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**FIGHTING INTERNATIONAL CORRUPTION:
THE EU LEGAL FRAMEWORK IN THE
INTERNATIONAL SCENARIO**

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INTRODUCTION

Corruption has its roots in every historical period and can be found almost in all existing social realities. However, it does not always present the same forms: it evolves following the evolution of society, technology and contrast methods.

Currently, especially due to globalization, to the role played by transactional companies and to the intensity and extent of economic transactions, corruption has reached alarming levels, without precedent, becoming endemic in politics and administration of many countries.

At these levels, corruption is harmful on many fronts: it damages the economic development, the rule of law, the proper functioning of the public administration and can even threaten the foundations of democracy.

The dimension reached by corruption, in a global economy, steps over the borders of individual States. Moreover, the growing transnationality of the phenomenon raises several issues relating mainly to the practice of the so-called forum shopping, to the social, political and cultural differences between the various regions of the world, to the difficulties related to the identification and recovery of the proceeds of crime and certainly also problems related to conflicts of jurisdiction and jurisdiction.

Given these premises, the States considered that a purely internal action was not adequate to respond to the threats brought by this phenomenon. Those circumstances led to the adoption, in the second half of the 90s, of several important international instruments to counter corruption.

Within this framework, the European answer to this worldwide spread problem should be analysed.

To this end, attention should be paid to the inter-regional level of cooperation in this area, in the work of OECD that led to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997, and in the one of the Council of Europe that, also, has taken action on anti-corruption matters.

This analysis, together with the reflections on the different institutional objectives of these organizations, is useful to assess and evaluate the European Union answer to corruption.

Indeed, within the European Union, it has been recognized that a contrast to corruption based exclusively on Member State action is certainly not enough and the need to harmonize national legislation has raised. Therefore, an intense legislative activity aimed at combating corruption begun. The removal of obstacles to the free movement of goods, persons and services has caused the need for a greater cooperation in the Justice and Home Affairs sector.

With the opening of the market and the abolition of borders, the EU soon faced a problem: the exclusion of criminal jurisdiction from the scope of Union action allowed the organized crime to exploit the differences between the different legal systems to escape the mesh of the law.

As a result, a process of transformation begun that, from the initial pillars structure and intergovernmental cooperation in criminal matters, led to the current system that moves towards the creation of a criminal law of the union, albeit with the difficulties and limitations that we will see. Certainly, the particular position that the European law occupies within the legal system of the Member States allows the Union to take effective actions to counter transnational corruption.

The entry into force of the Treaty of Lisbon has, in fact, opened up interesting opportunities for European law to penetrate national criminal law through the possibility of adopting directives in criminal matters that harmonize the definitions of criminal offences and sanctions for serious crimes with cross-border dimension. This opens up the matter of cooperation in the criminal area to a control of the Court of Justice, which was previously excluded in the pillar structure, and also to the possibility of undertaking the infringement procedure in the event of non-application or partial application of the Union law.

From the point of view of international law, we are facing an innovative interference in the criminal field, which has always been an element reserved to the domestic jurisdiction. Even if we cannot identify a unitary criminal law, it is undeniable that there is a transformation, not without resistance, from a purely

national criminal law to an internationalized or “Europeanized” one, depending on the field of investigation.

In summary, we can recognize different levels of anti-corruption law: national, European Union, regional of the Council of Europe, inter-regional of the OECD, and global of the UN.

The framework, then, becomes more complicated if we observe that the Union, in some cases, can become an autonomous part of these international treaties. As this is the case, for example the UN Convention and the Council of Europe Conventions.

Thus, it is evident that the problem of hierarchical coordination between these norms arises. Rather than an ordered system, they create, instead, a network of national, European and international rules that interact and intertwine with each other outside a rigid hierarchical order, creating a framework that is not easy to read and reconstruct.

With specific regard to the EU, which will be the main subject of this investigation, since its anticorruption legislation, as well as the international one, developed very rapidly mainly in the late 90s, its whole structure is still built on the pre-Lisbon structure and institutions and certainly requires an update, which has occurred only for some of the instruments envisaged and not for the others.

It must be said, in fact, that the Union's anti-corruption legislation is notoriously more effective and up-to-date with regard to the protection of its financial interests. For this reason, it leaves out a wide range of legal assets, among which, for example, the good development of the European administrative system. If the budget, in fact, is protected with new directives and law enforcement institutions, other legal assets are still protected by a conventional instrument dating back to 1997. Therefore, the basis of this work comes from the observation that, at the EU level, the regulatory framework for combating corruption is fragmented and not easy to reconstruct.

The purpose of this dissertation is to reconstruct and analyse the discipline to combat public corruption as provided for by the European Union's legal system. The question, to which we will try to give an answer at the end of the discussion, which constitutes the *file rouge* of all the work is: “is the European anti-corruption

action sufficient? Is it in line with the efforts and demands of the international community?”

As it comes to the structure of the dissertation, three chapters can be found.

In the first one we will analyse the process of supranationalization in the anti-corruption field both in a broad international perspective and within the EU. In other words, we will compare the international anticorruption instruments and the EU ones, in order to understand if the Union's efforts are in line with those of other international actors. Particular attention will be given to the historical and ideological path that has led to the growing interest of the international community in the fight against corruption. Reconstructing this path is, in fact, useful for understanding the scope of the tools and the reason for their differences.

We will then see the most important international anti-corruption conventions binding on the Member States and the Union itself. For each convention, we will focus on: the definition of a public official, the definition of active and passive corruption and the possible forecast of other cases ancillary to corruption.

The second part of the chapter is dedicated to the Union's own instruments. It will be seen how corruption affects the European Union and its interests and the evolution of Community and Union action will be reconstructed in the light of the succession of the various treaties and changes to the parts relevant for criminal law.

It will be seen how the entry into force of the Treaty of Lisbon allowed an evolution of the discipline in the criminal field and the consequences of the abandon of the pillar structure.

It must be remembered that the criminal sector is one of the last bastions of national sovereignty, and certainly the States, in this historical moment, are very reluctant to give up sovereignty. Indeed, it will be noted, especially when talking about the mechanism of the emergency break and about the establishment of the European Public Prosecutor's Office, that the Union's actions in criminal matters often meet the resistance of some Member States.

For each international and regional instrument analysed, the extension *ratione materiae* and *ratione personae* and the effectiveness of the same will be studied.

It is important to reconstruct the international legal framework. In fact, it will be noted that international instances have emerged in the same period, driven by corruptive scandals that have certainly given rise to the need and willingness to adopt conventions capable of building a fair international level playing field. It is recognized, in fact, that since this is a crime with a strong transnational component, differences between national laws can be dangerous for States, resulting in a loss of competitiveness, and could be exploited by criminal organizations for corruptive purposes.

Certainly, the interest of the European Community to the problem has brought some very interesting synergies between the international community and the Union, but there are also several problems arising from the coordination between the numerous instruments. Problems that, in large part, are due to the different definition of the crime of corruption in each of them and therefore to their different field of application.

Particular attention will then be given to the study of the Directive 2017/1371, so called PIF Directive, which regulates the measures for the protection of the financial interests of the Union and is of great importance with reference to the competence of the newly created European Public Prosecutor Office.

The second chapter starts with a general consideration: the correct transposition of the conventional rules does not necessarily ensure an effective application. We will therefore return to the studied international conventions and analyse the monitoring mechanisms envisaged by each of them. Moreover, we will see how the Union controls corruption in the Member States and the problems associated with joining an external monitoring system and developing an internal one.

The analysis will then proceed with the study of the institutions with competence in anticorruption provided by the EU. We will focus on the administrative investigations of OLAF, the criminal investigations of the recently created EPPO and the new role of coordinating bodies such as Eurojust and Europol after its entry into force.

Although in the administrative sphere there is a sort of Europeanisation of the control functions, it will be noted how, at least in this sector, the phenomenon

is only partial. Indeed, the phase of recovery of sums and assets, even if fundamental, escapes the OLAF competences. Moreover, from what specifically concerns the criminal area, we will see that the exercise of the action remains in some way anchored to the national level despite the creation of EPPO.

The third chapter is certainly the most heterogeneous and considers the most innovative and recent aspects of the Union activity to prevent and contrast corruption. Firstly, it will deal with the rules aimed at managing the conflict of interest included in the new code of conduct of the Members of the Commission. This is certainly an innovative tool if we consider that the conventional instruments and the instruments of European law analysed had never recognized, until now, the link between the conflict of interests and corruption.

Subsequently, the transparency rules in the public procurement directives will be analysed. As we shall see, the sector is one of the most at risk of corruption, but also one of the strategic sectors for the interests of the Union. An increase in transparency and a reduction in the discretion of officials in the various steps, including through the use of e-procurement platforms, can bring a big improvement in the levels of corruption in this sector.

