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The institutionalisation of strategies to prevent corruption: the international and European model

A institucionalização de estratégias para prevenção à corrupção: o modelo internacional e o europeu

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Abstract: The contribution deals with the emerging strategies to fight corruption through prevention at the international level, in the respect of national sovereignity. It describes the request for a holistic strategy, combining prevention and prosecution, mobilizing all the components of the domestic community and establishing dedicated and independent competent bodies.
It questions whether it is possible to strengthen the system of corruption prevention by linking independent institutions to the National Constitution, European Union law, and customary law.

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Keywords: Corruption prevention; International perspective; Institutionalisation.

Resumo: O artigo lida com as estratégias da luta contra a corrupção por meio da prevenção em nível internacional, em respeito à soberania nacional. Ele descreve a solicitação de uma estratégia holística, combinando prevenção e acusação, mobilizando todos os componentes da comunidade doméstica e estabelecendo corpos competentes comprometidos e independentes. Este trabalho questiona a possibilidade de enrigecer o sistema de prevenção à corrupção por meio da promoção de relação entre instituições independentes, Constituição Nacional, Direito da União Europeia e Direito consuetudinário.

Palavra-chave: Prevenção à corrupção; Perspectiva internacional; Institucionalização.

1. The establishment of a detailed international anti-corruption strategy

Observing the layers of the many international anti-corruption norms based on *hard* and *soft law,* it seems possible to outline an emerging model for preventing corruption, which from a structural, institutional, organisational and functional perspective is presented to domestic legal systems both at the international level and at the regional and continental level as not only useful, but also in some cases an essential source of inspiration for national policies in this area. In fact, more and more, the international legal context is presented as a "place" no longer and not so much for comparing sovereign national systems, but for preparing guidelines to enable individual national policies to converge towards models that can at least reciprocally interact even if they are not shared.

This is undoubtedly a consequence, in the legal context, of the factual process of globalisation. However, it is also the result of the evolution of the international community from the model that emerged from the peace of Westphalia to the "UN model": in this second model, the sovereign equality of all States is no less important; it remains, but is linked with the principle of international law. Indeed, the latter balances out the former with a drastic reduction of the perimeter of each country's own dominion, particularly in relation to the treatment of persons who fall within its national jurisdiction. The pursuit of peace, the maintenance and strengthening of the rule of law, democracy, respect for the principle of liberty and fundamental human rights become matters of international concern. Consequently, within the international community, the State is responsible for protecting the untouchable nature of its sovereignty, but it must achieve this by combining it with the aim of governing its territorial community in accordance with the principles cited above[2]. Of course, this does not mean rejecting a founding principle of the modern international community, but adding new dimensions to it.

Due to this process of dialogue between States, the sharing of political and legal pathways including by comparing models, their circulation and reciprocal influence, they therefore became the common model for comparison between the States themselves.

2 On this model see T.H. Widlak, *From International Society to International Community: The Constitutional Evolution of International Law,* Gdansk Un. Press, 2015, *passim*; E. Cannizzaro, *Diritto internazionale*, Turin, 2014², pp. 5-6; N. Parisi, *Le Nazioni Unite. La tutela dei diritti della persona*, in U. Draetta, M. Fumagalli (eds.), *Organizzazione internazionale – Parte speciale*, Milan, 2011², p. 43.

Now, it is without doubt that corruption offences are increasingly characterised by their transnational nature[3] even if that feature is due only (though it is hardly trivial) to "the nature or impact of such offences or from a special need to combat them on a common basis"[4]: this latter eventuality is truly symptomatic in the case of fighting corruption. Anti-corruption activity, therefore, involves a framework of close consultation between different State authorities, at the many levels involved, in the context of intergovernmental cooperation in order to contain its diffusion and combat the damage it causes[5]. The same international conventions on the subject, which the States stipulated, are the ones that[6] show how corruption is perceived by those States

3 For further reading on corruption involving public authorities, see M. Arnone, L.S. Borlini, *Corruption. Economic Analysis and International Law,* Cheltenham-Northampton, 2014, p. 176 et seq.; in relation to corruption between private individuals E. La Rosa, *Corruzione privata e diritto penale. A proposito della concorrenza come bene comune,* Turin, 2018, p. 20 et seq.

4 Art. 83, no. 2, TFEU is used for the particular significance of the expression. On the need to fight corruption at the global level, see among many others, S. Williams-Elegbe, *Fighting Corruption in Public Procurement. A Comparative Analysis of Disqualification or Debarment Measures*, Oxford-Portland, 2012, *passim*.

5 The damages caused by corruption are well summarised, for example, in the first paragraph of the Preamble of the Merida Convention); see among others, V. Mongillo, *La corruzione tra sfera interna e dimensione internazionale*, Naples, 2012, p. 8 et seq.; 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*, Brussels, 2014, p. 23 et seq.; with a perspective that also considers other factors related to poor administrative functioning, for example:, see S. Valaguzza, *Governare per contratto. Come creare valore attraverso i contratti pubblici*, Milan, 2018.

6 This is covered mainly by: The United Nations Convention against Corruption (UNCAC, opened for signature in Merida on 9 December 2003); and the Convention (opened for signature in Paris on 17 December 1997 in the context of the OECD) *on Combating Bribery of Foreign Public Officials in International Business Transactions*. With regard to the European regional context, see: the two Conventions prepared within the context of the Council of Europe (opened for signature in Strasbourg respectively on 27 January 1999 and 04 November 1999, called the *Criminal Law Convention on*

as a practice capable of jeopardising some of the basic principles of the stability of the inter-State system (of the international community as a whole) and of the individual national communities, compromising their values and basic legal interests: if the State apparatus is complicit (passively or actively) in these practices (this also being a violation of human rights, starting with the principle of non-discrimination), the result will be fragile democratic institutions caused by citizens losing faith in the ability of the latter to govern the territorial community impartially and efficiently. The reference international conventions make to the risk to which the rule of law is exposed is highly relevant[7].

Corruption and the *Civil Law Convention on Corruption*); the Convention on the Protection of the European Communities' Financial Interests adopted by the Council of the European Union on 26 July 1995, completed by three protocols (the first, dated 27 September 1996, on corruption of Community officials; the second (dated 19 June 1997) on the responsibility of legal entities and associated sanctions, money laundering and confiscation, cooperation between the services of the European Commission and Member States, as well as data protection; the third (of 29 November 1996) on the jurisdiction of the EU Court of Justice to interpret the Convention through preliminary rulings; the Convention *on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, adopted by the Council of the European Union on 25 May 1997; Framework Decision 2003/568/JHA of the Council of the European Union, of 22 July 2003, *on combating corruption in the private sector* (the legislative kit established by the Community is much more detailed since it is divided into numerous *hard* and *soft law* measures to which reference will duly be made in what follows below: see in particular paragraph 3 (at footnotes 46-51); 4 (at footnotes 72-73); 6 (at footnotes 94-96); 7 (at footnotes 102-111); 8 (at footnotes 123-131); 9 (at footnotes 141-149). Also the Palermo Convention (opened for signature on 15 December 2000) *against Transnational Organized Crime* contains a measure that extends its objective scope of application to corruption offences (Art. 3) and indeed the Merida Convention was adopted as a necessary completion of the same. For a discussion on all these instruments and their different fields of application, see N. Parisi, D. Rinoldi, *L'applicazione in Italia di strumenti giuridici internazionali contro la corruzione*, in G. Forti (eds.), *Il prezzo della tangente. La corruzione come sistema a dieci anni da 'mani pulite'*, Milan (Vita e Pensiero), 2003, p. 221 et seq. About other regional contexts see: *African Convention on preventing and combating corruption*, 11 July 2003; *Arab anti-corruption Convention*, 21 December 2010; Inter-*American Convention against corruption*, 29 March 1996.

7 In particular see 1st paragraph Preamble UNCAC; 4th paragraph Preamble

Again, these conventions have been stipulated in order to fight actions capable of distorting competition and impeding economic development[8]. In this context, current international law asks States to guarantee commercial freedom[9]; this freedom is accompanied by the responsibility of each State to ensure that said freedom is enjoyed in the context of competition, "*on a footing of absolute or relative equality*"[10], in particular by fighting the pathological distribution of wealth, which always results wherever corruption is present[11].

2. The need for a holistic strategy: prevention and prosecution as reciprocally integrated approaches for effective action against corruption

In the context of the framework outlined above, in the first part of this century, States acknowledged the inadequacy and insufficiency of a strategy based only on substantive

Criminal Law Convention on Corruption.

8 See the references cited in note 6 above.

9 P. Picone, *Diritto internazionale dell'economia e costituzione economica dell'ordinamento internazionale*, in P. Picone, G. Sacerdoti (eds.), *Diritto internazionale dell'economia,* Milan (Franco Angeli), 1982.

10 G. Schwarezenberger, *The Principles and Standards of International Economic Law*, in *Rec. des Cours,* 1966-1, p. 48.

11 Art. 3, paragraph 2, of the Italian Constitution is a domestic translation of this internationally applicable obligation, where it States that "It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic and social organisation of the country". On the subject of safeguarding competition between private entities against corruption, see the recent contribution by E. La Rosa, *Corruzione privata e diritto penale. cit*., pp. 13-14 and *passim*.

and procedural criminal law intended to harmonise the prosecuting instruments and coordinate the different phases essential to carrying out criminal prosecutions: in fact, this was the strategy (of the repressive sort) implemented almost exclusively in the treaties (which were very important) signed during the last century on fighting corruption, both domestic and international. These treaties (still in force and very useful) are traditionally based on two pillars: they are mainly intended to place the contracting parties under an obligation to criminalise corruption, identifying criminally significant circumstances to be covered by domestic legal systems; consequently, and in an ancillary capacity, they establish methods of cooperation between the respective national authorities tasked with applying criminal law.

There were two factors behind the abandonment of this strategy.

Firstly, in countries with a constitutional structure, repressive measures represent the *extrema ratio*, the response of last resort that the legal system gives to an event that requires, due to its severe deviation from norms that protect interests that are considered fundamental, a response that other instruments are unable to offer[12]. Therefore, before resorting to this, other methods must be tried: in this context criminal law demonstrates its subsidiarity.

Furthermore, the purely repressive approach was clearly shown to be inadequate for preventing corruption from becoming embedded, that is, from becoming widespread and pervasive: when this situation arises, criminal law is not the appropriate instrument, since the

12 N. Jareborg, *Criminalization as Last Resort (Ultima Ratio),* in 2 *Ohio St. J. Crim. L.*, p. 531. In recent Italian criminal law literature, see C.E. Palieri, *Pragmatica e paradigmatica della clausola di "extrema ratio"*, in *Riv. it. dir. proc. pen*., 2018, p. 1447 et seq.

role of criminal law is to establish individual liability (of the natural person or collective entity) in relation to an offence against a legal interest whose protection requires extreme measures of defence; and not to implement measures that are intended to combat a deviant social phenomenon. In this latter case, action to fight against corruption can only be exercised *ex ante* in the first instance, through prevention, therefore including through instruments made available by administrative law, without excluding the subsequent support of important repressive measures when exercised effectively. In this context it has justifiably been noted that "the synergy between administrative and criminal" is "unavoidable", emphasising the need to make use of preventive measures, through the "strengthening (…) of administrative instruments" that "avoid radicalisation towards (…) extreme uses of criminal law"[13]. In fighting corruption, therefore, prosecution and prevention turn out to be inseparable and complementary options and measures.

To combat the pervasive penetration of corruption, the various areas of inter-governmental cooperation have therefore also developed a different type of defence from the prosecution traditionally employed, organically implementing suggestions, instruments, procedures and institutions variously proposed in the past, even in a disorganised manner, in the many international institutional contexts. Two approaches were used to deal with this issue: on the one hand, it was proposed that awareness should be raised in relation to the severity of the damage caused by corrupt practices, primarily in order to heighten collective understanding and social concern in relation to certain practices, eliciting that (reputation based) sanction

13 F. Palazzo, *Corruzione pubblica. Repressione penale e prevenzione amministrativa*, Florence (Florence University Press), 2011, p. 96.

that other serious deviant behaviours provoke, or rather, the social isolation of the perpetrator; on the other hand, educating those involved in public and private work to adopt a different "lifestyle". There is no doubt, in fact, that the pervasiveness and diffusion of corruption demonstrate the existence of a cultural aspect: corruption originates and becomes embedded in a particular cultural context, with its own laws and structural mechanisms[14]; it does not come from outside the legal system concerned and it must be fought primarily in its own territory.

It was thanks to the Convention opened for signature in Merida in 2003 (which by being agreed at a global level, in the context of the United Nations marked the awareness of the community of States in relation to fighting corruption[15]) that there was a significant change in strategy: in fact, the Convention offers a wide, well-organised set of legislative provisions that include preventive measures[16].

Furthermore, even "first generation" international agreements (those, to be clear, with criminal law content) were already focused on a method of application aimed at protecting the integrity of legal systems and civil and business circles through instruments to prevent corruption. This is an approach that can be seen clearly, for example, in the activities performed by the *Working Group on Bribery* (WGB) created following the entry into force of the OECD Convention of 1997[17]: even though it has primary responsibility for verifying the State of compliance with the

14 I. Sales, *Dove nasce la corruzione,* in *Il Mattino*, 12 October 2017, pp. 1 and 47.

15 The *UN Convention against Corruption* (cited in note 5) was ratified (on 26 June 2018) by one hundred and eighty-six parties and an international organisation for regional integration, the European Union (see https:// www.unodc.org//en/ corruption/ratification-status.html).

16 Set out under Arts. 5-14.

17 Ibid *supra*, note 5.

Convention of 1997, it also works to prevent corruption, as we see from many clarifications given on the *governance* of public authorities, the private sector and entrepreneurial activity in light of principles of integrity, transparency, competence and accountability[18]. Furthermore, it should be noted that the Convention, despite being based on criminal law, was able to guide the Italian legal system (and those of other Member States) towards prevention strategies developed around adopting risk-based techniques and organised around compliance models, which will be discussed briefly in what follows[19]. This means, by referring to hard law obligations related specifically to criminal law, that this organisation also managed to protect, through soft law instruments, the prevention aspect by establishing a culture of integrity.

The same approach is used in so-called peer review procedures, which consist of an evaluation of each Member State's fulfilment of its obligations under the Convention. This type of obligation has been integrated into common practice by the demand to comply with *soft laws*, so much so that, for example, with regard to the Council of Europe, GRECO (and similarly the OECD's previously mentioned WGB[20]) evaluates national compliance in light of *soft law*s

18 In this context, see the very interesting ideas presented by S. Bonfigli, *La dimensione sovranazionale dell'etica pubblica*, in F. Merloni R. Cavallo Perin (editors), *Al servizio della Nazione*, Milan (Franco Angeli), 2009, p. 400 et seq. For a useful comparison between the UNCAC and the OECD Convention, see L. Borlini, P. Magrini, *La lotta alla corruzione internazionale dall'ambito OCSE alla dimensione ONU,* in *Dir. comm. internaz.*, 2007, p. 15 et seq.

19 The necessary reference is in Legislative Decree no. 231/2001 adopted further to Law no. 300/2000 authorising the ratification of the OECD Convention (as well as three other international agreements concerning anti-corruption).

20 M. Montanari, *La normativa italiana in materia di corruzione al vaglio delle istituzioni internazionali. I rapporti dell'Unione europea, del Working Group on Bribery dell'OCSE e del GRECO concernenti il nostro Paese*, in *Dir. pen. cont.*, 1 July 2012.

also, which focus attention on prevention and no longer just prosecution[21].

We must also consider that in international praxis, a strictly criminal categorisation of the concept of corruption (on which the relevant conventions tend to give a similar, almost overlapping definition[22]) was joined by a sociological notion[23]: this envelopes those behaviours that are considered to be "bad administration", which are not considered in terms of suppressive measures, sometimes being entirely without the significance of illegality, being based on mere irregularities, but which still translate into turning public interest into a private interest[24] and which, therefore, stand

21 In fact, the peer review is implemented starting with the two European Conventions of 1999 as supplemented by: *Resolution (97) 24 on the twenty guiding principles for the fight against Corruption; Recommendation No. R (2000) 10 of the Committee of Ministers to Members States on codes of conduct for public officials (including a model code)*; *Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)*; *Recommendation Rec (2003)4 of the Committee of Ministers to members States on common rules against corruption in the funding of political parties and electoral campaigns*. With regard to the Council of Europe, the assessment of the Member States is performed by the "*Group of States against Corruption*" (GRECO): it is thanks to the expanded legal base that the 4th round of evaluations has been able to examine the compliance of those countries that are part of GRECO with regard to preventing corruption amongst members of parliament, judges and public prosecutors. For a general discussion, see L. Salazar, *Contrasto alla corruzione e processi internazionali di mutua valutazione: l'Italia davanti ai suoi giudici*, in *Cass. pen*., 2012, p. 4270 et seq.

22 There are important differences with regard to subjective application (see *supra,* end of note 5), but with regard to the material object of the offence, there is broad agreement, generally based on improper advantage expressed very vaguely as "*any undue advantage*" (Arts. 2-3 *Criminal Law Convention on Corruption*; Art. 2 *Civil Law Convention on Corruption*; Art. 15 *UNCAC*). The OECD Convention stands out because it identifies the crime of transnational corruption (or international) in relation to economic transactions, which is a crime that must be included within the legal system of each contracting party (on this see S. Manacorda, *La corruzione internazionale del pubblico agente*, Naples, 1999).

23 M. Arnone, S. Borlini, *Corruption,* ibid, pp. 314-321.

24 A. Vannucci, *L'evoluzione della corruzione in Italia: evidenza empirica, fattori facilitanti, politiche di contrasto,* www.astrid-online.it/static/upload/

out for their illegality or even just their irregularity: in international law, the expression *wrongdoing* is used, which is a very non-technical and broad term[25]. In this context, it is appropriate to examine the concept of corruption and the recent tendency to include within it not only criminally relevant actions, but also those attributable to so-called "administrative corruption"[26]: this refers to "actions and behaviours that, even if they do not amount to specific crimes, are contrary to the required care for public interest and prejudice the trust of citizens in the impartiality of public authorities and the individuals who perform roles of public interest"[27]. Therefore, any "situation in which, regardless of the criminal relevance, there is a malfunction of a public authority due to the distorted use of the powers granted" will be detected[28].

In reality it does not seem necessary to coin a definition of administrative corruption[29] in order to connect it with

protected/Vann/Vannucci.pdf.

25 The Italian system of prevention is also informed by this approach: Department of Public Administration memo no. 1/2013 (specifically p. 4. Similarly, the *National Anti-corruption Plan*, 2015, paragraph 2.1), in commenting on certain questions of interpretation raised by the "Severino Law" (Law no. 190/2012), it underlines the polysemic nature of the word corruption used therein: this word, when used in law in relation to preventive activities, refers to corruption in the broadest sense, as covering the various situations in which, during the course of public duties, an individual abuses the power granted to him in order to obtain private advantages"; when used in relation to criminally significant offences, it refers to the technical and legal clarifications set out in the Criminal Code, from Art. 314 onwards.

26 M. Clarich, B.G. Mattarella, *La prevenzione della corruzione*, in B.G. Mattarella, M. Pelissero (edited by), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Turin, 2013, p. 61; M.C. Romano, *Il ruolo e le competenze di ANAC sui contratti pubblici*, in M. D'Alberti (edited by), *Corruzione e pubblica amministrazione*, Naples, 2017, p. 769.

27 M. Clarich, B.G. Mattarella, *La prevenzione della corruzione, loc. ult. cit.*

28 ANAC, *PNA 2013*, Rome, 2014, p. 13.

29 On the difficulty of attributing legal value to the "broad" notion of

the need for action to prevent corruption offences. Instead, bearing in mind that the agreed definition of a corruption offence in the sociological sense of the term is based on turning the powers granted by a mandate towards a private, individual interest (therefore essentially in giving priority, in a situation where there is a conflict of interest[30], to the private interest at the expense of the public one), prevention consists of preparing instruments that allow the behaviour of the person or the entity to which he/she/it belongs to be guided towards always prioritising the public interest. Prevention, therefore, intervenes prior to an offence (by omission or deliberate) involving illegality (including criminal acts) or irregularity, when there are "situations in which the risk is merely potential", situations therefore "where it is necessary to use measures to "remove" the risk, using options that sometimes completely disregard individual actions[31].

3. The clause on respect for national sovereignty

First of all, it is worth noting the explicit limit that convention norms encounter, independently of the fact that they emanate from a classical type of international organisation, rather than from one focused on integration, which, for the regional context in which the Italian system is located, is the European Union[32].

corruption, see R. Cantone, E. Carloni, *La prevenzione della corruzione e la sua Autorità,* in *Diritto pubblico,* 2017, p. 911.

30 On the notion of conflict of interests, on the types of the same, on the difficulty of recognising their existence, see OECD, *Guidelines for Managing Conflict of Interest in the Public Service,* Paris, 2003; OECD, EU, *Conflict of interest policies and practices in nine EU Member States: a comparative review,* SIGMA Paper No. 36.

31 R. Cantone, *Il sistema della prevenzione della corruzione in Italia,* in *Diritto penale contemporaneo,* 27 November 2017, par. 3.

32 On the typology of forms of institutionalised international cooperation (and

In the United Nations Convention, as in the Treaty on the European Union, there is a general clause according to which "States Parties shall carry out their obligations under this Convention in a manner consistent with the principle of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States"[33]. This norm is perfectly established in the structural principles of the international community's legal system as explained above: respect for the national integrity and domestic competence of each State, in the context of cooperation based on equal status among all States[34]. The perception of the potential pervasiveness of the obligations involved in ratifying the Convention, however, led the States to add specific clauses, concerning the same purpose, as individual norms of the Convention. In the Chapter dedicated to "*Preventive Measures*", we see repeatedly that the State assumes the obligation concerned "*in accordance with the fundamental principles of its legal system*": this is applicable to the norms that pertain to the type of strategy and State policy [35], which require the establishment of a "*body or bodies, as appropriate, that prevent corruption*"[36]; which make provisions with regard to the organisation of national public authorities[37], as well as integrity, honesty and the responsibility of public sector workers[38]; which establish

on the resulting legal differences they create for the Member States) see for all, U. Draetta, *Principi di diritto delle organizzazioni internazionali,* Padua, 2010[3], p. 79 et seq.

33 Arts. 2, paragraph 1, UNCAC.

34 An "*interpretative note*" was adopted in the preparatory work and affirms that this consistency and the interpretation of the notion of reserved dominion as accepted by the United Nations: A/58/422/Add.1, para. 10.

35 Art. 5, paragraph 1, UNCAC.

36 Art. 6, paragraph 1, UNCAC.

37 Art. 7, paragraph 1-2, UNCAC.

38 Art. 8, paragraph 1, UNCAC.

criteria for the management of public contracts and public finances[39]; which require transparency[40] including in the financing of political parties and candidatures[41] and, by promoting information sharing methods[42], to take measures to ensure the integrity of the judicial function[43], to organise and strengthen the national regulations on accounting, including through measures to promote transparency[44] and to promote the participation of civil society in State action against corruption[45]. Only the provision on the measures to assume to combat the laundering of "dirty money" establish a formula that is less protective of national sovereignty, establishing an obligation for all the different authorities of each State affected by this activity to collaborate at the national and international level "*within the conditions prescribed by its domestic law*"[46].

As mentioned previously, in the Treaty on European Union also there is a general clause according to which the "Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional"[47]. This formula is accompanied by clarifications that monitor, from other specific contexts, the actions of the organisation with regard to other Member States, requiring that in exercising its duties (even very invasive ones) it must operate in

39 Art. 9, paragraph 1, UNCAC.

40 Art. 7, paragraph 4, UNCAC.

41 Art. 7, paragraph 3, UNCAC.

42 Art. 10, paragraph 1, UNCAC.

43 Art. 12, paragraph 1, UNCAC.

44 Art. 12, paragraph 1, UNCAC.

45 Art. 13, paragraph 1, UNCAC.

46 Art. 14, paragraph 1, lett. b), UNCAC.

47 Art. 4, paragraph 2, TEU.

accordance with the principle of conferral[48], intervening in the sectors that are not under its exclusive jurisdiction "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States"[49], limiting the content and the form of action to what does "not exceed what is necessary to achieve the objectives of the Treaties"[50]. Therefore, the duty of the Union is to "carry out actions to support, coordinate or supplement the actions of the Member States" in terms of "administrative cooperation"[51] (considered a "matter of common concern" for Member States and the Union[52]) it must respect national sovereignty within the rigorous limits described. The difference with the set of measures established in the Merida Convention is that the defence against external "interference" is offered, in the latter, against the other contracting States, in the Union against the latter.

The *OECD Convention on combating bribery* establishes that the State must comply «*as may be necessary, in accordance with its legal principles*»[53], or «*within the framework of its law*»[54].

The protection of national sovereignty offered by the Council of Europe's *Criminal Law Convention on Corruption* is very vague, in the sense that in almost every provision it uses the phrase "*Each Party shall adopt such legislative and other measures as may be necessary* (…)"[55]. In the *Civil Law Convention on Corruption*, developed in the same institutional context, there is no trace of a similar filter to protect sovereignty.

48 Art. 5, paragraph 2 TEU.

49 Art. 5, paragraph 3, TEU.

50 Art. 5, paragraph 4, TEU.

51 Art. 6, lett. g), TFEU.

52 Art. 197, paragraph 1, TFEU.

53 Art. 2.

54 Art. 8, paragraph 1.

55 Arts. 1-15.

Therefore, there is a different level of "defence" for national legal systems in terms of the impact of convention provisions. This seems to depend on two different factors. Firstly, where the group of States that participates in the convention is homogeneous (so limited in number), the agreement of the States on the legal content is more easily obtained and there are fewer reciprocal suspicions. This is why the regional European conventions contain fewer "defences" (or sometimes none) compared to international conventions. Secondly, when an agreement is not limited exclusively to establishing reciprocal rights and obligations between States, but also aims to create an international body to govern material activities (even in competition with Member States), its greater potential influence and invasiveness is recognised in terms of national sovereignty and, therefore, the agreement itself is equipped with provisions that very accurately demarcate how the body itself must exercise its duties.

4. The mobilisation of different components of the State community, at both the domestic level and the international level

Moving on now to discuss whether there is an international model for preventing corruption and how it works, let us examine the strategies, methods, measures and instruments that are identified by the community (international and regional) of States to achieve effective State action to prevent corruption.

The first important point concerns the overall strategy that States are asked to implement. To combat a phenomenon considered serious, not only for the quantity of financial

resources drained[56], but primarily for the pervasive, systematic and widespread nature of these unlawful practices[57], we clearly need a strategy, which of course uses laws, procedures and institutions, but most of all one that can influence the cultural fabric of the community in which the phenomenon has become embedded. This involves the mobilisation of all the forces present in society, to direct them towards a different lifestyle, or rather (to use an expression used in an international recommendation) the construction of "*a coherent and comprehensive public-integrity system*"[58].

Evidence of this necessary general mobilisation of positive energy from a whole society and legal community comes in the form of the requests that emerge, for example, from the intergovernmental collaboration that occurs at the technical level within the OECD[59]; from the context of the Council of Europe[60]; from the European Union where there is disapproval towards fragmented anti-corruption measures that are inadequate for producing visible results

56 The severity of the phenomenon from a financial perspective was, for example, emphasised by Christine Lagarde, Director of the International Monetary Fund, who spoke (in the Report presented at the annual World Bank conference on 12 October 2017) of a "cost" resulting from corruption of 1.5 trillion dollars per year. See also the results reported in *European Commission, Special Eurobarometer 470 – Corruption*, October 2017, http://ec.europa.eu/commfrontoffice/publicopinio. The World Bank, *Worldwide Governance Indicators*, Washington, 2018.

57 On the severity of the phenomenon in the context of the rule of law, see *supra*, note 4.

58 Point II of the Recommendations of 26 January 2017 C(2017)5 *on Public Integrity*, intended to create a public system of integrity; they substitute the Recommendations of 1998 *on Improving Ethical Conduct in the Public Service.*

59 *Infra,* paragraphs 5 and 6.

60 Already in 1994 the Committee of Ministers had adopted a resolution, Res(94)24, *Twenty Principles for the Fight against Corruption*, which suggests a holistic approach to combating corruption. Along the same lines, see also *Basic Anti-Corruption Concepts. A training Manual*, Strasbourg, 2015.

unless they are used as part of a global approach[61]; and from the previously mentioned *United Nations Convention against Corruption*.

In particular, the latter is intended to promote and strengthen measures to prevent corruption effectively and efficiently; to encourage, facilitate and maintain international cooperation, including through training activities; to promote integrity (including by making public administration accountable) as well as through the correct management of public affairs[62]. As a consequence, the norms contained in the Convention chapter entitled "Preventive Measures" establish that the contracting States must take action firstly by investing energy in all the components of each national community: the public apparatus, the financial-productive component and civil society.

With regard to the national public administration, each State must intervene with measures capable of affecting the organisational structures, in order to promote integrity, transparency, the competency of the public apparatus and the individual responsibility of each of its components[63]. Attention should also be paid to the judiciary and the investigative services, whose independence and integrity must be protected including through the adoption of codes of conduct[64].

61 European Commission, *Thematic factsheet for the European Semester. Fight against corruption*, 22 November 2017, p. 8.

62 Art. 5. D. Vlassis, J. Pilgrim, *The United Nations Convention against Corruption: a framework for addressing common challenges in identifying incentives for private sector integrity*, in F. Bonelli, M. Mantovani (eds.), *Corruzione nazionale e internazionale*, Milan, 2014, pp. 253-254.

63 Art. 9-10. In more detail paragraphs 5 and 6; for transparency, paragraph 7.

64 Art. 11.

The Convention then deals with the private sector in its duplicate version. In relation to the productive component of the country, it obliges contracting States to prevent corruption by strengthening regulations in relation to accounting and auditing; by promoting and preparing norms and procedures intended to both preserve the integrity of private entities (with codes of conduct and measures to prevent conflicts of interest, also providing if necessary, and for a reasonable period of time, a suspension of professional activities)[65], both in order to establish good practices in commercial relations with each other and with the State; through transparency, which for example requires the effective property of private entities to be transparent[66]. The State must ban company expenses that amount to bribes from being deducted from taxes[67]. To protect the integrity of the private sector, the State must also equip itself with a system of sanctions (criminal, civil, administrative) that are effective, proportionate and dissuasive, a formula which has become standard in international conventions. The Convention promotes the adoption of regulations that protect public contracts, which will be discussed in more detail later on, with anti-corruption measures that reward transparency and competition[68] and

65 *Infra*, paragraph 6.

66 Art. 12, paragraph 1. In this context, starting with the St Petersburg Declaration and the G20 session where Australia had the Presidency and Italy the Co-Presidency (2014), the international community has been working towards property transparency in order to stop the illegal economy from entering into the legal economy, through among other things, the adoption of *High-Level Principles on Beneficial Ownership Transparency*, the creation of a framework for automatically exchanging tax information (the so-called AEOI, prepared by the OECD), EU Directive 20157849 (Art. 29), the recommendations adopted by the Financial Action Task Force. See FATF *Report on the G20 Beneficial Ownership*, September 2016; T.I., *Just to Show: Reviewing G20 Promises on Beneficial Ownership*, 2015.

67 Art. 12, paragraph 4.

68 Art. 9 See *infra*, paragraph 8.

discourage the laundering of money generated from illegal activities[69].

In relation to the second formulation for the private sector, the Convention requires that the contracting State should employ initiatives to involve civil society, stimulating citizens, communities of people and non-governmental organisations to participate in anti-corruption activities by making them more aware of the overall problem of corruption, transparency of decision-making processes, their participation in the latter, promotion of freedom of expression, research, information and access to the public bodies in charge of preventing corruption[70].

Furthermore, in an area of regional international cooperation marked by a unique process of economic, social and legal integration of national systems (so in a very different legal context to the one presented by the United Nations Convention against Corruption), the approach is entirely similar: reference need only be made to the contents of the European Commission Communication in relation to a *European Union comprehensive policy against corruption*[71].

The different international legal contexts involved in the fight against corruption to which reference has been made (UN, EU, OECD, Council of Europe) use, in short, a similar strategy that tends to combine norms with a general scope capable of achieving a dissuasive system effect and sector focused norms intended to raise the cost of corrupt actions[72].

69 Art. 14.

70 Art. 13.

71 COM(2003) 317 final.

72 Also F. Di Cristina, *Prevenire la corruzione e l'illegalità negli appalti pubblici: verso una nuova via europea*, in A. Del Vecchio, P. Severino (editors), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale*, Padua, 2014, pp. 328-330.

There is also a demand from the international arena in relation to the need to ensure coordination of strategy and coordination of action within the State with action outside the State. This request is expressed, for example, by the Merida Convention provision that requires collaboration between States (both bilateral and multilateral, including in the context of international and regional organisations) in order to promote and implement measures devised within the anti-corruption strategy prepared at the national level[73]. In the European Union there is an express clause (which also exclusively declares an implicit obligation in any international agreement[74]), which establishes the obligation for each Member State and the Union to respect and assist each other in fulfilling the tasks that result from the Treaties[75].

5. The need for institutions (independent and competent) dedicated to preventing corruption

It is usual for international treaties concerning activities for combating crime to include an obligation for contracting States to establish dedicated institutions. With regard to anti-corruption, the "criminal law" Convention prepared in the context of the Council of Europe[76] requires compliance with this obligation in order to coordinate suppressive action[77]; for

73 Art. 5, paragraph 4.

74 The Vienna Convention on the law of the treaties establishes the obligation for international agreements to be performed in good faith (Art. 26), creating a genuine principle of international law.

75 The principle of sincere cooperation is contained in Article 4, paragraph 3, TEU.

76 *Supra,* note 5.

77 Art. 20, read in correlation with Art. 21.

the same purpose again, as mentioned previously, there is the obligation established by Articles 36 and 46 of the Merida Convention[78]. On the subject of preventing corruption, this States that "*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption*"[79]. The first suggestion that is derived from international law is that (in the context of respect for *domestic jurisdiction* recognised as a corollary of State sovereignty[80]) centres of authority should be established for "*implementing the policies referred to in Article 5 of (…) [the] Convention*[81] *and, where appropriate, overseeing and coordinating the implementation of those policies*" and "*increasing and disseminating knowledge about the prevention of corruption*"[82].

The second suggestion contained in the Convention concerns the quality of these bodies: these must have the "*necessary independence (…) to enable the body or bodies to carry out its or their functions effectively and free from any undue influence*"[83]. More than a few words are required to discuss

78 Art. 36 requires contracting States to ensure the existence of national law enforcement authorities; Art. 46 establishes the obligation on the same to identify a central authority in charge of criminal judicial cooperation.

79 Art. 6, paragraph 1. In this context, the existence of a precise "legal necessity" has been discussed: see S. Valaguzza, *La regolazione strategica dell'Autorità Nazionale Anticorruzione*, in *Riv. Reg. Mer.*, 2016, especially par. 2.

80 In this context see *supra*, para. 3.

81 Art. 5, in relation to preventive anti-corruption policies and practices, affirms that each State party must develop, implement or maintain effective, coordinated anti-corruption policies; endeavour to establish and promote effective practices for preventing corruption and periodically assess the legal instruments and administrative measures used to determine their adequacy for the task. Furthermore, State Parties must collaborate to promote and implement these measures.

82 Art. 6, paragraph 1, lett. a-b), UNCAC.

83 Art. 6, paragraph 2. Also confirming the character of independence is the

the non-technical use of the concept of independence, but that is not the aim of this paper: suffice to say that this characteristic, in my opinion, should more properly be understood as neutrality, or rather impartiality, in relation to the areas of interest involved in the activity assigned to these bodies[84].

A third suggestion (written for educational purposes, in order to teach how to ensure, at least in terms of legislation, that the entity or entities in charge of prevention have a statute of independence) can be found in the provision according to which "*The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided*"[85]. It can be deduced that independence can be ensured only where there are adequate financial resources and numerically sufficient human capital, as well as persons with appropriate training in order to ensure, through their duties, the effectiveness of national preventive activity.

The practices of the States that are party to the Merida Convention in relation to compliance with the norm that requires the establishment of bodies dedicated to preventing corruption are very varied. Broadly speaking, three different models of compliance with the convention norm can be identified, through the establishment of: entities that merely

Legislative Guide for the Implementation of the United Nations Convention against Corruption, New York, 2006, para. 52. See also Resolution 5/4, *Follow-up to the Marrakech Declaration on the Prevention of Corruption*, adopted at the UNCAC State Parties Conference, point 12; and by Resolution 6/6, *Resolution 6/6 Follow-up to the Marrakech declaration on the prevention of corruption*, adopted at the UNCAC State Parties Conference, point 3.

84 For more detail on this see N. Parisi, *Il ruolo dell'Autorità nazionale anticorruzione*, in L. Foffani – D. Limone – V. Mongillo – G. Piperata (editors), *Manuale dell'anticorruzione*, Bologna, in the course of publication.

85 Art. 6, paragraph 2.

coordinate other bodies and national authorities; public institutions that contribute towards preventing corruption even if they are not specifically intended for this purpose; and bodies created specifically for this purpose, which contribute towards preventing corruption as a specific part of their duties[86].

GRECO has considered the levels of independence of national anti-corruption authorities on many occasions [87], at times focusing on the need for adequate "*financial and personnel resources*"[88]; on the effectiveness of the powers granted to them[89], on their collaboration with other State institutions in order to optimise the performance of their duties[90]. In relation to the Italian National Anti-corruption Authority, it commented that it "is playing a most valuable role with its proactive and determined leadership"[91].

86 On the different ways that States have adapted to the convention provision, see K. Hussmann, H. Hechler, M. Peñailillo, *Institutional Arrangements for Corruption Prevention: Considerations on the Implementation of the United Nations Convention against Corruption Article 6*, in *U4 Issue* 2009:4, Anti-Corruption Resources Centre Chr. Michelsen Institute; L. de Sousa, *Anti-Corruption Agencies: Between Empowerment and Irrelevance,* EUI Working Paper RSCAS 2009/08; PNUD (Programme des Nations Unites pour le development), *Guide des praticiens: Évaluation de la capacité des agencies anti-corruption*, 2011; J. Johnsøn, H. Hechler, L. de Sousa, H. Mathisen, *How to monitor and evaluate anti-corruption agencies: Guidelines for agencies, donors, and evaluators,* Anti-Corruption Resources Centre Chr. Michelsen Institute, U4 Issue 2011:8.

87 On the recommendations adopted in the context of the 4th round of evaluation, see GRECO, *Fourth Evaluation Round. Provisional Compilation of GRECO's Recommendations* (updated since GRECO 77), pp. 70-71.

88 Within the fourth round of peer review see Rec. XIX in relation to Macedonia; Rec. XIX in relation to Slovenia; Rec. XVI in relation to Georgia.

89 With reference to the fourth round of evaluation see Rec. XIII in relation to Serbia.

90 Again within the fourth round of peer review see Rec. V in relation to Ukraine; Rec. I in relation to Lithuania.

91 GRECO, *Evaluation Report – Italy* (in the context of the Fourth Evaluation

The OECD considers it to be "independent from the Government (…) gained a prominent role (…) on adopting and strengthening corruption-prevention measures (…)"[92] and capable of implementing international best practice in terms of supervision[93].

5.1 Independent authorities and European Union Law

The European Union's legal system, due to the primacy of its laws within national legal systems[94], could represent

Round), 19 January 2017, par. 2, according to which "The National Anticorruption Authority (so-called ANAC), the key coordinating body in Italy for corruption prevention and transparency of public administration purposes, is playing a most valuable role with its proactive and determined leadership. A broad Anticorruption Plan (2017-2019) is in the pipeline; it comprises multifaceted measures (publication of administrative information, rotation of personnel, strengthened control of conflicts of interest, monitoring of privatisation and externalisation of public services)".

92 *OECD Economic Survey – Italy*, April 2019, p. 32.

93 See the Report (of 18 December 2014) *on the governance system for contracts and on the methodology of preventive control of legitimacy;* and the *Interim Report* (of 30 March 2015) in which it is noted that "The experience (…) represents a model of integrated controls and institutional synergies that enable an *organised response from the institutions* to organised crime and corruption" (p. 4) and "the OECD believes that certain elements of best practice that emerged from the agreement with ANAC could be a source of inspiration for promoting the integrity of other large infrastructure projects (…)" (p. 10).

94 On this topic the reference to the intense and remarkable scientific production of Antonio Ruggeri is mandatory. Limiting the quotations to the most recent studies see: *Primato del diritto dell'Unione europea in fatto di tutela dei diritti fondamentali?,* in *Quaderni costituzionali*, 2015, p. 931 et seq.; *Primato del diritto sovranazionale versus identità costituzionale? (alla ricerca dell'araba fenice costituzionale: i "controlimiti"),* in *Forum di quaderni costituzionali*, 2016; *Il primato del diritto dell'Unione sul diritto nazionale: lo scarto tra il modello e l'esperienza e la ricerca dei modi della loro possibile ricomposizione,* in *Consultaonline,* 2016, III fasc.; *Corte costituzionale, corti europee, giudici comuni:*

a way to strengthen the independent nature of the national anti-corruption authorities. However, this offers only indirect ideas[95].

Firstly, with regard to the public tenders sector, there is a clear similarity in objectives between European law on public tenders, which protects the *par condicio* and competition, and anti-corruption law, for example, the Italian law inserted into the Public Tenders Code[96] partially for the purpose of avoiding the risk of corruption[97]. However, there are no provisions in the Community directives that require the establishment of *ad hoc* national authorities. The connection and interaction between fighting corruption through prevention, public contracts and, more generally,

le aporie di una costruzione giurisprudenziale, in *Consultaonline*, 2018, III fasc.; *Costituzione e rapporti interordinamentali, tra limiti e controlimiti, dal punto di vista della Corte costituzionale,* in *Ordine internazionale e diritti umani,* 2019, p. 507 et seq.; *Dopo* Taricco: *identità costituzionale e primate della Costituzione o della Corte costituzionale?,* in *La legislazione penale*, 4.2.2019, p. 1 et seq.

95 In this context, administrative scientific literature has shown a synergy between norms on anti-corruption and those inherent to public tendering procedures. Even the need to "improve the efficiency of public spending" set out in the preambles of the 2014 directives on tenders and concessions, encourages the use of anti-corruption policies, to protect values already recognised under European law: this is the line of reasoning proposed by S. Valaguzza, *Normativa sull'evidenza pubblica e sull'anticorruzione: prospettive a confronto*, in various authors, *La nuova disciplina dei contratti pubblici tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*, Documents from the 61st Administrative Sciences Conference, Milan, 2016, especially p. 703 et seq., which identifies, even though indirectly, a source of legitimacy for the anti-corruption Authority in European Law.

96 Legislative Decree no. 50/2016.

97 Consider, for example, the norms on conflicts of interest, contained in the 2014 directives on tenders and concessions (see, in particular, premise 16 and Art. 24 of Directive 24/2014/EU), the aim of which is *par condicio concorrentium*, but also to prevent the commission of corruption offences. The similarity of the objectives is emphasised in S. Valaguzza, *Normativa sull'evidenza pubblica e sull'anticorruzione: prospettive a confronto*, ibid, pp. 703 -705.

the integrity of the national public administration (which even though found in the European Union directives on public contracts[98] or rather in other anti-corruption measures adopted by the European Union[99]) does not, in short, translate into the construction of a form of administration that sees institutional dialogue between several authorities each belonging to its own legal system in accordance with the "European regulatory partnership"[100] or the "network"[101], as

98 EU Directives 23, 24, 25/2914, implemented in Italy with the aforementioned Legislative Decree no. 50/2016.

99 This refers, purely by way of example, to the "package" of anti-corruption measures adopted by the European Commission, Doc. COM(2011) 308 final; and the Report by the same Commission *on the fight against corruption in the European Union*, Doc. COM(2014) 38 final. See in addition: the Convention *on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, adopted by the Council of the European Union on 25 May 1997; the Framework Decision 2003/568/JHA of the Council of the European Union, of 22 July 2003, *on combating corruption in the private sector;* the *Convention on the Protection of the European Communities' Financial Interests* adopted by the Council of the European Union on 26 July 1995, completed by three protocols (the first, dated 27 September 1996, *on corruption of Community officials*; the second (dated 19 June 1997) *on the responsibility of legal entities and associated sanctions, money laundering and confiscation, cooperation between the services of the European Commission and Member States, as well as data protection*; the third (of 29 November 1996) *on the jurisdiction of the EU Court of Justice to interpret the Convention through preliminary ruling*; these conventional rules should have been replaced by the directive 2017/1371, 5 July 2017 *on the fight against fraud to the European Union's financial interests by means of criminal law.*

100 According to C. Franchini and G. Vesperini, *III. L'organizzazione*, in S. Cassese (editor), *Istituzioni di diritto amministrativo*, Milan, 2012[4] , pp. 126-127, the model is reproduced when "a structural and functional integration of independent national authorities is achieved (…) [,] cases of administrative integration (…) related to the phenomenon of the emergence of numerous administrative apparatuses common to Member States and the European Union, designed as systems composed of elements that complement each other".

101 This situation was explained very clearly in legal terms: "Integration between significant markets depends (…) essentially on integration

has already happened or has simply been proposed for issues that fall within other sectors not covered by the exclusive competence of the Union.

In this context, we should note the complex institutional systems created to ensure the confidentiality of personal data[102], to protect internal market competition[103] and to manage electronic communications[104]. Relevant in this context is the proposal (in the literature) to establish a network system of administration (that includes both the Union and its Member States in fighting the laundering of illegal revenue)[105]; as well as the proposal (made by the European Parliament, but not accepted by the Commission) to establish a European Authority for the protection of whistleblowers, evidently in partnership with the national authorities already

between businesses (supply) but even more on integration between public authorities, including those belonging to different Member States (demand) located in national contexts, and among these and those that are institutions of the European Union (…) according to a system of competences organised as a network, where it is the relationship of integration between national and European administrations that promotes the development of systems capable of achieving a shall we say balanced dismantling of the pre-existing administrative nationalisms": R. Cavallo Perin, *L'organizzazione delle pubbliche amministrazioni e l'integrazione europea*, in R. Cavallo Perin, A. Police and F. Saitta (editors), *L'organizzazione della pubblica amministrazione tra Stato nazionale e integrazione europea,* Florence (Florence Univ. Press), 2016, p. 7; see also pp. 20-23.

102 See Directive 95/46/EC of 24 October 1995 and the regulation (which substituted it) (EU) 2016/679 of 27 April 2016. For a discussion on this see N. Parisi, *Anac and the Italian Model for the prevention of corruption. Best practices, challenges and gaps,* in G. Bellantuono and F. Lara, *Legal Conservations between Italy and Brazil*, Trento (Università degli studi di Trento), 2018, p. 17 et seq.

103 See Regulation 1/2003/EC of 16 December 2002. See S. Cassese, *L'Autorità garante della concorrenza e del mercato nel "sistema" delle autorità indipendenti*, in *Giornale dir. amm.*, no. 1, 2011, pp. 102-104.

104 Directive 2002/21/EC of 7 March 2002.

105 D. Masciandaro, *Un'autorità europea contro il riciclaggio*, in *Il Sole 24 Ore*, 16 July 2018.

in charge of this task[106]. In this latter context, the directive that requires the harmonised protection of workers who report offences starting from within their place of work (regardless of whether it is private or public sector) is undoubtedly positive. However, the parliamentary provision of a specific body capable of working in synergy with the national institutions would have given added value to the attempt to harmonise the national systems for protecting whistleblowers. The proposal of the European Parliament had and has, furthermore, the merit of having been the first inspiration for a European policy on harmonising national anti-corruption action through an institution that without a doubt belongs to this sector. However, the provision of an institutional system of networked administration (even in the limited context of a single anti-corruption institution) would also have had the effect of strengthening the role of the national authorities involved, whose existence and competence would have found European legitimacy.

Finally, the Italian Anti-Corruption Authority could be anchored to community law in relation both to public tenders and to whistleblower protection, to the extent that it was assigned a role of governance over an integrated market of European dimensions[107], of which the national market is only a small part. In particular, the specific role granted to this institution by the Public Contracts Code in terms of dispute resolution seems relevant. If in fact we consider the "remedies directives"[108] we can appreciate

106 Art. 7: Doc. 3 May 2016, http://bit.ly/1rQJtRy. In its own resolution, the European Parliament suggests that the European authority should provide opinions to the national authorities and the European institutions, and that it should promote the harmonisation of good practices in the Union and in Member States with regard to whistleblowing.

107 Art. 212 Public Contracts Code.

108 Directive 2007/66/EC of 11 December 2007.

how it allows Members States some discretion in relation to identifying types of remedy, not even excluding that non-judicial methods may be established[109]. This directive was implemented in Italy primarily through the Administrative Process Code. But even the last Contracts Code makes a contribution to the extent that, for example, it includes dispute resolution methods alternative to those that are specifically judicial. The binding opinion under Art. 211, para. 1, of the Code can be read in this context, to the extent that the parties are both entitled to ask the National Anti-Corruption Authority not only for an interpretation, but also for a pre-litigation solution to a legal issue concerning an administrative measure issued[110]. In this context, one could also read Art. 211, para. 1*bis*, of the same Code, which empowers ANAC to legitimately challenge administrative measures that it deems unlawful: the role covered by this procedure consists of resolving the root cause of a problem before the parties take legal action.

In relation to whistleblower protection, it is beyond doubt that, when the Law 179/2017 will be amended to adapt the Italian legal system to the EU directive, the Anti-corruption Authority will be the governance body in the matter also for the European "internal market"[111].

109 Art. 2 dir. cit.

110 For more on this issue, see also C. Benetazzo, *I nuovi poteri "regolatori" e di precontenzioso dell'ANAC nel sistema europeo delle Autorità indipendenti*, in *federalismi.it*, 28 February 2018, footnote 59.

111 On the role of Italian whistleblowing legislation to improve an effective preventive action see *supra*, footnote 19.

5.2 Independent authorities and national Constitutions

A different important means of building a solid guarantee of independence to the advantage of national anti-corruption authorities could be offered by national constitutions, if the principle of the existence and/or legitimacy to exercise duties could be found within them.

In this sense, once again, we can think in terms of ANAC, which was established with a law expressly passed to fulfil international obligations. Law 190/2012 starts, in fact, by stating that "[i]n fulfilment of Article 6 of the United Nations Convention against Corruption (…) and Articles 20 and 21 of the Criminal Law Convention against Corruption (…), this law identifies, in the national context, the National Anti-Corruption Authority and the other bodies assigned to perform, with methods suitable for ensuring coordinated action, activities to control, prevent and fight corruption and illegality in public administration"[112].

It follows that the evoked conventional rule (*rectius*: the Italian law that contains the order to implement the same) is categorised as "interposed provision" (between the Constitution and the ordinary law of the Parliament) pursuant to Art. 117, para. 1, of the Constitutional Charter[113]. In legal terms the consequence is that subsequent laws can easily intervene to amend the laws on the existence, role,

112 Art. 1, para. 1, Law no. 190/2012.

113 Art. 117, para. 1, Italian Constitution. See the "twin" judgments of the Constitutional Court nos. 348 and 349/2007. On the constitutional legitimacy of ANAC, S. Valaguzza also offers a comment, *La regolazione strategica dell'Autorità Nazionale Anticorruzione,* in *Riv. reg. mercati*, 2016/1, p. 17. About the primacy of international agreements and European law pursuant to the Italian Constitution see *supra*, footnote 19. About the primacy of customary law pursuant the Italia Constitution see *infra*, para. 5.

competences and functions of the Authority, but without these legislative interventions removing the obligation assumed with the order to implement the Merida Convention within the Italian legal system: the existence of one or more anti-corruption bodies equipped with the guarantees of independence required by international law must always be ensured.

The guarantee of such compliance lies within the assessment of constitutionality exercisable by the Constitutional Court, which can be asked to evaluate the conformity of new laws with the provisions of the Constitution, according to which "legislative authority is exercised (...) in accordance with the Constitution, as well as with the commitments arising from the European Union's legal system and from international obligations"[114].

5.3 The benefit derived from the existence of national entities for preventing corruption

There are many advantages to be derived from compliance with the convention norms that ask States to establish dedicated anti-corruption authorities. I will discuss them based on the few years' experience gained since ANAC has been in operation. The Authority obtained accreditation in the *Registry*, held by the United Nations under the *United Nations Office for Drugs and Crime*[115].

The activity that the Authority performs to fulfil the normative provision cited is not so much intended to

114 Art. ult. cit.

115 Pursuant to Art. 6, para. 3, UNCAC, the existence of national entities created for the purpose of prevention pursuant to the Convention must be communicated to the *United Nations Office for Drugs and Crime*, UNODC, the UN office responsible for the *Registry* of accreditations.

represent Italy at the international level; the traditional government diplomatic delegations would suffice for that purpose. The Authority is rather associated with these delegations (in the contexts, for example, of the United Nations, the OECD, the Council of Europe, the European Union, the Open Government Partnership, the G20 and the G7, limiting the list to the most important for the issue under discussion here), enjoying within them guarantees of independence, since there its presence is exclusively to cover a technical role: its participation is essential for enhancing the national contribution to the international debate with its specific competences, especially when it involves identifying the best contents to include in the international norms in the process of adoption.

Again, the Authority uses these occasions to share and exchange information, data and knowledge on anti-corruption methodologies and practices in the broadest sense, as understood in our legal system also, with other similar national counterparts[116].

Thanks to this structure, the national authority is also able to represent and maintain, at the international level, the specific details of the domestic system within the numerous working groups, including those that draft the contents of binding laws, contributing also to disseminating any best practices that the "domestic system" is able to prepare within the legal system: this is what happened, for example in Italy, by express recognition by the OECD, with the procedures

116 Following on from the normative idea contained Art. 5, paragraph 4, UNCAC, in parallel with the work of GRECO, for example, a network of national anti-corruption authorities was created (Šibenik Declaration 16 October 2018), with the task of identifying the best national practices on preventing corruption, organising consistently and codifying them into "manuals" for national administrations to use, to better fulfil the recommendations issued by GRECO to each contracting party.

implemented by Art. 30 of Decree Law no. 90/2014 for the purpose of Expo Milan 2015[117].

In the domestic context, it is clear enough what advantages can be derived for the "domestic system" from the role performed by such an authority in terms of international relations and what implications arise from the resulting responsibilities. Firstly, in fulfilling its duties, the Authority is better able to transfer into its deliberations a correct understanding of both the literal provision of the norm that it contributed to setting at the inter-governmental level, and the purpose that it intends to pursue, thus ensuring a more complete adherence to the international obligations should it adopt measures with either a general or an individual aim[118].

In the meantime, the fact of participating in the process that led to the adoption of international norms allows the national authority to usefully assist the domestic legislator in their transposition; to better evaluate (and consequently to solicit) said national legislator towards a better legal structure in relation to antinomies, difficulties in interpretation and weaknesses in the national normative fabric[119].

A few more words are needed, precisely in relation to the last item identified (that is, the problems that the national legal system can present in relation to the actions required

117 See the two Reports adopted by the OECD in December 2014 and March 2015, published on www.anticorruzione.it.

118 If we consider the many and significant duties that the Italian National Anti-Corruption Authority has assumed including in the fields of regulation, supervision, consultancy, we can better understand the usefulness of such a technical role.

119 In this area it is in Italy the contribution that ANAC provided, for example, with the adoption of Guidelines no. 6/2015 that made the application of Art. 1, paragraph 51, of the "Severino Law" on protecting whistleblowers less complex, and this facilitation is still happening today in relation to the new provisions on the issue adopted under Law no. 179/2017.

by its participation in international relations), to underline the virtuous effect that derives from inter-governmental collaboration and more specifically, from the national anti-corruption authorities' participation in the same. The majority of the obligations assumed within the international governmental organisations (mentioned earlier), which pertain to fighting corruption, implement the verification mechanisms of the convention requirements, which in part have already been discussed in relation to another context[120]. The peculiarity of these mechanisms consists in very constructive methods of control that aim, not so much to ascertain the precise responsibility for the violation of an obligation, but to guide the non-compliant State in subsequent steps towards a satisfactory level of compliance with the obligation itself. This system (called peer review since it is performed in the context of a reciprocal relationship between equals, the State parties to the individual convention system) allows "defects" to be highlighted in the national legal system without creating consequences for itself in terms of penalties: the recommendations that end each phase of the different evaluation rounds aim, reciprocally, to make suggestions to States regarding methods for fulfilling their convention obligations. The participation of the prevention authorities in the evaluation "rounds" allows them to continuously introduce requirements arising from the international context into the national system (even in dialogue with the other institutions), thus contributing to the progressive process of adapting the latter to the former.

120 *Supra*, para. 2.

6. The contribution of customary international law

Finally, we can examine the question of whether this abundance of norms and practices for fighting corruption (and provide for domestic independent authorities) even in terms of prevention strategy constitutes the manifestation of the existence or the emergence of an international principle of customary nature (therefore of general scope, able to oblige all States to comply with it), and perhaps of a mandatory international norm intended to prohibit this sort of conduct as a crime against humanity, as some American[121] and Indian[122] literature is beginning to discuss. If so, the independence of national authorities would be strengthened, since jus cogens is mandatory for all States of the international Society, and – as we suggested - the fight against corruption greatly benefit from the presence of this kind of bodies, giving the fight itself greater effectiveness. According to the Italian Constitution[123], the domestic legal system adapts automatically to customary law, that "enter" in it with the rank of constitutional rules.

In the current state of international law, this latest suggestion does not seem tenable: not so much because there is no a legal qualification of corruption shared by States[124],

121 S. B. Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, in 101 *Northwestern Univ. Law Rev.*, No. 3, p. 1257 et seq.

122 **Swami Nathan, *Black money case, Treaty and International law (Jus Cogens). Bringing back Black Money can be thought of as part of Jus Cogens (international law)*, in https://www.pgurus.com/black-money-case-treaty-and-international-law-jus-cogens, July 16, 2016.**

123 Art. 10.

124 In the relevant Conventions there are important differences with regard to their subjective application,;but with regard to the material object of the offence they tend to give a similar, almost overlapping definition; there

but because the existence of an international *ius cogens* norm requires common consent on the severe deviance of the action contemplated by the same. Currently this consent does not seem likely, given the lack of widespread acceptance of this common consent.

However, it is worth noting that there is a strong discussion about the creation of an international criminal court to fight grand corruption: such an institution presupposes the belief that corruption is a crime under international law. The debate was initially raised by Mark L. Wolf (US judge), during the 2012 *St Petersburg International Legal Forum*[125]. The proposal is in particular sustained by the *Harvard Kennedy School of Government* [126], the *American Academy of Arts and Science* e the *III (Integrity Initiatives International),* a non-governmental organization founded (on 2016) with the aim to combat "grand corruption". GOPAC (*Global Organization*

is broad agreement, being the definition of corruption generally based on improper advantage, expressed very vaguely as "*any undue advantage*" (Arts. 2-3 *Criminal Law Convention on Corruption*; Art. 2 *Civil Law Convention on Corruption*; Art. 15 *UNCAC*). The 1997 OECD Convention stands out because it identifies the crime of transnational corruption (or international) in relation to economic transactions, which is a crime that must be included within the legal system of each contracting party (on this see S. Manacorda, *La corruzione internazionale del pubblico agente*, Naples, 1999). On the topic see also M. Arnone, S. Borlini, *Corruption. Economic Analysis and International Law*, Cheltenham-Northampton, 2014 pp. 314-321; A. Vannucci, *L'evoluzione della corruzione in Italia: evidenza empirica, fattori facilitanti, politiche di contrasto,* www.astrid-online.it/static/upload/protected/Vann/Vannucci.pdf.

125 *The Case for an International Anti-Corruption Court, Brookings Institution-Governance Studies at Brookings*, July 2014; *An International Court to Fight Corruption: A Federal Judge Makes the Case* (conference 2017-11-04); *Statement: An International Anti-Corruption Court for Grand Corruption*, pronounced at the 2016 London Anti-Corruption Summit.o

126 Protagonist on the debate is R. Goldstone (South African magistrate and prosecutor at the International Tribunal for Former Yugoslavia and Rwanda); some ONGs –as Global Witness e *Human Rights Watch* – participate in it.

of Parliamentarians Against Corruption) adopted the *Yogyakarta Declation* (8 October 2015) that recommends that the United Nations (at point 6) consider the adoption of a supplementary protocol aimed at establishing an international criminal court for combating this type of conducts.

This project is adversed by the Heritage Foundation[127].

Instead, it is certainly a norm of general international law that obliges States to fight corruption offences, since the structure of the current international community attaches to them individually and collectively the responsibility of ensuring the orderly and legal pursuit of international relations including with and between private parties[128].

The existence of this norm on the structure of the international legal system is manifested by the willingness of States to fight offences that are contrary to this orderly and legal structure: this willingness is make evident, in fact, by the signing of so many treaties and the adoption of unilateral international norms of hard and soft law.

7. The necessary balance between the exercise of normative and regulatory activities in the context of preventing corruption

Everything said up to this point means that norms to comply with international and European law are adopted

127 B.D. Schaefer, S. Groves, J.M. Roberts, *Why the U.S. Should Oppose the Creation of an International Anti-Corruption Court*, Backgrounder No. 2958, October 2014).

128 P. Picone, *Diritto internazionale dell'economia e costituzione economica dell'ordinamento internazionale*, in P. Picone, G. Sacerdoti (eds.), *Diritto internazionale dell'economia,* Milan (Franco Angeli), 1982; G. Schwarezenberger, *The Principles and Standards of International Economic Law*, in *Rec. des Cours,* 1966-1, p. 48.

between States, along with procedures to ensure their effectiveness and efficiency. In this context, we must not ignore that increasingly often, in the most diverse areas, academics, many figures from the economic sphere and observatories (national and otherwise) of the methods that underlie the strategy of fighting corruption through prevention claim that the procedures implemented in this respect represent an element that contributes towards (if not causes) the inefficiency of the public sector system and business activity due to the costs, delays and restrictions they involve. The common factor in their reasoning is their affirmation of the pointlessness, or rather the unsuitability of the rules for changing the attitudes and the culture of a State and a nation.

On the contrary, I am deeply convinced that the law and, therefore, the procedures it implements, can be a powerful means for launching a different cultural approach from the present one with regard to corruption and the actions that sustain and feed it[129]: a cultural approach at the centre of which is an awareness of the severity of the damage caused by a degree of corruption as high and pervasive as the level many areas of the world have long experienced, causing not only economic damage, but also social and political, since it is likely to destroy the relationship of trust between government officials and institutions placed at the base of a constitutional legal system. A cultural approach, therefore, through which the "costs" of corruption are visible and there is an awareness of the reprehensible extent of the offences involved[130].

129 See N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto*, Rome, 1977.

130 Emphasising the lack of this cultural ethos in Italian society are G. De Vergottini and G. Spangher, in *Corruzione contro Costituzione,* Padua, 2012,

However, the laws must be applied, in particular and firstly by a prepared and competent public administration, supported in being those things by investment in its formation, generational turnover and the acquisition of information technology. In relation to these requirements, the so-called invariance clause applied as standard, not only doesn't help, but is dystonic.

There is no doubt that the law, and with it procedures, represent a victory and a bastion for those who do not hold power (public, since they do not share positions in the government of the public sector, or private sector, since they are not financially strong). Bureaucracy, in the modern sense of the word, was created to achieve collective aims according to criteria of impartiality, impersonal use of power and rationality: it is an instrument for sharing authority as opposed to the arbitrary exercise of the same[131]. In principle, therefore, the condition of corruption within a society cannot be removed by the existence of laws and procedures: good rules lower the risk of corruption as a way of affirming the principle of the supremacy of law over discretion[132].

It is said (also referring to important historical references[133]) that the problem is caused by too many rules:

respectively pp. 2 and 44.

131 Obligatory reading is the modern bureaucracy theorist M. Weber, *Economy and Society*, in the edition edited by W.J. Mommsen, M. Meyer, Rome (Donzelli), 2005; but see also for a more contemporary discussion K.J. Meier, L.J. O'Toole, *Bureaucracy in a Democratic State: A Governance Perspective*, Baltimore (The Johns Hopkins University Press), 2006.

132 On the principle of legality and the characteristics of the norm (so it can be categorised as "law"), see the detailed case law of the European Court of Human Rights in relation to the interpretation and application of Art. 7 of the European Convention for the Protection of Human Rights, as explained by D. Rinoldi, *L'ordine pubblico europeo*, Naples, 2008, para. 41.

133 Notable is the comment made by Tacitus invoked by those who claim the inherent corruptive force of having many laws («*Corruptissima re publica*

of course, over-abundant laws often lead to difficulties with interpretation and application, aporias, contradictions; sobriety is a feature of good legislation. However, sobriety does not respond to objective, universal indicators, each situation deserving a greater or lesser degree of legislation.

It is better, therefore, to turn our attention away from the quantity of rules and focus on their quality[134]. Now, when a situation of diffuse and pervasive illegality needs to be fought, the quality of the rule is measured in terms of its effectiveness and, therefore, on its ability to combat the situation. For this purpose, I believe some conditions must be taken into account in exercising normative activity of great importance: firstly, the incentive scope for those who are tasked with applying the rules of conduct and the procedures that result from the norm; then, the exercise of public power by a competent and ethical administration; and lastly, the presence of the same qualities in the public administration's interlocutor. Lastly, there is the question concerning the interpretation and application of the norm: conceptual operations that must be informed by a substantialist criterion. The law, in fact, is an instrument that is not an end in itself, but is needed to achieve justice.

These are the conditions that cannot be improvised. Placing oneself in this context, perhaps we can better understand why it can be argued that (sober) laws and (good) procedures can contribute towards establishing a culture of individual responsibility, the anti-chamber of an undamaged social and legal context, where a few, linear rules are upheld

*plurimae lege*s»: *Annales*, Libro III, 27): the intended meaning of the author here is not that many laws produce corruption, but that a corrupt State multiplies the adoption of laws producing corruption, since adopted *ad personam*.

134 For a detailed legal discussion on this topic, see B.G. Mattarella, *La trappola delle leggi. Molte, oscure, complicate,* Bologna, 2011.

by the best antidote to corruption, that is, transparency. But this condition (transparency in the public sector and in the management of private affairs) represents a victory that is obtained at the end of a long journey supported and guided by norms that indicate clear models of conduct and which contain incentives for virtuosity[135], in order to accelerate the process of incorporating models of integrity into daily tasks, as much in the private sector as in the professional sector.

Fighting corruption is a process; it cannot be eliminated instantaneously; in fact it takes a long time. It is certainly not a linear process and many of the instruments it uses could themselves be corrupted[136]. We need, therefore, to start to launch a cultural process to change the approach, the cultural approach of individuals starting with simple, clear norms of conduct.

Central in this context, is the question of equipping a legal system with a set of rules and procedures, which, of course, force each entity to accept an initial burden of work dictated by, for example, the risk based strategy. However, these are the rules and procedures, which if followed in a substantialist manner and not as merely formal compliance, in the long term lead to the construction of virtuous models of conduct. Furthermore, the acknowledgement of the severity of the damage produced by conduct that is now so pervasive should lead each public and private institution to respond

135 On the need to equip anti-corruption legislation with incentives, see: S. Rose-Ackerman, *Corruption: an Incentive-Based Approach*, in various authors, *Corruzione contro Costituzione. Percorsi costituzionali*, no. 1/2, 2012, p. 109 et seq..; F.M. Teichmann, *Eliminating Bribery. An Incentive-Based Approach,* in *Compliance Elliance Journal*, 2018, p. 72 ss.; S. Rose-Ackerman, B.J. Palifka, *Corruption and Government. Causes, Consequences, and Reform*, New York (Cambridge Un. Press), 2016².

136 In the context of norms, which themselves produce corruption, see F. Giavazzi, G. Barbieri, *Corruzione a norma di legge. La lobby delle grandi opere che affonda l'Italia*, Milan (Rizzoli), 2014.

to corruption offences using alternative models, capable of reversing the direction, and which are effective and not governed randomly.

The lessons learned from the international context of action to combat a phenomenon that already stands out for its notable transnationality are very useful. They are offered as a support to each of the participating States (mediated because they are filtered by the extensive experience subsumed by national contexts at the level of inter-governmental cooperation) in order to reform national institutions and their procedures, recommending a reduction of State intervention in the market, the promotion of competitiveness including by merit (thus cutting back "privileged positions"), the reduction of barriers to entry for private companies, and an intact bureaucratic structure accompanied by better (because they are effective) control systems[137]. International law evaluates State compliance not on the basis of a formal adjustment to the obligations it establishes, but rather on the basis of the effectiveness and efficiency of the latter.

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137 For similar considerations see R. Coppier, *Corruzione e crescita economica. Teorie ed evidenze di una relazione complessa,* Rome (Carrocci) 2005, pp. 92-95.

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