be emphasized that Constitutional court of BiH has appellate jurisdiction in matters defined by Constitution, when they become the subject of dispute due to a decision of any court in Bosnia and Herzegovina[4].

Court of BiH is organized through general session and three divisions: criminal, administrative and appellate[5]. Criminal division of Court of BiH is further structured through three departments: Department designated to war crimes (Dept. I), Department designated to organized crime, economic crime and corruption (Dept. II) and Department designated to other criminal offences (Dept. III)[6]. Court of BiH has first level jurisdiction for all criminal offences defined by Criminal Code of BiH and other BiH state level laws[7]. According to the rule of extended jurisdiction Court of BiH will have jurisdiction over all criminal offences

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[3] "Official Journal of Republic of Srpska", n. 08/18.

[4] § VI/3 (b) of Constitution of Bosnia and Herzegovina, Annex 4 of The General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995.

[5] Law on Court of Bosnia and Herzegovina, "Official Journal of Bosnia and Herzegovina", n. 49/09 – consolidated text, 74/09 – revision, 97/09, § 10.

[6] *Ibid.* § 14.

[7] *Ibid*. § 7(1).

no matter if they are under jurisdiction on any other criminal justice jurisdiction in BiH if those offences: (1) endanger sovereignty, territorial integrity, political independence, national security and the international subjectivity of BiH; (2) or may have serious repercussions or adverse effects on the economy of BiH or may cause other adverse consequences for BiH or may cause serious harm or economic damage or other adverse effects outside the territory of the entity or BD BiH[8]. It also has appellate jurisdiction over first level Criminal division decisions[9].

Similarly to organization of Criminal division of Court of BiH, Prosecutors' office of BiH is organized through three departments[10]. It has the authority to act in prosecution of criminal offences and its perpetrators in the domain of BiH Court jurisdiction[11]. Prosecutors' office of BiH has the authority to act in domain on international legal cooperation as well[12]. It has no authority to direct and oversee the prosecutors' offices in entities and BD BiH.

2.1.2. Entity FBiH level

In entity FBiH court organization is composed of Constitutional court of FBiH, Supreme court of FBiH, 10 Cantonal courts and 31 Municipality courts. Jurisdiction of Constitutional court of BiH is defined by Constitution of FBiH and it does not encompass criminal matters, but needs to be mentioned that Constitutional Court of FBiH can decide on constitutional issues presented to it by the Supreme Court or a cantonal court which appears during the proceedings before that court[13].

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[8] *Ibid.* § 7(2).

[9] *Ibid.* § 9.

[10] Rule book of internal organization of Prosecutors' office of BiH, "Official Journal of Bosnia and Herzegovina", nn. 36/13, 16/14, 29/14, 56/15, 66/19, § 6.

[11] Law on Prosecutors' office of Bosnia and Herzegovina, "Official Journal of Bosnia and Herzegovina", n. 49/09 – consolidated text, § 12(1).

[12] *Ibid.* § 12(2).

[13] § 10 of Constitution of FBiH, "Official Journal of Federation of Bosnia and Herzegovina", nn. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 88/08.

Supreme court of FBiH has appellate jurisdiction, resolves jurisdiction conflicts between lower courts and decides in other issues[14]. It should have Special department designated to corruption, organized and intercantonal crime, based on Law against corruption and organized crime in FBiH[15]. Unfortunately, this department is still not in function.

Cantonal courts in FBiH in criminal matters have *ratione materie* first level jurisdiction for all criminal offences punishable over 10 years or with life imprisonment. Cantonal courts have jurisdiction for criminal offences transferred by Court of BiH as well and appellate jurisdiction over decisions of lower courts[16].

Municipality Courts in FBiH in criminal matters have first level jurisdiction for criminal offences punishable of up to 10 years of imprisonment[17].

Federal Prosecutors' office of FBiH according to the positive law in FBiH act in domain of Supreme Court of FBiH and other courts in FBiH[18]. It also oversees and directs the work of lower prosecutors' offices and prosecutors in FBiH and should have Special department designated to prosecution of corruption organized crime and intercantonal crime according to previously mentioned Law against corruption and organized crime in FBiH but it still is not in function as is the case with the Special department inside Supreme court of FBiH. Federal Prosecutors' office has other duties and responsibilities in combating crime.

Cantonal prosecutors' offices act in prosecution of criminal offences and its perpetrators in domain of cantonal and municipality court jurisdictions in FBiH and have other duties and responsibilities in combating crime.

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[14] Law on courts of Federation of Bosnia and Herzegovina, "Official Journal of Federation of Bosnia and Herzegovina", nn. 38/05, 22/06, 63/10, 72/10 – revision, 7/13, 52/2014, § 29.

[15] "Official Journal of Federation of Bosnia and Herzegovina", n. 59/14.

[16] *Ibid.* § 28.

[17] *Ibid.* § 27.

[18] Law on Prosecutors' office of FBiH, "Official Journal of Federation of Bosnia and Herzegovina", n. 19/03 §§ 16 and 17.

2.1.3. Entity RS level

In entity RS the court system is organized through Constitutional court of RS, Supreme Court of RS, 5 county courts, and 19 municipality courts. The Constitutional court of RS provides the protection of constitutionality and legality[19].

Supreme court of RS in criminal matters has appellate jurisdiction, resolves jurisdiction conflicts and decides in other issues[20].

County courts of RS in criminal matters have *ratione materie* first level jurisdiction for all criminal offences punishable over 10 years or with long-term imprisonment, jurisdiction for criminal offences transferred by Court of BiH, as well and appellate jurisdiction[21]. County Court of Banja Luka has Special Department designated to fight corruption, organized and other severe forms of economic crime, based on Law against corruption, organized and other forms of severe economic crime RS.

Municipality Courts of RS in criminal matters have jurisdiction for criminal offences punishable with fine or up to 10 years of imprisonment, jurisdiction based on special laws, jurisdiction for criminal offences transferred by Court of B&H, and jurisdiction over juvenile criminal proceedings[22].

Public prosecutors' offices of RS are Republic prosecutors' office and County prosecutors' offices. These offices are authorized to act in prosecution of criminal offences and its perpetrators according to the laws of RS and rise legal remedies to protect constitutionality and legality[23].

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[19] § 5/69 of Constitution of Republic of Srpska, "Official Journal of Republic of Srpska", n. 21/92 – consolidated text, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05, 117/05.

[20] Law on courts of Republic of Srpska, "Official Journal of Republic of Srpska", nn. 37/12, 14/14 – Constitutional court decision, 44/15, 39/16 – Constitutional court decision, 100/2017, § 28.

[21] *Ibid.* § 27.

[22] *Ibid.* § 26.

[23] Law on public Prosecutors' offices of Republic of Srpska, "Official Journal of Republic of Srpska", n. 69/16, § 17.

General republic prosecutor has the authority to resolve jurisdiction disputes between county prosecutors, oversees and directs the work of lower prosecutors' offices and prosecutors in RS and has other duties and responsibilities according to the law[24].

County prosecutors' offices in RS act in prosecution of criminal offences and its perpetrators and have other duties and responsibilities in combating crime. Within the Republic prosecutors' office is established Special Department designated to prosecution of corruption, organized and other severe forms of economic crime based on Law against corruption, organized and other forms of severe economic crime RS[25].

2.1.4. BD BiH level

Furthermore, in BD BiH court system is organized through Appellate and Municipality court of BD BiH:

Appellate court of BD BiH in criminal matters has appellate jurisdiction[26].

Municipality Court of BD BiH in criminal matters has jurisdiction for all criminal offences except the criminal offences under the jurisdiction of Court of BiH Court and jurisdiction for criminal offences transferred by Court of BiH[27]. It also has other duties according to the law.

Prosecutors' office of BD BiH act in prosecution of criminal offences and its perpetrators has other duties and responsibilities according to the law[28].

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[24] *Ibid*. §§ 9, 19, 20, 21, and 22.

[25] "Official Journal of Republic of Srpska", n. 39/16.

[26] Law on courts of Brčko district Bosnia and Herzegovina, "Official Journal of Brčko district Bosnia and Herzegovina", n. 18/20 – consolidated text, § 22.

[27] *Ibid*. § 21.

[28] Law on Prosecutors' office of Brčko district Bosnia and Herzegovina, "Official Journal of Brčko district Bosnia and Herzegovina", n. 19/07, § 12.

2.2. Law enforcement agencies

In prosecution of criminal offences in BiH the important role of different law enforcement agencies needs to be emphasized, due to the fact that those agencies have significant powers and responsibilities related to investigation of criminal offences. It is considered in contemporary environment that would be hard to imagine effective fight against crime, especially specific forms of organized crime without proactive role of law enforcement agencies and authorized officials in terms of uncovering, investigation and proving of criminal offences[29].

On the state level those agencies on the first place are State agency for investigation and protection (SIPA) and Border police (GP). In FBiH those are Federal police administration (FUP) and Cantonal police. In RS, Police of RS and in BD BiH, Police of BD BiH. According to laws of criminal procedure in BiH, there are other agencies and subjects involved in investigation on all levels as are judicial and financial police, prosecutors' office investigators and similar. All of them including police officials are generally titled as "authorized officials". In BiH the role of authorized officials in criminal proceedings is considered to be crucial for its successful initiation, conduct and proper completion. Depending on the type of criminal offences they act without previous notification of the prosecutor or they are obliged first to notify the prosecutor related to reasonable suspicion that criminal offence has been perpetrated[30].

2.3. Jurisdiction over criminal offences of corruption

Due to the fact that corruptive criminal offences are incriminated at every criminal justice level in BiH, accordingly these criminal offences will be prosecuted and trialed in respect the rules of jurisdiction of that particular criminal justice level.

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[29] S. Karović-S. Orlić, *Investigative and proving role of Law enforcement officials in criminal procedure in Bosnia and Herzegovina*, in *Police and Security* 29 (2020) 112 ff.

[30] H. Halilović, *Criminal procedure law*. 1. *Introduction and foundations*, Sarajevo 2019, 123-126.

On the BiH level the Court of BiH has the full jurisdiction over all criminal offences including corruptive ones which are defined by Criminal Code of BiH – hereinafter CC BiH[31] – or by other laws on BiH state level. Under the previously mentioned rule of extended jurisdiction, Court of BiH will have jurisdiction over all criminal offences including the corruptive ones no matter if they are under jurisdiction on any other criminal justice level in BiH if those offences meet conditions of extended jurisdiction.

RS level courts have the jurisdiction for all corruptive and other criminal offences incriminated in Criminal Code of RS – hereinafter CC RS[32] –, according to the rules of *ratione materie* jurisdiction in the same manner as courts in FBiH. Exceptions are the most serious forms of criminal offenses including a number of corruptive criminal offences in which cases jurisdiction will be transferred to the Special department of Banja Luka County court[33].

BD BiH level Court of BD BiH has the full jurisdiction over all corruptive and other criminal offences incriminated by Criminal Code of BD BiH – hereinafter CC BD BiH[34] – or by other laws on BD BiH level.

3. Criminal offences of corruption in BiH legislation(s)

Criminal offences of corruption are recognised at every criminal justice level in BiH as a specific group of criminal offences of corruption and criminal offences against official or other responsible duty. CC BiH defines these offences in Title XIX – Criminal offences of corruption and criminal offences against official or other responsible duty[35]. CC FBiH and CC BD BiH recognises that group of criminal offences in

[31] "Official Journal of Bosnia and Herzegovina", nn. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18.

[32] "Official Journal of Republic of Srpska", n. 64/17.

[33] Law against corruption, organized and other forms of severe economic crime RS, § 13.

[34] "Official Journal of Brčko district Bosnia and Herzegovina", nn. 10/03, 45/04, 06/05, 21/10, 52/11, 26/16, 13/17, 50/18.

[35] CC BiH, § 217-229.

Title XXXI – as Criminal offences of bribery and criminal offences against official or other responsible duty[36]. In CC RS these criminal offences are encompassed by Title XXV – Criminal offences against official duty[37]. It needs to be emphasized that term "criminal offence of corruption" in BiH legislations surpasses the specific catalogues of these offences defined by BiH criminal codes and encompasses offences which belong to other groups of criminal offences but under some legal circumstances can be considered as a corruptive (e.g. official status of perpetrator). Comprehensive list of corruptive criminal offences has been defined by High Judicial and Prosecutorial Council of BiH[38]. It is also worth to mention that no criminal code in BiH contain definition of corruption. But corruption is defined by other laws in BiH as is Law on Agency for the prevention of corruption and coordination on fight against corruption[39]. According to that Law, corruption denotes any abuse of power entrusted to the public official or person in a political position at the state, entity, cantonal level, level of the BD BiH, city or municipal level, which may lead to private gain. Corruption in particular can involve directly or indirectly soliciting, offering, giving or accepting bribes or any other undue advantage or its possibility, which impairs the proper performance of any duty or behaviours expected from the recipient of the bribe[40].

Main object of protection of this group of criminal offences is official duty of state, entity, BD BiH and other bodies with public authorities. Additional protected objects are: (1) rights and freedoms of citizens; (2) economy; (3) property; and other values[41].

Perpetrator of this kind of criminal offences is usually person entrusted with official or other responsible duty, but regarding some criminal offences, persons with no entrusted official or other responsible duty as well – e.g., in the case of Giving gift or other form of benefit

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36 CC FBiH, § 380-392; CC BD BiH, § 374-386.

37 CC RS, § 315-330.

38 List has been adopted by HJPC BiH in 2015 and revised in 2018.

39 "Official Journal of Bosnia and Herzegovina", nn. 103/09, 58/13.

40 § 2.

41 B. Petrović-D. Jovasević-A. Ferhatović, *Criminal law II (Complicity, Criminal Sanctions and Special part)*, Sarajevo 2016, 280.

and few other corruptive criminal offences. Perpetrator also can be BiH national or foreign official[42].

In relation to criminal liability for this kind of criminal offences, it needs to be emphasized that it is predominantly based on criminal intent. Pretty rare, it can be based on negligence as well, e.g., in the case of criminal offence of Uncovering the official classified information.

Criminal offences of corruption and criminal offences against official or other responsible duty defined by Title XIX of CC BiH are: (1) Accepting gifts or other form of benefits[43]; (2) Giving gifts or other form of benefits[44]; (3) Accepting gifts or other form of benefits for interceding[45]; (4) Giving gifts or other form of benefits for interceding[46]; (5) Abuse of office or official authority[47]; (6) Office embezzlement[48]; (7) Fraud in the office[49]; (8) Unauthorized lend of assets in the office[50]; (9) Lack of commitment in the office[51]; (10) Forging of official document[52]; (12) Illegal collection and disbursement[53]; (13) Unlawful release of a detainee[54]; (14) Unlawful appropriation of objects while searching or carrying out an enforcement order[55].

CC FBiH in Title XXXI groups the criminal offences of bribery and criminal offences against official or other responsible duty in the same manner as CC BiH with the exception of recognition of one additional criminal offence named Disclosure of official secret[56].

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[42] M. Babić-I. Marković, *Criminal law, Special part, Fourth revised and supplemented edition*, Banja Luka 2013, 289-290.

[43] CC BiH, § 217.

[44] *Ibid.* § 218.

[45] *Ibid.* § 219.

[46] *Ibid.* § 219a.

[47] *Ibid.* § 220.

[48] *Ibid.* § 221.

[49] *Ibid.* § 222.

[50] *Ibid.* § 223.

[51] *Ibid.* § 224.

[52] *Ibid.* § 226.

[53] *Ibid.* § 227.

[54] *Ibid.* § 228.

[55] *Ibid.* § 229.

[56] CC FBiH, § 388.

CC RS in Title XXV groups the criminal offences against official duty mostly the same way as state CC and CC FBiH but additionally recognises in this Title next criminal offences: (1) Disclosure of official secret[57]; (2) Misuse of budget[58]; (3) Unlawful giving benefits to business entities[59]; (4) Testimony extortion[60]; (5) Violation of human dignity through misuse of official position or authority[61].

CC BD BiH in Title XXXI defines the criminal offences of bribery and criminal offences against official or other responsible duty mostly the same way as state CC with the exception of additional recognition of two criminal offences: (1) Unlawful giving of benefit[62]; (2) Disclosure of official secret[63].

It should be emphasized that some of the additional criminal offences against official duty recognised in CC RS are unique, *sui generis* criminal offences, and cannot be find in catalogues of criminal offences in CCs at other levels. These are Misuse of budget and Violation of human dignity through misuse of official position or authority.

As it is previously mentioned, there are other corruptive criminal offences in BiH legislation(s) which belong to other groups (catalogues) of criminal offences defined by CCs in BiH but can be considered as a corruptive under some legal conditions. These are in particular: (1) Violation of the voters choice – if the act of violation has been undertaken by bribe[64]; (2) Uncovering of classified information – if the motive is greed[65]; (3) Violation of the law by judge[66]; (4) Trade in human beings – if the criminal offence has been committed by official person who is giving or receiving payments or other benefits in the course of its work[67];

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57 CC RS, § 323.
58 *Ibid.* § 324.
59 *Ibid.* § 325.
60 *Ibid.* § 328.
61 *Ibid.* § 329.
62 CC BD BiH, § 377a.
63 *Ibid.* § 378.
64 CC BiH, § 151(1).
65 *Ibid.* § 154(1) a).
66 *Ibid.* § 238.
67 *Ibid.* § 186(3) and (4).

(5) People smuggling – if the offence has been committed by abuse of official authority[68]; and other criminal offences both in CC BiH, entity and BD BiH CCs.

3.1. Main criminal offences of corruption in BiH legislation(s)

3.1.1. Accepting gifts and other forms of benefits[69]

Basic form of this criminal offence can be perpetrated: "When official or responsible person in the institutions of BiH including also a foreign official person, demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him".

Prescribed punishment for this basic form is 1 to 10 years of imprisonment. In RS unlike other legislations in BiH prescribed punishment is 2 to 10 years of imprisonment.

Perpetrator of this criminal offence can be official or responsible person in BiH institutions including foreign official (in the case of FBiH, RS and BD BiH CCs official or responsible person in FBiH, RS and BD BiH, including foreign official).

Privileged form of this criminal offences can be perpetrated: "When official or responsible person in the institutions of BiH including also a foreign official person, demands or accepts a gift or any other benefit or accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought to be performed by him, or for the omission of an act, which ought not to be performed by him".

Prescribed punishment for this form is 6 months to 5 years of imprisonment. In RS unlike other legislations in BiH it is 1 to 8 years of imprisonment.

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[68] *Ibid.* § 189(3).

[69] CC BiH, § 217; CC FBiH, § 380; CC RS, § 319 – titled as Accepting bribe; CC BD BiH, § 374.

Third form of this criminal offence will exist: "When official or responsible person in the institutions of BiH including also a foreign official person, demands or accepts a gift or any other benefit following the performance or omission of an official act referred in basic or privileged form and in relation to it".

Prescribed punishment for this form is 1 to 10 years of imprisonment at BiH state level and BD BiH; 6 months to 5 years of imprisonment in FBiH; and up to 3 years of imprisonment in RS.

Every form of this criminal offence requires existence of criminal intent to be perpetrated.

Legislation on all levels in BiH define a special provision related to forfeiture of gifts or other benefits, despite all levels have already been implemented a general rule of criminal property forfeiture.

3.1.2. Abuse of office or official authority[70]

Basic form of this criminal offence exists: "When official or responsible person in BiH institutions by taking advantage of his office or official authority, exceeds the limits of his official authority or fails to execute his official duty, and thereby acquires a benefit to himself or to another person, or causes damage to another person or seriously violates the rights of another".

Prescribed punishment for this basic form is 6 months to 5 years of imprisonment at BiH state level, BD BiH and FBiH. In RS it is 1 to 5 years of imprisonment.

Perpetrator of this criminal offence can be official or responsible person in BiH institutions (in the case of FBiH, RS and BD BiH CCs official or responsible person in FBiH, RS and BD BiH institutions).

Aggravated form will exist: "If a property gain acquired by the perpetration of this criminal offence exceeds the amount of 10.000 KM".

Prescribed punishment for this form is 1 to 10 years of imprisonment at all levels.

Aggravated form will also exist: "If a property gain acquired by the perpetration of this criminal offence exceeds the amount of 50.000 KM".

[70] CC BiH, § 220; CC FBiH, § 383; CC RS, § 315; CC BD BiH, § 377.

Prescribed punishment for this aggravated form is no less than 3 years of imprisonment at state level, FBiH and BD BiH. In RS it is 2 to 12 years of imprisonment.

Criminal liability requires existence of criminal intent.

Legislation on all levels in BiH imposes a special provision related to forfeiture of acquired property for this criminal offence as well.

3.1.3. Office embezzlement[71]

In research conducted through Basic court of Banja Luka, District court of Banja Luka, Basic court of Brčko district BiH, Municipal Court of Sarajevo and Cantonal court of Sarajevo for the period 2013-2015 on 91 court cases regarding corruption, it has been found that office embezzlement constitute 80% of proven criminal offences[72].

Basic form of this criminal offence will exist if: "Whoever, with an aim of acquiring unlawful property gain for himself or another, appropriates money, securities or other movable entrusted to him by virtue of his office in the institutions of BiH, or of generally his position within the institutions of BiH".

Prescribed punishment is 6 months to 5 years of imprisonment at all levels.

Aggravated form will exist: "If a property gain acquired by the perpetration of this criminal offence exceeds the amount of 10.000 KM".

Prescribed punishment for this form is 1 to 10 years of imprisonment at state level and FBiH and 1 to 8 years of imprisonment in RS and BD BiH.

Another aggravated form of this criminal offence will exist: "If a property gain acquired by the perpetration of this criminal offence exceeds the amount of 50.000 KM".

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[71] CC BiH, § 221; CC FBiH, § 384; CC RS, § 316; CC BD BiH, § 378.

[72] A. Maljević-S. Vujović, *Criminal justice systems response to corruption: Who is been prosecuted and for what*, in *Criminal Justice Issues. Journal of Criminal Justice and Security* 19 (2020) 39 ff., 42.

Prescribed punishment for this aggravated form is no less than 3 years of imprisonment at state level and FBiH. In RS and BD BiH, it is 2 to 10 years of imprisonment.

There is also privileged form: "If a property gain acquired by the perpetration of this criminal offence do not exceeds the amount of 500 KM (BD BiH)/300 KM (RS) with the criminal intent of a perpetrator to acquire only a property of a small value".

It is recognised only in RS and BD BH with the prescribed punishment of fine or imprisonment of up to 1 year.

Perpetrator of these criminal offences can be a person entrusted with money, securities or other movable property by virtue of his office, or of generally his position within the institutions of BiH (in the case of FBiH, RS and BD BiH criminal codes person entrusted with money, securities or other movable property of his office, or generally his position within the institutions of FBiH, RS and BD BiH or legal entity).

Criminal liability requires existence of criminal intent as is the case with the aforementioned criminal offences.

Legislation on all levels in BiH implements a special provision related to forfeiture of acquired property for this criminal offence as well.

Despite the fact that criminal sanction of imprisonment has been legally prescribed for most of the criminal offences of corruption in BiH criminal laws, different researches focused on penal policy for corruption offences found that courts in BiH are prone to exchange it with other forms of milder sanctions in particular with suspended sanction. In research conducted on 89 cases of Municipal and Cantonal court of Sarajevo for the period 2005-2011 it was found that perpetrators of corruptive criminal offences were sentenced to imprisonment in slightly more than one eighth of the cases while in nearly 87% of cases the sanction of imprisonment was not applied[73].

[73] D. Datzer-S. Vujović, *Penal Policy for Corruption Offences in Canton Sarajevo*, in *Criminology and Social Integration. Journal for Criminology, Penology and Behavioral Disorders* 21 (2013) 95 ff., 101.

4. Rules of criminal procedure and its applicability in fight against corruption

In BiH, the provisions of procedural criminal laws are largely in line with modern requirements in the fight against crime, including corruption offenses. This refers to both common evidentiary actions and special investigative measures that have been implemented in the criminal procedure law system in BiH. In addition to the above instruments, there are also other investigative and procedural tools as are cooperating witness, witness under immunity and measure of asset forfeiture targeted to higher level of efficiency in prosecution of criminal offences including corruption.

Crime investigation – according to Criminal procedure code of BiH (hereinafter CPC BiH)[74], Criminal procedure code of FBiH (hereinafter CPC FBiH)[75], Criminal procedure code of RS (hereinafter CPC RS)[76] and Criminal procedure code of BD BiH (hereinafter CPC BD BiH)[77] – is the first phase of criminal procedure targeted to collection of evidence and information in relation to criminal offence and its perpetrator. Crime investigation has additional purposes as well, to collect evidence which could not be collected during the later procedure or their collection later could be connected with disproportionate difficulties.

It is initiated by prosecutors' order if there is reasonable suspicion that criminal offence has been perpetrated and is directed and overseeded by prosecutor.

This phase of criminal procedure involves law enforcement officials with significant authorities to undertake different measures targeted to collect evidence. Law enforcement officials are also involved in special investigative measures under the pretrial judge warrant.

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[74] "Official Journal of Bosnia and Herzegovina", nn. 3/03, 32/03 – correction, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 29/07, 53/07, 58/08, 12/09, 16/09, 53/09, 93/09, 72/13, 65/18.

[75] "Official Journal of Federation of Bosnia and Herzegovina", nn. 35/03, 56/03 – correction, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14, 74/20.

[76] "Official Journal of Republic of Srpska", nn. 53/12, 91/17, 66/18.

[77] "Official Journal of Brčko district Bosnia and Herzegovina", n. 34/2013 – consolidated text, 27/14, 3/19, 16/20.

According to CPC BiH crime investigation can last up to 6 months and can be prolonged for additional timeframe of 6 plus 6 months (investigation of criminal offences punishable with up to 10 years of imprisonment) by the decision of general prosecutor or 12 plus 12 months (investigation of criminal offences punishable with over 10 years of imprisonment) by the decision of general prosecutor as well.

4.1. Common evidence collecting measures

Common crime investigation measures according to criminal procedure codes in BiH include:

1) Search of apartments other premises, persons and movables[78]. This measure targets for the uncovering of the suspect, accomplices, traces of criminal offence and material evidence as well. This measure is usually of urgent investigative nature but it can also be taken in later stages of proceedings[79]. It is traditional investigative measure in prosecution of all types of crimes. With the development of technology and its use in everyday life search of technical devices gets more significance as a tool for collecting the evidence. Can be initiated by court order but in exceptional circumstances no court order is required e.g., security of citizens or property, arrest of the perpetrator caught at the crime scene etc. – in the case of search of apartments or other premises; or during the arrest, if there is suspicion that suspect own firearms or other weapon etc. – in the case of search of a person. Search of movables also include: a) computer systems, b) data storage devices and c) cellular phones which is of great importance in collecting electronic evidence. Search must be concluded in timeframe of 15 days from the day of court order issuance.

2) Seizure[80] targets: a) to secure the evidence; b) to secure the citizens and property; c) to make criminal procedure and prosecution more

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[78] CPC BiH, § 51-64; CPC FBiH, § 65-78; CPC RS, § 115-128; CPC BD BiH, § 51-64.

[79] H. Sijercić Colić, *Criminal procedure law.* 1. *Criminal procedure actors and measures. Fourth revised and supplemented edition*, Sarajevo 2017, 315.

[80] CPC BiH, §§ 65-74; CPC FBiH, §§ 79-88; CPC RS, §§ 129-139; CPC BD BiH, §§ 65-74.

efficient. It is important investigation measure in relation to all types of criminal offences which can be initiated: a) by court order b) in some circumstances (danger of delay) without court order but subsequent court order is required. It encompasses different form of measures: a) temporary seizure of material evidence which needs to be seized according the criminal codes; b) temporary seizure of material evidence which can be used in criminal procedure; c) collecting of data stored on computer or other device for automatic data processing; d) temporary seizure of letters, telegrams and other mail; e) temporary seizure of documentation; f) submission of data related to bank deposits and other financial transactions and businesses of a person or other persons suspected they are involved in those transactions; g) temporary suspension of financial transactions; h) order to the operator of telecommunications; i) temporary seizure of property. Some forms of seizure are of the extreme importance in prosecution of corruption, in particular measures related to acquiring bank deposits data, data related to financial transactions, temporary suspension of financial transactions and seizure of property.

3) Interrogation of the suspect[81] is traditional investigative measure used in prosecution of all types of crime. This measure can be performed during the investigation by prosecutor or police officers. It must be performed with respect of the suspect rights and freedoms otherwise will result with illegal evidence.

4) Witness hearing[82] is aimed to the collection of witness statement in relation to criminal offence, perpetrator and other circumstances related to criminal event. It is common investigation measure in prosecution of all types of criminal offences as well.

5) Crime scene investigation and crime reconstruction[83] are traditional investigation measures in the framework of crime investigation in BiH. Crime scene investigation targets to collection of material evidence and traces related to criminal offence and its perpetrator, while the purpose

[81] CPC BiH, §§ 77-80; CPC FBiH, §§ 91-94; CPC RS, §§ 142-145; CPC BD BiH, §§ 77-80.

[82] CPC BiH, §§ 81-91; CPC FBiH, §§ 95-105; CPC RS, §§ 146-156; CPC BD BiH, §§ 81-91.

[83] CPC BiH, §§ 92-94; CPC FBiH, §§ 106-108; CPC RS, §§ 157-159; CPC BD BiH, §§ 92-94.

of crime reconstruction is verification of the evidence. Unfortunately, crime reconstruction is not commonly used in investigations in BiH.

6) Expertise[84]. The purpose of this measure is the collection of the evidence in the form of expert witness statement. It is used in clarifying facts in relation to the most types of crime. In BiH system of criminal procedure at all levels expertise can be ordered by prosecutor or the court. However, it is considered that expertise is generally ordered by prosecutor when findings and opinion of person who has specific professional knowledge are necessary for determination or evaluation of important facts[85]. This measure is of great importance in contemporary criminal procedure along other measures and gets more significance with the development of knowledge and technology in wide area of sciences. Specific forms of expertise are of the extreme importance in prosecution of corruption as is the forensic accounting which is inevitable part of investigation and trial in large number of criminal offences related to corruption. Forensic accounting is a form of expertise which is separately defined by criminal procedure codes in BiH unlike number of other expertise as are ballistic, biological, chemical and others[86].

In wider context conventional measures for the collection of evidence in criminal procedure codes in BiH present main pillar of criminal justice in prosecution of crime. These measures are applicable in investigation of practically every crime form and there are a lot of experience on the side of police officers and prosecutors in their implementation. If performed according to the legal provisions these measures will result with clear and reliable evidence. On the other side, they are not the best choice for investigation of complex crime forms except in combination with special investigative measures.

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[84] CPC BiH, §§ 95-115; CPC FBiH, §§ 109-129; CPC RS, §§ 160-180; CPC BD BiH, §§ 95-115.

[85] D. Bajraktarević Pajević-M. Kavazović-M. Lučić Ćatić, *Relationship of Prosecutors and Expert Witnesses*, in *Legal system of Bosnia and Herzegovina: Forensic Expertise – An Evidence that is in the Ascendant*, in *Journal of Eastern-European Criminal Law* 2 (2017) 157 ff., 161.

[86] CPC BiH, § 111; CPC FBiH, § 125; CPC RS, § 176; CPC BD BiH, § 111.

4.2. Special investigative measures

Special investigative measures recognised in BiH criminal procedure codes[87] are: a) surveillance and technical recording of telecommunications; b) surveillance and technical recording of premises; c) access to computer systems and data dissemination; d) secret surveillance and technical recording of persons, means of transport and related objects; e) use of undercover investigators and use of informants; f) simulated and controlled purchase and bribe giving; g) supervised transportation and delivery of items in relation to criminal offence.

Main principle of use of these measures during the investigation in BiH is they can only be performed in circumstances where it is otherwise impossible to collect evidence or their acquisition is associated with disproportionate difficulties. Furthermore, these measures can be authorized only by pretrial judge warrant and can be used only for investigation of serious crime, usually punishable with 5 or more years of imprisonment in prison including the vast array of corruptive criminal offences. For example, corruptive criminal offences specified in additional catalogue of criminal offences for which special investigative measures can be ordered are: a) accepting bribe or other form of benefit; b) giving bribe or other form of benefit; c) accepting bribe or other form of benefit for interceding; d) giving bribe or other form of benefit for interceding; e) Abuse of office or official authority. This list does not exclude the application of special investigative measures in investigation of other corruptive criminal offenses under the condition that they are punishable by imprisonment for a term of 5 years or more.

Results of special investigative measures in a form of: technical recordings, documentary evidence, material evidence and witness (or witness under protection) statements of police officers involved in performance of some measures can be used as evidence at trial. It is worth to note that any illegality in use of these measures, as they pose significant threat regarding the rights and freedoms of citizens, will result with the illegality of evidence collected.

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[87] CPC BiH, §§ 116-122; CPC FBiH, §§ 130-136; CPC RS, §§ 234-240; CPC BD BiH, §§ 116-122.

Special investigative measures are extremely useful for uncovering the complex crime forms including corruption.

4.3. Witness immunity

Witness immunity[88] at BiH level can only be granted in circumstances where witness statement is of importance for proving the criminal offence of another person. Not every witness can be granted immunity, just the one who would, by the means of its own testifying, expose himself to possible criminal prosecution. Immunity can only be granted for the criminal offence of the same or lesser seriousness than it is a criminal offence for which proving the testifying is used. Finally, immunity can never be granted for criminal offence punishable with more than 10 years of imprisonment. However, rules on witness immunity are not harmonized at all levels in BiH. In FBiH and BD BiH for example, witness immunity can be granted only for criminal offence of lesser seriousness than it is a criminal offence for which proving the testifying is used. As opposed to the regulations at the levels of BiH, FBiH and BD BiH in RS procedural rules on witness immunity are not elaborated in detail leaving that way possibility for wider interpretation[89].

4.4. Protection of witnesses

Witness protection in BiH is defined by special laws at all levels. At BiH level this is Law on the protection of witnesses under threat and vulnerable witnesses[90]. Laws in FBiH[91] and BD BiH[92] are identically titled, while in RS this Law is titled Law on protection of witnesses[93]. All laws recognize two categories of witnesses: witness under threat

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88 CPC BiH, § 84; CPC FBiH, §§ 130-136; CPC RS, §§ 234-240; CPC BD BiH, § 84.

89 CPC RS, § 149.

90 "Official Journal of Bosnia and Herzegovina", nn. 03/03, 21/3, 61/04, 55/05.

91 "Official Journal of Federation of Bosnia and Herzegovina", n. 36/03.

92 "Official Journal of Brčko district Bosnia and Herzegovina", n. 10/03.

93 "Official Journal of Republic of Srpska", n. 48/03.

and vulnerable witness. Some of the forms of protection they provide are: (1) provision of social, psychological and other support; (2) court-controlled ways of witness testifying; (3) testifying via technical devices for picture and voice transmission; (4) testifying in the absence of defendant (defendants removal from the courtroom); (5) other measures of protection.

Witness protection can be useful in investigation and proving of different forms of crime, including corruption but it is worth to emphasize that according to BiH laws court cannot base its decision exclusively or to a large degree only on the statement of witness under protection.

4.5. Criminal property forfeiture

Main principle adopted in criminal codes at all levels in BiH is that no one can retain any kind of property gain as a result of criminal offence perpetration[94]. Today asset forfeiture is considered to be one of the most effective tools in fight against organized and other serious forms of crime, including corruption. Material and procedure criminal provisions related to criminal property forfeiture are part of every BiH jurisdiction. In addition to material and procedure criminal codes every jurisdiction except the state one, adopted special laws aimed for the higher efficiency in criminal property forfeiture. In FBiH this is the Law on forfeiture of illegally acquired property by criminal offence[95], in RS Law on forfeiture of proceeds of crime[96] and in BD BiH Law on criminal property forfeiture[97]. Important part of the criminal property forfeiture laws in BiH are financial investigation as a specialized investigation of economic crime, corruption and other complex form of crime. Criminal property forfeiture forms recognized in BiH legislation(s) are: (1) ordinary forfeiture; (2) extended forfeiture, modern and efficient form of forfeiture especially in combating organised crime and corruption but

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94 CPC BiH, § 110; CPC FBiH, § 114; CPC RS, § 8; CPC BD BiH, § 114.

95 "Official Journal of Federation of Bosnia and Herzegovina", n. 71/14.

96 "Official Journal of Republic of Srpska", n. 66/18.

97 "Official Journal of Brčko district Bosnia and Herzegovina", n. 29/16.

still rarely exercised in BiH judiciary; (3) civil forfeiture, recognised on the state level legislation but never exercised by the judiciary[98].

5. Special anti-corruption laws

In relation to the fight against corruption it is also worth to emphasize that in BiH exists a number of special laws purposed to achieving general or specific goals in combating these forms of criminal offences as is the earlier mentioned Law on Agency for the prevention of corruption and coordination on fight against corruption in BiH and Law on the protection of persons reporting corruption in the institutions of BiH[99] as well. Similar law exists in RS[100] and BD BiH[101], but it is not adopted yet in FBiH and considering that the laws on the protection of persons reporting corruption define the protection of whistle-blowers, procedure for reporting, obligations of the responsible person and the competent authorities regarding the reporting and protection of whistle-blowers and other issues, it is easy to conclude their importance in reporting corruption which is usually first step toward investigation and prosecution.

Additionally, in FBiH and RS are adopted special laws against corruption, organized and economic crime. These laws establish institutional capacities for the fight against corruption, such as special departments of the prosecutors' office or the court and defines special instruments which can be used for more efficient investigation and proving of corruption as is the cooperating witness in FBiH. Unfortunately, in FBiH Law against corruption and organized crime despite been adopted in 2014 still has not been implemented. Examples like these and previous one related to protection of persons reporting corruption in FBiH are

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98 H. Halilović-M. Budimlić-E. Muratbegović, *Criminal property forfeiture in Bosnia and Herzegovina: Legal overview*, in *Criminal justice issues. Journal of criminal justice and security* 18 (2018) 123 ff., 128-129.

99 "Official Journal of Bosnia and Herzegovina", n. 100/13.

100 "Official Journal of Republic of Srpska", n. 62/2017.

101 "Official Journal of Brčko district Bosnia and Herzegovina", n. 25/18.

the one of the answers why BiH as a whole cannot achieve better results in combating corruption.

6. Conclusion

Criminal legislation in BiH, both substantive and procedural, largely follows international requirements regarding the implementation of specific criminal offenses as well as tools in their detection, proving and prosecution, including corruption. Within the framework of substantive criminal law, to a greater or lesser extent, the definitions of corruptive criminal offenses generally correspond to the definitions from the comparative legislation. That does not mean there is no need for the introduction of completely new incriminations or for further improvement of the existing ones as well. It just means that available portfolio of corruptive criminal offences defined by BiH legislation(s) constitute a decent base for their prosecution. In the field of procedural criminal legislation, in addition to the common measures for collection of the evidence, the criminal justice authorities have at their disposal special investigative measures as a particularly effective form of gathering evidence, and thus more efficient prosecution of criminal offenses and even those of a corrupt nature. Other legislative tools in combating corruption analysed in the text, especially forfeiture of criminal property, are also relevant and in combination with other measures contribute to higher efficiency in prosecution of these type of criminal offences.

On the other side, it is possible to rise a lot of objections to BiH criminal justice system in its fight against corruption. In the first place, they are aimed at non-harmonized legislature, especially related to the provisions of substantive criminal law, but to a certain extent also of procedural criminal law as well as other laws that should serve in achieving a more effective fight against corruption. Non-harmonized legislations certainly lead to inefficiency and inefficiency inevitably led to loss of confidence in country's legal system. Accordingly, BiH lawmakers need to work on harmonizing anti-corruption legislation. It is important condition for this fight to be efficient.

Additional objections may also be raised regarding the fact that some special anti-corruption laws within specific jurisdictions were adopted, but still has never been implemented.

Finally, the burden of the failure in the fight against corruption in BiH hardly lies only in the legislation(s) framework, there are undoubtedly other causes. These causes are specifically related to the holders of judicial, prosecutorial and police offices, their professionalism and willingness to prosecute corruption. In that sense, BiH criminal justice system and its key subjects still have a lot to do in achieving rule of law.

Alessandro Milone*

The crime of public corruption in the United States and the crisis of criminal legality. A lesson for Italy

Summary. 1. – Corruption in international sources: the cultural hegemony of the anglo-saxon model. 2. – Public corruption in the United States: a historical-legislative framework of the phenomenon. 3. – A widespread system of criminal repression: corruption and federal legislation. 3.1. – (follow) The crime of bribery and illegal gratuity. 3.2. – (follow) The distinction between bribery and extortion. 4. – Corruption in crisis between law in the books and law in the actions. 5. – Conclusions: a lessons for Italy.

1. Corruption in international sources: the cultural hegemony of the anglo-saxon model

Corruption is an issue that has historically concerned the United States of America, since its establishment as an independent nation in 1776, and American citizens, who are particularly attentive to the ethical and moral profiles of political representation and to the transparency of public administration[1].

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[1] For a historical framing of corruption in the American legal tradition, see the essay by Z. Teachout, *Corruption in America. From Benjamin Franklin's Snuff Box to Citizens United*, Harvard 2014, which traces and analyzes all the stages of the phenomenon of corruption in the United States. The author opens her work – in order to explain the importance and value of anti-corruption in the country since its constitution – by telling an anecdote related to the political and diplomatic life of the time happened to one of the Fathers of the Fatherland, Benjamin Franklin, who, in 1785, after years spent as a diplomatic representative in Paris, received on his departure from King Louis XVI, as a gift, a particularly valuable painting. Although "in Europe, in other words, the gift had positive associations of connection and graciousness", "in the United States it had negative associations of inappropriate attachments and

The fight against public corruption represents a cornerstone of the American constitutional construction[2], founded on the theory of the separation of powers and on the balance between them in the democratic game, in clear countertendency with respect to the corrupt English motherland, from which the overseas colonies were separated, still anchored to the political logic typical of a monarchical kingdom[3].

For this reason, the American law and "approach" to this phenomenon is so important: the United States – with its economists, political scientists and jurists – has always shown a marked sensitivity towards the study, knowledge and in-depth study of this subject, contributing significantly to the development of scientific literature on the subject, which – looking at the chronicles of recent years – remains more topical than ever, a real "daily puzzle" in which there is a complex relationship between "money, influence, power and politics"[4].

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dependencies": for this reason, the author reports, according to a law of the time, the gift, like all gifts received by diplomatic officials – since it could be considered a possible vehicle of corruption – had to be approved by the American Congress. It is an emblematic episode that testifies to how – according to Teachout – "this conception of corruption is at the foundation of the architecture of our freedoms", i.e. how the United States is (was) a Nation founded on anti-corruption. See Z. Teachout, *The Anticorruption Principle*, in *Cornell Law Review* 94 (2009) 341, 348; historically, on the value of anti-corruption in America, A. De Tocqueville, *Democracy in America* 1-2, New York 1961.

[2] «At the time the Constitution was drafted, fighting corruption was at the core of the drafter's vision for the constitutive principles of the country. Corruption was as fundamental ad anti-principle as the concept of ordered liberty was a positive principle. As Hamilton said, the drafters created "every praticable obstacle" to corruption, in dozens of clauses»: with these words recalls the American constituent spirit Z. Teachout, *Historical Roots of Citizens United vs. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights. The General Essay*, in *Harvard Law & Policy Review* 5 (2011) 163 ff. On the complex American legal system, in a comparative perspective, see the work of G. Fornasari-A. Menghini, *Percorsi europei di diritto penale*, Padova 2012.

[3] See M. Cutolo, *Agente provocatore ed entrapment nei reati corruttivi. Anatomia dogmatica in un'indagine comparatistica tra Italia e Stati Uniti*, in *Dir. Pen. del XXI secolo* 1 (2021) in course of publication, which – analyzing the institution of the agent provocateur in a comparative key – lucidly traces the stages of corruption in America.

[4] See Z. Teachout, *Facts in Exile: corruption and abstraction in Citizens United v. Federal Election Commission*, in *Loyola University Chicago Law Journal* 42/2

The importance of the comparison between Italy and the United States – and of the relative systems of repression and contrast of corruption – lies not only in a common interest in the phenomenon but also, and above all, in numerous almost parallel legislative trends.

The widening of the area of punishability of corruption, the crisis of the principle of legality, the use of invasive investigative tools, the explosion of recourse to penitentiary policies to respond to social needs and the consequent twisting of criminal law, a constant interest in the theme of lawful lobbying between public and private sectors (especially in the field of political financing): these are the trends that – as in Italy – are also found in American society and criminal law.

We have already mentioned it on more than one occasion, especially in the last decades, the Western world – and consequently also our country – has followed the innovations and tools that America was already experimenting in the field of anti-corruption.

In fact, the United States was responsible for the first approval of an organic regulation, the Foreign Corrupt Practices Act of 1977 signed by President Carter, which regulated cases of international corruption, in order to outlaw certain types of corrupt conduct by foreign officials, until then scarcely considered by society, put into practice by employees and managers of various multinational companies that operated continuously on the global market, and therefore mostly outside American territory, altering competition.

The FCPA – which represents the culmination of a legislative process linked to the attempt to combat corruption abroad that began in the early 50's[5] – is a very important text because it is traditionally considered

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(2011) 295 ff. For an analysis from a political science perspective on the definition of corruption, see J. G. Peters-S. Welch, *Political Corruption in America: A Search for Definitions and a Theory, or if Political Corruption is in the Mainstream of American Politics Why is it not in the Mainstream of American Politics Research?*, in *The American Political Science Review* 72/3 (1978) 974 ff.; J. Gardiner, *The Politics of Corruption*, New York 1970; J. A. Heidenheimer, *Political Corruption: Readings in Comparative Analysis*, New York 1970.

[5] On the legislative history of the FCPA, starting from the Watergate case which initiated a rapid process of unveiling of slush funds and accounting artifices useful for financing electoral campaigns and flows of bribes to domestic or foreign officials by

as the direct antecedent and inspiration for the OECD Convention on corruption[6], which will take up its general structure[7], testifying to a strong US influence on the model of contrasting corruption outlined in the international agreement. The text[8] was conceived as a response to

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large American companies, and on the analysis of the provisions contained therein, see G. Acquaviva, *Il Foreign Corrupt Practices Act: la legislazione statunitense in materia di lotta alla corruzione di fronte agli ultimi sviluppi internazionali*, in *Liuc Papers. Serie Impresa e istituzioni* 89 (2001). For a comprehensive examination of the US discipline on international bribery, see M. Koehler, *The Foreign Corrupt Practices Act in a New Era*, Cheltenham UK-Northampton MA-USA 2014.

[6] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted November 21, 1997, entered into force February 15, 1999). See C. Rose, *International anti-corruption norms. Their creation and influence on domestic legal systems*, Oxford 2015, which traces the fundamental stages of the international instruments against corruption, with particular regard to the OECD Convention and the UN Convention. According to the author, "the OECD Convention has its origins in Watergate, a domestic political scandal that prompted the passage of domestic legislation in reaction to the unethical conduct of American businesses abroad" once again underlining the link between America's internal political dynamics and the adoption of the Convention.

[7] See C. Corr-J. Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, in *Vanderbilt Journal of Transnational Law* 32 (1993) 1249-1344, according to which the FCPA "is the precursor of the OECD Convention"; B. Earle, *The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Follow the Money Argument*, in *Dickinson Journal of International Law* 14 (1996) 207-224.

[8] Article 1 of the Convention obliges the signatory states to incriminate the active corruption of foreign officials, but also instigation or attempt, in the context of economic transactions, leaving it to the countries where the act of corruption actually takes place to prosecute the passive corruption of their officials. See L. Borlini-P. Magrini, *La lotta alla corruzione internazionale dall'ambito OCSE alla dimensione ONU*, in *Dir. Comm. Internaz.* 1 (2007) 15 ff.; G. Sacerdoti, *La convenzione OCSE del 1997 e la sua laboriosa attuazione in Italia*, in *Corporate responsibility and international anti-corruption instruments. Dalla convenzione OCSE 1997 al Decreto n. 231/2001*, ed. G. Sacerdoti, Milano 2003; S. Manacorda, *La corruzione internazionale del pubblico agente*, Napoli 1999; P. Magrini, *L'attuazione della Convenzione OCSE contro la corruzione negli Stati membri: il quadro comparato*, in *Responsabilità d'impresa e strumenti internazionali anticorruzione. Dalla convenzione OCSE 1997 al Decreto n. 231/2001*, ed. G. Sacerdoti, Milano 2003.

a regulatory protection vacuum, revealed following a scandal that had caused a great uproar in the national and international community, Watergate (1972), which led to the resignation of President Nixon in 1974[9].

The FCPA, therefore, had to respond to the need to restore credibility to the American system and reassure investors about the ethicality of the country's economic system (not unlike what happened several decades later in Italy with the Severino law). The case not only brought to light opacities in the management of private financing to parties and in the correctness of electoral campaigns, but also brought to light widespread corporate payments (the SEC calculated at about 300 million dollars) to officials, politicians and parties of foreign countries[10].

Punishing American citizens for unlawful conduct abroad, however, has represented a marked encroachment of the American legislator on other jurisdictions[11], and it is also for this reason that the United States has exerted influence and pressure in terms of advocacy[12] on the adoption

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[9] On this point, Stanley Sporkin, former Director of Enforcement for the Securities and Exchange Commission and one of the authors of the FCPA – in one of his articles – recalls how the regulatory interest grew on the basis of testimonies of corporate employees about "impermissible contributions made by those corporations to President Nixon's re-election campaign". See S. Sporkin, *The Worldwide Banning of Schmiergeld: a look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, in *Northwestern Journal of International Law and Business* (1998) 269, 271.

[10] On the emergence of the so-called corporate corruption, see, in the American literature, M. B. Clinard, *Corporate Corruption: The Abuse of Power*, New York 1990.

[11] On the subject, he expressed himself in a particularly critical way, S. R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, in *Yale Journal of Int. L*aw 24 (1998) 223, 231; Id., *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, in *Michigan Journal of Int. L*aw 20 (1999) 419. See B. Hock, *Transnational bribery: when is extraterritoriality appropriate?*, in *Charleston Law Review* 11 (2017) 305.

[12] It should be remembered that the first step of the OECD Convention was the "Recommendation on Bribery for Foreign Public Officials" of 1996, which, however, was not binding. In fact, as recalled by T. F. McInerney, *The regulation of bribery in the United States*, in *Revue internationale de droit penal* 73 (2002) 81 ff., the United States "not satisfied with the non-binding Recommendation, continued to press for a binding treaty" in order to adopt a true and proper convention that would incorporate the FPCA regulations.

of the OECD Convention, based on the principle of neutrality, so that the other member states, adapting *de facto* to the American discipline, would approve a uniform regulation on the subject, by virtue of which all the large companies of the world could compete on the same "field" with the same rules for all.

The Italian case *ex* art. 322 *bis* c.p. of international corruption, whose jurisprudential application today is rather scarce, descends, therefore, from this legal tradition that has solid roots planted in the United States, where there is a very wide use of the sanctions provided by the FCPA. It should be briefly mentioned here that the fate and fortune of the institution in the USA is also due to a constant development of alternative methods of solving corruption cases, the so-called deals de justice and plea bargains, which allow the parties to settle the sentence and avoid trial.

In any case, it is no coincidence that the corruption "problem", on the global scenario, has been posed by America, in the wake of a deeper awareness of the economic costs of the phenomenon in terms of inefficiency, fed by the contribution in scientific terms of economic analysis that American scholars have been able to offer between the eighties and nineties of the last century (in particular see the studies of S. Rose Ackerman)[13].

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[13] See R. Klitgaard, *Controlling corruption*, Berkeley 1988. Recently, E. L. Glaeser-R. E. Saks, *Corruption in America*, in *Journal of Public Economics* 90 (2006) 1053-1072, who investigate the causes and consequences of corruption also in relation to the economic welfare resulting from the level of education in individual states and according to the racial fragmentation of each state; J. J. Wallis, *The concept of systematic corruption in American history*, in *Corruption and reform: lessons from America's economic history*, eds. E. L. Glaeser-C. Goldin, Chicago 2006, who analyzes, among the first, observing the interaction between politics and economics in the history of the country theorizes the so-called systemic corruption in the United States; C. Hauser, *Fighting against corruption: does anti-corruption training make any difference?*, in *Journal of Business Etichs* 159 (2019) 281-299; N. Apergis-O. C. Dincer-J. E. Payne, *Live free or bribe: on the causal dynamics between economic freedom and corruption in U.S. States*, in *European Journal of Political Economy* 28 (2012) 215 ff.

2. Public corruption in the United States: a historical-legislative framework of the phenomenon

Public corruption is a theme that has accompanied the entire young American history[14]. In the following pages, we will deal with the subject by following the same thread already used in the previous chapters on the Italian anti-corruption experience, dealing on the one hand with the phenomenon (corruption), which is much broader, and on the other hand with the various federal criminal cases (starting with bribery) applicable to episodes of illegality.

From the legislative point of view, the regulatory framework of reference in terms of repression of corruption has not undergone, especially at the federal level which we will discuss[15], significant upheavals or changes.

On the other hand, particularly interesting is the academic and scientific debate that – over the years – has revolved around the

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[14] There have been many cases of corruption in American history, starting with the scandal at the end of the nineteenth century, which involved the Credit Mobilier company, which swept away the political career of numerous congressional representatives involved in diverting public funds towards a fictitious company in which, in agreement with conniving businessmen, they had shares. For a review of cases, see N. Abrams-S. S. Beale-S. R. Klein, *Federal Criminal Law and its enforcement*, St. Paul 2010.

[15] It should be remembered that in the United States there are 52 legal systems, consisting of the legal systems of the 50 States, the legal system of the District of Columbia and the federal system: each one is an expression of autonomous sovereignty and has proceeded to the development of its own body of criminal laws represented by statutory crimes, common law crimes and crimes resulting from a combination of the two. The political system, delineated by the Constitution, which in turn regulates certain crimes such as treason or the more famous impeachment, provides for the division of powers between the federal government, Congress and the States, therefore the government enjoys only certain powers specifically indicated. See M. C. Bassiouni, *Diritto penale degli Stati d'America*, Milano 1985, who, in an extensive manual work of reconstruction of criminal law in America, also retraces the history of federal criminal laws, which began with the Crimes Act of 1790 that provided, among others, already the crime of corruption in federal court.

numerous pronouncements of the Supreme Court[16], the real balance in the interpretation of the law in the USA, on the subject of corruption.

In particular, according to an approach also recognized by the Court, the phenomenon of corruption in the United States should be traced back not only to individual cases of bribery, payoffs and kickbacks in the traditional sense, which over time have involved public officials, politicians and the business world at various levels of administration, but mostly to a system – very different from what we are used to in Italy – of financing of politics and electoral campaigns in which large private contributions, entirely legal, can generate opacity between the interests of lobbies and decisions of public power[17]. As we shall see, how this commingling of particular and public interests will be at the base of the theory of so-called institutional corruption.

But on the other hand, if public officials are strictly forbidden to receive or request sums of money, in the American system, private

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[16] The Supreme Court is not obliged to examine all the appeals submitted to it: it agrees to judge – by granting the writ of certiorari – only on those cases which at the preliminary stage appear to it to present a question of law of some importance. As recalled by M. C. Ubiali, *Abuse of power by public officials and review by the criminal judge: an important ruling of the U.S. Supreme Court on the principles of legality and separation of powers*, in *Sistema Penale* (2020).

[17] On this point, G. L. Gatta, *La repressione della corruzione negli Stati Uniti. Strategie politico-giudiziarie e crisi del principio di legalità*, in *Riv. It. Dir. Proc. Pen.* 3 (2016) 1282 ff., describes the trend of the political-judicial strategy to counter the phenomenon by identifying a clear line of distinction between campaign contribution cases and all other cases handled which are followed by two different standards of judgment by the American courts, on the sica of the Supreme Court: «the first, looser, aimed at avoiding criminal prosecution and conviction in the face of any solicitation, promise or giving of money or other benefits to political figures on the occasion of or in proximity to electoral campaigns, whose success increasingly depends on the funding that committees and foundations are able to rake in from individuals, businesses, unions and various lobbies; the second, more rigorous, aimed at bringing into the net of the criminally relevant, in contexts other than electoral campaigns, any form of exploitation of public power to obtain personal benefits, by unfaithful public officials (including, of course, politicians)». See similarly in the American literature, I. B. Gold, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbes Act Prosecutions in the 2000s*, in *Journal of Law & Policy* 36 (2011) 261 ff.

financing of politics is an issue on the agenda in the United States, practically unavoidable, without which it would be impossible for a politician to aspire to hold public office, from the least important positions in the administration to the office of President[18], where it is absolutely recurrent for a candidate to withdraw from the race for the primaries – both democratic and republican – because he has run out of funds to support his candidacy.

One of the most relevant, almost revolutionary, pronouncements of the Supreme Court is undoubtedly the one on the case Citizens United v. FEC regarding freedom of expression and campaign financing.

Citizens United is a small nonprofit, with a conservative political ideology that, in 2008, during the electoral campaign of the Democratic primaries, in which the former first lady Hillary Clinton and the future President Barack Obama were running, tried, with the intent to discredit the campaign of the Senator from New York, considered too progressive and "close to European socialism", to air on DirecTv a documentary and a short commercial entitled "Hillary: The Movie".

The FEC (Federal Election Commission) blocked the airing due to violation of section 441(B) of the Bipartisan Campaign Reform Act (BCRA), a "campaign-finance law" of 2002, a sort of *par condicio* law, which prohibited any politically committed company from airing commercials in the 30 days preceding the presidential primaries.

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[18] U.S. Supreme Court, "McCormick v. United States" (1991), in which, aware of the relevance of private financing for politics, it tries to outline the lawful activities of contribution to electoral campaigns without them falling into corrupt behavior through the criterion of the explicit promise to carry out or not a certain act of office: «Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done». For this reason, as mentioned above, the payments should be considered illicit «in return for an explicit promise or undertaking by the official to perform or not to perform an official act». See L. Dwyer-K. Golden-S. Lehman, *Public Corruption*, in *American Criminal Law Review* 51 (2014) 1558, where, it is specified, with reference to the jurisprudence of the lower federal courts, that donations of money supported by vague expectations of some future favorable treatment are not configurable as corruption.

The organization challenged the decision by invoking, also for legal entities, the First Amendment[19], freedom of speech, believing, moreover, that the law in question should not be applied to documentary projections and that – in this specific case – there was no reference to a corrupt exchange – the so-called *quid pro quo* requirement[20] – that could allow Congress to use its powers to protect elections and against corruption, which, instead, according to the defense thesis of Citizens United's lawyers, would be entirely legitimate "to punish and deter explicit bribes". Everything, therefore, that is not circumscribed by this formula would not be corruption.

The Court, in a historic judgment of January 2010, drafted by Majority Justice Anthony Kennedy, with 5 votes to 4, upheld the arguments of the company and lowered all limits on corporate expenses, overturning the last judicial orientation Austin v. Michigan State Chamber of Commerce of 1990 which allowed the government to limit freedom of expression in cases of "corrosive and distorting effects of immense aggregations of wealth". The decision took up the considerations already expressed in a

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[19] «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances». The regulation of private interests was a necessity well present at the time of the Founding Fathers who were preparing in Philadelphia to build the entire system of powers of the republican government. In fact, one of the founding ideas of the American state resides in the so-called right of petition, which was one of the historical prerequisites of American independence from the United Kingdom of George III, which will be crystallized in 1791 by the Bill of Rights in the First Amendment. The right of petition is the historical antecedent of modern lobbying, which is therefore an expression of the right of speech, freedom of thought and the right to petition the legislature. On the history and stages of lobbying in the United States, see R. Alagna, *Lobbying e diritto penale*, Torino 2018, 45 ff.; in the American literature refer to J. L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in *The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development*, eds. K. R. Bowling-D. R. Kennon, Athens 2002, 57 ff.; N. W. Allard, *Lobbying is an honorable profession: the right to petition and the competition to be right*, in *Stanford Law & Policy Review* (2008) 23.

[20] See J. Lindgren, *The Theory, History and Practice of the Bribery-Extortion Distinction*, in *Univ. of Penn. Law Review Online* 5 (1993) 1708 ff.

precedent of 1976 – the case of Buckley v. Valeo – in which the Court specified how the First Amendment universally protects the right to express oneself freely, even politically, even by investing money, regardless of the methods and subjects involved[21].

As far as we are concerned, the Court, in its judgment, reiterates the elementary principle of American anti-corruption law of the *quid pro quo*, in order for conduct to be considered corrupt. It exists only when "direct examples of votes being exchanged for ... expenditures" can be found, and it is for this reason that "undue influence" and "favoritism" cannot be considered as corrupt conduct. For the Court, in a hyper-conservative view and extreme guarantee, from this moment on, therefore, conduct that influences the political world is legitimate[22]. This means that – because of a freedom guaranteed by the Constitution – large corporations, with a strong capacity to spend money on elections, can *de facto* support a candidate and lead him to victory, in order to

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[21] For a broad survey of constitutionally guaranteed rights, including freedom of expression, see J. B. Attanasio-J. K. Goldstein, *Understanding Constitutional Law*, New Providence NJ 2012[4]; E. Chemerinsky, *Constitutional Law. Principles and policies*, Aspen 2015[5]; and J. H. Choper-R. H. Fallon Jr.-Y. Kamisar-S. H. Shriffin-M. C. Dorf-F. Schauer, *Constitutional Law. Cases, Comments, and Questions*, St. Paul MN 2015[12]; B. A. Smith, *Campaign Finance and Free Speech: Finding the Radicalism in Citizens United v. FEC*, in *Harvard Journal Law & Pub. Pol'y* 139 (2018).

[22] « The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: favoritism and influence are not...avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is promised on responsiveness» as we read in Citizens United, 130 S. Ct. at 910, a fundamental passage that changes the classic conception of corruption. See S. K. Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to end the Constitutional Personhood of Corporations*, in *Univ. of Penn. Journal of Business Law* 14/1 (2011) 209 ff.

obtain, once elected, to receive favorable acts in exchange[23]. In short, money is speech[24].

The Supreme Court's decision is a very crude, questionable and debatable one[25], which sets back the action of justice, which should be read in parallel with the importance of total transparency in the financing of politics, which has probably been overtaken by the times and by the new, increasingly broader concept of corruption and prevention of corruption, which, finally, contrasts with the global attention and the primacy that national states are giving and are giving to the "fight against corruption", with the United States in the forefront.

A choice in countertendency, therefore, which places at the center of American priorities, individual liberty, in all its forms, and in particular the liberty of expression (in this regard, we will speak of the free speech doctrine), even when there may be the danger of an injury to the correctness and impartiality of public powers, having to balance the instances of prevention of corruption and the system of fortification of democracy.

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[23] On the subject of the legislation of the financing of politics before and after the Citizens United ruling, also from a comparative point of view, see the essay by V. Dembitskiy, *Where Else is the Appearance of Corruption protected by the Constitution: a comparative analysis of campaign finance laws after Citizens United and McCutcheon*, in *Hasting Const. L. Q.* 43 (2016) 885.

[24] The theme had already been posed in these terms a few decades earlier by, among others, J. S. Wright, *Politics and the Constitution: is money speech?*, in *The Yale Law Journal* 85/8 (1976), analyzing previous cases, starting with the "Buckley v. Valeo" decision, on the relationship between the First Amendment and campaign financing.

[25] See, just as an example, the harsh criticism of F. Wertheimer, *Citizens United and Its Disastrous Consequences: The Decision*, in *The Huffington Post* (2016) www.huffingtonpost.com; T. B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, in *The New York Times* (2018) www.nytimes.com. Instead, Teachout (nt. 1) 229, criticizing the ruling, recalls the passage written by Scalia, one of the judges who signed the Citizens ruling, a few years earlier in the "Sun Diamond" case: «Talmudic sages believed that judges who accepted bribes would be punished by eventually losing all knowledge of divine law». Eleven years later, comments the author: «Scalia and the other justices in Citizens United seemed to forget all knowledge of what in America is the closest we get to divine law: the laws of human nature and democratic politics». See *Sun-Diamond Growers of California v. United States*: 526 U.S. (1999) 404-405.

The Citizens United decision, as mentioned above, will anticipate and open the doors to a season of jurisprudence that will considerably limit, with restrictive interpretations, the area of applicability of federal legislation on corruption in cases of political financing[26]. On the other hand, it will be the harbinger of an exponential increase in the perception of corruption[27] in American society, which has increasingly begun to view with suspicion and lack of trust the relationship between the political world (reference is often made to "Washington DC") and the world of powerful and influential lobbies[28]. This is an important element that,

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[26] In this wake, the 2016 "McDonnel v. U.S." case fuels this restrictive jurisprudential trend. See Gatta (nt. 17) 1286, who recalls how the Court, annulling a sentence of conviction issued against the former governor of Virginia Robert McDonnell, excluded that the concept of "official act, as consideration for a donation of money or other benefits, is referable to typical para-political activities such as the organization of meetings in institutional seats and the activity of intermediation with third parties, even within the public administration". On the case, ample analysis provided by G. M. Gilchrist, *Corruption law after McDonnell: not dead yet*, in *Univ. of Penn. Law Review Online* 165.11 (2016), according to which, in the case in question, "the Court introduced a limit on what counts as a public function meant to be gratuitously exercised" with respect to the historically accepted notion of corruption, summarized in the famous words of J. T. Noonan, *Bribes*, New York-Londra 1984, «the core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised». See on the innovations to the interpretation of bribery norms made by this ruling, D. Hellman, *A theory of bribery*, in *Cardozo L. Rev*. 38 (2017) 1947.

[27] See N. Persily-K. Lammie, *Perception of Corruption and Campaign Finance: when Public Opinion determines Constitutional Law*, in *Univ. of Penn. Law Review Online* 153.1 (2004) 119 ff.

[28] On this point, as evidence of a growing distrust of citizens towards the political class and the role of institutions, we report the data related to the well-known ranking of Transparency International, the Corruption Perception Index, whose mechanisms of operation we have already analyzed for Italy. In 2015, the ranking saw the U.S. in 16th place, compared to Italy's 61st, however, only four years later, in 2019, after experiencing numerous episodes of political corruption, the States have reached their lowest point since the beginning of the measurement by placing 23rd with a score of 69 points. This is how, in a note, Scott Greytak, Advocacy Director at Transparency US, comments on the 2019 result on the US: «More than in any other major developed country, people in America believe that rich people buy elections. When people think their government is for sale, they stop believing in its future. In the US, many of our laws on campaign

in a certain sense, anticipates the institutionalist theory of corruption, because for many American jurists the concept of corruption is much broader than that indicated by the Supreme Court in Citizens United.

3. A widespread system of criminal repression: corruption and federal legislation

One of the common trends between Italian and US legislation concerns the progressive widening of the area of punishability of acts of corruption, especially in cases of illicit activities carried out by public administration officials.

If in Italy, this progressive extension has been achieved through two modalities, i.e. with the widening of the boundaries of the cases of corruption with the introduction of generic corruption for the exercise of the function and with the constant work of the jurisprudence of interpretation of the existing cases of corruption, instead, in the United States the objective of effectively combating the phenomenon has been achieved through the use of criminal offences not properly designed and imagined to strike at corruption, such as extortion and conspiracy, but adapted – again by the Courts – in a subsidiary way, in cases where the crime of federal bribery could not guarantee satisfactory coverage.

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finance, lobbying, and ethics were written almost 50 years ago. The world has changed since then, and we plan to learn from it by bringing political reforms from across the globe to American audiences». See S. P. Green-M. B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, in *Law and Contemporary Problems* (2012) 33 ff.; M. Johnston, *Corruption Control in the United States: Law, Values, and the Political Foundations of Reform*, in *International Review of Administrative Sciences* (2012) 392 ff. On the other hand, Gatta (nt. 17) 1292, analyzing the strategy of contrast adopted by the United States, reports in great detail, cases and statistical data on corruption and the repression of corruption in individual states and at the federal level. In particular, citing the Report of the "Public Integrity Section" of the Department of Justice, the author verifies how, between 1996 and 2015, more than 22.000 people were prosecuted for federal offences in the field of corruption and of these about 90% were convicted. See United States Department of Justice, Public Integrity Section, Criminal Division, Report to Congress, Table II 23-24; J. Handelsman Shugerman, *Fighting Corruption in America and Abroad*, in *Fordham Law Review* 84.2 (2015) 407 ff.

In fact, as we shall see, the American anti-corruption enforcement, in addition to a series of local rules, administrative provisions and ethical codes with specific sanctions on corruption, has only one provision textually suitable to repress corrupt conduct at federal level, the so-called Bribery, governed by § 201 of the U.S.C., which requires, however, the element of connection between utility and act, difficult to prove in court.

A similar "narrowing" of the scope of application can also be seen in the provision of § 666 of the U.S.C., which regulates the law prohibiting "theft and bribery by local government officials in connection with programs that receive federal funds"[29].

In this way, the regulatory framework on the subject of repression of corruption in the USA, cannot be limited to a recognition of only the existing provision of corruption, but must take into account various incriminating norms of the federal level which, depending on the case, can be used to repress acts of corruption, in clear contrast to the principle of legality.

3.1. (follow) The crime of bribery and illegal gratuity

The most relevant provision on public corruption is found in § 201 of the United States Code (U.S.C. – Title 18: Crimes and Criminal Procedure) and regulates in §§ a) and b), since 1962, the so-called "Bribery of public officials and witnesses"[30], a form of corruption that

[29] The provision punishes, inter alia, anyone who – acting on behalf of an organization or a state or local government (...) – appropriates, embezzles, obtains by means of fraud, abuses or, without having the power to do so, knowingly diverts from the use of the legitimate owner i) an asset having a value in excess of five thousand dollars and ii) is owned by or under the care, custody or control of the aforesaid organizations or governments. This is a crime hypothesis with vague and imprecise contours reminiscent of the Italian provisions on abuse of office and peculation. «The reason for these broad formulations lies in the fact that the federal legislator, with the introduction above all of the case of § 666 U.S.C., wanted to have an adequate instrument to protect, from any conduct of embezzlement, diversion, commodification or abuse, the enormous amount of (federal) money that is given from Washington to state and local governments, as well as to private organizations»: thus Ubiali (nt. 16) 3.

[30] The most common definitions of bribery in American criminal law are as follows: «Bribery is the giving of any valuable consideration or benefit to the holder

can be traced back to the Italian model of mercantile corruption. This is a form of corruption that can be traced back to the Italian model of mercantile corruption.

This is a very complex regulation, which opens with the exact identification of the persons to whom it applies[31], and which attempts to outline and trace within itself every possible form of corruption. The structure of the offence[32] – substantially very similar to the Italian one –

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of a public office, or to a person performing a public duty, or the acceptance thereof by such person, with the corrupt intention that he be influenced thereby in the discharge of his legal duty»: R. Perkins-R. Boyce, *Criminal Law*, New York 1982[3]; «Bribery is corruptly tendering or receiving a price for official action»: R. Wharton, *Criminal Law*, Ruppenthal 1932[12]; «The core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised»: Noonan (nt. 26). All of these definitions have in common the idea that bribery is, at its base, a "corrupt benefit" given or received to influence the behavior of the public agent. For J. Lindgren, *The elusive distinction between bribery and extortion: from the common law to the Hobbs Act*, in *UCLA Law Review* 35 (1988) 823, instead, there is more. Bribery, would not only be an attempt to deflect the officer's behavior, but would consist primarily of a way to influence actions in favor of the private individual.

[31] 18 U.S. Code § 201 "Bribery of public officials and witnesses":

(a) For the purpose of this section.

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit. Cfr. www.law.cornell.edu.

[32] 18 U.S. Code § 201 "Bribery of public officials and witnesses":

(b) "Whoever.

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent –

foresees the necessary presence of two active subjects, sanctioned with

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom.

Shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States".

This norm – as it is constructed today – finds its antecedent in the legislation of the late eighteenth century which exclusively punished judges who were corrupted to make procedural determinations and customs officers who secretly smuggled in goods. It was not until 1853 that the more generic conceptualization of "giving or promising with the intent to influence a vote or decision concerning an official act" was adopted. See B. F. Jordan, *Disclosing Bribes in Disguise: Campaign Contributions as Implicit Bribery and Enforcing Violations Impartially*, in *Journal of Constitutional Law* (2015) 1437 ff. For an analysis of the crime in all its components, see the article, *Bribery*, in *Am. Crim. L. Rev*. 18 (1980) 239; S. Daunhauer Phillips, *The federal bribery statute: an argument for cautious revision*, in *Ky L. J.* 68 (1979) 1026.

a pecuniary punishment from three times the monetary value that gave rise to the corruption, up to fifteen years in prison or punished together.

The object of the corruptive agreement is a thing of value[33] which, like the Italian utility, can be interpreted extensively in cases of rarefaction and demonetization of the service.

In the text, the link with a determined and determinable official act[34] (in exchange for an official act) remains unchanged, according to the criterion already highlighted of the *quid pro quo*[35] – the central element

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[33] Dwyer-Golden-Lehman (nt. 18) 1569 accurately describe the boundaries of the "things of value" required by the standard: «Courts broadly define the term 'thing of value' to include both tangible and intagible benefits. Things of value encompass campaign contributions, promises of future employment, sexual acts, life insurance policies, loans, expungements of criminal records, overseas travel, installation services, and shares of stock. Any item the recipient subjectively belivies to have value qualifies, even if it has little or no objective commerical worth».

[34] As Gatta (nt. 17) 1296, lucidly points out, the official act must be determined, among the various possible ones: «for the federal courts, in fact, the vague expectation of some future benefit connected to the promise or the giving of money or another good (referable, in Italy, to corruption for the exercise of the function, ex art. 318 c.p.) does not integrate the figure of 'federal bribery'». On the concept of act of office, the Supreme Court has also expressed itself: «To qualify as an 'official act', the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy', or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an 'official act', or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) — without more — does not fit that definition of 'official act'» from "McDonnell v. United States", 136 S. Ct. 2355-2372 (2016).

[35] «*Quid pro quo* comes from Latin, indicating 'this for that'. Its historical usage is in contracts. It refers, in that context, to the idea of relative equality – *quid pro quo* – a cour might question whether there was an actual contract. It was casually and colloquially used in relationship to corruption since the nineteeth century at least, where writers would sometimes refer to the *quid pro quo* recevived by bribed voters or elected officials. In those situations, *quid pro quo* stood in for some kind of exchange, as opposed to a gift. The use of *quid pro quo* as a legal term in relation to corruption does not appear until the 1970s in relationship to bribery or corruption law». With these words, Teachout (nt. 1) 239, reconstructs the origin of the expression.

of the case which, furthermore, must include the specific intention – the intent to corrupt or influence.

The wording "to influence any official act" leads us to believe that it is not necessary for the act to be actually carried out by the public agent, but – for the purposes of the configurability of the crime – it is simply necessary for the ability of the corrupt public employee to exert an influence on the act carried out by a third party (for example towards a subordinate or a colleague of the Administration). In addition, it is not relevant the achievement of the final purpose or the actual implementation of the act, being punishable, as in Italy, even only the acceptance of the promise.

Finally, the law closes with § c) which regulates the less serious offence of illegal gratuitousness, which in practice is not easy to distinguish from federal corruption.

The differences, minimal but significant if we consider the different punishment (the maximum sentence is fifteen years for bribery and two years for illegal gratuity), lie especially in the active subject and the subjective element of the crime: a past public official (therefore also ceased from office) and a specific intent (corruptly) to give or receive in exchange for an official act (*quid pro quo*) is required for bribery, while for illegal gratuity it is sufficient that the promise or giving of the undue is made for an "official act"[36].

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[36] On the element of criminal intent at the basis of the distinction between the two cases, see the numerous cases consolidated in jurisprudence: "United States v. Strand", 574 F.2d 993, 995 (9th Cir. 1978) (only simple mens rea required for violation of gratuity provisions); "United States v. Anderson", 509 F.2d 312, 332 (D.C. Cir. 1974) (donor's conviction for bribery and donee's conviction for receipt of gratuities not inconsistent where evidence permitted conclusion that intent of parties differed), cert. denied, 420 U.S. 991 (1975); "United States v. Harary", 457 F.2d 471, 475 (2d Cir. 1972) (specific intent to influence is only element distinguishing bribery from giving gratuity); "United States v. Polansky", 418 F.2d 444, 446 (2d Cir. 1969) (all elements except specific intent present, acquittal on bribery but conviction on gratuity); "United States v. Kenner", 354 F.2d 780, 785 (2d Cir. 1965) (subsection (f) conviction requires only proof that payment made for performance of official act), cert. denied, 383 U.S. 958 (1966); "United States v. Irwin", 354 F.2d 192, 197 (2dCir. 1965) (Congress purposely omitted corrupt intent element from gratuity provisions and set less severe penalties), cert. denied, 383 U.S. 967 (1966). Similarly, case law has focused on the necessary

This pair of rules is intended to cover all areas of manifestation of corruption: on the one hand, bribery punishes symmetrical and bilateral relationships, on the other hand gratuity is structured according to a unilateral action of the donor towards the public agent.

3.2. (follow) The distinction between bribery and extortion

A central provision in the fight against corruption in America is certainly represented by a particular form of extortion[37], provided for by § 1951 U.S.C. commonly known as Hobbs Act, which punishes, with a penalty of up to 20 years of imprisonment, the "interference with commerce by threats or violence", i.e. the extortionate conduct committed by anyone who interferes ("obstructs, delays, or affects") with the commerce or with the circulation of any good or service[38].

The regulation provides for two types of extortion: "coercive or blackmail extortion" and "extortion under color of office".

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presence of the element of the so-called *quid pro quo*, in order to differentiate the two crimes. See "United States v. Strand", according to which "*quid pro quo* distinguishes corrupt intent for bribery from simple mens rea for gratuity offense", or "United States v. Brewster", by virtue of which "bribery section necessitates explicit *quid pro quo* which is not necessary if only an illegal gratuity".

[37] On the theme of the difference between extortion and bribery is a point of reference the work of Lindgren (nt. 20) 1695 ff.; Lindgren (nt. 30) 815 ff.; Noonan (nt. 26) 584 ff.; N. H. Jacoby-P. Nehemkis-R. Eells, *Bribery and extortion*, in *World Business*, New York-Londra 1977, 90 ff.

[38] 18 U.S. Code § 1951 "Interference with commerce by threats or violence".

(a) «Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

The first type requires violent methods (a physical and moral threat[39]) capable of spoiling the free determination of others.

The second type, more undefined, concerns the fictitious abuse of the quality of public official, used to receive a benefit by virtue of the position held, and represents the type of extortion on which the academic debate has focused on the distinction with corruption.

According to the majority view of the Supreme Court, as stated in Evans v. US of 1992, the incrimination would not necessarily require conduct of induction and active deception on the part of the false public official but only the simple passive acceptance of the utility.

For the Court, in Evans, in order to affirm the existence of the crime of extortion in the head of the public official is sufficient to prove that he has "obtained an undue payment, in the knowledge that this payment was made in relation to acts of the office", excluding any relevance in relation to the criteria of initiative, the contrariety or compliance with the duties of office of the conduct. This criterion, in fact, is almost marginal in the Anglo-Saxon legal tradition, mainly focused on the consideration that the public agent has exploited the office for the purpose of personal enrichment.

This allows the norm to present itself as a valid alternative to federal corruption, transforming itself into "a general figure of free-form corruption, with, to say the least, evanescent contours"[40]. This confirms

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(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45».

[39] On the subject see G. L. Gatta, *La minaccia. Contributo allo studio delle modalità della condotta penalmente rilevante*, Roma 2013, 40 ff.

[40] Thus Gatta (nt. 17) 1302, who also reports the critical considerations of Justice Thomas, in a well-known dissenting opinion, with respect to the distorted use that the case law of the Evans case has made of the crime in question in violation of

that it is always difficult to separate corruptive and extortionate conduct, as also happened in Italy, especially during the '*Mani Pulite*' (Clean Hands) season. However, while in Italy jurisprudence has made an effort to find the distinctive criteria between the two norms (starting from the Maldera sentence) and to keep the cases of bribery and extortion separate, in the United States, after Evans, it would seem that the practice of jurisprudence has certified the almost total overlapping of the two cases, according to procedural needs.

The two norms – bribery and extortion – in any case refer, as noted by Lindgren[41], to the same offence protected by the legal system: the so-called misuse of agency, i.e. the abuse of public power for personal ends and the betrayal of the trust of the community, which would make the distinction between bribery and extortion impracticable, as they would overlap in borderline areas.

As can be seen, this is a dangerous trend, also recently confirmed by the Ocasio v. US of 2016, because it would allow – in a state of common law in which the figure of the agent provocateur is cleared through customs and in which the public prosecution, impersonated by a politician elected by the citizens, is exercised according to criteria of discretion and opportunity (including political) – applying moreover a rule with harsher penalties, to continuously test the loyalty and correctness of the

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the principle of legality: «Where extortion is at issue, the public official is the sole wrongdoer; because he acts "under color of office", the law regards the payor as an innocent victim and not an accomplice. With bribery, in contrast, the payor knows the recipient official is not entitled to the payment; he, as well as the official, may be punished for the offense. Congress is well aware of the distinction between the crimes; it has always treated them separately (...) by stretching the bounds of extortion to make it encompass bribery, the Court today blurs the traditional distinction between the two crimes». Justice Thomas points out how the two cases are profoundly different from each other: the crime of extortion does not require the element of bilaterality necessarily and only one of the two active subjects is punishable. According to Thomas, therefore, the Supreme Court, in the wake of the need for repression, confuses (to blur) crimes that have different histories and legal structures. See J. Thomas, dissenting opinion in "Evans v. U.S." (1992) 284.

41 «If a citizen is paying only to buy fair treatment and nothing more, he is the victim of extortion and has not commited bribery according to its general conception. Bribery consists of paying for better than fair treatment»: Lindgren (nt. 30) 824.

actions of its public employees and incriminate them – once they have fallen into the trap, as happened to Evans – even in the absence of a stable corrupt agreement having as its object a determined act of the office.

4. Corruption in crisis between law in the books and law in the actions

As anticipated, the federal legislation of the United States is experiencing a fervent and lively jurisprudential creative work which sees the prosecutors and the federal courts – engaged in their activity of repression of corruption – increasingly resorting to incriminating norms different from those dedicated to bribery, connoted by a generic character able to allow, in concrete application, a greater degree of flexibility which – in the evidentiary field – lends itself more to the objective of an effective fight against corruption without quarter in the Public Administration.

It is in this sense that the American criminal law of corruption enters into crisis, between an indeterminate positive law and a creative living law.

This innovation, similar and comparable to what has happened in Italy, shows evident tensions with the principles of criminal law of the taxability and precision of the criminal law, and more generally of criminal legality, which are also very valid in the United States of America[42].

As has been lucidly noted, the Courts often, in the impossibility of finding an official act that is the object of a sale or purchase and in the impossibility, therefore, of challenging the conduct *ex* § 201(b) or (c), pursue corrupt conduct through the very strict provisions on fraud (mail fraud § 1341 or wire fraud § 1343) committed through the postal service or the use of communication by case. Corruption, then, as a form of fraud.

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[42] For a review of the principles of American criminal law, which essentially revolve around the so-called due process (the italian '*giusto processo*'), see Bassiouni (nt. 15) 32 ff.; P. H. Robinson-M. T. Cahill-B. Baughman, *Criminal Law. Case Studies & Controversies*, New York 2020[5].

The two provisions, traditionally anchored to the deprivation of money or property[43], because of a particularly imprecise and susceptible to extensive application, have allowed the courts, as happened with the judgments Skilling, Black and Weyrauch v. US, the possibility of being used to repress corruption through the textual reference to the cd. right to honest service, which should not be affected in any way by fraud.

The individual or collective right to an honest and transparent service rendered by those who – like the public official – have the legal duty to behave honestly, therefore, becomes the legal loophole that allows the practice of living law to incriminate fraudulent conduct that is carried out through the exchange of favors or bribes. The fraud-corruption hypothesis from shirking the right to honesty reveals an ethicizing nature of American criminal law that tends to feed the narrative that everything is anti-dual and everything is corruption, even those utilities that are not illegal.

The use of offenses other than federal bribery, however, does not end with the misuse of fraud. One of the most widely used federal provisions in practice is found in 371 U.S.C. § 371, The conspiracy to commit offense or to defraud United States, which governs the general consipiracy statue[44], i.e., the agreement between "two or more persons to commit any offense against the United States or to defraud the United States or any agency thereof, in any manner and for any purpose, provided that one or

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[43] As statue with the sentence "McNally v. US", 483, U.S., 350, 356, (1987). See L. K. Griffin, *The federal common law crime of corruption*, in *North Carolina Law Review* 89 (2011) 1816 ff., which retraces the historical-legislative evolution of the crime in question and the most notorious cases in which it has been called into question.

[44] 18 U.S. Code § 371 "Conspiracy to commit offense or to defraud United States": «If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanour». See J. K. Strader, *Understanding White Collar Crime*, New Providence NJ 2015[3]; W. R. LaFave, *Criminal Law*, St. Paul MN 2010[5].

more of the persons involved perform any act to achieve the object of the agreement ('conspiracy')".

Conspiracy, as can be seen from a first reading of the text, is a norm that leaves ample room for an extensive interpretation of the literal content of the provision. Punishing a nucleus of persons who agree to commit an illicit act, not necessarily a crime, against the United States and carry out "any act", possibly even preparatory acts, means granting an excessive margin of application of the case, which is well suited to the repression of mere corrupt agreements.

We are in the presence, therefore, of a provision that considerably anticipates the threshold of intervention of criminal law, through recourse to the punishability of socially harmful facts, regardless of the criminal progression of the dangerous agreement, which according to jurisprudence – already in itself – would present a disvalue such as to induce the system to protect itself.

If the "conspiratorial" conduct were to materialize, the figure would be presented as an autonomous crime with respect to the one actually committed, whether it be bribery or extortion.

For this reason, the crime of conspiracy is particularly used by the prosecution, because it allows, depending on the cases and the available evidentiary material, to be contested both to aggravate the sanctioning load, and in a completely subsidiary way, in evident violation of the principle of typicality, and exploiting the indeterminateness of the norm, when the evidence gathered fails to demonstrate the existence of violence, fraud or an act of the office being bought and sold, therefore the actual consummation of a second crime.

5. Conclusions: a lesson for Italy

Having reached the end of the regulatory reconstruction proposed in this essay, it is necessary – without the pretension of being exhaustive – to trace the lines of comparative reasoning between the American and Italian criminal anti-corruption systems, drawing from the analysis carried out a lesson in terms of similarity between the two legislations.

In a historical moment, for Italian and European criminal law, in which a process of "common law-isation" of Italian criminal law is increasingly affirming itself, it is useful for the scholar to dwell on the anticipatory tendencies that the Anglo-Saxon model entails.

As we have seen, the effectiveness of the anti-corruption contrast, in the United States, is guaranteed not only by the firm political will to severely punish cases of corruption, through the predisposition of particularly innovative anti-corruption instruments, but also through the all too vigorous use of the regulations on federal bribery that the law makes available to the prosecution. This use, in fact, is also at the expense of some essential principles of modern liberal systems, due to an extension of the legislation in question that leaves room for interpretations – by the Courts – particularly broad and flexible, so as to be able to include in corruption cases, probably, at the border with it. On this point, in the United States, the space is seriously open for a reflection in terms of violation of the principle of legality, whenever a legislation born for other purposes is lent to the field of anti-corruption.

A reflection, in fact, that fully concerns also the Italian criminal anti-corruption law, where – in the last decade – it has been found an excessive contraction of the principle of typicality, in the case of public corruption, on the altar of a fight without quarter to the phenomenon of corruption.

The twisting of legal cases and a clear anticipation of criminal protection, in fact, is an all-Italian tendency and, if we look closely, it is a real glue common to both the systems examined, precisely on the subject of public corruption. Similarly, the expansion of the criminal law and the marked flexibility of the rules and guarantees of criminal law operated by the living law to counter corrupt criminality, in the case of the new phenomenology of systemic corruption, could prove to be scarcely effective at the level of reducing illicit conduct, inasmuch as, criminal law does not possess the appropriate means to put a brake on criminal phenomena, but is the instrument that intervenes ex post with respect to individual events.

Alisa Pašić Macić*

Measures of Anti-Corruption in Bosnia and Herzegovina's

Summary. 1. – Introduction. 2. – Main forms of corruption in BiH. 3. – Areas affected by corruption. 4. – The consequences of corruption. 5. – Measures of Anti-Corruption in BiH. 6. – Conclusion.

1. Introduction

Corruption committed by public servants and elected officials in public institutions has always been the bane of many governments across the world. Some governments which have been able to manage corruption have strong economies and a sound legal framework that has allowed those countries to prosper. Corruption has many negative effects on any country's economic development and progress. For example, countries with high levels of corruption like Bosnia and Herzegovina (BiH) have many stalled projects and poor infrastructure because corrupt government officials loot funds for development. A country's ability to manage corruption can either develop or destroy that country. The economy of any country is also dependent on the country's ability to manage corruption. This paper examines measures of anti-corruption in BiH. This study examines measures being used to curb corruption, causes of corruption, the effects of corruption, factors that hinder corruption, and management of corruption[1].

Corruption has been a significant threat to BiH's economic and social development. For example, according to The US Department of

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[1] J. Köckeis, *Corruption in Bosnia and Herzegovina: Measuring bribery from microdata*, Uppsala 2016.

State, government corruption in BiH is a significant contributing factor to continued political and economic stagnation, and some political leaders have manipulated deep-seated ethnic divisions, weakening democracy and governance, undermining the rule of law and distorting public discourse in the media[2]. A low standard of living and poverty is largely caused by corruption; in other words, corruption supersedes all these problems. A corrupt system leads to unemployment, which affects the standard of living of a given community. Corruption also affects government officials' performance where the outcome is a gap in delivering services to citizens and citizen's needs. Studies have shown that there is a medium to high risk that citizens and businesses in BiH will be asked by government officials to pay bribes before accessing some government services at a given time[3]. Citizens have not been able to classify corruption as a crime just like any other because of the way they have become socially accepted. Corruption is being seen as a norm, as such, citizens no longer see anything wrong in giving bribes. Despite calls from many political agencies and civil society agencies as well as international community to stamp out corruption, BiH legal frameworks have loopholes that have made it difficult to achieve any tangible results; the highly complex government arrangements and institutional culture also encourages corruption, and the lack of political will in BiH between many parties that need to act together to fight corruption poses a significant threat to success of the national fight against corruption.

Efforts to fight corruption in BiH have not born much fruit because corruption is deeply rooted. Anti-corruption laws, policies and strategies that have been formulated have in practice largely remained theories, because of a lack of political will to implement them. To achieve meaningful results in the fight against corruption, acknowledging root causes of corruption and correcting them must be accomplished before there will be acceptable results. Put simply, BiH must address the causes

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[2] United States Department of State, *2016 Country Reports on Human Rights Practices: Bosnia and Herzegovina*, 3 March 2017 (https://www.refworld.org/docid/58ec8a6849.html).

[3] *Trace Bribery Risk Matrix* (2017) (https://traceinternational.blob.core.windows.net/uploads/MatrixFiles/2017/Reports/Bosnia).

of corruption before addressing the effects of corruption. The culture and traditions in many government institutions has to be changed, and there should be an accompanying change in citizen's perceptions of what is acceptable behavior on the part of public servants and elected officials, who are supposed to serve citizens, and what is unacceptable (and this sense of acceptable or not must in turn become more important to citizens than any instinct to place nationalist loyalties ahead of and expectation of sound public administrative practice). Children have to be taught the dangers of corruption right from primary school, and they should be made to scorn it as they grow to become responsible adults and productive members of BiH society. Nationalism, unity, and love for one's country or entity or canton, or all of these, can be turned to be a positive and useful tool to fight corruption. For example, children should be taught by both parents and schools, as well as religious institutions about the importance of loving their country, and/or their entity or canton, and why they need to protect it from corruption. Fighting corruption should be a collective responsibility involving all citizens including public servants and elected officials; they all should be focused on fighting corruption, because if it doesn't affect each one of them directly, it affects every one of them indirectly.

2. Main forms of corruption in BiH

According to the US Department of State "officials frequently engaged in corrupt practices with impunity, and corruption remained prevalent in many political and economic institutions. Corruption was especially prevalent in the health and education sectors, public procurement processes, local governance, and in public administration employment procedures"[4].

Public procurement in most government agencies opens space for corruption; for example, the public procurement plan of the Commercial district court in Banja Luka for 2015 did not contain the planned

[4] United States Department of State, *2019 Country Reports on Human Rights Practices: Bosnia and Herzegovina* (2019) 4 (https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/bosnia-and-herzegovina/).

procurement's estimated value as required by the Public procurement law. Procurement carried out by competitive request and direct agreement has not been published as required by article 35 of the Public procurement law. The RS Ministry of Justice did not conduct public procurement procedures for servicing and maintain public vehicles as required by the law[5]. These irregularities, among many irregularities across the institutions carrying out public procurement in BiH form the basis of corruption in public procurement. Transparency in public procurement is a critical tool in preventing corruption. Transparency in the context of carrying out public procurement means that information on the processes involved and the requirements or services being sought, must be available to everyone: contractors, suppliers, service providers and the public at large, unless there are valid and legal reasons to keep certain information confidential. A lack of transparency in procurement happens in procurement enables tenders and contracts to be awarded to chosen suppliers whether they are offering best value or not. When the best bid is not used, not only is there likely to be corruption and waste of public funds involved, but also there is the danger in supplying non-standard goods and under-supplying in that the corrupt officials responsible often cannot make demands for correction as they are already compromised by the supplier. In a speech in Sarajevo in December 2019, the US Ambassador to BiH stated that «public procurement comprises one of the largest portions of economic activity in this country worth over 3 billion KM annually; and public procurement is frequently cited as part of the overall corruption problem here. The second most common violation in public procurement is conflict of interest. Because of a weak legal framework and weak supervision, public procurement in BiH are used for private profiteering by politically privileged individuals. This is a violation of the public trust and is a crime against citizens although BiH law does not recognize it as such». He went on to state that «Progress in Bosnia and Herzegovina is stalled by inadequate legal solutions and

[5] *Public Administration Reform Monitoring in BiH: Analysis of Results in the Areas of Transparency, Accountability and Integrity 2015-2016* (2017) (https://www.cin.ba/javnauprava/en/monitoring/doc/monitoring-reforme-javne-uprave-transparentnost-odgovornost-integritet-2017.pdf).

the lack of transparency in public procurement. The way to remove opportunities for abuse is to make every procurement truly public and truly competitive – through the e-procurement system – and to make the stakes of corruption too high – with strict oversight and penalties».

While there has been some progress in implementing e-procurement across the board for public procurement in BiH, the current US State Department Business Investment Advisory states that «Foreign investors have criticized government and public procurement tenders for a lack of openness and transparency»[6].

Weak justice and law enforcement have also opened doors for corruption. According to studies carried out by Transparency International in BiH the four independent legal systems make coordination between institutions challenging because there is a gap on who should do what when it comes to law enforcement[7]. It also reduces accountability because there is a shift of blame. The minimal resources allocated to judicial institutions makes it difficult for these institutions to be independent, thus making them more vulnerable to political interference. A minimal number of officials are convicted of abuse of power or other corrupt practices. Whenever the media highlights these cases, the judicial society ignores them. Weak investigations enable cases to be dismissed for lack of evidence. Some of the cases are only investigated when an official allegedly involved leaves power. According to Transparency International, this issue has given rise to suggestions to improve the judiciary but these have been met by an unwillingness of the Parliaments to adopt the changes.

Corruption during elections is also another challenge faced by BIH. According to Piacentini, bribery during elections is very prominent, often in a form where individuals are asked to vote for a particular candidate or

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[6] United States Department of State, *2020 Investment Climate Statements: Bosnia and Herzegovina* (2020) (https://www.state.gov/reports/2020-investment-climate-statements/bosnia-and-herzegovina/).

[7] *Governments are doing a poor job at fighting corruption across Europe and Central Asia* (2016) (https://www.transparency.org/en/gcb/europe-and-central-asia/europe-central-asia-2016).

political party in exchange for monetary gain[8]. The corruption of voters denies the country a chance to elect good leaders. Because these leaders get into office through dubious means, they continue perpetrating corruption to fulfill the promises made to their allies before elections and to expand their own financial gain.

3. Areas affected by corruption

BiH parliaments are among the BiH institutions seen by its citizens and being the most affected by corruption, as 54% of BiH citizens regard their various parliament representatives and the governments they operate as corrupt. The members of Parliament are irregularly appointed: «existing regulations do not separate party functions from professional functions in public enterprises and institutions, and there are no restrictions on public officials using their position to promote their political party or themselves as candidates»[9]. The power the major political parties hold makes it practically impossible for the judiciary to investigate them because they are in the lawmakers. Many of the bills put forward for voting into law and that have to do with fighting corruption have been met with resistance. Thus, for example, the Current Law on Public Procurement of BiH does not address issues of conflict of interest (Article 52), and largely refers to other regulations on conflicts of interest in Bosnia and Herzegovina. The wording from Article 52, § 3 of the Law on Public Procurement of BiH, which resolves possible situations of conflict of interest of participants in public procurement in accordance with the existing regulations in BiH, is inadequate and insufficient. In Article 52 § 4 conflict of interest is defined only for managers, i.e. members of management and supervisory boards of contracting authorities, and it is quite flexible considering that ownership in the capital of a certain business entity is

[8] A. Piacentini, *Nonaligned Citizens: Ethnic Power-Sharing and Nonethnic Identities in Bosnia and Herzegovina. The Case of Sarajevo*, in *Nationalities Papers* 48 (2020) 1-14.

[9] *Governments are doing a poor job at fighting corruption across Europe and Central Asia* (nt. 7).

allowed up to 20%, without considering it a conflict of interest. Article 52 of the Law on Public Procurement of BiH also prescribes previous consultations, but does not prescribe their transparency, so that this part additionally determines the door to conflicts of interest and corruption. The nullity of a contract concluded in a situation of conflict of interest, which according to all relevant international standards is an inseparable segment of resolving a conflict of interest, is not provided by the applicable regulations. The draft Law on Amendments to the Law on Public Procurement from January 2019, composed of working groups appointed by the Council of Ministers of BiH, in the work of which Transparency International BiH participated to a certain extent with partner civil society organizations, is amended and determined concerning conflicts of interest and corruption. It can be concluded that certain segments of the Draft Law on Amendments to the Law on Public Procurement from January 2019 make a significant step forward in preventing and resolving conflicts of interest, as well as preventing and combating corruption and they should find their place in the final text of amendments to the Law on Public Procurement of BiH.

When it comes to the recruitment process in the civil service, the existing legal solutions also leave room for various manipulations, arbitrary decisions of the heads of institutions, nepotism and corruption. All laws on employment in the civil service in BiH, to a greater or lesser extent, circumvent the principle of merit in employment, leaving room for abuse, nepotism, corruption, and the employment of party-like and obedient employees. Article 33 § 1 of the Law on Civil Service of the Federation of BiH stipulates that the final decision on the appointment of a civil servant is made by the head of the civil service body who nominates the candidate (with previously obtained opinion of the FBiH Civil Service Agency), from the list of successful candidates in public competition. The manager has the discretion to choose one of the candidates from the list, but he is not obliged to choose the candidate who achieved the highest number of points on the general knowledge exam or professional exam, nor to explain his decision, which calls into question the selection process.

In addition, the law does not stipulate the obligation of the manager to explain to the candidates who achieved a higher number of points

than the appointed candidate why he decided to choose that particular candidate. The reserve list of successful candidates is kept until the expiration of the probationary period of the appointed civil servant, and the Law and Rulebook on Uniform Criteria, Rules and Procedure for Appointment and Appointment of Civil Servants in FBiH Civil Service Bodies do not contain provisions on possible application of the reserve list. It determines that the civil servant does not meet the conditions of the competition if the candidate withdraws and does not start working. The criterion set by the Law on Civil Service in Public Administration Bodies of the Brčko District is the closest to the criterion of meritoriousness, i.e. the criterion for selecting the most successful candidate, followed by the Law on Civil Service in the Institutions of Bosnia and Herzegovina. However, when it comes to senior civil servants, this criterion is abandoned and a wide discretion is envisaged regarding the selection from the 'list of successful candidates', i.e. those candidates who achieve the minimum points required by the public competition. According to Republika Srpska regulations, the head of the body is given the discretion to select one of the three most successful candidates, which somewhat limits and focuses the selection on the success of the public competition, but still does not guarantee the selection of the most successful candidate.

When it comes to hiring employees, the criteria are even less transparent. This is best illustrated by the provision of Article 25 of the Law on Employees in Civil Service Bodies in the Federation of Bosnia and Herzegovina, according to which "the head of civil service bodies decides on hiring employees from the list of candidates who meet all public announcement requirements". This provision can be interpreted as the discretion of the head of the institution to select any candidate who meets the formal requirements of the position, without mandatory verification of expertise and ability. Considering the above provisions, it can be concluded that these are three types of criteria. Amendments/ adoption of new regulations on civil service at all levels of government in Bosnia and Herzegovina is not substantially in line with the Reform Agenda for 2015-2018.

Business is equally affected by corruption in BiH[10]. This negative effect of corruption is due to the loopholes that are evident when seeking business permits. They open a window for individuals to pay bribes to officials so as to be given business permits. Awarding of tenders is also often done irregularly. Suppliers who meet the criteria but are unable to pay bribes are often denied the tenders, and those who are ready to pay bribes or are 'connected' are awarded the tenders, in some cases even if they don't qualify. Public procurement among all levels of government in BiH is also marred with corruption where businesses that win tenders either supply substandard goods or don't supply goods at all. Respirators from China at the beginning of the Covid 19 crisis being one of the cases in point. Overpricing also denies the public funding meant for other sometimes critical public services supply and delivery.

Bribery is apparently deep rooted among BiH public servants; this is according to GAN Integrity 2020. Among other very poor practices, nepotism was found to be used when seeking public services like licenses, birth certificates, and business permits, among other important documents. The constitution does not give a clear outline of accountability, which accounts for the many corruption cases witnessed in public service. Public finances management, especially in public procurement, lacks transparency.

The justice system has been dramatically affected by corruption. According to an Expert Report on the Rule of Law Issues in Bosnia and Herzegovina, presented by the European Rapporteur for the State of Justice, Reinhard Priebe, to the EU and BiH officials in late 2019, BiH «must reform its dysfunctional justice system and reduce political pressures on the judiciary».

BiH's education, particularly higher education, has been dramatically affected by corruption. BiH education is governed by decentralized structures that make monitoring difficult. University students have described their professors as untouchable and yet unqualified that has

[10] *Bosnia & Herzegovina Corruption Report* (2020) (https://www.ganintegrity.com/portal/country-profiles/bosnia-herzegovina/).

compromised the quality of education given[11]. Like many others, issues regarding education are not adequately addressed because of a lack of accountability and harmonisation. "There are competence disputes between the Republika Srpska entity and the state and between the cantonal and the Federation level"[12].

In BiH, students are apparently willing to bribe to obtain better grades[13]. This can only result in formally qualified but substantially under-qualified persons posing as professionals. It has to be assumed that the same students will also be willing and likely to bribe public officials and politicians in order to secure jobs. The implications of under-qualified professionals on public and other services in BiH are obvious. The quality of services delivered by every institution employing 'fake' professionals can only fall, with adverse consequences for BiH citizens.

When the examination and admission process is flawed and marred by corruption, the process releases under-qualified and under-prepared graduates who cannot contribute positively to economic development.

Significant corruption can be found in the BiH healthcare sector. A 2019 study by Transparency International Bosnia and Herzegovina and the Centre for Civic Initiatives showed that "more than a half of the surveyed healthcare institutions (54% in FBiH and 67% in RS) lack the established internal oversight system".

The same study found that all of the public healthcare institutions surveyed failed to meet professional and ethical standards and norms in the way they were managing public procurement and that they lacked adequate resources to perform transparent and lawful public procurement.

As can be seen in many public institutions in BiH, the appointment of the management bodies in public healthcare organisations is deeply politicised and linked to the various political coalitions and

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[11] A. Sabic-El-Rayess, *When Corruption Gets in the Way: Befriending Diaspora and EU-noinizing Bosnia's Higher Education*, in European Education 45 (2013) 6 ff.

[12] Commission Staff Working Document, *Analytical Report Accompanying the document Communication from the Commission to the European Parliament and the Council Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union*, COM (2019) 261 final.

[13] Sabic-El-Rayess (nt. 11).

their functioning. The current legal framework does not enable the appointment of the most competent individuals to the bodies governing the public health care organisations. Rather, political hacks with varying levels of relevant skill are to be found running these bodies. Not surprisingly in such an environment of mismanagement, waiting times for some non-urgent services in BiH is excessive. Perhaps more alarming, vague procedures for creating hospital wait-lists and failure to disclose these enable opportunities for corruptive and illegal actions where healthcare workers are encouraging patients to bribe or where patients offer a bribe in order to accelerate the provision of services.

4. The consequences of corruption

Key stakeholders determine government expenditure plans. When a lack of transparency obscures expenditure records, the government opens itself to damage caused by public and elected officials likely losing public funds to corruption that could otherwise have been channeled into many projects needed for development of the country and for provision of essential services and welfare to its citizens. The process of approving and tendering a government project involves a number of government officials. When these members get involved in corruption, they may demand bribes from companies awarded to complete these projects. Companies will pay the bribes to get the work. But, they will wrap this 'gray' expenditure into the funding being released to them for the project. In other terms, they will look for ways to recover money paid out in bribes, use substandard materials, or overprice the project. Overpricing makes a government spend a lot on a single task, when the same money could have been used on other projects[14].

Corruption hurts everyone. The impacts of corruption goes beyond the corrupt individuals, the innocent citizens who are often implicated, or the reputation of the organisations they work for. Ultimately, it is the citizens of BiH, that lose out. Some impacts of corruption are:

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[14] Ö. C. Dogmus-J. Ø. Nielsen, *Is the hydropower boom taking place? A case study of a southeast European country, Bosnia and Herzegovina*, in *Renewable and Sustainable Energy Reviews* 110 (2019) 278 ff.

1. Organisational impacts of corruption;
2. financial loss;
3. damage to employee morale;
4. damage to organisation's reputation, organisational focus;
5. resources diverted away from delivering core business and services to the community.

Community impacts of corruption:

1. wasted taxpayer funds;
2. loss of goods and services;
3. lower community confidence in public authorities;
4. disadvantage to honest businesses that miss out on government contracts.

Corruption increases the gap between minority groups. For example, according to UNDP (2010), it encourages the already existing disparities between men and women. Moreover, women are more vulnerable to corruption than men. They often suffered most from corrupt regimes since they are forced to bow to their pressure to give bribes to get some vital service from the public offices. Women are often discriminated against in seeking employment, and corrupt human resource practices enable this. Their chances are often falsely limited, thus increasing the already existing social, economic, political, and cultural discrimination. Women have been forced to be involved sexually with those in power to secure tenders, get jobs, and promotions, business permits, among other social injustices.

Corruption is a significant threat to foreign investment; a country's economic power depends largely on foreign investors' willingness to invest in the country; when the country is corrupt, these investors are hesitant to invest. This will limit the country's ability to do business outside and thus weakens the economy. Foreign investors are reluctant to invest in these countries for fear of the safety of their investment because corruption encourages a shift in the market trends. In 2019, BiH was ranked at 101 of 180 countries on a corruption scale of 'least corrupt countries'[15], thus scaring the investors from investing in the country.

[15] *Bosnia and Herzegovina Corruption Rank* (2020) (https://tradingeconomics.com/bosnia-and-herzegovina/corruption-rank).

Export and import business are also affected by the country's weak trading policies that make the country lose revenue[16].

The cost of doing business is raised due to corruption; small business holders fail in their business endeavor because of the stumbling blocks put on their way by corrupt officials (for example when seeking business permits). Small business enterprises' inability to run makes the government miss the tax from this small business, and the quality of life is also affected. Corrupt deals with government officials push small-scale businesses to the mud and increase the cost of doing business. For example, a business person who acquires his goods through underhand methods, which helps them evade taxes, will sell their goods at a lower price, making it difficult for small businesses to thrive[17].

Corruption leads to poor service delivery in public offices and the essential service providers like in the hospitals, for example, in the health sector, where one is expected to bribe the health care providers to receive a service. Corruption has also led to the procurement of substandard medicine in hospitals, which has put public health at risk. Substandard cancer equipment has seen many patients lose their lives, a situation that could have been prevented[18].

5. Measures of Anti-Corruption in BiH

According to the Regional Anti-Corruption Initiative "prevention, education and coordination of anti-corruption activities, including the analysis of corruption trends, development of anti-corruption policies and monitoring of their implementation in BiH are the main responsibilities of the Agency for the Prevention of Corruption and Coordination of

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[16] I. Šušić-M. Šušić-D. Dragić, *The influence of political stability and economic stability on the inflow of foreign capital in Bosnia and Herzegovina*, in *Journal of Process Management. New Technologies* 7 (2019) 27 ff.

[17] S. Petković-C. Jäger-B. Sašić, *Challenges of small and medium-sized companies at an early stage of development: Insights from Bosnia and Herzegovina*, in *Management: journal of contemporary management issues* 21 (2016) 45 ff.

[18] F. Hadžić, *Economic Crime, Abuse of Ethnopolitical Power, and Systemic Corruption in Bosnia and Herzegovina. Analysis of Causes and Risks of Phenomena*, in *International journal of arts and social science* 3 (2020).

the Fight against Corruption, which is an independent body that reports to parliament. The Prosecutor's Office of BiH is a unique institution, as it is not superior to the entity Prosecutor's Offices and its jurisdiction is limited to the prosecution of specific crimes, including cases of corruption involving BiH civil servants. The two entity-level Prosecutor's Offices of the Federation of BiH and of Republika Srpska, as well as the Public Prosecutor's Office of the Brčko District, are therefore each competent and 'supreme' within their own area of jurisdiction".

Efforts have been made to root out corruption by strengthening the Judiciary. But, according to Fagan & Dimitrova, the judiciary in BiH is interfered with by politicians who run it by extension, making it difficult for the Courts to make crucial decisions when investigating corrupt individuals. The Judiciary has been largely unsuccessful in investigating and prosecuting government officials who are involved, sometimes publicly, in corruption scandals. Many share the view that "Bosnia's justice system remains reluctant to tackle high-level corruption, preferring to focus on petty crimes"[19].

The judiciary also needs to be empowered by being given enough resources to run its affairs. Out of the lack of enough resources, the Judiciary is not autonomous because it still depends on the actions of politicians for funding; this opens a window for politicians to interfere with a Court's decisions. Lack of funds also makes it easy for the judicial system itself to be corrupt or corrupted. A lack of adequate funding for investigations of corruption by the Judiciary will serve to hinder even the most competent investigation as investigations will be incomplete and therefore unlikely to capture all or sometimes any evidence, which immediately causes cases to be dismissed.

Public awareness is also vital in fighting corruption; this is done by educating the public on fighting crime and resisting to the pressure of giving out bribes. The public needs to understand that they have the right to public services, and they don't need to bribe to get those services. The

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[19] D. Brkanic, *Bosnia Courts Avoid Prosecuting 'Big Fish' for Corruption*, in *Balkan Insight* (2019) (https://balkaninsight.com/2019/12/09/bosnia-courts-avoid-prosecuting-big-fish-for-corruption/#:~:text=Experts%20say%20tally%20of%20court,to%20focus%20on%20petty%20crimes).

people also need to be enlightened that by appointing corrupt leaders or taking bribes in favor of a given political party, they are opening up loopholes for a corrupt leadership that will loot public resources and plunder the economy of the country. And when that happens, the ordinary citizens are those who suffer. They should also be aware that by reporting corruption cases to anti-corruption agencies, they free their country from crime and secure future generations. According to Piacentini, citizens of BiH are paid by politicians to vote for a particular group of people. Ethnicity also plays an integral part in the elections[20].

The procedural provisions of the law at the level of BiH hampers whistle-blowing. Together with underdeveloped administrative and judicial practice in whistle-blower protection, these challenges account for the minimal number of corruption reports in the public sector.

Whistle-blower protection laws help in minimizing corruption. According to Mirjanic many citizens in BiH fear raising the alarm when they witness corruption cases for fear of victimization[21]. Whistle-blower protection laws have been adopted at various levels of government in BiH, but the challenge is that these laws are not performing their functions.

For example, Law on Protection of Persons Reporting Corruption in BiH: Institutions[22] regulates the status of persons who report corruption in BiH institutions and legal entities persons who establish BiH institutions and exclude other persons who are not employed in BiH institutions who may be provided with protection. Subjects of protection should be more broadly defined, former employees of the Institution should be included, as well as persons engaged in other types of contracts, then suppliers, subcontractors, etc. The law also requires that whistle-blowers act in good faith, defining good faith itself as the attitude of the whistle-blower based on facts and circumstances of which he or she has his or her own knowledge and which he or she considers to be true (Article 2 § 1, item h). The main role of this standard is to prevent

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[20] Piacentini (nt. 8).

[21] Z. Mirjanic, *Role of Social Partners in Protecting an Employed Whistleblower as an Element of Social Development*, in *Economic and Social Development: Book of Proceedings* (2016) 791 ff.

[22] Official Gazette of BiH, n. 100/13.

the abuse of the rights of whistle-blowers, i.e. malicious or harassment with the aim of harassment, but it is extremely difficult to apply it in practice because it introduces into the protection procedure, as dominant in relation to the information itself. The motive of the whistle-blower or his or her intentions should not be relevant. In the context of weak institutions and rule of law, it is very difficult to make decisions about motives, because they are difficult to test because they are impossible to assess and convince with certainty; and, good international practices lately point to abandon the interpretation of good faith from the standpoint of whistle-blower motives and instead focus on the sincere conviction of the whistle-blower, based on reasonable grounds.

The Council of Europe explains the view that the motives of the whistle-blower or his or her good faith should be excluded from deciding whether or not to give protection to the whistle-blower. The law does not contain any provisions on the possibility of anonymous reporting. Anonymous reporting of corruption to the Agency for the prevention of corruption and coordination of the fight against corruption (APIK) is certainly possible and present, but this reporting is not regulated by the Law on Protection of Persons Reporting Corruption in the Institutions of BiH, so it raises the question of the possibility of protecting anonymous applicants if their identities are revealed.

Unlike BiH Law, in the Republic of Srpska, the Law on the Protection of Persons, reporting corruption[23] defines the term 'applicant' in a broader and more comprehensive manner. Applicants are therefore not only those from the public sector, but protection is also provided for applicants in the private sector and for legal entities and for all persons who have direct knowledge of corruption. From the point of view of international good practices, this definition of the applicant is certainly a better one of two tests, having in mind a wide range of persons who, due to the nature of business or relations with the public and private sector in RS, can obtain valuable information on corruption. Law on the Protection of Corruption Reporters in the FBiH it has not yet been adopted, but is in draft form. Analysis of the Draft Law indicates a great similarity with the solution adopted in RS.

[23] Official Gazette of the Republika Srpska, n. 63/17.

So, whistle-blower protection laws have been adopted at various levels of government in BiH, but the challenge is that these laws are often not performing their functions adequately. Among reasons for this is the notion that confidence in the institute where the public are supposed to report the cases is minimal. Protection laws still don't meet the international standards because they deviate from acceptable international practices. The good faith of whistle-blowers' requirements is always problematic; this has made the citizens shy away from whistle-blowing because they don't feel protected by the laws.

According to APIK 2016 report, only 16 whistle-blower reports were submitted; this shows the mistrust of the laws; the citizens still don't trust these laws, so the number of citizens ready to report the cases of corruption is still low. Whistle-blower protection laws need to be strengthened to improve public trust. The public needs to be enlightened on the need to report corruption as the only way to secure their country's future.

There should be a genuine political will to fight corruption for the policies to fight corruption to work. Political will plays a vital role in any reforms suggested by any country; the reforms in many sectors have been seen to fail because the political class is not willing to accept change because they feel threatened by change. The political class needs to pay attention to corruption at the political levels and clean their house before moving outside. DW's Benjamin Pargan argues that «though the political representatives of Bosnia's three ethnic groups – the Muslim Bosniaks, the Orthodox Serbs, and the Catholic Croats – have nursed their animosities for years, they have found it easy to divide up the country's resources and riches amongst themselves. Each party supplies its benefactors with jobs in the administration, public contracts, and subsidies. That has functioned well for years, and the parties have constantly been re-elected into the many parliaments of the fractured political structures»[24].

No doubt that there are politicians and public servants working in the various components of the BiH government structure that do their jobs

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[24] B. Pargan, *Opinion: Bosnia is still Europe's black-hole of corruption*, in *DW.com* (2014) (https://www.dw.com/en/opinion-bosnia-is-still-europes-black-hole-of-corruption/a-18114406).

honestly and ethically. But many studies and external assessments share Pargan's view and have shown and continue to show that the BiH political class, right across all is deep-rooted in corruption; they are the significant perpetrators in crime; being the lawmakers, they have turned out to be the stumbling block to any reforms to fight corruption. For example, in 2009 the Parliamentary assembly of BiH passed a law establishing the Agency for the prevention of corruption and coordination of the fight against corruption (APIK); this was an independent agency responsible to the Parliamentary assembly of BiH. This agency's primary role is to prevent corruption by educating the public on the importance of fighting corruption by reporting corruption cases. The agency is also mandated to coordinate anti-corruption activities, including research on corruption trends, develop anti-corruption policies, and to monitor their implementation. Lack of political will almost saw this agency collapse as funds were not allocated to this agency for a long time. After a lot of pressure from the international community and push from independent bodies, funds were issued in 2012. Now the body is functional, the staff has been hired, and funds have been allocated to the agency. However, the body has not achieved much because the Agency has limited powers of implementing the anti-corruption policies.

The anti-corruption measures and those meant to reduce conflict of interest and favoritism are linked to deep-rooted structural and cultural change in public bodies and broader society. Therefore, there is a need to address these issues rather than adopting legislation and ensuring formalistic compliance. There is a need to change the culture in public offices, where significant numbers of public officials are so used to corruption that they don't see anything wrong in engaging in corruption or tolerating others around them doing so; while any official found guilty on corruption charges, or even acting in an unethical manner needs to be dealt with very severely, a major national effort must be made to educate all BiH public servants and politicians that it is their patriotic duty to act with personal integrity, uphold the integrity of their office, and to serve the public equally and without favor. Government officials' culture needs to be changed; laws permitting the prosecution of parliament officials involved in corruption need to be implemented. The members of the public must also start electing corruption-free members to Parliament.

The structure in these sectors also needs to be changed to ensure that the people working in these areas are tasked with fighting corruption; for example, the employees in public office need to feel safe when reporting their bosses' corrupt dealings. This structural and cultural change will go a long way in fighting corruption than merely coming up with policies on paper which may not even be implemented.

For anti-corruption policies to work, transparency and accountability are crucial. Government transparency generally occurs through one of four primary channels[25]:

1. proactive dissemination by the government;
2. release of requested materials by the government;
3. public meetings;
4. leaks from whistle-blowers.

Transparency of government relies on strong public sector institutions, especially in the areas of audits, budgeting, procurement, strategic planning, and management. Strong institutions are enabled by robust laws that clearly define limits of authority, requirements for identifying and mitigating against 'conflicts of interest'. Freedom of Information processes need to not only be enabled by law, but citizens need to be aware of them and feel comfortable using them. A free and active media is an essential tool in forcing government to move forward on transparency issues. BiH has made progress on implementing several tools aimed at creating an acceptable level of transparency to the workings of government. Through the efforts of the Public Procurement Agency of Bosnia and Herzegovina, e-Procurement tools such as e-Auctions and e-Tendering enable both participants and the public much greater access to process, deliberations and decisions around public procurement.

The presence of independent media is very crucial for a successful anti-corruption framework. For example, studies have shown that the media plays a vital role in fighting corruption but is compromised by corrupt government officials. Compromising is done by paying off the media personnel for stories covering corruption cases in the country. Some are threatened not to present the evidence collected to court on

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[25] S. J. Piotrowski, *Governmental Transparency in the Path of Administrative Reform*, New York 2007.

the extreme instances some media personnel get killed to protect or destroy the evidence collected on corruption cases. The media in BiH is described as partly free, that is, according to Freedom house (2018). The media in BiH has been declared free because the government has not been able to respect its rights, which continue to be violated by the political class[26].

An independent civil society also plays an essential role in fighting corruption by bringing to light the various corruption cases; they also organize protests against the hiring of corrupt officials or failure by the judiciary to prosecute corrupt public officials. In general, the independent media and civil society act as an eye to the government to fight corruption. BiH does not have strong civil society culture; it is fragile and cannot stand on its own it depends on political will to survive. It also depends on international community funding to survive; without financial support, it is difficult to stay; it also lacks permanent employees, making it difficult to operate and make progress in fighting corruption[27].

According to Markuš public sector reforms are crucial in fighting corruption in BiH[28]. These reforms should be geared towards increasing transparency and accountability of the public sector. There is a need to change the employees' culture in the public sector by making contact between them and the citizens free of corruption. Citizens' feedback on the kind of service they receive from the public service will help minimize corruption cases. Strict disciplinary measures on the members of the public service involved in corruption can also reduce corruption instances. Ethical and professional employees' culture will help reduce BiH's public offices' corruption, where transparent interviews should give the most suitable candidate positions. Not the one with bribes or the one with a connection from the top officials, employees who get

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[26] Z. Tang-L. Chen-Z. Zhou-M. Warkentin-M. L. Gillenson, *The effects of social media use on control of corruption and the moderating role of cultural tightness-looseness*, in *Government Information Quarterly* 36 (2019) 101 ff.

[27] A. Markos-T. Hoang-A. Sarinova, *Private Sector and Civil Society Partnerships against Corruption in Southeastern Europe* (2019) (http://www.ra-un.org/uploads/4/7/5/4/47544571/3_unodc_final_paper.pdf).

[28] R. Markuš, *Monitoring of the Eu Reform Agenda in Bosnia and Herzegovina*, in *Dubrovnik International Economic Meeting* 3.1 (2017) 300-317.

jobs irregularly are more likely to take bribes than those who get the jobs by following the right procedures. Promotion should be based on competence instead of nepotism and corruption. Human resources policy in all public offices must require that public servants have an impeccable track record available to enable consideration for promotion. Regular and enthusiastic in-training will reduce corruption among the public servants. Proper service delivery and customer service can help minimize corruption in BiH's public sector. Public servants must be taught that delivering service to the general public is their responsibility. They are not doing a favor to citizens but fulfilling their duty.

There is a need for reforms in the education sector for any meaningful achievement in fighting corruption in BiH. From their early years of school, children should be taught the importance of a corrupt-free society; this will go a long way to change the children's mindset on corruption. School and college syllabus should contain topics on what corruption entails, the effects of corruption on the country's economy, and the need to live in a corrupt-free society. Teachers should be discouraged from seeking favors from the students to offer them services, especially the university professors, should award marks on merit, not basing on the benefits or tips provided by students. Promotion should be based on performance, not on connection to the people in authority. This promotion will ensure that only competent individuals hold high offices in education institutions to improve service delivery. Enough funding should be given to schools to ensure fractural development, which offers a conducive learning environment. Paying the tutors well will make them resist the temptation of taking bribes. Higher education should be treated with the seriousness it deserves; degrees should be awarded on merit to avoid under skilled professionals who hinder the country's progress. For proper monitoring and oversight, there is a need to strengthen the BiH Agency for Higher Education and Quality Assurance of Bosnia and Herzegovina (HEA BiH) along with the functional equivalents at Entity and Canton level. Officials of these offices need to be held accountable for their performance and accomplishments.

Patients' feedback should be encouraged by placing suggestion boxes in all public hospitals. The input will help minimize corruption cases as the healthcare practitioners will be reluctant ask for bribes for fear

that the citizens might report them for bribes. Healthcare practitioners who are found to uphold integrity should be rewarded by being given promotions. Special recognition will make other members aspire to achieve such recognition for being corruption-free. Billboards should be erected in all public hospitals, enlightening the public that paying bribes to receive care is a way of taking the country backward; the public should also be educated that they have a right to receive medical care.

Healthcare practitioners should be taught right from co

llege the value of upholding integrity when dealing with patients. They should be made to swear among the other oaths an oath to serve the patients placed in their care without demanding rewards. Doctors and nurses involved in corruption should be stripped of their licenses and banned from offering medical services. In line with enlightening medical care practitioners, it is essential to enumerate the medical staff to not be prone to corruption by desperation. The public should also be enlightened that getting service from public hospitals is their right, not a favor; hence, they don't need to bribe to get those services[29].

Procurement in the healthcare sector should be transparent bidding for tenders should be made public to avoid unscrupulous suppliers from paying their way into winning tenders. They fail to supply the required equipment. BiH hospitals have been said to lack necessary medical equipment like syringes and needles, not to mention the required medicine. The machines, like x-ray equipment, dialysis machines, among others, are reported to either missing or in appalling conditions. The poor condition of these equipment makes cancer patients and other patients without requirements that need constant care to cut essential services because the tendered machines never arrived or the ones that were supplied were substandard.

Enough funds should be allocated to the health sector to hire enough qualified staff and pay them well. They are providing medical equipment and medicines to cover the gaps that open room for corruption. Like underpayment of staff and struggle for the available resources have been

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[29] P. C. Aka, *Four Hallmarks of a Good Healthcare System: A Guide for Healthcare Reforms in BIH*, in *Genetic Counseling and Preventive Medicine in Post-War BIH*, Singapore 2020, 45-69.

ranked top causes of corruption in the health sector. Public hospitals doctors' nurses have been reported to have asked for bribes from the patients to get urgent service or wait for months before attending.

Anti-corruption enforcement agencies and regional cooperation are vital in fighting corruption. There is a need to have anti-corruption enforcement agencies independent and well trained in fighting corruption, collecting evidence, and prosecuting the people involved in corruption. Regional cooperation is also crucial in fighting corruption because, more often than not, people loot from their countries and hide the money in different countries; with regional collaboration, it will be easy to expose these individuals and make them responsible for their actions[30].

6. Conclusion

Corruption in BIH is a significant challenge to the progress of the country. The economy has and continues to be dramatically affected by corruption. Lack of employment is partly created by corruption. The cost of living is adversely affected by corruption. People are forced to live below the poverty lines because public funds meant for development and public services are lost in corrupt government projects and practices.

Corruption affects almost all government sectors from the public service to education to health to Parliament, to mention but a few. These negative effects of corruption have reduced the quality of service provided to the citizens, thus decreasing living standards. There is a need for new measures and working policies that can help minimize corruption cases in BiH. For example, various measures have been put in place though implementation is still a challenge because of lack of political will, the culture of this country that encourages corruption, the irony that the institutions that are supposed to fight corruption are deeply rooted in corruption, among other challenges.

For effective implementation of these measures, there should be a total change in the culture of the entire system of governance in the country and the public's belief concerning corruption. The election of Parliament

[30] D. A. Sotiropoulos, *Corruption, anti-corruption, and democracy in the* Western Balkans, in Političke perspective 7 (2017) 7 ff.

members should be free of corruption; the electoral commission should ensure that. The citizens should be taught through civil society the importance of a free and fair election. Further, citizens should be taught to desist from taking bribes to vote in favor of a given candidate or political party; by doing that, they will elect Parliament members who uphold integrity. It will be easy for such members to pass laws that help in fighting corruption.

Members of the public should be enlightened on the need to desist from giving bribes to get some service, which is their right. Billboards should be erected in all government offices, discouraging the public's members from offering bribes to get benefits. Strict punishment to public servants involved in corruption should not target the junior officers and high-ranking officials. The judiciary should be empowered and made autonomous with enough funding to avoid high-ranking officials from bribing their way out of corruption charges.

The big question is there hope of eliminating corruption from BiH? Research has shown that with enough commitment to fighting this monster where all stakeholders participate fully, it is possible to eradicate corruption in BiH. But it will take the active participation and inter cooperation of all BiH citizens, and leadership and genuine cooperation on the part of BiH' huge and cumbersome score of political actors. BiH citizens of all ethnicities have a right to expect similar levels of service, accountability and security from their government and governments at all levels as other Europeans of comparable culture. And it is very likely most BiH citizens share that goal. Sadly, BiH politicians of all colours seem to remain focused on shouting at each other about historical and divisive issues rather than accepting the mantel of leadership with the accompanying requirement for a sense of public duty and accountability that is needed to make deep and meaningful progress in pulling BiH out of the very sad situation it is in with respect to the level and costs of corruption among its public sectors and political institutions. Citizens have to hope that neighbours, NGO's and powerful international actors will continue to assist BiH to free itself of this considerable burden.

Duško Samardžija*

Cutting Edge Technologies – ICT in Urban Planning and Architecture Building Transparent, Efficient and Developed Cities

1. Introduction

Dynamism, motion, speed, changes, and challenges are key variables of today`s life.

The goal of the Thesis is to investigate the intercorrelation between technology and urban planning with peculiar reference to influences and connections among their dynamics. How technology is used to improve city governance in the challenging period of urbanization and globalism today? Is ICT (Information and Communication Technologies) driven city more attractive for people, capital, and enterprises than other cities?

The research area in the scope of the use of ICT in urban management and planning has been researched by scholars but not enough investigated from the multidisciplinary view of comprehensive implications on city governance from the fields of society, economy, urban management in a period of dynamic variables – urbanization and globalization. The core

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of futuristic challenges with the new age was placed by Koolhaas and Marten in the scope of urbanization and globalism.

The possibility of applying obtained results is based on the idea of contributing to the scientific research of contemporary practice in ICT usage in an urban planning-management domain, also as a systematization of the previous practice because the research area has not been sufficiently explored. It is intended to better understand the influence of ICT on city governance, and in which way citizen benefits from the implementation of ICT in urbanism.

This is the time of the Fourth Industrial Revolution – smart technology and Internet of Things – connection of smart devices. We are a data-driven population, in the 2017 year, 48,996% of the world population use the internet (The World Bank Open Data).

Technology affects our lives since the First Industrial Revolution of 1760. Urban image of cities has changed drastically as cities become magnetic to people. In one hundred years (1801-1901) the population of London has risen six times, from 1 million to 6.5 million, New York from 33,000 inhabitants in 1801. A rapid increase in population sought new urban solutions. A dramatic transformation of cities have started – Osman (1859) turned Paris into a regional metropolis – through the existing city fabric he broke the streets while Ildefonsko Serda (1859) planned Barcelona with 22 blocks placing traffic as the starting point of all urban transformation[1].

Following the dynamics of technological changes in the Fourth Industrial Revolution on urbanization brings the new concept of 'smart city'.

«A smart sustainable city is an innovative city that uses information and communication technologies (ICTs) and other means to improve quality of life, the efficiency of urban operation and services, and competitiveness, while ensuring that it meets the needs of present and future generations concerning economic, social and environmental aspects»[2].

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[1] K. Frampton, *Kenneth. Modern Architecture: a Critical History*, London 1992.

[2] FG SSC Doc 100, *Smart Sustainable Cities: An Analysis of Definitions*.

The Institute for Management Development, in collaboration with Singapore University for Technology and Design (SUTD), has released in 2019 and 2020 Smart City Index List.

The Smart City Index ranks cities based on economic and technological data, also by their citizens' perceptions of how 'smart' their cities are.

In SCI's context, a 'smart city' is defined as an urban setting that applies technology to enhance the benefits and diminish the shortcomings of urbanization for its citizens Singapore, Helsinki and Zurich have come top in the 2020 Smart City Index, while many European cities fall in the rankings comparing to 2019[3].

Smart City Index List is used in the Thesis as a tool for selecting case study city examples to answer does implementation of ICT in a city brings attractiveness for people, capital, and enterprises, and how they cope with urban management issues – transparency and corruption in urban planning?

Technical and socio-economic factors have been shaping the world more dynamically. Urbanization as a process of making surrounding more urban has become more than an ever huge challenge for cities. We live in a globalized world in which the key characteristic is the interconnection between cities (as points) which forms a global network of flows people, data and communication, services, goods, finance, etc.

Physical space is changed «we no longer live in a space of places, but in a global space of flows»[4].

In a globalized world, a key characteristic is an interconnection between cities (gateways) which forms a global network of flows.

Observing the world map as a global space of flows, there are gateway cities on the global, national, or regional level. What does make one city gateway city?

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[3] *Smart City Index Report 2020 – A tool for action, an instrument for better lives for all citizens, 2020* (https://www.imd.org/smart-city-observatory/smart-city-index/).

[4] M. Doel-P. Hubard, *Taking world cities literally: Marketing the city in a global space of flows*, in *City analysis of urban trends, culture. theory, policy, action* 6.3 (2010) 351 ff.

Friedmann claims that financial assets, transport infrastructure, population size, business services, manufacturing output, TNC headquarters as the presence of international institutions are indicators of world-city ness.

The world cities are successful not only because of their major role in national economies, but they collectively facilitate and mediate global flows. Michael Porter says that competitive advantages arise from the strategic manipulation of local assets, while for Kresl, Duffy, Oatley city competitiveness and success unquestionably derive from the internal characteristics of a city[5].

Gateway cities stand as 'magnetic' cities. The Global Power City Index (GPCI) evaluates and ranks the major cities of the world according to their comprehensive power to attract people, capital, and enterprises from around the world.

The Global Power City Index List is used as the tool to investigate the position of the top-ranked smart cities (Singapore, Helsinki, and Zurich) to determine does 'smartness' of a city (city based on ICT) means more attractiveness for people, capital, and enterprises.

A better understanding of phenomena within different spatial contexts is understood through case study research of smartest cities: Singapore, Helsinki, and Zurich. It is showed that the implementation of ICT is possible in different conditions and settings. These cities rely heavily on the deployment of technology city governance. As opposite to static traditional urban planning based on blueprints, ICT makes the practice of urban planning more flexible making it attuned to dynamic challenges as rapid population growth, urbanization, globalization. The conception of the case study smartest cities can be described with Maarten saying: «Not proximity but connectivity, not history but adaptation are key variables».

The use of ICT in urban management provides proactive inclusion of citizens as active agents of deciding urbanism as technology – Internet of Things uses citizens' data to gather information on the use of space. Sustainable development is achieved through a deep understanding of spatial interventions on the spot – with 3D models or Holo Planning.

[5] Doel-Hubard (nt. 4).

Use of ICT provides development of new startups and growth in Mobile Application Clusters. ICT is base on urban transparency allowing updated insight in the city`s decisions by geoinformatics.

These findings are proofed by the data from the Smart City Index (SCI) report 2020. Table 6 shows the Technology pillar describing the technological provisions and services available to the inhabitants from the sector of Governance measuring high scores for Singapore, Helsinki, and Zurich in the next IT services:

- Online public access to city finances has reduced corruption;
- An online platform where residents can propose ideas has improved city life.

ICT brings the inclusion of citizens providing transparency and reducing the corruption score in urban management as an interaction of the city and its inhabitants is intensified by ICT.

Technology makes the world go round. The dynamic of the world is driven by technology. Every time we send a message, make a call, send an email, social media post, online search, or complete a transaction we leave digital traces. Everything is controlled under the power of ICT. It changes our life habits – from personal experience vacations in a new environment are less stressful with Google Maps and review sites.

As mentioned at the beginning challenges are key variables of today`s life, ICT could help us to be predictable, prepared, and flexible to changes.

This year shows us that more than ever before. We have been confronted with the new reality of a sudden stop of dynamics of life which Pandemic brings.

2. Theoretical background

This research aims to investigate the interplays between information systems and urban planning, with peculiar reference to influences and connections among their dynamics.

The narrow discourse of the research is to re-examine the discourse of urban planning in the period of fast globalization and urbanization

by paying attention to parallel fast changes in Infomation and Communication Technology – ICT.

Through research, it aims to investigate what urban planing-management presents today, and in which way it should be considered by governments. Competitiveness between cities on the world map is happening through 'magnetism' or comprehensive power to attract people, capital, and enterprises from around the world.

There are 'big players' in the world game of cities which act as multilevel gateway cities, also smaller cities that are specialized for one to a few areas but are still important points in the global network of flows.

The research topic is conceived as a critical and analytical study of the phenomenon of urbanization and ICT, and as a result, the understanding and valorization of the phenomenon is expected through the examination of how the implementation of ICT influences local and global characteristics of the city.

The city today should not be considered as a closed system, made by buildings and artifacts. In urban practice, it still stands like that. The city is today more than never part/point of the dynamic system called gateway network, a city it is a complex whirlpool of global and local impacts.

Use of ICT has the potential for comprehensive development of all layers of the city on local and global aspects to be updated city of the 21st century, it will be researched.

Following the subject of the research, assumptions that will be examined in the context of the framework are presented in this chapter.

Life influence of ICT – Innovations in information and communication technologies (ICT) are pervasive, substantially affecting many spheres of our lives.

Urban influence of ICT – Urban environments have always stood in close relationship to the technologies of production, transport, and communications – today digitalization – ICT.

Dynamics ICT/Urbanism – As technology dynamics development is fast – its impacts on urban environment change, dynamics of ICT development calls for new or adapted concepts, ideas, and models in urbanism.

City as Lab of local and global factors – Urbanism is a live whirpool system of global and local influences. Traditional urban planning has heavily depended on tangible space, urban scholars and planners find the invisible and intangible characteristics of ICT difficult to handle[6]. Global space of flows – in the globalized world, a key characteristic is an interconnection between cities (as points) which forms a global network of flows. 'Magnetism' or their comprehensive power they are able or not to attract people, capital, and enterprises from around the world is what matters. Physical space is changed «we no longer live in a space of places, but in a global space of flows»[7].

«The urban overall vulnerability depends therefore on physical, social, economic, and functional factors and their interrelations, which can be influenced at the urban scale through urban planning and spatial design tools»[8].

2.1. Urban planning

2.1.1. History of urban planning from the perspective of ICT

With the development of increasingly abstract means of communication, the continuity of conventional means of communication was replaced by systems that were further improved during the 19th century, enabling increasing mobility of the population, providing information that was more accurately synchronized with the fast pace of history. The railway, the daily press, and the telegraph are gradually taking over the role that space previously had in informing[9].

[6] R. J. Firimino, *(Re)thinking urban planning: Urban-technology and planning in medium-sized cities in São Paulo*, in *Creative Urban Regions: Harnessing Urban Technologies to Support Knowledge City Initiatives. Hershey*, eds. T. Yigitcanlar-K. Velibeyoglu-S. Baum, London 2008.

[7] Doel-Hubard (nt. 4).

[8] G. Esposito De Vita-A. Gravagnuolo-I. ALberico-R. Iavarone, *Resilience assessment tool for public space regeneration*, in *AESOP 30th Annual Congress*, Lisbon 2017.

[9] F. Choay, *The Modern City: Planning in the 19 Century*, New York 1969.

The appearance of the cities of Europe that existed five centuries ago has changed drastically in the past 100 years. This is a consequence of the action of technical and socio-economic factors that did not exist before, and which influenced the change of the urban image of cities. Many of the factors that will influence the change in the urbanism of cities appeared in England during the second half of the 18th century. In 1825, the first regular railway line was opened – the Stockton – Darlington line, followed by the rapid development of new infrastructure. In 1860, there were already 10,000 miles of rails in Britain. Thanks to the steam engine, other maritime lines were introduced after 1865, and in that way, the migration of Europeans to America, Africa, and Australia increased. These migrations provided the population for the expanding economy, as well as the settlement of orthogonally placed cities of the new world. The military, political and economic obsolescence of traditional fortified European cities after the revolution of 1848 led to the demolition of the ramparts, so the city began to expand into growing suburbs. This development leads to a decline in human mortality due to better health and nutritional conditions, a sharp rise in urban concentration occurs first in England and then in other parts of the developed world. In one hundred years, the population of Manchester increased from 1801 to 1901, eight times from 75,000 to 600,000 inhabitants. London has risen six times, from 1 million to 6.5 million, and Paris 500,000 inhabitants to 3 million inhabitants. New York had only 33,000 inhabitants in 1801 and 3.5 million in 1901[10].

Such a rapid increase in population turned the old parts of the city into slums, which were supposed to be near to the production center – within walk distance. Such housing density could not provide the necessary urban standards – lighting, ventilation, sanitary conditions were poor, which was the cause of epidemics – first turbecologists, and then cholera, which spread to Europe and America in the 1830s and 1840s. Legal provisions in England have created an awareness of improving the living conditions of city dwellers.

Napoleon III and Baron Georges Osman left an indelible mark in Paris and the larger cities of Central Europe, where regulation according

[10] Frampton (nt. 1).

to Ottoman principles which were carried out during the second half of the 18th century. Paris was facing with an unregulated sewage system, without enough free space for parks and cemeteries, with traffic chaos. Osman applied the principle of breakthroughs in the urban matrix of the city with axial axes of roads in the direction of north-south and east-west, connecting the railways in the north and south. During Osman, 137 kilometers of new boulevards with tree-lined avenues were built, types of residential buildings and norms for facades were determined, and street equipment systems were introduced (benches, canopies, kiosks, clocks, lighting poles, etc.). In his work, he encountered problems with the bourgeoisie, which protected its property rights from his encroachments.

In Barcelona, regional forms of urban development were developed by the Spanish engineer Ildefonsko Serda, who in 1859 planned to expand Barcelona in the form of an orthogonal city network with 22 blocks, bordered on one side by the sea and intersected by two diagonal avenues. In his work Teoria general de flows urbanizacion (General Theory of Urbanizations – Serda is the creator of the term 'urbanization'), he gives priority to the traffic system, and then to the steam engine. For him, traffic was the starting point of all scientifically based urban solutions.

Intensive use of the city center began in 1891 when two necessary funds for the construction of tall buildings came into use. It was the invention of a special crane in 1853 and a perfected steel skeleton in 1890. When the subway was built in 1863, an electric tram was introduced in 1884, and in 1890 regular suburban traffic started – then green suburbs became a natural form of the future expansion of the city[11].

Through the above-mentioned one could understand the fast development of urban planning as a young discipline and its connection with ICT (Information and Communication Technologies). Mentioned examples of cities show the change in urbanism that was caused by the Industrial Revolution.

What Fourth Industrial Revolution brings to us when we talk about urban planning?

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[11] *Ibid.*

Is ' Big data – ICT' a big promise for our cities as they face the challenges and opportunities that the Fourth Industrial Revolution is producing?

2.2. Information and Communication Technologies for urban planning

2.2.1. ICT in urban planning

The technological advances and social changes as characteristic of the late twentieth century resulted in the need for the development of contemporary strategies of urban planning. The development of advanced information and telecommunications networks have created new kinds of socioeconomic activities, while changes in values and increases in cultural diversity within cities have made manifest the need for planning schemes based on flexibility and responsiveness to change[12].

The development of information and communications technologies and the diffusion of the Internet may bring a turning point possibly as significant as that produced by the Industrial Revolution. Technology and mobile applications penetrate daily life more and more reshaping contemporary living. Cyberspace merely consists of collections of electronic data that offer some degree of spatial awareness, while it has the possibility to support real space by providing functions that would be otherwise time-consuming and costly[13]. So it is concluded that ICT has a possibility of transformation urban planning for better use of space in cities under increasing pressure on resources and capacity.

Urban planning in the Internet Era should be based on the adaptation of ICT developments and the anticipation of others[14].

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[12] N. Shiode, *Urban Planning, Information Technology, and Cyberspace*, in *Journal of Urban Technology* 7.2 (2000) 105-126.

[13] *Ibid*.

[14] *Ibid*.

As it is hard difficult to depict the exact image of future planning design under rapidly changing socio-economic conditions, we should aim at a flexible planning scheme, laying more emphasis on the process than on final output as in the case in conventional planning schemes[15].

2.2.2. ICT city as Smart City

«A smart sustainable city is an innovative city that uses information and communication technologies (ICTs) and other means to improve quality of life, the efficiency of urban operation and services, and competitiveness, while ensuring that it meets the needs of present and future generations with respect to economic, social and environmental aspects»[16].

A smart city may be considered as a concept of city related to the concepts of the informational city, digital city, intelligent city, and sustainable city[17].

According to Google Trends, the term 'smart city' from 2004 reached its peak in 2015, July 2019, and September 2020. It is proof that many studies and discussions on the smart city concepts are going on, and rising in the period of the pandemic of Coronavirus – maybe through a search of new paradigms of city management in specific conditions.

But, no exact agreement has been reached on the definition of the smart city, but it is understood as an ideal model for urban planning and development, adaptation to environmental issues such as climate change and global warming, and efficiently utilizing and managing energy. Information and Communication Technologies (ICT) can extensively and effectively help cities achieve a comparative edge in achieving urban policy based on governance and open data[18]. In the

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15 *Ibid*.

16 FG SSC Doc 100 (nt. 2).

17 M. Kyunghun-Y. Moonyoung-F. Katsunory, *A Comparison of a Smart City's Trends in Urban Planning before and after 2016 through Keyword Network Analysis*, in *Sustainability* 11 (2019) 1 ff.

18 *Ibid*.

area of improving the urban quality, the term smart city is considered as an umbrella concept that includes various sub-concepts such as sustainable smart environments, smart technology, smart energy, smart transportation, smart mobility, and smart governance. The concept of the smart city is emerging through ideas of improving the functioning, efficiency and competitiveness of cities and solve environmental challenges[19].

Development of ICT results in the improvement of the various fields of urban management such as transportation, energy, health care and water while participation of the citizens through e-governance and e-services through the delivery of information and knowledge generated in daily life is being advanced[20].

ICT is a technical platform for the process of collecting and processing massive amounts of data – big data, enhancing digital devices, Internet services and the Internet of people's societies[21]. These techniques and technologies are seen as tools to create innovative, intelligent spaces and to improve urban sustainability[22]. Future predictions are based on the gathered data from information systems and various applications in smart cities[23] which are used for future urban smart management. The smart city concept relies on ICT as part of the urban infrastructure of pervasive computing and related big data applications. Smart devices share their own information and access other devices generating information with applications[24]. With these

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[19] *Ibid*.

[20] M. P. Castells-J. Martinez Durà-J. Samper Zapater-R. Cirilo Gimeno, *Use of ICT in Smart Cities. A practical case applied to traffic management in the city of Valencia*, in *Proceedings of the InSmart Cities*, Prague 2015.

[21] *Ibid*.

[22] A. S. Patil-M. Nadaf, *Study on ICT, IoT and big Data Analytics in smart city application*, in *International Research Journal of Engineering and Technology* 4.8 (2017) 59-64.

[23] S. M. Wu-T. C. Chen-Y. J. Wu-M. Lytras, *Smart cities in Taiwan: A perspective on big data applications*, in *Sustainability* 10 (2018) 106.

[24] O. Vermesan-P. Friess-P. Guillemin-R. Giaffreda-H. Grindvoll-M. Eisenhauer-M. Serrano-K. Moessner-M. Spirito-L. C. Blystad-E. Z. Tragos, *Internet of Things beyond the Hype: Research, Innovation and Deployment*,

ICT processes, the information is used for understanding, analyzing, evaluating, monitoring and as such contributes to the development of the concept of the sustainable city[25]. Smart systems today require a comprehensive understanding of the possibilities of how unpredictable and unprecedented urban issues like population growth, environmental pressure, and human welfare and safety can be managed[26].

Then, cooperation from citizens and the involvement of citizens as active agents in the process of urban planning is crucial for the implementation of smart city strategies in the practice. They are involved in urban initiatives and governance and contribute to disseminating smart devices and internet sharing and generating information.

But we should consider that innovative strategies and smart strategies should be harmonized with government policies[27] and as such should require an approach following the urban development level, technologies and frameworks of governance with the community[28].

Smart cities and ICT as an integral part of the future evolving city has the potential to provide better urban management and practice in the area of urban planning than it was in the past and is now (the practice of blue prints).

Integration networks as a collection of smart devices, sensors, and real-time big data with ICT related to human life on one side, and on the other side new paradigm in urban planning policies related to governance and the economy make new comprehensive attitude towards consideration of the spatial management[29]. Processes and results of analysis via ICT

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in *Building the Hyperconnected Society. IoT Research and Innovation Value Chains, Ecosystems and Markets*, eds. O. Vermesan-P. Friess, Aalborg 2015, 15-85.

[25] S. E. Bibri-J. Krogstie, *ICT of the new wave of computing for sustainable urban forms: Their big data and context-aware augmented typologies and design concepts*, in *Sustainable Cities and Society* 32 (2017) 449-474.

[26] Kyunghun-Moonyoung-Katsunory (nt. 17).

[27] M. Angelidou, *Smart city policies: A spatial approach*, in *Cities* 41 (2014) 53 ff.

[28] A. Vanolo, *Smartmentality: The Smart City as Disciplinary Strategy*, in *Urban Studies* 51 (2014) 883-898.

[29] L. G. Cretu, *Smart cities design using Event-driven paradigm and semantic web*, in *Informatica Economica* 16 (2012) 57 ff.

can be reflected through the entire city and used to stimulate the future urban image of the city.

To sum up, the key components of a smart city are the technologies, the people resources such as creativity, diversity, education, and the institutions – policy and governance[30]. For governments, it is important to adapt old and create new strategies by reflecting the concept of smart city policies. A smart city requires governance based on the communication and cooperation of citizens, stakeholders, governments, and private companies[31].

ICT has the potential to establish the root of a big urban concept of the contemporary city in which networks of places and networks of data would intersectionally flow.

2.3. Decision making in urban planning

2.3.1. Smart governance

In 2015, 195 nations agreed with the United Nations that they can change the world for the better. This will be achieved by bringing together governments, businesses, media, institutions of higher education, and local NGOs to improve the lives of the people in their country by the year 2030. Goals are to eliminate poverty, erase hunger, establish good health and well-being, provide quality education, enforce gender equality, improve clean water and sanitation, grow affordable and clean energy, create decent work and economic growth, increase industry – innovation and infrastructure, reduce inequality, mobilize sustainable cities and communities, influence responsible consumption and production, organize climate action, develop life below water, advance life on land, guarantee peace – justice and strong institutions, build partnerships for the goals.

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[30] T. Nam-T. Pardo, *Conceptualizing smart city with dimensions of technology, people, and institutions*, in *ACM International Conference Proceeding Series* (2011) 282-291.

[31] Kyunghun-Moonyoung-Katsunory (nt. 17).

The United Nations via Sustainable Development Goals (SDGs) which agreed in 2015 specified inclusively sustainable cities and communities – under Target 11 and guarantee peace – justice and strong institutions under Target 16[32].

These two targets seen as 'sustainable cities and communities' and 'justice and strong institutions' together with ICT have been seen as the core components and active materials for the smart city. Transparency and anticorruption strategies can be supported with ICT technologies as powerful toll.

2.3.2. Integrity of practice and corruption

Corruption in urban development is an obstacle to a prosperius, inclusive, resilient urban future. Urban decisions as zoning, land management, infrastructure, and service build-out offer some of the most sophisticated, inscrutable, and lucrative ways for personal enrichment, crony capitalism, clientelism and political patronage[33].

In China, for example, 60% of 150 listed real estate firms are politically connected to local government[34].

Consequences in urban planning are long-term and hardly improved, they are deeply set into the fabric of cities and difficult to undo. Corrupted urban planning and development of rapidly growing cities need resources to expand services and upgrade infrastructures. How should we protect urban development?

In this term, ICT has without any doubt an important role in taking control of urban planning practice. But it is important to develop the integrity of the profession of urban planning, not just to avoid corruption.

To realize that of great importance is to aim for three levels of strategy:

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[32] UNDP (https://www.undp.org/content/undp/en/home/sustainable-development-goals.html).

[33] D. Zinnbauer, *Towards Cities of Integrity: The Role of Urban Planners* (U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, n. 4), Bergen 2019.

[34] Y. Wang-D. Zhang, *Can Clientelism Subvert Authoritarianism? Evidence from China's Housing Market,* in *APSA Annual Meeting Paper* (2014).

1. Reinforce personal integrity through ethics training, the invocation of social value systems, and related awareness-raising.

2. Often this is embedded in an organizational approach to build cultures of integrity within specific organizations and administrations, emphasizing one from the top, codes of conducts and an enabling Intra organizational ethics infrastructure[35].

3. More recently, such integrity approaches have also taken a sectoral turn as integral parts of a growing number of collective action initiatives, such as for the extractives, construction, pharmaceutical, or shipping sectors[36].

The New Urban Agenda of 2018 is the central set of global policy commitments of the urban development community for the next twenty years. This agenda further expands on the Sustainable Development Goals for cities. Preventive anti-corruption measures and a strong capacity for urban planning and design with the provision of training for urban planners at national, subnational and local levels lend strong legitimacy with a focus on integrity in urban planning as part of urban governance. With advanced ICT utilization of data could be used for this purpose of promoting urban justice.

Urban justice, data-driven cities, and sustainable urbanism – should be seen as an integral system of urban management.

3. Methodology

3.1. Research methodology

Case study methodology is chosen to study phenomena of how ICT influence the urban dynamics on an inner and global level. Cases will be holistically researched from the overview of the smart city goals to concrete ICT tools used in urban planning-management.

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[35] D. E. Warren-J. P. Gaspar-W. S. Laufer, *Is formal ethics training merely cosmetic? A study of ethics training and ethical organizational culture*, in *Business Ethics Quarterly* 24.1 (2014) 85-117.

[36] Zinnbauer (nt. 33).

A qualitative case study is an approach that allows exploration of the issue through lenses of:

- ranking of case study cities on the Smart City Index list to examine ICT strength in the smart city;
- the Global Power City Index (GPCI) evaluates and ranks the major cities of the world according to their 'magnetism' or their comprehensive power to attract people, capital, and enterprises from around the world;
- which for multiple facets of the phenomenon to be revealed and understood.

The case study is in correlation with a research question: Does ICT implementation in urban planning – management in different spatial contexts improve the 'competitiveness' of a city on the global level?

The base for the selection of case studies examples is: "As technology dynamics and its impacts on urban environment change, their relationship calls for new or adapted concepts, ideas, and models in urban planning – management".

To bind the case the most suitable is to research within the most 'intensive' cases of implementing ICT in urbanism. Criteria time and activity are used to bind the cases – the Smart City Index list is used for that. It is a tool to show the best ranking recent cases of cities according to the criteria of use ICT as strength in the smart city from the 2020 year.

Multiple case study is seen as the most suitable as it enables to explore differences within and between cases, so a comparison could be drawn for all the cases. Case studies – experiences have the potential to be a model in less or more framework for implementation of the phenomena. A better understanding of phenomena within different contexts can be understood – to show that implementation of ICT is possible in different conditions and settings, and that practice of UP should be more flexible – not just based on blueprints.

But has ICT implications on the 'magnetism' of the city?

A potential proposition is: Innovations in information and communication technologies (ICT) are pervasive, substantially affecting many spheres of our lives[37]. Fast dynamics of ICT development calls for

[37] M. Castells, *The Rise of Network Society*, Oxford 1996.

new or adapted concepts, ideas, and models in urbanism to stand as a 'magnetic smart' city.

The goal is to describe the context within which the phenomenon of implementation ICT in urban planning – management is occurring as well as the phenomenon itself. The research problem is identified worldwide.

3.2. The Smart City Index

The Smart City Index[38] ranks cities based on economic and technological data, also by their citizens' perceptions of how 'smart' their cities are.

The Institute for Management Development, in collaboration with Singapore University for Technology and Design (SUTD), has released the 2020 Smart City Index.

Singapore, Helsinki and Zurich have come top in the 2020 Smart City Index, while many European cities fall in the rankings comparing to 2019.

In SCI's context, a 'smart city' is defined as an urban setting that applies technology to enhance the benefits and diminish the shortcomings of urbanization for its citizens[39].

In line with previous and on-going efforts initiated and carried out by IMD's World Competitiveness Center, the Smart City Index presented here remains a holistic attempt to capture the various dimensions of how citizens could consider that their respective cities are becoming better cities by becoming smarter ones. Part of the SCI's uniqueness is to rely first and foremost on the perceptions of those who live and work in the cities covered by the index while providing a realistic recognition that not all cities start from the same level of development, nor with the same set of endowments and advantages.

Ranking Methodology.

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[38] *Singapore, Helsinki and Zurich triumph in global smart city index* (https://www.imd.org/smart-city-observatory/smart-city-index/).

[39] *Smart City Index Report 2020* (nt. 3).

1. The IMD-SUTD Smart City Index (SCI) assesses the perceptions of residents on issues related to structures and technology applications available to them in their city.

2. Edition of the SCI 2020 ranks 109 cities worldwide by capturing the perceptions of 120 residents in each city. The final score for each city is computed by using the perceptions of the last two years of the survey.

3. There are two pillars for which perceptions from residents are solicited: the Structures pillar referring to the existing infrastructure of the cities, and the Technology pillar describing the technological provisions and services available to the inhabitants.

4. Each pillar is evaluated over five key areas: health and safety, mobility, activities, opportunities, and governance.

5. The cities are distributed into four groups based on the UN Human Development Index (HDI) score of the economy they are part of.

6. Within each UN Human Development Index (HDI) group, cities are assigned a 'rating scale' (AAA to D) based on the perceptions-score of a given city compared to the scores of all other cities within the same group.

For group 1 (highest HDI quartile), scale AAA–AA–A–BBB– BB
For group 2 (second HDI quartile), scale A–BBB– BB–B– CCC
For group 3 (third HDI quartile), scale BB–B– CCC–CC–C
For group 4 (lowest HDI quartile), scale CCC–CC–C–D

7. Rankings are then presented in two formats: an overall ranking (1 to 109) and a rating for each pillar and overall[40].

[40] *Ibid*.

City	Smart City Rank 2020	Change	Smart City Rating 2020	Smart City Rank 2019	Smart City Rating 2019
Singapore	1	— (0)	AAA	1	AAA
Helsinki	2	▲ (+6)	AA	8	A
Zurich	3	▼ (-1)	AA	2	AAA
Auckland	4	▲ (+2)	AA	6	A
Oslo	5	▼ (-2)	AA	3	AA
Copenhagen	6	▼ (-1)	AA	5	AA
Geneva	7	▼ (-3)	AA	4	AA
Taipei City	8	▼ (-1)	A	7	A
Amsterdam	9	▲ (+2)	A	11	A
New York	10	▲ (+28)	A	38	BBB
Munich	11	new	A		
Washington D.C.	12	▲ (+19)	A	31	BBB
Dusseldorf	13	▼ (-3)	A	10	A
Brisbane	14	▲ (+13)	A	27	BBB
London	15	▲ (+5)	A	20	BBB
Stockholm	16	▲ (+9)	A	25	BBB
Manchester	17	new	A		
Sydney	18	▼ (-4)	A	14	A
Vancouver	19	▼ (-6)	A	13	A
Melbourne	20	▲ (+4)	A	24	BBB
Montreal	21	▼ (-5)	A	16	A
Hamburg	22	new	A		
Newcastle	23	new	A		
Bilbao	24	▼ (-15)	BBB	9	A
Vienna	25	▼ (-8)	BBB	17	BBB

Figure 1[41]: Ranking of the first 25 cities on the Smart City Index Report 2020, p. 9.

According to the table, it is concluded that the top three cities have the highest HDI (UN Human Development Index score) of the economy.

[41] *Ibid.*

Singapore remains the smartest city and in 2020, Helsinki improves its position for six places, while Zurich drops down for one place.

Observing the top three "smartest cities" from HDI (UN Human Development Index score) of the economy, Singapore kept AAA score, Helsinki from A improve its score to AA, while Zurich drop from AAA to AA.

The conclusion is that placement on the Smart City index list follows the situation in the economy.

How do the top smartest cities rank on the Global Power City Index list? Can it show us the connection between 'magnetism' (comprehensive power to attract people, capital, and enterprises) and the smartness of the city? Global Power City Index (GPCI) is going to be examined.

3.3. Global Power City Index (GPCI)

The Global Power City Index (GPCI) evaluates and ranks the major cities of the world according to their 'magnetism' or their comprehensive power to attract people, capital, and enterprises from around the world. GPCI evaluates its target cities in 6 urban functions: Environment, Accessibility, Economy, Research and Development, Cultural interaction and Liveability – providing a multidimensional ranking.

Each of these 6 urban functions comprises multiple indicator groups (total: 26 groups), which in turn consist of several indicators. Originally formulated with input from the late Sir Peter Hall, an authority in the urban research field, and published annually since 2008, this ranking is created under the direction of the Executive Committee, comprised of various experts in different fields, while the Working Committee oversees concrete data analysis. To ensure the impartiality of the ranking process and results, two third-party peer-reviewers validate the contents and provide suggestions for improvement. A total of 70 indicators are used in the GPCI. The average scores for each indicator within an indicator group are combined to calculate a city's function-specific rankings, which are then totaled to determine its comprehensive ranking. The highest possible total score equals 2,600 points[42].

[42] *Global Power City Index 2020*.

Ranking of the cities regarding the criteria of the comprehensive power of global cities for the 2020 year according is showed in the next figure.

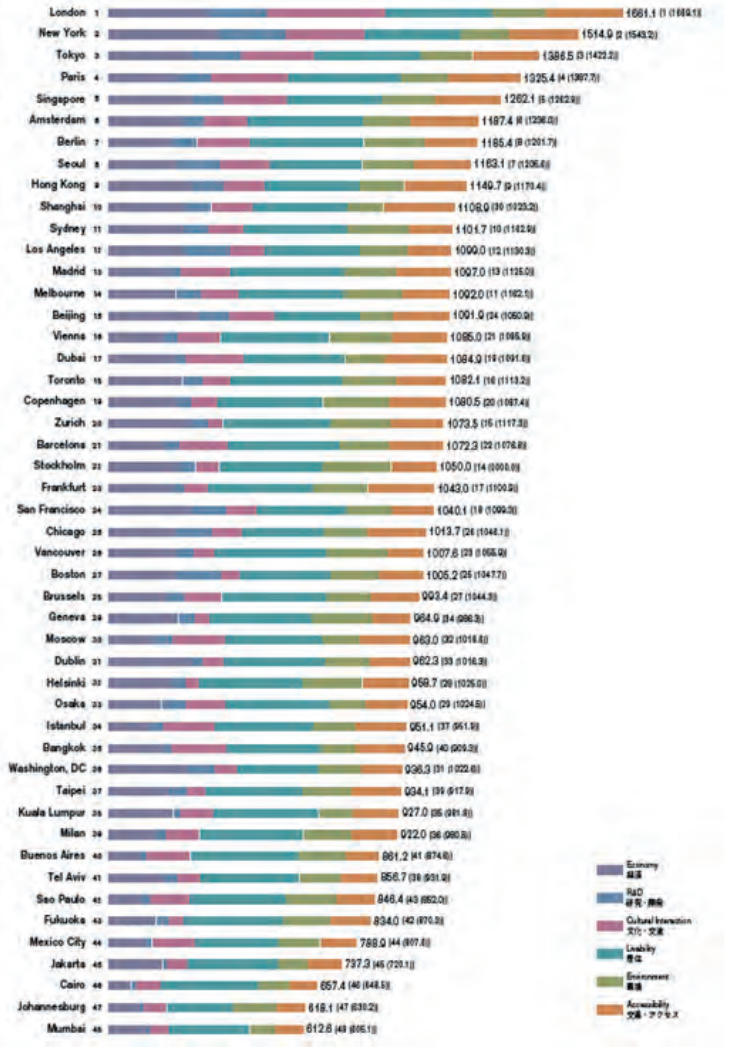

Figure 2[43]: Comprehensive Ranking (Global Power City Index 2020, p. 7)

[43] *Smart City Index Report 2020* (nt. 3).

The key feature of the GPCI is that, rather than targeting a single specific function, it evaluates the comprehensive power of global cities by offering a multi-dimensional view based on these 6 functions: Environment, Accessibility, Economy, Research and Development, Cultural interaction and Liveability.

	Economy		R&D		Cultural Interaction		Livability		Environment		Accessibility	
	経済		研究・開発		文化・交流		居住		環境		交通・アクセス	
1	New York	362.8	New York	212.1	London	380.5	Amsterdam	374.1	Stockholm	220.7	London	248.5
2	London	328.0	London	186.8	New York	293.0	Madrid	370.1	Copenhagen	213.2	Paris	230.5
3	Beijing	308.0	Tokyo	153.0	Paris	249.9	Berlin	368.0	Vienna	200.9	Shanghai	226.8
4	Tokyo	273.7	Los Angeles	153.2	Tokyo	239.9	Paris	365.3	Berlin	196.2	New York	223.8
5	Singapore	272.5	Boston	136.5	Singapore	201.7	Barcelona	362.8	Vancouver	196.1	Amsterdam	216.8
6	Hong Kong	271.5	Seoul	132.0	Dubai	185.2	Toronto	361.3	Sydney	196.0	Frankfurt	214.8
7	Dublin	269.8	Chicago	110.4	Bangkok	176.2	Vancouver	360.1	Zurich	194.8	Tokyo	213.3
8	San Francisco	269.8	San Francisco	108.6	Berlin	170.0	Vienna	352.8	Geneva	193.8	Singapore	210.4
9	Zurich	268.9	Hong Kong	100.2	Moscow	167.5	Buenos Aires	351.7	Helsinki	191.8	Dubai	203.9
10	Washington, DC	256.9	Singapore	99.8	Istanbul	166.5	London	349.1	Melbourne	188.3	Hong Kong	200.8
11	Shanghai	252.2	Paris	96.8	Seoul	158.8	Zurich	345.8	Frankfurt	172.4	Chicago	197.0
12	Amsterdam	245.2	Beijing	94.3	Madrid	158.3	Tokyo	343.0	Toronto	170.4	Seoul	191.9
13	Los Angeles	241.2	Washington, DC	84.7	Barcelona	155.5	Frankfurt	342.7	Singapore	169.5	Beijing	191.1
14	Sydney	241.1	Sydney	78.4	Beijing	144.5	Kuala Lumpur	341.8	London	168.1	Copenhagen	190.5
15	Toronto	240.5	Shanghai	78.2	Buenos Aires	138.2	Copenhagen	341.3	Seoul	165.3	Vienna	176.2
16	Stockholm	231.0	Melbourne	77.4	Amsterdam	137.2	Melbourne	340.1	Madrid	164.5	Barcelona	174.4
17	Paris	230.4	Berlin	74.9	Mexico City	136.3	Brussels	338.8	Sao Paulo	164.4	Madrid	174.2
18	Geneva	227.7	Osaka	73.8	Vienna	134.4	Osaka	337.7	Tokyo	163.8	Berlin	168.9
19	Boston	224.9	Amsterdam	63.0	Shanghai	130.3	Sydney	336.5	Taipei	157.7	Zurich	168.5
20	Seoul	224.5	Toronto	62.8	Hong Kong	129.7	Milan	336.0	Boston	157.1	Istanbul	162.5
21	Vancouver	224.3	Moscow	56.5	Osaka	123.5	Stockholm	333.8	Barcelona	155.8	Moscow	162.4
22	Copenhagen	224.1	Brussels	56.5	Sao Paulo	122.2	Helsinki	333.5	New York	154.5	Toronto	162.1
23	Chicago	221.5	Taipei	53.4	Melbourne	117.4	Geneva	332.9	Los Angeles	153.1	Bangkok	158.7
24	Dubai	220.9	Zurich	51.0	Brussels	117.0	Dubai	328.6	Milan	151.1	Taipei	158.0
25	Melbourne	218.7	Geneva	48.9	Sydney	111.3	Dublin	328.2	Paris	150.8	Brussels	154.3
26	Frankfurt	211.0	Stockholm	47.2	Los Angeles	104.8	Fukuoka	322.3	Fukuoka	150.1	Melbourne	150.2
27	Kuala Lumpur	210.0	Vancouver	46.5	Milan	104.8	Tel Aviv	320.5	Amsterdam	149.1	Milan	148.9
28	Helsinki	208.2	Copenhagen	39.6	Kuala Lumpur	103.7	Moscow	316.3	Buenos Aires	149.1	Helsinki	147.8
29	Berlin	207.8	Vienna	39.4	San Francisco	96.0	Istanbul	315.5	Hong Kong	144.5	Kuala Lumpur	146.9
30	Taipei	195.5	Madrid	39.1	Chicago	94.3	Cairo	313.9	Dublin	141.1	Stockholm	144.3
31	Madrid	190.8	Helsinki	38.7	Toronto	85.3	Taipei	313.5	Brussels	140.6	Los Angeles	139.7
32	Brussels	186.4	Barcelona	37.7	Copenhagen	82.0	Sao Paulo	312.0	San Francisco	140.6	Boston	139.1
33	Barcelona	186.1	Tel Aviv	37.4	Cairo	75.5	New York	308.6	Washington, DC	139.4	Sydney	138.0
34	Tel Aviv	183.6	Fukuoka	36.3	Stockholm	73.1	Singapore	308.4	Johannesburg	137.6	San Francisco	133.6
35	Vienna	181.8	Istanbul	35.0	Johannesburg	71.8	Los Angeles	307.3	Chicago	136.5	Osaka	132.6
36	Bangkok	178.9	Dublin	33.6	Frankfurt	70.5	Bangkok	306.1	Istanbul	135.4	Fukuoka	130.2
37	Jakarta	175.8	Frankfurt	31.8	Tel Aviv	67.9	Shanghai	306.0	Mexico City	130.5	Dublin	127.1
38	Osaka	171.7	Milan	28.5	Vancouver	66.6	Hong Kong	303.0	Tel Aviv	130.0	Washington, DC	126.0
39	Fukuoka	154.0	Sao Paulo	27.1	Washington, DC	66.3	Seoul	300.5	Dubai	120.9	Geneva	120.9
40	Milan	152.9	Dubai	25.4	Dublin	62.4	Jakarta	293.4	Moscow	115.3	Sao Paulo	117.6
41	Moscow	145.1	Buenos Aires	20.7	Jakarta	58.8	San Francisco	291.7	Osaka	114.7	Tel Aviv	117.2
42	Istanbul	136.2	Kuala Lumpur	18.6	Boston	57.5	Boston	290.1	Shanghai	114.5	Mexico City	115.6
43	Mumbai	122.3	Bangkok	18.1	Taipei	56.0	Beijing	271.9	Bangkok	107.9	Vancouver	114.0
44	Mexico City	118.6	Mexico City	17.2	Mumbai	54.7	Mexico City	270.9	Kuala Lumpur	106.2	Jakarta	106.7
45	Sao Paulo	103.0	Cairo	11.5	Zurich	44.4	Chicago	264.0	Beijing	105.2	Buenos Aires	104.0
46	Johannesburg	101.3	Jakarta	10.7	Fukuoka	41.1	Washington, DC	263.1	Cairo	97.8	Johannesburg	90.1
47	Buenos Aires	97.5	Mumbai	7.4	Geneva	40.7	Mumbai	260.7	Jakarta	92.0	Mumbai	90.0
48	Cairo	72.5	Johannesburg	5.2	Helsinki	38.9	Johannesburg	212.2	Mumbai	77.6	Cairo	86.2

Figure 3[44]: Function Specific Ranking. (Global Power City Index 2020, p. 11)

[44] *Ibid*.

The GPCI can grasp the strengths, weaknesses, and challenges of global cities in a continuously changing world not only through a ranking but also through analyzing that ranking's specific components.

3.4. Case study methodology

It is important to emphasize that in SCI's (Smart City Index) context, a 'smart city' continues to be defined as an urban setting that applies technology to enhance the benefits and diminish the shortcomings of urbanization for its citizens. As previously mentioned the 'smartest cities' are Singapore, Helsinki and Zurich.

To investigate does ICT technology and its use in urbanism (the concept of the smart city) affect city power to attract people, capital, and enterprises – the Global Power City Index and Smart City Index report should be compared.

The way to do that is to examine where the top three 'the smartest cities' Singapore, Helsinki and Zurich (from the Smart City Index Report) are positioned on the Global Power City Index list.

According to the Comprehensive Ranking – the Global Power City Index is the next: Singapore is on 5th place, Helsinki 32nd and Zurich 20th place.

Placement of «the smartest cities» Singapore, Helsinki and Zurich considering function-specific ranking (Environment, Accessibility, Economy, Research and Development, Cultural interaction and Liveability – the Global Power City Index) is the next:

City	Economy	R&D	Cultural Interaction	Livability	Environment	Accessibility
Singapore	5	10	5	34	13	8
Helsinki	28	31	48	22	9	28
Zurich	9	24	45	11	7	19

Table 1: Placement of the 'smartest cities' on the Power City Index-Function Specific Ranking list

Comparing placement of the 'smartest' cities on the Global Power City Index-Function Specific Ranking the next is concluded:

Singapore has the best placement in Economy, Research and Development Cultural Interaction and Accessibility.

Zurich has the best placement in Livability and Environment.

Also, it is concluded that observing together the top smartest cities Singapore, Helsinki and Zurich have the best placements in Environment function.

According to the methodology which is used for Global Power City Index 2020 in the Environment function, the three indicator groups 'Sustainability', 'Air Quality and Comfort', and 'Urban Environment' are considered.

Observing Table 4 which connects two lists the Smart City Index Report and Global Power City Index – Function Specific Ranking it is concluded that the Environment function is the function with the best placement of the smartest cities.

What makes these 'smartest cities' Singapore, Helsinki and Zurich so well placed on the Global Power City Index – Function Specific Ranking-Environment?

So the next case study examples are chosen with the aim to discover what smart cities do in the Environment sector that makes them 'magnetic' for people, capital, and enterprises from around the world.

3.5. The case of Singapore

Singapore, an island city-state off southern Malaysia, is a global financial center with a tropical climate and multicultural population.

Singapore's ambitious Smart Nation uses technology as a tool to stay a global city and to improve the lives of citizens.

But first, why does Singapore need to be a Smart Nation? Growth in two main factors of production drove Singapore's growth in the first 50 years: labor force and capital investment. As the population ages and the inflow of immigrants slows (given our finite physical space), labor as a factor of production will grow more slowly. Consumption as a percentage of GDP will also likely rise relative to investment as Singapore's

population ages. The main contribution to growth and prosperity will have to be total factor productivity, which could be achieved through a mix of technology and better business processes[45].

Building a Smart Nation is a whole-of-nation which have three pillars: Digital Government, Digital Economy and Digital Society.

The Wall Street Journal, remarking on the breadth of the project, has noted that «it is a sweeping effort that will likely touch the lives of every single resident in the country (Watts 2016)»[46].

'Smart' projects in some cities are not thoughtful, but in the case of Singapore Smart Nation is a deliberate and defined government plan. Smart Nation's gives Singapore develops its strengths for planning urban initiatives for and with its citizens.

In Singapore, the Government has set the pace for ICT while in other countries it is by the private sector. When it comes to Digital Government, Singapore is fortunate to be building on strong previous efforts with the National Computerisation Programme in the 1980s. By the 2000s, they provided government services online, first as websites, and then as phone applications. Citizen-centric oriented applications make services integrated and experimenting since the 2010s.

Five Strategic National Projects are important for considering Singapore as a smart city: National Digital Identity, E-payments, Moments of Life, Smart Nation Sensor Platform, and Smart Urban Mobility[47].

For a long time urbanists have been considering technology as a tool for redefinition the urban form and urban management – the city is driven by information and towards innovation. Smart city urban management includes efficiency and control on the one hand and inclusion and participation on the other.

URA SPACE

The geospatial platform is designed to obtain a comprehensive array of up-to-date planning and real estate information on a digital map: current and past Master Plans and check on site-specific planning information,

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[45] *About Smart Cities – Cities, Events, Journal – Singapore 2020* (https://www.Aboutsmartcities.Com/Smart-City-Singapore/).

[46] *Ibid*.

[47] *Ibid*.

such as development charge rates, past development approvals, urban design guidelines, use of property, and private residential property transactions. URA SPACE also allows the public to purchase season parking at carparks managed by URA.

EPlanner – geospatial urban planning analytics tool, enables planners to quickly construct queries and visualize, analyse and overlay over 100 data layers. It provides planners across URA and other agencies with quantitative and qualitative insights of each area while complementing traditional sources of information gathering such as site visits, groundwork and community engagement.

Planning the City in 3D

3D Urban Planner is a 3D Geographic Information System (GIS) platform that integrates diverse types of data – ranging from planning parameters for unique sites to detailed 3D building information models in Singapore. Urban decisions are easier made in the spirit of holism to the environment by safeguarding important view corridors and analyzing the impact of sun-shading in public spaces.

URA also uses 3D models to engage with the community and demonstrate how a future planning project might look and feel. By showing residents these models, planners can receive instant feedback and make changes to their plans,

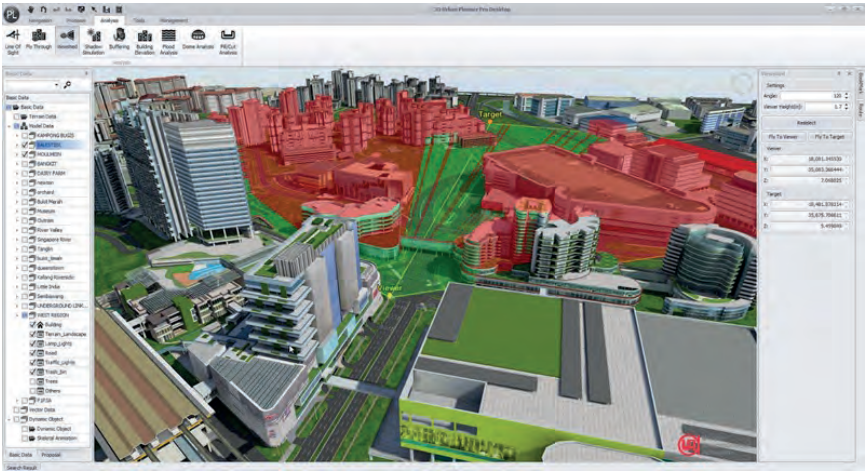

Figure 5: URA SPACE

3.6. The case of Helsinki

Sweden's King Gustavus Vasa founded Helsinki on the mouth of Vantaanjoki River in 1550. As a compact and vibrant city Helsinki is one of Europe's fastest-growing cities, offering an intriguing mix of history and high-tech[48].

Helsinki stands as the most functional and sustainable city in the world, built on social cohesion, famous for its design and high-tech, committed to bringing people together through authentic experiences, interesting spaces and nature explorations.

«The most important element of a smart city is smart people. And I think that that is the basis for an innovative society» said Vapaavuori the Mayor of Helsinki[49].

Transparency and openness are part of DNA with the most open government in the world. In 2009, Helsinki was among the first capital cities to start publishing its data as open data.

Helsinki has been ranked as the Best in Smart Tourism and Best Digital Mobility Services, as the smart city and a home base for start-ups list. According to The Financial Times, it is the best place for foreign direct investment among mid-sized European regions.

5G data networks are expanding in Finland and Helsinki. Opportunities for using ICT is expanding with the Internet of Things and smart mobility like navigation of self-driving buses and networking sensors in the city, managing air quality with sensors used by the Helsinki Air Quality Testbed.

Helsinki has been focused on accessibility and sustainability for a long time and aims to be carbon neutral by 2035.

Helsinki is a world leader in smart mobility and aims to reduce traffic emissions by 69% from 2005 levels by 2035 (Finland's national goal is 50%). MaaS (Mobility-as-a-Service), platforms are enabling citizens to

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[48] *Sustain Europe – Smart Helsinku 2019* (https://www.sustaineurope.com/smart-helsinki-20191025.html#:~:text=Helsinki%20is%20in%20the%20top,base%20for%20start%2Dups%20list.).

[49] CGTN, *What makes Helsinki such a 'smart' city?*, 2019 (https://news.cgtn.com/news/2019-11-22/What-makes-Helsinki-such-a-smart-city-LPGwcllOdG/index.html).

buy mobility services as digital services, removing the need for urban car ownership – private cars only account for around 1 in 5 trips here[50].

Key players in Helsinki smart city development are Forum Virium Helsinki, an urban innovations unit; investment promotion agency Helsinki Business Hub; the Smart & Clean Foundation; the City of Helsinki Economic Development division and its innovation unit; and the Helsinki-Uusimaa Regional Council. Helsinki Marketing promotes the City of Helsinki expertise internationally. Helsinki also attracts private businesses wanting to test solutions and Google has chosen it for its drone transport experiments[51].

Key targets of Helsinki Smart City are Urban cleantech – energy and resource efficiency, circular economy, bio-economy, consumer cleantech.

The theme is especially carried out by the Smart&Clean Foundation. Its goal is to make the region the best testing area for intelligent and clean solutions.

Health & wellness – healthcare solutions, processes, technologies, services and taking care of yourself.

The area supports projects in preventive healthcare and solutions in digital health. The development of services for the aged is also supported by participating in the EIP AHA network (European Innovation Partnership on Active and Healthy Ageing).

Digitalising industry – logistics, robotics, the Internet of things.

Better competitiveness for regional enterprises is the goal for the spearhead Digitalising industry.

Citizen city – the wellbeing of all citizens, open urban development, citizen participation, the usability of services, co-creation.

Goal combines urban development and the services solutions enabled by new technologies based on people's needs. It is user-oriented and open approaches based on the development environment of everyday life.

Regarding urban activities and ICT used in Helsinki, there are various, such as:

The City of Helsinki map service is a map portal that can be used to access the map and geographic information datasets of several

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50 *Sustain Europe – Smart Helsinku 2019* (nt. 48).

51 *Ibid*.

departments. The portal can be used to locate buildings and other real estates, city plan maps, and register information about locations. The portal gives access to many basic maps such as the guide map, various versions of the real estate map, orthophotographs, and a large collection of historical maps and aerial photos[52].

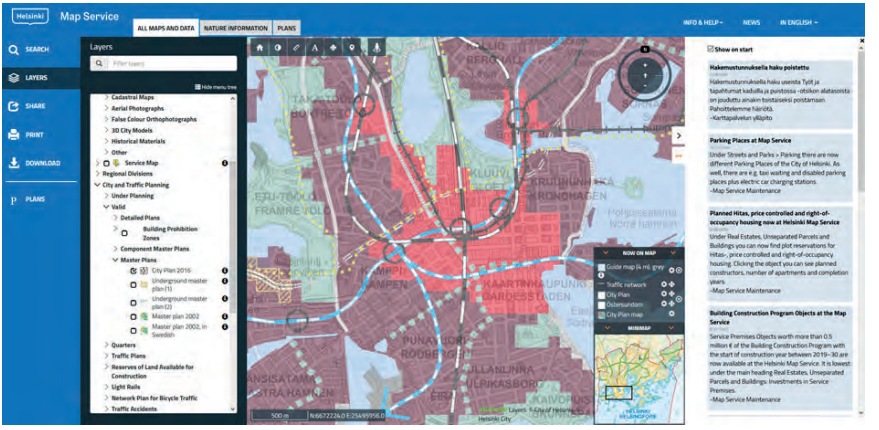

Figure 6[53]: Map Service – showing City plan

3.7. The case of Zurich

The city of Zurich is a global center for banking and finance, which lies at the north end of Lake Zurich in northern Switzerland.

In the next twenty years, the community of Zurich is planning to increase by around a quarter. To maintained or improve the quality of citizen's life new technologies and digital transformation are seen as mechanisms in the battle.

Strategies Zurich 2035 promotes innovation and position the city of Zurich as a smart city. Many projects have been already based on ICT[54].

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[52] City of Helsinki (https://www.hel.fi/Helsinki/en/maps-and-transport/city-maps-and-gis/maps-and-aerial-photographs/).

[53] Karttapalvelu Helsinki (https://kartta.hel.fi/?sukkaId=2019-011342#).

[54] Strategy Smart City Zurich, 2018.

Citizens are active agents of shaping the city according to their needs (digitally and directly).

Smart city objectives are: Equal opportunities and high quality of life for all. This includes everyone who lives or works in Zurich as well as visitors to the city.

Conservation of resources and sustainable development: The city of Zurich is using digital transformation to improve environmental quality and to achieve the 2000 watt society.

Innovation and an attractive business location: Zurich promotes a modern digital infrastructure and attractive framework conditions for innovative entrepreneurship[55].

Three strategic priorities in the Smart City area are:

Future forms of integrated public mobility. Social and technical trends, such as the sharing economy, individualization, digital booking platforms, electric mobility, and automated driving which are already changing the mobility market today.

Digital city. The city council wants to drive digitalization in the city administration significantly for the benefit of the population and businesses.

Smart participation. In concrete urban projects, innovative forms of cooperation by different stakeholders should be used and evaluated. This combines the aspiration of involvement of the population and interest groups considering the challenges of urban growth and technological change. The first such project is the process of reviewing the StadtQuartiere interface, with the use of e-Participation[56].

What is happening in the area of the Environment? Which projects are implemented to be a smart city in the area of the Environment?

3D city model – Digital twin

Visual communication is a decisive factor for the efficient handling of important construction projects. The 3D city model from Geomatik + Vermessung (GeoZ) offers optimal conditions for the simulation of planned construction projects. The three-dimensional data also form the basis for various analyzes and calculations such as visibility, noise

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55 *Ibid*.

56 *Ibid*.

propagation and solar potential analyzes, shadow calculations, flood simulations, etc.

HoloPlanning

Figure 7: HoloPlanning

Figure – Augmented reality glasses brings the digital and real city together

With augmented reality glasses like the 'HoloLens', future buildings, underground lines and much more can be made visible on-site as semi-transparent 3D holograms.

The tool is used for urban planning studies, architecture competitions, civil engineering projects, and archeology and supports the digitization of urban planning, construction, and maintenance processes.

On certain public tours through the development areas of the city, those interested can put on 3D glasses and get a clear picture of the planned buildings – long before the first excavators arrive[57].

Urban geoportal.

The cadastre, the zone plan, or the reference data of the official survey are essential basics when it comes to planning and projecting in civil engineering. The city of Zurich has a large number of geodata. From the new urban geoportal, all geodata of the city, as well as that of the canton, can be obtained centrally in one place in different formats as easily as possible[58].

3.8. Case study observations

Case study cities are chosen according to criteria of 'smartest' and they are ranked as the top three cities on the Smart city index list. According to the Comprehensive Ranking – the Global Power City Index is the next: Singapore is on 5th place, Helsinki 32nd and Zurich 20th place. Placements of 'smartest cities' in Environment function the Global Power City Index is the next: Singapore is 13th, Helsinki 9th and Zurich is 7th.

Observing the use of ICT in urban management it is concluded that all these cities use technological infrastructure – relying heavily on the deployment of technology.

ICT through smart applications and other technological tools enables citizens to be an active agent of making decisions in urban planning. Citizens produce data via ICT which are used for urban planning as they interact with ICT through the Internet. ICT allows citizens time evaluation on some prepositions in urban planning – like urban projects, buildings, etc. Through ICT citizens can react to some urban issues. For instance, mobile applications allow monitoring of the presence of citizens enabling the government to use data in making some decisions

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[57] Stadt Zurich (https://www.stadt-zuerich.ch/portal/de/index/politik_u_recht/stadtrat/weitere politikfelder/smartcity/projekte/holoplanning.html).

[58] *Ibid*.

like in the sector of planning new public spaces or even taking the security improvement.

Sustainable development through ICT is obvious through a deeper understanding of spatial interventions on the spot. That is possible with virtual models like 3D or HoloPlanning with augmented reality glasses which enables planners to see future buildings, underground lines and much more can be made visible on-site as semi-transparent 3D holograms. This provides way various analyzes and calculations such as the influence of future interventions and planning are simulated showing its implications on visibility, noise propagation and solar potential analyzes, shadow calculations, flood simulations, etc.

The new digital methods and models – ICT is produced by municipalities, other public administration actors, private companies by the collaboration of more participants. The new startups and the growth of companies in Mobile Application Clusters is an indicator of the strength of the Smart City. New firms take advantage of the new market channels and changing business environment of mobile applications, making a new industry around Open Data.

ICT is the base for urban transparency. Technology provided citizens with open access to information in the sector of urban planning. GIS systems or even systems which cities developed like The City of Helsinki map service in Helsinki or URA SPACE in Singapore are a geospatial platform designed to obtain a comprehensive array of up-to-date planning and real estate information on a digital map and 3D. These systems provide plenty of layers showing citizens all necessary data on the build surrounding like current and past Master Plans and check on site-specific planning information, such as development charge rates, past development approvals, urban design guidelines, use of property, and private residential property transactions, etc.

According to the observation of the case studies cities, the next table shows identified ICT steps in urban management in all cases.

ICT Steps in Urban Management	Singapore	Helsinki	Zurich
Digitalization – technology	+	+	+
Projects for harnessing technology to improve the livehoods of citizens	+	*	*
Public participation in making decisions	+	+	+
Sustainable development	+	+	+
Collaboration with the private sector in developing applications for urban management	In Singapore, it is part of the public sector	+	+
Transparency of data	+	+	+

Table 2: Case study conclusions.

What makes Singapore different from the other two cities Helsinki and Zurich in the field of Projects for harnessing technology to improve the livelihoods of citizens is the Smart Nation initiative. 'Smart' projects in some cities are not thoughtful, but in the case of Singapore Smart Nation is a deliberate and defined government plan.

Through the Smart Nation initiative aim is to make an outstanding city in the world ... for people to live, work, and play in, where the human spirit flourishes. To achieve this, we have to apply technology systematically and extensively, rather than in a piecemeal manner, to improve the lives of our people.

But first, why does Singapore need to be a Smart Nation? Growth in two main factors of production drove Singapore's growth in the first 50 years: labor force and capital investment. As the population ages and the inflow of immigrants slow (given our finite physical space), labor as a factor of production will grow more slowly. Consumption as a percentage of GDP will also likely rise relative to investment as Singapore's

population ages. The main contribution to growth and prosperity will have to be total factor productivity, which could be achieved through a mix of technology and better business processes[59].

Smart Nation besides providing a better life for its citizens, can be a reason why home-grown talent would want to continue living here, and why foreign talent would want to relocate here. This is the magnetic mechanism that the world's leading cities, such as New York, London, San Francisco, Shanghai, and Tokyo use. Initiative control the process of integrating technology into collective efforts to improve lives so that Singapore does not fall behind global cities. Singapore is fortunate to be building on strong previous efforts with the National Computerisation Programme in the 1980s. By the 2000s, they provided government services online, first as websites, and then as phone applications. Citizen-centric oriented applications make services integrated and experimenting since the 2010s.

Singapore's focus is on the adoption of cutting-edge Infocomm technology as an economic driver.

According to the Global Power City Index 2020, Comprehensive Ranking in 6 urban functions Environment, Accessibility, Economy, Research and Development, Cultural interaction and Liveability – the Global Power City Index Singapore is in 5th place.

It is also concluded that implementation of ICT brings inclusion of citizens providing transparency and reducing the corruption score in urban management as the interaction of city and its inhabitants is intensified by ICT. That is proved by the next Table which shows the Technology pillar describing the technological provisions and services available to the inhabitants from the sector of Governance – Data are used from Smart City Index (SCI) report 2020.

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[59] *About Smart Cities – Cities, Events, Journal – Singapore 2020* (nt. 45). See also Singapore Government (https://www.gov.sg/).

	Online public access to city finances has reduced corruption Max score is 63	An online platform where residents can propose ideas has improved city life Max score is 63
Singapore	59,3	61,1
Helsinki	60,2	51,4
Zurich	48,4	48,6

Table 3: the Technology pillar describing the technological provisions and services available to the inhabitants – Governance – Data are used from Smart City Index (SCI) report 2020.

4. Conclusions and suggestions for urban planners

Traditional master plans have been mainly static in nature, attuned to a scenario of slow urban growth ... Rapid population growth, lack of infrastructure and services, and shortages of funds and staff in a developing country city require a more dynamic planning process[60].

The smarter cities stand as 'magnetic cities' because they have comprehensive power to attract people, capital, and enterprises from around the world.

Our lives have been constantly changing. It is intensified from The First Industrial Revolution in the 18th century. Now we face with The Fourth Industrial Revolution. The impact of newness in the area of technology on our lives is huge.

This year is the year of the novel Coronavirus (COVID-19) which spread was rated by the WHO as a global pandemic in March 2020.

Pandemia spread very fast throughout the world, showing us once more the world` s dynamics, proofing the claim of Doel Marcus and Phil

[60] G. Clarke, *Towards appropriate forms of urban spatial planning*, in *Habitat International* 16.2 (1992) 149-165.

Hubbard that «we no longer live in a space of places, but in a global space of flows».

What can help us to cope with challenges, is that ICT?

The Organisation for Economic Co-operation and Development (OECD) underlines: «the pivotal role of digitalization in emergency responses to the pandemic has pushed many cities to systematize the use of smart city tools more permanently while staying alert and monitoring the risk of contagion».

Bruno Lanvin, President of the IMD Smart City Observatory explained that Smart City Index suggests that the cities that have been able to combine technologies, leadership, and a strong culture of 'living and acting together' should be able to better withstand the most damaging effects of such crises.

So, it seeks to observe cities through the technologically driven lens of the Fourth Industrial Revolution – a technological revolution that will fundamentally change the way we live, work and relate to one another. Looking at its scale, scope, and complexity, the revolution will be different than anything humankind has experienced before.

The data-driven population is seen through mobile cellular subscriptions, in 2017 year 48,996% of the world population use the internet (The World Bank Open Data)[61].

Following the dynamics of technological changes in The Fourth Industrial Revolution on urbanization brings the new concept of 'smart city'.

«A smart sustainable city is an innovative city that uses information and communication technologies (ICTs) and other means to improve quality of life, the efficiency of urban operation and services, and competitiveness, while ensuring that it meets the needs of present and future generations concerning economic, social and environmental aspects»[62].

A smart city project is based on the collection, processing, and interpretation of data used to transform some aspects of the city in a period of urbanization when cities have little control over population

[61] Https://data.worldbank.org/indicator/IT.NET.USER.ZS.

[62] FG SSC Doc 100 (nt. 2).

growth. Applying technology Smart city enhance the benefits and diminish the shortcomings of urbanization for its citizens. Cities are becoming better cities by becoming smarter ones.

Gazing into the crystal ball: What does the future hold for cities and urban dwellers?

Administrators will have to respond quickly to adapt policies and gain a competitive place in a globalized world where cities are competing for investments by offering incentives and infrastructure.

City administrators and urban residents can not see technology as a solution for all problems, changes across governance, regulation, institutional capacity, and public-private collaboration will be required in the drive to improve unsustainable cities, but they are also the key to sustainability. Strong leadership, new technologies, and bottom-up innovation can move cities towards urban transformation.

Challenges that urbanization put in front of cities are increasingly relying on citizens, governments, and ICT (the private sector, NGOs, and academic institutions) to provide better lives.

Cities should contribute to improving the quality of life using technology to design and develop urban growth. Technology helps the city to develop a smart approach to designing urban policies and fostering citizen participation. Cities should involve people to be included in policy choices. Cities proceeding towards sustainability should rediscover smartness and participation[63].

[63] M. Romanelli– C. Metallo – R. Agrifoglio – M. Ferrara, *Cities, Smartness and Participation Towards Sustainability*, Berlin 2019.

Zlatko Vranješ*

Role of Greco in the Fight Against Corruption

1. Introduction

Corruption can be broadly defined as abuse of power for private gain. Depending on the amount of resources lost and of the sectors implied can be classified as grand, petty and political. Corruption erodes public institutions and democracy[1] impacting negatively on productivity and economy; therefore it must be analysed from an economic, social, political and legal perspectives.

Ever since ancient times, corruption has been one of the most widespread and insidious of social evils. When involving public officials and elected representatives, it is inimical to the administration of public affairs. Since the end of the 19th century, it has also been seen as a major threat in the private sphere, undermining the trust and confidence which are necessary for the maintenance and development of sustainable economic and social relations. It is estimated that hundreds of billions of Euros are paid in bribes every year[2].

Governments have made progress in addressing this problem through international agreements and instruments. The Council of

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1 Council of Europe, Conseil de l'Europe, www.coe.int.

2 *Ibid*.

Europe exists to uphold and further pluralist democracy, human rights and the rule of law and has taken a lead in fighting corruption as it poses a threat to the very foundations of these core values. As emphasised in the Criminal Law Convention, corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.

The approach of the Council of Europe in the fight against corruption has always been multidisciplinary and consists of three interrelated elements: the setting of European norms and standards, the monitoring of compliance with the standards and the perspective of capacity building offered to individual countries and regions, through technical co-operation programmes.

One of the many agreements and instruments is Group of states against Corruption (GRECO), in the framework of Council of Europe. The Group established in 1999 through an agreement of 17 member States of Council of Europe, is a platform for sharing best practices on the prevention of corruption through improvement of the capacity its members to fight against this phenomenon.

2. What is GRECO?

The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption[3].

[3] *Ibid.*

According to the rules membership, GRECO is not limited to Council of Europe member States. Any State which took part in the elaboration of the enlarged partial agreement, may join by notifying the Secretary General of the Council of Europe. Moreover, any State which becomes Party to the Criminal or Civil Law Conventions on Corruption automatically accedes to GRECO and its evaluation procedures. Currently, GRECO includes 50 member States (the 48 States members of the Council of Europe, Kazakhstan and the United States of America).

The functioning of GRECO is governed by its Statute and Rules of Procedure. Each member State appoints up to two representatives who participate in GRECO plenary meetings with a right to vote; each member also provides GRECO with a list of experts available for taking part in GRECO's evaluations. Other Council of Europe bodies may also appoint representatives (e.g. the Parliamentary Assembly of the Council of Europe). GRECO has granted observer status to the Organisation for Economic Cooperation and Development (OECD) and the United Nations – represented by the United Nations Office on Drugs and Crime (UNODC). GRECO elects its President, Vice-President and members of its Bureau who play an important role in designing GRECO's work programme and supervising the evaluation procedures[4].

GRECO's Statutory Committee is composed of representatives on the Committee of Ministers of member States which have joined GRECO and of representatives specifically designated by other members of GRECO. It is competent for adopting GRECO's budget. It is also empowered to issue a public statement if it considers that a member takes insufficient action in respect of the recommendations addressed to it[5]. GRECO's Statute defines a master-type procedure, which can be adapted to the different legal instruments under review.

GRECO, which has its seat in Strasbourg, is assisted by a Secretariat, headed by an Executive Secretary, appointed by the Secretary General of the Council of Europe.

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[4] *Ibid.*
[5] *Ibid.*

2.1. How does GRECO work?

GRECO monitors all its members on an equal basis, through a dynamic process of mutual evaluation and peer pressure. The GRECO mechanism ensures the scrupulous observance of the principle of equality of rights and obligations among its members. All members participate in, and submit themselves without restriction to, the mutual evaluation and compliance procedures[6].

[6] Rule 31 revised Compliance procedure – As from the Third Evaluation Round. 1. Upon proposal by the Bureau, GRECO shall select two members to be responsible for preparing a compliance report (hereinafter "RC-report") indicating whether the member has complied with the recommendations addressed to that member in the evaluation report. The selection shall be based on criteria, such as involvement in the first evaluation and similarity of legal systems or geographical proximity with the member evaluated. The Heads of delegation or the persons designated by them (hereafter "rapporteurs"), shall present the report to the Plenary. Only members of delegations or evaluators of GRECO may be appointed rapporteurs. 2. The Secretariat shall assist the rapporteurs in drafting the RC-report (P1), which shall reflect the common view of the rapporteurs (P2). 3. The draft RC-report (P2) shall be sent to the member concerned for comments. The comments shall be submitted to the Executive Secretary within 14 days from the reception of the draft RC-report. 4. The Secretariat shall assist the rapporteurs in revising the draft RC-report, taking into account the comments provided by the member. 5. The revised draft RC-report (P3) shall be sent to GRECO representatives at least 14 days before the Plenary meeting at which it will be examined. 6. The draft RC-report (P3) shall as a rule be dealt with by GRECO no later than six months after the reception of the RS-report by the Secretariat. In case this time limit cannot be adhered to, the Secretariat shall inform GRECO of the reasons. 7. GRECO shall adopt the RC-report in plenary, following examination and debate. The member submitted to the compliance procedure shall be represented by the Head of delegation who may be assisted by other national representatives or experts. At the request of the Head of delegation, GRECO may postpone the adoption of the RC report if it considers that additional information or expertise is necessary. 8.1. The RC-report shall indicate whether each individual recommendation: I. has been implemented satisfactorily or otherwise been dealt with in a satisfactory manner; II. has been partly implemented; III. has not been implemented. 8.2. In case of conclusion II) or III) above the member concerned is required to submit, within a period specified by GRECO, a second RS-report with additional information regarding action taken to implement the recommendation(s) in question. 8.3. The RC-report shall also contain an overall conclusion on the implementation of the recommendations. If the said conclusion is that the response to the recommendations is globally unsatisfactory GRECO will decide

GRECO monitoring foresees:

1. a "horizontal" evaluation procedure (all members are evaluated within an Evaluation Round) leading to recommendations aimed at furthering the necessary legislative, institutional and practical reforms;

2. a compliance procedure designed to assess the measures taken by its members to implement the recommendations.

GRECO works in cycles: these are evaluation rounds, each covering specific themes. GRECO's first evaluation round (2000-2002) dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution, etc. The second evaluation round (2003-2006) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons (corporations, etc.) from being used as shields for corruption. The third evaluation round (launched in January 2007) addresses (a) the incriminations provided for in the Criminal Law Convention on Corruption and (b) the transparency of party funding[7].

The evaluation process follows a well defined procedure, where a team of experts is appointed by GRECO for the evaluation of a particular member. The analysis of the situation in each country is carried out on

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to apply Rule 32.1 Pursuant to Decisions 23 and 24 of GRECO 46 (Strasbourg, 22-26 March 2010). 9. On the basis of the second RS-report submitted by a member pursuant to § 8.2 of this Rule, the rapporteurs selected in accordance with § 1 of this Rule shall draw up a second RC-report, for consideration and adoption by GRECO. §§ 1 to 8.1 and 8.3 of this Rule shall apply accordingly to the preparation and adoption of the second RC-report. The adoption of the second RCreport shall terminate the compliance procedure unless GRECO decides to apply Rule 32 or asks for further information because the information contained in the second RS-report is clearly insufficient.

[7] Rule 23 Evaluation rounds. 1. GRECO will determine the length of each evaluation round in the light of the provisions selected to be covered. 2. The selection of provisions for a given evaluation round may include the following: a) one or more of the Guiding Principles set out in Resolution 97(24), b) one or more provisions contained in the Criminal Law Convention on Corruption (ETS 173), c) one or more provisions contained in the Civil Law Convention on Corruption (ETS 174), and/or d) one or more provisions contained in any other international legal instrument adopted in pursuance of the Programme of Action against Corruption.

the basis of written replies to a questionnaire and information gathered in meetings with public officials and representatives of civil society during an on-site visit to the country[8]. Following the on-site visit, the team of experts drafts a report which is communicated to the country under scrutiny for comments before it is finally submitted to GRECO for examination and adoption. The conclusions of evaluation reports may state that legislation and practice comply – or do not comply – with the provisions under scrutiny. The conclusions may lead to recommendations which require action within 18 months or to observations which members are supposed to take into account but are not formally required to report on in the subsequent compliance procedure[9].

One of the strengths of GRECO's monitoring is that the implementation of recommendations is examined in the compliance procedure. The assessment of whether a recommendation has been implemented satisfactorily, partly or has not been implemented, is based on a situation report, accompanied by supporting documents submitted by the member under scrutiny 18 months after the adoption of the evaluation report. In cases where not all recommendations have been complied with, GRECO will re-examine outstanding recommendations

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[8] Rule 27 Country visits. 1. Country visits shall be carried out in conformity with Article 13 of the Statute. The dates of the visit shall be determined by the Executive Secretary in consultation with the host-country and shall correspond to the programme of visits adopted by the Bureau. 2. A country visit shall, as a rule, not take place earlier than 3 months after the reception of the reply to the questionnaire by the Executive Secretary. 3. On the basis of a draft programme submitted by the member undergoing the evaluation to the Secretariat, the team will agree to the programme proposed for the visit as soon as possible. 4. Before starting the country visit, a preparatory meeting shall take place in order to allow a preliminary exchange of views among the experts in the team and the Secretariat. 5. The length of the country visit shall, in principle, not exceed four days and have a reasonable timetable. The Bureau or the Executive Secretary may, in special cases, extend the length of a visit. 6. There shall be a final on-site meeting with the authorities of the host member in order to discuss all outstanding issues related to the evaluation. 7. The country visit shall end with a concluding meeting between experts in the team and the Secretariat to develop a common assessment of the country visit with respect to the provision(s) under examination. The points made shall be summarised at the end by the Secretariat.

[9] 18 months is term for the implementation recommendations.

within another 18 months. Compliance reports and the addenda thereto adopted by GRECO also contain an overall conclusion on the implementation of all the recommendations, the purpose of which is to decide whether to terminate the compliance procedure in respect of a particular member. Finally, the Rules of Procedure of GRECO foresee a special procedure, based on a graduated approach, for dealing with members whose response to GRECO's recommendations has been found to be globally unsatisfactory.

2.2. Historical background

Council of Europe member States has shaped the Organisation's work against corruption over more than a decade, leading to the adoption of a set of comprehensive standard setting instruments and the establishment of an effective monitoring body.

Several milestones have marked the development of this work since 1981, when the Committee of Ministers recommended to take measures against economic crime (including, *inter alia*, bribery)[10]. In 1994 the Ministers of Justice of Council of Europe agreed that corruption should be addressed at European level, as it poses a serious threat to the stability of democratic institutions[11]. The Council of Europe, as the pre-eminent European institution defending democracy, the rule of law and human rights, was called upon to respond to the threat. The Ministers were convinced that an effective fight against corruption must take a broad approach and recommended that a Multidisciplinary Group on Corruption (GMC) be set up to prepare a comprehensive programme of action against corruption and to examine the possibility of drafting legal instruments in this field, referring expressly to the importance of elaborating a follow-up mechanism to implement the undertakings contained in them.

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[10] Recommendation n. R (81) 12.

[11] Valletta, 19th Conference of European Ministers of Justice: corruption to be addressed at European level.

With the creation of the Multidisciplinary Group on Corruption (GMC)[12] in September 1994, under the responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ)[13], the fight against corruption was firmly established as one of the Council of Europe's priorities.

In November 1996, the Committee of Ministers adopted the Programme of Action against Corruption prepared by the GMC and set the deadline for its implementation at 31 December 2000[14]. The Committee of Ministers welcomed in particular the planned elaboration of one or more international conventions to combat corruption and the intention to foresee a follow-up mechanism to implement undertakings contained in them.

In June 1997, the Ministers of Justice of Council of Europe member States (21st Conference, Prague)[15] expressed concern about new trends in modern criminality, in particular the organised, sophisticated and transnational character of certain criminal activities. Fighting organised crime necessarily implied an adequate response to corruption. Moreover, the fact that corruption may endanger the stability of democratic

[12] In the light of these recommendations, the Committee of Ministers agreed, in September 1994, to set up the Multidisciplinary Group on Corruption (GMC) under the joint responsibility of the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ) and invited it to examine what measures would be suitable for a programme of action at international level against corruption, to make proposals on priorities and working structures, taking due account of the work of other international organisations, and to examine the possibility of drafting model laws or codes of conduct in selected areas, including the elaboration of an international convention on this subject and a follow-up mechanism to implement undertakings contained in such instruments. The GMC started operating in March 1995.

[13] Since its establishment in 1963, the European Committee on Legal Co-operation (CDCJ) is a standard-setting body, with a wide scope of competence in the field of public and private law. The CDCJ, as a steering committee: reports directly to the Committee of Ministers; makes proposals of texts to the Committee of Ministers for their adoption; makes proposals concerning the overall priorities in its fields of competence, future work and draft terms of reference.

[14] Action Programme 1996 Strasbourg, 1996 Programme of Action against Corruption.

[15] Prague, 1997 21st Conference of European Ministers of Justice: anti-corruption efforts to be intensified through standard setting and monitoring.

institutions and the moral foundations of society was also emphasised. Consequently, the Ministers recommended that efforts be intensified to ensure early adoption of a criminal law convention providing for a co-ordinated criminalisation of corruption offences and for enhanced cooperation in the prosecution of offences. They further recommended to the Committee of Ministers that an effective follow-up mechanism, open to member States and non-member States of the Council of Europe on an equal footing, be provided for.

In October 1997, the Heads of State and Government of the member States of the Council of Europe (Second Summit, Strasbourg) decided that common responses to the challenges posed by the growth in corruption and organised crime should be sought. They instructed the Committee of Ministers to adopt guiding principles to be applied in the development of domestic legislation and practice, to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption and to establish without delay an appropriate and efficient mechanism for monitoring observance of the guiding principles and implementation of the relevant international instruments.

In November 1997, the Committee of Ministers (101st Session, Strasbourg)[16] adopted Resolution (97) 24 on the twenty guiding principles for the fight against corruption and instructed the GMC to submit without delay a draft text proposing the establishment of an appropriate and efficient mechanism for monitoring the observance and implementation of the Council of Europe's anti-corruption standard setting instruments.

In March 1998, the GMC, having taken account of the opinions of the CDCJ and the CDPC, approved a draft Agreement establishing the "Group of States against Corruption – GRECO". In May 1998, the Committee of Ministers (102nd Session, Strasbourg) authorised the establishment of the "Group of States against Corruption – GRECO" in

[16] 2nd Summit of Heads of State and Government of the Council of Europe member States: common principles to prevent and combat corruption and organised crime are to be sought Resolution (97) 24 on Twenty Guiding Principles against Corruption.

the form of an enlarged partial agreement and on 1 May 1999, GRECO was set up by the following 17 founding members[17].

3. Organisational structure and regulatory framework

Statutory Committee

The Statutory Committee shall be composed of the representatives on the Committee of Ministers of the Member States of the Council of Europe which are also members of the GRECO and of representatives specifically designated to that effect by the other members of the GRECO[18].

The Statutory Committee shall determine every year the members' compulsory contributions to the GRECO. The scale according to which the contributions of non-members of the Council of Europe are calculated shall be decided in agreement with the latter; as a general rule, that scale shall conform to the criteria for the determination of the scale of contributions to the general budget of the Council of Europe.

Bureau

Article 9 sets up the Bureau, with a maximum of seven members, which performs a number of important functions[19].

Bureau shall carry out the following functions: prepare the preliminary draft annual programme of activities and the draft on the annual activity report; make proposals to the GRECO concerning the preliminary draft

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[17] Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden.

[18] According to Article 18 of the Statute, The Statutory Committee shall be composed of the representatives on the Committee of Ministers of the Member States of the Council of Europe which are also members of the GRECO and of representatives specifically designated to that effect by the other members of the GRECO.

[19] On Thursday, 29 November 2016, GRECO elected Marin Mrčela (Croatia) as its President and Agnès Maitrepierre (France) as its Vice-President. Helena Lišuchová (Czech Republic), Aslan Yusufov (Russian Federation), Vita Habjan Barborič (Slovenia), Ernst Gnägi (Switzerland), and David Meyer (United Kingdom) have been elected members of the Bureau for the duration of the 5th Evaluation round starting in 2017.

budget; organise country visits on the basis of the decisions taken by the GRECO; make proposals to the GRECO on the composition of the ad hoc evaluation teams; prepare the agenda for the meetings of the GRECO including the meetings that will discuss the evaluation reports; make proposals to the GRECO as regards the provisions to be selected for evaluation procedures in pursuance of Article 10 § 3; make proposals to the GRECO concerning the appointment of scientific experts and consultants.

All above mentioned fuctions Bureau shall exercise under the general supervision of the GRECO[20].

The election of bureau members is done as follows[21]. The Bureau shall be composed of the President, the Vice-President and up to five representatives to be determined in proportion to the number of members of GRECO. Rule 5, §§ 2 and 3, shall apply, *mutatis mutandis* to the election and submission of candidatures to seats in the Bureau.

Rule 5, §§ 4 and 5, shall also apply to the election of vacant seats in the Bureau. However, in the first ballot, candidates having obtained the majority of the votes cast will be elected. In the second ballot, the remaining vacant seats will be filled by candidates following the decreasing order of the number of votes received respectively. The Bureau shall function according to and be entrusted with the tasks enumerated in Article 9 of the Statute of GRECO. Meetings of the Bureau shall be convened at regular intervals by the Executive Secretary upon instruction of the President or whenever the Executive Secretary considers it necessary for the proper functioning of GRECO.

4. GRECO and Bosnia and Herzegovina

4.1. Evaluation reports IV evaluation round

In this section we will present the recommendations and their implementation. At its 79th Plenary Meeting (Strasbourg, 19-23 March

[20] Rules of procedure (GRECO).
[21] *Ibid.*

2018) GRECO adopted the fourth evaluation round for Bosnia amd Herzegovina, focused in particular upon prevention of corruption in respect of members of parliament, judges and prosecutors as compliance report Bosnia and Herzegovina.

I think these are the most important areas where the fight against corruption must show real results otherwise, Bosnia and Herzegovina would find myself far from of the European integration process. The result wolud be weak economic development and even more profound internal divisions.

According to rules the Compliance Report assesses the measures taken by the authorities of Bosnia and Herzegovina to implement the recommendations issued in the Fourth Round Evaluation Report on Bosnia and Herzegovina which was adopted at GRECO's 70th Plenary Meeting (30 November-4 December 2015) and made public on 22 February 2016, following authorisation by Bosnia and Herzegovina (Greco Eval IV Rep [2015] 2E). GRECO's Fourth Evaluation Round deals with "Corruption Prevention in respect of members of parliament, judges and prosecutors". Pursuing GRECO's Rules of Procedure, the authorities of Bosnia and Herzegovina submitted a Situation Report on measures taken to implement the recommendations. This report was received on 14 June 2017 and served, together with the information submitted subsequently, as a basis for the Compliance Report. Spain (with respect to parliamentary assemblies) and "the former Yugoslav Republic of Macedonia" (with respect to judicial institutions) was selected by GRECO to appoint rapporteurs for the compliance procedure. The Rapporteurs were assisted by GRECO's Secretariat in drawing up the Compliance Report. The Compliance Report assesses the implementation of each individual recommendation contained in the Evaluation Report and establishes an overall appraisal of the level of the member's compliance with these recommendations. The implementation of any outstanding recommendation (partially or not implemented) will be assessed on the basis of a further Situation Report to be submitted by the authorities 18 months after the adoption of the present Compliance Report.

GRECO addressed 15 recommendations to Bosnia and Herzegovina in its Evaluation Report.

I. *Corruption prevention in respect of members of parliament Recommendation GRECO recommended (i) introducing precise rules defining and facilitating public consultation processes of legislation in Parliament, and assuring effective compliance thereafter; and (ii) enhancing the transparency of the parliamentary process by introducing rules for parliamentarians on how to interact with third parties seeking to influence the legislative process*.

The authorities of Bosnia and Herzegovina report on different measures occurring on this front, some of which are implemented through international technical assistance projects. At the start, the authorities point at amendments in the Rules of Procedure of the respective parliaments, providing for transparency of both plenary and committee work as a general rule. The 2016 report of the regional NGO ActionSEE (Accountability, Technology and Institutional Openness) highlights the need for a two-way interaction with the public. In an effort to open communication channels between citizens and Parliament, an online platform (so-called *eKonsultacije*) was launched in April 2016. In addition, the so-called Civil Society Sustainability Project (2013-2018) helps civil society representatives to, inter alia, engage with public bodies through a more informed and active relationship.

GRECO acknowledges the new legislative and practical actions reported to facilitate public consultation of legislative proposals and their subsequent discussion in Parliament, including by further enhancing channels for public participation; the launching of the *eKonsultacije* website is certainly a welcome development.

As for the second part of the recommendation, GRECO notes that the issue of lobbying remains unregulated in Bosnia and Herzegovina. GRECO can only reiterate the outstanding need to develop principles, rules and procedures that give parliamentarians clear directions on how they are permitted to engage with lobbyists and other third parties seeking to influence the legislative process.

GRECO concludes that recommendation i has been partly implemented.

II. *GRECO recommended that internal mechanisms be further articulated to promote and enforce the Code of Conduct for parliamentarians and thereby safeguard integrity within the legislature, including by (i)*

providing tailored guidance, counselling and training regarding ethical, integrity and corruption prevention related provisions, as well as (ii) developing effective oversight and compliance tools on these critical matters.

The authorities of Bosnia and Herzegovina indicate that after GRECO's evaluation, Parliament amended its Code of Conduct, notably, to simplify appellate and penalty proceedings and thereby render liability more effective. In particular, the Joint Committee for Human Rights is responsible for supervision of implementation and monitoring of adherence with the Code. It is also entrusted with keeping records of all the activities pertaining to the implementation of the Code and making an annual report, which is then debated in plenary.

Sanctions consist of written warning, fine, and public warning published in the media.

Appeals can be lodged before a Joint Collegium of both houses of Parliament.

No complaints have been received in the period November 2017 (entry in force of the Code)-February 2018; one infringement case has been dealt with resulting in withdrawal.

GRECO notes that, regarding the first component of the recommendation, no new developments have been reported on integrity-related guidance, training and counselling opportunities. Concerning the second part of the recommendation, GRECO takes note of the changes introduced to the code, which are reportedly geared towards reinforcing ethical standards and accountability in Parliament. GRECO sees potential in the current (reviewed) oversight system, which specifically tackles a shortcoming of the previous Code regarding its enforcement and appeal channels. Time and experience will show how (and whether) the new system proves effective in practice. GRECO looks forward receiving more concrete details on the relevant monitoring reports – once they are published – regarding the Code's implementation.

GRECO concludes that this recommendation ii has been partly implemented.

III. *GRECO recommended harmonising the legislation on conflicts of interest throughout the national territory*.

The authorities of Bosnia and Herzegovina indicate that a draft Law on Conflicts of Interest has been prepared by a group of members of

Parliament, reportedly in close coordination with international donors (notably, Council of Europe, EU and the OSCE-ODIHR) and the NGO sector (Transparency International). The draft is undergoing consultation, among others, of the Government, the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption (APIK), the Central Election Commission and other relevant bodies. The current draft is reportedly aimed at ensuring an effective and independent application of the conflict of interest institute, and at aligning and harmonising regulations in the field of conflict of interest and financial and asset declarations of public office holders. The following changes are proposed:

- Establishment of an independent, professional body for the implementation of the LCI, notably, the Commission for Deciding on Conflicts of Interest (CDCI), as a permanent, independent and autonomous body established by the Parliament, staffed with experts selected by Parliament on the basis of a public call;
- more detailed definition and expansion of the circle of persons upon whom the LCI applies, in order to ensure equal treatment across public service;
- Introduction of clear and consistent rules which limit the performance of public office, as well as for clear rules applicable to performance of duties, engagement and conduct of public office holders even after termination of office, to ensure impartiality in decision-making;
- Consolidation and harmonisation of regulations on asset declaration and conflict of interest, as well as clearer determination of the CDCI's competences regarding collection, publication and verification;
- Introduction of a system for verification of asset declarations (in particular, regarding data accuracy) and publication of a register of public officials' assets;
- Widening scope and type of sanctions and introduction of new enforcement mechanisms, e.g. annulment of the act resulting from a conflict of interest. GRECO welcomes the preparation of a draft LCI, which aims at addressing key shortcomings identified by GRECO, including membership and procedures of the CDCI's

objet and subjects covered by the financial reporting obligation, publication of reports, sanctions for non-submission/incorrect/ and false reporting, etc. The draft also foresees consolidation and harmonisation of rules on asset declaration and conflicts of interest. These are all steps in the right direction, but still subject to further parliamentary consultation and agreement.

GRECO concludes that recommendation has been partly implemented.

IV. *GRECO recommended (i) unifying the applicable requirements regarding financial disclosure in one single declaration form; (ii) introducing a duty to report the property of close relatives and to provide an update in the event of significant change in the information to be reported in the course of the legislative mandate; and (iii) ensuring the publication of and easy access to financial information, with due regard to the privacy and security of parliamentarians and their close relatives subject to a reporting obligation*.

The authorities of Bosnia and Herzegovina reiterate that pursuant to the Election Law (Article 15) candidates for election and elected representatives are under an obligation to file asset declarations at the beginning and at the end of the mandate; there is no obligation to make updates while in office if significant changes in value occur. The submitted declarations must also include details of close relatives (spouse, children and members of the family household whom it is the official's obligation to support). The Central Election Commission (CEC) developed an application, in 2016, to make the filed declarations available online; the application has been in operation since December 2017 and declarations are publicly available on the CEC's website (personal data are excluded). No changes have occurred as regards co-existence of two parallel reporting regimes for MPs and their recommended streamlining. Hence, pursuant to the LCI (Article 12), MPs also have to file a financial report, whose contents do not fully coincide with those required for asset declarations, nor do they cover the assets of close relatives. Financial reports are not public, but the decisions of the CDCI, when it finds that an official has a conflict of interest, are public.

GRECO notes that there has been some progress as compared to the situation which was assessed at the time of the evaluation visit in June 2015. MPs still report on their assets via two parallel systems:

one consisting of "asset declarations" as governed by electoral law (covering both election candidates and elected representatives), and the other relying on "financial reports" under the LCI (covering elected officials, executive office holders and advisors). With respect to the asset declaration obligation under electoral law, GRECO welcomes the fact that declarations are now publicly accessible online at the CEC's website. This partially satisfies the last component of this recommendation, but only with regard to asset declarations and not financial reports, which, pending adoption of the LCI amendments, are not made available to the public as yet. In this connection, and with particular reference to financial reports, no updates have been provided, other than that the related measures are on stand-by until the new LCI is adopted. In particular, the draft LCI introduces new requirements concerning regular reporting (updates when significant changes in the financial information reported occur), disclosure of close relatives' assets and publication of financial reports.

Pending adoption of this piece of legislation (and its subsequent effective implementation), GRECO concludes that recommendation has been partly implemented.

Financial reports (required by LCI to elected officials, executive office-holders and advisors) include personal details of official and his/her close relatives (name, date and place of birth, address), information on public office held, current income and sources of income (e.g. all incomes, wages, pension, profits, etc.); property in BiH and abroad which exceeds 1.000 KM (511 EUR) (e.g. money, business documentation, shares, bonds, real estate, etc.); liabilities (e.g. debts, disbursements, promissory notes, loans, etc.); and data on other positions (public enterprises, Agency for Privatisation, private company, associations and foundations). They are also required to declare the positions held (in public enterprises, Agency for privatisation and private companies) of their close relatives, but not their assets and income. Asset declarations (required by the Election Law to candidates for election and elected representatives) comprise information on current income and sources of income (e.g. all incomes, wages, profit from property, etc.); property which exceeds 5.000 KM (2.554 EUR) in BiH and abroad (e.g. money, bank accounts, business

documentation, shares, bonds, real estate, etc.); liabilities (e.g. debts, disbursements, promissory notes, loans, etc.).

V. *GRECO recommended (i) coupling the disclosure system with an effective control mechanism (including random verifications) and (ii) introducing appropriate sanctions for false reporting*.

The authorities of Bosnia and Herzegovina indicate that the draft LCI strengthens oversight mechanisms (including looking into data accuracy, carrying out random verifications and cross-checking registers). The draft also introduces administrative sanctions for false reporting. The authorities further note that actual implementation of this recommendation will not only be conditioned to the adoption of the draft LCI, but also to amendments in the Election Law. GRECO acknowledges the proposed legislative amendments, which are still at parliamentary consultation stage; it further notes that changes would also need to be introduced in electoral law. Moreover, it will be necessary to ensure that the law, once adopted, is effectively implemented in practice. The absence of operational mechanisms allowing asset declarations/ financial reports to be effectively reviewed for both repressive (detection of irregularities) and preventive (as a basis for counselling on ways in which to avoid potential conflicts of interest) purposes is certainly a crucial weakness in the existing conflict of interest regime.

GRECO concludes that this recommendation has been partly implemented.

VI. *GRECO recommended that the advisory, supervisory and enforcement regime regarding conflicts of interest be completely reviewed and properly articulated, notably, by ensuring its independence and timeliness, and by making it effective through a system of appropriate sanctions.*

The authorities of Bosnia and Herzegovina indicate that the draft LCI provides for a reviewed composition, form and terms of election of the members of the CDCI. Notably, the CDCI must be independent and impartial, and this must be ensured both in its organisational status and set-up and its membership and decisionmaking process (which should be free from political interference and politicisation). The CDCI is to be composed of experts with relevant experience and provided with adequate administrative and investigative powers, as well as personnel and financial support. Special care is placed in the selection

and appointment procedure of the members of the CDCI to ensure their expertise, independence and impartiality (the draft establishes strict bans on political membership to this effect). Experts will be selected by Parliament (qualified majority) on the basis of a public call. The CDCI would have unimpeded direct access to relevant information concerning public officials (e.g. information held by tax authorities, land records, company registration). The sanctioning system would also be upgraded and a doubleinstance review (administrative and judicial) would be available. Finally, the CDCI would have important corruption prevention responsibilities, including through providing training and the issuance of formal/informal opinions.

The authorities add that, pending adoption of the draft LCI, a number of practical steps have been taken to enable the CDCI to operate, including by sorting out basic procedures and logistics. As to concrete outputs from the CDCI since GRECO's evaluation visit, the authorities report on the following: Activity 2015-2016. Opinions made with regard to whether an action or an omission represent a violation of provisions of the Law on conflict of interest in the government institutions of BiH. Adopted Decisions on initiating the proceedings. Adopted Decisions on not initiating the proceedings. Adopted Decisions on pronouncing sanctions for violation of provisions of the Law on conflict of interests in government institutions of BiH – Decisions made further to requests for access to information. Furthermore, the plan of vetting elected officials, holders of executive functions and advisors for 2017 was adopted. CDCI officials have also been quite proactive in seeking opportunities to engage and share experience and lessons learned with counterparts in third countries.

GRECO takes note of the activities carried out by the CDCI as well as the new additional improvements proposed in the draft LCI to ameliorate the advisory, supervisory and enforcement regime regarding conflicts of interest. As these are all proposals which will need to effectively materialise not only in law, but also in practice, the recommendation can only be considered partly implemented. GRECO concludes that this recommendation has been partly implemented.

VII. *GRECO recommended that the respective parliaments of the Republika Srpska, the Federation of Bosnia and Herzegovina and Brčko*

District of Bosnia and Herzegovina be invited to take action in accordance with the recommendations issued in this section of the report.

The authorities of Bosnia and Herzegovina indicate that efforts are being made at Entity level to enhance transparency, integrity and accountability in their respective legislatures. All Entities now have access to information and public consultation mechanisms in place to better interact with their citizens; changes in their respective rules of procedures have been made to this effect. The Federation of Bosnia and Herzegovina and Republika Srpska are in the process of adopting their codes of conduct, while Brčko District and several cantons of the Federation of Bosnia and Herzegovina (Sarajevo, Tuzla and Zenica-Doboj) have their own codes in place, including oversight/monitoring mechanisms for their implementation. As for conflicts of interest legislation and implementation arrangements, the situation should be clearer once the draft LCI is adopted. GRECO is pleased to note that the Entities are proceeding at a steady pace towards fulfilment of the recommendations. This is an encouraging sign, all the more given the complexity of institutions and government levels in the country and the reiterated call from the international community to embark upon more coordinated action.

GRECO concludes that this recommendation has been partly implemented. Corruption prevention in respect of judges and prosecutors Recommendation VII.

VIII. *GRECO recommended that determined legislative and operational measures be taken to strengthen the High Judicial and Prosecutorial Council's role in protecting the holders of judicial and prosecutorial offices from undue influences – both real and perceived – including by (i) providing for separate judicial and prosecutorial sub-councils; and (ii) avoiding an over-concentration of powers in the same hands concerning the different functions to be performed by members of the High Judicial and Prosecutorial Council; and (iii) ensuring that decisions of the High Judicial and Prosecutorial Council on the appointment, promotion and disciplinary liability of judges and prosecutors are subject to appeal before a court*.

The authorities of Bosnia and Herzegovina indicate that the implementation of this recommendation will require amendment of the Law on the High Judicial and Prosecutorial Council of Bosnia and

Herzegovina (HJPC BiH). Both the Ministry of Justice of BiH and the Commission for legislation of the HJPC are currently preparing proposals to amend this law or draft a new one and are taking into account the recommendation in this process. The HJPC's draft is due by the end of June 2018.

GRECO notes the intention of the authorities to update the Law on the HJPC in accordance with this and other GRECO recommendations, but recalls that this process has been on-going since 2013, before the adoption of the Evaluation Report. It encourages the authorities to step up their efforts to make the changes necessary. Moreover, GRECO points out that the recommendation also calls for operational changes, for instance to avoid that the same HJPC members be involved in different aspects of a judge's or a prosecutor's career. Such measures could well be implemented without changes to the law.

GRECO concludes that this commendation viii has not been implemented.

IX. *GRECO recommended that further steps are taken to improve the performance appraisals (with a priority given to qualitative over quantitative criteria) to both enforce the high ethical and performance standards expected from judges and prosecutors and assist in identifying meritorious candidates for promotion*.

The authorities of Bosnia and Herzegovina explain that new criteria for the evaluation of the work of prosecutors were adopted by the HJPC on 7 July 2016. New criteria for the evaluation of the work of chief prosecutors, deputy chief prosecutors and heads of departments/sections in prosecutor's offices, which are harmonised with the former text, were adopted by the HJPC on 29 November 2016.

Among the changes introduced by the new criteria, the quality of indictments is now measured according to the complexity of the case, with cases of economic crime, organised crime and war crimes being monitored separately from other cases. Decisions not to prosecute or to discontinue prosecution have been added to the monitored criteria. A third change is that grounds have been added to award negative points to a prosecutor for the quality of his/her decisions if they are subject to significant corrections. The HJPC also adopted on 7 July 2016 a Book of Rules on benchmarks for the work of prosecutors in BiH,

which sets out annual norms on cases achieved or cases closed, which are broken down according to the types of crimes. It also sets out criteria for taking into account the complexity of cases, ways of closing cases and levels of penalty. The purpose of this Book of Rules is to ensure a uniform application of the evaluation rules throughout the territory of BiH. It will also help in determining the necessary allocation of human resources – both prosecutors and support staff – in an attempt to ensure more efficiency in the prosecution service. Chief prosecutors are responsible for proper implementation of the Book of Rules. They have to organise a record keeping system based on the automatic management system of prosecutorial cases and to report periodically. Their correct implementation of the system is in turn monitored by the chief prosecutors of BiH and its entities, as well as by the HJPC. Moreover, the HJPC adopted on 14 December 2016 a Book of Rules on the process of appraisal of chief prosecutors, deputy chief prosecutors, heads of departments/sections and prosecutors. It stipulates the appraisal procedures, their monitoring, the appeal procedure against an appraisal, the content of appraisal and appraisal monitoring forms. The adoption of a new Book of Rules on benchmarks for the work of judges and further improvement of the criteria for performance appraisal of judges is foreseen in the HJPC's 2017 work plan. The work plan also foresees the implementation of expert recommendations on the system of appraisal and appointment into by-laws and practice of the HJPC. Finally, the authorities add that the draft law on the HJPC that is currently under preparation by the Ministry of Justice envisages an improvement of the provisions related to the performance appraisal of holders of judicial and prosecutorial functions. However, a possibility will be left for certain issues to be elaborated in greater detail through by-laws of the HJPC – for example as regards promotion criteria.

GRECO welcomes the different documents adopted by the HJPC with a view to improving prosecutors' performance appraisals, which represent an attempt at increasing the objectivity and uniformity of the appraisal system. Much will depend, however, on how the system will be implemented in practice. Moreover, GRECO notes that the chief prosecutors of the Prosecutor's Office of Bosnia and Herzegovina, the Federal Prosecutor's Office of the Federation of Bosnia and

Herzegovina, the Republic Prosecutor's Office of Republika Srpska and the Prosecutor's Office of the Brčko District of Bosnia and Herzegovina are currently exempt from the evaluation system. It invites the HJPC to adopt evaluation criteria also for these professionals. Finally, the performance appraisal system for judges still needs to be upgraded.

GRECO concludes that this recommendation has been partly implemented.

X. *GRECO recommended (i) carrying out an analysis of the budgetary and staff situation in courts and prosecution offices, with a view to ensuring that the resources necessary are available and efficiently used across the judicial systems; and (ii) seeing to it that judicial resources are better prioritised with due regard for the gravity of cases*.

The authorities of Bosnia and Herzegovina explain that Chapter 6 of the Strategy for reform of the justice sector in BiH for the period 2014-2018 (SRJS) foresees an upgrade in the budget planning procedures for all 14 Governments with competences over the justice sector in BiH. Accordingly, each justice sector institution will make its own detailed financial plan, taking into account:

a) its current financial standing;

b) an assessment of its dependence on international financing;

c) possible savings;

d) creative testing for activities' financing.

GRECO's recommendation was examined by the Commission for judicial administration and court and prosecutorial budgets of the HJPC, which decided that an analysis of expenses per court/prosecution office will be carried out. Data on expenses and case flows in courts/prosecution offices for 2016 are currently being gathered and will form the basis of the analysis. GRECO welcomes the fact that an analysis of courts' and prosecutorial offices' expenses and case flows has been decided. However, this process is still at an early stage and GRECO cannot, therefore, consider that the recommendation has been implemented, even partly.

GRECO concludes that this recommendation has not been implemented.

XI. *GRECO recommended significantly strengthening and further developing – for judges and prosecutors – confidential counselling and dedicated training of a practical nature on issues of ethics and integrity*.

The authorities of Bosnia and Herzegovina report that the standing committee for education of the HJPC deliberated possible solutions for the implementation of this recommendation, in view of a statement of disinterest of the judicial community to attend certain training. Possible modalities considered included the possibility of introducing a compulsory one-day training event on matters of ethics for all judges and prosecutors, the possibility of such training being part of a distance training module and the possibility for such training or part of it to be conducted in courts and prosecutor's offices themselves, with educators and representatives of the Office of the Disciplinary Council. In 2018, integrity training has been[22] made part of the initial training programme for newly appointed judges and prosecutors. The HJPC also sent out letters to all judicial institutions highlighting the importance of this type of training and inviting members of the judiciary to attend seminars on integrity. During the preparation of the training programmes for 2018, the HJPC advised the entity training centres to include more practical seminars on ethics, integrity, disciplinary procedures, guidelines for the prevention of conflicts of interest etc. Such training events will be available for all participants in judicial training: judges, prosecutors, court associates and interns. The first seminars on integrity are planned for April 2018. Finally, the authorities refer to the initial and continuous training activities provided by the Centre for education of judges and prosecutors in the Federation of BiH, following the instructions and under supervision of the HJPC. Topics such as ethics, professional standards in the judiciary and communication between the judiciary and the general, scientific and professional public have been routinely covered in such activities since 2012.

GRECO takes note of the training activities organised so far to implement the recommendation. It encourages the authorities to develop them further, both at state and at entity levels. Furthermore, GRECO

[22] Moreover, one-day training events on development of judicial and prosecutorial integrity plans were organised on 4-7 April 2017 in four different cities (Tuzla, Banja Luka, Mostar and Sarajevo) by USAID in cooperation with the HJPC, the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption (APIK) and the Regional Anti-Corruption Initiative (RAI). Over 170 participants from all courts and prosecutor's offices in BiH participated in these events.

recalls that the recommendation also calls for a further development of confidential counselling on issues of ethics and integrity. GRECO concludes that this recommendation has been partly implemented.

XII. *GRECO recommended developing rules on conflicts of interest that apply to all judges and prosecutors, along with an adequate supervisory and enforcement regime*.

The authorities of Bosnia and Herzegovina indicate that the HJPC adopted in July 2016 Guidelines for the prevention of conflicts of interest in the judiciary. These Guidelines had been prepared by a working group comprised of representatives of the HJPC, associations of judges and prosecutors and professional experts, with the support of USAID. They cover:

a) incompatibilities;
b) reporting on property, income, obligations and interests;
c) gifts and other benefits;
d) contacts with third persons and abuse of confidential information;
e) nepotism;
f) education and awareness-raising.

The Guidelines recall the existing legislation and code of ethics and go into further detail with practical "do's and don'ts" in a variety of situations. Oversight over implementation of the Guidelines is based on the existing legislative and institutional framework. The HJPC is responsible for preventing, monitoring and sanctioning conflicts of interest among judicial office holders. It decides on incompatibilities and collects and keeps annual financial statements. It does not, however, perform a thorough systematic check due to the lack of appropriate mechanisms, pending an amendment of the Law on the HJPC. The working group also recommended a more significant role for the standing committee of the HJPC for judicial and prosecutorial ethics, incompatibility and independence. Disregard for the provisions of the Guidelines represent a serious breach of official duties or compromise the public confidence in the impartiality or credibility of the judiciary and could constitute a disciplinary offence. Finally, the authorities indicate that there has been no case of disciplinary action taken so far upon breach of the Guidelines.

GRECO welcomes the adopted Guidelines for the prevention of conflicts of interest in the judiciary. They provide valuable illustrations

and explanations of the existing legislation, along with clear instructions on how (not) to act. However, the supervision and enforcement regime has not been upgraded, which prevents compliance by judicial office holders from being closely monitored, as required by the recommendation.

GRECO concludes that this recommendation has been partly implemented.

XIII. *GRECO recommended (i) developing an effective system for reviewing annual financial statements, including adequate human and material resources, cooperation channels with relevant authorities and appropriate sanctions for noncompliance with the rules or false reporting and (ii) considering ensuring the publication of and easy access to financial information, with due regard to the privacy and security of judges, prosecutors and their close relatives*.

The authorities of Bosnia and Herzegovina explain that the HJPC's Strategic plan for 2014-2018 foresees activities towards the introduction of a functioning system for the submission and monitoring of annual financial statements from judicial office holders. These activities are primarily directed at introducing an electronic declaration system, verification mechanisms and making data available to the public.

Carrying out these activities is among others connected to the amendment of the Law on the HJPC, which is under preparation as explained under recommendation VIII. As part of a project financed by the Swedish Government, there is also a plan to establish an electronic system for submitting, registering, processing and monitoring financial statements. Project staff is currently being recruited. The issue of judges' and prosecutors' financial statements will also be considered within the upcoming peer review process organised by the European Commission.

GRECO takes note of the information provided and concludes that this recommendation has not been implemented.

XIV. *GRECO recommended that (i) the independence, capacity and transparency of the activity of the Office of the Disciplinary Counsel be increased; and that (ii) the disciplinary procedure and sanctions in case of misconduct of judges and prosecutors be revised in order to ensure that cases are decided in a timely manner and that misconduct is effectively subject to proportionate and dissuasive sanctions*.

The authorities of Bosnia and Herzegovina indicate that the HJPC adopted in July 2016 Guidelines for drafting and implementing integrity plans in judicial institutions in BiH, as well as supporting documents, namely a Methodological instruction for drafting integrity plans and a Model integrity plan. As described under recommendation Guidelines for the prevention of conflicts of interest in the judiciary were also adopted, as well as Guidelines for determining disciplinary measures in disciplinary proceedings. These sets of guidelines have been prepared under a USAID project, following recommendations contained in a Diagnostic analysis of integrity of the justice sector and possible risks of corruption and unethical conduct in the judiciary, carried out by USAID in cooperation with the HJPC and the Agency for prevention of corruption and coordination of the fight against corruption (APIK).

The Guidelines for determining disciplinary measures aim at providing support to the HJPC disciplinary bodies in determining and pronouncing sanctions against judicial office holders and expert associates, in order to ensure both consistency and fairness in all cases with similar circumstances and infringements. The authorities also state that the implementation of this recommendation mainly depends on the amendment of the Law on the HJPC (see recommendation VIII). The need to strengthen the independence, capacity and transparency of the work of the Office of the Disciplinary Counsel was also recognised in the Peer Review Report of the European Commission expert. The recommendations of this report are to be implemented into the by-laws and practice of the HJPC, according to its Action Plan for 2017.

GRECO takes note of the adoption by the HJPC of a set of guidelines on integrity plans, conflicts of interest and disciplinary measures. While welcome, these guidelines do not contribute to the objectives of the recommendation, with the exception of the latter. That said, these guidelines alone are not sufficient to consider that the recommendation has been implemented, even partly. The implementation of the first part of the recommendation is contingent on an amendment of the Law on the HJPC which has not yet materialised. As to the second part of the recommendation, it was given in view of the mildness and inadequacy of the sanctions applied by the HJPC's disciplinary panels. Therefore, GRECO expects information showing that the practice of these panels

has evolved and that disciplinary sanctions applied in concrete cases are now more dissuasive.

GRECO concludes that this recommendation has not been implemented.

XV. *GRECO recommended that a communication policy, including general guidelines and training on how to communicate with the media and the relevant civil society organisations, be developed for the judicial system (judges and prosecutors) with the aim of enhancing transparency and accountability*.

The authorities of Bosnia and Herzegovina make reference to several training events organised by the HJPC in cooperation with judicial training centres in the Entities[23]. The Centre for education of judges and prosecutors of the Republika Sprska has organised, over the past three years, an annual training event on "contemporary communications with the media" which is intended for managers of judicial institutions, judges and prosecutors. Finally, the authorities mention that a communication strategy is currently being drafted by the HJPC. The HJPC action plan for 2017 contains a line of activities pertaining to the improvement of public trust, transparency and cooperation, as a contribution to the implementation of the recommendation. In this framework a series of meetings, seminars and workshops took place on the relations and communication between the judiciary, the media and the public. These meetings provided input which the HJPC is using in devising its communication strategy. A first draft has been presented and is currently being refined by a working group. Several surveys on court users' satisfaction have also been carried out. GRECO takes note of the training activities organised. However, many of them predate the adoption of the Evaluation Report and it seems that the activities organised since then simply represent a continuation rather than an intensification of efforts. GRECO also recalls that the recommendation calls for such training

[23] The Centre for education of judges and prosecutors of the Federation of BiH organised: three seminars on "judiciary and the media" in Teslić (29 June 2012), Tuzla (6 November 2012) and Sarajevo (9 June 2015); one seminar on "law, media and the internet" in Sarajevo on 4 March 2015; and one seminar on "judiciary and the public" in Sarajevo on 9 June 2015. These events were attended by spokespersons of courts and prosecutors' offices, as well as judges and prosecutors.

activities to be part of a more comprehensive policy aimed at restoring public trust and improving the judiciary's negative image. It welcomes therefore indications that the preparation of such a communication strategy is under way. GRECO also recalls that the Evaluation Report made reference to several promising initiatives contained in the Justice Sector Reform Strategy 2014-2018, such as setting up a regular practice of informing the public about the role and work of judicial institutions, ensuring that all communication by all judicial institutions follows the 14 same principles and publishing more detailed statistics on some types of criminal offences. It would be helpful to know if these initiatives have materialised. GRECO concludes that this recommendation has been partly implemented.

In view of the foregoing, GRECO concludes that Bosnia and Herzegovina has implemented satisfactorily none of the fifteen recommendations contained in the Fourth Round Evaluation Report. Eleven recommendations have been partly implemented and four have not been implemented. More specifically, recommendations I-VII, IX, XI, XII and XV have been partly implemented and recommendations VIII, X, XIII and XIV have not been implemented. With respect to members of parliament, timid steps have been made by Parliament to strengthen its integrity system. A long-awaited amendment of the Code of Conduct took place in 2015 to reportedly step up enforcement and oversight mechanisms for ethical breaches, but it remains to be seen how it is indeed implemented in practice. Further, much more needs to be done in terms of the provision of advisory and training opportunities on corruption prevention matters for members of Parliament. The new proposed legislation on the prevention of conflicts of interest is a promising development, which could go a long way in meeting GRECO's recommendations. At present, however, there is still no credible and independent mechanism to deal with conflict of interest or to check up on asset declarations by parliamentarians at State level. This calls for determined and priority action. It is nevertheless encouraging to see a more coordinated action being taken in the country, with Entities and Brčko District proceeding at a steady pace towards fulfilment of GRECO recommendations in this area, and thereby better promoting integrity principles in their respective legislatures.

I think very little progress has been made due to the complex structure of the judiciary, strong influence of politics on the judiciary as well as lack of poltical will. As far as judges and prosecutors are concerned, the High Judicial and Prosecutorial Council has adopted new criteria to improve prosecutors' performance appraisals, guidelines on preventing conflicts of interest in the judiciary, guidelines on integrity plans, as well as guidelines on disciplinary sanctions.

Many of the changes required, however, are subject to amendments to the Law on the High Judicial and Prosecutorial Council.

Although this is not enough, it is a litlle step towards fullfiling the recommendations. However, bearing in mind that several substantial reforms are underway and on the understanding that the Bosnia and Herzegovina authorities will further pursue their efforts, we can conclude that the current low level of compliance with the recommendations is not "globally unsatisfactory" as stated in the GRECO report.

5. GRECO and source of regulation (Soft Law)

The term "soft law" refers to quasi-legal instruments which do not have any legal binding force, or whose binding force is somewhat weaker than the binding force of traditional law, often contrasted with soft law by being referred to as "hard law". Traditionally, the term "soft law" is associated with international law, although more recently it has been transferred to other branches of domestic law as well.

The Council of Europe's approach against corruption (AC) and anti-money laundering (AML) and Countering of Terrorist Financing (CFT) is threefold.

Standard setting in the form of treaty law and through other "soft law"[24] instruments (recommendations and resolutions). Monitoring of

[24] Most Resolutions and Declarations, Elements such as statements, principles, code of practice etc.; often found as part of framework treaties; Action plans; Other non-treaty obligations. The term "soft law" is also often used to describe various kinds of quasi-legal policy instruments of the European Union: "recommendation", "codes of conduct", "guidelines", "communications". In international law, the terminology of "soft law" remains relatively controversial because there are some international practitioners

the compliance by those jurisdictions that have subscribed to Council of Europe's and other global standards through its monitoring mechanisms, in particular the Group of States against Corruption (GRECO) and the Committee of Experts on the Evaluation of Anti Money Laundering Measures and the Financing of Terrorism (MONEYVAL). Technical cooperation, as the last corner of the triangle, through which the Council of Europe supports the member states and nonmembers to bridge gaps in the legislative and institutional frameworks and in addressing any capacity building needs[25].

The technical cooperation and assistance related activities and programmes are implemented by the Economic Crime Cooperation Division.

In using standard-setting, monitoring, and technical assistance altogether, the Council of Europe as a Pan-European political organisation displays a unique added value in supporting significant reforms concerning economic crime, corruption and money laundering in many of its Members States and beyond in the neighbourhood regions[26].

Council of Europe presence, partnership and approach when involved in those reforms and cooperation modalities offers to the countries: access to experience and knowledge in mainstreaming their legislation in line with European acquis; sharing tools to effectively implement international standards; using the Council's monitoring methodologies to address concerns in neighbouring regions; coordinating, supporting and hosting professional networks which promote better international co-operation in criminal matters (European Union/Council of Europe member States and other countries)[27].

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who do not accept its existence and for others, there is quite some confusion as to its status in the realm of law. However, for most international practitioners, development of soft law instruments is an accepted part of the compromises required when undertaking daily work within the international legal system, where states are often reluctant to sign up to too many commitments that might result in national resentment at over-committing to an international goal.

25 Council of Europe, Conseil de l'Europe, www.coe.int.

26 *Ibid*.

27 *Ibid*.

Such networks and exchange of good practices in implementing and monitoring international and European standards, have served to build capacities and create strong links among homologue practitioners, professionals and government structures that share common goals and objectives when tackling economic and organised crime and its cross-border effects.

6. Conclusion

Greco's aim is to improve the capacity of its members in the fight against corruption by using dynamic process of mutual evaluation and peer pressure. In this perspective assistance to Bosnia and Herzegovina is extremely important, although the implementation of recommendations in Bosnia and Herzegovina is not entirely successful.

I believe that the key problems in the implementation of the recommendations lie in the internal structure of the B&H state, the internal structure of political parties, underdeveloped democratic behavior. Likewise in the minds of the people there is no understanding about corruption especially in some sectors.

Therefore, the role of GRECO in the circle of its instruments and assets is very significant. In this way states that are obliged to implement the recommendations strengthen their legal system through the rule of law. This achieves the ultimate goal of the state and that is to achieve the well-being of society as a whole.

Muhidin Hadžibegić*

Criminal Offences of Bribery – Criminal Law Practice in Bosnia and Herzegovina and Italy

1. Introduction

In recent years European countries' political life is being influenced by a rise of right-oriented ideas and so-called anti-system politics like: *Fidesz* in Hungary, *Lega Nord* in Italy, *Freiheitliche Partei Österreichs* in Austria and so on. Migrant flow from Asia and Africa that is going on for

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some time now has only contributed to spreading of these political ideas among European nations. It has been 75 years since the end of Second World War and the birth of ideas of united Europe. For these 75 years major European nations were not affected by war atrocities. Historical views of people like Robert Schuman and Altiero Spinelli and ideas of cherishing peace in united Europe nowadays seem to be out of focus of new generations of Europeans. In contrast, ideas of regaining national sovereignty are being offered as a solution of economic problems and migrant crisis in the EU.

At the same time, Bosnia and Herzegovina is struggling hard on its way to become a member of European Union. As many times in its history, this state is caught in a middle of interests of global forces of east and west. One cannot deny the obvious influence of both on major political parties in the state. Unfortunately, and unlike the major EU countries, Bosnia has had a vast war conflict on its territory which included neighbour states in fairly recent history. Today, joining the EU is perceived as the only way to ensure peace and stability which would lead to economic growth and higher standard of living. Despite political differences, vast majority of its citizens are pro-EU oriented. Apart from the stability issue, Bosnian citizens look forward to reaching EU standards particularly in the field of fighting corruption (in the public sector). Lack of confidence in public officials due to corruption has become dominant reason for young people to leave the country. According to a report[1] published by The World Bank, 48% of the population Bosnia and Herzegovina has emigrated, of which 55% are high-skilled workers. From Bosnia and Herzegovina perspective EU is recognized as a union of countries with a high standard of anti-corruption policies which is essential for proper functioning of one democratic state. It reflects that most of the people value the system which has rules that are applicable to all citizens. Italy is a member state of EU that has developed a recognizable anti-corruption system, due to its previous experiences from the 1990ies. I believe that comparing experiences in fight against corruption of Italy and Bosnia and Herzegovina is a good starting point for understanding the key

[1] World Bank, *Migration and Brain Drain (English). Europe and Central Asia Economic Update*, Washington D.C. 2019.

aspects that have to be changed in Bosnia and Herzegovina in order to achieve better results in this field.

The aim of this paper is to show similarities and differences in criminal law provisions in two legislations with the outcome they produce, and what are the obstacles that Bosnia and Herzegovina needs to overcome in order to achieve better results in fighting corruption. The research is going to be made through comparison two countries' corruption level, organization of criminal judiciary and results in fighting corruption through criminal procedure. Also, attention will be on previous experiences in processing corruption cases with political background and its consequences on political life of one a country.

2. International legal instruments

Being an international problem, fighting corruption on national level turned out to be insufficient method that could not ensure stable market economy nor legal security in international relations. The key issues that emerged from this method were difference in criminalization of certain behaviours, non-effective judicial assistance and cooperation between states especially when it comes to criminal procedures that included foreign officials. These issues were to be overcome by signing international treaties with aim to fill the gaps in national legal systems, to harmonize the definitions of corruption offences and to ensure effective cooperation between the member states.

2.1. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention") was signed in December 1997 and came into force in February 1999. The Convention is a result of Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development

(OECD)[2] which, inter alia, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions. Its aim was to criminalize such acts of bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country.

By signing the Convention, the member state agrees to criminalize 'bribery of a foreign public official' as a «criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business»[3]. Also, the Convention criminalizes an attempt and conspiracy to bribe a foreign public official.

In 2009 the OECD adopted Recommendation of the Council for Further Combating Bribery in order to enhance the ability of the States Parties to the Convention to prevent, detect and investigate allegations of foreign bribery. Also in the same year, the OECD adopted Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, which further strengthens the role of tax authorities in combating bribery by requiring explicit legislation to prohibit the tax deductibility of bribes and promoting enhanced cooperation between tax authorities and law enforcement agencies to counter corruption.

There are currently 37 Member Countries of the Convention, including Italy (since 1962) and Bosnia and Herzegovina is still not a member.

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[2] The convention establishing the OECD was signed on Dec. 14, 1960, by 18 European countries, the United States, and Canada and went into effect on Sept. 30, 1961. It represented an extension of the Organisation for European Economic Co-operation (OEEC), set up in 1948.

[3] http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

2.2. Council of Europe conventions: the Criminal Law Convention against Corruption (2002) and the Civil Law Convention against Corruption (2002)

Bosnia and Herzegovina being a member of Council of Europe ratified two Council of Europe conventions: the Criminal Law Convention against Corruption (2002) and the Civil Law Convention against Corruption (2002). Both conventions represent important instruments for upgrading domestic legislative framework for the fight against corruption.

2.2.1. The Criminal Law Convention against Corruption

The Criminal Law Convention against Corruption covers both public and private sector (private – to – private) corruption and aims at coordinated criminalisation of corrupt practices. It also provides for complementary criminal law measures and for improved international cooperation in the prosecution of corruption offences. International cooperation is emphasized in mutual law enforcement assistance, extradition, investigations, as well as confiscation and seizure of proceeds of corruption. The Convention covers offences of bribery (domestic and foreign), trading in influence, money laundering and accounting offences.

Definition of corruption:

Active corruption: the deliberate action of a person who promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official, for himself (or herself) or for a third party, for him (or her) to act or refrain from acting in accordance with his (or her) duty or in the exercise of his (or her) functions in breach of his (or her) official duties.

Passive corruption: the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself (or herself) or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his (or her) duty or in the exercise of his (or her) functions in breach of his (or her) official duties.

Its main disadvantages are that it has few preventive measures; no provision on statutes of limitation and those parties can make reservations to the Convention in relation to some provisions.

2.2.2. The Civil Law Convention against Corruption

The Civil Law Convention against Corruption was brought out of the necessity of international approximation of civil law remedies in the fight against corruption. Like the criminal convention, it also covers both public and private sector. Apart from the main purpose to provide the right to compensation for damage resulting from an act of corruption, it has also provisions on liability, state responsibility, validity of contracts, protection of employees, acquisition of evidence, interim measures, etc.

2.2.3. Monitoring mechanism, GRECO

The implementation of the above mentioned Conventions is monitored by the Group of States against Corruption – "GRECO". Committee of Ministers authorised the establishment of a monitoring body, the GRECO, in the form of a partial and enlarged Agreement. The aim of GRECO is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field. The functions, composition, operation and procedures of GRECO are described in its Statute. The establishment of an efficient and appropriate mechanism to monitor the implementation of international legal instruments against corruption was considered as an essential element for the effectiveness and credibility of the Council of Europe initiative in this field.

Italy is a member of GRECO since 2007 and Bosnia and Herzegovina since 2002. In the Fourth Interim Compliance Report on Bosnia and Herzegovina adopted by GRECO in May 2018, it's stated that «GRECO concludes that Bosnia and Herzegovina has implemented satisfactorily none of the fifteen recommendations contained in the Fourth Round Evaluation Report. Eleven recommendations have been

partly implemented and four have not been implemented»[4]. The most problematic areas of corruption still tend to be public procurement, corruption in the judiciary, and the lack of a systemic law on conflicts of interest at the state level. As observed on various occasions, a significant problem in Bosnia and Herzegovina is lack of regulations on the state level. In a complex country such as Bosnia and Herzegovina, with notable jurisdictions of lower levels of power, it is at most importance to have state level laws that prescribe at least common principles and sufficient legal framework in order to have harmonized legal system. Partial regulations within each level of administrative power lead to different and fragmented solutions in practice which is the opposite of legal security and rule of law in general.

On the other hand, the same report on Italy states: «Italy has implemented satisfactorily only three of the twelve recommendations contained in the Fourth Round Evaluation Report on the prevention of corruption in respect of MPs, judges and prosecutors. Four recommendations have not been implemented and five only partially»[5]. Unlike in Bosnia and Herzegovina case, GRECO has found that Italy made progress in corruption prevention measures concerning the judiciary. It also states that a reform of the justice sector that's into force since 2016 has the potential to improve the efficiency of both civil and criminal law trials. Regarding the same issue in Bosnia and Herzegovina, we can conclude that for a country, in order to make progress in implementing recommendations, it is necessary to have reforms/activities coordinated at countrywide (national) level.

2.3. The United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) was adopted by the UN General Assembly on the 31 October 2003, by

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[4] GRECO, *Fourth Evaluation Round Compliance Report on Bosnia and Herzegovina*, GrecoRC4(2020)6, Adopted by GRECO at its 79th Plenary Meeting (Strasbourg, 19-23 March 2018).

[5] https://www.coe.int/en/web/portal/-/greco-italy-should-speed-up-reforms-to-prevent-corruption-among-mps-judges-and-prosecutors.

resolution 58 and came into force on the14 December 2005, and so far has 187 parties (vast majority of UN member states). The Convention is the only legally binding universal anti-corruption instrument. Due to its far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem. Its main goals are: to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; to promote integrity, accountability and proper management of public affairs and public property. The conventions main chapters cover: Preventive measures, Criminalisation and law enforcement, International cooperation, Asset recovery, Technical assistance and information exchange and Mechanisms for implementation.

Bosnia and Herzegovina became party to the UNCAC in 2006 (signed in 2005) which lead to the Implementation Review Mechanism, established in 2009 to enable all parties to review their implementation of UNCAC provisions through a peer review process. One of the objectives of this mechanism is to encourage a participatory and nationally driven process towards anticorruption reform. Italy signed the Convention in 2003 and ratified it on 5 Oct 2009.

3. Current data on corruption in public administration in Bosnia and Herzegovina and Italy

Although corruption is too complex a concept to be captured by a single score, today the most common tool for measuring corruption in public sector is a Corruption Perceptions Index (CPI), by Transparency International (TI).

Each year Transparency International conducts a survey on perceived levels of public sector corruption in 180 countries/territories around the world. Exact level of corruption in one country is hard/impossible to determine, so this survey is based on citizens' perception on corruption. Perception of corruption is influenced by a lot of factors such as level

of education, access to information, employment etc. Obviously that perception can be higher or lower than actual corruption is but nevertheless it is a significant fact that can help in determining how corruption is affecting processes in some country.

Results of the survey are presented by the CPI, Tl's flagship research product, which is the leading global indicator of public sector corruption. The index offers an annual snapshot of the relative degree of corruption by ranking countries and territories from all over the globe. In 2012, Transparency International revised the methodology used to construct the index to allow for comparison of scores from one year to the next.

The 2019 CPI draws on 13 surveys and expert assessments to measure public sector corruption in 180 countries and territories, giving each a score from zero (highly corrupt) to 100 (very clean). In 2019 the average country score was 43/100. The highest scoring region was Western Europe & the EU scoring 66/100. Lowest scoring region was Sub-Saharan Africa scoring 32/100, as presented below.

HIGHEST SCORING REGION
WESTERN EUROPE &

EUROPEAN UNION
66/100
AVERAGE REGIONAL SCORE SINCE 2017

LOWEST SCORING REGION
SUB-SAHARAN AFRICA
32/100
AVERAGE REGIONAL SCORE SINCE 2018

According to the latest report on corruption perception published by Transparency International, Bosnia and Herzegovina is at 101st place amongst total of 180 countries involved in this survey, scoring CPI of 36/100. Comparing results from the past eight years that were gathered by the same methodology, Bosnia and Herzegovina has been in slight regression, from scoring 42/100 in 2012 to 36/100 in 2019. Looking at the 180 countries average of 43/100, Bosnia and Herzegovina is 6 points below, and even 30 points below EU average of 66/100.

Italy, on the other side, ranked 51/180, scoring CPI of 53/100. In comparison to other countries, it is 10 points above average of 43/100,

and 13 points below EU average of 66/100. Interesting record to point out is that in 2012 Italy scored 42/100, same as Bosnia and Herzegovina. Comparing results for the last 8 years, it's noticeable that starting from the same position in 2012, Italy has made a progress by 9 points, and Bosnia and Herzegovina declined by 6 points for the same period.

3.1. Perception of corruption influence

It has come to understanding that CPI corresponds with lack of citizens' trust in public institutions in their country. This perception of corruption that citizens have comes into realisation /practice with each contact with the PA. Citizens tend to search for so-called "grey-zones" and unlawful procedures in order to avoid presumed incorrect acting of PA. This is why we can say that lack of trust in PA is the main driver of corruption. However, it should be pointed out that there are also opinions against this TI's methodology. Some argue that by measuring perceptions of corruption, as opposed to corruption itself, the Index may simply be reinforcing existing stereotypes and clichés.

4. Previous cases of influence

4.1. "Mani pulite"

Italy had one major-scale investigation during the early 1990s, which resulted in radical change in political environment in the country. The so-called "Clean hands" investigation ("*Mani pulite*") showed that political parties in Italy had succeeded in taking control over all aspects of public life, from the bureaucracy to public enterprises to civil society. This kind of highly corruptive system was known in public as "*Tangentopoli*" ("Bribevile"): «the term coined by Italian newspapers in the early 1990s to describe the system of widespread political corruption and illegal

party financing linked to *tangenti* ('rake-offs'), which were paid to obtain public contracts»[6].

When it first came to unravel in Milan, as a network of corruption throughout the city's administration, it was assumed to be a local issue, involving kickbacks on a cleaning contract. During the investigation, an accused politician began naming accomplices from far beyond the boundaries of Milan. In the time that followed, more scandals emerged, starting from bribes paid to political parties in return for public contracts to money laundering and embezzlement, that included highest members of political parties, both the Christian Democratic and Socialist parties, bankers, the Italian State oil company ENI, mafia and even clerks.

«Public prosecutors uncovered numerous instances of illegal arrangements between businessmen and political figures, including illicit financing of political parties, as well as ties between elected officials and organized crime. Over 1,300 persons were either convicted and sentenced or accepted plea bargains. Those sentenced to prison terms, generally for periods of 3 years, were able to benefit from a legal system that allows alternative punishment for persons whose sentences do not exceed 4 years. Thus few individuals served jail sentences as a result of the trials»[7].

Apart from the issue of criminal procedure and public coverage of the scandal, "*Mani pulite*" investigations and court proceedings eventually led to the collapse of the then-dominant Christian Democrat and Socialist parties. Never has one criminal investigation on corruption related to public administration had such impact on change in political life of one country. However, in years that followed the impact of these investigations lead to permanent tensions between the political and judicial branches of the State. «The constantly asserted need for a reform of the administration of justice to reduce the allegedly arbitrary power of judges, who it is claimed are politically biased and without any electoral legitimation, has become the central issue on the political agenda. The 'moral question' has been marginalised through having become the trademark of a minor party, Italy of Values (*Italia dei Valori*, *IdV*), led

[6] https://www.globalsecurity.org/military/world/europe/it-clean-hands.htm.
[7] https://www.globalsecurity.org/military/world/europe/it-clean-hands.htm.

by the former public prosecutor, Antonio Di Pietro, who initiated the "*Mani pulite*" inquiry»[8].

Due to huge public interest and media coverage of the "*Mani pulite*" Di Pietro became too famous for his own security. Being under this much pressure in 1993 Di Pietro resigned from judiciary. In the late 1990s he began a political career, serving as the minister of public works (1996-97). Interestingly, he also came under investigation in 1997 for his activities both in the police and as a judge. It was later found that the main prosecutor handling the case, Fabio Salamone from Brescia, was the brother of a man that Di Pietro himself had prosecuted, and who had been sentenced to 18 months of jail for various corruption charges. Although it took some time for the authorities to realize this, Salamone was eventually allocated other duties and, after years of trials, Di Pietro was eventually cleared of all charges. Di Pietro was also a member of the Italian Senate (1997-2001), and a member of the European Parliament (1999-2006). The *Italia dei Valori* was founded in 2000 and Di Pietro served as the minister of infrastructure (2006-08), however by the 2014 he had left the party.

4.2. "Pandora" case

Bosnia and Herzegovina on the other hand, still seem to be waiting for its "*Mani pulite*". In 2014 Prosecutor's Office of Bosnia and Herzegovina carried out what was then called the largest post-war investigation of the criminal offenses of corruption, named "Pandora". By the end of that year, in all parts of Bosnia and Herzegovina, in its both entities and in the territory of the Brčko District fifty-four persons have been deprived of liberty or put under supervision, and searches of a large number of facilities have been conducted. This was the outcome of an eight months investigation carried out by prosecutors of Special Department for Organized Crime, Economic Crime and Corruption of Prosecutor's Office of Bosnia and Herzegovina. «Among the persons deprived of liberty, there are around thirty officials of customs authorities and the

[8] A. Vannucci, *The controversial legacy of 'Mani Pulite': A critical analysis of Italian corruption and anti-corruption policies*, in *Bulletin of Italian politics* 1 (2) 2009.

Indirect Taxation Authority of Bosnia and Herzegovina, including the former Director of the Indirect Taxation Authority of Bosnia and Herzegovina. The suspected persons in this case are subject to investigation for corruptive criminal offenses of organized crime, customs and tax evasion, illegal tax re mission and VAT refund, money laundering and abuse of office or official authority in relation to the import of textile and other goods to Bosnia and Herzegovina»[9]. A part of this case was also a financial investigation which was to block and seize illegal goods and properties in multi-million amounts. However, despite the early expectations this court proceeding never reached its end, nor any final verdicts have been brought by the court so far.

4.2.1. Correlation with politics

At that time, a member of Governing board of Indirect Taxation Authority of Bosnia and Herzegovina was Nikola Spiric, also a member of major political party called Alliance of Independent Social Democrats SNSD (*Savez nezavisnih socijal-demokrata*). Being at that position, his name was often mentioned in the investigation findings and it was expected that this case would finally expose connection between politics and organized crime (corruption).

It is important to emphasize that in 2018, the United States Embassy in Bosnia and Herzegovina released statement that U.S. Department of State had credible information that Mr. Nikola Spiric had been involved in and benefited from public corruption, including the improper gain in public office and obstruction of public processes during his tenure as a member of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina. Since September 2018 Mr. Spiric, his wife, son and daughter, had been on the black list of the US Department of State, Foreign Operations, and Related Programs for alleged involvement in significant corruption or gross violations of human rights. In 2020, despite all the previous accusations, the same person, Mr. Spiric, now

[9] *Bilten*, issue n. 5 (http://www.tuzilastvobih.gov.ba/files/docs/BILTEN/Tuzilastvo_BiH-Bilten_5-BHS-web.pdf) Prosecutor's Office of Bosnia and Herzegovina, Sarajevo, December 2014, 19.

a member of the Parliament's House of Peoples, was appointed as a member of the Commission for the Selection and Monitoring of the Work of the Agency for Prevention of Corruption and Coordination of the Fight against Corruption APIK (*Agencija za prevenciju i koordinaciju borbe protiv korupcije*).

Concerning the latter, Transparency International in Bosnia and Herzegovina (TI BiH) warned that the appointment of Mr. Spiric to the Committee makes all efforts in the fight against corruption meaningless. «The Committee, as an independent body of the Parliamentary Assembly, oversees the work of APIK, and has a key role in the process of appointing and dismissing the management of the only institution whose mandate is dedicated exclusively to the fight against corruption. By appointing Spiric, the legislature gives an opportunity to a politician who is facing the most serious accusations of corruption to monitor, supervise and influence the work of the anti-corruption agency»[10].

The above mentioned example illustrates inability of Bosnia and Herzegovina to make real progress in fight against corruption. The judiciary in Bosnia and Herzegovina seems to be neither powerful nor independent enough to carry out this kind of major scale conviction to an end.

5. Organization of criminal justice system

5.1. Italy

Italy is a republic divided into regions (*regioni*), provinces (*province*), and communes (*comuni*). There are 15 ordinary regions: *Piemonte*, *Lombardia*, *Veneto*, *Liguria*, *Emilia-Romagna*, *Toscana*, *Umbria*, *Marche*, *Lazio*, *Abruzzo*, *Molise*, *Campania*, *Puglia*, *Basilicata* and *Calabria*; and an additional 5 to which special autonomy has been granted: *Sicilia*, *Sardegna*, *Trentino-Alto Adige*, *Friuli-Venezia Giulia* and *Valle d'Aosta*.

[10] Press Release n. 02-06-804 (https://ti-bih.org/wp-content/uploads/2020/09/Press-rls-24.09.2020.docx-e.pdf) Transparency International Bosnia and Herzegovina, 24 september 2000.

Despite the mentioned administrative division, the judicial system is unified, with every court being part of the national network. The courts are located in various districts of Italy and have jurisdiction over the disputes in accordance with territorial jurisdiction rules. These districts

do not correspond to the 20 administrative districts (*Regioni*) into which the country is divided. Although each district has the power to make laws, providing they do not conflict with the Constitution, only the State has jurisdiction over substantive and procedural penal law. The administrative functions of the criminal justice system fall under the authority of the Minister of Justice (*Ministro di Grazia e Giustizia*). Courts and prosecutors offices are organized as follows:

First instance

- Justices of the peace (*Giudici di pace*) – who are honorary (not professional) judges. They hear minor civil and criminal matters
- Courts or tribunals (*Tribunali*) – hear the more serious cases
- The penal office (*Ufficio di sorveglianza*) – hears cases in the first instance involving penal (criminal) justice (questions about prisoners, convictions, etc.)
- Juvenile court (*Tribunale per i minorenni*)

Second instance

- Courts of appeal (*Corte d'appello*)
- Penal tribunals (*Tribunale di sorveglianza*) – second instance (and, in some special matters, first instance) courts in matters involving penal justice

Third instance

- Supreme court (*Corte di cassazione*) – with overall competence and final instance.

Inside the main tribunals, there are also special sections. Courts of assizes (*Corti d'assise*) sit with two professional judges and six jurors. Jurors are chosen from the body of citizens to serve for short periods, to cooperate and represent the various sectors of society. These courts take decisions on serious crimes (murder, serious assault and similar).

The Supreme Court of Cassation is the highest appeal court and mainly reviews the judgments delivered by the courts of appeal and the courts of assizes of appeal. The grounds for review must concern only the correct application of law and not fact.

In Italy, the role of public prosecutor is played by career magistrates, who exercise their functions under the supervision of the chief of their bureau. This operates as a kind of hierarchy that applies only to the public prosecutors' offices. Magistrates who play the role of the public prosecutors in the trials are:

- Chief prosecutors of first instance (*Procuratore della Repubblica presso il Tribunale*) and their deputies (*Sostituti procuratori*)
- Chief prosecutors of second instance (*Procuratore generale presso la Corte d'appello*) and their deputies (*Sostituti procuratori generali*)
- Attorney general for the supreme court (*Procuratore generale presso la Corte di cassazione*) and his or her deputies (*Sostituti procuratori generali*)

5.2. Bosnia and Herzegovina

In Bosnia and Herzegovina criminal justice system is organized following the state's organization, as defined by current Constitution of Bosnia and Herzegovina given in Annex IV of The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Agreement (DPA)[11]. By the DPA, Bosnia and Herzegovina consists of two entities: Entity Federation of Bosnia and Herzegovina and Entity Republic of Srpska, and Brčko District of Bosnia and Herzegovina. Entity Republic of Srpska and cantons are divided into municipalities.

[11] Peace agreement between The Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia reached at Wright-Patterson Air Force Base near Dayton, Ohio, United States, in November 1995, and formally signed in Paris on 14 December 1995. The Agreement has 11 annexes and Annex IV represents Constitution of Bosnia and Herzegovina (replacing former Constitution of Republic of Bosnia and Herzegovina).

In accordance with state's administrative organization, there are four distinct criminal justice levels with its own courts and prosecutor's offices, as explained further:

1. State level – Court has full jurisdiction over all criminal offences prescribed by Criminal Code of Bosnia and Herzegovina[12]:

[12] Criminal Code of Bosnia And Herzegovina ("Official Gazzette of B&H" nn. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18).

– Court of Bosnia and Herzegovina
– Prosecutors office of Bosnia and Herzegovina

2. Entity Federation of Bosnia and Herzegovina level – Courts have the jurisdiction over all criminal offences prescribed by Criminal Code of Federation of Bosnia and Herzegovina[13] according the rules of ratione materiae jurisdiction:
   – Supreme Court of Federation of Bosnia and Herzegovina
   – Cantonal Courts (10) – have jurisdiction over offences punishable over 10 years or with long-term imprisonment
   – Municipality Courts (31) – have jurisdiction over offences punishable by fine or up to 10 years of imprisonment
   – Federal Prosecutor's office
   – Cantonal prosecutor's offices (10)
3. Entity Republic of Srpska level – Courts have the jurisdiction for all criminal offences prescribed by Criminal Code of Republic of Srpska[14] according the rules of ratione materiae jurisdiction:
   – Supreme Court of Republic of Srpska:
   – County Courts (6) – have jurisdiction over offences punishable over 10 years or with long-term imprisonment
   – Municipality Courts (28) – have jurisdiction over offences punishable by fine or up to 10 years of imprisonment
   – Public Prosecutor's office of Republic of Srpska
   – County public prosecutor's offices (6)
4. Brčko District of Bosnia and Herzegovina level – Court has the full jurisdiction over all criminal offences prescribed by Criminal Code of Brčko District of Bosnia and Herzegovina[15]:
   – Appellate Court of Brčko District of Bosnia and Herzegovina
   – Municipality Court of Brčko District of Bosnia and Herzegovina
   – Prosecutor's office of Brčko District of Bosnia and Herzegovina.

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[13] Criminal Code of Federation of Bosnia and Herzegovina ("Official Gazzette of F B&H" nn. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17).

[14] Criminal Code of Republic of Srpska ("Official Journal of RS" n. 64/17).

[15] Criminal Code of Brčko District of Bosnia and Herzegovina ("Official Gazzette of BD B&H" nn. 10/03, 45/04, 06/05, 21/10, 52/11, 26/16, 13/17 and 50/18).

Each level has its own legislation related to: incriminations (criminal offence legal definitions), criminal liability, criminal sanctions, investigation, trial rules, legal remedies, penitentiary provisions, criminal property forfeiture provisions and correspondent institutional capacities (courts, prosecutors' office[s], police agencies and correctional facilities). The main problems that arise from this kind of structure are that there are criminal behaviors which are recognised as criminal offences in one entity but not in another; there are different legal definitions of same criminal offences and there are different criminal sanctions for the perpetration of legally identical criminal offence prescribed by different criminal codes. The mentioned problems have even more effect due to non-existence of one supreme court on the state level. At this point it can be said that Bosnia and Herzegovina has non-harmonized legal decisions within one state territory. But, despite the existing judiciary structure, it would be possible to have unified legal standards that apply on the whole state territory and to maintain organisation according to the constitution. Unfortunately, due to still present political ideas that favour weakening of the state's institutions, forming of the supreme court at the state level is not to be expected in near future. It could be concluded that legal insecurity is not only the consequence of inadequate court and prosecutor's offices activity, but it also derives from the legal structure itself.

5.2.1. The system's faults recognized by the European Commission

Nevertheless, there is some optimism regarding the forming of supreme court at the state level, as it is a deficiency recognized by European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union[16], as follows: «Bosnia and

[16] Bosnia and Herzegovina's application for EU membership was submitted on 15 February 2016. The Commission adopted its Opinion (Avis) on the EU membership application of the country in May 2019, identifying 14 key priorities for the country to fulfill in view of opening EU accession negotiations. The Opinion constitutes a comprehensive roadmap for deep reforms in the areas of democracy/functionality, the rule of law, fundamental rights and public administration reform.

Herzegovina has no state-level supreme court. The consistency of case-law across the legal orders in the country is promoted by voluntary harmonisation panels among the highest judicial instances. Ultimately, Bosnia and Herzegovina needs to establish a judicial body to ensure the consistent interpretation of the law and the harmonisation of case-law, while fully ensuring the principle of independence of all judges»[17].

When it comes to the fight against corruption and organised crime, the Opinion is even more thorough on identifying key problems and goals that authorities in Bosnia and Herzegovina are expected to achieve: «The fight against corruption and organised crime is hampered by a lack of harmonisation of legislation across the country and by weak institutional cooperation and coordination. Corruption is widespread and all levels of government show signs of political capture directly affecting the daily life of citizens, notably in health, education, employment and public procurement matters. The policy, institutional and legal framework to prevent corruption is fragmented and has significant gaps. Law-enforcement agencies are fragmented and vulnerable to undue political interference. Prosecutors are not sufficiently proactive. Financial investigations and asset seizures are largely ineffective. Fight against money laundering needs to be stepped up. Final convictions in high-level corruption cases are very rare and sanctions are not deterrent enough. Prevention of violent extremism and counterterrorism policies and measures need to be strengthened. The coordination of migration-related measures among competent institutions across all levels of government is poor. Persons looking for international protection cannot effectively access asylum procedures.

Bosnia and Herzegovina needs in particular to adopt and implement legislation on conflict of interests and whistle-blowers' protection, ensure the effective functioning and coordination of anti-corruption bodies, align the legislation and strengthen capacities on public procurement, ensure effective cooperation among law enforcement bodies and with prosecutor's offices, demonstrate progress towards establishing a track record of proactive investigations, confirmed indictments, prosecutions

[17] *European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union,* Brussels, 29.5.2019, COM (2019) 261 final.

and final convictions against organised crime and corruption, including at high-level, and de-politicise and restructure public enterprises and ensure transparency of privatisation processes»[18].

5.2.2. The "Priebe report"

In 2019 the European Commission launched an initiative to monitor the whole Rule of Law system in Bosnia and Herzegovina, from Law Enforcement Agencies to Courts. This activity was undertaken within the framework of the Commission's Opinion on the EU membership application of Bosnia and Herzegovina. The focus of the Initiative, led by Mr Reinhard Priebe, former Director at the EU Commission and a senior rule of law expert, was on the monitoring and assessment of effective implementation of Rule of Law-reforms and increasing the accountability of the Rule of Law-chain in Bosnia and Herzegovina. Mr Priebe's findings were summarized in the Expert Report on Rule of Law issues in Bosnia and Herzegovina[19], published on the 5 December 2019 in Brussels, Belgium.

Regarding the organization of criminal justice system, he stated: «Cooperation between state, entities/district and cantonal jurisdictions is extremely weak. The lack of coordination and cooperation among the participants of the criminal justice system (i.e. law enforcement bodies, prosecutor's offices and related courts on all levels of authority in Bosnia and Herzegovina) inevitably creates conditions for serious dysfunctionality and lack of efficiency ... Such fragmentation and lack of cooperation has a strong negative impact both on the capacity and efficiency of law enforcement, especially in cases of high-level corruption»[20].

Concerning fight against corruption and organized crime, he stated: «The Federation's lack of political will to establish specialised and

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[18] *Ibid*.

[19] *Expert Report on Rule of Law issues in Bosnia and Herzegovina* (http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf) Priebe Reinhard, 5 December 2019, Brussels.

[20] *Ibid*.

independent departments for fight against corruption and organised crime within the Federation of Bosnia and Herzegovina Prosecutor's Office and Federation of Bosnia and Herzegovina Supreme Court is evident[21]. Nevertheless, such specialised departments are essential in complex corruption cases. The special departments at the Bosnia and Herzegovina Prosecutor's Office of Bosnia and Herzegovina and Prosecutor's Office in the Republic of Srpska entity exist but did not achieve any results in high-level cases ... The operational inefficiency in cases of corruption, complex financial crime and organised crime are a cause of particular concern. In these cases, the judicial system is clearly not functioning, which leads to impunity and lack of trust on the part of the citizens. Legal fragmentation and competence arguments are frequently used to justify inaction or to undermine an investigation.

Widespread corruption in the public sphere and its strong link to organised crime is worrying. The courage and professionalism of a few members of the judiciary, prosecutors and law enforcement officers has been observed. However much more effort, courage, responsibility and higher ethical standards are needed to make a decisive difference and eradicate the deep-rooted corruption.

In cases of high-level corruption unexplainable professional and legal mistakes, negligence, abuse of procedures and questionable court decisions have been observed. Furthermore, there seems to be no accountability for such mistakes»[22].

The report findings comply with my previous observation that organizational structure of criminal justice system and its consequences are expression of political will rather than expression of independent judiciary. That being said, it would take a serious political turn in order to resolve the systems failures discovered by the report. The same conclusion could be made from the EU point of view, expressed after the publication of the report.

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[21] *Law against corruption, organized and intercantonal crime of FB&H* ("Official Journal of F B&H" n. 59/14) passed in 2014, prescribed forming a special department for prosecution of corruption, organized crime and intercantonal crime within Federal Prosecutor's Office. However, by the end of 2020 this department is still not formed.

[22] *Expert Report on Rule of Law issues in Bosnia and Herzegovina* (nt. 19).

Following the experts' findings that pointed to a series of deeply concerning rule of law deficiencies in Bosnia and Herzegovina, the EU urged all political leaders, competent authorities, judicial institutions and all judicial office holders in the country to start addressing immediately the findings of the report and the corresponding key priorities identified in the Commission's Opinion. Analysing this "recommendation", it is clear that the EU itself recognized that the first ones to address the issue of legal system deficiencies are politicians.

6. Criminal offences against public administration

6.1. Italian legislation

Criminal offences against public administration in Italian Criminal Code are divided into two groups: Crimes of Public Officials against Public Administration and Crimes of Private Persons against Public Administration.

Crimes of Public Officials against Public Administration are listed in Chapter I of Italian CC (artt. 314-335 *bis*) including: embezzlement, extortion (through bribery), bribery, abuse of office, refusal/abuse of official acts.

Crimes of Private Persons against Public Administration are listed in Chapter II of Italian CC (artt. 336-360) including: violence/resistance to a public official, insulting a public official, disturbing freedom of enchantment, breach of contract and fraud in public supplies, boasting credit, trafficking in illicit influences.

6.2. Bosnia and Herzegovina legislations

In Bosnia and Herzegovina criminal offences against public administration are prescribed by the criminal codes of the state, entities and Brčko district. All of these offences can be divided into: criminal offences of bribery and criminal offences against official or other

responsible duty and criminal offences defined as corruptive by the High Judicial and Prosecutorial Office of Bosnia and Herzegovina (HJPC)[23].

6.2.1. Criminal offences of bribery and criminal offences against official or other responsible duty

- Criminal Code of Bosnia and Herzegovina (state CC) – Title XIX:
- Accepting gifts or other form of benefits (Art. 217)
- Giving gifts or other form of benefits (Art. 218)
- Accepting gifts or other form of benefits for interceding (Art. 219)
- Giving gifts or other form of benefits for interceding (Art. 219a)
- Abuse of office or official authority (Art. 220)
- Office embezzlement (Art. 221)
- Fraud in the office (Art. 222)
- Unauthorized lend of assets in the office (Art. 223)
- Lack of commitment in the office (Art. 224)
- Forging of official document (Art. 226)
- Illegal collection and disbursement (Art. 227)
- Unlawful release of a detainee (Art. 228)
- Unlawful appropriation of objects while searching or carrying out an enforcement order (Art. 229)

[23] The High Judicial and Prosecutorial Council of Bosnia and Herzegovina is an independent institution established under the Law on the HJPC BiH ("Official Gazzette of BiH" nn. 25/04, 93/05, 48/07 and 15/08), in 2004, with the task of ensuring the maintenance of an independent, impartial and professional judiciary in BiH. The Law establishes the following remit: appointment of judges, prosecutors and legal associates, disciplinary responsibility, judicial administration and statistics, judicial institutions budgets, supervision over professional development, introduction of ICT systems, as well as taking a leading role in the implementation and coordination of reform activities in the BiH justice sector. HJPC is also a state-level regulatory body establishing the standards of ethics and professional conduct for judicial community. In accordance with the Law, the Council is composed of representatives of the BiH legal community (judges, prosecutors and lawyers), and the executive and legislature. Council members are elected for a term of four years with the possibility of re-election.

– Criminal Code of Federation of Bosnia and Herzegovina – Title XXXI:

Defines the criminal offences of bribery and criminal offences against official or other responsible duty similarly as state CC; additionally recognises in this Title the criminal offence:

– Disclosure of official secret (Art. 388)
– Criminal Code of Republic of Srpska – Title XXV:

Defines the criminal offences against official or other responsible duty mostly the same way as state CC and CC Federation of Bosnia and Herzegovina; additionally recognises in this Title next criminal offences:

– Disclosure of official secret (Art. 323)
– Misuse of budget (Art. 324)
– Unlawful giving benefits to business entities (Art. 325)
– Testimony extortion (Art. 328)
– Violation of human dignity through misuse of official position or authority (Art. 329)
– Criminal Code of Brčko District of Bosnia and Herzegovina – Title XXXI:

Defines the criminal offences of bribery and criminal offences against official or other responsible duty same way as state CC; additionally, recognises in this Title following criminal offences:

– Unlawful giving of benefit (Art. 377a)
– Disclosure of official secret (Art. 378).

6.2.2. Other criminal offences defined by the High Judicial and Prosecutorial Office as corruptive which belong to other catalogues (Titles) of criminal offences defined by CCs in Bosnia and Herzegovina

– Examples (CC Bosnia and Herzegovina):
– Violation of the voters' choice (Art. 151 *sub* 1) – if the act of violation has been undertaken by bribe
– Uncovering of classified information (Art. 154 *sub* 1a) – if the motive is greed
– Violation of the law by judge (Art. 238)

- Trade in human beings (Art. 186 *sub* 3 and 4) – if the criminal offence has been committed by official person who is giving or receiving payments or other benefits in the course of its work
- People smuggling (Art. 189 *sub* 3) – if the offence has been committed by abuse of official authority
- Other criminal offences both in CC Bosnia and Herzegovina and entities and BD Bosnia and Herzegovina CCs.

It should be noted that definitions of these criminal offences in Bosnia and Herzegovina's legislations mostly correspond to provisions of The UN Convention against corruption, and The COE Criminal Law Convention against Corruption of which the state is a party, as we will see in the case of criminal offence Abuse of office or official authority.

6.3. "Bribery" and "Corruption"

When discussing criminal offences against public administration, a clear distinction between corruption and bribery should be made. In the case of corruption there is a position of equality between the parties involved, a free agreement which leads to conspiracy (*pactum sceleris*) that involves the private citizen and the public official. On the other hand, in the case of bribery the public official is in the superior position to the public official that allows him install fear towards the citizen.

In that sense, the most serious crime of bribery in Italian CC is called *concussione* (Extortion through bribery): «The public official or public service representative who, abusing his quality or his powers, forces someone to give or promise unduly, to him or to a third party, money or other benefit is punished with imprisonment from six to twelve years»[24]. By the judgment of Italian Supreme Court, «the offense exists in the presence of a constricting abuse of the public official implemented through violence or threat, from which derives a serious limitation of the freedom of self-determination of the recipient who, without receiving any advantage, is faced with the alternative of suffering the prospective evil or to avoid it by giving or promising utility»[25].

[24] Art. 317 of the Italian Criminal Code (Text amended by Law 190/2012).
[25] Judgment of 10.24.2013 (dep. 14.3.2014), n. 12228.

In CC's in Bosnia and Herzegovina however, there is no such criminal offence. Accepting gifts or other form of benefits as an offence lacks the notion of force (violence or threat), as it states: «An official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him, shall be punished by imprisonment for a term between one and ten years»[26]. Since in the latter, the public official is just demanding, while not imposing a serious threat, the citizen still possesses a freedom of self-determination. In that way a protected legal good is only good performance and the impartiality of public administration, and the free determination of individuals is the protected legal good which makes the offence in Italian CC more severe. Having this in mind, there is a significant difference in minumal sanction, which is 6 years for the *concussione* and only one year for the Accepting gifts or other form of benefits.

6.4. The Structure of criminal

Each year HJPC publishes a Structure of criminal, which incorporates data on all criminal offences that were processed by prosecutor offices' and courts in one year. The Council gathers these statistic data from a Case management system (CMS), an information system that is used by all courts and prosecutors' offices throughout the country. By the Structure of criminal in 2019[27], regarding Criminal offences of corruption and criminal offences against official duty or other responsible duty there were 1.697 criminal reports.

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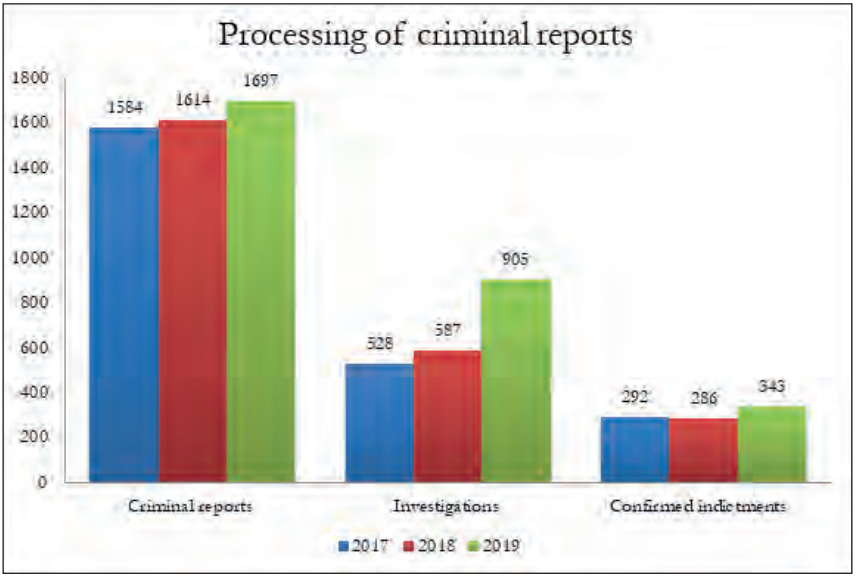
[26] Art. 217 Criminal Code of Bosnia and Herzegovina.

[27] https://vstv.pravosudje.ba/.

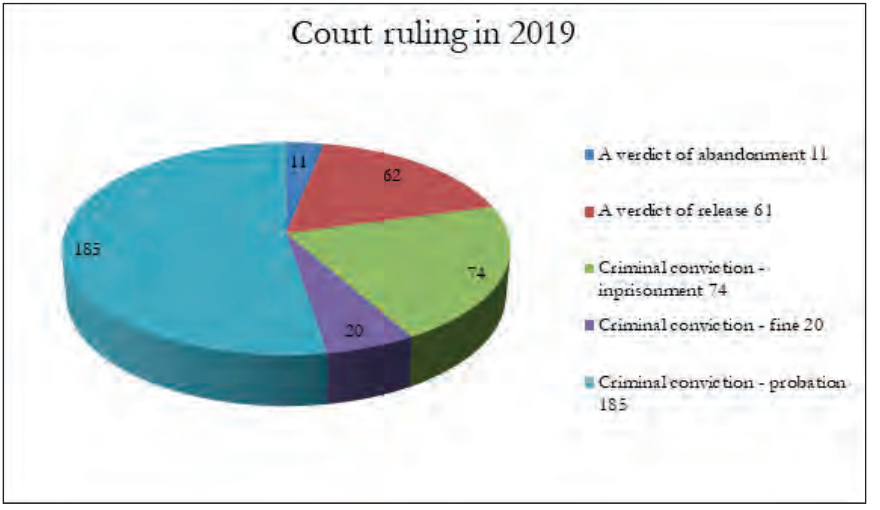


During the same year prosecutors' offices in Bosnia and Herzegovina started 905 investigations for these offences. It is important to point out that not all of these investigations refer to criminal reports submitted in 2019. The same applies for the 343 confirmed indictments – not all of those resulted from investigations started in 2019. According to criminal laws in Bosnia and Herzegovina, investigation should be over in maximum period of 6 months, so it's understandable that some of those indictments are result from investigations started in previous year. Taken into account the number of reports and investigations in 2018, it can be concluded that there is big disproportion between number of submitted reports and investigations ordered by the prosecutors.

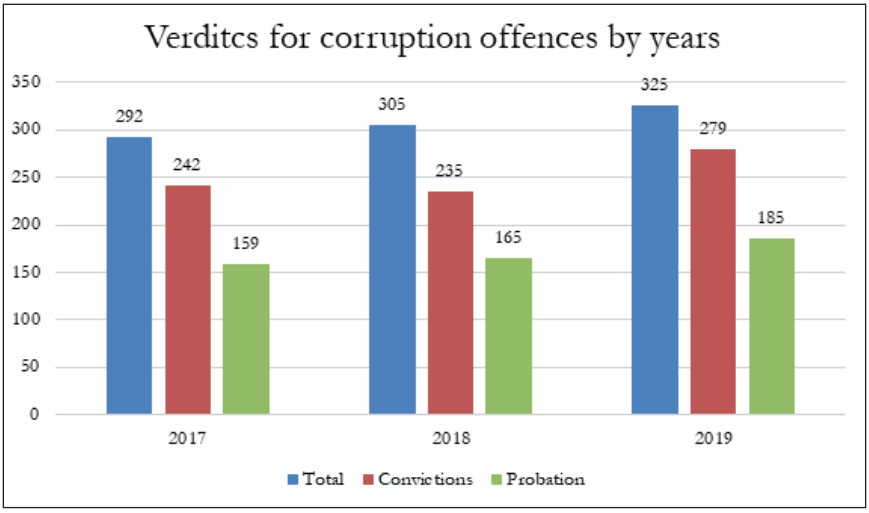
However, there is notable tendency of opening more investigations and confirmed indictments from 2017 to 2019, which could indicate that prosecutors are putting more effort in solving cases of corruption. Other positive tendency is rise of criminal reports on corruption during the past three years. This could indicate that there is an increase of citizens' trust in judiciary institutions when it comes to fighting corruption, or

that citizens or other institutions, tend to recognize better corruptive behaviours that occur in their environment as such.

Also, when discussing the statistics regarding prosecutors' work on criminal reports of corruption, the number of total criminal reports received in one year should be taken into account. For instance, in 2019 there were 22,540 criminal reports submitted for various criminal offences. Looking at the whole picture, the number of 1.697 reports of corruption offences represents only 7.5% of reports submitted to the prosecutors' offices. Once again, it goes to show that these "victimless crimes" do not seem to provoke much interest in reporting, and that the possibility of adequate measurement of corruption phenomena in one state is questionable.



In 2019 for the offences of corruption, there were total of 325 verdicts brought by courts. Considering types of verdicts, it is notable that out of 279 convictions, 185 or 66% of were probation sentences. When compared to results from the previous years, it is obvious that this ratio doesn't change much, in 2017 it was 65.7% and in 2018 it was 54 % so the conclusion is that the majority of convictions for the offences of corruption are probation sentences.



It is also important to emphasize that imposed sanctions for criminal offences of bribery in criminal codes in Bosnia and Herzegovina vary from 6 months to 12 years imprisonment. Taken this into account, rather mild sanctions given by courts (66% of the convictions are probation) cannot achieve special nor general prevention of crime, which is the purpose of sanctioning itself. Also, high percentage of these mild sanctions indicates that in majority of cases indictments were not made for cases of high-level corruption.

6.5. Abuse of the office

The most most frequent offence of corruption in Bosnia and Herzegovina is Abuse of the office or official authority. By the Structure of criminal in 2019, there was total of 106 convictions for this offence, which is 38% of total convictions for the corruption offences.

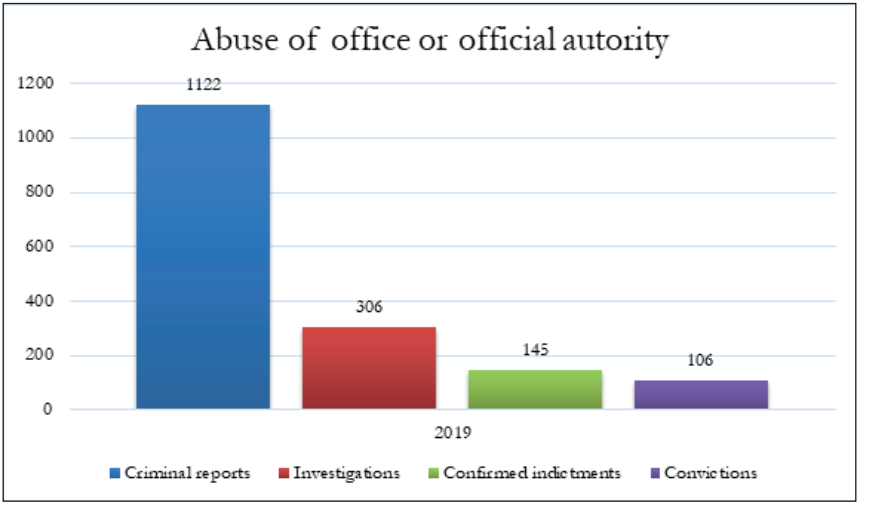
In its basic form it is defined as follows: «An official or responsible person in the Bosnia and Herzegovina institutions who, by taking advantage of his office or official authority, exceeds the limits of his official authority or fails to execute his official duty, and thereby acquires a benefit to himself or to another person, or causes damage to another

person or seriously violates the rights of another, shall be punished by imprisonment for a term between six months and five years»[28].

For this form of the offence, imposed sanction is 6 months to 5 years of imprisonment at the state level, Brčko District and Federation of B&H level, but 1 to 5 years of imprisonment in Republic of Srpska.

By this definition, the perpetrator of the offence is an official or responsible person in B&H institutions (or institutions of entities or Brčko District). The performing act consists of exceeding the limits of official authority or failure to execute official duty, and thereby acquire a benefit to himself or to another person, or cause damage to another person or seriously violate the rights of another person.

In its aggravated form, if a property gain acquired by the perpetration of this criminal offence exceeds the amount of 10.000 KM,[29] the punishment would be 1 to 10 years of imprisonment at all levels; or if a property gain acquired by the perpetration of this criminal offence exceeds the amount of 50.000 KM, the punishment would be no less than 3 years of imprisonment at state level, Brčko District and Federation of B&H level but 2 to 12 years of imprisonment in Republic of Srpska.



[28] Art. 220 Criminal Code of Bosnia and Herzegovina.

[29] KM (Bosnian Convertible Mark – BAM) is a currency in Bosnia and Herzegovina, 1 KM equals cca. 0.5 Euro.

There is also a special provision that prescribes forfeiture of unlawfully acquired property gain for this criminal offence that is identical in all criminal codes in the state.

By the Structure of criminal in 2019 it is clear that there is significantly small number of convictions in comparison to submitted criminal reports for this offence, only 9,4% of the reports results in convictions. Looking at the figures only, one can easily conclude that prosecutors' offices are doing far from their best when it comes to investigating and persecuting for this offence.

Crimes of corruption are mainly consentient criminal offenses, based on agreement between people involved in it. If that agreement is fulfilled, there is no interest for the people involved to provide any information of it – on a contrary there is an interest to withhold information or destroy any incriminating traces. This specific characteristic of corruption offenses poses a significant problem of gathering evidence for the prosecution.

In Bosnia and Herzegovina, it has to be recognized that apart from the usual difficulties regarding proving of the corruption offences, the additional complication may present unclear law provisions on the range of official duties of responsible person, especially at the state level. As previously mentioned, due to highly complicated administration structure in the state there are often cases of overlapping of competences between the state, entities and cantons. The state level institutions in many cases have only coordinating competence and the real executive authority is given to entities' or cantonal institutions. That being said, not always is the case that a manager of an institution is actually the "responsible person" because it is hard to prove that some "official duty" belongs only to him.

6.5.1. Comparison with legal provisions on Abuse of office in Italian legislation

In Italian criminal legislation, Abuse of Office is prescribed as follows: «Unless the fact does not constitute a more serious offence, a public official or a person in charge of public service who, in the performance

of his or her duties or service, in violation of the law or regulations, or by failing to abstain in the presence of an interest of his or her own or of a close relative or in the other prescribed cases, intentionally procures for himself or others an unjust financial advantage or causes unjust damage to others, shall be punished by imprisonment of from one to four years»[30].

Comparing the two criminal law provisions there are noticeable similarities:

- committed by public official or person in charge of public service/ responsible person in a public institution
- by exercising his duties or service/office or official authority
- can be done by doing, or abstaining
- unjust benefit/financial advantage is acquired or
- unjust damage/violation of another's right is caused.

Since both countries are parties to The United Nations Convention against Corruption, it could be concluded that the Conventions' intention was successfully implemented regarding this offence, as it was proscribed: «Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions»[31].

The main difference between the two provisions is that in the Italian law there is a notion of 'intent' which is in accordance with the convention. This means that in order for a person to be criminally liable for this offence it is necessary to prove existence of criminal intent, therefore it is not possible to commit this offence in negligence. However, there is a provision in UNCAC which states: «Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances»[32].

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[30] Art. 322 Italian Criminal Code.

[31] Art. 19 Abuse of functions, Chapter III Criminalization and law, UNCAC, 18.

[32] UNCAC, Art. 28. Knowledge, intent and purpose as elements of an offence, 22.

It could be concluded that this rather broad provision gives a beneficial support to the prosecution in providing evidence for the offence in court proceedings. Being a mandatory but also a subjective element to the crime, that's mostly hard to prove, it is better not to have too formal requirement that has to be met in order to be considered as proved fact.

Regarding the definition of the Abuse of office offence in Bosnian law(s) it could be said that the law provisions on the offence should be amended with the notion of intent. The benefit of equal regulation according to the UNCAC should be in avoiding different judiciary practice when dealing with this offence that can have international character, which is one of the aims of international treaties itself.

7. Conclusion

During this research on fight against corruption, from the point of view of criminal law, many similarities arose in fields which I maybe did not expect them to exist. On the other side, some differences came to surface where seemed to some similarities between the two countries. Since Italy is significantly larger country, with administrative division based on long historical background, it was somehow presumable that court jurisdictions would follow that division which could implicate possible existence of different legal systems. However, it turned out not to be the case in Italy, but in Bosnia and Herzegovina which despite its rather small territory has complex administrative division which is then followed by the court organisation. As demonstrated, the latter presents significant obstacle for cooperated and coordinated functioning of judiciary. Also it creates an opportunity for evasion of justice especially in cases of organized crime where cooperation of justice institutions and police agencies is a necessity. Unfortunately, this is the case with high level corruption cases, where Bosnia and Herzegovina still doesn't have successful court proceedings which could be the foundation for general prevention of these crimes.

Considering that, it was good not to have a premise on this topic, but to let the results of the research lead to conclusions. Also, I've tried to maintain in the field of criminal law and judiciary institutions concerning

fight against corruption as much as possible, in order to avoid too broad approach to the topic, and possible misleading conclusions. Based on this approach, this material cannot be considered as a whole picture of anti-corruption practices in the two countries, which should include activities of anti-corruption agencies and other institutions involved. Particularly excluding the Italian National Anti-Corruption Authority ANAC (*Autorità Nazionale AntiCorruzione*) turned out to be difficult, when discussing this topic, because of its significant role in the fight against corruption. But at the same time, the intention was to show that the existing similarities in (criminal) legal provisions of the countries are not sufficient to ensure effective results in this field. Further conclusion is that The Agency for the Prevention of Corruption and Coordination of the Fight against Corruption APIK (*Agencija za prevenciju korupcije i koordinaciju borbe protiv korupcije*) in Bosnia and Herzegovina, though its existence formally fulfils requirements given by the international treaties, due to its limited competences does not have as significant role as ANAC does in Italy. For that reason, preventive measures that are proven to be of most significance in fighting corruption, fail to give results in Bosnia and Herzegovina.

The previously mentioned corresponds with recommendations given in the "Priebe report" which I find to be highly constructive and given in good will in order to make Bosnia and Herzegovina more functional state, especially in the field of this topic. As we've seen, one of the key issues is the lack of coordination and cooperation among the participants of the criminal justice system.

At the time of writing these ending conclusions a new affair struck the High judicial and prosecutors office, which is the key institution for establishing the mentioned cooperation and coordination. After a second recording of the president of HJPC being involved in incriminating arrangements hit the public, there is a big pressure from domestic and international circles on him to resign from the head position. Despite that, since the recording had not been lawfully authorized, he claims that the whole case should be considered as an attack to the state, and that his security is jeopardized by this recording. It should be also pointed out that for now, his only public support is coming from the previously

mentioned political party which member is "blacklisted" for being involved in corruption activities.

It is arguable whether it could be expected from the latest crisis to emerge the long awaited change in functioning of judiciary. However, most agree that in order make progress in functioning of judiciary system a change in top management is necessary. As stated earlier, a positive outcome is something that is to be expected, since the reform of judiciary is one of key priorities given by the European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, and all major political stakeholders accepted those as an obligation to be fulfilled.

Mario Blaževića*

Base Erosion and Profit Shifting (BEPS) Action Plans and the Correlation Between Corruption and Tax Evasion in the Tax Administration

Summary. 1. – Introduction. 2. – Fundamental principles of taxation. 2.1. – Fundamental principles of taxation. 2.2. – Taxes on income and consumption. 2.3. – Corporate income tax. 3. – Global Forum on transparency and exchange of information for tax purposes. 3.1. – Automatic Exchange of Information (AEOI). 3.2. – The standard for Exchange of Information on Request (EOIR). 4. – BEPS (Base Erosion and Profit Shifting). 4.1. – BEPS Action Plans. 4.1.1. – Action Plan 1: Addressing in the tax challenges of the Digital Economy. 4.1.2. – Action Plan 2: Neutralising the effetcs of hybryd mismatch arrangements. 4.1.3. – Action Plan 3: Designing the effective strenghten controlled foreign company (CFC) rules. 4.1.4. – Action Plan 4: Limiting base erosion involving interest deductions and other financial payments. 4.1.5. – Action Plan 5: Countering harmful tax practices more effectively, taking into account transparency and substance. 4.1.6. – Action Plan 6: Preventing the granting of treaty benefits in inappriopriate circumstances. 4.1.7. – Action Plan 7: Preventing the artificial avoidance of permanent establishment status. 4.1.8. – Action Plan 8-10: Aligning tranfer pricing outcomes with value creation: intangibles risks & capital high-risk transactions. 4.1.9. – Action Plan 11: Measuring and monitoring BEPS. 4.1.10. – Action Plan 12: Mandatory disclosure rules. 4.1.11. – Action Plan 13: Trasfer pricing documentation and country-by-country reporting. 4.1.12. – Action Plan 14: Making dispute resolution mechanisms more effective. 4.1.13. – Action Plan 15: Developing a multilateral instrument to modify bilateral tax treaties. 5. – The correlation between corruption and tax evasion. 6. – Conclusion.[1]

1. Introduction

In an increasingly interconnected world, national tax laws have not always kept pace with global corporations, fluid movement of capital,

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and the rise of the digital economy: all this contributed to allow MNEs to exploit the rules so to generate double non-taxation, with negative effects on the fairness and integrity of tax systems. All this had a negative impact on tax systems around the world, so it was necessary to do something quickly in order to preserve the fiscal stability of countries around the world. The integration of national economies and markets has increased substantially in recent years, putting a strain on the international tax rules, which were designed more than a century ago.

The solution to the weaknesses shown by the previous traditional tax system, which could no longer respond to the challenges and needs of the new business environment, was report Addressing Base Erosion and Profit Shifting in February 2013, OECD and G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. The Action Plan identified 15 actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty.

Base Erosion and Profit Shifting (BEPS) which refers to the erosion of a national tax base and one process by which this happens. Basic erosion and profit diversion (BEPS) refers to a set of measures to prevent erosion of the national tax base and the outflow of profits to other countries where the tax rate is low. This practice is basically legal, but it costs all countries between 100-240 billion USD in lost revenue annually, which is the equivalent to 4-10% of the global corporate income tax revenue[1].

So the main aim by creator BEPS is be in that how to reducing the potential for base erosion and profit shifting. The creation of BEPS was necessary to restore confidence in the tax system and ensure taxation of profits where economic activities take place and create new value.

In the second part of my master's thesis, I would also refer on the connection between tax evasion and corruption. Although corruption and tax evasion are distinct and separate problems, they can easily become intertwined and reinforcing. A society that is more corrupt may enable more tax evasion as corrupt officials seek more income via bribes; conversely, higher levels of tax evasion may drive corruption by offering

[1] OECD (https://www.oecd.org/tax/beps/).

more opportunities for bribes. Although we have a lot of papers on each topic separately, the relationship between these two issues has remained largely an unexplored area.

We will focus on showing that there is a clear link between society corruption and the level of tax evasion. The results will show that corruption is what largely drives a higher level of tax evasion; that is, corruption in the tax administration is a statistically and economically significant determinant of tax evasion. Therefore, to conclude, the higher the acceptance of bribes, the higher the level of tax evasion and the fight against tax evasion is, in a way, the fight against corruption.

2. Fundamental principles of taxation

In order to better understand the ways in which tax evasion can be reduced, this chapter will discuss the principles of tax policy that have traditionally guided the development of tax systems.

The following is an overview of the principles on which corporate tax revenue is based, focusing primarily on the taxation of cross-border income under domestic law and in the context of tax treaties. Finally, it provides an overview of the design features of value added tax (VAT) systems.

2.1. Fundamental principles of taxation

In a context where many governments have to cope with less revenue, increasing expenditures and resulting fiscal constraints, raising revenue remains the most important function of taxes, which serve as the primary means for financing public goods such as maintenance of law and order and public infrastructure. The fundamental principles of taxation include neutrality, efficiency, certainty and simplicity, effectiveness and fairness, as well as flexibility. In addition to these well-recognized principles, equity is an important consideration for the design of tax policy[2].

[2] https://www.oecd-ilibrary.org/docserver/9789264218789-5-en.pdf?expires=1604672427&id=id&accname=guest&checksum=140C9E04C5A5341A4F57440F5F6C4163#:~:text=2.1%20Overarching%20

- Neutrality: Taxation should seek to be neutral and equitable between forms of business activities. A neutral tax will contribute to efficiency by ensuring that optimal allocation of the means of production is achieved. A distortion, and the corresponding deadweight loss, will occur when changes in price trigger different changes in supply and demand than would occur in the absence of tax.
- Efficiency: Compliance costs to business and administration costs for governments should be minimized as far as possible, while achieving maximum results at the same time.
- Certainty and simplicity: Tax rules should be clear and simple to understand, so that taxpayers know their position and what to expect. A simple tax system makes it easier for individuals and businesses to understand their obligations and entitlements.
- Effectiveness and fairness: Taxation should produce the right amount of tax at the right time, while avoiding both double taxation and unintentional non-taxation. In addition, the potential for evasion and avoidance should be minimized.
- Flexibility: Taxation systems should be flexible and dynamic enough to ensure they keep pace with technological and commercial developments. It is important that a tax system is dynamic and flexible enough to meet the current revenue needs of governments while adapting to changing needs on an ongoing basis. This means that the structural features of the system should be durable in a changing policy context, yet flexible and dynamic enough to allow governments to respond as required to keep pace with technological and commercial developments, taking into account that future developments will often be difficult to predict.

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principles%20of%20tax%20policy&text=These%20include %20neutrality%2C%20 efficiency%2C%20certainty,fairness %2C%20as%20well%20as%20flexibility.

2.2. Taxes on income and consumption

Most countries impose taxes on both income and consumption. While income taxes are levied on net income (i.e. from labour and capital) over an annual tax period, consumption taxes operate as a levy on expenditure relating to the consumption of goods and services, imposed at the time of the transaction.

There are a variety of forms of income and consumption taxes. Income tax is generally due on the net income realized by the taxpayer over an income period. In contrast, consumption taxes find their taxable event in a transaction, the exchange of goods and services for consideration either at the last point of sale to the final end user (retail sales tax and VAT), or on intermediate transactions between businesses (VAT) (OECD, 2011), or through levies on particular goods or services such as excise taxes, customs and import duties. Income taxes are levied at the place of source of income while consumption taxes are levied at the place of destination (i.e. the importing country). It is also worth noting that the tax burden is not always borne by those who are legally required to pay the tax.

2.3. Corporate income tax

Although the tax base can be defined in a great variety of ways, corporate income tax (CIT) generally relies on a broad tax base, formulated to encompass all types of income derived by the corporation whatever their nature, which encompasses the normal return on equity capital in addition to what can be described as 'pure' or 'economic rents' i.e. what the enterprise earns from particular competitive advantages which may be related to advantageous production factors (such as natural resources that are easily exploitable or low labour costs) or advantages related to the market in which the products will be sold (e.g. a monopolistic position).

The corporate taxes are generally imposed on net profits, that is receipts minus expenses. Two basic models, different in their approach but similar in their practical result, are used to assess this taxable income:

- The receipts-and-outgoings system (or profit & loss method): net income is determined as the difference between all recognized income derived by a corporation in the tax period and all

deductible expenses incurred by the corporation in the same tax period.

- The balance-sheet system (or net-worth comparison method): net income is determined by comparing the value of the net assets in the balance sheet of the taxpayer at the end of the tax period (plus dividends distributed) with the value of the net assets in the balance sheet of the taxpayer at the beginning of the tax period.

3. Global Forum on Transparency and Exchange of Information for Tax Purposes

The Global Forum on Transparency and Exchange of Information for Tax Purposes is a multilateral framework for tax transparency and information sharing, within which over 160 jurisdictions participate on an equal footing. Transparency and exchange of information for tax purposes is about putting an end to bank secrecy and tax evasion through global tax co-operation. The Global Forum is a key international body working on the implementation of international standards. The Global Forum monitors and peer reviews the implementation of international standard of exchange of information on request (EOIR) and automatic exchange of information (AEOI)[3].

The Global Forum Terms of Reference break down the standard in ten essential elements, divided into three main parts: A – availability of information, B – access to information, C – exchange of information. For the exchange of information to be effective, each jurisdiction should have appropriate international EOI instruments in place with all relevant partners, but it must also make sure that the information sought is available and accessible to its competent authority. Information which is not available or cannot be accessed cannot be exchanged. However, even if a jurisdiction never exchanges information, implementing the Global Forum's standards on availability of and access to information is key to ensuring that it can protect its own domestic tax base.

[3] https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews_2219469x.

The EOIR provides for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. All Global Forum members have agreed to have their implementation of the EOIR standard be assessed by peer review. In addition, non-members that are relevant to the Global Forum's work are also subject to review. The legal and regulatory framework of each jurisdiction is assessed as is the implementation of the EOIR framework in practice. The final result is a rating for each of the essential elements and an overall rating.

3.1. Automatic Exchange of Information (AEOI)

Automatic exchange of information (AEOI) provides for the automatic exchange of a predefined set of information between tax authorities. The AEOI Standard requires the annual exchange of information on financial accounts held by non-resident individuals and entities in a pre-defined format. The information exchanged includes details about the financial account (e.g. the financial institution maintaining it, the account number and the account balance) and details about the account holder (e.g. their name, address, date of birth and Taxpayer Identification Number).

Main reason why Governments are adopting international standards for Automatic Exchange of Information (AEOI) is to help fight cross-border tax evasion.

Implementing the AEOI Standard requires jurisdictions to collect the information each year from their financial institutions (which include banks, hedge funds and investment trusts) and to automatically exchange it with the jurisdictions where the account holder is tax resident (provided the jurisdiction has in place the necessary framework to keep the information confidential and properly safeguarded). The AEOI Standard is therefore built on three key components:

1. A domestic legal framework that requires financial institutions to collect and report the information;

2. Exchange agreements between all Interested Appropriate Partners (those interested in receiving information and that meet the required standards in relation to confidentiality and data safeguards);

3. The systems and processes for the information to be reported and exchanged effectively in practice, including to ensure compliance by Financial Institutions.

Through these three components the AEOI Standard provides for a powerful tool to help deter and identify offshore tax evasion through holding financial assets abroad.

AEOI requires jurisdictions to have in place the required standards in relation to confidentiality and data safeguards, particularly in relation to the policies and systems, to ensure the information they receive is kept safe. This requires the following components:

- A domestic and international legal framework that keeps the use of the information restricted to the purposes under which the information is exchanged and which forbids its unauthorized disclosure;
- Policies and systems that ensure that in practice the information is kept confidential and properly safeguarded.

Even before exchanges had started, AEOI was having an impact: taxpayers came forward and disclosed formerly concealed assets and income through voluntary compliance mechanisms and other offshore investigations to avoid being caught by AEOI once it started. By June 2019, jurisdictions around the globe had identified over EUR 95 billion in additional revenue (tax, interest, penalties) from such initiatives.

Now with AEOI a reality, we can see the clear benefit to tax administrations of AEOI – information on more than 47 million financial accounts were exchanged in 2018 alone, with a total value of around EUR 4.9 trillion. Tax administrations are now able to assess which of these accounts had not been disclosed and collect the taxes due on the income.

The OECD's analysis shows that bank deposits in international financial centers (IFCs) have fallen by approximately 34% over the past ten years for a decline of USD 551 billion. Specifically, AEOI has led to a decline of 20% to 25% in the bank deposits in IFCs over the past decade.

3.2. The Standard for Exchange of Information on Request (EOIR)

The Standard for Exchange of Information on Request (EOIR) has been in operation for many years and all Global Forum members are committed to its implementation. The Global Forum completed a first round of peer reviews in this regard between 2010 and 2016 and strengthened its approach to reviewing the implementation of the EOIR standard, including by requiring the availability of information on who the beneficial owners of assets are. It commenced a second round of peer reviews in July 2016. The results so far show that a huge amount of progress has been achieved to ensure the effective implementation of the EOIR Standard worldwide, although there is still more to do[4].

The Global Forum carries on peer reviews to assess the standard of exchange of information on request (EOIR) and rates the jurisdictions' compliance. Individual elements are clustered in three categories related to various aspects of EOIR:

1. A = Availability of information.

Availability of information, including legal and beneficial ownership of companies, partnerships, trusts, foundations and other legal persons or arrangements; accounting records, including underlying source documentation; banking records, including the legal and beneficial owner of the account and transaction records.

The information must be maintained for at least five years and effective enforcement provisions must ensure the availability of information, including adequate monitoring for non-compliance, as well as sufficiently strong compulsory powers.

2. B = Easy of access to information.

Easy of Access to information and powers to obtain it, including power to access ownership, accounting and banking information; access powers that apply for the purposes of answering a request even if there is no domestic tax reason for accessing the information; access powers that are enforceable with sufficiently strong compulsory powers; suitable limitations to taxpayer notification and appeal rights to prevent EOI from being unduly constrained.

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[4] https://www.oecd.org/tax/transparency/who-we-are/about/.

3. C = Practice of exchange of information.

Practice of exchange of information agreements to provide the legal basis for exchange, including agreements with a network of all relevant international counterparts; safeguards to protect taxpayers' rights and confidentiality; organizational processes to facilitate practical and timely operation of exchange of information.

Overall ratings result form the sum of individual elements of the assessment.

Four distinct ratings can be allocated to a jurisdiction once it has undergone a full peer review:

Compliant*:* The EOIR standard is implemented. This rating can be granted even if a few recommendations were issued, to the extent that no material deficiencies were identified.

Largely Compliant*:* The EOIR standard is implemented to a large extent but improvements are needed. Some deficiencies identified are material but have limited impact on EOIR.

Partially Compliant*:* The EOIR standard is only partly implemented. At least one material deficiency which has had, or is likely to have, a significant effect on EOIR in practice has been identified.

Non-Compliant*:* Fundamental deficiencies in the implementation of the EOIR standard have been identified.

The implementation of the international standards on transparency and exchange of information has been swift and global. Only few jurisdictions have fallen short in meeting the commitments made to the Global Forum. They are provided with support to advance their regulatory environment and practices. As of 1 September 2020, 111 of the 125 jurisdictions reviewed are currently rated as Compliant (22), Largely Compliant (87) or Provisionally Largely Compliant (2), which powerfully signals high compliance with the standard. Only 14 jurisdictions are rated Partially Compliant (11) or Non-Compliant (3).

4. BEPS (Base Erosion and Profit Shifting)

The tax base of country is defined as the persons and the profits that a country is permitted to tax. Base erosion refers to the reduction of the

companies and amount of profits that a country can tax. If a company moves its residence to different country or causes its profit to arise in a different country another country (e.g., by transferring its intellectual property to another country so that royalties go there), then the ability of the original country to collect corporation tax will be diminished. Base erosion is thus caused either by companies or their profit ceasing to be taxable in the country.

MNEs are engaged in active 'aggressive tax planning' so that profits are not taxed. They focused planning on shifting profits out of tax grasp of higher tax country and into lower tax country. The country where profit is shifted are offering low tax regime along their normal corporation tax system to MNEs. Most of MNEs to avoid double non taxation uses structures and new technologies to save deflating high to low tax jurisdiction, it will result in saving tax (for example, CFC and manipulating transfer pricing). Thus profit is shifted by MNEs to a tax saving country 'Safe Tax Heaven'.

Amazon Case: Amazon, a Luxembourg company, which has a significant volume of sales to UK customers and has a large warehouse in the UK. Since the OECD guidelines specifically recognize that a warehouse may not be sufficient to constitute a PE, it is likely that Amazon's profits are not taxable in the UK under standard OECD principles. Those who consider that Amazon 'ought' to pay more tax on its 'fair share' of profit should remember that the rules apply equally to UK companies trading overseas. Nevertheless, it highlights the tensions over a definition of a PE which was designed for the days when a physical presence, or force of sales people, was required in order to make sales in a country[5].

Google Case: Its customers signs their contracts with the company's subsidiary in Ireland, rather than with local branches. Thus Google records most of its international revenue at its European headquarters in Ireland, where the corporate tax rate is low, together with EU membership (that lets companies based in one member state operate across the 27 member countries) and an extensive set of double tax avoidance agreements/

[5] https://www.researchgate.net/publication/270393838_Critical_account_of_the_OECD%27s_Action_Plan_on_Base_Erosion_and_Profit_Shifting.

treaties (DTAAs/DTATs), makes Ireland a very attractive destination for foreign investment. Culling out ratio from the aforementioned Google used complicated structure for shifting profit to Ireland, resulting in billions of profit to the company. The company use Google Ireland to minimize its global tax liabilities, by showing that there is no UK PE of the Irish company. To avoid UK corporate tax Google relied that its sales to UK client take place in Ireland. Despite of the fact the majority of its sale takes place in UK.

Base erosion and profit shifting (BEPS) so refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax. Although some of the schemes used are illegal, most are not. This undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers. Developing countries higher reliance on corporate income tax means they suffer from BEPS disproportionately. BEPS practices cost countries USD 100-240 billion in lost revenue annually.

The OECD/G20 tried to find solution and they brings Inclusive Framework on BEPS together over 135 countries and jurisdictions to collaborate on the implementation of the BEPS Package to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.

BEPS is of major significance for developing countries as Bosnia and Herzegovina due to their heavy reliance on corporate income tax, particularly from multinational enterprises. Engaging developing countries in the international tax agenda is important to ensure that they receive support to address their specific needs and can effectively participate in the process of standard-setting on international tax.

The Inclusive Framework on BEPS allows interested countries and jurisdictions to work with OECD and G20 members on developing standards on BEPS related issues and review and monitor the implementation of the BEPS Package.

On October 30, 2019, Bosnia and Herzegovina also signed the Multilateral Convention on the Implementation of Tax Treaty-Related

Measures to Prevent Base Erosion and Profit Diversion to become the ninetieth jurisdiction to accede to the Convention, which now covers more than 1.600 bilateral tax agreements.

4.1. BEPS Action Plans

The BEPS Package provides 15 Actions which brings together over 135 countries and jurisdictions to collaborate on the implementation of the BEPS Package as solution to tackle tax avoidance.

The main target of the BEPS action plan is to design a new international standard to ensure the coherence of corporate income taxation at the international level. BEPS concern to tackle the new issue arose because of the revolution in the digital economy.

OECD and G20 countries along with developing countries that are participating in the implementation of the BEPS Package and the ongoing development of anti-BEPS international standards established a modern international tax framework to ensure profits are taxed where economic activity and value creation occur.

Countries now have the tools to ensure that profits are taxed where economic activities generating the profits are performed and where value is created. These tools also give businesses greater certainty by reducing disputes over the application of international tax rules and standardising compliance requirements.

The BEPS Package consists in five types of outcomes with different status:

1. The minimum standards (harmful tax practices, treaty abuse, Country-by-Country reporting and dispute resolution mechanism) were agreed in particular to tackle issues in cases where no action by some countries would have created negative spillovers on other countries. These constitute the core of the BEPS implementation. The monitoring will consist of an assessment of the compliance with the minimum standards in the form of a periodic and public report on what countries have done to implement these BEPS outcomes.

2. Common approaches (hybrid mismatch arrangements and interest deductibility) will facilitate the convergence of national practices.

Countries' views are expected to get closer over time through the implementation of these actions. Recommendations for the design of domestic rules and model treaty provisions have been agreed together with detailed commentary for their implementation. Common approaches could become minimum standards in the future.

3. With reinforced international standards (permanent establishment and transfer pricing), existing standards have been updated to be more effective in order to eliminate double taxation and stop abuses. This translates into a set of agreed guidance, which reflects the common understanding and interpretation of provisions based on the OECD and the United Nations (UN) Model Tax Conventions. Follow-up work is needed in these areas and will allow the CFA, where necessary, to provide additional clarification on the new treaty wording and guidance introduced by the reports on Action 7 and Actions 8 to 10. This will lead to the update of the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

4. Best practices (controlled foreign company rules and mandatory disclosure rules) have been designed to support countries intending to strengthen their domestic legislation in specific areas. Best practice approach is not binding, even for the OECD member countries, but reflects an agreement between participating countries that is expected to be followed in practice. A country may supplement this approach with other rules.

5. Analytical reports (tax challenges of the digital economy, economic analysis of BEPS and development of a multilateral instrument) have also been released, leading to further monitoring and implementation work. The evolutions of the work streams on Action 1 and Action 11 will need to be monitored, while the negotiations on the development of a multilateral instrument (under Action 15).

The OECD/G20 Inclusive Framework on BEPS actively monitors the implementation of all the BEPS Actions and reports annually to the G20 on this progress. The implementation of the BEPS Minimum Standards is of particular importance, and each of these is the subject of a peer review process that evaluates the implementation by each member and provides clear recommendations for improvement.

Peer review and monitoring process of the four minimum standards:

- Action 5
- Action 6
- Action 13
- Action 14

As more data becomes available, a fuller picture can be shown of the true cost of tax avoidance and the benefit of the BEPS Project. Finally, addressing the tax challenges arising from digitalization is a key policy issue today. The Inclusive Framework has made major progress by developing a Program of Work and aims to produce a consensus-based, long-term solution for delivery to the G20 in 2020.

4.1.1. Action Plan 1: Addressing in the tax challenges of the digital economy

We live in a time of digitalization that brings people around the world a new modern way and way of life, which basically makes life easier and changes life habits, but also brings with it some new challenges. These changes that digitalization brings has been impact to the companies as well as individuals, who also tried to found a way to adapt to new business models and trends which digitalization brings with it. Before we start talking about digitalization it is important to understand what is a value creation in the digital economy. In the digital economy, value is often created from a combination of algorithms, user data, sales functions and knowledge. For example, a user contributes to value creation by sharing his/her preferences (e.g. liking a page) on a social media forum. This data will later be used and monetized for targeted advertising. The profits are not necessarily taxed in the country of the user (and viewer of the advert), but rather in the country where the advertising algorithms has been developed, for example. This means that the user contribution to the profits is not taken into account when the company is taxed.

The digital economy is massive and still growing. Seven tech giants are now among the top 10 public companies by market capitalization. The value of transactions facilitated by digital platforms is projected to grow by 35% per year in the coming decade. And the top five e-commerce

retailers have sustained annual revenue growth rates of around 32% between 2008 and 2016, while the entire EU retail sector registered on average just 1% annual growth rate in revenue in the same period.

Broader tax challenges raised by the digital economy such as royalties, may be subject to withholding tax in the country of the payer, depending on the terms of any applicable treaty. Whether a transaction is characterized as business profits or as another type of income, therefore, can result in a different treatment for tax treaty purposes. There is a need to clarify the application of existing rules to some new business models in order to determine whether those rules produce appropriate results in the digital economy and whether differences in treatment of substantially similar transactions are justified in policy terms.

That new business models has big implications for the entire tax system, because it had a negative impact on the collection of both direct and indirect taxes (collection of VAT), which imposed the need to revise the tax policies of countries in the world.

Tax rules have been traditionally based on the principle of 'permanent establishment': taxation is linked to the place where all or part of business activities are physically carried out. This framework of understanding economic activity subject to taxation is, however, inadequate in the digital era for at least two reasons. First, it is increasingly difficult to establish the tax presence (so-called 'nexus') of certain companies given that digital business models allow for the provision of digital services with a minimal physical presence in a given tax jurisdiction (so-called 'scale without mass'). Second, the role of data and users and the reliance on intangible assets that characterize new digital business models bring into question how and where value is created.

That fundamental elements of the global tax system that determined where taxes should be paid served their purpose well. Namely, they built in tax security and helped eliminate double taxation by stimulating global trade. Today, however, digitization facilitates three important phenomena – masslessness, reliance on intangible assets, and data centrality – presenting serious challenges to the cornerstones of the global tax system. On the one hand, the emergence of new and often intangible drivers of value has revolutionized entire sectors by creating new business models, while continuously eroding the need for physical

proximity to target markets. This continuously calls into question the effectiveness of existing rules on the distribution of profits and the links for the distribution of taxation of income rights from cross-border activities in a way that is acceptable to all small, large and developed and developed countries. On the other hand, new technologies have made it easier to avoid taxes by diverting profits from multinational companies (MNEs) to low tax jurisdictions or without them. This is the essence of the base erosion and profit diversion (BEPS) project and remains a top priority of the Inclusive Framework. Cross-border trade in goods, services and intangibles (which include for VAT purposes digital downloads) creates challenges for VAT systems, particularly where such products are acquired by private consumers from suppliers abroad. The digital economy magnifies these challenges, as the evolution of technology has dramatically increased the capability of private consumers to shop online and the capability of businesses to sell to consumers around the world without the need to be present physically or otherwise in the consumer's country. This often results in no VAT being levied at all on these flows, with adverse effects on countries' VAT revenues and on the level playing field between resident and non-resident vendors. The main tax challenges related to VAT in the digital economy relate to (i) imports of low value parcels from online sales which are treated as VAT-exempt in many jurisdictions, and (ii) the strong growth in the trade of services and intangibles, particularly sales to private consumers, on which often no or an inappropriately low amount of VAT is levied due to the complexity of enforcing VAT-payment on such supplies.

All this influenced the birth of the idea of establishing a new efficient and sustainable international tax system at the global level, so that it would remain stable and sustainable and increase tax equality between traditional and digital companies.

Under the threat of unilateral measures, which would harm investment and economic growth in a fragile global economy, the European Commission put forward two proposals for fair and effective taxation of the digital economy in March 2018.

First, proposal is a common reform of the EU's corporate tax rules for digital activities. This proposal would enable Member States to tax profits that are generated in their territory, even if a company does not

have a physical presence there. The new rules would ensure that online businesses contribute to public finances at the same level as traditional 'brick-and-mortar' companies. A digital platform will be deemed to have a taxable 'digital presence' or a virtual permanent establishment in a Member State if it fulfils one of the following criteria: It exceeds a threshold of €7 million in annual revenues in a Member State. It has more than 100,000 users in a Member State in a taxable year. Over 3000 business contracts for digital services are created between the company and business users in a taxable year.

The new rules will also change how profits are allocated to Member States in a way which better reflects how companies can create value online: for example, depending on where the user is based at the time of consumption. Ultimately, the new system secures a real link between where digital profits are made and where they are taxed.

The measure could eventually be integrated into the scope of the Common Consolidated Corporate Tax Base (CCCTB) – the Commission's already proposed initiative for allocating profits of large multinational groups in a way which better reflects where the value is created.

Proposal 2 is an interim tax on certain revenue from digital activities. This interim tax ensures that those activities which are currently not effectively taxed would begin to generate immediate revenues for Member States. It would also help to avoid unilateral measures to tax digital activities in certain Member States which could lead to a patchwork of national responses which would be damaging for our Single Market. Unlike the common EU reform of the underlying tax rules, this indirect tax would apply to revenues created from certain digital activities which escape the current tax framework entirely. This system will apply only as an interim measure, until the comprehensive reform has been implemented and has inbuilt mechanisms to alleviate the possibility of double taxation. The tax will apply to revenues created from activities where users play a major role in value creation and which are the hardest to capture with current tax rules, such as those revenues: created from selling online advertising space, created from digital intermediary activities which allow users to interact with other users and which can facilitate the sale of goods and

services between them, created from the sale of data generated from user-provided information.

Tax revenues would be collected by the Member States where the users are located, and will only apply to companies with total annual worldwide revenues of € 750 million and EU revenues of € 50 million. This will help to ensure that smaller start-ups and scale-up businesses remain unburdened. An estimated € 5 billion in revenues a year could be generated for Member States if the tax is applied at a rate of 3%.

With the enduring stalemate at the EU level, France, one of the strongest supporters of an EU approach, took the initiative in July 2019 of introducing a 3% DST on the gross income from digital services of companies with global revenues of € 750m per year or more and revenues above € 25m per year within the country. Digital services of targeted advertising and e-commerce intermediaries fall within the scope of the tax, while some other products and services are exempt. In the absence of a shared approach, more national initiatives will soon materialize. In fact, several other EU countries are poised to introduce a digital tax. For instance, Italy has recently adopted a DST, which will enter into force in January 2021, or even before.

Concrete proposals for the two challenges facing the international income tax can be found in the Program of Work (PoW) to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalization of the Economy published in 31 May 2019.

4.1.2. Action Plan 2: Neutralizing the effect of hybrid mismatch arrangements

BEPS Action 2 called for the development of model treaty provisions and recommendations regarding the design of domestic rules to neutralize the effects of hybrid instruments and entities.

Hybrid mismatch arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation, including long-term deferral. These types of arrangements are widespread and result in a substantial erosion of the taxable bases of the countries concerned. They

have an overall negative impact on competition, efficiency, transparency and fairness.

With a view to increasing the coherence of corporate income taxation at the international level, the OECD/G20 BEPS Project called for recommendations regarding the design of domestic rules and the development of model treaty provisions that would neutralize the tax effects of hybrid mismatch arrangements.

The work by OECD member states and Inclusive Framework member jurisdictions on BEPS Action 2 culminated in the 2015 OECD report on Neutralizing the Effects of Hybrid Mismatch Arrangements.

BEPS Action 2 recommendations target mismatches resulting from differences in the tax treatment of financial instruments or entities. The work on hybrid mismatches was subsequently expanded to deal with similar opportunities that arise through the use of branch structures, resulting in a 2017 OECD report Neutralizing the Effects of Branch Mismatch Arrangements.

OECD published the report that sets out the recommendations for the design of the domestic law and sets out recommended changes to the OECD Model Tax Convention. Once translated into domestic and treaty law, these recommendations will neutralize hybrid mismatches, by putting an end to multiple deductions for a single expense, deductions without corresponding taxation or the generation of multiple foreign tax credits for one amount of foreign tax paid. By neutralizing the mismatch in tax outcomes, the rules will prevent these arrangements from being used as a tool for BEPS without adversely impacting cross-border trade and investment.

Action 2 explicitly refers to possible amendments to the OECD Model Tax Convention (OECD 2014) to ensure that dual residents are not used to unjustifiably benefit from a contract.

Change of Art. 4 (3) OECD Model of the tax convention (OECD, 2014) which will result from the work on Action 6 1 so that the new version of Art. 4 (3) reads as follows:

If, by virtue of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavor to determine by mutual agreement the Contracting State or otherwise constituted and

any other relevant factors. In the absence of such an agreement, such person shall not be entitled to any relief or exemption from the taxes provided for in this Convention, except to the extent and in such manner as the competent authorities of the Contracting States may agree.

The Action Item states that this may include:

(a) changes to the OECD Model Tax Convention to ensure that hybrid instruments and entities (as well as dual resident entities) are not used to obtain the benefits of treaties unduly;
(b) domestic law provisions that prevent exemption or non-recognition for payments that are deductible by the payer;
(c) domestic law provisions that deny a deduction for a payment that is not includible in income by the recipient (and is not subject to taxation under CFC or similar rules);
(d) domestic law provisions that deny a deduction for a payment that is also deductible in another jurisdiction;
(e) where necessary, guidance on co-ordination or tie-breaker rules if more than one country seeks to apply such rules to a transaction or structure.

4.1.3. Action Plan 3: Designing the effective strengthen controlled foreign company (CFC) rules

Action 3 of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) recognizes that groups can create non-resident affiliates to which they shift income and that these affiliates may be established wholly or partly for tax reasons rather than for non-tax business reasons. Action 3 calls for the development of "recommendations regarding the design of controlled foreign company rules". The objective was to develop recommendations for CFC rules that are effective in dealing with base erosion and profit shifting.

Controlled foreign company (CFC) rules respond to the risk that taxpayers can strip the tax base of their country of residence and by shifting income into a foreign company that is controlled by the taxpayers. Without such rules, CFCs provide opportunities for profit shifting and long-term deferral of taxation.

Existing CFC rules have often not kept pace with changes in the international business environment, and many of them have design features that do not tackle base erosion and profit shifting risks effectively.

Action Plan called for the development of recommendations regarding the design of CFC rules. The OECD 2015 Action 3 report set out recommendations in the form of building blocks for the design of effective CFC rules, which include the definition of a CFC, exemptions and thresholds, approaches for determining the type of income subject to the rule, computation of CFC income, the attribution of CFC income to shareholders and measures to eliminate the risk of double taxation. These recommendations are not minimum standards, but are designed to ensure that jurisdictions that choose to implement them will have rules that effectively prevent taxpayers from inappropriately shifting income into foreign subsidiaries.

The report sets out the following six building blocks for the design of effective CFC rules:

- Definition of a CFC – CFC rules generally apply to foreign companies that are controlled by shareholders in the parent jurisdiction. The report sets out recommendations on how to determine when shareholders have sufficient influence over a foreign company for that company to be a CFC. It also provides recommendations on how non-corporate entities and their income should be brought within CFC rules.
- CFC exemptions and threshold requirements – Existing CFC rules often only apply after the application of provisions such as tax rate exemptions, anti-avoidance requirements, and *de minimis* thresholds. The report recommends that CFC rules only apply to controlled foreign companies that are subject to effective tax rates that are meaningfully lower than those applied in the parent jurisdiction.
- Definition of income – Although some countries' existing CFC rules treat all the income of a CFC as 'CFC income' that is attributed to shareholders in the parent jurisdiction, many CFC rules only apply to certain types of income. The report recommends that CFC rules include a definition of CFC income,

and it sets out a non-exhaustive list of approaches or combination of approaches that CFC rules could use for such a definition.

- Computation of income – The report recommends that CFC rules use the rules of the parent jurisdiction to compute the CFC income to be attributed to shareholders. It also recommends that CFC losses should only be offset against the profits of the same CFC or other CFCs in the same jurisdiction.
- Attribution of income – The report recommends that, when possible, the attribution threshold should be tied to the control threshold and that the amount of income to be attributed should be calculated by reference to the proportionate ownership or influence.
- Prevention and elimination of double taxation – One of the fundamental policy issues to consider when designing effective CFC rules is how to ensure that these rules do not lead to double taxation. The report therefore emphasizes the importance of both preventing and eliminating double taxation, and it recommends, for example, that jurisdictions with CFC rules allow a credit for foreign taxes actually paid, including any tax assessed on intermediate parent companies under a CFC regime. It also recommends that countries consider relief from double taxation on dividends on, and gains arising from the disposal of, CFC shares where the income of the CFC has previously been subject to taxation under a CFC regime.

The latest edition of Corporate Tax Statistics, published in July 2020, collected information on CFC rules for the first time. The data highlights that comprehensive and effective CFC rules have the effect of reducing the incentive to shift profits from a market jurisdiction into a low-tax jurisdiction, and that out of the 122 Inclusive Framework members surveyed, 49 had CFC rules in operation in 2019, with different approaches to the type of income covered and the presence of substantial activity tests.

4.1.4. Action Plan 4: Limiting base erosion involving interest deductions and other financial payments

The Action 4 recommendations aim to limit base erosion through the use of interest expense to achieve excessive interest deductions or to finance the production of exempt or deferred income.

Multinational groups may achieve favorable tax results by adjusting the amount of debt in a group entity. BEPS risks in this area may arise in three basic scenarios:

- groups placing higher levels of third party debt in high tax countries.
- groups using intragroup loans to generate interest deductions in excess of the group's actual third party interest expense.
- groups using third party or intragroup financing to fund the generation of tax exempt income.

The use of third party and related party interest is perhaps one of the most simple of the profit-shifting techniques available in international tax planning. The fluidity and fungibility of money makes it a relatively simple exercise to adjust the mix of debt and equity in a controlled entity.

In particular, the deductibility of interest expense can give rise to double non-taxation in both inbound and outbound investment scenarios. The interest payments are deducted against the taxable profits of the operating companies while the interest income is taxed at comparatively low tax rates or not at all at the level of the recipient.

Most countries tax debt and equity differently for the purposes of their domestic law. Interest on debt is generally a deductible expense of the payer and taxed at ordinary rates in the hands of the payee. Dividends, or other equity returns, on the other hand, are generally not deductible and are typically subject to some form of tax relief (an exemption, exclusion, credit, etc.) in the hands of the payee. While, in a purely domestic context, these differences in treatment may result in debt and equity being subject to a similar overall tax burden, the difference in the treatment of the payer creates a tax-induced bias, in the cross-border context, towards debt financing. The distortion is compounded by tax planning techniques that may be employed to reduce or eliminate tax on interest income in the jurisdiction of the payee.

In the cross-border context, the main tax policy concerns surrounding interest deductions relate to the debt funding of outbound and inbound investment by groups. Parent companies are typically able to claim relief for their interest expense while the return on equity holdings is taxed on a preferential basis, benefiting from a participation exemption, preferential tax rate or taxation only on distribution. On the other hand, subsidiary entities may be heavily debt financed, using excessive deductions on intragroup loans to shelter local profits from tax. Taken together, these opportunities surrounding inbound and outbound investment potentially create competitive distortions between groups operating internationally and those operating in the domestic market. This has a negative impact on capital ownership neutrality, creating a tax preference for assets to be held by multinational groups rather than domestic groups.

In addition, as identified in the BEPS Action Plan (OECD 2013), when groups exploit these opportunities, it reduces the revenues available to governments and affects the integrity of the tax system. The use of interest deductions to fund income which is exempt or deferred for tax purposes, and obtaining relief for interest deductions greater than the actual net interest expense of the group, can also contribute to other forms of base erosion and profit shifting. These include the use of intragroup loans to generate deductible interest expense in high tax jurisdictions and interest income in low or no tax jurisdictions; the development of hybrid instruments which give rise to deductible interest expense but no corresponding taxable income; and the use of loans to invest in assets which give rise to a return that is not taxed or is taxed at a reduced rate.

The 2015 Action 4 report on Limiting Base Erosion Involving Interest Deductions and Other Financial Payments focused on the use of all types of debt giving rise to excessive interest expense or used to finance the production of exempt or deferred income. In particular, this report established rules that linked an entity's net interest deductions to its level of economic activity within the jurisdiction, measured using taxable earnings before interest income and expense, depreciation and amortization (EBITDA). This approach includes three elements: a fixed ratio rule based on a benchmark net interest/EBITDA ratio; a group ratio rule which may allow an entity to deduct more interest expense

depending on the relative net interest/EBITDA ratio of the worldwide group; and targeted rules to address specific risks.

As at mid-2019, a number of OECD and Inclusive Framework members have adopted interest limitations rules or are in the process of aligning their domestic legislation with the recommendations of Action 4. From the commencement of 2019, all EU Member States apply an interest cap that restricts a taxpayer's deductible borrowing costs to generally 30 percent of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA).

4.1.5. Action Plan 5: Countering harmful tax practices more effectively, taking into account transparency and substance

The Action 5 Report is one of the four BEPS minimum standards. It involves two distinct aspects: a review of certain preferential tax regimes and substantial activities in no or only nominal tax jurisdictions to ensure they are not harmful, and the transparency framework. Each of the four BEPS minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. All members of the Inclusive Framework on BEPS commit to implementing the Action 5 minimum standard, and commit to participating in the peer review.

The Forum on Harmful Tax Practice (FHTP) has been conducting reviews of preferential regimes since its creation in 1998 in order to determine if the regimes could be harmful to the tax base of other jurisdictions. The peer review of the Action 5 minimum standard is undertaken by the FHTP and approved by the Inclusive Framework on BEPS.

The purpose of a peer review is to ensure the effective and consistent implementation of an agreed standard and to recognize progress made by jurisdictions in this regard. The peer review evaluates the implementation of the standard against an agreed set of criteria. These criteria are set out in terms of reference, which include each of the elements that a jurisdiction needs to demonstrate it has fulfilled in order to show effective implementation of the standard.

The peer review has been conducted in accordance with the agreed methodology. The methodology sets out the process for undertaking the peer review, including the process for collecting the relevant data, the preparation and approval of annual reports, the outputs of the review and the follow up process.

The current work of the Forum on Harmful Tax Practices (FHTP) comprises three key areas.

Firstly, the assessment of preferential tax regimes to identify features of such regimes that can facilitate base erosion and profit shifting, and therefore have the potential to unfairly impact the tax base of other jurisdictions.

Secondly, the peer review and monitoring of the Action 5 transparency framework through the compulsory spontaneous exchange of relevant information on taxpayer-specific rulings which, in the absence of such information exchange, could give rise to BEPS concerns

Thirdly, the review of substantial activities requirements in no or only nominal tax jurisdictions to ensure a level playing field.

4.1.6. Action Plan 6: Preventing the granting of treaty benefits in inappropriate circumstances

BEPS Action 6 of the OECD/G20 Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns. Action 6 identifies tax policy considerations jurisdictions should address before deciding to enter into a tax agreement.

Over the last decades, bilateral tax agreements, concluded by nearly every jurisdiction in the world, have served to prevent harmful double taxation and remove obstacles to cross-border trade in goods and services, and movements of capital, technology and persons. This extensive network of tax agreements has, however, also given rise to treaty abuse and so-called 'treaty-shopping' arrangements.

Treaty shopping typically involves the attempt by a person to indirectly access the benefits of a tax agreement between two jurisdictions without being a resident of one of those jurisdictions. There are a wide number of arrangements through which a person who is not a resident

of a jurisdiction that is a party to a tax agreement may attempt to obtain benefits that a tax agreement grants to a resident of that jurisdiction.

Taxpayers engaged in treaty shopping and other treaty abuse strategies undermine tax sovereignty by claiming treaty benefits in situations where these benefits were not intended to be granted, thereby depriving countries of tax revenues.

These new treaty anti-abuse rules first address treaty shopping, which involves strategies through which a person who is not a resident of a State attempts to obtain benefits that a tax treaty concluded by that State grants to residents of that State, for example by establishing a letterbox company in that State. The following approach is recommended to deal with these strategies:

- First, a clear statement that the States that enter into a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements will be included in tax treaties.
- Second, a specific anti-abuse rule, the limitation-on-benefits (LOB) rule, that limits the availability of treaty benefits to entities that meet certain conditions will be included in the OECD Model Tax Convention. These conditions, which are based on the legal nature, ownership in, and general activities of the entity, seek to ensure that there is a sufficient link between the entity and its State of residence. Such limitation-on-benefits provisions are currently found in treaties concluded by a few countries and have proven to be effective in preventing many forms of treaty shopping strategies.
- Third, in order to address other forms of treaty abuse, including treaty shopping situations that would not be covered by the LOB rule described above, a more general anti-abuse rule based on the principal purposes of transactions or arrangements (the principal purposes test or 'PPT' rule) will be included in the OECD Model Tax Convention. Under that rule, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits, these benefits would be denied unless it is established that granting

these benefits would be in accordance with the object and purpose of the provisions of the treaty.

Income may escape taxation altogether or be subject to inadequate taxation in a way the parties did not intend and the jurisdiction of residence of the ultimate income beneficiary has less incentive to enter into a tax agreement with the jurisdiction of source, because residents of the jurisdiction of residence can indirectly receive treaty benefits from the jurisdiction of source without the need for the jurisdiction of residence to provide reciprocal benefits.

As part of the BEPS package, the Action 6 Report sets out one of the four BEPS minimum standards, which is that members of the BEPS Inclusive Framework commit to include in their tax treaties provisions dealing with treaty shopping to ensure a minimum level of protection against treaty abuse.

The minimum standard on treaty shopping requires jurisdictions to include two components in their tax agreements: an express statement on non-taxation (generally in the preamble) and one of three methods of addressing treaty shopping.

To foster the implementation of the minimum standard and other BEPS treaty-related measures in the global treaty network, a Multilateral Instrument (the MLI) that can modify existing bilateral tax agreements was concluded.

The first peer review on the implementation of the Action 6 minimum standard reveals that a large majority of Inclusive Framework members have begun to translate their commitment on treaty shopping into actions and are now in the process of modifying their treaty network.

As of 1 January 2019, the provisions of the MLI started to take effect with respect to some treaties. For the treaties for which the MLI is effective, tax administration can now use effective treaty provisions to put an end to treaty-shopping.

4.1.7. Action Plan 7: Preventing the artificial avoidance of permanent establishment status

The work carried under BEPS Action 7 provides changes to the definition of permanent establishment in the OECD Model Tax Convention to address strategies used to avoid having a taxable presence in a jurisdiction under tax treaties.

Tax treaties generally provide that the business profits of a foreign enterprise are taxable in a State only to the extent that the enterprise has in that State a permanent establishment (PE) to which the profits are attributable. The definition of PE included in tax treaties is therefore crucial in determining whether a non-resident enterprise must pay income tax in another State.

The Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013a) called for a review of that definition to prevent the use of certain common tax avoidance strategies that are currently used to circumvent the existing PE definition, such as arrangements through which taxpayers replace subsidiaries that traditionally acted as distributors by commissionaire arrangements, with a resulting shift of profits out of the country where the sales took place without a substantive change in the functions performed in that country.

Changes to the PE definition are also necessary to prevent the exploitation of the specific exceptions to the PE definition currently provided for by Art. 5 (4) of the OECD Model Tax Convention (2014), an issue which is particularly relevant in the digital economy.

This report includes the changes that will be made to the definition of PE in Article 5 of the OECD Model Tax Convention, which is widely used as the basis for negotiating tax treaties, as a result of the work on Action 7 of the BEPS Action Plan.

BEPS Action 7 proposes several changes to the definition of permanent establishment in the OECD Model Tax Convention to counter BEPS:

- changes to ensure that where the activities that an intermediary exercises in a jurisdiction are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, that enterprise will be considered to have a taxable presence in

that jurisdiction unless the intermediary is performing these activities in the course of an independent business;

- changes to restrict the application of a number of exceptions to the definition of permanent establishment to activities that are preparatory or auxiliary nature and will ensure that it is not possible to take advantage of these exceptions by the fragmentation of a cohesive operating business into several small operations;
- changes to address situations where the exception applicable to construction sites is circumvented through the splitting-up contracts between closely related enterprises.

The Multilateral Instrument (MLI) is a flexible instrument that allows jurisdictions to adopt BEPS treaty-related measures to counter BEPS and strengthen their treaty network. The MLI was signed by nearly 90 jurisdictions and about half of the MLI Signatories have so far adopted the MLI articles that implement the permanent establishment changes.

4.1.8. Action Plans 8-10: Aligning transfer pricing outcomes with value creation: intangibles risks & capital high-risk transactions

BEPS Actions 8-10 address transfer pricing guidance to ensure that transfer pricing outcomes are better aligned with value creation of the MNE group. In this regard, Actions 8-10 clarify and strengthen the existing standards, including the guidance on the application of the arm's length principle and an approach for appropriate pricing of hard-to-value-intangibles within the arm's length principle.

Over the last decades and in step with the globalization of the economy, worldwide intra-group trade has grown exponentially. Transfer pricing rules, which are used for tax purposes, are concerned with determining the conditions, including the price, for transactions within an MNE group resulting in the allocation of profits to companies within the group in different countries. In this regard, based on the arm's length principle, transactions between associated enterprises have to be priced as if the enterprises were independent, operating at arm's length and engaging in comparable transactions under similar conditions and economic circumstances.

The arm's length principle has proven useful as a practical and balanced standard for tax administrations and taxpayers to evaluate transfer prices between associated enterprises, and to prevent double taxation. However, with its perceived emphasis on contractual allocations of functions, assets and risks, the existing guidance on the application of the principle has also proven vulnerable to manipulation. This manipulation can lead to outcomes which do not correspond to the value created through the underlying economic activity carried out by the members of an MNE group.

As part of the BEPS package, the Actions 8-10 Reports enhance the guidance on the arm's length principle to ensure that what dictates results is the economic rather than the paper reality. In this regard, the work under Actions 8-10 seeks to align transfer pricing outcomes with the value creation of the MNE group. In other words, the guidance provided under Actions 8-10 provides guidance to determine the transfer pricing outcomes in accordance with the actual conduct of related parties in the context of the contractual terms of the transaction. These and other changes reduce the incentive for MNEs to shift income to 'cash boxes' – shell companies with few if any employees and little or no economic activity, which seek to take advantage of low or no-tax jurisdictions.

Action 8 – Intangibles

Action 8 of the Action Plan on Base Erosion and Profit Shifting mandated the development of transfer pricing rules or special measures for transfers of hard-to-value intangibles (HTVI) aimed at preventing base erosion and profit shifting by moving intangibles among group members.

The outcome of that work is the approach to hard-to-value intangibles, which is found in the 2015 Final Report for Actions 8-10, "Aligning Transfer Pricing Outcomes with Value Creation" (BEPS TP Report) and it was formally incorporated into the Transfer Pricing Guidelines, as Section D.4 of Chapter VI. The HTVI approach protects tax administrations from the negative effects of information asymmetry by ensuring that tax administrations can consider ex post outcomes as presumptive evidence about the appropriateness of the ex-ante pricing arrangements. At the same time, the taxpayer has the possibility to rebut such presumptive evidence by demonstrating the reliability of the

information supporting the pricing methodology adopted at the time the controlled transaction took place.

The guidance contained in this report aims at reaching a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of the HTVI approach. This guidance should improve consistency and reduce the risk of economic double taxation.

BEPS Action 8 involve:

- adopting a broad and clearly delineated definition of intangibles;
- ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation;
- developing transfer pricing rules or special measures for transfers of hard-to-value intangibles;
- updating the guidance on cost contribution arrangements.

Action 9 – Risks And Capital

The stated purpose of Action 9 is to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. This issue deserves special attention, also because free capital movement and freedom of contract allows multinational enterprises MNE to easily shift capital and risks between group companies.

Action 9 now provides detailed guidance on the identification of economically significant risks, the determination of contractual allocation of these risks and the functions relating to these risks.

This will involve adopting transfer pricing rules or special measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The rules to be developed will also require alignment of returns with value creation. This work will be coordinated with the work on interest expense deductions and other financial payments.

In order to have a clear picture on the before mentioned points, an exact and detailed functional analysis has to be performed. From a transfer pricing point of view, the risk should then be allocated to the party which controls the risk and has the financial capacity to assume the risk. Thus, it is essential identifying which entities have the capability

to manage these risks, i.e. the functional substance (in other words: key personnel) of a company is crucial. A pure financing company, providing funding but not exercising control over the financial risks associated with the funding, is only entitled to a risk-free return.

This means that contractual arrangements between affiliated entities will come under greater scrutiny. In line with the basic principle relevant when analyzing the ownership of intangible assets under Action 8, also with respect to Risk and Capital the contractual agreement might form the starting point of the transfer pricing analysis, will however not be the decisive factor. Tax authorities are allowed to disregard the transaction for transfer pricing purposes if the contractual arrangement does not match the conduct of the parties.

As an example, affected arrangements could probably be Contract Research and Development ('R&D') Agreements, where a pure Funding Company is rewarded for the risk taking and capital endowment with the residual profit while the Contract R&D Company is remunerated on a cost-basis. If the Funding Company should not have the functional substance allowing to control the risk, tax authorities could reclassify the transaction as a pure finance transaction, granting a risk-free return to the Funding Company and allocating the residual profit to the Contract R&D Company.

From a practical point of view, it might thus be recommendable to accurately review actual contractual relationships within multinational enterprises under the guidance provided by Action 9.

Action 10 – Other High-Risk Transactions

The OECD Transfer Pricing Guidelines have included guidance on the transactional profit split method since their first iteration in 1995. Since the revision to the Guidelines in 2010, the transactional profit split method has been applicable where it is found to be the most appropriate method to the case at hand. This basic premise is unchanged. However, this revised guidance, while not being prescriptive, clarifies and significantly expands the guidance on when a profit split method may be the most appropriate method. It describes presence of one or more of the following indicators as being relevant:

- Each party makes unique and valuable contributions;

- The business operations are highly integrated such that the contributions of the parties
- cannot be reliably evaluated in isolation from each other;
- The parties share the assumption of economically significant risks, or separately assume closely related risks.

It develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties. This will involve adopting transfer pricing rules or special measures to:

- clarify the circumstances in which transactions can be recharacterized,
- clarify the application of transfer pricing methods, in particular profit splits, in the context of global value chains,
- provide protection against common types of base eroding payments, such as management fees and head office expenses.

Significant progress has been made on the projects mandated by the 2015 Final Report on Actions 8-10.

4.1.9. Action Plan 11: Measuring and monitoring BEPS

The Base Erosion and Profit Shifting report (OECD 2013) recognized that the scale of the negative global impacts on economic activity and government revenues have been uncertain.

The findings of the work performed since 2013 highlight the magnitude of the issue, with global corporate income tax (CIT) revenue losses estimated between 4% and 10% of global CIT revenues, i.e. USD 100 to 240 billion annually. Given developing countries' greater reliance on CIT revenues, estimates of the impact on developing countries, as a percentage of GDP, are higher than for developed countries. In addition to significant tax revenue losses, BEPS causes other adverse economic effects, including tilting the playing field in favour of tax-aggressive MNEs, exacerbating the corporate debt bias, misdirecting foreign direct investment, and reducing the financing of needed public infrastructure.

Six indicators of BEPS activity highlight BEPS behaviours using different sources of data, employing different metrics, and examining different BEPS channels. When combined and presented as a dashboard

of indicators, they confirm the existence of BEPS, and its continued increase in scale in recent years.

The profit rates of MNE affiliates located in lower-tax countries are higher than their group's average worldwide profit rate. For example, the profit rates reported by MNE affiliates located in lower-tax countries are twice as high as their group's worldwide profit rate on average.

The effective tax rates paid by large MNE entities are estimated to be 4 to 8% percentage points lower than similar enterprises with domestic-only operations, tilting the playing-field against local businesses and non-tax aggressive MNEs, although some of this may be due to MNEs' greater utilisation of available country tax preferences.

Foreign direct investment (FDI) is increasingly concentrated. FDI in countries with net FDI to GDP ratios of more than 200% increased from 38 times higher than all other countries in 2005 to 99 times higher in 2012.

The separation of taxable profits from the location of the value creating activity is particularly clear with respect to intangible assets, and the phenomenon has grown rapidly. For example, the ratio of the value of royalties received to spending on research and development in a group of low-tax countries was six times higher than the average ratio for all other countries, and has increased three-fold between

2009 and 2012. Royalties received by entities located in these low-tax countries accounted for 3% of total royalties, providing evidence of the existence of BEPS, though not a direct measurement of the scale of BEPS.

Debt from both related and third-parties is more concentrated in MNE affiliates in higher statutory tax-rate countries. The interest-to-income ratio for affiliates of the largest global MNEs in higher-tax rate countries is almost three times higher than their MNE's worldwide third-party interest-to-income ratio.

Furthermore, empirical analysis indicates that BEPS adversely affects competition between businesses, levels and location of debt, the location of intangible investments, and causes fiscal spillovers between countries and wasteful and inefficient expenditure of resources on tax engineering.

The empirical analysis in this report, along with several academic studies, confirms that strong anti-avoidance rules reduce profit shifting

in countries that have implemented them. Improving the tools and data available to measure BEPS will be critical for measuring and monitoring BEPS in the future, as well as evaluating the impact of the countermeasures developed under the BEPS Action Plan.

4.1.10. Action Plan 12: Mandatory disclosure rules

This action plan provides recommendations for the design of rules to require taxpayers and advisors to diisclose aggressive tax planning arrangements. Governments need timely access to relevant information in order to identify and respond to tax risks posed by tax planning schemes and these recommendations seek a balance between the need for early information on aggressive tax planning schemes with a requirement that disclosure is appropriately targeted, enforceable and avoids placing undue compliance burden on taxpayers. Many countries have therefore introduced disclosure initiatives to give them timely information about taxpayer behavior and to facilitate the early identification of risks. These initiatives include: rulings, penalty reductions for voluntary disclosure and the use of co-operative compliance programs and additional reporting obligations as well as mandatory disclosure regimes. Mandatory disclosure regimes differ from these other disclosure and compliance initiatives in that they are specifically designed to require taxpayers and promoters to provide tax administrations with early disclosure of potentially aggressive or abusive tax planning arrangements.

This Action Plan recognizes that one of the key challenges faced by tax authorities is a lack of timely, comprehensive and relevant information on potentially aggressive or abusive tax planning strategies and notes that the availability of such information is essential to enable governments to quickly identify areas of tax policy and revenue.

Action 12 notes the usefulness of disclosure initiatives in addressing these issues and calls on OECD and G20 member countries to develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and

businesses and drawing on experiences of the increasing number of countries that have such rules.

The Action 12 report sets out specific recommendations for rules targeting international tax schemes, as well as for the development and implementation of more effective information exchange and co-operation between tax administrations.

4.1.11. Action Plan 13: Transfer pricing documentation and country-by-country reporting

The BEPS Action 13 report (Transfer Pricing Documentation and Country-by-Country Reporting) provides a template for multinational enterprises (MNEs) of income, taxes paid and certain measures of economic activity to report annually and for each tax jurisdiction in which they do business. This report is called the Country-by-Country (CbC) Report.

The Country-by-country report requires multinational enterprises (MNEs) to report annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax and income tax paid and accrued. It also requires MNEs to report their number of employees, stated capital, retained earnings and tangible assets in each tax jurisdiction. Finally, it requires MNEs to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in.

To facilitate the implementation of the CbC Reporting standard, the BEPS Action 13 report includes a CbC Reporting Implementation Package which consists of (i) model legislation which could be used by countries to require the ultimate parent entity of an MNE group to file the CbC Report in its jurisdiction of residence including backup filing requirements and (ii) three model Competent Authority Agreements that could be used to facilitate implementation of the exchange of CbC Reports, respectively based on the:

1. Multilateral Convention on Administrative Assistance in Tax Matters;
2. Bilateral tax conventions;

3. Tax Information Exchange Agreements (TIEAs).

Three-tired approach guidance to transfer pricing documentation also requires MNEs to provide tax administrations high-level global information regarding their global business operations and transfer pricing policies via three main things:

- 'master file' that would be available to all relevant country tax administrations;
- 'local file' specific to each country, identifying material related party transactions, the amounts involved in those transactions, and the company's analysis of the transfer pricing determinations they have made with regard to those transactions;
- third, large MNEs are required to file a Country-by-Country Report that will provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax and income tax paid and accrued. It also requires MNEs to report their number of employees, stated capital, retained earnings and tangible assets in each tax jurisdiction. Finally, it requires MNEs to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in.

Taken together, these three documents (master file, local file and Country-by-Country Report) will require taxpayers to articulate consistent transfer pricing positions and will provide tax administrations with useful information to assess transfer pricing risks, make determinations about where audit resources can most effectively be deployed, and, in the event audits are called for, provide information to commence and target audit enquiries.

This information should make it easier for tax administrations to identify whether companies have engaged in transfer pricing and other practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments. The countries participating in the BEPS project agree that these new reporting provisions, and the transparency they will encourage, will contribute to the objective of understanding, controlling, and tackling BEPS behaviors.

4.1.12. Action Plan 14: Making dispute resolution mechanisms more effective

Eliminating opportunities for cross-border tax avoidance and evasion and the effective and efficient prevention of double taxation are critical to building an international tax system that supports economic growth and a resilient global economy. Countries agree that the introduction of the measures developed to address base erosion and profit shifting pursuant to the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD 2013) should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation. Improving dispute resolution mechanisms is therefore an integral component of the work on BEPS issues.

The BEPS Action 14 Minimum Standard seeks to improve the resolution of tax-related disputes between jurisdictions. Inclusive Framework jurisdictions have committed to have their compliance with the minimum standard reviewed and monitored by its peers through a robust peer review process that seeks to increase efficiencies and improve the timeliness of the resolution of double taxation disputes.

As cross-border business and international labour mobility continues to be commonplace in a 21st century global economy, disputes relating to which jurisdictions can tax what types of income inevitably arise on occasion.

Many tax treaties between jurisdictions contain a MAP provision providing for a process used to resolve such disputes. Article 25 of the OECD Model Tax Convention provides a mechanism, independent from the ordinary legal remedies available under domestic law, through which the competent authorities of the Contracting States may resolve differences or difficulties regarding the interpretation or application of the Convention on a mutually-agreed basis. This mechanism – the mutual agreement procedure – is of fundamental importance to the proper application and interpretation of tax treaties, notably to ensure that taxpayers entitled to the benefits of the treaty are not subject to taxation by either of the Contracting States which is not in accordance with the terms of the treaty.

The measures developed under Action 14 of the BEPS Action Plan aim to strengthen the effectiveness and efficiency of the MAP process. They aim to minimize the risks of uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the mutual agreement procedure.

The Action 14 Minimum Standard consists of 21 elements and 12 best practices, which assess a jurisdiction's legal and administrative framework in the following four key areas:

- preventing disputes;
- availability and access to MAP;
- resolution of MAP cases;
- implementation of MAP agreements.

4.1.13. Action Plan 15: Developing a multilateral instrument to modify bilateral tax treaties

The Multilateral Instrument offers concrete solutions for governments to close loopholes in international tax treaties by transposing results from the BEPS Project into bilateral tax treaties worldwide. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) allows governments to implement agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies without the need to renegotiating for each treaty bilaterally.

The MLI enables all Parties to meet the treaty-related minimum standards that were agreed as part of the BEPS package, which are the minimum standard for the prevention of treaty abuse under Action 6 of the BEPS package and the minimum standard for the improvement of dispute resolution under Action 14.

In November 2016, over 100 jurisdictions concluded negotiations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting that will swiftly implement a series of tax treaty measures to update international tax rules and lessen

the opportunity for tax avoidance by multinational enterprises. The MLI already covers over 90 jurisdictions and entered into force on 1 July 2018. Its provisions entered into effect for the first provisions on 1 January 2019.

Developing countries as Bosnia and Herzegovina are relatively dependent on foreign investments and on direct taxation of income derived from these investments. Developing countries that have concluded tax treaties may be exposed to treaty abuse that limits the possibilities for taxing such income. Such developing countries may have only limited resources to renegotiate their tax treaties on a bilateral basis. By signing up to the Multilateral Instrument, these countries will have the opportunity to strengthen their tax treaty network in a swift and efficient way.

5. The correlation between corruption and tax evasion

Governments have a natural monopoly over the provision of many publicly provided goods and services, and a selfless and impartial government official would provide these services efficiently at their marginal cost. However, it has long been recognized that public officials are often self-seeking, and such officials may abuse their public position for personal gain. That may include such behavior as demanding bribes to issue a license, awarding contracts in exchange for money, extending subsidies to industrialists who make contributions, stealing from the public treasury, and selling government-owned commodities at black-market prices. In their entirety, these actions can be characterized as abusing public office for private gain, or 'corruption'[6].

'Tax evasion' is a related but clearly different concept, and refers to illegal and intentional actions taken by individuals to reduce their legally due tax obligations. Individuals can evade income taxes by under reporting incomes; by overstating deductions, exemptions, or credits; by failing to file appropriate tax returns; or even by engaging in barter to avoid taxes. Most often these actions are viewed through the lens of

[6] A. Shleifer-R. W. Vishny, *Corruption*, in *Quarterly Journal of Economics* 108.3 (1993) 599-617.

individuals via the individual income tax, and in fact most all theoretical and empirical work on tax evasion has focused on the individual income tax. However, these types of actions can clearly be taken in other taxes. For example, in the corporate income tax, firms can under report income, over state deductions, or fail to file tax returns, just as individuals do in the individual income tax. Similarly, indirect taxes like the value-added tax (VAT) present numerous opportunities for evasion; indeed, firms can simply fail to register for the VAT, underreport sales, or they can present fraudulent invoices that allow them to understate their tax liabilities.

Although corruption and tax evasion are distinct and separate problems, they can easily become intertwined and reinforcing. A society that is more corrupt may enable more tax evasion as corrupt officials seek more income via bribes; conversely, higher levels of tax evasion may drive corruption by offering more opportunities for bribes.

Empirical evidence based on cross-country comparisons does suggest that corruption has a major adverse effect on private investment and economic growth[7] and also has a significant impact in constraining firm growth[8].

These results give support to theargument that tax compliance is dependent on the quality and the honesty of the tax enforcers. Corruption effectively negates any reduction in evasion from establishing higher audit rates and penalties, the traditional enforcement measures used to increase compliance rates. Rules do not matter if no one bothers to enforce them.These results indicate that governments seeking to attack tax evasion – and increase their tax revenues – should firstensure that their tax administration is honest. Corrupt tax administrations not only cause tax short falls through increase devasion on part of the taxpayers, but they also appropriate some portion of the collected taxes due to the government. An honest tax administration enforces the existing tax laws, effectively reducing evasion and remitting all tax collections to thegovernment. Addressing corruption can ameliorate both corruption

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[7] P. Mauro, *The Effects of Corruption on Growth. Investment and Government Expenditure: A Cross-Country Analysis*, Washington DC 1996.

[8] T. Beck-A. D. Kunt-V. Maksimovic, *Financial and Legal Constraints to Growth: Does Firm size Matter?*, in *The Journal of Finance* (2005).

(directly) and tax evasion (indirectly). Additionally, anhonest tax administration allows policy makers to pursue a variety of other tax reforms designed to reduce evasion with the confidence that those reforms will be properly implemented.

6. Conclusion

Base erosion and profit shifting constitutes a serious risk to tax revenues, tax sovereignty and tax fairness for OECD member countries and non-members alike. With global economy slowing down, political leadership across the world has become increasingly worried of practices followed by MNEs that plan their affairs in a manner that countries are deprived of their legitimate share of tax.

BEPS was established as an OECD project that sought to find solutions to practices adopted by some multinational companies in order to reduce corporate income tax in certain countries where the corporate income tax rate is high while moving the tax base to countries where the base is low, thus there is a redirection of profits to countries 'tax havens' at the expense of countries where the tax base is high and the erosion of the tax base.

The action plan contains fifteen action points, and each action plan offers a possible solution with clear deadlines for implementation. The Action Plan aims to address BEPS concerns by establishing international coherence of corporate income tax systems; restring the full effects and benefits of international standards; ensuring transparency while promoting increased certainty and predictability; and establishing a multilateral instrument to implement the responses to BEPS swiftly.

The main target of the BEPS action plan is to design a new international standard to ensure the coherence of corporate income taxation at the international level. BEPS concern to tackle the new issue arose because of the revolution in the digital economy.

The key pressure issues in the BEPS report are:

- jurisdiction to tax,
- transfer pricing,
- anti-avoidance.

In a globally connected economy, and particularly with the growth of e-commerce it is clear that digital revolution takes a big role in worldwide trade. E-commerce takes over in some areas as means of standard trading. Today, it is possible for a company to has strongly involved in the economic life of another country without the obligation to be physically and infrastructurally in that country. For example doing business with customers located in that country via the Internet without a taxable presence.

The action plan identifies such type of issue in Action. Countries also should consider the ecommerce questions from both an exporter and an importer perspective. Replacing the tax deduction in the country where the interest is paid with a tax credit equivalent to the tax credit equivalent to the tax paid on the receipt in the recipient's country.

When we speak about transfer pricing, the action plan places a strong emphasis on them by devoting 3 out of 15 BEPS action plans to them. The main concerns raised in the Action Plan relate to the diversion of income and the creation of 'stateless income' through the transfer of intangible assets, risk-sharing, capital and transactions that would not, or very rarely, occur between third parties.

Actions 8, 9 and 10, all deal with the fact that MNEs can easily divert their profits to a low-tax jurisdiction by entering into transactions with other groups of companies that do not replicate outside the group.

The Action Plan focus on the development and refinement of four potential domestic anti-avoidance rules, namely, the controlled foreign companies (CFC) regime, limited rules for interest deductions and other financial payment, anti-tax haven regimes and anti-hybrid mismatch rules.

And to conclude now. We have too many unanswered questions in the air as: where did these ideas actually come from? How universal is the acceptance of this action plan by other states? The transition to a developing economy like the United States that has its own taxation model; the question also arises as to whether the United States will jeopardize its own interest in meeting these universal standards. Here, on the whole, one needs to be realistic again and realize that an action plan will not always result in real action. The true is that the BEPS action plan is not so perfect as to really lead to the disappearance of tax base erosion

and the transfer of profits to 'tax haven' countries and implementation of BEPS action plans by all members probably will not ever reduce tax evasion to zero. Reducing tax evasion and erosion of the tax base to zero level would theoretically be possible only in the case of the existence of a global economy with a single market and a single tax and monetary policy, i.e. one state from which it would be impossible to transfer profits to another state and / or avoid taxes. As this is not the case, we can only continue to work on creating uniform BEPS rules and accounting standards that will seek to reduce the opportunities for MNEs to exploit loopholes in laws and flee to tax havens to take advantage of BEPS.

But the real question is what is the alternative?

Just as we cannot expect corruption to be completely eradicated, so we cannot expect the BEPS action plan to eradicate these phenomena. What we can expect and what is clear according to the first results is that although the BEPS action plan is not ideal, it has met expectations and can be considered a good starting point that needs to be further upgraded. In ideal case, there should be that we have a unique standards that all signatories to the BEPS Action plan should apply and make them binding, rather than in the form of a recommendation that individual signatories can then interpret depending on their wishes and needs.

Therefore, we see that if we manage to stop the tax gap in the tax administration, we will consequently succeed in reducing the high level of corruption in the tax administration. This means that by solving one problem we could come to the solution of another problem.

In the fight against corruption and in the fight against tax evasion, we have only one key goal, and that is the principle of equality before the law, which means that taxpayers (businesses enterprises and citizens) must be equal before the law and the law must be applied equally to all. without exception. So, when we talk about the fight for a society in which everyone will have to be equal before the law and that no one should be privileged because he gave a bribe or because he used some of the 'holes' in the law.

Davor Ninic*

Fight Against Corruption in Public Administration

1. Introduction

Corruption appears as a phenomenon in all societies. It is more pronounced in poorer countries and developing countries than in developed countries. Public administration is a breeding ground for corruption for several reasons. Some of the reasons can be mentioned as the fact that civil servants perform their official duties and receive a fiscal salary for that, their effectiveness alone does not directly affect his income. There could be a motive for corrupt action through "extra income". Some consequence resulting from the committed corrupt action also has no direct impact on the individual. It is a global problem and it is most pronounced that way. In order to fight corruption, we first

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need to understand corruption as a manifestation. What it refers to and how it manifests.

This paper starts with the definition of corruption in the legal sense and legalistic and sociological definitions of corruption. The types and forms in which corruption can occur are described. The basic claims are given for causes and consequences of corruption.

Then it follows a section that deals with general principles of the fight against corruption which shows joint activities in the fight against corruption as well as the most important state bodies that fight corruption on the front line.

Eventually there is a part which is about the strategy as the most important and complete document of every country in the fight against corruption. The types of strategies and areas of action of the strategy are mentioned. It was important to note risks that arise in the implementation of the Anti-Corruption Strategy and how we can measure implementation and constantly make supervision of strategy implementation.

2. Corruption as a social phenomenon

Corruption dates back to the time of ancient Greece and Rome and can be said to be as old as the state. Throughout history, it has evolved and appeared in various forms. It can be said to be widespread everywhere. By interfering with the state in the general economy, corruption developed. State control bodies were the first code of corruption to emerge. The cause of this was the desire to get rich and power by influencing democracy. Today, corruption is expressed in the form of organized crime and has developed so much that it is one of the biggest problems in the world, especially in poor and developing countries. Corruption is characterized by its topicality, high level of social danger, as well as various new forms of manifestation in the public and private sector within economic and non-economic activities, it is an integral part of organized crime and acts as a threatening factor of security. Corruption is a criminal offense, although in some cases it borders on legality. It is most often associated with criminal offenses in the Economy, with the

proviso that certain offenses may constitute corrupt economic offenses. It is a known fact that corruption crimes, due to the different form in which the perpetrator appears, are difficult to detect and prove, so the number of committed crimes is very unknown and therefore occupies a significant place in this area of crime. Can conclude that there are many forms of corruption that are not identified in different spheres of life. It often happens that certain parts are declared criminal offenses, but the process of proving itself is extended for many years, which is characteristic in cases when a high-ranking civil servant appears as the perpetrator. What should be pointed out is that corruption is related to poverty, which is related to the motive for committing corruption crimes and moral perceptions of corruption. The impact of corruption on poverty can be identified by increasing the prices of basic necessities of life and on the other hand by reducing the quality of products and services provided. Also the impact of corruption is manifested in the increase of public spending slows down which slows down economic growth and prevents regular and normal budget revenue.

2.1. Conceptual definitions

Some of the definitions of corruption: "Corruption is the abuse of entrusted powers for private gain" (Transparency International); "Corruption is the abuse of public authority for private gain" (World Bank).

In the broadest sense, corruption is any abuse of position by a civil servant or a person performing a certain public function, which is aimed at personal or material gain.

2.1.1. The definition of corruption in the legal sense

In legal terms, corruption is defined in different ways and as different criminal offenses. The standard definition is the provision according to which corruption is:

a) seeking or receiving directly or indirectly from a public official, or a person performing a public function, any monetary value, or other

privileges, such as a gift, favor, promise or favor for him or another person or unit, in exchange for an act or failure to perform public duty;
b) offer or guarantee, directly or indirectly, to a public official, or a person performing a public function, any monetary value or other privileges, such as a gift;
c) service, promise or favor for him or another person or unit, in exchange for an act or omission in the performance of public duty;
d) an act or promission of a public official or a person performing a public function in the performance of his/her duties for the purpose of obtaining an illegal benefit for himself or a third party;
e) misuse or acquisition of property derived from an act defended by this article;
f) participation as a mover, co-initiator, participant or helper or concealer after the act has been committed, or in any way, in exchange for retaliation or in anticipation of retaliation, for any cooperation or conspiracy to commit an act.

2.1.2. Legalistic and sociological definitions of corruption

According to the Legalist definition, corruption is corrupt behavior if it violates a formal standard or rule of conduct established by a political authority and intended to regulate the actions of public officials. According to Nye, the most important representative of this direction, a certain procedure is a public servant who is elected or appointed if he deviates from the formal duties of a public office in order to acquire private interests.

The criticisms that can be leveled at this notion of corruption are mainly based on the assessment that such definitions are unfavorably defined. Neither are all illegal, contrary acts necessarily corrupt, nor are all acts reminiscent of corruption necessarily illegal. In addition, the so-called closed circuit problem. Laws can also be an unintended

consequence of certain forms of corruption. A further objection to this group stems from the fact of legalistic consequentialism.

2.2. Types and forms

In many legislations, there are similar or the same formulations of corruption offenses that have common features:

1. on the one hand, he is an official with public authority, because one usually wants to achieve some benefit or gain;
2. there must be an intent to bribe because it is one of the offenses because it is an intent.

We can talk about type or sides of corruption.

2.2.1. Two sides of corruption

Most European legislation distinguishes between two sides of corruption:

1. "active" corruption, which exists when someone, by offering, promising or giving some gift, benefit or privileged (excessive) exercise of a right, commits a criminal offense such as bribery or other forms of incitement;
2. "passive" corruption, which exists when someone in an official or private position receives an offer, gift, benefit or promise of a gift or benefit, and thus commits the criminal offense of accepting bribes, abuse of position and authority, illegal mediation, etc.

2.2.2. Criminological: criminalistic distinction

There is also the usual criminological-criminalistic distinction of certain forms of corrupt behavior according to possible groups of perpetrators:

Street corruption covers all forms of covert bribery of public officials or responsible persons, without prior notice or special notice to the recipient of the bribe, for the purpose of avoiding regular obligations or acting in accordance with the law.

Corruption in public administration, execution of legal obligations, sanctions, realization of undue benefits or excessive realization of some rights and the like. These cases of corruption are most easily recognizable when bribing e.g. Police officers, customs officers, financial police officers, tax, market and other members of inspection services and other officials.

Contractual corruption or corruption in public administration occurs as a result of concluding harmful contracts, awarding concessions, construction works, status of suppliers or service providers with contracting "commission", non-compliance with the regular procedure of awarding these jobs without quality control, deadlines, manner of performing these works and similar.

Political corruption it takes more form, than the conscious preparation and passing of defective Laws and bylaws and decisions. This form of corruption also implies securing funds from suspicious funds of political party sponsors, avoiding tax liabilities, without transparent keeping of records of financial transactions, giving unfounded interest to others to the detriment of general interests.

Judicial corruption covers illegal acts by abusing the position of judges and other members of the judiciary. Like all others, this corruption undermines and destroys the rule of equality.

The terms economic and general corruption include all other forms of corrupt behavior in the economy, construction, health, education, social programs, professional sports and the like.

2.3. Causes and consequences of corruption

The negative effects of corruption act as an arbitrary tax that increases costs and disrupts the allocation of resources and the equitable distribution of income. Corruption destroys the rule of law and society's trust in state institutions, ie priority is given to the individual at the expense of the social community. It affects the social value system because it encourages the culture and morality of each individual as a member of the social community and on society as a whole. Whether it is a small or large form, society is directly or indirectly impoverished in

a number of ways, of which it is certainly important to emphasize that only the rich benefit and are deprived of funds for social programs of the poor. There is a curtailment of tax inflows to the state which directly leads to a reduction in public services that benefit the poor, a reduction in economic growth which leads to a reduction in opportunities for the poor to get out of poor economic conditions, thus depriving poor citizens of their rights.

Corrupt institutions in society slow down the import and application of new technologies, capital imports, successful privatization, mobility and increased labor productivity and other factors of economic success. The cost of entering the market increases and distorts competitiveness and increases business risk. Small companies are under greater pressure from the bureaucracy and cannot fight the market competition on their own, while large corporations have more financial resources and human resources at their disposal, so they can more easily solve their own administrative problems through corruption and protect their interests. Furthermore, corruption affects foreign direct investment and is an obstacle to the development of entrepreneurship and the economy. A corrupt politician and public servant will buy both expensive and outdated technology from public money. The general benefit will not be decisive for him, just "his part". He will also accept the loan at exorbitant interest rates and thus will over-indebted both his own and future generations. In privatization, a corrupt politician or public servant can leave the company to his party supporters and friends, regardless of their ignorance, so that companies will fail, jobs will disappear, and consequently social problems will grow.

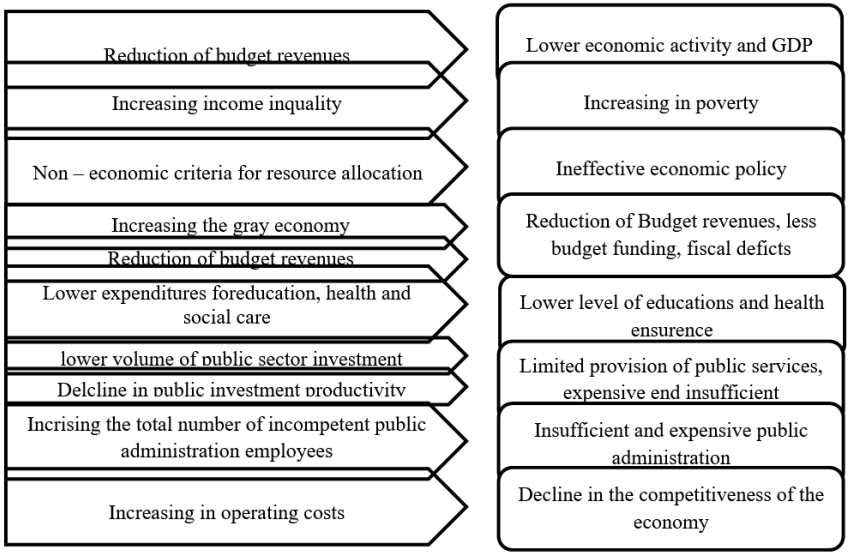

Figure 1 – Negative effects of corruption on economic growth and development

3. General principles of the fight against corruption

As society is increasingly aware of the presence of corruption and all its negative effects on human social life, as well as the already expressed desire to combat this corruption, one of the first ways is to establish an adequate strategy in the fight against corruption. The strategy itself must take into account the specifics of society itself or its social organization.

Of course, it is necessary to mention that the Local Community Strategy should be part of a larger strategy, and most often it is a state strategy.

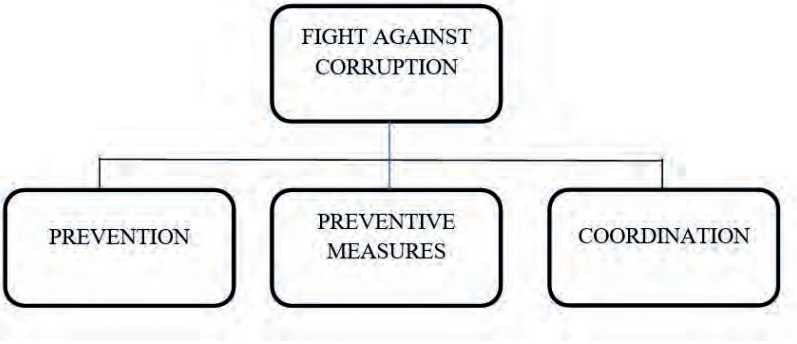

Figure 2 – Important determinants of the anti-corruption strategy

All corruption activities are based on general objectives, so the anti-corruption program itself should be an approach characterized by transparency, impartiality, expertise, inclusiveness, comprehensiveness, measurability and focus on the final effects, which is the best approach in the fight against corruption.

Corruption is a layered problem that requires the involvement of all institutions, each of which, from its own angle, will contribute to the fight against corruption.

The strategy includes measures and preventive activities in the field of implementation of laws and bylaws, which includes coordination of all public administration bodies, capacity building and awareness raising on the need and mechanisms for fighting corruption, as well as standards and values of the entire public administration. The goal of the Strategy is to achieve the following results at the end of its implementation: activities to raise awareness of the harmfulness of corruption, reduce tolerance of corrupt behavior, prevent corruption, visible results of the fight against corruption, higher rule of law and increased public confidence in government institutions[1].

[1] *Ibid.*

3.1. Fighting corruption

The fight against corruption is a dominant topic of political and especially criminal-political discussions at the national and international level. Anti-corruption instruments are contained in numerous documents: conventions, declarations, strategies, programs, etc. In democracies countries, with a solid rule of law, corruption was initially perceived as a marginal phenomenon[2].

In the last few decades, such an understanding has changed and corruption is defined as a phenomenon of wider significance present in the public and private spheres of life. It is a behavior of a more permanent nature, not a phenomenon that becomes socially obvious in a period of special crises or in some special relationships. Some statistics show that there is less corruption in developed western countries than in post-socialist and developing countries. In post-socialist countries, the phenomenon of corruption is very pronounced due to the fact that there is no established civil society or mechanisms of public control of government as already built by Western Europe. The lack of a strong state apparatus and impartial media also contributes to the spread of corruption. Therefore, especially in post-communist countries, investigating corruption and effectively combating corruption in all fields is one of the essential preconditions for building democracy[3].

3.1.1. Common activities

Protecting those who report corruption is one of the key things that creates a conducive environment and culture. Primary service employees are the first to notice corruption, but it often happens that if they report such malfunctions, they can be threatened, harassed, put in worse working conditions, banned from promotion, reduced salaries, by those involved. In order to achieve a satisfactory level of protection, it is necessary to adopt special provisions within the existing laws or to adopt

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[2] F. Bacic, *Corruption and Anti-Corruption Criminal Law, Croatian Yearbook of Criminal Law and Practice*, Zagreb 2000, 827.

[3] D. Grubisa, *Political Corruption in Societies in Transition*, Zagreb 1995, 34.

new laws, which would better regulate this area. International standards, for which there are numerous documents from many international organizations, require that applicants need to be provided with a safe alternative to silence, which would mean that they should not be put in danger of any kind. What can best be countered are legal sanctions and measures. Although prevention is the first and basic measure to combat socially undesirable behaviors, it is not perfect and it is realistic to expect that regulations will be violated. Violation of legal goods and interests through corruption is regulated by various legal regulations, the most important of which are disciplinary, misdemeanor and criminal. The appropriate impact on corruption should be a credible oversight system that results in adequate sanctions and measures. Appropriate influence means certainty in the detection of guilt and commitment to those types and measures of sanctions that are proportional to the gravity of the offense committed. This is also stipulated by international standards in the field of criminal offenses that are characterized as corrupt[4].

In institutions where disciplinary sanctions for corrupt and other criminal conduct are rarely imposed, criminal policy is usually not well regulated.

3.1.2. Police

The police have a significant role to play in the fight against corruption. In the same way as with all punishable conduct, and with corruption, it is often the police who are first on the front line, whether they report behaviors with the characteristics of corruption or ex officio. "Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure.

[4] Assembly of Brcko District (nt. 11) 15.

The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks"[5].

There is a constant need to improve links between the Police and other state bodies in the fight against corruption.

Objective: To increase the capacity to fight corruption and international cooperation in this field.

Strategic programs[6]:

1. Personnel, material and technical strengthening of the Police for the detection and proof of corrupt criminal offenses;
2. Continuous professional development of police officers in the field of criminal investigation of corruption offenses;
3. Strengthening cooperation between the Police and other state bodies in the fight against corruption.

3.1.3. Judiciary

The task of the Prosecutor's Office is to undertake investigative actions and prosecute potential perpetrators of criminal offenses. What was said by the police officers also applies to the prosecution staff. Objectivity and impartiality in appointments and promotions must be completely independent. This is particularly the case in the Recommendation on the role of prosecutors in the Council of Europe's criminal justice system. Education of prosecutorial staff for the fight against corruption, includes getting acquainted with the forms of material gain generated by corruption and the possibilities of confiscating it. The Prosecutor's Office needs independence in detecting and proving corruption crime in accordance with international standards and the Anti-Corruption Conventions, which establish an obligation to take measures to strengthen the integrity and prevent opportunities for corruption among prosecutors[7].

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[5] Council of Europe, *Criminal Law Convention on Corruption*, Article 20 – *Specialised authorities*, 6.

[6] Assembly of Brcko District (nt. 11) 16.

[7] *Ibid*. 17.

The fight against corruption should be one of the most important tasks of the prosecution. Transparency needs to be constantly developed.

Objective: Strengthening the cooperation and capacity of judicial and other state bodies in terms of effective prosecution of perpetrators of corrupt delinquency.

Strategic programs[8]:

1. Improving transparency and objectivity in the work of judicial institutions;
2. Analysis and strengthening of the capacity of judicial and other bodies for effective criminal prosecution of corrupt crime;
3. Improving the preconditions for effective prosecution of perpetrators of corrupt delinquency, especially by conducting financial investigations;
4. Continuation of activities in creating an adequate penal policy for corrupt crime, especially in the area of effective confiscation of proceeds of crime;
5. Harmonization of criminal legislation of countries with international standards, especially the recommendations of the Group of States against Corruption.

3.1.4. Audit departments

The recommendations of the Group of States against Corruption (GRECO)[9] indicate the great importance of inspection bodies in detecting and reporting corruption. If corruption arises as a result of a poor system of control and supervision, then improving the system of monitoring the legality of work is considered an indispensable

[8] *Ibid*.

[9] The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards. GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.

component in the fight against corruption. Legally regulated supervision ensures the legality and protection of the entire interest. Supervisors have a very strong oversight of the implementation of the Law. The problem of insufficient capacity of supervisory bodies is reflected in the efficiency of work.

Objective: Improving oversight to establish a higher level of legality and protect the public and private interests from all forms of corruption.

Strategic programs[10]:

1. Improve the efficiency of supervision with the aim of preventing and combating corruption as well as improving the overall state of the business;
2. Personnel and professional strengthening of the capacity of the supervisory bodies;
3. Analysis and, depending on the results, a proposal to improve the legal framework in terms of competencies and sanctions imposed by supervisory authorities.

3.2. Anti-Corruption Agency

Anti-corruption agencies play a pivotal role in enforcement, prevention and investigation of corruption. An effective anti-corruption agency is a huge strength in the fight against corruption – when they are independent of the government and empowered to investigate allegations, they have the potential to hold even the most powerful people in society to account.

3.2.1. The law established the competence of the agency

Agency jobs[11]:

1. monitors the implementation of strategic documents, submits to the National Assembly a report on their implementation with recommendations for action, gives responsible entities

[10] Assembly of Brcko District (nt. 11) 18.

[11] National Assembly of the Republic of Serbia, *Law on Prevention of Corruption*, Article 6.

recommendations on how to eliminate shortcomings in the implementation of strategic documents and initiates amendments to strategic documents;
2. enacts general acts;
3. initiates and conducts a procedure in which it is decided on the existence of violations of this law and imposes measures in accordance with this law;
4. decides on conflicts of interest;
5. submits criminal charges, requests for initiating misdemeanor proceedings and initiatives for initiating disciplinary proceedings;
6. maintains and publishes the Register of Public Officials and the Register of Assets and Revenues of Public Officials in accordance with this Law;
7. checks the report on assets and revenues submitted by public officials;
8. keeps and verifies data from the records determined by this law;
9. acts on the petitions of natural and legal persons;
10. gives opinions on the application of this law on its own initiative or at the request of natural or legal persons and takes positions relevant to the application of this law.

4. Anti-Corruption Strategy

The anti-corruption strategy is based on the identification of corruption-risky business processes and the causes of irregularities in the conduct of civil servants in the relevant public authorities. The strategy is aimed at changing the attitudes and behavior of all civil servants. The strategy enables the launch of targeted anti-corruption actions according to previously determined goals in priority areas. The goal of the strategy is to prevent corruption, i.e. to manage its risks in public administration and all its organizational units of local and regional self-government, public law bodies, companies in which the state and local and regional self-government units have ownership shares, private and non-profit sector[12].

[12] Croatian Parliament, *Anti-corruption strategy 2015-2020*, 4.

4.1. General goals and principles of the strategy

The purpose of the Strategy is to eliminate corruption as an obstacle to economic, social and democratic development as much as possible. The consequences of corruption consist not only in the impoverishment of society and the state, but also in a drastic decline in citizens' trust in democratic institutions, as well as the creation of uncertainty and instability of the economic system.

Authorities and holders of public authority, who are involved in the prevention and fight against corruption, are obliged to exercise their powers in accordance with the following general principles[13].

The principle of the rule of law – Legality of treatment and equality before the law of all citizens to Laws and bylaws, as well as ratified international treaties and generally accepted rules of international law.

The principle of "zero tolerance" for corruption – Law enforcement in all forms of corruption.

The principle of responsibility – Commitment to take full responsibility for policy making and effective implementation, including the implementation of the strategy.

The principle of comprehensive application of measures and cooperation of entities – Duty to implement measures comprehensively and in all areas, with cooperation and exchange of experiences at all levels of government.

The principle of efficiency – to regularly implement anti-corruption measures and to provide ongoing training to improve efficiency in the fight against corruption.

The principle of transparency – Guarantee of transparency in the decision-making and implementation process. Provide access to information by law.

4.2. Type of strategies

Anti-patronage version of corruption control.

[13] National Assembly of the Republic of Serbia, *National Strategy for the Fight Against Corruption in the Republic of Serbia 2013-2018*, 2.

The first anti-corruption strategy aimed at combating corruption, especially in the public sector, is the anti-patronage version of corruption control.

The reformers of the time believed that the positive premise of good governance was its management by experts who acted as professionals on the basis of the highest moral and public standards. This is achieved through appropriate work that can serve as an example of desirable management. Aspirations for public administration reform into an honorable, professional and exemplary one have appeared in parallel with the increasingly intense criticism of the system by purchasing administrative functions called patronage. This type of management, which with its non-transparency, unprofessionalism, lack of motivation and responsibility of employees in the administration, has led to a slow, expensive, unmotivated and corrupt administration[14].

This type of fight against corruption is a bit of an idealistic type, one could say difficult feasibility because it is difficult to introduce such a high level of morale among civil servants of all institutions.

Progressive anti-corruption strategy.

For proponents of this anti-corruption strategy, the structure of these public services plays the most important role in combating corruption in public services. According to this view, it is necessary to reform the entire political system, not just the system of employment and training of people to work in the public sector. The progressives, unlike the anti-patronage version, did not so much emphasize the moral as the institutional integrity of public administration, in order to separate it from the system of political power. And this strategy was resolutely against the system of patronage in public administration[15].

Model of scientific management of public administration.

This model of scientific management of public administration was the first anti-corruption strategy that was a link between corruption in the public and private sector and that contributed to the development of a model of anti-corruption[16].

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[14] Derencinovic (nt. 4) 36-37.
[15] *Ibid*. 120.
[16] *Ibid*. 120 ff.

This strategy approached the problem of corruption in public administration as a problem in the proper formation of the organization itself, and not as a problem caused by political or moral reasons. The inappropriate structure of the administration should have been adapted to the model of the private sector and the new administration should have been based on the principles of scientific management of the public sector[17].

This version had other goals, not only the control of corruption, it led to the realization that the integrity of public administration can be achieved through the process of administrative control. As the administration becomes larger and more widespread, the division of functions and duties within it becomes more complicated[18].

Panoptic version of corruption control.

Since the early 1970s, advocates of anti-corruption strategies have increasingly stood out for legal regulations as the primary weapon against corruption in public administration. Not neglecting the achievements of previous approaches to combating corruption in public services, the new approach represented a whole new orientation in the fight against corruption. Because of its rigor and formality, this approach, modeled on the work of Jeremy Bentham and Michael Foucault, has been called panoptic[19].

Proponents of the panoptic version advocated the regulation of a control system that would monitor the work of politicians, officials and all other employees in the public sector, and in case of violation of the rules, sanctions would be applied to them. In addition to theorists, the proponents of this theory were prosecutors, investigators, and judges, as well as special oversight services[20].

The premise of this approach was that all public servants were potentially corrupt and subject them to some control regardless of the negative consequences of such control on the efficiency of work in public administration. Given that all civil servants are suspicious and

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17 *Ibid*.
18 *Ibid*.
19 *Ibid*. 121.
20 *Ibid*.

guided solely by their own interests, the control of corruption should be redirected to the area of legal regulation where numerous techniques for monitoring the work of civil servants are normatively envisaged and evidence of their corruption is collected[21].

Revisionist model of anti-corruption strategies.

The basic premise of the revisionist conception of anti-corruption strategy is in the requirement that politics must accept a certain level of corruption, but at the same time ask: what is the optimal level of corruption, in terms of balancing the costs of anti-corruption strategies and management efficiency[22]. The revisionist model of anti-corruption strategies, in contrast to the Panoptic version of corruption control, which can lead to high implementation costs because to a certain extent it does not monitor the normal functioning of business processes in public administration, tolerates corruption to a certain extent.

4.3. Areas of strategy

Although corruption is a phenomenon that encompasses the entire society, the Strategy identifies individual areas in which action will be given priority, and which are recognized as key to building and strengthening systemic anti-corruption mechanisms. It is not possible to solve problems in a limited period and with limited resources in all areas where corruption may occur. That is why the strategy seeks to create a solid foundation for a future comprehensive fight against corruption by properly allocating limited resources over a period of five years. Objectives have been defined that refer to the areas of priority action, as well as to all other areas in which corrupt behavior may occur. Areas of priority action have been identified based on a qualitative and quantitative analysis of indicators on trends, scope, manifestations and other issues related to country issues. They are based on various sources of information, including the Agency's annual reports on the implementation of the Strategy from 2005, the reports of the Anti-Corruption Council, the needs analysis of the Strategy, the European Commission's progress

[21] *Ibid*.
[22] *Ibid*. 23.

report on corruption, the analysis within the Group of States Council of Europe Anti-Corruption (GRECO), Organization for Economic Co-operation and Development (OECD) and the United Nations Convention against Corruption, models of integrity plans developed in co-operation with the authorities in a process coordinated by the Agency, analysis of citizens' perceptions of corruption, civil sector, as well as other relevant documents. The structure of this chapter of the Strategy is such that it first states the area of priority action and a brief description of the situation and key problems in it, and then the formulation of objectives[23]. Like any strategy, it must contain realistic goals that meet real needs. What is important to emphasize is economy, ie it is necessary to focus all resources on solving the most important problems and to start with priority.

4.4. Risks that arise in the implementation of the Anti-Corruption Strategy

Given that corruption is a very sensitive phenomenon and reaches deep into human society and as it is closely linked to economic status, the emergence of various obstacles that make it difficult to fight corruption is a reality[24]:

- Lack of political will: politicians as leaders of changing legislation are often reluctant to make radical decisions and act decisively in passing laws;
- Failure to meet international obligations: insufficient harmonization of state legislation with international documents;
- Lack of independence and competence of the subjects of implementation;
- Appropriate anti-corruption skills and knowledge are needed;
- Lack of engagement of enforcement entities;
- Appropriate anti-corruption skills and knowledge are needed;
- Lack of financial and other resources;

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[23] National Assembly of the Republic of Serbia, *National Strategy for the Fight Against Corruption* (nt. 24) 2.

[24] Assembly of Brcko District (nt. 11) 8.

– Insufficient financial resources for the implementation of the anti-corruption process;
– The complexity of the political system;
– A political system that is not efficient enough;
– Lack of systematicity and coordination: anti-corruption policies cannot be effective if they are carried out occasionally, incoherently, and without sufficient systematic action;
– Lack of public support;
– The will of the public is needed in the process of fighting corruption;
– Unfounded expectations for quick effects in the fight against corruption.

If there is a lot of corruption, there is a great desire to fight corruption, but this can result in impatience and reduced public support for anti-corruption measures and activities.

4.5. Legal, institutional and social framework for the fight against corruption

The legal framework includes laws and bylaws that define and regulate all areas related to corruption or that are important for the fight against corruption.

Institutional framework it should bring together the most important state institutions. Social framework implies citizens and social gatherings.

There can be determined in the following[25]:

Legal framework:

1 – criminal material regulations;
2 – criminal procedure regulations;
3 – public procurement;
4 – public finance;
5 – conflict of interest;
6 – financing of political parties;
7 – free access to information;
8 – election process.

[25] *Ibid*. 8 ff.

Institutional framework:

The institutional framework includes the following institutions:
1 – Assembly;
2 – Goverment and public administration bodies;
3 – Police;
4 – Judicial institutions;
5 – Public institutions.

Social framework:

They belong to the social framework:
1 – Political parties;
2 – Private sektor;
3 – Media;
4 – Educational institutions;
5 – Associations and other civil society organizations;
6 – Citizens.

4.6. Prevention

One of the most important parts of anti-corruption strategies is its prevention. Prevention should be built into all spheres where corruption can occur.

Prevention means the totality of planned, organized and undertaken measures and activities that try to eliminate or reduce the direct and indirect causes of corrupt behavior.

Prevention can be situational and social. Situational implies an effort to eliminate situations in which corruption occurs, and social is an integral part of the overall development strategy and includes measures of social, economic, legal, educational and other policies, i.e. the involvement of society as a whole in reducing this phenomenon[26].

The main goals in preventing corruption are[27]:

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[26] Parliament of Bosnia and Herzegovina, *Anti-corruption Strategy of Bosnia and Herzegovina 2009-2014*, 10.

[27] National Assembly of the Republic of Serbia, *National Strategy for the Fight Against Corruption* (nt. 24) 2.

1. Corruption risk analysis established in the process of preparation of regulations.

The legislative framework should include an obligation to consider the effects on corruption during the preparation of laws and other regulations.

2. System of employment and promotion in government bodies based on criteria and merits.

A system of employment and promotion that is not based on criteria of merit. Participants in the procedure of the interview and the assembly of candidates are not in a completely equal position, the managers still have too much authority in the selection of candidates. It is necessary to harmonize the legal framework that regulates the employment status of employees in the state administration and to adopt provisions that will be dedicated to the criteria for selection, appointment or appointment of managers, prevention of conflicts of interest and evaluation of their work.

3. Transparency in the work of government bodies is ensured.

Transparency of the work of government bodies is provided in several ways, and the most important is at the legal level, namely the Law on Free Access to Information of Public Importance. Transparency of the work of public authorities should be provided to all citizens equally.

4. Continuous education on corruption and ways to fight corruption.

It is necessary to conduct frequent continuous education of civil servants on corruption and how to fight corruption. The contents of the training must include: questions of ethics, integrity, recognition of situations of conflict of interest, rights of whistleblowers. Education on the fight against corruption needs to be focused on raising the awareness of all citizens that corruption is a socially unacceptable behavior that needs to be eradicated. In this field, it is necessary to achieve or improve international cooperation and knowledge transfer in the field of anti-corruption.

5. Conditions have been created for more active participation of civil society in the fight against corruption.

The institutional and legal framework for supporting civil society organizations needs to be improved. The state should provide support for all beneficiaries who, when submitting an application for the

allocation of funds from public sources, submit a statement on the absence of conflicts of interest and an internal act on anti-corruption policy (e.g. code of ethics). In this way, more active participation of civil society organizations is directed towards the achievement of strategic goals, but also the achievement of certain standards in their organization and operation.

6. Conditions created for more active participation of the private sector in the fight against corruption.

The state should support civil society anti-corruption projects. The Chamber of Commerce should adopt the Integrity Plan, the rules of the Code of Business Ethics, the Code of Corporate Governance of the International Chamber of Commerce for the fight against corruption. In addition to improving the state's mutual cooperation with the private sector, it is necessary to eliminate the risks of corruption that hinder the existence of a favorable environment for business operations. The gray economy, lack of tax transparency, and inadequate business inspections are the starting points for a comprehensive fight against corruption in the private sector.

7. The Assembly should monitor the implementation of the conclusions, ie the recommendations it made regarding the reports of independent state bodies.

Therefore, it is necessary to regulate the procedure of supervision over the implementation of the conclusions adopted by the National Assembly with the possibility of taking measures in case the conclusions have not been implemented without justified reasons.

8. Expanded and specified competencies and improved personnel capacities and working conditions.

Anti-corruption agencies often do not have the necessary competencies and do not have adequate human, spatial and technical capacities, which limits the end effects of their work.

9. Effective and efficient protection of persons reporting suspicions of corruption has been established.

It is necessary to complete the legal framework, i.e. to pass a special law that would deal with the protection of persons who make disclosures in the public interest, both in the public and in the private sector. In addition, it is necessary to gain the trust of the public.

10. A system for preventing conflicts of interest of public sector employees has been established.

Establish mechanisms for the prevention and elimination of conflicts of interest which will create equal mechanisms for the prevention and elimination of conflicts of interest for all employees in the public sector. Effective control of the implementation of provisions on the prevention of conflicts of interest implies the submission and verification of property cards of all employees in public administration, the most important role of which would be played by the head, internal auditors, Tax Administration, Agencies and other authorities.

4.7. Implementation and supervision of strategy implementation

In the process of strategy implementation and supervision, the key areas are classified as[28]:

1. Implementation of the Strategy.

The Anti-Corruption Strategy is a medium-term strategic document that contains goals that will be achieved in the next five years. The framework for implementing the strategic objectives should be specified and explained in detail through the action plan. The action plan will envisage concrete measures and activities for the implementation of strategic goals, deadlines, responsible entities and resources for implementation. Also, indicators for the implementation of measures and activities will be defined, on the basis of which the degree of their implementation will be monitored, as well as indicators for assessing the success of the set goals. As they are, the Strategy needs to be periodically analyzed and possibly changed in accordance with the current social circumstances.

2. Coordination of the implementation of the Strategy Effective implementation.

Strategies imply the existence of a strong political will, which can only be achieved through joint efforts and cooperation at the highest political level. Competent bodies for judicial affairs should be in charge of mutual communication, exchange of experiences and information

[28] *Ibid*. 19 ff.

on activities undertaken for the implementation of the Strategy. The appropriate organizational unit should be in charge of coordinating the implementation of the Strategy. It should be a contact point for cooperation with authorities and officers of public authority and international organizations. The Ministry in charge of justice will organize regular quarterly meetings at which contact persons from state bodies will exchange experiences in the implementation of the Strategy and Action Plan. It is necessary to organize meetings at which cooperation will be established with the International Anti-Corruption Organizations. In this way, regular mutual communication, exchange of information and coordination will be established, organized and simplified.

3. Monitoring the results of the implementation of the Strategy and Action Plan.

The Anti-Corruption Council is an advisory working body of the Government, which reviews activities in the fight against corruption, proposes measures to be taken in order to effectively fight corruption, monitors their implementation and gives initiatives for the adoption of regulations, programs and other acts and measures in this area. The Council points out to the Government the observed forms of corruption and points out the shortcomings in the mechanisms of the fight against corruption. The Council should monitor the results of the implementation of the Strategy. The Council will gather information on the experience and obstacles to the effective implementation of the Strategy and Action Plan and should report to the Government.

4. Supervision over the implementation of the Strategy and Action Plan.

Supervision over the implementation of the Strategy and Action Plan is the responsibility of the Anti-Corruption Agency, which was established by the Law on the Anti-Corruption Agency, as an independent state body. All authorities and holders of public authority in charge of implementing the measures from the Strategy and Action Plan should submit semi-annual and annual reports on the implementation of the Strategy and Action Plan of the Agency. In addition to the report, each obligor of the action plan should submit evidence for the allegations from the report, which are in line with the indicators of activities in the action

plan. If, in addition to the report and the attached evidence, there are doubts regarding the fulfillment of obligations, the Agency will invite a representative of the authorities to clarify them orally, at a meeting where the presence of the public will be allowed. The obligor of the action plan will be obliged to respond to the invitation of the Agency. Everyone is obliged to submit a report, and if a taxpayer of the action plan does not submit a report, evidence, as well as if he does not respond to the call of the Agency, he can be fined. The report on the implementation of the Strategy should be an integral part of the annual report on the work of the Agency, as a special report submitted to the National Assembly. Mandatory elements of the report of the Anti-Corruption Agency on the implementation of the Strategy and Action Plan will be prescribed.

5. Agencies on the implementation of the Strategy.

The reports of the Anti-Corruption Agency are considered by the National Assembly. In case the conclusions are not implemented without justified reasons, it is necessary to take measures. In addition, it is necessary to introduce the obligation of the Government to, within six months, submit to the National Assembly a report on the implementation of the conclusions of the National Assembly adopted on the occasion of the consideration of the Agency's report.

5. Conclusion

As it has been known since ancient times, corruption is a phenomenon that destroys all the values of society. Definitions of corruption explain it in the narrowest sense, but it is difficult to describe corruption in two to three sentences. There are also numerous definitions of corruption, but I believe that the more comprehensive definitions best describe it. It is necessary to understand the phenomenon of corruption as a phenomenon in society and try to identify its presence and act preventively and not wait and measure the harmful consequences. In some cases, corruption borders on legal behavior and much depends on the country's legislation. Therefore, I think that when determining the definition of corruption, it is necessary to review the legislation and on the basis of it to define corruption.

Types and manifestations of corruption occur in the simplest and most complex processes of work of the Public Administration. Given that corruption also occurs in different forms, it should be acted upon in a comprehensive manner. Causes and consequences of corruption show the best how harmful corruption is to society as a whole. What I would point out is that some of the consequences are neither visible nor measurable, especially those that are identified over a longer period of time.

Every country has authorities that fight against at the first line of defense. These are the institutions that make up the pillars of state power. Their task, is not only the fight against corruption, but the respect they possess, the knowledge, experience and complete process from prevention to the fight against corruption are the most important weapons in the fight against corruption. Their performance should be well prepared based on years of research, measurement and analysis.

The anti-corruption strategy has to be a five-year plan that should be clearly defined and the results should be constantly monitored and controlled. There is no successful prevention against corruption without adequate strategies. For its realization, the effort of all administrative bodies and their timely action is necessary. I would like to point out that only if the institutions act in synchronized can they suppress corruption. Of course, measurement and analysis will show which strategy is most appropriate for society and the outputs can be an indicator of the need to supplement or change strategies.

Mladen Prkaćin*

Corruption, Perception of Corruption and Reporting Corruption in Bih Institutions

Summary. 1. – Introduction. 2. – Meaning of Corruption. 2.1. – Types and forms of Corruption. 2.2. – Ethics and integrity. 2.3. – Conflict of interest and asset statement. 2.3.1. – International standards for conflicts of interest, asset declarations and codes of conduct. 2.4. – UN Convention against Corruption. Article 8 Codes of Conduct for Civil Servants. 3. – Anti-corruption strategy in BiH. 3.1. – Normative, institutional and social framework for the fight against corruption in Bosnia and Herzegovina. 3.2. – Reporting corrupt behavior. 3.3. – Integrity plans. 4. – Criminal Laws. 5. – Survey on Public Attitudes toward Corruption. 5.1. – Executive summary. 5.2. – Research methodology. 5.3. – Research structure. 5.4. – Sample research. 5.5. – Sources of knowledge on Corruption in BiH. 5.6. – Experience with government service. 5.7. – Corruption experience. 5.8. – Reporting Corruption. 6. – Reporting Corruption in BiH Institutions. 7. – Corruption perception Index in 2019. 8. – Conclusion.

1. Introduction

Corruption is widespread throughout the world. From time immemorial, States have been fighting corruption. Even in Christianity, customs officers are mentioned, who were considered very corrupt people because they collected taxes for the emperor, and by collecting taxes themselves, those who collect them are subject to corrupt behavior. And geographical features give us a picture of where there is more corruption and where less. In the Scandinavian countries, paying taxes is considered more common, while in Mediterranean countries, it is considered more common if you manage to avoid paying taxes. I took the topic for this paper in order to try to "peek" into corruption to some extent, and the

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opinions of Bosnian citizens on corruption. In this final paper, I will touch on corruption in general, corruption and forms of corruption in BiH. Criminal laws that regulate corruption in BiH, as well as the perception of citizens about corruption in BiH. Due to the situation with the corona virus, numerous limitations, unavailability of information, in my work I took desktop research, which I accompanied by my own research, from those institutions from which I was able to obtain data. Due to their prevalence, citizens face some form of corruption all around them.

2. Meaning of Corruption

The word corruption itself originates from the Latin word *corruptio*, which means corruption, bribery etc. In the literature it can be found that the word *corruptio* is actually a compound, in which the first part of the word ("*cor*") indicates agreement, and the second part comes from the verb *rompere* which means 'to break', 'to disturb'. In any case, the meaning of the term corruption changes in different temporal, social and political contexts, as it represents a complex phenomenon that has numerous causes, manifestations and consequences.

To properly understand the essence of corruption, it is crucial to understand that corruption exists if there is a deliberate violation of the principle of impartiality in decision-making, in order to appropriate some benefit. This is important in order to distinguish this phenomenon from cases when bias in decision-making is the result of prejudice or inclination, and not the intention to gain some benefit for oneself or another, as well as from situations where harmful decision is the result of lack of information or knowledge that decision maker disposes.

Today, the concept of corruption is extensively defined by numerous international acts, and there are operational definitions, among which the following definitions of the World Bank and Transparency International are the most widely used:

– Abuse of public authority for private gain (World Bank)

– Abuse of entrusted power for private gain (Transparency International).

The difference between these two definitions is in the sector in which corruption occurs, because according to the definition of the World Bank, acts committed outside the public sphere are not considered corruption, while according to the second definition, corruption is not limited to abuse of public authority by which it is possible to abuse authority and thus obtain material or some other benefit for oneself. The second definition therefore includes private-to-private corruption, as part of a comprehensive anti-corruption approach. Namely, private companies do not operate in isolation from the rest of the system, and the so-called 'private corruption' has been shown to threaten national security, free market principles and confidence in the business environment[1].

2.1. Types and forms of Corruption

As corruption is a complex and multi-layered phenomenon, its types and manifestations are numerous. In general, we divide corruption into large (high-level corruption), administrative (petty corruption) and political corruption, depending on the amount of money lost and the sector in which it occurs.

High-level corruption is acts committed at a high level of government that violate the rules or functioning of the State, allowing an official to gain benefits to the detriment of the public good. Minor corruption, also known as "low" or "street" corruption, is defined as "the day-to-day abuse" of entrusted authority by lower and middle-level public officials through their interaction with ordinary citizens, who often try to access goods or services hospitals, schools, police and other agencies. "Political corruption" means manipulation of policies, institutions and rules of procedure in the allocation of resources and funding by political decision-makers, who abuse their position to maintain power, status and wealth.

Corruption can be divided into so-called 'active' and 'passive', where:

Active corruption means a situation where someone, by offering, promising or giving a gift, benefit or privileged exercise of a right, commits a criminal offense; while

[1] See, for example, the OECD Convention against Bribery in International Business Transactions and other OECD initiatives.

Passive corruption is a situation when a person in a position (official or private) receives a gift, an offer, realizes some benefit and thus commits the criminal offense of accepting bribes, abuse of position or authority, etc.

The most frequent forms of corruption are bribery, extortion, clientelism, kleptocracy, nepotism, corrupt networks, etc.

The United Nations Convention against Corruption (UNCAC) explicitly lists acts that should be criminalized, without requiring that these acts be equated with corruption. The Council of Europe's Criminal Law Convention on Corruption acted in a similar way.

In addition to other definitions contained in domestic legislation, the Anti-Corruption Strategy of Bosnia and Herzegovina 2015-2019 relies on one of the most comprehensive and complete definitions of corruption contained in the Civil Law Convention against Corruption of the Council of Europe, which indicates various forms corruption that are sanctioned by the norms of criminal legislation in BiH[2].

According to the Convention, «corruption means seeking, offering, giving or receiving, directly or indirectly, a bribe or any other unlawful benefit or making it appear, which distorts the prescribed performance of any duty or conduct required of the recipient of the bribe, unlawful benefit or person to whom it is put into appearance».

This definition goes beyond the one prescribed by the Law on APIK, which in turn defines corruption as: «any abuse of power entrusted to a public servant or a person in a political position at the state, entity, cantonal level, Brčko District of Bosnia and Herzegovina, city or municipal level, which may lead to private gain. Corruption may in particular include the direct or indirect solicitation, offering, giving or accepting of bribes or any other undue advantage or possibility thereof, which impairs the proper performance of any duty or conduct expected of the recipient of the bribe».

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[2] Strasbourg, 4 November 1999, entered into force on 1 November 2003, entered into force in relation to BiH on 1 November 2003 (Official Gazette of BiH, n. 36/2001).

2.2. Ethics and integrity

Since corruption implies the conscious intention of an individual to abuse certain powers in order to gain personal gain, the basic moral and ethical principles that individuals should adhere to in performing their duties, as well as the personal integrity of individuals who perform them, are crucial for corruption prevention issues, public functions, which ultimately reflects on the integrity of the public administration itself, i.e. the civil service.

The word integrity comes from the Latin word *Integritas* and means wholeness, harmony, incorruptibility, indivisibility, perseverance, sincerity, purity of soul, honesty, unity and other moral values of a person[3]. In addition to moral values, integrity implies a personal component, i.e. work on developing a person completely. To have integrity means to have an unconditional and unwavering obligation to one's own moral values and duties. Integrity is also the ability to self-control one's feelings and impulses to the extent that they do not prevail over reason. One of the definitions is that integrity is the ability to maintain dignity, both personal and the dignity of other people.

As recognized by the Bosnia and Herzegovina Anti-Corruption Strategy 2015-2019, high ethical standards and the integrity of public officials and civil servants are the best, simplest and, in terms of resources used, the least demanding obstacle to corruption. However, no matter what measures are implemented, it cannot be expected with certainty that all civil servants will always behave ethically in practice, especially in situations where corruption temptations are high, either because of the value of possible illegal benefits, lack of control mechanisms or allegedly a moral justification for such actions. Adherence to high ethical standards is especially important in relation to the prevention of conflicts of interest, in dealing with users of public sector services and business partners of public institutions, because the public sector is expected to respect and promote higher moral principles. Ethical principles, as required by the conventions of the United Nations and the Council of

[3] Handbook: Introduction of Integrity Plans at the Local Level, Transparency International BiH 2015.

Europe, should be enshrined in laws and codes of ethics. When the rules are precise, they make it easier to apply but also to identify behaviors that deviate from those rules.

2.3. Conflict of interest and asset statement

According to Transparency International, a conflict of interest is a situation in which an individual or legal entity, whether a government, business, media or civic association, is confronted with a choice between the requirements and obligations of their position and their private interests.

Thus, it is a situation that may call into question the impartiality of decision-making and in this context a conflict of interest is seen as a possible precondition for corruption. In the literature, the conflict of interest is also called the so-called 'gray zone' of corruption.

Not every conflict of interest is corruption. Also, not every corruption is based on a conflict of interest. For example, accepting bribes for performing regular business activities is corruption, but since regular business activity is still realized, there is no conflict of interest in the background. Whether in a specific situation private interest will prevail over public, as well as consequent decision-making, is a decision based on personal integrity, the probability of detection and the amount of the sanction. In this sense, the prevention of conflicts of interest is part of broader measures to prevent corruption.

Conflict of interest is sometimes impossible to resolve and then it needs to be properly managed, i.e. recognized, disclosed and further treated in a way that will not lead to corruption.

2.3.1. International standards for conflicts of interest, asset declarations and codes of conduct

One of the most important documents in defining the concept of conflict of interest at EU level is Recommendation 10/2000 of the Committee of Ministers of the Council of Europe ("First Recommendation"), which forms the basis of a reference document for

a code of conduct for public officials within EU member states[4]. This document proposes one of the most comprehensive definitions of the term 'conflict of interest', as well as a procedure for disclosure of interest.

2.4. UN Convention against Corruption. Article 8 Codes of Conduct for Civil Servants

1. In order to combat corruption, each State Party shall, inter alia, promote the integrity, integrity and accountability of public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavor to apply, within its institutional and legal system, codes of conduct or standards of conduct for the proper, honorable and proper performance of public functions.

3. For the purposes of applying the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take into account relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials, contained in the annex to General Assembly Resolution 51/59 of 12 December 1996.

4. Each State Party shall, in accordance with the basic principles of its domestic law, also consider establishing measures and systems to enable public officials to more easily report acts of corruption to the appropriate authorities when they notice such acts in the performance of their functions.

5. Each State Party shall, where appropriate and in accordance with the basic principles of its domestic law, endeavor to establish measures and systems requiring public officials to make statements to the appropriate authorities concerning, inter alia, their external activities, employment, investments, goods and significant gifts or benefits that may result in a conflict of interest with respect to their functions as public officials.

6. Each State Party shall, in accordance with the fundamental principles of its domestic law, consider disciplinary and other measures

[4] Recommendation n. R (2000) 10 of the Committee of Ministers to member states on a code of conduct for public officials, adopted by the Committee of Ministers of the Council of Europe at its 106th session on 11 May 2000.

against public officials in violation of codes or standards established in accordance with this Article.

3. Anti-Corruption strategy in BiH

Bosnia and Herzegovina, which is a potential candidate for accession to the European Union, needs a huge step forward in reforms to meet the requirements of EU accession. Functioning as an equal member of the European Union implies a comprehensive modernization of public administration based on good European practices and fundamental principles applied to the administrative space.

The Reform Agenda for Bosnia and Herzegovina for the period 2015-2018 marked public administration reform as one of the six key areas of intervention (others: public finances, taxation and fiscal sustainability, business climate and competitiveness, labor market, social protection reform and pensions and the rule of law and good governance), i.e. as one of the key priorities for ensuring fiscal sustainability and quality service delivery to citizens. It needs to be implemented in close connection with reforms in the areas of the socio-economic system and the rule of law and good governance, including the fight against corruption. The reform is expected to create a more modern, competent, transparent, efficient, economical and accountable public administration that, as such, will improve the provision of public services and achieve savings.

In parallel, there is a need to ensure the irreversible strengthening of the rule of law, in the form of concrete progress in the fight against organized crime, terrorism and corruption. All operational and institutional activities should aim to create a safer environment for citizens without corruption, as well as to restore citizens' trust in institutions responsible for the rule of law, developing capacity, accountability, professionalism and integrity[5]. The reform agenda envisages, among other things, the adoption of anti-corruption strategies and the establishment of effective structures for prevention and supervision, in accordance with relevant international standards and respecting constitutional competencies and adopted documents at all levels of government. Also the establishment

[5] Reform Agenda for Bosnia and Herzegovina for the period 2015-2018.

of adequate integrity measures, with the aim of preventing corruption and the effective application of sanctions, and adherence to the highest standards of integrity, especially by the institutions of the rule of law.

In the 2015 Report for Bosnia and Herzegovina, the European Commission states that the country has achieved a certain level of preparedness in the fight against corruption, having made some progress in the previous year. However, corruption is still widespread, and political commitment on this issue has not yet been translated into concrete results.

According to the European Commission, Bosnia and Herzegovina should pay special attention to the fact that:

– ensure that sufficient funds are allocated from the budget for the anti-corruption strategy and the implementation of the action plan;

– establish bodies for prevention and supervision at the appropriate levels of government and ensure their functioning with the coordination of the Agency for the Prevention of Corruption and the coordination of the fight against corruption;

– improve the legislative framework, in particular for the financing of political parties, asset declarations and the protection of whistleblowers;

– introduce stricter penalties in the field of preventing and combating corruption in order to achieve a stronger deterrent effect[6].

3.1. Normative, institutional and social framework for the fight against corruption in Bosnia and Herzegovina

Of the international acts in the field of the fight against corruption ratified by Bosnia and Herzegovina, the United Nations Convention against Corruption is certainly more significant[7].

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[6] European Commission, Report for Bosnia and Herzegovina for 2015.

[7] The United Nations Convention against Corruption, adopted by the General Assembly, resolution n. 58/4 of 31.10.2003, entered into force on 14 December 2005. BiH signed this Convention on 16.09.2005, ratified on 27.03.2006, and the instrument on ratified by the Secretary-General of the United Nations on 16 October 2006.

UNCAC is the first global, legal instrument on corruption and a comprehensive document containing measures for prevention, criminalization and international cooperation. Its main goals are:

– to improve and strengthen measures for more efficient and effective prevention and fight against corruption;

– to promote, facilitate and support international cooperation and technical assistance in preventing and combating corruption, including the return of goods;

– to promote integrity, accountability and good governance of public affairs and public property.

The Convention is divided into 5 basic parts, as follows: General provisions (basic concepts and objectives of the convention); Prevention (requirement for States Parties to adopt certain effective measures in the fight against corruption); Criminal law part (which defines various incriminations in the field of corruption and contains a request to states to incorporate these incriminations into their legislation); International cooperation (implies specific forms of mutual legal assistance between the signatory states); and Repossession of property (which defines certain terms for repossession of property, prescribes the procedure for repossession of property, etc.).

In more detail, the wide range of measures included in the Convention includes:

– Anti-corruption education;

– Laws on freedom of access to information and other laws related to transparency of decision-making;

– Codes of conduct;

– Combating conflicts of interest, incompatibilities, gifts and services;

– Monitoring and control of property of public officials;

– Public procurement and public financial management;

– Submission of public reports;

– Measures related to the judiciary and the prosecution;

– Company participation;

– Measures to prevent money laundering;

– Application of appropriate penal provisions and sanctions for acts of corruption;

– Establishment of a preventive anti-corruption body;

– Restitution of illegally acquired property;
– International cooperation, and other measures.

In addition, Bosnia and Herzegovina has ratified the Council of Europe Criminal Law Convention on Corruption (1999[8]) and the Council of Europe Civil Law Convention on Corruption (1999).

Among recent international initiatives, it is necessary to mention the global multilateral initiative Open Government Partnership (OGP), initiated by the President of the United States, Barack Obama, in 2009. Bosnia and Herzegovina joined the initiative in September 2014, as the 65th member state, by sending a letter of intent to join.

By accepting the values and principles of the Open Government Partnership Declaration, Bosnia and Herzegovina has demonstrated its commitment in four key areas, namely:

1. Fiscal transparency – Eligibility assessment criteria are based on the scoring of published essential documents – budget proposals and audit reports, and the use of indicators from the Open Budget Index for 2012 (Open Budget Index), conducted by the International Budget Partnership.

2. Access to information – It implies the existence of the law on freedom of access to information as an essential means to achieve the idea and practical application of openness of government.

3. Disclosure of data on the property of public officials – implies the availability of data on the property and income of elected officials, which is a key prerequisite for preventing corruption, and open and accountable government.

4. Involvement of citizens – Implies the openness of the government towards cooperation with citizens and their involvement in decision-making processes, especially in terms of protection of basic civil liberties.

When it comes to the structure of Bosnia and Herzegovina, as stated in the Anti-Corruption Strategy 2015-2019, due to the existence of several levels of government, the normative framework for the fight

[8] Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, which entered into force on 1 July 2002 (and BiH signed this Convention on 1 March 2000 and ratified it on 30 March 2002), European Treaty Series, n. 173.

against corruption is very complex. There are a large number of laws at all levels of government that regulate this area, and in addition to the Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption, the most important are those that regulate the following areas:

– criminal law regulations;
– public procurement;
– conflict of interest;
– financing of political parties;
– free access to information;
– election processes;
– prevention of money laundering;
– protection of persons who report corruption.

In addition to the law, the fight against corruption at various levels of government in BiH is determined by existing or future anti-corruption strategies and action plans for their implementation, which, based on the Law on the Agency, should be in line with general principles set out in the Strategy.

Due to the existence of a large number of institutions with competencies at the appropriate level of government, the institutional framework for the fight against corruption in BiH is also complex and includes the following institutions:

– Parliamentary Assembly of Bosnia and Herzegovina (PS BiH);
– Council of Ministers of Bosnia and Herzegovina (CoM BiH) and state institutions;
– Agency for Prevention of Corruption and Coordination of the Fight against Corruption (APIK);
– Anti-corruption bodies at the level of entities, BD BiH and cantons;
– Parliament of the Federation of BiH (PF BiH) and the National Assembly of the Republika Srpska (NS RS);
– Entity governments and institutions;
– Assembly of BD BiH;
– Government and institutions of BD BiH;
– Legislative bodies of the canton;
– Cantonal governments and institutions;

In addition to regulations and the work of public institutions, a very important role in the fight against corruption is played by all other segments of society that are, or should be, interested in reducing the harmful effects of corruption. These are: political parties; the private sector and other forms of its association; media; universities and other academic and educational institutions; civil society associations and organizations and citizens[9].

3.2. Reporting corrupt behavior

Article 33 of the United Nations Convention against Corruption provides that each State Party shall consider providing in its internal legal system for appropriate measures to protect against any unjustified treatment of any person who notifies the competent authorities in good faith and on reasonable grounds of any fact relating to offenses established in accordance with this Convention[10].

The principle of protection of "reporting corruption" is one of the basic anti-corruption principles for all public services in Bosnia and Herzegovina, prescribed by the Law on the Agency for Prevention of Corruption and Coordination of the fight against Corruption. According to him, «no one shall be punished or in any way suffer any consequences for reporting, in good faith, what he considers a corrupt act or irregularities in the prescribed procedures. If a person who reports possible corrupt behavior or improper conduct in the performance of public service suffers the consequences, he is entitled to compensation determined by a special procedure with the competent authority, on which the Agency will issue a special regulation»[11].

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[9] Anti-Corruption Strategy 2015-2019 and Action Plan for the Implementation of the Anti-Corruption Strategy 2015-2019 of Bosnia and Herzegovina.

[10] United Nations Convention against Corruption, Article 33 (Protection of the applicant).

[11] Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption (Official Gazette of BiH, nn. 103/09, 58/13), Article 7 (Anti-Corruption Principles).

With the entry into force of the Law on the Protection of Persons Reporting Corruption in the Institutions of BiH[12], this area began to be further regulated. The Law on the Protection of Persons Reporting Corruption in BiH Institutions was adopted on 16 December 2013 and introduced the term Whistleblowers into domestic legislation, as provided for in Article 33 of the UN Convention against Corruption. The Law regulates the status of persons reporting corruption (whistleblowers) in the institutions of Bosnia and Herzegovina and legal entities establishing institutions of Bosnia and Herzegovina, the procedure for reporting corruption, the procedure for protecting these persons, as well as the obligations of institutions regarding reporting corruption of this law.

There are two types of secure reporting, internal and external. Internal reporting means submitting an application to a superior, manager or other person responsible for the lawful operation of the institution. External reporting refers to the submission of a report to the body responsible for criminal prosecution, the Agency for Prevention of Corruption and Coordination of the Fight against Corruption, i.e. the public. External reporting is done in the event that the internal reporting procedure lasts more than 15 days, if the whistleblower considers that the person responsible for the lawful work of the institution is connected with corrupt practices.

APIK is competent to grant whistleblower the status of a person who submits a report for certain corrupt activities in BiH institutions. Persons who have the status of whistleblowers are released from material, criminal and disciplinary responsibility for revealing business secrets when reporting corruption. APIK also has the possibility to order the head of the institution where the whistleblower is employed to take corrective action, i.e. to remove the harmful action in the act against the whistleblower (protected person), which was done to deter him from reporting or which is an act of retaliation. In this way, protection is provided to persons who "in good faith and on reasonable grounds" file charges against alleged perpetrators of criminal offenses of corruption.

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[12] Law on Protection of Persons Reporting Corruption in the Institutions of Bosnia and Herzegovina (Official Gazette of BiH, n. 100/13).

Heads of BiH institutions who do not act on the order of APIK, may be fined in the amount of 10,000 to 20,000 KM. This Law also stipulates that all BiH institutions must adopt internal acts on the manner of internal reporting of corruption. Such a legal solution makes it easier for employees in BiH institutions to report corrupt behavior and promotes the fight against corruption within the institutions themselves.

Laws on the protection of whistleblowers at the entity and Brčko District levels of BiH have not yet been adopted, and according to the European Commission, the rules on the protection of whistleblowers in Bosnia and Herzegovina are at a very early stage.

3.3. Integrity plans

Prescribing a uniform methodology and guidelines for the development of integrity plans in Bosnia and Herzegovina and providing assistance to all public institutions in their implementation is the responsibility of the Agency for Prevention of Corruption and Coordination of the Fight against Corruption by the Law of the same name. Accordingly, APIK has drafted and published on its website the following most important acts:

– Questionnaire for self-assessment of integrity within the institution;

– Guidelines for the development and implementation of the Integrity Plan;

– Integrity Plan Model;

– Methodology of making an integrity plan, etc.

The Integrity Plan is an internal document that contains a set of measures of a legal and practical nature that prevent and eliminate opportunities for the emergence and development of various forms of corrupt behavior and corruption of a public institution. The integrity plan is the result of the self-control process of a public institution in order to maintain and improve the integrity, transparency and professional ethics, which identify, reduce, eliminate and prevent opportunities for the emergence and development of:

a) irregularities in work;

b) ethically and professionally unacceptable practices;

c) corrupt behavior and corruption.

The integrity plan contains:

a) list and review of all internal regulations and acts of the public institution;

b) organizational structure-scheme of the public institution;

c) a list of posts with detailed descriptions of powers and responsibilities;

d) a completed report on the status of the integrity plan;

e) all other relevant documents related to the integrity plan[13].

4. Criminal Laws

Criminal laws in Bosnia and Herzegovina (CC BiH, CC FBiH, CC RS and CC BD) criminalize various acts of corruption. Considering that there is no essential difference between the valid provisions of the four laws in BiH, the criminal offenses according to the Criminal Code of BiH are briefly discussed below, with a list of possible differences.

Criminal Code of BiH in Chapter XIX – Criminal Offenses of Corruption and Criminal Offenses against Official Duties and Other Responsible Functions, regulates the following criminal offenses of corruption: Receiving gifts and other forms of benefits, giving gifts and other forms of benefits, Illegal mediation, Abuse of office or authority, Unaware work in service, Embezzlement in service, Fraud in service and Service in service.

For the criminal offense of Receiving Gifts and Other Forms of Benefit (According to the RS Criminal Code "Accepting Bribes"), it is characteristic that the perpetrator can only be an official. According to the CC BiH, CC FBiH and CC BD, the notion of an official has been extended to a foreign official, which is not the case with the CC RS. This criminal offense, which is also referred to as passive bribery, has 3 forms: right, wrong and subsequent passive bribery[14]. The act of execution in the

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[13] Guidelines for the development and implementation of the integrity plan, Articles 4 and 5 Agency for Prevention of Corruption and Coordination of the Fight against Corruption.

[14] M. Babić-L. J. Filipović-I. Mraković-Z. Ralјič, *Comments on Criminal Laws in BiH*, Council of Europe and European Commission, Sarajevo 2005.

first two forms consists in requesting or receiving a gift, receiving some other benefit, receiving a promise of a gift, and receiving a promise of some other benefit. The difference between these two forms is reflected in the nature of the official action that the official undertook to do. In the case of genuine passive bribery, the official undertakes to perform or not to perform an official action that he should not or should not perform, while in the case of false passive bribery it is an action that the official would otherwise have to perform, or would not boldly execute. Thus, the first form of the act is an illegal action of an official, while the second form of bribery is received in order to act within the limits of official authority, i.e. a legal official action is taken. Subsequent passive bribery exists when an official requests or receives a bribe after an official action has been performed or has not been performed, and the receipt of a bribe is done in connection with those actions[15]. With this form of crime, it is not relevant whether it is a legal or illegal act – it implies actions from both real and false passive bribery. Criminal laws in BiH do not recognize the attempted criminal offense of accepting gifts and other forms of benefit, since this offense was completed by the very request or receipt of a bribe, or its promise.

The criminal offense of giving gifts and other forms of benefit (according to the RS Criminal Code Giving Bribes) is in a functional relationship with the criminal offense of receiving gifts and other forms of benefit. The perpetrators in this act are persons who do not have the capacity of an official, and when officials do so, they do not do so in the capacity of officials. The act of execution consists in making or promising a gift. The official action requested from the official can be illegal (execution or non-execution of an official action that he should not or should not perform) or legal (execution of an action that he would otherwise have to perform, or should not perform). This is a right and wrong form of active bribery. Both forms of this criminal offense also criminalize mediation in bribing an official. Mediation can be done through actions such as getting to know the giver and recipient of bribes, communicating conditions and the like. It is important that the person is aware that the reason for contacting the donor and the official

15 *Ibid*.

is bribery. It does not matter for the existence of the act whether the official accepted the bribe or not, or from whom the initiative originated, however, a special basis for exemption from this act is provided. Such a ground exists provided that the official initiated the bribery and that the perpetrator reported such conduct before it was discovered, i.e. before he learned that the crime had been discovered.

The criminal offense of Illegal Mediation is characterized by the fact that the perpetrator is a person to whom his official or influential position (for example in a political party) enables mediation with another official, to perform or fail to perform a certain official action. In this way, a differentiation was made in relation to the criminal offense of accepting a bribe, because the perpetrator of the act of mediation does not accept a bribe to commit or fails to commit an act, but to influence another person to do so[16]. The law provides for 3 forms of crime, depending on whether the execution of a legal or illegal official act is required, or whether or not a reward for mediation is received. The first form of the act is easier and provides for mediation for the performance or non-performance of a lawful act. In the second form of the act, mediation is performed in order to obtain an illegal act, i.e. an act that should not be performed or should be performed. The third form of the act exists when a certain compensation has been received for illegal mediation, provided that the said mediation should result in the commission or non-commission of an illegal act. This is a more difficult qualification of another form of work.

Abuse of position and authority exists when an official or responsible person, by using his position or authority, exceeds the limits of official authority, and obtains property gain for himself or others, harms another or seriously violates the rights of another.

Embezzlement in the service exists when the executor, with the aim of obtaining for himself or another property gain, appropriates money, securities or other movables entrusted to him.

Fraud in the service exists when an official or responsible person, in order to obtain illegal property gain for himself or another, submits false

16 *Ibid*.

invoices or otherwise misleads another authorized person, and that other person pays something to the official or responsible person.

Service in the service exists when someone makes unauthorized use of money, securities or other movables entrusted to him in the service or work, and if he gives these things to a third party for service.

Strategic program 1.10. Action Plan for the Fight against Corruption in BiH – Improving the normative framework in BiH for the fight against corruption with the aim of more successful cooperation and coordination between judicial and law enforcement agencies, amendments to criminal legislation are envisaged to incriminate "influence trafficking" adoption of legislation in the field of lobbying at all levels in BiH[17].

5. Survey on Public Attitudes toward Corruption

Due to the whole situation with the corona virus, which marked the lectures within the SIPPAS project, and also our lives in 2020, I took a desktop survey from PARCO, which PARCO did within the project "Capacity building to fight corruption in civil service structures in BiH".

5.1. Executive summary

The research was conducted with the aim of collecting information on experiences with use, and satisfaction with the provided public services and the actions of officials, on the basis of which it will be possible to improve better service delivery and the integrity of public administration. A special goal of the research was to determine the characteristics of corrupt behavior of civil servants.

The survey covered 1,200 citizens living in 134 municipalities in Bosnia and Herzegovina. The research was conducted using the CATI method (Computer Assisted Telephone Interview). The sample includes citizens with an average age of 52.66 years. Of the total number of respondents, 62.8% are females and 37.2% are males. When it comes

[17] Measures 1.10.4. and 1.10.5. Action Plan for the Implementation of the Anti-Corruption Strategy 2015-2019.

to education, half of the respondents have completed a maximum of three years of secondary school, while the same number of those who have completed a four-year secondary education, college or master's/ doctoral study. About 1/4 of the respondents are employed, about one third are unemployed, and the same number are pensioners. About 4% of respondents are students and 6% housewives. Of those employed, more than one third work in the public sector, about 60% work in the private sector, while a relatively small percentage of those work in the non-governmental sector (2.2%). Respondents most often live in households with 3 people. However, the survey also covered about 20% of people living in households of 5 or more people.

The negative effects of corruption in a society are completely clear and indisputable. Hence the expectation that corruption, regardless of the form of corrupt behavior, is completely unacceptable for citizens. In order to gain insight into the general attitude of the public towards corrupt behavior, the research also includes the question of the acceptability of certain forms of corrupt behavior.

Table. 1

Evaluate the acceptability of the following statements.	**Acceptable**	**Non acceptable**
A civil servant receives fewer gifts than citizens to increase low incomes.	16,7%	83,3%
A civil servant gets a job through family ties or through friends.	10%	90%
A civil servant is asking for money or gifts to speed up the administrative procedure.	5,3%	94,7%
To offer money to a civil servant in order to speed up the administrative procedure.	6,8%	93,2%
A civil servant accepts a gift from a private company.	10,5%	89,5%

These results indicate that various forms of corrupt behavior are, in part or in full, acceptable to citizens in Bosnia and Herzegovina.

Receiving gifts to increase low incomes seems most acceptable, and asking for money or gifts to speed up administrative procedures seems the least acceptable.

To create an appropriate picture of public attitudes about the quality of services provided by public services, as well as about the integrity of public services, it is of particular importance to separate perception from experience. In this regard, respondents were asked whether they had had contact with any civil servants in the past 12 months, including through intermediaries (for example, to use a public service, seek information/assistance, documents, or during an administrative procedure). Just over a quarter of respondents (27%) have had such contact in the last 12 months. Among them, slightly more than half (52.8%) were satisfied with the service, and slightly less than half (47.2%) express a certain level of dissatisfaction.

Another important issue is the issue of experience with corrupt behavior. The question was asked as follows: Please recall all the contacts you have had with civil servants in the past 12 months. Did it happen that you had to give a gift to one of them, offer a reciprocal service or give money, even through an intermediary? Answering this question, 10.7% of respondents, who previously said that they had contacts with civil servants, stated that they were in such a situation. The remaining 89.3% of respondents deny personal experience with corrupt behavior of civil servants.

Given the time of giving, citizens most often (55.6%) give gifts or money before providing the service. About 20% of cases are characterized by giving during the provision of services, while in 13.9% of cases it is giving after the service has been provided. In only one case, probably in one of the above-mentioned large benefits, part of the money was given before and part after the service was provided.

It is interesting that only one case of giving was reported, to the ombudsman.

Given the importance of reporting corruption, all respondents (N=1200) were asked the following question: To what extent do you agree or disagree with the statements on reporting corruption below?

Table. 2

	Agree	Not Agree	Dont know
It is common practice to pay or give gifts, why would I apply	30,2%	59,3%	10,5%
There is no point in reporting corruption because nothing useful can be done about it	56,5%	32,9%	10,6%
People who report corruption are likely to regret it	57,5%	24,8%	17,7%
Sometimes corruption is the only way to get things done	50,4%	37,1%	12,5%
No one knows where acts of corruption are reported	41,3%	43%	15,7%

5.2. Research methodology

During the implementation of this task, using the experience in creating research instruments for the problem of corruption, it was necessary to define the most optimal instrument (questionnaire), based on which it would be possible to collect data useful for public relations officers and their communication with the public about corruption, prevention of corruption and fight against corruption in state institutions. In doing so, several factors had to be taken into account when drafting the questionnaire. Among other things, the following factors had a special influence on the final version of the questionnaire:

- Research time frame;
- Size of the planned sample;
- Data collection method;
- Objectives to be achieved by the research.

5.3. Research structure

The thematic units that agreed on the final version of the questionnaire included:

- Opinions and perceptions of corruption
  - o Source of information
  - o Perception of corruption in institutions
  - o Acceptability of corruption
- Experience with public institutions
  - o Contact
  - o Degree of satisfaction
  - o Reason for dissatisfaction
- Experience of corruption
  - o Frequency
  - about whom the gift was given
  - o What was given
  - o What was the purpose
  - o What was the reason
  - o As requested
  - o Whether requested before or after the duty was performed
- Reporting

5.4. Sample research

With the above methodology, data were collected from 1200 respondents. With regard to socio-demographic characteristics, basic data are presented here.

Table. 3

Sex					
		Frequency	**Percent**	**Valid Percent**	**Cumulative Percent**
Valid	Men	447	37,3	37,3	37,3
	Women	753	62,8	62,8	100,0
	Total	1200	100,	100,0	

Slightly more women than men participated in the study.

Table. 4

Year					
		Frequency	**Percent**	**Valid Percent**	**Cumulative Percent**
Valid	18-34	176	14,7	14,7	14,7
	35-44	141	11,8	11,8	26,4
	45-54	233	19,4	19,4	45,8
	55-64	328	27,3	27,3	73,2
	65-72	322	26,8	26,8	100,0
	Total	1200	100,0	100,0	

Respondents were also asked for the exact number of years. However, for the sake of clarity, the data are presented here in summary. As can be seen from the table, only persons older than 18 years (adults) are in the sample. The survey did not cover persons under the age of 18 because it

is considered that persons in those years did not have the opportunity to contact the competent services directly. Due to the expected contacts with the competent services, and the related possible corrupt experience or knowledge about corruption in the services, the emphasis in the research was placed on people of mature age. In particular, the surveyed citizens are on average 52.66 years old. The standard deviation is 16.9 years. This practically means that the largest number of respondents were between 35 and 69 years old.

Table. 5

Would you say for yourself that you are?					
		Frequency	**Percent**	**Valid Percent**	**Cumulative Percent**
Valid	Employed person	254	21,2	21,2	21,2
	Self-employed person	25	2,1	2,1	23,3
	Unemployed person	363	30,3	30,3	53,5
	Student	47	3,9	3,9	57,4
	Retired person	433	36,1	36,1	93,5
	Other	78	6,5	6,5	100,0
Total		1200	100,00	100,0	

When it comes to the employment situation, slightly less than a quarter are employed, about one third are pensioners and unemployed.

5.5. Sources of knowledge on Corruption in BiH

When asked about the sources from which they draw information about corruption in the civil service, half of the respondents (50.8%) state

that their source is television. Slightly less than a third of respondents (30.5%) do not cite a specific source, but state that "it is generally known that there is a lot of corruption in BiH". A relatively small number of respondents (only 6%) cite web portals and social networks as a source, while slightly more (8.6%) base their position on the level of corruption in civil services on personal experience.

Table. 6

Sources of knowledge on corruption in BiH	
Other	0,3
None of the above	30,5
Experience of family members and close friends	2,4
Personal experience	8,6
Web portals and social networks	6
Radio	1,4
Television	50,8

5.6. Experience with government services

The prevalence of corruption in BiH institutions is an issue that differs significantly from the opinion of citizens on the prevalence of corruption in BiH institutions. In fact, the difference is reflected in the fact that the first refers to the real state of affairs, the actual prevalence, while the second refers to the opinion on how widespread corruption is in institutions. The bad image of BiH, and its institutions, is usually based on the "bad opinion" of citizens, and much less on their "experience". In order to obtain information on the extent to which corruption is really prevalent in BiH institutions, it makes sense to first ask whether citizens have had any contact with civil servants in the past 12 months, and only then to ask them about their experiences during those contacts.

Just over a quarter of respondents (27%) have had such contact in the last 12 months. Among them, slightly more than half (52.8%) were satisfied with the service, and slightly less than half (47.2%) express a certain level of dissatisfaction.

Focusing on those who expressed dissatisfaction, it is stated that one third of citizens are dissatisfied with the work of civil servants because they were rude.

Approximately the same number of citizens express dissatisfaction because they think that officials have not done enough to solve their problem or because they have not solved their problem. A very small number of citizens (5.2% of them) express dissatisfaction because they were asked for money.

5.7. Corruption experience

The question of experience with corrupt behavior is posed as follows: Please recall all contacts you have had with civil servants in the past 12 months. Did it happen that you had to give a gift to one of them, offer a reciprocal service or give money, even through an intermediary?

Answering this question, 10.7% of respondents, who previously said that they had contacts with civil servants, stated that they were in such a situation. The remaining 89.3% of respondents deny personal experience with corrupt behavior of civil servants. If this data is viewed in the context of the fact that in the past 12 months only 27% of citizens had contacts with civil servants (slightly more than a quarter), it can be concluded that the negative image of institutions and civil servants is more a result of perception citizens, formed on the basis of a "general story", rather than on the basis of personal experiences in contacts with civil servants. This further means that corruption is much less prevalent in BiH institutions than is thought and presented in the media.

The reasons why citizens decided to give money or a gift most often refer to the acceleration or completion of an administrative procedure (61.1%). Getting better treatment (increasing points, reducing taxes, etc.) was the reason for giving money or gifts in 22.2% of cases, while avoiding paying a fine was the reason for giving in a relatively small 5.6%.

Given the time of giving, citizens most often (55.6%) give gifts or money before providing the service. About 20% of cases are characterized by giving during the provision of services, while in 13.9% of cases it is giving after the service has been provided.

5.8. Reporting Corruption

An effective fight against corruption, as well as the prevention of corruption, largely depends on how often citizens or civil servants report corruption. Citizens are expected to report corruption in cases where they find themselves in a situation where someone is asking for something in return, while civil servants are expected to report corruption in situations where citizens offer them something in exchange for any type of service. This research found that slightly more than 10% of citizens who had contact with civil servants had some kind of corrupt experience. It is interesting, however, that only one case of giving was reported, to the ombudsman.

6. Reporting Corruption in BiH Institutions

According to the generally accepted understanding, corruption in BiH is widespread, but according to the results of the research, citizens do not encounter corruption as much. Not wanting to go deep into the reasons why citizens think that corruption is widespread, the research shows us that there was only one case of reporting corruption, and it was reported to the obdusman. To support the results of the research, I sent letters to the "Stolac Health Center" and the "Stolac Municipality" to send me the answer to the question: Have you had any cases of reporting corruption in 2018-2019? I took those two institutions because I live in Stolac, and due to the coronavirus pandemic, many institutions in BiH work at reduced capacity, not accepting citizens, and also their employees work from home, at reduced capacity. For this reason, it was easiest for me to take these two institutions, because I received an answer to the requested question from them in time. Stolac Health Center has 67 employees, serving the entire municipality of Stolac with health services.

The Municipality of Stolac (as an institution) has 60 employees. Both institutions sent me a reply that they had no reports of corruption in 2018 and 2019. The generally accepted view is that health workers, and administrative workers are corrupt, but citizens do not report corruption. The response to such a situation is surprising given the general view of BiH citizens that BiH is a corrupt state.

7. Corruption perception Index in 2019

Transparency International BiH has published data, which each year ranks countries around the world in relation to the perceived level of corruption in the public sector. BiH received a score of 36 on a scale from 0 to 100, where 0 represents the highest level of corruption and 100 the lowest level, and therefore BiH ranks 101st out of 180 countries included in the survey. This is the worst grade that BiH received compared to 2012, when it received a score of 38 and was ranked 89th in the global rankings, and is now ranked among the countries that fall behind the most. The analysis of the results and comparison with other surveys showed that such a large decline in BiH was mostly due to irregularities in the conduct of elections, laws in the field of financing political parties and the election campaign. Therefore, BiH is one of the countries that, due to the constant increase of the most serious forms of political corruption, are not able to provide their citizens with basic human rights. The report also states that brutal repression and threats to voters, manipulation of voter lists of election results and full mobilization of state resources in the service of the ruling parties distance the state from political responsibility and democratization. As stated in the report, full political control of organized crime over the judiciary requires action. The initiatives of civil society organizations to conduct detailed inspections of all judicial officials were ignored by the BiH authorities, but also by the EU authorities. Transparency International BiH notes that BiH has succeeded, which no other state has succeeded in, and that is an additional decline when it comes to corruption and constant setbacks.

8. Conclusion

Bosnia and Herzegovina has enacted many anti-corruption laws, as well as an anti-corruption strategy, and thus follows the laws of the European Union, but the implementation of these laws is not at the highest level. One of the poor reasons is that there are several levels of government in BiH, so the competencies of different levels of government are intertwined. People are not aware of exactly who should be reported for corrupt behavior, and even when they do know, there is a very small percentage of such reports. According to the Corruption Perceptions Index and the PARCO survey, BiH is one of the worst ranked countries in Europe. Citizens consider Bosnia and Herzegovina to be a corrupt state. But when asked about whether they gave bribes, the percentage of such is not as high as the generally accepted view. Also, neither of the two institutions from which I was able to obtain data on reporting corruption responded that they had not reported any cases of corruption in the last two years. Here we come to contradictory data, citizens believe that Bosnia and Herzegovina is a highly corrupt country, and those who reported corruption, or participated in a corrupt event is very low. The reason for that may be that citizens are afraid to report corruption, or that they think that there will be nothing to report corruption, and that is why they do not report corruption. They do not trust the state apparatus. As I was writing this final paper, from various sources from which I drew information, and perhaps from lecturers on the S.I.P.PA.S. Project, I could conclude that the most effective tool for fighting corruption is reporting corruption.

In collaboration with

Agencija za državnu službu Bosne i Hercegovine
Civil Service Agency of BiH State

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Civil Service Agency of Federation of BiH

Agencija za državnu upravu Republike Srpske
Civil Service Agency of Republika of Srpska

Pododjeljenje za ljudske resurse of Brčko Distrikta
Subdivision for Human Resources of Brčko District

Whit the support of

Direkcija za evropske integracije
Directorate for European Integration

This publication was produced with the financial support of the European Union. Its contents are the sole responsibility of Università degli Studi di Napoli *Parthenope* and do not necessarily reflect the views of the European Union.