Finally, the chapter deals with the proposed whistleblowing directive. Trade unions and NGOs dealing with corruption have long required this instrument to the European Union. In fact, protecting those who report acts of corruption that are witnessed by any retaliation by the employer or by any process, has certainly proved to be one of the most effective tools to combat corruption, given the difficulty of breaking the *pactum sceleris* that binds the corrupt and the corrupter.

The fourth chapter concerns the attention to anti-corruption in the Union's relations with third countries. The evolution of anticorruption, or anti-corruption related, clauses in trade agreements between the Union and third countries will be analysed. The difference in treatment between developing countries and advanced countries will be addressed.

Moreover, particular attention will be given to the innovative anti-corruption section included in the future agreement with Mexico, and probably also with Chile, during the ongoing negotiations for the update of the EU-Mexico Global Agreement.

Then we will analyse the anti-corruption policies required by the Union for accession candidate countries. The case of the Central and Eastern Europe countries will be very important to understand how and why the European Union has increased its attention to this specific chapter of the *acquis communautaire*.

The last two chapters, far from being exhaustive, contains a framework of the most recent and innovative aspects of the discipline.

The structure of the dissertation allows to notice the evolution, at the European level, of the anti-corruption approach. The first phase is characterized by an effort to level the international and regional playing field; a second phase, still in progress, is responsible for monitoring the implementation of the conventions and countering the phenomenon through the institutions of law enforcement; the third phase, instead, goes through the fight against corruption in certain specific sectors.

Certainly, there is also a need for a clear definition of the crime of corruption that would guarantee greater clarity and uniformity. In fact, to date, within the Union there is no criminal definition of this offence except with reference to the corruption that damages the financial interests of the Union.

However, as we shall see, this “economic” type of corruption, although worrying, is certainly not the only one that occurs. A definition of this kind, therefore, has the defect of leaving out all the cases, just as harmful, which do not directly affect the EU budget. Indeed, corruption, as will be explained, also damages the rule of law, the credibility of the institutions and the trust that citizens place in the democratic State. Moreover, it is also dangerous for human rights, especially in developing countries, threatening access to essential assistance services.

Most of the material research was carried out in Brussels at the European Commission library. This allowed me to get in touch with the context we are talking about, but, more importantly, to access to the most updated materials and working documents of the institutions of the Union.

During the reading, in fact, it will be noted that, alongside a research work of doctrinal material that certainly characterizes the first two chapters, there is a

careful reading and analysis of the normative texts and the preparatory documents on which the third and fourth chapter are based, given their extreme novelty.

CHAPTER I

BIRTH AND DEVELOPMENT OF THE ANTICORRUPTION INTERNATIONAL AND EUROPEAN LEGISLATION

SUMMARY: Introduction to the first chapter: methodological premises - 1. Corruption as an international phenomenon: genesis of the action, problems in definition, consequences and difficulties in fighting it – 1.1 History and development of the anticorruption action in international and regional organizations – 1.2 Impact of corruption and nature of the crime: the different visions adopted by International Organizations – 1.3 The first answer of the International Community: the OECD Convention and the protection of economic interests – 1.4 A completely different approach: Council of Europe 1999 Conventions, defending Rule of Law and Human Rights – 1.5 The completion of the path: United Nation Convention against Corruption, the global effort for codification – 2. The European Union action in preventing corruption: an evolving competence – 2.1 Empirical considerations - 2.2 Evolution of European legislation against corruption - 2.1 The protection of the EC financial interests: the 1995 PIF Convention and its protocols – 2.2 Beyond the protection of community budget: EU Convention on Corruption – 3. Fight against corruption in the context of an emerging criminal law competence of the Union – 3.1 Maastricht and Amsterdam Treaties: the three-pillar structure and the limits of the Justice and Home affair pillar – 3.2 Abolishing the Third Pillar: European Union competence in criminal law after Lisbon – 3.3 Harmonization of criminal substantive law: PIF Directive

Introduction to the first chapter: methodological premises

Analysing the development of an international anti-corruption action, we will note, in the course of this chapter, that the international legislative activity in

this area is quite fragmented.

Many international and regional organizations, in fact, starting from the 90s, have undertaken actions in this area. In particular, Organization of American States, OECD, European Union, Council of Europe, United Nations and African Union adopted conventions on anticorruption between the late 90s and the first years of the new millennium

Throughout this chapter, we will deal with international law and, only subsequently, with European Union law, because it is important to include the action of the Union in the broader international legal framework, especially since there are several treaties, in this matter, that provide for access by the European Union as an independent legal entity from its Member States.

There can be many reasons for such a choice: on the one hand, it can be assumed that the Union would be able to legislate directly in this area, harmonizing the disciplines of the Member States, within the areas of competence that, until the adoption of the Treaty of Lisbon, fell under the third pillar and now constitute the innovative attempt to create a European criminal law; on the other hand, the Union's choice to access the Treaties can be attributed to the fact that the Union itself, and its large number of officials, also because of the large amount of funds they are managing, can be subject to corruption, that could undermine its foundations and its capacity for action; moreover, this may be a political choice, since the international community is, as we shall see, very sensitive to this subject, as it is demonstrated by the numerous initiatives in this area also in the context of informal multilateral *fora* such as the G7, G8, G20.

It is important to note, however, that the treaties that we will analyse, while recognizing the injury of the phenomenon Corruption intended in a more or less broad sense, rest on different premises. This is mainly due to the double harmfulness of the phenomenon of corruption, both on the economic and the democratic level.

Obviously, the analysis of each convention cannot be separated from a clear reference to the aims of the respective organization. Moreover, it should be clear that, if the organization aims at economic development, such as the OECD, the convention will deal with preventing and combating corruption for purely economic

ends, for the protection of the free market and free competition; whereas, on the other hand, the organization has different aims, oriented towards the protection of human rights, democracy and the rule of law, such as the UN and the Council of Europe, the resulting Convention will be informed of these principles. It is precisely from these latter that a line of doctrine develops, which deserves to be mentioned here, which assumes that corruption is strictly connected to a violation of human rights, also on the basis of the empirical finding that the countries that face higher risk of corruption are those where frequent human rights violations persist¹.

For the European Union, the issue is certainly more sensitive because, if at first the anti-corruption action was specifically aimed at economic ends, and at the protection of the Union's financial instruments and interests, with the EU Convention on corruption, and particularly with the entry into force of the Treaty of Lisbon, there is an evolution and cases of corruption are punished even if they are disconnected from the damaging of economic interests, with the awareness that acts of corruption can lead to a loss of trust in the institutions, damage the good governance of the public administration and undermine the foundations of the democratic system.

For each Convention we will delineate the premises for adoption and the scope of application, with specific reference to the subjects of reference, the cases of incrimination provided and the innovative characteristics of each of them. In fact, it will be noted that we move from very narrow treaties, like the OECD convention, to treaties that aim at a holistic approach, by regulating the matter in a more complete way and also by addressing ancillary offences.

Before moving on to an analysis of the purely European discipline, we will reconstruct the international framework both from a chronological point of view and from a more objective point of view of the scope and application of the individual instruments.

Similarly, we will analyze the instruments of European law, inserting them in the temporal context in which they were developed, with all the limits deriving

¹ In this sense, for further information on the relation between corruption and human rights, see, among the others, J.M. NGUGI, “*Making the Link Between Corruption and Human Rights: Promises and Perils.*” in *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 104, 2010, pp. 246–250.

from the placement of the discipline in the so-called third pillar and with the possibilities opened by the Lisbon Treaty and the communitarisation of criminal law.

1. Corruption as an international phenomenon: genesis of the action, problems in definition, consequences and difficulties in fighting it

The international anti-corruption action must be inserted in its historical context. It is necessary, in order to fully understand the scope of the tools and the reasons of some choices, to understand the facts and considerations that led to certain tools, to know the countries that have sponsored the adoption of these conventions and to analyze, even briefly, the cases that stimulated the international debate.

1.1 History and development of the anticorruption action in international and regional organizations

The first documented case of corruption dates back to 3000 B.C., however at that time corruption was considered an integral part of society and the word itself had not yet acquired that negative meaning to which we are used to². The corruptive behaviour consisted, in fact, merely in an exchange of reciprocity perfectly accepted by the community. However, with some provisions in the Hammurabi Code, the ethical struggle to criminalize corruption started. In the Roman Empire, several attempts to punish corruption failed and, according to various scholars, rampant corruption was one of the main reasons that led to the end of the Roman Empire. Nevertheless, originally, the only type of public officials punishable for corruption acts were judges, as it is apparent from the Jewish Bible and from some Egyptian hieroglyphs³. Corruption, however, remained a generally accepted

² J.T. NOONAN, JR., *Bribes*, California, 1984

³ For deep analysis of evolution of corruption in ancient history see J.T. NOONAN, JR., *op.cit.*

phenomenon until the 20th century. In some countries, the expression itself, commonly used to describe corruption, has not an intrinsic negative meaning. In French, for instance, those payments are called *pots-de-vin*, which is an expression that implies that the payment is inoffensive, “*an offer of politeness and hospitality*”⁴.

In the modern era, historically, corruption was perceived as an internal problem, but several factors led to a “*globalization of corruption*”⁵. Globalization of corruption it’s a product of current time. In particular, we can relate such a globalization to three key factors: the end of the Cold war, globalization and a wave of bribery scandals around the world.

For a long time, especially during the Cold War, corruption was considered a factor bringing stability in the international scenario⁶. The falling of this dualistic political system ended the custom to overlook case of corruption involving countries that were in the “right” political camp. After the end of the Cold War, there was a “*a marked decrease in the willingness of the public to tolerate corrupt practises by their political leaders and economic elite*”⁷. Moreover, the fall of the Berlin Wall, the distension of East-West relations and the expansion of the European Union represented a qualitative leap in relation to the globalization of markets.

Globalization is, indeed, the second of the three factors: it opened new frontiers to trade and business. Globalization came with the growth of commerce, the birth of new transnational economic actors⁸ and the establishment of new free

⁴ For a summary background of the terms commonly used around the world to describe corruption see e.g. J.G. TILLEN, S. M. DELMAN, *A Bribe by Any Other Name*, Forbes online, 28th May 2010. Available at <https://www.forbes.com/2010/05/28/bribery-slang-jargon-leadership-managing-compliance.html#115b7a2041ca>, accessed on 14th November 2018.

⁵ S. MANACORDA, *La corruzione internazionale del pubblico agente. Linee dell'indagine penalistica*, Jovene, Napoli, 1999

⁶ There are some theories, developed by some US political experts, which define it as “*the oil for the wheels of the economy*” and highlight the positive functions of corruption: an effective way to compensate for deficiencies in the official structure, an alternative to revolution and civil war and, as mentioned above, a means to achieve political stability. For further readings on those theories see, among others: S.P. HUNTINGTON, *Political Order in Changing Societies*, London, 1968 and D.H. BAYLEY, *The Effects of Corruption in a Developing Nation*, The Western Political Science Quarterly vol. 19 no. 4, 1966

⁷ P. GLYNN, S.J. KOBRIN, M. NAÏM, *The globalization of corruption*, in K.A. ELLIOTT (ED.), *Corruption and the Global Economy*, Institute for International Economics, 1997

⁸ See J.F. MALEM SEÑA, *Globalizzazione, commercio internazionale e corruzione*, Bologna, 2004

trade areas, customs unions, economic unions and common markets all around the world. But, if, on the one hand, it opened new frontiers to business and trade, on the other one, it opened those frontiers also to criminal organizations and corrupt practices. Moreover, it increased the detrimental effect of corruption and, as almost every international instrument in this field recognizes in preambles, underlined the inadequacy of preventive and repressive national instruments.

With globalization, the so-called multinational – or better, transnational – enterprises are gaining more and more power. A very important fact is that large transnational companies often have bigger economic dimension, and power, than the countries in which they operate. As a result, they have, or may have, great social influence, they can have a great social influence such as to replace the one lost by the States themselves. And, in fact, the UN Global Compact Program⁹ pushes enterprises to incorporate the Ten Principles on human rights, labour, environment and anti-corruption in order to develop a culture of integrity and to achieve the goals of the 2030 Sustainable Development Agenda..

Scholars affirmed that the huge growth of transnational criminality represents “*the dark side of globalization*”¹⁰ which, alongside corruption, includes other crimes such as transnational terrorism and human trafficking. Indeed, one of the main problems connected with the economic globalization is the ability of organized crime to find and use the weakness of various legal system for their advantage.

Globalization of the economy, and its degenerative aspects, have been accompanied by the globalization of law. The strong expansion of international trade has led to complex evolutionary processes that forced the States to abandon a purely internal conception of regulating those aspects. In particular, the action of contrasting corruption at a merely internal level has appeared progressively inadequate to respond to the increased social dangerousness of the phenomenon.¹¹ The individual states have therefore deemed necessary to cooperate with each other

⁹ Global Compact was launched in 1999 by UN secretary Kofi Annan. Up to date Global Compact is the biggest initiative of corporate citizenship ever built.

¹⁰ J. HEINE, R. THAKUR (EDS.), *The Dark Side of Globalization*, UN, New York, 2013

¹¹ A. DEL VECCHIO, *il Quadro dei Problemi di Contrasto alla Corruzione nel Diritto Internazionale*, in A. DEL VECCHIO, P. SEVERINO (EDS.), *il Contrasto alla Corruzione nel Diritto Interno e nel Diritto Internazionale*, CEDAM, 2014, pp. 371-375

in order to achieve incisive results on a global level.

We must bear in mind that globalization must not be seen as the direct cause of corruption in developing countries and Third World countries, where corruption is widespread in all levels of society. However, we can certainly say that globalization has "*improved the opportunities for corruption and strengthened their negative impact on growth and development*"¹².

In theory, this is the exact moment in which the need to legislate in this area raised in the international scenario. Anyhow, the spark that ignited social and political will to address corruption was mainly due to a wave of bribery scandals that showed that the problem of corruption was not confined to developing countries but affected also the most developed democracies. As scholar pointed out, after those scandals, "*corruption was seen as an endemic problem*"¹³.

During the 1970's, because of the well-known "*Lockheed*" - and various others¹⁴ - scandal, which raised from the investigation on "*Watergate*" and refers to acts of corruption that involved politicians and managers to promote the purchase of American aircrafts by many foreign governments, single countries started to become aware of the corruption problem. In 1977, for the first time in history, bribery of foreign public official was made illegal. Indeed, the US adopted the Foreign Corrupt Practices Act (FCPA).

We have seen the social, economic and political reasons that brought to the changing of perception on the corruption issue, but the path towards global efforts against corruption accelerated mainly because, after the FCPA adoption, US government started a public lobbying campaign for an international anti-corruption treaty aimed at reaching an international level playing field¹⁵, in order to prevent its companies from being stood with a handicap¹⁶ against other foreign companies

¹² F. TARGETTI, A. FRACASSO, *Le Sfide della Globalizzazione. Storia, politiche e istituzioni*, Milano, 2008

¹³ D. DELLA PORTA, Y. MÉNY, *Introduction* in D. DELLA PORTA, Y. MÉNY (EDS.), *Democracy and Corruption in Europe*, Pinter, 1997

¹⁴ Such as the so-called *Bananagate* scandal which involved Chiquita Brands International.

¹⁵ The level playing field means an environment, a legal one in this case, in which all competitors must follow the same rules and get equal opportunity to compete.

¹⁶ A study by the U.S. government shows that American enterprises, which had to adhere to the FCPA, lost 30 billion USD in contracts from 1997 to 1998. For further information see S. NATHAN, *Tie Loans to Corruption: Weigh Bribery in Aid Decisions*, U.S.A. Today, 3B, 17 February 1999.

because of the stringent rules of the FCPA¹⁷.

Regarding this, it must be said that civil society, intended both as NGOs and as private sector in the broad sense, has immediately started to stimulate the international debate towards the adoption of a global level-playing field. Suffice it to say that Transparency International, the main NGO dealing with anticorruption, was founded in 1993, well before the development of the first convention on the subject, which will have to wait four years before seeing the light.

In October 1996, World Bank President James Wolfensohn stated: *“Corruption is a cancer. Corruption is the greatest eroding factor in a society. Corruption is the largest impediment to investment. And it is not just a theoretical concept. It is a concept whose real implications become clear when children have to pay three times the price that they should for lunches. It becomes clear when people die from being given bad drugs, because the good drugs have been sold under the table. It becomes clear when farmers are robbed of their livelihood”*¹⁸. This was one of the first public statements against corruption made by a representative of an international organism.

The result of both the US lobbying campaign and of this statement was the birth of a general discussion among regional and universal international organizations that ended with the adoption of several treaties, namely: Inter-American Convention Against Corruption, adopted in 1996; OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, signed in 1997; the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union signed in 1997; Criminal Law Convention on Corruption of the Council of Europe, adopted in 1999; Civil Law Convention on Corruption of the Council of Europe, adopted in 1999; United Nations Convention Against Corruption, adopted in 2003; African Union Convention on Preventing and Combating Corruption, adopted in 2003.

¹⁷ See J. WOUTERS, C. RYNGAERT, A.S. CLOOTS, *The Fight Against Corruption in International Law*, Working Paper No.94, July 2012, Katholieke Universiteit Leuven, 2012

¹⁸ J.D. WOLFENSOHN, President, World Bank, *The Right Wheel: An Agenda for Comprehensive Development, Remarks at the International Conference on Democracy, Market Economy, and Development*, in *Voice for the World's Poor: Selected Speeches and Writings of World Bank President James D. Wolfensohn*, World Bank, 2005, pp.138-140,.

The UN and OECD Conventions are the only two purely international instruments, with a potentially unlimited territorial application, the others were developed by regional organizations, that means that their application and applicability are limited *ratione loci*.

Alongside with those conventional instruments, a large number of Soft Law¹⁹, hence non-binding, instruments entered into force in the forms of codes of conducts for transnational enterprises²⁰, self-regulation acts, guidelines²¹, recommendations²² and corporate social responsibility (CSR) instruments²³.

In the World Bank, the efforts on this subject culminated with the insertion of anti-corruption clauses in the Bank's "conditionality" for loans. Following the leading example of the World Bank, also the IMF, at first reluctant, included good governance standards into its practices.

1.2 Impact of corruption and nature of the crime: the different visions adopted by International Organizations

Every discussion and statement made in the multilateral fora underline the detrimental effect outlined by President James Wolfensohn in his speech. The 2003 UN Convention against Corruption preamble, for instance, recognizes the "*threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law*".

Even the doctrine recognized the broad impacts of corruption as the unequal redistribution of income and wealth, distortion in decision-making, restriction of

¹⁹ For a detailed examination of all the latest Soft-law instruments adopted, see V. MONGILLO, *La corruzione tra sfera interna e dimensione internazionale: effetti, potenzialità e limiti di un diritto penale "multilivello" dallo Stato-nazionale alla globalizzazione*, Napoli, 2012, pp.516 ss

²⁰ E.g. The UN Program *Global Compact* and ICC rules on combating corruption.

²¹ Among the others: OECD *Guidelines for Multinational Enterprises*, *Guiding Principles for Business and Human Rights*, ICC *Guidelines on Agents, Intermediaries and Other Third Parties*, UN *Guiding Principles on Business and Human Rights*.

²² In particular OECD 2009 *Recommendation for further Combating Bribery of Foreign Public Officials in International Business Transactions*.

²³ E.g. UN *Norms on the responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. Also, the 2001 Commission Green Paper: *promoting a European Framework for CSR*.

citizen's rights and the undermining of the foundations of Rule of Law and the democratic system²⁴.

Summing up, we can distinguish between two visions²⁵: the first adopt an economic approach, emphasizing the economic damages of corruption, such as hindering of competition, poor allocation of public resources with wasteful investments in the so-called white elephants - or sandcastles -, the leavening of public costs²⁶, the reduction of Foreign Direct Investments and others. This vision has been adopted by various multilateral *fora* such as the OECD and the development banks, International Monetary Fund and World Bank *in primis*.

The second vision, which is more political, was adopted by the Council of Europe and by the UN, which are more committed to the protection of fundamental rights. It focuses on the effects of corruption which can undermine the very existence of the State and the democratic foundations of society, equality before the law and human rights.

While it is true that all international instruments and organizations agree on the dangerous effects of corruption on all levels of society, it is also true that there is not a general, universally accepted definition of corruption capable of covering every single form of manifestation of the crime, and every attempt to find an agreement on such a definition has to face legal, criminological and political problems.

In many jurisdictions, corruption has not a technical-legal meaning, instead, it is more a concept of the criminal policy. USA, United Kingdom, Germany and Spain, for example, adopt a different word to designate corruption in the strict sense, namely bribery²⁷.

Therefore, we must draw a distinction between a criminal law definition and the concept of corruption used for purposes of policymaking²⁸. The distinction is

²⁴ See J. WOUTERS, C. RYNGAERT, A.S. CLOOTS, *op. cit.*

²⁵ V. MONGILLO, *op.cit*

²⁶ A 2012 study of Mestre CGIA, Mestre association of artisans and small enterprises, based on the Italian *Corte dei Conti*'s data, estimated that the large public works in Italy will cost, because of corruption, 93,6 billion more than they should, which at the time was almost 6% of Italian GDP, an additional cost of more than 1500 euros for each citizen. See <http://www.cgiamestre.com/wp-content/uploads/2012/07/corruzione-1.pdf>

²⁷ *Cohecho* in Spanish, *Bestechung* and *Bestechlichkeit* in German respectively for active and passive corruption.

²⁸ P. SZAREK-MASON, *The European Union's fight against corruption : The evolving policy towards*

fundamental because the criminal law one, providing the basis for punishment of corrupts and corrupters, must be clear, precise and unequivocal, so national criminal law doesn't usually criminalize the general corruption phenomenon, instead it focuses on specific types of conduct such as bribery, conflict of interest and fraud, which can be more clearly defined. Whilst, the concept used for policy making should be broader, and, of course, should embrace the criminal law definition, but it will not be limited to it.

For what concerns the criminal law definitions, it is necessary to deepen each individual instrument, while, for the policy-making definition we can already clarify the situation.

In national criminal laws, corruption is defined by the doctrine as “*the behaviour of persons, with public or private responsibilities, who fail to fulfil their duties because a financial or other illicit advantage has been granted or offered to them, either directly or indirectly*”²⁹ or, as Transparency International³⁰ summed up, as “*the abuse of entrusted power for private gain*”³¹. Those definitions assess both private and public corruption, but for the scope of this work we can narrow our view only to public corruption and consider the World Bank's definition of corruption as “*the abuse of public power for private gain*”. We can also accept Dennis Thompson's less technical definition as “*pollution of the public by the private*”³².

Focusing on criminal law, corruption, unlike other economic crimes, is based on reciprocity: the givers and the takers of the bribe establish a *pactum sceleris* which practically consist in a mutual relation of advantage. For this specific reason, networks of corruption are quite often very complex to unveil. Thus, we can distinguish between “active corruption” and “passive corruption” depending on

member states and candidate countries, Cambridge studies in European law and policy, Cambridge University Press, 2010.

²⁹ L. FEROLA, *The action of European Union Against Corruption*, in *Legal Issues of Economic Integration*, 1999.

³⁰ Transparency International is an international non-governmental organization founded in 1993 whose purpose is to take actions to combat global corruption. Well-known in the global panorama for the publication of the Corruption Perception Index (CPI), an index that ranks 176 country according to the perceived corruption in each of them.

³¹ <https://www.transparency.org/what-is-corruption#define>, accessed on 23rd October 2018.

³² T.F. BURKE, *The Concept of Corruption in Campaign Finance Law*, 14 Const Comment, 127,131 (1997).

whether you look at it from the point of view of the corrupter or of the corrupted.

It is a rather complex crime, made invisible by the conspiracy that binds the corrupt and the corruptor. Consequently, it presents a large “dark figure”, which represents an important source of funding for crime. In addition, criminal associations rely on corruptive practices to penetrate the legal markets. For those reasons, scholars affirmed that corruption thus represents “*a physiological and constant moment of contact between political power, criminal organizations and white-collar criminality*”³³.

Moreover, corruption can be casual or systematic. The first one is the most widespread but also the less dangerous one, and it generally consists in petty bribery. However, the most worrying and emerging is the latter, which consists in a situation where corruption regularly occurs in some situations, i.e. public procurements. It can also be classified, on a scale based on the amount of money involved, as petty or grand and it can even lead to a “state capture”.

According to the report “*The Business case Against Corruption*”³⁴, the costs of corruption equals more than 5% of global GDP (2,6 trillion USD), with over 1 trillion USD paid in bribes each year.

Before examining the most important anti-corruption instruments, some fundamental terminological premises are necessary. We must draw a distinction, inside the categories of crimes of international relevance, among international crimes and transnational crimes.

International law usually identifies international crimes with *crimina iuris gentium*, in other words with the core international crimes. Those crimes are, in a simplistic way, and moving from the classification adopted by the International Criminal Court’s statute: war crimes, crimes against humanity, genocide and crime of aggression³⁵. All united by the fact that they are harmful to interests considered vital to the international community.

³³ Trans. from G. MAROTTA, *Teorie criminologiche. Da Beccaria al postmoderno*, Milano, 2004.

³⁴ A joint publication by the International Chamber of Commerce, Transparency International, the United Nations Global Compact and the World Economic Forum Partnering Against Corruption Initiative, <https://cdn.iccwbo.org/content/uploads/sites/3/2008/07/The-business-Case-against-Corruption.pdf>, accessed on 30 October 2018

³⁵ Among the vaste literature on the subject: A. CASSESE, *Lineamenti del diritto internazionale Penale*, vol.1, Bologna, 2009 and E.GREPPI, *I crimini dell'individuo nel diritto internazionale*, Torino, 2012

Sometimes, the expression international crime is used *latu sensu* to define criminal conducts established in international sources of law³⁶. However, the most relevant aspect of transnational crimes is not their insertion in an international source of law, but the fact that the structure of the crimes contains element of extraneity, with reference to the *locus commissi delicti*, to the object of the crime, to the subject who realizes the offence or to the fact that, by committing that offence, there is a violation of foreign law.

Given those premises, we can distinguish several situations amenable to the general definition of international corruption: transnational corruption, which occurs when the offences are partially or totally realized in a foreign country, corruption of a foreign public official and corruption of an international public official, both characterized by the intervention of a non-national public official³⁷.

1.3 The first answer of the International Community: the OECD Convention and the protection of economic interests

As a result of the abovementioned strong US lobbying campaign, in 1996 the OECD Council issued a first recommendation³⁸, dedicated to counter some important problems of tax nature. In many States, in fact, multinational companies could deduct from revenues the “bribes” provided, as long as they were properly accounted for. Over time all OECD States responded positively to that recommendation.

In 1997, the OECD adopted a second recommendation³⁹ which urged the States to criminalize corruption of a foreign public official. This recommendation

³⁶ See U. CASSANI, *la lutte contre la corruption: vouloir, c'est pouvoir?* in U. CASSANI, A.H. LACHAT, *Lutte contre la corruption internationale. The never ending story*, Zurich, 2011. Cassani states that “corruption is an international crime, meaning that there is an international convention that defines it and requires State Parties to criminalize it”

³⁷ S. MANACORDA, *op.cit.*; G. DE AMICIS, *Cooperazione giudiziaria e corruzione internazionale, verso un sistema integrato di forme e strumenti di collaborazione tra le autorità giudiziarie*, Milano, Giuffrè, 2007, p.51

³⁸ OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, adopted by the Council on 11 April 1996 at its 873rd session C/M(96)8/PROV

³⁹ OECD Revised Recommendation of the Council on Bribery in International Business Transactions of 23 May 1997, C(97)123/FINAL

shortly anticipated the Convention on Combating bribery of Foreign Public Officials in International Business Transactions adopted on December 1997. Almost all OECD Member States, except for Australia, and five non-OECD countries⁴⁰ signed the instrument. The Convention entered into force only five months after the signature.

The rapidity for entry into force shows the strong political will of the international community, or at least of a relevant part of it, in combating international corruption. Nowadays the Convention is living an expansive phase and has been signed by 41 States: all 36 Member States⁴¹ and 8 non-OECD Countries⁴². The Convention is indeed open to non-OECD States on the condition that they become full members in the OECD Working Group on Bribery.

Since OECD Member States constitutes about 70 percent of world trade, governments of these countries have a strong force in combating corruption, as well as, of course, an interest in developing a global level-playing field. Moreover, since they have, at least theoretically, similar levels of domestic corruption, and similar commercial interests, the OECD has been able to adopt a more effective tool than many others, not having suffered the blockage of developing countries that are known to have a different sensitivity to this problem⁴³.

The *ratio* underneath the Convention is the protection of economic interests threatened by criminal acts capable of producing significant market distortions. The prohibited acts are therefore bribery's acts in the context of commercial economic transactions, like in the FCPA and the Merida Convention, and differently from the EU Convention and the Council of Europe Criminal Convention, which are characterized by broader purposes. Corruption acts without economic purpose of any kind are therefore excluded. Therefore, it is evident that this Convention aims

⁴⁰ Argentina, Brazil, Bulgaria, Chile and the Slovak Republic.

⁴¹ The 36 Member States of the OECD are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States

⁴² Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa. Two of the original non-OECD countries Party of the Convention, Chile in 2010 and Slovak Republic in 2000, accessed OCSE with a full membership.

⁴³ P. PIERROS, C. HUDSON, *The Hard Graft of Tackling Corruption in International Business Transactions, Progress in International Co-operation and the OECD Convention*, Journal of World Trade, vol. 2, 1998

at the needs of the market rather than, as is the case with other important instruments, the need to restore legality⁴⁴.

Since there is no indication of what is to be intended as international business transactions, the interpretation must be guided by international conventions⁴⁵ and most likely it would include “*transactions where parties to a business agreement are located in different jurisdictions*”⁴⁶.

The convention is built around the pillar of the abovementioned economic, market oriented, vision, as it is clear from the very first words. The first recital, for instance, recognises that “*bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions*”.

Developing this vision, Article 1 requires States Parties to criminalize the conduct of who “*intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business*”. Corruption therefore, according to this instrument, is not seen as a crime against the public administration, instead it is “*attracted by the broader and more complex orbit of transnational economic crime*”⁴⁷.

As is clear from the text of the norm, it is irrelevant that the bribe goes to a third party, provided that it constitutes the *quid pro quo* for the improper conduct of the official public.

Since it is an obligation to incrimination, and not a form of direct penalisation, Article 1 is not a self-executive provision, thus it needs national

⁴⁴ In this sense D. GALLO, *La Corruzione di pubblici funzionari stranieri e funzionari di organizzazioni internazionali: considerazioni critiche sulla convenzione dell'OCSE del 1997*, in A. DEL VECCHIO, P. SEVERINO, *op. cit.*

⁴⁵ The Vienna Convention on International Sales of Goods of 1980, for instance, grounds the internationality of a business transaction in terms of the seller and buyer's place of business. See Article 1.

⁴⁶ I. CARR, *Fighting corruption Through Regional and International Conventions: A Satisfactory Solution?* in European Journal of Crime, Criminal Law and Justice, 2007, pag.121-153

⁴⁷ Trans. from G. MANNOZZI, *Percezione della corruzione e dinamiche politico-criminali di contenimento e repressione del fenomeno corruttivo*, in Riv. trim. dir. Pen. Econ., 2011, no. 3, p.445

implementing rules. Therefore, we can consider this crime, as every other crime provided in international conventions, as an “*internationally imposed internal crime*”⁴⁸. Furthermore, for what concerns the obligation of indictment, the perfect coincidence between the transposition rule and the text of the Convention is not requested, since the Convention adopted the principle of functional equivalence⁴⁹.

We have to focus on concepts of “improper advantage” and of “foreign public officials” which are very important to outline the sphere of applicability of this instrument.

The Convention covers the corruption aimed at obtaining an improper advantage. That means “*something to which a company was not clearly entitled*”⁵⁰. The so called “small facilitation payments” are therefore excluded from the sphere of action of the Convention. This is the case of small bribes paid to a public official in order to, for instance, get a visa on a passport or renew any valid authorization⁵¹. However, if this is true with reference to the so-called *munuscula*, and thus to the small amount of money and to the utilities of purely symbolic values, we cannot say the same of every other payment given to public officials⁵².

For what concerns the definition of foreign public officials, it is clear, from the text of Article 1 paragraph 4, that the Convention adopt a binary system that contains two parameters: the first, functional one, takes into account the concrete functions of public relevance carried out by the public official; the second, so-called formal one, which considers the institutional classification attributed to the official. So, for public official, the Convention means “*any person in a foreign country who holds a legislative, administrative or judicial office, or who exercise a public*

⁴⁸ N. RONZITTI, voce *Crimini internazionali*, in Enc. Giur., vol. X, Roma, 1998

⁴⁹ See Preamble to the *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction*, Adopted by the Negotiating Conference on 21 November 1997.

⁵⁰ C. PACINI, J.A. SWINGEN, H. ROGERS, *The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials*, in Journal of Business Ethics, Vol.37, No. 4, 2002, pp. 385-405

⁵¹ E. QUINONES, *L'évolution du droit international en matière de corruption: la convention de l'OCDE*. In *Annuaire français de droit international*, volume 49, 2003. pp. 563-574.

⁵² In this sense, see D. GALLO, *op.cit.*, p. 392. See also V. MONGILLO, *op.cit.*, p.p. 542 ss. Mongillo distinguishes on the basis of the amount of money used for corruption, stressing that the exemption from punishment of small facilitation payments meets two limits. The first one is purely economic: the Convention is, in fact, committed with ensuring the repression of the most relevant cases of corruption from the economic point of view, and not the offer of small *pots-de-vin*. The second, on the other hand, is of a legal type: payments must not be pre-ordered to carry out acts contrary to official duties.

function, including a public agency or enterprise”⁵³. The term also includes the officers of the international public organizations but excludes the political party officials.

This exclusion is in line with the general exclusion of funding for political parties or candidates for election. According to the general doctrine, this lack could weaken the Convention, leaving an important legal loophole which companies may use to continue corrupt practices, especially where corruption is endemic in the political system.

From the text of the convention, is clear that the obligation to incriminate corruption acts is limited to the hypothesis of active bribery. Thus, the task of sanctioning the passive corruption of the officials, remains among the States. However, the classic definition of corruption as an offence in which conspiracy is intrinsic gets lost and the “*bilateralism of the crime is broken at the roots*”⁵⁴. This exclusion from the scope of application is due to several factors. On the one hand States wanted to avoid the emergence of possible conflicts of jurisdiction, on the other hand, the immunity problems of foreign agents and international officials have been resolved *ab origine*⁵⁵. Even the OECD model, however, is still anchored to a *do ut des*, to an exchange between an improper advantage and an office of the public official. However, the *ex post facto* corruption, and the corruption simply aimed at collecting the benevolence of the public official without an immediate direct return for the company remain outside the scope of the convention, since they are incompatible with the text of the agreement

Articles 2 and 3 of the Convention are the key provisions and provide that each Party shall adopt the measures necessary to establish the liability of legal persons and to introduce a system of “*effective proportionate and dissuasive criminal penalties*”, as such, comparable with the range of sanctions “*applicable to the bribery of the Party’s own public officials*”. According to the abovementioned principle of functional equivalence, those Articles do not require States to recognise the liability of legal persons, because a provision of this kind could have discouraged the ratification of the Convention due to an excessive interference in

⁵³ C. PACINI, J.A. SWINGEN, H. ROGERS, *op.cit.*

⁵⁴ Trans. from S. MANACORDA, *op.cit.*

⁵⁵ D. GALLO, *op. cit.*

domestic jurisdiction. However, in those cases where criminal liability is not applicable to legal persons, each State Party must ensure that they are punishable by other types of sanctions.

In this regard, however, it is necessary to underline that commentaries to the Convention⁵⁶, even if they adopt the principle of functional equivalence, leave very little discretion to national legislators. They establish, in fact, that the requisite foreseen by the national implementing rule for the realization of the crime cannot be more stringent than those foreseen by the Convention, and that the ascertainment of these requisites must not depend on the verification of the law of the country of the official.

In other words, we can summarize two principles: the first one deals with reaching an international level playing field, meaning that the convention sets minimum rules that certainly can be extended, but not restricted; the second, instead, deals with the autonomy of the crime of corruption of foreign public officials from the law of the foreign country.

Also relevant are the provisions on accounting transparency⁵⁷ prohibiting the establishment of extra-financial funds, and the rules on mutual legal assistance⁵⁸ which eliminate the reason for refusal based on banking secrecy.

Naturally, the transnationality of the offence poses problems for what concerns the jurisdiction of the States parties to the Convention. Art. 4 solves the issue and requires States to prosecute the offence by applying the “territorial criterion”. Paragraph 2 also provides that, where the State pursues its nationals for offences committed abroad on the basis of the “criterion of active nationality”, the latter must also be applied to the case of international corruption.

So, the applicable criteria vary from system to system, since some States recognize, as a criterion for the exercise of jurisdiction, the nationality of the offender, while others – especially common law countries – use a territorial criterion, which takes into account the *locus commissi delicti*.⁵⁹

However, the convention lacks a system for the resolution of hypothetical

⁵⁶ *Commentaries on the Convention on Combating Bribery of Foreign Public Official*, cit.

⁵⁷ See Article 8

⁵⁸ See Article 9

⁵⁹ G. DE AMICIS, *op.cit.*

conflicts of jurisdiction that may arise and that in fact are very frequent because of the transnational nature of this crime.

Alongside with the convention, the OECD adopted a very large number of recommendations and guidelines and tools related to anticorruption.⁶⁰

The most relevant one is certainly the “*Recommendation for further combating corruption of foreign public officials in international business transactions*”⁶¹. This recommendation calls, among other things, for a greater commitment by States to counter the abovementioned small facilitation payments, already defined as “*corrosive*” by the commentaries to the convention. States are therefore required to review their policies on this issue and to encourage companies to prohibit or discourage such payments in their compliance programs.

1.4 A completely different approach: Council of Europe 1999 Conventions, defending Rule of Law and Human Rights

The general activity of Council of Europe deals with the development of common democratic principles in Europe, with regard to human rights, rule of law and democracy.

In 1981, the Committee of Ministers recommended the adoption of measures against economic crime, including corruption. In 1994, the Ministry of Justice of all Member States of the CoE, during the nineteenth conference held in Valletta, agreed on the need to fight corruption through integrated strategies at European and pan-European level

In September, the Committee of Ministers established the Multidisciplinary Group on Corruption, GMC, which set up a Programme of Action against Corruption⁶² adopted in 1996.

In November 1997, the Council adopted the Twenty Guiding Principles for

⁶⁰ To get an idea of the OECD’s strong commitment to the issue of anti-corruption and of the variety of instruments adopted in this area, just visit the site: <http://www.oecd.org/corruption/>, accessed on 15th October 2018

⁶¹ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted on 26 November 2009

⁶² GMC (96) 95, PF/DAJ/GMC/programme action E

the Fight against Corruption⁶³ which set out a range of anticorruption measures such as reducing the immunity for corruption charge, denying tax deductibility for bribes⁶⁴ and strengthening international cooperation in this field.

Criminal Law Convention on Corruption was adopted on 27 January 1999 and entered into force the 1st of July 2002. Nowadays it was ratified by 43 States⁶⁵.

In the Preamble attention is drawn to the protection of human rights, in line with the competence of the Council, in fact it is stated that corruption not only distorts competition and hinders economic development, but also “*threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice*” and so it “*endangers the stability of democratic institutions and the moral foundations of society*”⁶⁶ and that “*an effective fight against corruption requires increased, rapid and well-functioning international co-operation in criminal matters*”⁶⁷.

This Convention is the first, in chronological order, to include both corruption in public and private sector. Moreover, it adopts a wider holistic approach than the previous instruments. On the one hand, it is not limited in scope by the requisite of completing the act during international business transactions. On the other hand, it introduces wide and detailed criminalization obligations, which affect various manifestations of the corruptive phenomenon, by including provisions relating to active and passive bribery of domestic⁶⁸ and foreign⁶⁹ public officials, judges and officials of international courts⁷⁰, members of domestic, foreign and international public assemblies⁷¹, officials of international and

⁶³ Resolution (97) 24 of the Committee of Ministers, adopted on 6 November 1997

⁶⁴ J. WOUTERS, C. RYNGAERT, A.S. CLOOTS, *op.cit.*

⁶⁵ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom. Moreover, it has been ratified by one non-Member State, namely Belarus. Two non-Member States, Mexico and the US, have equally signed but not yet ratified the Convention.

⁶⁶ Council of Europe, Criminal Law Convention on Corruption, Preamble, Paragraph 4.

⁶⁷ *Ibidem*, Paragraph 5.

⁶⁸ See Articles 2 and 3.

⁶⁹ See Article 5.

⁷⁰ See Article 11.

⁷¹ Respectively Article 4, Article 6 and Article 10.

supranational organizations of which the Party is a member⁷².

In this convention there is a first shy attempt to abandon the dualism corruption equals bribery, since the number of punishable conducts is increased by providing, beyond bribery, as a “new form of corruption”, also the trading in influence in the public sector⁷³, which lies indeed in the very first stage of corruption.

Furthermore, the convention requires the criminalization of a series of offences instrumental to corruption, such as the laundering of proceeds of crime and a series of accounting and financial offences provided for in Article 14.

As for the sanctions, the convention requires the adoption of proportionate, efficient and dissuasive measures, which, for natural persons, include deprivation of personal liberty⁷⁴. On the other hand, as in the OECD Convention, the decision to provide criminal or extra-criminal sanctions for what concerns the liability of legal persons is up to the State Parties.

Regarding the definition of public official, the declared goal of the writers, is to cover all the possible categories of public official and, in order to do so, the convention, unlike the other international instruments analysed, which adopt their own definition of public officials, and similar to the EU Convention, refers to the definition provided by the Member State to which the official belongs.

For what specifically concerns the definition of the corruption offence, the CoE Convention, define, in Article 2, active corruption as “*the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions*”. And specularly, in Article 3, passive corruption as “*the request or receipt by any [...] public official, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions*”.

From the facts that the convention scope is extended outside of the international business transactions, and that it requires the criminalization of active

⁷² See Article 9.

⁷³ See Article 12.

⁷⁴ See Article 19.

corruption, one can easily derive the rationale of the discipline and, therefore, the duality of the paramount values protected by the Convention. Namely, the transparency and the fairness of the decision-making process of foreign administrations and the free economic competition.

Despite the provisions on both public and private sectors, the fight against corruption in the public one remains the priority for the Council⁷⁵. Such a conclusion comes from the fact that there are several provisions in Article 37 that grants Member States the right to stipulate reservations only as to criminalization of corruption in private sector and not in the public one.

In order to develop a holistic approach against corruption, the Council of Europe, in November 1999 introduced also a Civil Law Convention⁷⁶ on Corruption which entered into force four years later. It focuses on civil remedies for damages that occurs in case of corruption acts.

Certainly peculiar, in the context of the conventions on anti-corruption, is the wide definition of corruption adopted by art. 2 of this Convention: corruption means “*requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof*”. It is worth underlining the wide scope of this definition, which reflect the Council’s comprehensive approach to anticorruption as a menace, as we said before, not only to international business, but also to democracy, rule of law, human rights and progress.

In the same perspective, in 1998 it created the Group of State against Corruption, GRECO⁷⁷, thus creating an *ad hoc* institution to monitor the implementation of the convention, and, in addition to conventional instruments, the

⁷⁵ M. KAIAFA-GBANDI, *Punishing Corruption in the Public and the Private Sector: The Legal Framework of the European Union in the International Scene and the Greek Legal Order*, in *European Journal of Crime, Criminal Law and Criminal Justice* 18, 2010. Pp.139-183.

⁷⁶ The convention was ratified by 45 Council of Europe Member States: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Montenegro, Netherlands, Norway, Poland, Republic of Moldova, Romania, Serbia, Slovak Republic, Slovenia, Spain, Sweden, The former Yugoslav Republic of Macedonia, Turkey, Ukraine. Was also ratified by the non-member Belarus. Was signed but not ratified by: Andorra, Denmark, Germany, Iceland, Ireland, Luxembourg and United Kingdom.

⁷⁷ From the French, Group d’État contre la Corruption

Council has developed several non-binding tools such as the Recommendation on Codes of Conduct for Public Officials⁷⁸ and the Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns⁷⁹.

1.5 The completion of the path: United Nation Convention against Corruption, the global effort for codification

The history of the development of the UN Convention against corruption (hereinafter also: UNCAC) is bonded with the development of the Palermo Convention against Transnational Organized Crime. In December 1999, the General Assembly asked to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime to insert in the final draft some norms specifically destined to address cases of corruption related to transnational crime, either in the form of an annex or as a separate instrument⁸⁰.

One year later, in the “Vienna Declaration”⁸¹, adopted by the tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, held in April 2000, and in the preparatory work for the UN Convention against Transnational Organized Crime⁸², the General Assembly decided that an autonomous instrument specifically suited for fight against corruption would have been more adequate. The latter convention recognizes the link between Transnational Organized Crime and Corruption⁸³. In January 2002 it was decided that negotiations should have started in order to develop a “*broad and effective*” convention, adopting a “*comprehensive and multidisciplinary*” approach.

⁷⁸ Recommendation of the Committee of Ministers No. R2000 (10), adopted on 11 May 2000.

⁷⁹ Recommendation of the Committee of Ministers No. R2003 (4), adopted on 8 April 2003.

⁸⁰ See GA Resolution 54/128, of December 17th, 1999.

⁸¹ Available at <https://www.un.org/ruleoflaw/blog/document/vienna-declaration-on-crime-and-justice-meeting-the-challenges-of-the-twenty-first-century/>, Accessed on 5th November 2018

⁸² GA Resolution 55/25, Annex II, which came into force on September 19, 2003.

⁸³ UNTOC Convention recognize this link in the preamble and in Article 8. Article 8, in particular, requires the criminalization of active and passive bribery of domestic public officials and asks Member States to consider criminalizing bribery of foreign public officials.

The Ad Hoc Committee approves the draft convention on 1 October 2003⁸⁴ and presents it to the General Assembly, which adopts it on 31 October 2003⁸⁵. The Convention against Corruption finally entered into force on 14 December 2005, thus becoming one of the fastest ratified UN convention in history⁸⁶, coming into force within only two years of its agreement and counting 186 States Parties up to date⁸⁷. This testifies the fact that combating corruption is recognized as a crucial priority for States all around the world.

The UNCAC is open for accession by regional economic integration organizations. The European Union signed the Convention on 15 September 2005 and ratified it on 12 November 2008⁸⁸.

This Convention constitutes the first inter-state agreement of authentically Global extension, for the contrast to corruption as a phenomenon of global vocation.⁸⁹

Built on broad international consensus from States, Private Sector and civil society, UNCAC even recognizing its limitations, in particular, the necessary recognition of State sovereignty and the inevitable social, political, cultural differences, as well as the different legislative traditions of the States parties and their different levels of economic development, is built as an international instrument including the many facets of corruption, aimed at establishing a common language and at providing a base for the international level playing field in the subject matter.

It certainly is a relevant effort for codification that completes the previous

⁸⁴ Ad Hoc Committee for the Negotiation of a Convention against Corruption, *Report A/58/422 and Annex*.

⁸⁵ GA Resolution 58/4 of October 31st, 2003, and Annex. This resolution, in point 7, also decided that December 9th will be the international anti-corruption day, to promote the fight against corruption all around the world.

⁸⁶ Together with the UN Convention on the Rights of the Child and the UN Framework Convention on Climate Change

⁸⁷ For more information on signature and ratification status: <https://www.unodc.org/unodc/en/corruption/ratification-status.html>, accessed on 13th November 2018

⁸⁸ Council Decision 2008/801/EC of 25 September 2008 *on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption*, O.J. L 287 of 29 October 2008,

⁸⁹ See V. MONGILLO, *op.cit.*, p.557 and A. ARGANDOÑA, *the United Nation Convention Against Corruption and its Impact on International Companies*, Journal of Buisness ethichs , 2007, vol.74, p.482

negotiation experiences conducted on the subject by various international, regional and sub-regional organizations⁹⁰.

The vision underneath the convention is, like that of the Council of Europe, more articulated and organic than the one of the OECD. It is a “*unique instrument not only because of its worldwide coverage but also in the extent of its provisions*”⁹¹. For the same reasons, it is also considered to be the broadest and most ambitious international legal tool⁹².

Article 1 of the convention is named “*statement of purpose*” and, indeed, it enucleates the scope of the convention, distinguishing the three main objectives: first of all, the promotion and strengthening of measures to combat corruption. This is possible only by the involvement of civil society and non-governmental organizations, in other words, of the entire private sector, including the business area⁹³. In this sense, this convention led to a change of approach, to a call to the active participation of the business world through a mechanism of permanent collaboration between the public and private sectors that some authors call “*multi-shareholder approach*”⁹⁴; the second goal is the promotion and the facilitation of cooperation and technical assistance; the third and last, instead, deals with promotion of integrity and the adequate management of public goods.

Therefore, it is clear that UNCAC deals with corruption in a multidisciplinary perspective, addressing the issue with a holistic view. The Convention is made up of 71 articles divided into eight chapters, which, because of the breadth of their scope, constitute a “*sort of mini-code on the fight against corruption*”⁹⁵: general provisions (Ch. I); preventive measures (Ch. II); criminalization and law enforcement (Ch. III); international cooperation (Ch. IV); asset recovery (Ch. V); technical assistance and information exchange (Ch. VI);

⁹⁰ G. DE AMICIS, *op.cit.*, p.68

⁹¹ H. HECHLER, *La CNUCC en bref: Guide pratique sur la Convention des Nations Unies contre la corruption à l'intention des membres du corps diplomatique et des organismes donateurs*, Bergen, Chr. Michelsen Institute, U4 Brief 2011, no.4.

⁹² I. BANTEKAS, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, in *Journal of International Criminal Justice*, Vol. 4, Issue 3, pp. 466-484, 2006

⁹³ See Art.13

⁹⁴ G. TARTAGLIA POLCINI, P. PORCELLI, *Profili internazionali*, in Circolare 231: approfondimenti, notizie e informazioni, Aprile 2018

⁹⁵ See V. MONGILLO, *op cit.*, p.560

mechanisms for implementation (Ch. VII); final provisions (Ch. VIII).

Even in this case, as in the case of other conventions analysed, some terminological premises are necessary. Despite the name of the convention, it does not define the term corruption, as it is an ambiguous term which can be interpreted with very different meanings, which vary according to time and place. The editors of the Convention, instead, defined a broad spectrum of offences, in order to allow greater flexibility in the implementation and in the interpretation of the instrument.

As for the notion of foreign public official adopted, reference may be made to what was said during the study of the OECD Convention⁹⁶, bearing in mind that the scope of the UNCAC is not limited to foreign public official but also cover national public officials. It is worthy to underline that, in both cases, an autonomous definition of public official is adopted, thus totally ignoring the specificity of the foreign country of reference and which does not require that corruption of a foreign public official constitutes a crime according to the law of the country of reference⁹⁷.

The convention, in the second chapter, contains several provisions on prevention of corruption, however most of them are built in non-mandatory terms, meaning that the choice on whether implementing them or not is up to the States.

Article 5 opens the chapter asking the States to provide for a comprehensive and coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. States Parties are requested to adopt a wide range of measures, for instance, countries are requested, among the others, to ensure the existence of anti-corruption bodies⁹⁸, to provide an adequate system for the recruitment, hiring, retention, promotion and retirement of civil servants, to promote integrity via the adoption of code of conduct for public officials, to establish appropriate public procurement and management of funds

⁹⁶ See *Infra* §1.1

⁹⁷ *Legislative Guide to the Implementation of UN Convention against Corruption*, adopted by UNODC in 2006

⁹⁸ Both UNCAC and the Council of Europe Criminal Law Convention on Corruption lay down certain conditions that anti-corruption authorities should meet in order for them to be effective. Both the Conventions refer to the requirements of independence, adequate resources, training and specialization.

systems.⁹⁹

If we focus on criminalization provisions, we must underline that the Convention does not entail only binding prescription, and so incrimination obligations, but there are also several non-binding norms, whose internal transposition are on the discretion of State Parties. Therefore, we can say that the convention contains, in its binding core, the *de minimis* rules necessary to the level-playing field. While. If applied entirely, it constitutes a theoretically complete tool for combating corruption.

Article 16 specifically deals with “*Bribery of foreign public officials and officials of public international organizations*” addressing both active and passive corruption¹⁰⁰

Paragraph 1 deals with active bribery, and define it as the “*promise, offering or giving [...] of an undue advantage, [...] in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business*”. Paragraph 2, instead, deals with passive bribery, and define it as: “*the solicitation or acceptance [...] of an undue advantage, [...] in order that the official act or refrain from acting in the exercise of his or her official duties*”.

We can therefore identify a number of differences with the previous instrument adopted by the OECD.

First of all, as we already said, the UN convention deals also with passive corruption. However, a real incrimination obligation is requested only for the supply side of corruption, while, according to Article 16 Paragraph 2, with reference to passive corruption, State Parties are only required to consider the adoption of the

⁹⁹ Preventive measures go from Article 5 to Article 12, with the latter specifically designed for private sector. Even if the text of the norms states that States Party “shall” adopt or establish those measure, this requirement is often weakened by adding qualifiers such as “in accordance with the fundamental principles of its domestic law”. In this sense see J. WOUTERS, C. RYNGAERT, A.S. CLOOTS, *op. cit.*

¹⁰⁰ UNCAC does not use the term active and passive corruption, instead it focuses on the “promise, offering or giving” and on the “solicitation or acceptance” of the bribe. However, the *Legislative Guide to the Implementation of UN Convention against Corruption*, which, of course, is not a binding instrument, suggests to national legislators de adoption of different provisions for those two offences. The result of such an adoption would be the fragmentation of a multi-subjective conduct into two distinct mono-subjective conducts, which would lead to a clear simplification on the probative level. It is an obvious attempt, made on the regulatory level rather than on the factual one, to simplify the investigation of the crime, by breaking the *pactum sceleris* that binds the corrupt to the corruptor.

legislative measures herein contained. Element, this latter one, that differs that UNCAC from the Council of Europe Criminal Law Convention.

Furthermore, in the case of the UN Convention, the act of the public official must be carried out in the exercise of his duties, while, the OECD Convention, thanks to the broader formula adopted, consider also acts that goes beyond the authorised competences of the officer.

Another difference could be found in the definition of the advantage that the corruptor must seek. According to the OECD Convention, there should be an “*improper*”¹⁰¹ advantage, while, in the UN instrument, the advantage should be “*undue*”. According to some authors, “*given the vagueness of both the expressions, it is not entirely clear if they are perfectly interchangeable*”¹⁰².

As we said the Convention does not focus only on bribery, instead it addresses a wide range of *latu sensu* corruptive practices, for example, it provides that State Parties shall criminalize: embezzlement, misappropriation and other diversion of property by a public official¹⁰³; money-laundering of proceeds of crime¹⁰⁴; obstruction of justice¹⁰⁵; liability, not necessarily criminal, of legal persons for the offences established by the Convention¹⁰⁶. Moreover, various Articles contains non-binding provisions for State Parties, with regard to the criminalization of, for instance, trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, embezzlement of property in the private sector¹⁰⁷ and concealment or continued retention of property with the consciousness that are proceed of crimes under the Convention¹⁰⁸.

The UNCAC has been universally recognized as a leading norm, a model for other initiatives in this field¹⁰⁹. In its 71 articles the convention not only ends the traditional dualism corruption equals bribery, since it carried the introduction

¹⁰¹ For what improper advantage means, See *infra* §1.1

¹⁰² See, V.MONGILLO, *op.cit.*, p.563

¹⁰³ Article 17

¹⁰⁴ Article 23

¹⁰⁵ Article 25

¹⁰⁶ Article 26

¹⁰⁷ Respectively Articles from 18 to 22

¹⁰⁸ See Article 24

¹⁰⁹ See A.K. WEILERT, *United Nations Convention against Corruption – After Ten Years of Being in Force*, in Max Planck Yearbook of United Nations Law Online, 2016, Vol.19, Issue 1, pp.216-240

of various other offences, but provides a full range of instruments essential in order to combat corruption as it evolves thanks to globalization. It is quite a very important goal for international relations that a matter so deeply connected with international sovereignty was incorporated within a universal international treaty such as the UNCAC, even with the necessary compromises reached due to negotiations.

2. The European Union action in preventing corruption: an evolving competence

To discuss about the anti-corruption action of the European Union it is necessary to start from some empirical premises. In fact, it is necessary to understand how corruption can affect the Union, its interests and its activities. We will also see that the action of the union has undergone an evolution not only from the point of view of the sources adopted before and after the Treaty of Lisbon, but also with regard to the reasons for the action itself.

If at first, in fact, the EU aimed exclusively at safeguarding its financial interests, then this market-oriented vision was overcome, and the EU moved to a more general protection of the good governance of the public administration. Currently the subject is constantly evolving. This evolution, however, as we will see in the next chapters, no longer happens through the adoption of instruments that specifically aim at countering corruption, but through the adoption of a series of ancillary instruments such as, among others, greater protection of whistleblowers, a wider monitoring of corruption in the Member States and the insertion of anti-corruption rules in the commercial treaties between the Union and the Third Countries.

2.1 Empirical considerations

If we focus on the EU, the Eurobarometer survey on corruption of 2017

shows that over two thirds of EU citizens think that corruption is widespread in their country, a quarter of Europeans think that they are personally affected by corruption in their daily lives and over four in ten Europeans think that corruption in their country has increased in the past three years. A majority of Europeans regard corruption as unacceptable, with less than a quarter thinking that doing a favour, offering a gift or making a payment to obtain something from the public administration or a public service is an acceptable form of behaviour¹¹⁰.

It's been calculated that there have been around 25 million cases of corruption in the EU and that every year corruption costs amount to 120 billion Euros¹¹¹, equals to 1% of the EU GDP¹¹². Given those premises, it is clearly understandable that combating corruption should be a priority in the EU. For this reason, as we will see, in the last two decades the Union and its Member States have taken several efforts to reduce corruption both regionally and nationally.

In the internal market there is a shared interest of Member States to reduce corruption, since it comes with relevant transnational implications and important outcomes in the whole European territory. Corruption in public procurement, for instance, is an obstacle to free competition in the internal Market, because economic operators of some Member States, may be reluctant to operate in markets that they consider to be more susceptible to corruption¹¹³.

Rampant corruption inside Member States is a major threat. Criminal organizations could use corruption to penetrate the structures of Member States in order to achieve their illicit purposes. Above all, however, corruption undermines the principles of democracy and Rule of Law which are referred to in article 2 of the TEU as fundamental to the functioning of the Union and common to all Member States.

Moreover, and most importantly, corruption represents a great threat to

¹¹⁰ Special Eurobarometer 470 on Corruption, *Report*, 2017, available at: http://data.europa.eu/euodp/en/data/dataset/S2176_88_2_470_ENG, accessed on 4th November 2018.

¹¹¹ *The Business case Against Corruption*, study made by specialised institutions and bodies, such as the International Chamber of Commerce, Transparency International, UN Global Compact, World Economic Forum.

¹¹² EU Commission Report on corruption, 2013.

¹¹³ R. STEFANUC, *Corruption, or how to tame the shrew with the European Union stick: the new anti-corruption initiative of the European Commission*, Era Forum, 2011.

distribution and management of EU funds. The presence of corruption connected with the distribution of those funds within Member States was confirmed by GRECO. For example, the 2001 GRECO evaluation reports on Greece¹¹⁴ observed that one of the most common forms of corruption was the bribery of public officials in return of their assistance in obtaining subsidies or aid from EU funds¹¹⁵.

European citizens carry high expectations for what concerns a stronger European anticorruption action, indeed, from the public consultation on Stockholm program emerged that 88% of respondent would like a bigger involvement of EU institution in the fight against corruption.

2.2 Evolution of European legislation against corruption

In the very first phase the anticorruption legislation stem from the necessity to protect the financial interests of the Union. Corruption was faced just as an ancillary criminal instrument useful for committing frauds against the Community, not because of its intrinsic hazard profile, neither because of the detrimental effect on institutions and on competition.

In 1995, the Council adopted a convention the covers the misappropriation of EU funds, the Convention on the Protection of the European Communities' