ROLACC
مجلة مركز حكم القانون ومكافحة الفساد
RULE OF LAW AND ANTI-CORRUPTION CENTER JOURNAL

RESEARCH ARTICLE

Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities

Nicoletta Parisi*

* Member of the Board of Autorità Nazionale Anticorruzione (ANAC), the Italian National Anti-Corruption Authority, Rome, Italy; former Professor, Faculty of Law, University of Catania, Italy

Email: n.parisi@anticorruzione.it

Cite this article as: Parisi N. Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities, Rule of Law and Anti-Corruption Journal 2018:2
https://doi.org/10.5339/rolacc.2018.2.

كيوساينس
QSCIENCE
دار جامعة حمد بن خليفة للنشر
HAMAD BIN KHALIFA UNIVERSITY PRESS

ABSTRACT

1. Premise. 2. The essential characteristics of an effective model for preventing corruption. 3. The process of contamination between models devised for preventing corruption in different contexts. 4. The distinctive traits of the public sector model adopted under Italian Law no. 190/2012. 5. The private sector model traits pursuant to Italian Legislative Decree no. 231/2001. 6. The point of intersection between the private and public sector models: private companies controlled by public bodies. 7. The scope of the different models involved. 8. Closing remarks on the effectiveness of these models: simple laws, effective procedural models and the ethical responsibility of public sector employees and economic operators.

Keywords: Ethical responsibility, anti corruption model, Italian Legislative Decree no. 190, Italian Legislative Decree no. 231, public sector, private companies.

ملخص:

١. الفرضية. ٢ . الخصائص الأساسية للنموذج الفعال لمكافحة الفساد. ٣. التماهي الناتج عن خلط النماذج التي تم تصميمها لمنع الفساد في سياقات مختلفة. ٤. السمات المميزة لنموذج القطاع العام المعتمد بموجب القانون الإيطالي رقم ١٩٠/٢٠١٢.
٥. السمات المميزة لنموذج القطاع الخاص وفقا للمرسوم التشريعي الإيطالي رقم ٢٣١/٢٠٠١. ٦. نقطة التقاء نماذج القطاعين العام والخاص: الشركات الخاصة التي تدار من قبل الهيئات العامة . ٧. نطاق النماذج المعنية الأخرى. ٨. الملاحظات الختامية حول فعالية النماذج محل الدراسة : قوانين بسيطة ونماذج إجرائية فعالة والمسؤولية الأخلاقية لموظفي القطاع العام والمشغلين الاقتصاديين.

الكلمات المفتاحية: المسؤولية الأخلاقية، نموذج مكافحة الفساد، المرسوم التشريعي الايطالي ١٩٠، المرسوم التشريعي الايطالي ٢٣١، القطاع العام، شركات خاصة

1. PREMISE

At this historic time for the Italian legal system, three anti-corruption measures are in effect. The first has a *typically public sector nature*: it is the system implemented by the "Severino Law" (no. 190/2012) and by all the provisions set out under the said law or, in any event, ancillary to it, which serve to fully enact the general rules contained therein, including the "Madia Law" (no. 124/2015, together with its delegated decrees), Law no. 69/2015, the Public Contracts Code adopted under Legislative Decree no. 50/2016 as integrated by Legislative Decree no. 56/2017[1].

Previously, the Italian legislature (with Legislative Decree no. 231/2001) set out provisions that established the application of a *model for the prevention of typically private sector corruption*: this procedure is the result of obligations derived from urgent demands placed on Italy by the international context in which it participates. The adaptation of the Italian legal system to the 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] in fact required an internal adjustment which also covered rules regarding the obligations of legal entities and entities in general. Therefore, it considered how to pursue the latter for acts of corruption committed to its advantage[3] by persons who are either in senior executive positions or subject to the supervision or direction of the latter. In response to this requirement, our legislation adopted a regulation that allows private entities to be exonerated from liability if the organisational model it has implemented is proven to be – despite the occurrence of unlawful acts – suitable and effectively implemented for combating corruption[4].

Finally, an anti-corruption model was recently (2016) adopted, which is relevant to both the *public sector* and the *private sector*: the *UNI ISO 37001*[5]. This is the fruit of self-regulatory activities adopted by economic operators and state public institutions, organised within private associations dedicated – at different levels in which they operate: global, European and national – to harmonising procedures and technical rules. Its scope (as suggested by the title "*Sistemi di gestione per la prevenzione della corruzione*", meaning "Management Systems for Preventing Corruption") is to establish appropriate measures to prevent instances of corruption from becoming entrenched.

In this paper, I will discuss the "philosophy" of the three models, examine how they relate to each other, consider the areas covered by each one or by more than one and, finally, outline a few considerations regarding their effectiveness.

2. THE ESSENTIAL CHARACTERISTICS OF AN EFFECTIVE MODEL FOR PREVENTING CORRUPTION

The fundamental question that I considered viewing the phenomenon from the perspective of the procedures of the Italian Anticorruption Authority led me to explore the fundamental characteristics of a good structure designed to prevent corruption. I am referring to a general model, regardless of the sector (public or private) within which it is intended to operate. Considering the procedures with which ANAC is involved, I decided that, when the authority is asked to evaluate the 3-year programmes for prevention of corruption and transparency in the public bodies that it supervises, there seem to be four fundamental criteria against which the effectiveness of these programmes should be assessed.

