ASSESSMENT OF THE EFFECTIVENESS OF ANTI-CORRUPTION MEASURES FOR THE PUBLIC SECTOR AND FOR PRIVATE ENTITIES

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Abstract

The article examines the "philosophy" (nature and objectives) of the anti-corruption measures provided in the Italian legal system, assessing how and why they relate one another, in consideration of the areas covered individually and in combination, and presenting few final considerations regarding their effectiveness.

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1. Introduction

Three anti-corruption measures are currently in place in the Italian legal system. The first one has a *typically public sector nature*: it is the system implemented by the "Severino Law" (n. 190/2012) and by all the provisions set out under this law, including the "Madia Law" (n. 124/2015, together with its delegated decrees), Law n. 69/2015 and the Public Contracts Code adopted under Legislative Decree n. 50/2016 as integrated by Legislative Decree n. 56/2017[1].

Previously, the Italian legislator (with Legislative Decree n. 231/2001) had set out provisions that established the implementation of a *model for the prevention of typically private sector corruption*: this procedure was the result of obligations derived from urgent demands placed on Italy by the international instruments to which it participates. The adaptation of the Italian legal system to the Organisation for Economic Co-operation and Development (OECD) Convention of 1997 (on combating the corruption of foreign public officials in international business transactions) and the three conventions drafted within the European Union (to combat fraud against the financial interests of the Organisation[2]) required a domestic adjustment that also

[1] This issue is discussed in greater detail in N. Parisi, *Invece di una conclusione*, in D. Rinoldi, V. Petralia (eds.), *Il contrario della corruzione. Integrità e nuovi mariuoli, nuova autorità nazionale di prevenzione, nuovi strumenti interni e internazionali di repressione* (2019).

[2] This relates to the Convention on the Protection of the European Communities' Financial Interests adopted on 26 July 1995; this is supplemented by three Protocols: the first (27 September 1996) relates to the corruption of Community officials; the second (19 June 1997) concerns the liability of legal persons and the respective sanctions, money laundering and confiscation, cooperation between the services of the European Commission and Member States, as well as data protection; the third (29 November 1996) confers jurisdiction on the European Court of Justice to interpret the Convention through preliminary rulings. Italy adopted the Convention and the first and third Protocols following the authorisation for ratification and the enforcement order issued with Law n. 300 of 31 October 2000 (which also gives authorisation to the government for its full implementation: see Legislative Decree n. 231 of 8 June 2001). The second Protocol was executed and authorised for ratification with Law n. 135 of 4 August 2008. With reference to the Convention, its Protocols and their impact on the legal systems of Member States, among many publications, see: S. Manacorda, *La corruzione internazionale del pubblico agente. Linee dell'indagine penalistica* (1999); L. Salazar, *Genèse d'un droit pénal européen: la protection des intêrets financiers communautaires*, in Rev. int. dr. pén. 39 (2006); A.

covered rules regarding the obligations of legal persons and entities in general. It dealt with considerations on how to prosecute legal persons for acts of corruption committed to its benefit[3] by individuals that are either in senior executive positions or subject to the supervision or direction of those senior officials. In response to this requirement, our legislation adopted a regulation that allows private entities to be exonerated from liability in the event that the organisation model it has adopted is proven to be - despite the occurrence of unlawful acts - suitable and effectively implemented for combating corruption[4].

Finally, an anti-corruption model that is relevant as much to the *public* as to the *private sector* (including non for profit) was adopted in 2016: the *UNI ISO 37001*[5]. This is the result of self-regulatory activities issued by economic actors and public institutions, organised within private associations - at global,

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Venegoni, *La Convenzione sulla protezione degli interessi finanziari della Unione europea*, in L. De Matteis, C. Ferrara, F. Licata, N. Piacente, A. Venegoni (eds.), *Diritto penale sostanziale e processuale dell'Unione europea* (2011), I, 40 and II, 10. The Convention and its Protocols are destined to be substituted by the regulation set out under the Directive of 5 July 2017, to which Member States must adapt within two years of its adoption. On this subject, see N. Parisi, D. Rinoldi, *La protezione del bilancio dell'Unione tramite il diritto penale. Spunti a partire dalla direttiva relativa alla lotta contro la frode che lede gli interessi finanziari dell'Unione*, in 3-4 Il diritto penale della globalizzazione (2017).

[3] The reform introduced to implement the EU framework decision on private corruption (discussed below in note 4) states that it is not necessary for corruption to cause harm to society in order for the crime to occur.

[4] Articles 5-7 of Legislative Decree n. 231/2001. The decree has been amended on many occasions, mainly for the purpose of extending the list of offences to which the regulation is applicable; in relation to the issue in question - preventing the commission of acts of corruption - this was amended by Legislative Decree n. 38/2017 to fulfil the European rules on private sector corruption (Framework Decision 2003/568/JHA), which, in amending Article 2635 of the Italian Civil Code, also removed the condition of the entity having to derive an advantage from the act of corruption as a criterion used to assess the entrenchment of its liability.

[5] The UNI ISO acronym is derived from the manner in which the standard was adopted; or rather, it is applied when the *Ente Nazionale Italiano di Unificazione* (UNI, Italian National Standardisation Body) adopts (even by supplementing it) a standard that has already been approved universally by the International Organization for Standardization (ISO); if European bodies are also involved, that is, if the European Committee for Standardization (CEN) assisted in drafting the standard, then the applicable acronym is UNI EN ISO. The UNI represents the interests of Italy at the CEN and ISO.

European and national levels - dedicated to harmonize procedures and sectorial rules. Its scope (as suggested by the title: "Anti-bribery management system") is to establish adequate measures to prevent cases of corruption.

In this brief paper, we will discuss the "philosophy" (nature and objectives) of the three models, assess how and why they relate one another (in consideration of the areas covered individually and in combination) and then present few final considerations regarding their effectiveness.

2. The essential features of an effective model for preventing corruption

The fundamental question considering the phenomenon from the perspective of the procedures of the Italian Anti-Corruption Authority (ANAC) led us to explore the essential characteristics of a strong structure designed to prevent corruption. Reference is made to a general model, regardless of the sector (public or private) it is intended to operate in.

Considering the procedures of ANAC, Authority should assess the three-year plans for the prevention of corruption and transparency in the public bodies (aka institutional plans), in light of four central criteria.

2.1. First of all, the organization must move towards a *risk based* approach [6], to use a term (and therefore a technique) developed in the international context, particularly in terms of the cooperation built within the OECD. This means that the entity must consider the risk of corruption stemming from its specific activity, within its particular context, and consider how the risk can be mitigated.

This technique includes a list of conceptual and operational steps divided into two basic wings: the first one (*risk assessment*) is meant to verify the existence of risks, identify their factors, indicate actions to deal with those, and establish control procedures. The second part (*risk mitigation and management)*

[6] In relation to the international origins of the Italian regulation, please refer to N. Parisi, *Il contrasto alla corruzione e la lezione derivata dal diritto internazionale: non solo repressione, ma soprattutto prevenzione*, in Diritto comunitario e degli scambi internazionali 185 (2016).

concerns the adoption of decisions, which must be taken in order to manage the identified risk[7].

It is important to underline the procedure to identify the risk in light of an analysis of both the external and internal context of the organization. The process that each entity adopts must be considered a unique product[8]: in other words, the detection of the specific risk is a necessary process for the entity, which relates on the intrinsic nature of the compliance model adopted to prevent corruption. The events that led to the formulation of the "legislation 231 models" are very informative in this respect, in the sense that they explain why they suffered from the problems of inefficiency and lastly, of bureaucratisation within private entities. In fact, at the time they were first introduced, many initiatives had been put forward to package the models proposed by consultancy firms, forgetting that, by obtaining outside assistance, the organization could not truly learn to recognise its own risks. Needless to say, the criminal courts have considered ineffective those models[9].

2.2. The second characteristic of a constructive approach to preventing corruption within an organisation is the presence of individuals in *top management* who are genuinely committed to combating the risk of corruption. This is a typically private sector term: if one were to limit discussion to the public sector, then we would need to refer to the leaders of public entities and their senior managers. We have chosen "top management" to use a more general term (that covers both the public and private

[7] The process as it is applied in the Italian legal system by the "Severino Law" has been described and praised at the international level: see OECD, *Rapporto sull'integrità in Italia. Rafforzare l'integrità nel settore pubblico, ripristinare la fiducia per una crescita sostenibile* (2013), specifically 106-107 (http://www.keepeek.com/Digital-Asset-Management/oecd/governance/rapporto-ocse-sull-integrita-in-italia_9789264206014-it#.WgCDWo_Wzow#page2).

[8] It has been correctly pointed out (in relation to the organisational model required by Legislative Decree n. 231/2001) that this must be "*tailor made*": M. Zecca, A. Paludi, *Corruzione e modelli di organizzazione delle imprese. Un'analisi giurisprudenziale,* in A. Del Vecchio, P. Severino (eds.), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale* (2014), 117.

[9] See the procedure discussed in M. Colacurci, *L'idoneità del modello nel sistema 231, tra difficoltà operative e possibili correttivi,* in 2 Diritto penale contemporaneo 66 (2016).

sectors), also considering that the public sector may learn efficiency from the private companies.

Decision-makers of the entity must be involved in the activity of identifying, analysing and managing the risk of corruption. The absence of a real interest in this type of approach is what many people within public bodies, who are tasked with being in charge of transparency and preventing corruption, complain about, having encountered the great difficulty of engaging the political leaders in the process of formulating a good anti-corruption strategy.

ANAC has tried to alleviate this lack of support, with some positive results. During the annual meetings for RPCTs (i.e. the person in charge of transparency and the prevention of corruption situated in each public body), held in May 2015, 2016 and 2017, there was a very clear change in the attitudes of the participants. At the first meeting, RPCTs complained (almost exclusively) about their isolation within the entity. At the second meeting, the same RPCTs explained that, despite the persisting isolation, it had been possible to design some strategies for sharing the burden of the tasks associated with the role. On 24 May 2017, the event was very constructive, well above expectations: there was a widespread proactive attitude enshrined in the Three-year Plans for Preventing Corruption and Transparency (aka PPCTs or institutional plans), which presented the operative solutions they had been able to prepare and even introduce into the procedures of their respective public bodies.

This difference in attitude can be explained through the strategy that ANAC had been implementing through the National Anti-Corruption Programme (aka NAP or the Programme), since October 2015[10]. In this context, the Programme suggests that each public entity should use structures and persons within its organisation to guide them in preventing corruption in accordance with – and to enhance – their specific competences and respective roles. Attention is thus given to the method according to which the institutional plan is the last shield in an internal process in which many "agents" participate, namely: the Internal Supervisory Body (ISB), leaders and senior management, as well as each employee, with the aim of preventing institutional corruption.

[10] The NAP adopted this with Decision n. 12 of 28 October 2015, par. 4.

With regard to this last point, we could explore the role of public sector employees who report instances of corruption and other offences taking place within their places of work (whistleblowing). Who better than employees can know how certain internal strategies are functioning, how the "ritual" of clocking-in and out works. This is the time to promote the role of public sector employees, who represent a different way of behaving: the way of the employee who knows that the Constitution demands him to perform his job "with discipline and honour"[11], given that he works for a public entity that ensures "the proper functioning and impartiality" of public sector work[12]. In this context, he is directly and individually involved in the responsibilities associated with the safeguarding and promotion of the entity's culture of integrity. However, for this to happen the decision-makers need to be involved in the culture of integrity: only in this way will public sector employees feel at home, in a secure and confident environment.

With regard to this, it seems very important to mention some of the steps involved in the recommendations adopted by the Committee of Ministers of the Council of Europe on the protection of whistle-blowers[13], especially where it is stated that (emphasis added) "[t]he normative framework should reflect a comprehensive and coherent approach to *facilitating public interest reporting and disclosures*"[14]; and that "[t]he national framework should be promoted widely in order to develop *positive attitudes* amongst the public and professions and *to facilitate the disclosure of information* in cases where the public interest is at stake"[15].

Returning to the matter at hand: the lack of involvement by the entity's decision-makers leads directly to a lack of credibility for the Programme. A culture of integrity is established by example, just as one does with children: there is no point in giving

[11] Article 54 of the Italian Constitution.

[12] Article 97.2 of the Italian Constitution.

[13] Recommendation (2014) 7, adopted on 30 April 2014, identifies twenty-nine principles that the states must apply to establish "*a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threat or harm to the public interest*" (as per the 11th recital).

[14] Principle n. 7 doc. cit. in note 13.

[15] Principle n. 27 doc. cit. in note 13.

long lectures about virtuosity; what is essential is to practise integrity in our daily lives, if there is to be any chance that our efforts to instil good behaviour will be successful. Therefore, if the administrative and political leaders are involved in the culture of preventing corruption, then the entire work environment cannot fail to benefit from this favourable climate, providing the anti-corruption structure with a better chance of effectively penetrating the entity's culture.

2.3. The third feature of an effective anti-corruption model consists in creating procedures governing the different *risk based* operations, designing a specific *action plan*. Excellent opportunities arise for reorganising the entity from this process, among others, in terms of making it more efficient: the connection between mitigation and prevention of corruption is very clear.

This kind of procedures partly consists of the strategy adopted in many national legal systems, which is strongly supported by the context of international cooperation between institutions[16]. The strong point of this strategy is the programmes designed for short and medium term planning on how to combat the risk of corruption. In the Italian legal system, these schemes are called "compliance programmes" (for the private sector, in relation to the need to comply with Legislative Decree n. 231/2011) and Three-year Programmes for Transparency and the Prevention of Corruption (for the public sector, as established under the "Severino Law" and Legislative Decree n. 97/2016).

With regard to the advantages resulting from this strategy, we can refer again to the context of international cooperation: again the OECD claims that in Countries where they are practised, the programmes and plans are intended "to modernise the public service in general, and in particular to make the regulations more stringent, to ensure transparency in the administration and in financing political parties, to promote openness of government information and freedom of the media and to improve international cooperation in such efforts"[17].

2.4. Lastly, the fourth feature of a good model for preventing corruption consists in applying a stress test to the programme.

[16] On this subject, see at least OECD, *Trust in Government Ethics Measures in OECD Countries* (2000), https://www.oecd.org/gov/ethics/48994450.pdf.
[17] OECD, *Trust in Government*, 68 (doc. cit. in note 16).

Indeed, when a model is formulated for this purpose, rules for its operation, procedures for its implementation and functioning, monitoring and reporting systems and supervision methods, including checks during the process and afterwards, are established. In order to assess and guarantee the efficiency and effectiveness of the model, all these procedures need to be tested.

However, we must go even further. After a while, an anti-corruption structure tends to become obsolete, because the way it functions is known and shared. As a result, the entity needs to be prepared to continuously update the model and the assumptions on which it is based. Therefore, it must be considered a "dynamic" element, rather than a static one. It is not by chance that the "Severino Law", in relation to the public model, envisages a (three-year) programme on an annual rolling basis. This system offers an excellent opportunity for guaranteeing effectiveness: it enables everything that was learned from the previous year experience to be swiftly added to the Programme, and it enables checks on inadequate portions of the model in relation to corruption, as well as on other aspects in need of simple adjustment and other ones that were successful, therefore confirmed. It is not by chance that the case law, which evaluated the efficiency of an organisational model pursuant to Legislative Decree n. 231/2001, considered its capacity to be dynamic as one of its essential criteria[18].

3. Characteristics of the public sector model (under Italian Law n. 190 of 2012)

Law n. 190/2012 requires that each public body adopts a Three-year Anti-Corruption Programme which (under Legislative Decree n. 97/2016) must also include measures concerning transparency. Incidentally, the decision to merge the two different Programmes seems very appropriate. Transparency is the essential component of an anti-corruption strategy: it is clear that if we could achieve full transparency in the public sector, then our Country would almost entirely solve its corruption problems, which is facilitated by the persistence of opacity. It seems obvious,

[18] Order of the Preliminary Proceedings Judge of the District Court of Milan on 20 September 2004, in II Foro it. 528 (2005).

in fact, to say that transparency makes corrupt agreements more difficult to detect: maybe it is not too mean to think that for this exact reason in our legal system there are many obstacles to full transparency, in both the public and private sector.

The model advocated by the law, as mentioned earlier, is characterised by three elements: it operates on "*a rolling basis*", it is "*cascading*" and it is based on pursuing effectiveness.

3.1. Each entity (whether public or private) is not a static creature, but a body in motion. This means that we must continuously consider the needs that endlessly arise from the internal and external context. In order to be effective and thorough, the analysis must be able to consider the two sides of risk: both the "threats" side (i.e. the dangers that attack the system) and the "vulnerabilities" side (in their two sub-aspects: the negative aspect of problems and weaknesses, and the positive aspect of the capacity to resist and react, the so-called resilience).

Acknowledgement of this requirement leads us to recognise the need for an anti-corruption structure that is dynamic too. The Programme required under Law n. 190/2012 is defined as "rolling", in the sense that, even though it is adopted for a three-year period, it must be updated yearly. This process is not merely formal. Indeed, it should take place on the basis of two elements: additions and amendments should primarily be established through the experience of the entity itself, which is required to evaluate the indicators, the deficiencies and what data emerge from the analyses, so that they can be considered in the Plan and a more effective system for preventing corruption can be created. The second element, which contributes to the process of updating the Plan, consists of the National Anti-Corruption Programme, which ANAC adopts annually and which also operates on a "rolling" basis.

3.2. Reference is thus made to the second component of the anti-corruption strategy designed under Law n. 190/2012 and represented by the fact that it is "cascading", organised as it is on the basis of a double level (central and peripheral) response to the risk of corruption within the entity. The first level is administered by a National Anti-Corruption Programme (NAP) adopted by the governance body for the sector, i.e. ANAC; the second one is administered by the individual public administrations through their own three-yearly institutional plans. The NAP is, as

mentioned earlier, also three-yearly and "rolling", just like the plans established by individual public sector bodies.

The purpose of NAP is to identify "the main risks of corruption and the associated remedies (...) in relation to the dimension and different sectors of activity in which entities operate", in order to guide and support public sector bodies and the other parties to which the anti-corruption legislation is applied in the preparation of the institutional plans[19]. The national Programme contains recommendations; given that it also includes illustrative guidelines, there remains a need to contextualise the risks and remedies (the so-called measures) in relation to the specific organisational context of each entity. The method used therefore, supplemented by the two rolling and cascading actions, enables the creation of a continuous cycle of control, learning and application of personalised, made to measure instruments for prevention.

3.3 In this context it seems appropriate to note the change to the strategy that occurred between the approval by the CIVIT (*Commissione per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche*, Commission for the evaluation, transparency and integrity of the public sector) of the first NAP (of 2013) and the adoption by ANAC of the subsequent NAPs (of 2015, 2016, 2017 and 2018). It was a change in strategy in some way instigated by the requests for support that reached the Authority from certain areas of the public sector, notably from the health service; but it was also noted by the Authority itself as necessary after the findings that emerged from its supervisory activity in the period immediately following the establishment of its new Council (July 2014). From this activity, in fact, it was noted that the quality of the institutional plans had to be considered "generally" unsatisfactory"[20].

The poor quality of the first institutional plans was without doubt partially due to the novelty of the compliance required: at that time, the public sector was not equipped to evaluate and manage the risk of internal corruption, since adequate time and appropriate occasions for developing the necessary

[19] Article 1.2*bis* of Law n. 190/2012, as amended by Legislative Decree n. 97/2016.

[20] ANAC, *Relazione annuale 2015* (2016), 79.

"revolutionary" skills had not been allocated, and the same applied to the Italian legal system. It is true that, due partially to this situation, in handling this new task, there was a tendency (which was also demonstrated in the first application of Legislative Decree n. 231/2001) towards a merely formal, slavishly compliance with the "Severino Law". Consider, by way of example, that the first round of supervisory activity revealed the case of a municipal authority that had adopted the institutional plan of another municipal authority (without even changing the heading of the organization and the name of the RPCT), and a large hospital in Campania region that had used the plan of a hospital based in a small province of Piedmont region.

This resulted, as mentioned before, in an evaluation of the sterility of a national programme, which in its generic and uniform application, lent to a "cut-and-paste" exercise, to mere vague proposals, and to cosmetic operations. The public sector was not put in a position, from the first introduction of Law n. 190/2012, to understand the logic and the benefits of the process, which consists in recognizing the specific, individual risks determined by the context (both external and internal) that characterises each entity.

The following national programmes, including the one that is about to be published, are based on the principle that the public sector is not an undifferentiated universe, consisting instead of very diverse components. These new generation of NAPs, consequently, include only few measures aimed at the public sector as a whole[21]; whereas most of them consist of clarifications directed at specific areas of the public sector[22]. ANAC has therefore abandoned the idea of issuing the same recommendations to all entities of public sector, regardless their function, size, whether central or local, and whether with a stable nature or otherwise. The aim is now to appreciate the diversity of the general and specific risks, the difference between the areas at

[21] The 2015 PNA contains 24 general pages; the 2016 PNA, 37; the 2017 PNA only 17.

[22] In the PNA, the clarifications pertain, in 2015, to the public tender and health service sectors; in 2016, small municipal authorities, metropolitan cities, professional associations and colleges, academic institutions, cultural heritage, territorial government and healthcare; in 2017, the port system authorities, official receivers and universities.

risk according to the function, the different external context, duration and stability of the entity, in a tailor-made style. Furthermore, this assessment was helped by a well-oiled technique: that is, through consultation with those who for different reasons have been made aware of the contents of the national programme via joint "working groups" in which the risks of corruption and the tools available were discussed.

This is the type of conceptual approach that ANAC considers more practical for guaranteeing that the recommendations for the public sector will be more effective. Only in this way can the organisational model for preventing corruption be truly operative.

The search for a substantial approach emerges from all the Authority's practices. Only one example is needed, which illustrates the practice of "copy-paste homework", so to speak. The "Severino law" establishes the obligation to impose sanctions on public bodies that do not have an institutional plan, regardless its effectiveness. ANAC has concluded that programmes that are copied verbatim, with no specific risk analyses, are in essence non-existent: therefore, these entities are liable for sanctions. This idea contradicts the assumption that anti-corruption procedures lead to a new, more intense (ineffective) bureaucratisation of the public sector, forcing the entity to spend human and financial resources into a model that has proven to be ineffective, given that it was not developed for its own context[23].

4. … the private sector model (pursuant to Italian Legislative Decree n. 231 of 2001)

The compliance model established under Legislative Decree n. 231/2001 does not find detailed instructions, which are helpful for identifying its contents and drafting techniques, in the guidelines of positive law[24]. Three parameters are stated therein:

[23] Furthermore, Article 2 of the Severino Law contains an invariance clause: this determines the illegitimacy of consultancy fees in relation to the preparation of the PPCTS (as established by ANAC with Decision n. 831 of 3 August 2016).

[24] On the conciseness of the provisions in question, see the recent publication by R. Sabia, I. Salvemme, *Costi e funzioni dei modelli di organizzazione e gestione ai sensi del D.Lgs. n. 231/2001,* in A. Del Vecchio, P. Severino (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti* (2016), 434, 438 and 456.

on the one hand – with regard to the drafting of a possible strategy for combating risks (also) of corruption – it should be noted that the organisation, management and control model (essential for avoiding the possibility for the entity being considered liable for alleged offences) must respond to certain characteristics, namely: "a) identify the activities in the context of which offences may be committed; b) establish specific protocols intended to schedule the making and implementation of the entity's decisions with regard to the offences that need to be prevented; c) identify methods for managing financial resources, which are suitable for preventing the commission of offences; d) establish obligations to disclose information to the organisation assigned to supervise the functioning of and compliance with the models; e) introduce a suitable disciplinary system to penalise non-compliance with the measures set out in the model."[25] The model must also establish, "in relation to the type and dimensions of the organisation and the type of activity performed, suitable measures for ensuring the performance of the activity in accordance with the law and identifying and promptly eliminating risk situations"[26]. On the other hand, in terms of effectiveness, it was decided that the model must at least require "a) periodic verification and, where appropriate, amendments to the same when significant breaches of the rules are discovered or when there are changes to the organisation or the activity; b) a disciplinary system appropriate for penalising non-compliance with the measures set out in the model"[27].

On the conciseness of the regulatory provisions, the rulings of a few criminal courts provide relevant case law. On several occasions they have considered, in addition to the criminal liability of the natural person who effectively implemented the act of corruption, the possibility of reconstructing a liability[28] of the

[25] Article 6.2.

[26] Article 7.3.

[27] Article 7.4.

[28] The literature is divided on the type of liability of the entity under Legislative Decree n. 231/2001. For a reconstruction with a general scope, see P. Severino, *"Omogeneizzazione" delle regole e prevenzione dei reati: un cammino auspicato e possibile*, in A. Fiorella, A.M. Stile (eds.), *Corporate Criminal Liability and Compliance Programs* (2012), 427 ss. The administrative nature is affirmed by M. Romano, *La responsabilità amministrativa degli enti, società, associazioni: profili generali*, in Riv. soc. 398 (2002). For a discussion of the mixed nature, O. Di

entity on whose behalf the person acted[29]. It was thus that a system of rules was codified, a group of conditions through which the entity can presume it has an effective anti-corruption model: the so-called "Milan Handbook", supplemented by the case law of the Naples District Court (*Tribunale di Napoli*),[30] provides a useful summary. However, this analysis performed using case law is still weak to give certainty to the subjects who adopt the model in terms of the defence before the criminal courts, of an organisational and management model, and therefore, it does not help to make appealing the process of adopting a similar model appealing in substantive terms[31]. The absence of incentives to make this process effective and not a merely cosmetic operation has led to some attempts of reform[32].

5. …. and the UNI ISO 37001

ISO 37001 (on Anti-Bribery Management Systems) is aimed to support organizations (large and small, public and private), through a series of concrete measures, in the prevention of

Giovine, *Lineamenti sostanziali del nuovo illecito punitivo*, in G. Lattanzi (ed.), *Reati e responsabilità degli enti* (2015), 15 ss.; and similarly the Italian Supreme Court, Section VI, sentence n. 36083 of 9 July 2009. Claiming (and I agree) that this involves criminal liability, C.E. Paliero, *La responsabilità della persona giuridica nell'ordinamento: profili sistematici,* in F. Palazzo (ed.), *Societas puniri non potest* (2003), 23 ss. For a comparative discussion on the evolution at the European level of the legal regime of company liability and entrepreneur's liability, see F. Clementucci, *Comparative analysis of criminal law, procedures and practices concerning liability of entrepreneurs*, in https://rm.coe.int/16806d8140.

[29] Case law (up to 2012) is presented in S.M. Corso (ed.), *Codice della responsabilità "da reato" degli enti annotato con la giurisprudenza* (2015).

[30] This concerns the orders adopted respectively by the Preliminary Investigations Judge at the Milan District Court (Tribunale di Milano) on 20 September 2004, in 47 Guida dir. 69 (2004), and the Preliminary Investigations Judge in Naples on 26 June 2007, in 4 Resp. Amm. Soc. 163 (2007). For an effective comment on the contents of this case law, please refer to M. Zecca, A. Paludi, *Corruzione e modelli*, cit., 113.

[31] Regardless of the uncertain benefits of this internal compliance system in terms of court proceedings, the process of collecting and analysing data that it requires, it can enable the organisation concerned, if nothing else, to identify, acknowledge and understand some internal problems.

[32] On this point, see F. Centonze, M. Mantovani, *Dieci proposte per una riforma del d.lgs. n. 231/2001*, in Id. (eds.), *La responsabilità "penale" degli enti. Dieci proposte di riforma* (2016), 283 ss.

corruption and in promoting a culture of business integrity. The ISO 37001 standard is based on a system that adopts a structure common to all ISO standards: the so-called *High Level Structure* (*HLS*). This consists in seven conceptual stages, of an organisational model, namely leadership (*focus on the top*), planning, support, operational activities, evaluation of services and improvements. Methodologically, this seems more valuable than the two models described above which, on the contrary, are quite homogeneous. Published in October 2016 (following the work of the ISO/Technical Committee #309 on "Governance of organizations"[33]), ISO 37001 was adopted in December of the same year by the Italian *Ente Nazionale Italiano di Unificazione* (UNI[34]).

In comparison to previous domestic instruments, this one adds a system of reporting, monitoring, auditing and periodic verification (which was not specified under Law n. 190/2012, nor in Legislative Decree n. 231/2001); as well as the performance of investigations and the implementation of corrective actions (merely implied in the "Severino Law"). On the functioning of ISO 37001, one cannot disregard the fact that the standard gives attention to the continuously changing context, thus providing practical indications and concrete examples in order to avoid sanctions. The recurring verification is a crucial element in making fertilization smoothly flow and reinvigorate. A bit like artificial intelligence, this mechanism is able (and meant to) learn from the past and eliminate previous mistakes by taking improved actions for the future. This is the whole point of section n.10 of the standard (so called "Improvement", divided into 10.1 - nonconformity and corrective action - and 10.2 - continual improvement), with focus on self-adjusting the anti-bribery management system in the pursue of suitability, adequacy and effectiveness.

Concerning the public sector[35], we note how in some States (i.e. Indonesia[36], Malaysia[37] and Guatemala[38]) the standard

[33] More information at www.iso.org/committee/6266703.html.

[34] See (in italian) at www.uni.com/index.php#.

[35] See W. MacMurray "*The public sector: how did it use ISO 37001 in 2018? Creatively!*", in www.ethic-intelligence.com/en/experts-corner/international-experts/518-the-best-word-to-describe-public-sector-use-of-iso-37001-in-2018-creative.html.

receives soft usage, meaning that important public sector organizations require self or their partners' certifications. In other cases, States make hard use of the standard, when their prosecutors consider ISO 37001 certifications as conditions for judicial agreement (in Brazil[39] and Singapore[40]) or as part of companies' good faith remediation efforts (Denmark[41]).

6. The scope of the different models

Some interesting points emerge from a comparison of the contexts covered by the three anti-corruption models in force. The public sector model identifies seven criteria for any corruption risk management system: an analysis of the entity's internal and external context, along with a consultation with the stakeholders, the assignment of roles and competencies within the organisation; the analysis of risks of corruption; the identification of prevention measures starting with the areas of activity most at risk from corruption; the drafting of a plan with details regarding calendar and duties for its implementation; verification of what has been achieved and the connection of the results of the outputs established in the Plan with the system for evaluating the performance of the managers[42].

The proper criteria for a compliance programme (of Legislative Decree n. 231/2001) can be found in the

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[36] See: skkmigas.go.id/detail/2467/skk-migas-starts-implementing-sni-iso-37001-2016-on-anti-bribery-management-system-smap and skkmigas.go.id/detail/2641/skk-migas-resmi-terakreditasi-sni-iso-37001.

[37] See *Anti-graft system for high-risk depts,* at www.theedgemarkets.com/article/antigraft-system-highrisk-depts.

[38] See *Remarks at the Conference on Prosperity and Security in Central America*, at www.state.gov/secretary/remarks/2018/10/286571.htm.

[39] See For Odebrecht*, Agreement With CGU And AGU Strengthens Legal Certainty For Business Recovery*, at www.publicnow.com/view/F40A482B9E92DDB02E824064A66E9A0BF629A99C

[40] See Singapore Adopts ISO Standard on Anti-Bribery Management Systems, at www.cpib.gov.sg/press-room/press-releases/launch-singapore-standard-anti bribery-management-systems.

[41] See Atea Denmark reaches settlement with public prosecutor, at news.cision.com/atea-asa/r/atea-denmark-reaches-settlement-with-public-prosecutor,c2574577.

[42] L. Carrozzi, *Piani di prevenzione della corruzione. L'approccio dei sistemi di gestione e i fattori critici di successo*, in Gnosis 161 (2016).

aforementioned case law analysis, according to which "the effectiveness of an organisational model depends (...) on its suitability in practice with regard to creating decision and control mechanisms that can significantly eliminate or reduce the risk of liability and obviously effectiveness and must be linked to the efficiency of instruments suitable not only for penalising unlawful acts, but also for identifying the areas of risk in the company's activity"; this must be "specifically suitable for preventing the commission of offences in the context of the entity for which it was prepared; the model must be, therefore, specific, effective and dynamic, that is, such that it can adapt to changes to the entity concerned"[43]. In addition, the existence of this model is not enough. It is necessary that the entity "has implemented it effectively, by applying it in practice, through ongoing verification of the suitability of its functioning, through progressive updating, so as to ensure a constant adjustment to operational and/or organisational changes that have occurred"[44].

In practice, the two models tend to function according to methods that are in some ways similar. One should consider that even in relation to the anti-corruption sector *stricto sensu*, ANAC tends to apply a mode of conduct that is based on the beneficial process of collaborative supervision codified for the public tender sector[45], as a consequence of the desire (and the effort) to support the public sector in adopting virtuous conduct, instead of imposing sanctions. Conversely, long time ago, the judiciary launched a process that tends to establish methods of collaboration (during preliminary investigations) with the entity, invited to open internal defensive investigations to support and coordinate with the public prosecutors offices, in order to avoid the initiation of criminal proceedings, which often entail the application of cautionary measures, both pecuniary and interdictory[46], in a certain sense borrowing the (collaborative)

[43] Preliminary Investigations Judge District Court of Milan, Order of 20 September 2004, cit.

[44] Preliminary Investigations Judge District Court of Naples, Order of 26 June 2007, cit.

[45] Article 213, par. 3, letter h), Public Tenders Code; Article 4, par. 2, letter a), of the supervisory regulation of 15 February 2017.

[46] F. Palazzo, *Obblighi prevenzionistici, imputazione colposa e discrezionalità giudiziale*, in 12 Diritto pen. proc. 1545 (2016).

experience gained in other legal systems, where criminal prosecution is not even compulsory[47].

7. The process of cross-fertilization for preventing corruption in different contexts

Following the presentation of models for the prevention of corruption that exist in our legislation, the second theme that should be analysed concerns the process of inter-models fertilization that we are experiencing. This is a process defined by the fact that the underlying needs of the public and private sectors are identical in terms of the aspects relevant to our discussion, in the sense that they both require the establishment of effective responses to the risk of corruption.

This inter-models fertilization is very interesting, complex and characterised by a transnational influence. It takes place, primarily, through processes that are entirely domestic to the Italian legal system. It is certainly not original to observe, for example, that the anti-corruption measures established under the "Severino Law" are inspired by the compliance programmes system set under Legislative Decree n. 231/2001[48]. This process of,

[47] In France it was governed by the hypothesis of "*convention judiciaire d'intérêt public*»: Article 22 Law n. 2016-1691 of 9 December 2016 (*Loi Sapin II*), inserted into the new Article 41-1-2 of the French Code of Criminal Procedure; in the USA the model applied is the *Deferred Prosecution Agreement* ("DPA") introduced in 1999 by the United States Department of Justice (DOJ) with *DOJ Guidance for Proceeding Against a Corporation "Federal Prosecution of Corporations"* (*Holder Memo*).

[48] The inspirational function of the "231 model" in relation to the strategy of preventing corruption in the public sector originates from the work of the so-called "Garofoli Commission": "(…) the Commission waited for different proposals to be drafted on promoting mechanisms for preventing corruption. First of all, the development, within public entities, of methods for identifying and measuring corruption, as well as the establishment of a suitable management structure, based on risk management models, along the lines of the organisation and control models used in private companies and entities as established under Legislative Decree n. 231 of 8 June 2001": R. Garofoli (ed.), *Rapporto della Commissione per lo studio e l'elaborazione di proposte in tema di trasparenza e prevenzione della corruzione nella pubblica amministrazione, La corruzione in Italia. Per una politica di prevenzione. Analisi del fenomeno, profili internazionali e proposte di riforma*, 1 October 2012, par. 8.1, 35. The contamination between the two models, however, encounters certain limits, which arise from the intimate nature of each of these - as highlighted by the guidelines adopted

shall we say, "horizontal fertilization" within our legal system is evident even by observing how the strategy based on the programme initially became established in the banking and finance sector[49], later spreading to other fields of private economic activity and was finally generalised by the aforementioned legislative decree.

The process of fertilization among models could be useful in terms of the methodological enrichment that comes from UNI ISO[50]. However, a new element was introduced by model 37001 (the element that the pertinent literature considers the most important) in relation to which there is much to discuss. This is the fact that the UNI ISO model explicitly states the possibility of certifying how real and effective the anti-corruption organisational model is, for all types of organisation (small, medium, large, public and private). This development is not new: it was already suggested in the practices adopted during the period when the "231 models" were launched; the development was then re-proposed in the draft bill prepared by the Research

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by the National Anti-Corruption Authority with Decision no.8/2015 (*Guidelines for the implementation of the law on transparency and the prevention of corruption by private sector companies and entities owned or partially held by public sector bodies and for-profit public entities*, 11) - mainly attributable to two facts: the public model must address only corruption offences against the State (that is, only passive corruption); the notion of corruption assumed by this is much broader, since it considers not only criminally significant actions, but also those that consist of so-called "maladministration" (in relation which, please refer to N. Parisi, *L'attività di contrasto alla corruzione sul piano della prevenzione. With regard to public tenders and more ...,* in R. Borsari (ed.), *La corruzione a due anni dalla "Riforma Severino"* (2016), 91 ss.

[49] See, *mutatis mutandis*, the forty recommendations established by the Financial Action Task Force (FATF-GAFI) devised to combat money laundering and terrorist financing (www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html).

[50] It is very evident how much this model deviates from the public sector model and the "231 model". UNI ISO 37001 is a pervasive, very rigid and static instrument: it has to be fully adopted, with all its processes being applied to each entity that wants to use it; it "photographs" the condition of the entity at a particular moment in time and is not designed to adapt itself, through the fundamental support of the controls, to the dynamism of the flow of social life. Furthermore, a methodological function is performed by UNI ISO 31000/2010 in relation to the first PNA (2013), of which Appendix 6 contains the principles for the management of risk based on said model.

and Legislation Agency (*Agenzia di Ricerche e Legislazione* - AREL)[51].

No doubt, the process of certifying the effectiveness of a model has its own intrinsic benefits: indeed, it enables not only the standardisation of models, but also facilitates the use of a common language at the international level. From this perspective, certification could produce a positive effect on the entire strategy system for preventing corruption in the context of international trade. This characteristic also accounts for another factor: the UNI ISO model is suitable for business-to-business relationships (not by chance does it include business practices), but is much less suitable for dialogue between for-profit entities and public authorities (regardless of their nature: administrative or judicial).

However, looking first of all at the experience of the "231 models", one cannot but have some serious doubts about the role of certification in exonerating the entity of its liability for the commission of acts of corruption. The *Impregilo case* provides a good example in this respect: the District Court of Milan[52] first, and the Court of Appeal in the same city [53] later, have ruled that the organisational model implemented by the entity was adequate in relation to actions committed by those in top management positions who had fraudulently evaded the model itself. These decisions, however, were subsequently quashed by the Italian Supreme Court (Corte di Cassazione)[54]: in short, the Court did not feel bound by any certification (in the event arising from the model having adopted both the scanty provisions of Articles 6 and 7 of Legislative Decree n. 231/2001 and the Guidelines adopted by Confindustria) and ruled with full autonomy, having assessed the efficiency and effectiveness of the compliance model. Furthermore, ANAC will not feel constrained either by an ISO certification of effectiveness, whether in relation to a public body or a private for-profit entity, just because the strategy fulfils the criteria of model 37001 and, as a result, it received certification.

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[51] See in www.arel.it. On this subject see *La certificazione del Modello organizzativo ex Decreto Legislativo 231/2001,* in www.filodiritto.com.

[52] Judgment of 20 September 2004, in II Foro it. 528 (2005).

[53] Judgment of 21 March 2012, n. 1824, in www.penalecontemporaneo.it.

[54] VI Section, judgment of 18 December 2013, n. 4677, in Dir. pen. proc. 1429 (2014).

Secondly, and from the conceptual perspective, part of the literature points, rightly so, to "the impossibility and (...) inadequacy of the certification mechanisms in terms of managing blame within an organisation": this would have an influence, in fact, in a context that is "structurally not (...) subject to certification and instead (...) is totally incompatible with assessments of that type"[55].

Certainly, both the "231 model" and the UNI ISO 37001 standard share a common advantage (of the public sector model also): they enable the organisation to recognise and discover internal problems. Ultimately, they enable a sort of check up to be performed, which can photograph the structure and organisation of the entity's activities: what represents a beneficial outcome, even if not strictly essential, but only preparatory, for the measures needed to prevent corruption.

In conclusion, apart from the educational value that a different study of the compliance models could provide, nothing seems to have changed with regard to the framework used by the court as an assessment parameter, for the private sector, and by the authority in charge of preventing corruption, for the public sector.

We can now mention which are the incentives to cross-fertilization, both externally and internally, and horizontally or vertically. First of, the examination should distinguish between fertilization of models and fertilization of actors, public and private. While some incentives may have effects on both levels, others are more specific for either one. On the cross-fertilization of models, the interaction is between legal actors, operating on the normative space, both nationally or internationally. Therefore, any element that improves the size, quality and reliability of both normative environment and its operators has an effect on cross-fertilization of models. Making reference to the analysis above, drivers of this communication are, at international level: a) the globalization of legal norms (i.e. the dissemination, understanding and voluntary or binding compliance of international recommendations); b) the permeability and inclusiveness of

[55] On this, R. Sabia, I. Salvemme, *Costi e funzioni dei modelli di organizzazione,* cit., 462, reporting the judgment of C. Piergallini, *Paradigmatica dell'autocontrollo penale, Parte II*, in Cass. pen. 842 (2013), specifically par. 9.

international principles (i.e. the ability of international norms to recognize, elevate and enshrine national practices) and c) the appeal of national standards (in other words, the power of domestic norms to move internationally and influence foreign or international rules). At national level, the interaction between public and private sector will surely improve the cross-fertilization between models stemming from these two spaces. Therefore, at this level, drivers of fertilization will be: 1) the binding power of public model; 2) the measure (size, quality and dissemination) of compliance of the private sector vis-à-vis the public model and 3) the inclusiveness of the public model (i.e. the capacity to recognize good practices from the private sector and include them into the public model). In other words, the degree of proper absorption in the private sector: i.e. how much private actors are able to recognize and factor in good practices, and implement them a proper and effective fashion.

Additionally, we can also refer to the political will or ability to regulate the private sector. Provided that the italian market is under a situation of liberalism, we know that the economic activity can be regulated in light of social justifications[56]. Equally important, the Italian Constitution also prescribes the State to "*remove the economic and social obstacles which, (…) prevent the full development of the human person and the effective participation of all workers in political, economic organization, and social life of the Country*" [57]. In light of this combination of conditions and obligations, it would not be surprising, let alone illegitimate, for a legislator or executive authority to go so far as to address this concern by regulating competition of economic actors in a way to suggest, facilitate or initiate putting in place requirements for the prevention of corruption. In other words if, on one hand, the free and competitive market is a constitutional right, as a fundamental element of the person's dignity, and that the market shall be used

[56] Article 41 of the Italian Constitution reads (emphasis added) "Private economic initiative is free. It cannot be carried out in contrast with *social utility* or in such a way as to damage safety, freedom and *human dignity*. The law determines the appropriate programs and controls for public and private economic activity to be directed and coordinated for social purposes" (see at https://www.senato.it/1025?sezione=122&articolo_numero_articolo=41).

[57] See Article 3 of the Constitution of the Republic of Italy, at www.senato.it/1025?sezione=118&articolo_numero_articolo=3.

for social utility and, on the other hand, corruption is an unfair distortion of the competition, which affects the weakest members of society, then the State may engage in strong, well-distributed, inclusive but also binding requirements for the promotion of business integrity models. This would represent an undisputable accelerator of cross-fertilization, from the public towards the private models.

Concerning the reasons for such cross-fertilization, we understand that they are closely linked to self-survival. Basically, distorted competition represent an alteration of the market, which bring uncertainty of risks, rules and therefore higher costs. By nature, economic actors must foresee the consequences of their investment. They cannot survive long-term uncertainty. They can mitigate the risk in two ways: a) by "conquering" the market, meaning develop dominating size entities or coalitions or b) create a level-play field, by engaging and promoting corruption-adverse rules and models. If, like the example in this paper, actors engage in establishing and complying with integrity models, they have a strong interest in having all other competitors follow the same rules. They can exercise this pressure in different ways and directions. They may, for example, advocate policy makers in order to pass legislation and implement instruments for market integrity. Furthermore, they can develop peer pressure aimed at, like the example above, promote, support and reward integrity-strong partners and, on the other hand, demote, marginalise and discriminate integrity-weak actors. In conclusion, the reason for cross-fertilization is, at its heart, not really altruistic, rather the contrary is true. Economic actors will have a strong desire to push in different ways as to create an integral market in order to gain certainty, mitigate the risk and, ultimately, reduce the cost of doing business. In other words, the pursue of selfish individual interests, will have the unexpected but necessary virtuous effect to establish a clean economic space.

7.1. Intersections between the private and public sector models: private companies controlled by public bodies

A very interesting fertilization occurs by virtue of the transplantation aimed by the Legislative Decree n. 97/2016: due to the fact that the controlled private company can be a fertile environment for both active and passive bribery, the private entity

must get - in addition to the "model 231" - other tools for the detection and management of risk falling under the second type of (passive) corruption. On the other hand, if the entity has no "model 231", then it is obliged to adopt a "single model" (in Italian "*modello unificato*") that contains all the measures necessary to deal with the risk. The two briefly described models (public and private) have a point of contact in the construction of an anti-corruption strategy within private companies in which public entities hold a share. In accordance with the mandate contained in the "Madia law", Legislative Decree n. 175/2016 was passed and contains the Consolidated Act on reorganisation of State owned enterprises (SOEs). This codification is, however, unusually silent on the subject of anti-corruption and transparency: so much that we need to find the regulation relevant to our discussion in another piece of legislation with identical origins (Legislative Decree n. 97/2016), intended to regulate, in general terms, the subject of fighting corruption through prevention in public bodies (using administrative transparency measures also), which was already covered under the "Severino Law" and Legislative Decree n. 33/2013[58].

The solution identified in establishing rules on transparency and the prevention of corruption, even for so-called public companies, is built on the basis of the limited instructions that emerge in part from Law n. 190/2012[59], as enhanced by the 2016 NAP[60] as well as the current Guidelines adopted by ANAC[61], and

[58] On this subject, see R. Cantone, *Prevenzione della corruzione nel sistema delle società pubbliche: dalle linee guida dell'ANAC alle norme del D. Lgs. n. 175/2016*, in F. Auletta (ed.), *I controlli nelle società pubbliche* (2017), 17; A. Massera, *Gli statuti delle società a partecipazione pubblica e l'applicazione delle regole amministrative per la trasparenza e l'integrità*, cit., 45; M. C. Lenoci, D. Galli, D. Gentile (eds.), *Le società partecipate dopo il correttivo 2017* (2017); M. Lacchini, C.A. Mauro (eds.), *La gestione delle società partecipate pubbliche alla luce del nuovo Testo Unico. Verso un nuovo paradigma pubblico-privato* (2017); S. Fortunato, F. Vessia (eds.), *Le "nuove" società partecipate e in house providing*, in 408 Quaderni di giurisprudenza commerciale (2017); V. Sarcone, *L'applicazione delle misure di prevenzione della corruzione e sulla tutela della trasparenza (L. N. 190/2012 e decreti attuativi) alle società pubbliche*, in F. Cerioni (ed.), *Le società pubbliche nel Testo Unico* (2017), 220 ss.

[59] Originally the rule was stated in Article 1.2 of Law n. 190/2012; this was amended by Legislative Decree n. 97/2016, which added (thanks to the provision contained in Article 41) a new Article 1.2*bis*.

[60] PNA, 13 ss.

outlined by Legislative Decree n.97/2016, which was confirmed by the Council of State[62]. This requires that in relation to private companies owned by public bodies, the "231 model" (which is not compulsory for private entities),[63], must be supplemented by a programme of anti-corruption measures[64] (failing to do so would result on penalty of its pointless bureaucratisation). Specifically, in relation to the prevention measures intended to implement administrative transparency, the regulation established for public entities[65] is also applied to publicly owned private entities "as regards both its organisation and the range of activities performed"[66]. The solution collectively chosen by the Legislature originates from the desire to achieve a substantial assimilation (limited to these aspects) between the owned private entity and the public entity[67].

When a private entity is only partially owned or shared, then only the rules on transparency are applied (and not all the others on preventing corruption), establishing, moreover, that this regulation is to be used "only in relation to activities carried out in the public interest"[68]. This is a broad interpretation of the legislative structure that emerges from Article 22 of Legislative Decree n. 175/2016 and Legislative Decree n. 97/2016 (endorsed by the Council of State[69]) according to which any private entity that performs (even non-exclusively) public functions must be

[61] Decision n. 8/2015, cit.

[62] Opinion n. 1257 of 29 May 2017.

[63] In the sense claimed here, see Supreme Court, Section VI, judgment of 23 June 2006, n. 32627. *Contra*, even though authoritative, Council of State, opinion last citation, par. 9.1.

[64] This interpretation of the rules established by ANAC with the Guidelines passed with decision n. 1134/2017 on 8 November 2017, par. 1.3, *adopted for the implementation of legislation on transparency and the prevention of corruption in private companies and entities that are owned or partially owned by public administrations or for-profit public bodies*.

[65] See the new Article 2*bis* of Legislative Decree n. 33/2013 (introduced by Legislative Decree n. 97/2016).

[66] This is the confirmation of the legislation in force implemented in the Guidelines of ANAC cit. in note 50, par. 1.2.

[67] The legislative solution, furthermore, confirms what was already established in ANAC's Guidelines adopted with Decision n. 8 of 17 June 2015, fully replaced by the new Guidelines cit. in note 50.

[68] Op. cit.

[69] Opinion n. 1257 of 29 May 2017.

transparent with regard to these provisions. The structure has important consequences in terms of public access, which can, therefore, be exercised even with regard to partially owned private companies[70].

Listed companies are situated outside this sphere. Legislative Decree n. 97/2016 does not cover these, since it was not considered appropriate to extend to them the regulation established for non-listed companies due to the different interests involved, and refers to a subsequent legislative provision devised in consultation with the Ministry of Economics and Finance and CONSOB (the Italian National Commission for Corporations and Stock Market).

The recent Law n.179/2017 introduces provisions for the protection of those who report offences or irregularities, which they have become aware of in the context of a private or public sector job. It adds a useful element with regard to companies in which public entities hold a share. Its provisions, with regard to what is set out under Article 1, are fully applicable to subsidiaries due to their connection with the anti-corruption regime applicable to the public sector; and, with regard to what is set out under Article 2, to subsidiaries, with a regime that is certainly weaker because it is governed by only the "231 model", which the company itself has adopted.

This implantation has twofold consequences: on one hand, one enters an additional dimension of effectiveness and efficiency, which is typical of a public action, into the logic of the model 231, which in its original creation pertained to a mere prevention of crimes. Basically, it also includes a dimension that has to do with the so called "administrative corruption" and that perhaps it is only - but surely no little - the most careful and close evaluation of situations of conflict of interest. On the other hand, there is an extension of the supervisory powers of the National Anti-Corruption Authority in the private body, certainly limited to the scope of "supplementary measures".

7.2. The vertical cross-fertilization among models

This process of cross-fertilization operates vertically as well. It was already emphasised how anti-corruption strategies have

[70] Guidelines cit. in note 50, par. 3.3.3 and 3.3.4, 38-39.

been, in many ways and particularly for the Italian legal system, prepared on the basis of ideas originating in the international context, which has managed to influence the national legal system, guiding it towards certain basic principles of the anti-corruption model[71]. Furthermore, the process of "vertical cross-fertilization" operates in the opposite direction too: it is in fact true that the virtuous practices of some States are likely to continuously flow, back and forth, from the national stage into the international fora, through the many periodic working groups attended by representatives and entities from both the public and private sectors. Significant in this respect is what emerges from the work of the so-called "SPIO Working Party" (*Senior Public Integrity Officials Network*), established by the OECD within the *Directorate for Public Governance*, which is able to attract and circulate the best practices on integrity models of national public administrations among the thirty-six member States (plus the partners) of the organisation. Up to now, this body has produced two separate generations of recommendations, which inform national administrations to adopt virtuous models of conduct [72]. Furthermore, the Italian context has also contributed to enrich this circulation of good conducts: the definition of effective forms of institutional cooperation and procedures for the supervision of public tenders implemented by ANAC in coordination with the OECD[73], to mark EXPO 2015, was recognised by the OECD as a best practice of the Organisation[74]. Therefore, it was exported to other national contexts engaged in large construction projects, such as the new airport in Mexico city. Additionally, the

[71] Please refer *supra* to notes 2, 4, 6 and 7, in relation to the influence of the Italian experience of this issue on the international scene.

[72] On 26 January 2017 the OECD Council approved (after the complex and long consultation process that took place in the working group mentioned earlier with the public administrations of the member states) the new Recommendations C(2017)5 *on Public Integrity*, to promote the construction of a coherent, all-encompassing public system of integrity; these substitute the Recommendations of 1998 *on Improving Ethical Conduct in the Public Service.*

[73] Memoranda of Understanding of 6 October 2014 and 12 May 2016 (published on www.anticorruzione.it).

[74] See the *Reports* of the OECD of 18 December 2014 and 30 March 2015.

compliance programmes technique adopted by the OECD is based on the system applied in the USA[75].

The circulation of best practices at the international level tends, therefore, to develop a process of harmonisation and strengthening of national strategies, with significant fertilization being a result. Good national practices, once brought to the international cooperation level, do not remain unchanged, they influence each other, flowing back into the domestic context in a form improved and enriched by the many other experiences gathered in other national contexts. This process, with its circular manner of operation, is without doubt reciprocally enriching for all legal systems involved.

The UNI ISO 37001 model of 2016 (*Anti-bribery management systems*) certainly belongs to this type of "bidirectional fertilization" experience. It contains standards that have mainly been formulated at the national level. In fact, the model originates from the combination of two of the leading bodies for technical standards, the one established in the United Kingdom (pursuant to the UK Bribery Act of 2010, which implemented it[76]) and the other one in the United States (pursuant to the Foreign Corrupt Practices Act - FCPA - of 1977). Their contents have been elevated to the international level following a sophisticated debate and discussion at the International Standard Organisation (ISO)[77]; in the end, these standards re-entered our legal system, through the work of the Italian National Unification body (aka UNI).

7.3. Cross-fertilization among actors and offices

Regarding the cross-fertilization among private parties (typical for "model 231" and ISO 37001), the analyses concerns economic actors, i.e. those operating in the market. Therefore, any instrument that can improve the size, openness, speed, ease or

[75] On this subject, see C. De Maglie, *L'etica e il mercato: la responsabilità penale delle società* (2002), 102.

[76] This refers to BS 10500: see https://www.legislation.gov.uk/ukpga/2010/23/contents.

[77] See ISO 37001, *Anti Bribery Management Systems. Requirements with Guidance for Use*. Developed by a committee composed of representatives from the United Kingdom, the United States and other ISO member states, it was devised to help organisations reduce the risk of corruption and, through their widespread adoption, create a common baseline of minimum corruption levels that should be adopted by the organisations.

depth of commerce can have a side-effect and facilitate the movement of "integrity cross-fertilization". In this view, global and open markets are the natural space in which (good) economic actors can express their business potential. Global markets therefore reduce distance between very different actors (in terms of size, sector or type of governance) and increase the range and reach of cross-integration. Similarly, the ease of use of that market, in terms of harmonisation, understanding and certainty of rules, can unquestionably facilitate the circulation of positive integrity standards, as well as its recognition and penetration into other legal systems and organizations. In this group we should include both rules and customary codes, like common definitions, terms, principles of commercial contracts and other instruments of international private law[78] and initiatives.

Internally, meaning inside the organization, we understand that the size, impact and speed of fertilization will depend on the number, type of activities and interference level with other departments. Thus, endo-fertilization will depend on the number and openness of the exchanges among offices of one organization. It is additionally believed that, in a process of self-preservation, the compliant unit will terminate or drastically reduce contacts and interactions with risky (i.e. integrity-weak) offices. In other words, in a natural selection fashion, the weak cell will be targeted, marginalized and then definitively expelled by and from the body.

Externally, the procedure will be very similar to the one described above. We said that the organization may cast spilling effects outward, to the economic actors that consult for, cooperate with, and supply to the (ISO compliant) organization. The cross-fertilization here is proven by the fact that non-compliant consultants, partners, suppliers or service providers will see their business relationship terminated, unless they accept to comply with the new standard. Outwardly, the standard spreads effects on economic partners, clients and suppliers, pushing them to recognize, understand and embody the requirements into their own system. Lacking this compliance will result in de-risking, through the modification or termination of business with the

[78] For example, see UNIDROIT at www.unidroit.org/about-unidroit/overview or the International Chamber of Commerce https://iccwbo.org/.

compliant company. In other words, each organization that decides to be certified ISO 37001 automatically becomes a positive fertilizer that, like a healthy carrier of integrity, either transmits its positive anti-bribery values to each actor it interacts with, or it stops relations with non-compliant entities. Likewise, ISO 37001 certified organizations spread their expertise among their business partners, and those entities to their partners respectively, in a continuous, long-lasting and self-reinvigorating pandemic movement of good anti-corruption practices.

Additionally, concerning the direction of the fertilization, we must note that each organization is at the same time messenger and receiver. This means that while the organization spreads positive standards outward, the same company may also be demanded (by its business partners) to receive and internalize improved standards. It is interesting to note that this public communication, among meritorious partners, is surely by-directional, but it goes top-down only, with an improvement (not deteriorating) effect. In other words, horizontally the good (improved or higher) standard of integrity goes from one company to the other, and vice-versa. However, vertically the standard only goes from the top (the stronger, high compliant company) towards the bottom (the weaker, low or non-compliant company), and not the other way round. This is because, in a process of de-risking, an integrity compliant company will not seek new business (or will terminate ongoing one) with non-compliant companies. It is a one-way path. Understanding the sense of movement is very important in order to fully assess and appreciate the value of corruption prevention mechanism.

It is unquestionable that ISO 37001 has been conceived, from the its very beginning, in a way to seek for positive fertilization effects. ISO 37001 addresses bribery concerns both within the organization (either horizontally - among functions and departments - and vertically - among its employees) and outside the entity (to and from its business partners at large, including consultants, suppliers and clients). These two environments represent two channels the standard can forecast its effect through. Internally, the standard-compliant unit casts its improved integrity effects on other departments or branches of the same organization. The opportunities of fertilization are represented by the contacts with other departments. The size and

speed of fertilization, as well as its impact, will depend on the number, type of activities as well as interference level with other departments. In other words, the fertilization rate and depth are directly proportional to the number and openness of the exchanges (in terms of communications, collaborations or influence) among departments. This is because, in assessing its own risk, the complying department will evaluate the threats that other departments represent and it will accordingly mitigate this risk by: either demanding the weak department to improve its own level of integrity, therefore re-establishing a level play field or, by reducing the number, frequency or degree of interactions, thus decreasing the threat received by that fragile partner.

It is equally interesting to note that the movement of ISO 37001, and therefore its cross-fertilization effect, is greatly facilitated by its "regulatory independence" and completeness. In other words, like other new generation ISO standards, the 37001 has an improved quality in that it makes no reference to other regulations, it is self-sustained, with no relations to other norms. This lightness is a remarkable improvement and a boost for the open move of the standard, through a simple contract clause[79].

8. A few closing remarks on the effectiveness of these models: simple laws, effective procedural models and the ethical responsibility of public sector employees and economic operators

Academics, practitioners, economists and observers (national and otherwise) on the methods that underlie the strategy of fighting corruption through prevention increasingly claim that the procedures implemented in this respect represent an element that contributes towards (if not determines) the inefficiency of the public sector system and business activity due to the costs, delays and burdens that they involve. The common factor in their reasoning is their affirmation of the pointlessness, or rather the

[79] See in this sense S. Bonetto (President of technical committee on services, UNI) and A. Ruffini (President of arbitration council, UNI) at www.uni.com/index.php?option=com_content&view=article&id=5898:sistemi di-gestione-per-la-prevenzione-della-corruzione-le-novita-della-uni-iso-37001&catid=171:istituzionale&Itemid=2612.

unsuitability of the rules for changing the attitudes and the culture of a state and a nation.

On the contrary, the law (and therefore also the procedures that it implements) can be a powerful tool for establishing a different cultural approach towards corruption and the behaviours that support it and feed it from what we have now[80]. A cultural approach central to which is an awareness of the magnitude of the damages that a high, pervasive level of corruption such as that which has affected the "Italian system" for a long time entails[81].

The contradiction of an argument such as this is truly unique, when in other ways these same individuals consider themselves passionate supporters of the rule and primacy of law.

It is without doubt that the law and the associated procedures represent a victory and a defender for those who do not hold power (public power, since it is part of the government institutions, or private power, since it is economically strong). Bureaucracy in the modern sense of the word originated precisely for the purpose of achieving collective goals according to criteria of impartiality, neutrality of power and rationality: this forms an instrument for transmitting command that is contrary to the arbitrary exercise[82]. In principle, the existence of corruption in society cannot be attributed to the presence of laws and procedures: if anything, good rules lower the risk as instruments for affirming the principle of the supremacy of law over arbitrariness[83].

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[80] On the promotional function of the law, see, more authoritatively, N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto* (1977).

[81] On the damages that are summarised, for example, in the Preamble of the Merida Convention against the corruption, see, from among many, V. Mongillo, *La corruzione tra sfera interna e dimensione internazionale* (2012), 8 ss.; G.M. Racca, R. Cavallo Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty*, in G.M. Racca, C. R. Yukins (eds.), *Integrity and Efficiency in Sustainable Public Contracts* (2014), 23 ss.

[82] Of course reference must be made to the theorist of modern bureaucracy, M. Weber, *Economia e società*, in the edition edited by W.J. Mommsen, M. Meyer (2005); but also more recently, K.J. Meier, L.J. O'Toole, *Bureaucracy in a Democratic State: A Governance Perspective* (2006).

[83] On the principle of legality and the characteristics of the rule that permit it to be considered a "law", see the complex case law of the European Court of Human Rights with regard to the interpretation and application of Article 7 of

It is also said (with reference furthermore to historical legacies[84]) that the problem was caused by too many rules: of course, excessive legislation often leads to difficulties in terms of interpretation and application, contradictions; simplicity is a sign of good legislation. However, simplicity does not respond to objective and universal indicators, since each situation deserves a greater or lesser degree of legislation. In this context, here is an example taken from experience at the National Anti-Corruption Authority, which highlights how the quantitative reduction of rules does not necessarily lead to a better legislative structure. With regard to the performance of supervisory functions, the Authority had until recently only one regulation, that is, the one related to public contracts, which was extended to the other sectors covered by the Authority itself (conflicts of interest, anti-corruption, transparency). The authority decided to replace this single regulation with four separate regulations, one per areas of activity[85]. This decision was taken by the Authority's Board due to evidence that the certainty of the law and the protection of the individual prerogatives of people involved in supervisory proceedings are guaranteed better by a specific regulation for each area, different from the others.

Having considered the quantitative aspect, let us now consider the quality of the rules[86]. When a situation of widespread, pervasive illegality needs to be fought, the quality of the rule is measured by its effectiveness and, therefore, its capacity to combat that situation. To this end, there are few conditions that cannot be overlooked. Firstly, the incentivising capacity for anyone who has to apply the rules of conduct and its procedures; then the exercise of public power by a competent and ethical

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the European Convention on Human Rights, as reconstructed by D. Rinoldi, *L'ordine pubblico europeo* (2008), par. 41.

[84] The words of Tacito are notable - always used by those who claim the law is useless - "*Corruptissima re publica plurimae leges*" (Annales, III, 27): according to the intention of the author, this does not mean that many laws produce corruption, but instead that a corrupt state tends to multiply rules that produce corruption, since they are adopted *ad personam*.

[85] The regulations (adopted in February 2017) are available on the Authority's website (www.anticorruzione.it).

[86] With regard to rules, which themselves produce corruption, see F. Giavazzi, G. Barbieri, *Corruzione a norma di legge. La lobby delle grandi opere che affonda l'Italia* (2014).

administration; lastly, the presence of the same characteristics in the interlocutors for the public sector.

In conclusion, the question surrounding the interpretation and application of the rule: conceptual processes that must be informed by a criterion of substance. The law, in fact, is an instrument, not an end in itself: it is useful for achieving justice.

These are the conditions that cannot be improvised. From this perspective, perhaps it is easier to understand why it is argued that (good) procedures can contribute towards establishing a culture of individual responsibility, the precondition of an intact social and legal context, in which just a few rules are upheld by the best antidote to corruption: transparency. However, this condition (transparency in the public sector and in the management of private businesses) represents a victory that can be achieved at the end of a long journey supported and guided by rules that set out clear models of conduct and contain incentives for virtuosity[87], so as to accelerate the process of incorporating the models of integrity.

The fight against corruption is a process that cannot be completed instantly: it is a long and non-linear journey. Many of the instruments it uses could themselves be corrupt. We need, therefore, to initiate and launch a cultural process to change the social approach of individuals, starting with simple, crystal clear rules of conduct.

From this point of view, the question of providing the Country with a set of rules and procedures, which demands every entity an initial burden of work required by the risk based strategy is central. Nonetheless, these are the rules and procedures which, if followed, in a substantial, conscious and conscientious manner and not as a merely formal obligation, will lead in the long term to the creation of virtuous, highly cross-fertilizing, models of conduct. Furthermore, the awareness of the size of the damages caused by conduct that is now so pervasive should lead the healthy part of our country to react to corrupt practices with alternative models, which are capable of reversing the trend.

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[87] With regard to the need to equip the anti-corruption legislation with incentives, see F.M. Teichmann, *Eliminating Bribery. An Incentive-Based Approach,* in Compliance Elliance Journal 72 (2012); S. Rose-Ackerman, B.J. Palifka, *Corruption and Government. Causes, Consequences, and Reform* (2016); Aa.Vv., *Corruzione contro Costituzione*, in 1/2 Percorsi costituzionali 109 (2012).