2.1. First, the entity must move towards the so-called *risk-based* approach, in order to use a term (and therefore a technique) developed in the international context, particularly in terms of the cooperation built within the Organisation for Economic Co-operation and Development[6]: this means that the entity must consider the risk-corruption issues arising from its specific activity, in the particular context in which it operates, and how the latter can be managed.

This technique extends starting from a concatenation of conceptual and operational stages marked by two fundamental steps: the first step (*risk assessment*) is intended to verify the presence of risks, identify the risk factors for corruption, define measures for dealing with the latter and devise measures for monitoring and control. The second step (*risk mitigation and management)* is concerned with adopting the resulting decisions which must be made to manage the risk that was identified[7].

1 This issue is discussed in greater detail in N. Parisi, *Alcune poche considerazioni conclusive*, in Il Contrario Della Corruzione. Integrità E Nuovi Mariuoli, Nuova Autorità Nazionale Di Prevenzione, Nuovi Strumenti Interni E Internazionali Di Repressione (D. Rinoldi ed., 2017).

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 no. 300 of 31 October 2000 (which also gives authorisation to the government for its full implementation: see Legislative Decree no. 231 of 8 June 2001). The second Protocol was executed and authorised for ratification with Law no. 135 of 04 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 Communautaire*, *in* Rev. int. dr. pén. 39 (2006); A. Venegoni, *La Convenzione Sulla Protezione Degli Interessi Finanziari Della Unione Europea*, *in* Diritto Penale Sostanziale E Processuale Dell'unione Europea Vol. I 40–69, Vol. II 10–56 (L. De Matteis et al. eds., 2011).
The Convention and its Protocols are destined to be substituted by the regulation set out under the Directive of 05 July 2017, to which Member States must adapt within 2 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* Il Diritto Penale Della Globalizzazione (2017).

3 This last condition became obsolete with the most recent reform of the regulation introduced with the transposition of the European Union's framework decision, which is discussed in note 3.

4 Legislative Decree no. 231/2001, arts. 5–7. 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 no. 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 abbreviation UNI ISO 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 abbreviation is UNI EN ISO. The UNI represents the interests of Italy at the CEN and ISO.

6 Unfortunately, I am obliged to use, and not infrequently, English terminology, due to the fact that the technique for fighting corruption through the punitive measures adopted in Italy starting with the Severino Law has international origins (a legal context in which the working language is mostly English). 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*, 2016, p. 185 et seq.

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 106–07 (2013), *available at* http://www.keepeek.com/Digital-Asset-Management/oecd/governance/rapporto-ocse-sull-integrita-in-italia_9789264206014-it#.WgCDWo_Wzow#page2 (last visited June 18, 2018).

The important process of exploring risk in light of an analysis of the external and internal contexts of the entity itself should be emphasised. The programme that each entity adopts, in fact, must be considered a unique and unrepeatable creature[8]: therefore, the discovery of a specific risk is a necessary process for the entity, which relates to 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 as well as of bureaucratisation within private entities. When they were first introduced, in fact, many initiatives had been put forward to package the models proposed by consultancy firms, forgetting that, by obtaining assistance from outside the entity, the latter was not in a position to recognise the risks that might arise separately and specifically against it, both in a specific external context and in light of its own internal traits. Unsurprisingly, the models adopted in this way turned out to be ineffective when tested by criminal courts[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 engaged in combating the risk of corrupt behaviour. This is a typically private sector term; if I were to limit my discussion here to the public sector, then I would need to refer to the political leaders of public entities and their senior managers; I have chosen "top management" to use a more general term that covers both the public and private sectors, considering furthermore that the public sector also must learn to organise itself on the basis of efficiency criteria, in the same way that private companies do.

Therefore, the 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.

The National Anti-Corruption Authority has tried to alleviate this lack of support; there already seem to be some positive results. During the meetings dedicated to the RPCT, i.e. the person in charge of transparency and the prevention of corruption situated in each public body (held on 24 May 2015, 2016 and 2017), there was a very clear change in the attitudes of the individuals to whom the initiative was addressed: in the first year, they complained almost exclusively about the problems that arose from their isolation within the entity. In the second year, the same persons in charge of transparency and the prevention of corruption (PTPCs) explained that their isolation persisted, but, nonetheless, they could devise some strategies for sharing the burden of the tasks associated with the job. On 24 May 2017, the event was very constructive, well above expectations: there was a widespread proactive attitude among the PTPCs, who presented the operative solutions they had been able to prepare and even introduce into the procedures of their respective public bodies.

I believe this difference in attitude can be attributed to the strategy that ANAC implemented with regard to the performance of regulatory activities exercised through the previous adoption of the National Anti-Corruption Programme (NAP) in October 2015: in this context, the programme suggests that each public entity should also use structures and persons within its organisation to guide them in preventing corruption, in accordance with – but if I may add, to enhance – their specific competences and respective roles. Substance is thus given to the method, according to which the PTPC is the last stop in an internal process in which many "agents" participate, starting with the Internal Supervisory Body (ISB), political leaders, senior management and each individual employee, with the aim of preventing corruption from taking root within the entity[10].

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: who better than they, in fact, to know what problems exist within their public body, how certain strategies are working and how the "ritual" of clocking-in and clocking-out functions. 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 asks him to perform his job "with discipline and honour"[11], given that he works for a public entity that must ensure "the proper functioning and impartiality" of public sector work[12]. In this context, he is involved, personally and individually, in the responsibilities associated with the safeguarding and promotion of the entity's culture of integrity. However, for this to happen (returning to how I began these considerations), 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 whistleblowers[13], especially where it is stated that "[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 we do (excuse the hagiographic reference) with our children: there is no point in giving 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

8 It has been correctly pointed out (in relation to the organisational model required by Legislative Decree No. 231/2001) that this must be "*tailor made*". M. Zecca & A. Paludi, *Corruzione E Modelli Di Organizzazione Delle Imprese. Un'analisi Giurisprudenziale*, *in* Il Contrasto Alla Corruzione Nel Diritto Interno E Nel Diritto Internazionale 117 (A. Del Vecchio, P. Severino eds., Padua 2014).

9 See the procedure discussed in M. Colacurci, *L'idoneità Del Modello Nel Sistema 231, Tra Difficoltà Operative E Possibili Correttivi*, *in* Diritto Penale Contemporaneo no. 2/2016, 66 et seq.

10 The NAP adopted this with Decision No. 12 of 28 October 2015, para. 4.

11 Art. 54 Costituzione [Cost.] (It.).

12 *Id.* art. 97.2.

13 Recommendation, adopted on 30 April 2014, identifies 29 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 *Id.* (Principle no. 7).

15 *Id.* (Principle no. 27).

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 of creating procedures governing the different *risk-based* operations, devising a specific *action plan*. From this process, among other things, excellent opportunities arise for reorganising the entity, in terms of making it more efficient generally: in this process, the connection between performance and the prevention of corruption is very clear. From a conceptual perspective, this feature has, among other things, the certainty of the medium- and long-term benefits of an approach to anti-corruption measures based on a logic not merely of formal compliance with legislative provisions but of a constructive opportunity for rationalising the entity in terms of its organisation and in relation to the ways in which it conducts its activities.

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 devised 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 No. 231/2011) and Three-year Programmes for Transparency and the Prevention of Corruption (TPTPCs, for the public sector, as established under the Severino Law and Legislative Decree no. 97/2016).

With regard to the advantages derived from this strategy, we can refer again to the context of international cooperation: again, the OECD claims that in the countries where it is 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. Finally, the fourth feature of a good model for preventing corruption (which in my experience has still not been widely implemented in the Italian public sector) consists of applying a stress test to the programme. In fact, 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 and after the process, are established. In order to evaluate and guarantee the efficacy and effectiveness of the model, all these procedures must be tested to verify their efficacy and effectiveness.

However, we must go even further. When an anti-corruption structure tends to become obsolete over time, because the way it functions is known and shared, the entity must be prepared to continuously update the model and the assumptions on which it is based: it is also for this reason (and not only because of the constant evolution of the social context), it must be considered a "dynamic" creature rather than something static. It is not a coincidence that the Severino Law, in relation to the public model, envisages a (3-year) programme on an annual rolling basis. This system offers an excellent opportunity for guaranteeing effectiveness: it enables everything that was learnt from the experiences of the previous year to be promptly added to the programme; it enables checks to be made on which part of the model was inadequate in relation to acts of corruption, which aspects need only adjustment and which ones were successful and can be confirmed. Similarly, it is not by chance that the case law, which evaluated the efficacy of an organisational model pursuant to Legislative Decree no. 231/2001, considered its capacity to be dynamic as one of its essential criteria[18].

3. THE PROCESS OF CONTAMINATION BETWEEN MODELS DEVISED FOR PREVENTING CORRUPTION IN DIFFERENT CONTEXTS

The second point I would like to examine concerns the process of fertilisation (or hybridisation) that we experience between models. 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 contamination between models is very interesting, very complex and characterised by a transnational influence. It primarily takes place through processes that are entirely internal to the Italian legal system. For example, it is certainly not original to observe that the anti-corruption measures established under the Severino Law are inspired by the compliance programmes system set out under Legislative Decree no. 231/2001[19]. This process of, what we call, horizontal fertilisation 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[20], spreading later to other fields of private economic activity and was finally generalised by the aforementioned legislative decree.

This process of contamination also operates vertically. I have already emphasised how anti-corruption strategies have been in many ways prepared, particularly for the Italian legal system, based on 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[21]. Furthermore,

16 On this subject, *see* OECD, Trust in Government Ethics Measures in OECD Countries (2000), *available at* https://www.oecd.org/gov/ethics/48994450.pdf (last visited June 18, 2018).

17 *Id.* at 68.

18 Order of the Preliminary Proceedings Judge of the District Court of Milan on 20 September 2004, Foro it., 2005, II, c. 528.

19 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 no. 231 of 08 June 2001". 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 8.1, 35 (R. Garofoli ed., Oct. 1 2012). 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 by the National Anti-Corruption Authority with Decision no. 8/2015 entitled *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* – mainly attributable to two facts: the public model must address only corruption offences against the State (i.e. 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 the so-called "maladministration". *Id.* at 11; *see also* N. Parisi, *L'attività Di Contrasto Alla Corruzione Sul Piano Della Prevenzione*, in La corruzione a due anni dalla "Riforma Severino" 91–137 (R. Borsari ed., Padova University Press 2016).

20 *See*, *mutatis mutandis*, Financial Action Task Force (FATF-GAFI) International Standards to combat money laundering and the Financing of Terrorism & Proliferation (2012, *available at* www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (last visited June 18, 2018.

21 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.

the process of vertical contamination also operates in the opposite direction: it is true that the virtuous practices of some states are likely to continuously flow back from the national programme into the international programme during the many periodic working groups attended by individuals and entities from both the public and private sectors. In this respect, 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*, is significant, which is able to circulate the best practices regarding models for the integrity of national public administrations among the 35 member states of the organisation. To date, this has produced, for example, two separate generations of recommendations, which push national administrations to adopt virtuous models of conduct[22]. Furthermore, the Italian context has also contributed towards enriching this circulation of good conduct: the definition of effective forms of institutional cooperation and procedures for the supervision of public tenders implemented by ANAC in coordination with the OECD[23], to mark EXPO 2015, was recognised by the OECD as a best practice of the Organisation[24] and therefore exported to other national contexts engaged in large construction projects, for example, the new airport in Mexico's capital city. Additionally, the compliance programmes technique adopted by the OECD is based on the system applied in the USA[25].

The circulation of best practices at the international level therefore tends to develop a process of harmonisation and strengthening of national strategies, resulting in significant contamination: 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 many other experiences from other national contexts. This process, with its circular manner of operation, is reciprocally enriching for both legal systems involved.

The UNI ISO 37001 model of 2016 (*anti-bribery management systems*) certainly belongs to this type of "mutual contamination" 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[26]) and the one in the United States (pursuant to the Foreign Corrupt Practices Act (FCPA) of 1977). Their contents have been subsumed at the international level following a complex process of debate and discussion at the ISO[27]; finally, these re-entered our legal system, thanks to the work of the Italian National Unification Body (*Ente Nazionale Italiano di Unificazione*, UNI).

4. THE DISTINCTIVE TRAITS OF THE PUBLIC SECTOR MODEL ADOPTED UNDER ITALIAN LAW NO. 190/2012

Here, I will give a very brief outline of the public sector model applied in the Italian legal system.

Law no. 190/2012 requires that each public body should adopt a Three-year Anti-Corruption Programme, which under Legislative Decree no. 97/2016 must also include measures concerning transparency. Incidentally, this decision to merge the two different programmes originally established as separate seems very appropriate. Transparency is the essential component of an anti-corruption strategy. In this respect, I am certain that, if we could achieve transparency in the public sector, then our country would almost entirely solve its problems with regard to corruption, which is supported by the persistence of opacity. It seems obvious, in fact, to say that transparency makes corrupt agreements more difficult: maybe it is not too malicious to think that for this reason precisely, in our legal system, there are many obstacles to full transparency in both the public sector and its relations with certain activities pursued in the private sector.

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

4.1. First, I want to return to an image I used earlier: 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 continuously (the repetition is intentional) arise from the internal and external contexts of the entity. In order to be effective and complete, 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, that is, the so-called resilience).

Acknowledgement of this requirement leads us to recognise the need for an anti-corruption structure that is dynamic too. The Plan required under Law no. 190/2012 is defined as "rolling", in the sense that, even though it is adopted for a 3-year period, it must be updated every year.

This process is not merely cosmetic. 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 which indicators, which problems and what data emerge from the process, 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, in turn, adopts annually and which also operates on a "rolling" basis.

4.2. Reference is thus made to the second component of the anti-corruption strategy devised under Law no. 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 (*Piano Nazionale Anticorruzione*, NAP) adopted by the governance body for the sector, ANAC, and the second level is administered by the individual public administrations through their own Three-year

22 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*.

23 Memoranda of Understanding of 06 October 2014 and 12 May 2016, *available at* http://www.anticorruzione.it.

24 *See* Report of the OECD (Dec. 18, 2014); Report of the OECD (Mar. 30, 2015).

25 On this subject, *see* C. De Maglie, L'etica E Il Mercato: La Responsabilità Penale Delle Società 102 et seq. (2002).

26 This refers to BS 10500. *See* Bribery Act 2010 (U.K.), https://www.legislation.gov.uk/ukpga/2010/23/contents.

27 *See* ISO 37001, Anti Bribery Management Systems. Requirements with Guidance for Use (2016). 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.

Programmes for Transparency and Preventing Corruption. As mentioned earlier, the NAP is also 3-yearly and "rolling", just like the plans established by individual public sector bodies.

The purpose of the 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 TPTPCs[28]. The 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.

4.3. I must also mention the effectiveness that this strategy aims to achieve. 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 (2013) and the adoption by ANAC of the subsequent NAPs (2015, 2016 and 2017). 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 the new Council (July 2014). From this activity, in fact, it was noted that the quality of the TPTPCs had to be considered "generally unsatisfactory"[29].

The poor quality of the first TPTPCs was partially attributable 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 "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 no. 231/2001) towards a merely formal compliance with the rules established on the subject by 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 TPTPC of another municipal authority (without even changing the heading of the entity and the name of the Person in Charge of Preventing Corruption) and a large hospital in Campania that had used the TPTPC of a hospital in a small province of Piedmont.

As mentioned above, this resulted in an evaluation of the sterility of a NAP, which, in its genericness and expected uniform application, lent itself to a "cut-and-paste" operation, to mere vague proposals, and, in addition, to cosmetic operations inserted from outside the entity itself. The public sector was not put in a position, from the first introduction of Law no. 190/2012, to understand the logic, and the benefits, of the process, which consists of acknowledging the specific, individual risks determined by the context (both external and internal) that characterises each separate entity.

The subsequent NAPs, including the one that is about to be published, are based on the principle according to which the public sector is not an undifferentiated universe, consisting instead of very diverse components. These NAPs, consequently, are equipped with a small component of measures aimed generally at the public sector as a whole[30], whereas most of them consist of clarifications directed at specific areas of the public sector[31]. ANAC has therefore abandoned the idea of issuing the same recommendations to all public sector entities, regardless of the function of each entity, its size, whether it is central or local territorial or local non-territorial and whether it has a stable nature or not. The aim is to appreciate the diversity of the general and specific risks, the difference between the areas at risk according to the function, the different external context and the different duration and stability of the entity, which may have been established only for contingent and transient needs. Furthermore, this appreciation was helped by the technique used: that is, through consultation with those who for different reasons have been made aware of the contents of the NAP via joint "working groups" in which the risks of corruption and the measures available for combating them were discussed.

ANAC considers this type of conceptual approach more practical in order to guarantee that the recommendations aimed at the public sector will be more effective. Only in this way can the organisational model for preventing corruption be operative.

The search for a substantialist approach emerges from all the authority's practices. Only one example is needed, which illustrates the practice of "copying homework", so to speak. The Severino Law establishes the obligation to impose sanctions on public bodies that do not have a TPTPC, not when they have one, but it is ineffective. ANAC has concluded that copied programmes are essentially non-existent programmes; therefore, it considers these cases to be equally liable for sanctions. This idea contradicts the assumption according to which the proceduralisation of anti-corruption measures leads to a new, more intense (ineffective) bureaucratisation of the public sector, forcing the entity to invest human and financial resources into a model that has proven to be ineffective because it was not developed in the context of the entity itself[32].

5. THE PRIVATE SECTOR MODEL PURSUANT TO ITALIAN LEGISLATIVE DECREE NO. 231/2001

The compliance model set out under Legislative Decree no. 231/2001 does not find detailed instructions, which are helpful for identifying its contents and drafting techniques, in the guidelines of positive law[33]. Three parameters are stated therein: on the one hand, with regard to the establishment of a possible strategy for combating (also) risks of corruption, it should be noted that the

28 Law no. 190/2012, as amended by Legislative Decree no. 97/2016, art. 1.2*bis*.
29 ANAC, Relazione Annuale 2015 79 (2016).
30 The 2015 NAP contains 24 general pages; the 2016 NAP, 37; the 2017 NAP only 17.
31 In the NAP, 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, and in 2017, to the port system authorities, official receivers and universities.
32 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 TPTPC (as established by ANAC with Decision no. 831 of 03 August 2016).
33 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* Tutela Degli Investimenti Tra Integrazione Dei Mercati E Concorrenza Di Ordinamenti 434, 438, 456 (A. Del Vecchio & P. Severino eds., 2016).

organisation, management and control model (essential for avoiding the possibility of the entity being considered liable for alleged offences) must respond to certain characteristics, which I will set out by reproducing the text of the provision: "a) identify the activities in the context of which offences may be committed; b) establish specific protocols intended to schedule the formation 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."[34] 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."[35] On the other hand, in terms of effectiveness, it was established 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."[36]

With regard to 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[37] of the entity on whose behalf the person acted[38]. 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 Decalogue", supplemented by the case law of the Naples District Court (Tribunale di Napoli),[39] provides a useful summary. However, this analysis performed using case law is still too unreliable to give certainty to the subjects who adopt the model in terms of the "resistance", before the criminal courts, of an organisational and management model, and therefore, it does not help to make the process of adopting (with costs that are sometimes unjustifiable) a similar model appealing in substantive terms[40]. The absence of incentives to make this process effective and not a merely cosmetic operation has led to, along with the fragility of the system, the implementation of attempts to reform it[41].

6. THE POINTS OF CONTACT BETWEEN THE PRIVATE AND PUBLIC SECTOR MODELS: PRIVATE COMPANIES CONTROLLED BY PUBLIC BODIES

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.

Anyone reading this paper will certainly know that, in accordance with the mandate contained in the "Madia Law", Legislative Decree no. 175/2016 was passed and contains the Consolidated Act on reorganisation with regard to companies in which the public sector holds a share (SOEs). This codification is, however, unusually almost silent on the subject of anti-corruption and transparency so much so that we need to find the regulation relevant to our discussion in another piece of legislation with identical origins (Legislative Decree no. 97/2016), intended to regulate, in general terms, the subject of fighting corruption through prevention in public bodies (as well as using administrative transparency measures), which was already covered under the Severino Law and Legislative Decree no. 33/2013[42].

The solution identified in establishing rules on transparency and the prevention of corruption, even for the so-called public companies, is built on the basis of the limited instructions that emerge in part from Law no. 190/2012[43], as enhanced by the 2016 NAP[44] as well as the current Guidelines adopted by ANAC[45] and outlined by Legislative Decree no. 97/2016, which was confirmed by the Council of State[46]. This requires that in relation to private companies owned by public bodies, the "231 model", which in my opinion is not compulsory for private entities, on penalty of its sometimes pointless bureaucratisation[47], when present, must be supplemented by a programme of anti-corruption measures[48].

34 Severino Law, art. 6.2.
35 *Id.* art. 7.3.
36 *Id.* art. 7.4.
37 The literature is divided on the type of liability of the entity under Legislative Decree no. 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* Corporate Criminal Liability and Compliance Programs 427 et seq (A. Fiorella & A.M. Stile eds., 2012). The administrative nature is affirmed by M. Romano, *La responsabilità amministrativa degli enti, società, associazioni: profili generali*, *in* Riv. soc. 398 et seq. (2002). For a discussion of the mixed nature, is O. Di Giovine, *Lineamenti Sostanziali Del Nuovo Illecito Punitivo*, *in* Reati E Responsabilità Degli Enti 15 et seq. (G. Lattanzi ed., 2015); and similarly the Italian Supreme Court, Section VI, Sentence no. 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* Societas Puniri Non Potest 23 et seq. (F. Palazzo ed., 2003). 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*, https://rm.coe.int/16806d8140 (last visited 18 June 2018).
38 Case law (up to 2012) is presented in Codice Della Responsabilità "Da Reato" Degli Enti Annotato Con La Giurisprudenza (S.M. Corso ed., 2015).
39 This concerns the orders adopted respectively by the Preliminary Investigations Judge at the Milan District Court (Tribunale di Milano) on 20 September 2004 (in *Guida dir.*, no. 47/2004, p. 69 et seq.) and the Preliminary Investigations Judge in Naples on 26 June 2007 (in *Resp. Amm. Soc.*, no. 4/2007, p. 163 et seq.). For an effective comment on the contents of this case law, please refer to Zecca & Paludi, *supra* note 9, at 113.
40 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.
41 On this point, *see* F. Centonze & M. Mantovani, *Dieci Proposte Per Una Riforma Del D.Lgs. N. 231/2001*, *in* La Responsabilità "Penale" Degli Enti. Dieci Proposte Di Riforma 23 et seq. (Idem ed., 2016).
42 On this subject, see R. Cantone, *Prevenzione Della Corruzione Nel Sistema Delle Società Pubbliche: Dalle Linee Guida Dell'anac Alle Norme Del D.Lgs. 175/2016*, in I Controlli Nelle Società Pubbliche 17 et seq. (F. Auletta ed., 2017); A. Massera, Gli Statuti Delle Società A Partecipazione Pubblica E L'applicazione Delle Regole Amministrative Per La Trasparenza E L'integrità 45 et seq. (2017); Le Società Partecipate Dopo Il Correttivo 2017 (M. C. Lenoci, D. Galli & D. Gentile eds., 2017); La Gestione Delle Società Partecipate Pubbliche Alla Luce Del Nuovo Testo Unico. Verso Un Nuovo Paradigma Pubblico-Privato (M. Lacchini, C. A. Mauro eds., 2017); S. Fortunato & F. Vessia, Le *"Nuove" Società Partecipate E In House Providing*, 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 Le Società Pubbliche Nel Testo Unico 220 et seq. (F. Cerioni ed., 2017).
43 Originally, the rule was stated in Article 1.2 of Law no. 190/2012; this was amended by Legislative Decree no. 97/2016, which added (thanks to the provision contained in Article 41) a new Article 1.2*bis*.
44 NAP, p. 13 et seq.
45 Decision no. 8/2015, *supra* note 20.
46 Council of State Opinion no. 1257 of 29 May 2017 (It.).
47 In the sense claimed here, *see* Supreme Court, Section VI, Judgment of 23 June 2006, no. 32627. *Contra*, even though authoritative, Council of State, Opinion 1257, *supra* note 47, at para. 9.1.
48 This interpretation of the rules was established by ANAC, Guidelines 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, adopted 8 Nov. 2017, para. 1.3.

Specifically, in relation to the prevention measures intended to implement administrative transparency, the regulation established for public entities[49] is also applied to publicly owned private entities "as regards both its organisation and the range of activities performed"[50]. 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[51].

When a private entity is only partially owned, then only the rules on transparency are applied (and not all the others on preventing corruption), establishing, moreover, that this latter regulation is to be used "only in relation to activities carried out in the public interest"[52]. This is a broad interpretation of the legislative structure that emerges from Article 22 of Legislative Decree no. 175/2016 and Legislative Decree no. 97/2016 according to which any private entity that performs (even non-exclusively) public functions must be 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[53].

Listed companies are situated outside this sphere. Legislative Decree no. 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 recent Law, adopted by Parliament on 15 November 2017[54], "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", 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.

7. THE SCOPE OF THE DIFFERENT MODELS INVOLVED

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 formulation of a plan with details regarding time scales and duties for its implementation; verification of what has been achieved and connection of the results of the outputs established in the Plan with the system for evaluating the performance of the managers[55].

The proper criteria for a compliance programme as set out under Legislative Decree no. 231/2001 can be found in the 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 therefore be specific, effective and dynamic such that it can adapt to changes to the entity concerned"[56]. 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"[57].

In practice, the two models tend to function according to methods that are in some ways similar. We consider that, in practice, even in relation to the anti-corruption sector in the strict sense, ANAC tends to apply a mode of conduct that is based on the tried and beneficial process of collaborative supervision codified for the public tender sector[58], as a consequence of the desire (and the effort) to support the public sector in adopting virtuous conduct, instead of imposing sanctions. Conversely, long ago, the judiciary launched a process that tends to establish methods of collaboration (during preliminary investigations) with the entity, invited to launch internal defensive investigations to support and coordinate with the public prosecutors offices, in order to avoid, as much as possible in some cases, the initiation of criminal proceedings, which often entail the application of cautionary measures, both pecuniary and prohibitory[59], in a certain sense borrowing the experience (collaborative) gained in other legal systems, where criminal prosecution is not even compulsory[60].

The UNI ISO 37001 standard is based on a system that adopts a structure common to all ISO standards: this is the so-called *High Level Structure* (*HLS*), which consists of seven conceptual stages, constituting an organisational model, leadership (*focus on the top*), planning, support, operational activities, evaluation of services and improvements to be made. This seems methodologically more valuable than the two models detailed above, which, instead, are quite homogeneous: it adds, in

49 *See* the new Article 2*bis* of Legislative Decree no. 33/2013 (introduced by Legislative Decree no. 97/2016).
50 This is the confirmation of the legislation in force implemented in the Guidelines of ANAC. *See supra*, note 48, para. 1.2.
51 The legislative solution, furthermore, confirms what was already established in ANAC's Guidelines adopted with Decision no. 8 of 17 June 2015, fully replaced by the new Guidelines cited *supra* note 48.
52 ANAC, *supra* note 48.
53 ANAC, *supra* note 48, para. 3.3.3–3.3.4.
54 Not yet published in the Official Journal.
55 L. Carrozzi, *Piani Di Prevenzione Della Corruzione. L'approccio Dei Sistemi Di Gestione E I Fattori Critici Di Successo*, *in* Gnosis 161 et seq. (2016).
56 Preliminary Investigations Judge District Court of Milan, Order of 20 Sept. 2004.
57 Preliminary Investigations Judge District Court of Naples, Order of 26 June 2007.
58 Public Tenders Code, art. 213, par. 3(h); Supervisory Regulation of 15 Feb. 20, art. 4, para. 2(a).
59 F. Palazzo, *Obblighi Prevenzionistici, Imputazione Colposa E Discrezionalità Giudiziale*, 12 Diritto Pen. Proc. 1545, 1545–52 (2016).
60 In France it was governed by the hypothesis of "*convention judiciaire d'intérêt public*". Law no. 2016–1691 of 09.12.2016 (Loi Sapin II), art. 22, inserted into the new French Code of Criminal Procedure art. 41–1-2. In the United States, 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*).

comparison to these, for example, a system of reporting, monitoring, auditing and periodic verification, not detailed under Law no. 190/2012 or in Legislative Decree no. 231/2001, as well as the performance of investigations and the implementation of corrective actions, which in the Severino Law are only implied.

The result is that the process of fortification among models could be useful in terms of the methodological enrichment that comes from UNI ISO[61].

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 because of 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 and Legislation Agency (*Agenzia di Ricerche e Legislazione* – AREL)[62].

Undoubtedly, 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 inducement to use 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 B2B 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 type: administrative or judicial).

However, looking first at the experience of the "231 models", one cannot fail to 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: first the District Court of Milan[63] and then the Court of Appeal in the same city[64] 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 overturned by the Italian Supreme Court (Corte di Cassazione)[65]: making a ruling on legality, the latter did not feel, in short, constrained by any certification (in the event arising from the model having adopted both the scanty provisions of Articles 6 and 7 of Legislative Decree no. 231/2001 and the Guidelines adopted by Confindustria) and ruled with full autonomy, having assessed the efficacy and effectiveness of the compliance model. Furthermore, ANAC will not feel constrained 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.

Second, and from the conceptual perspective, part of the literature points, not without reason, 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"[66].

I will omit the matter of the cost of the process, even though it is not irrelevant: it is a "burden" that is added to the many expenses for-profit entities have to pay; and we must consider that it cannot be borne by public entities, given the provisions of Article 2 of the Severino Law[67].

Both the "231 model" and the UNI ISO 37001standard share a common benefit (including the benefit of the public sector model): 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.

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, figures from the sphere of economics and observatories (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 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 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[68]: a cultural approach central to which is an awareness of the seriousness of the damages that a high, pervasive level of corruption such as that which has affected the "Italian system" for a long time entails[69].

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.

61 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 NAP (2013), of which Appendix 6 contains the principles for the management of risk based on the said model.

62 *See* AREL, http://www.arel.it. On this subject *see* La certificazione del Modello organizzativo ex Decreto Legislativo 231/2001, *available at* http://www.filodiritto.com.

63 Judgment of 20 Sept. 2004, *Foro it.*, 2005, II, c. 528.

64 Judgment of 21 Ma. 2012, no. 1824, *available at* www.penalecontemporaneo.it.

65 Judgment of 18 Dec. 2013, no. 4677, sec. VI, *reproduced in* Dir. pen. proc. 1429 et seq. (2014).

66 On this, Sabia & Salvemme, *supra* note 34, at 462 (reporting the judgment of C. Piergallini, Paradigmatica dell'autocontrollo penale, Parte II, Cass. Pen. 842 et seq. (2013)).

67 *See* supra note 32.

68 On the promotional function of the law, *see*, more authoritatively, N. Bobbio, Dalla Struttura Alla Funzione. Nuovi Studi Di Teoria Generale Del Diritto (1977).

69 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 8 et seq.(2012); G.M. Racca & R. Cavallo Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty*, *in* Integrity and Efficiency in Sustainable Public Contracts 23 et seq. (G.M. Racca & C.R. Yukins eds., 2014).

The law and the associated procedures represent a victory and a bastion 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 achieving collective goals according to criteria of impartiality, impersonality of power and rationality: this forms an instrument for transmitting command that is contrary to the arbitrary exercise of the same[70]. In principle, the existence of corruption in society cannot therefore be attributed to the presence of laws and procedures: good rules lower the risk as instruments for affirming the principle of the supremacy of law over arbitrariness[71].

It is also said (with further reference to historical legacies[72]) that the problem was caused by too many rules: of course, excessive legislation often leads to difficulties in terms of interpretation and application, aporias and contradictions. Simplicity is a sign of good legislation; however, it does not respond to objective and universal indicators, since each situation deserves a greater or lesser degree of legislation. In this context, I will give an example taken from experience gained 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 has up until very 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): it decided to substitute this single undifferentiated regulation with four separate regulations, for each of the four areas of activity[73]. 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[74]. Now, when a situation of widespread, pervasive illegality needs to be combated, the quality of the rule is measured by its effectiveness and thus its capacity to combat that situation. To this end, there are a few conditions that cannot be overlooked: First, the incentivising capacity for anyone who has to apply the rules of conduct and the procedures that result from the rules; second, the exercise of public power by a competent and ethical administration and third, the presence of the same traits in the interlocutors for the public sector.

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

These are the conditions that cannot be improvised. From this perspective, perhaps it is easier to understand why I argue that (good) procedures can contribute towards establishing a culture of individual responsibility, the antechamber 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[75], so as to accelerate the process of incorporating the models of integrity.

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

From this viewpoint, the question of equipping the country with a set of rules and procedures, which, of course, constrain every entity to an initial burden of work required by the risk-based strategy, is central. However, these are the rules and procedures, which, if followed, in a substantialist manner and not as a merely formal obligation, will lead in the long term to the formulation of virtuous models of conduct. Furthermore, the awareness of the seriousness 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.

ACKNOWLEDGEMENTS: I wish to thank Daniela Cardullo, Luigi Carrozzi and Francesco Clementucci for their many helpful comments.

70 Of course, reference must be made to the theorist of modern bureaucracy, M. Weber, Economia E Società (W.J. Mommsen & M. Meyer eds., Donzelli 2005); *see also*, more recently, K.J. Meier & L.J. O'Toole, Bureaucracy in a Democratic State: A Governance Perspective (2006).

71 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 the European Convention on Human Rights, as reconstructed by D. Rinoldi, L'ordine Pubblico Europeo para. 41 (2008).

72 The words of Tacito are notable – always used by those who claim the law is useless – "*Corruptissima re publica plurimae leges*" (*Annales*, Book 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*.

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

74 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).

75 With regard to the need to equip the anti-corruption legislation with incentives, *see* S. Rose-Ackerman, *Corruption: An Incentive-Based Approach*, 1(2) Corruzione contro Costituzione. Percorsi Costituzionali 109 (2012).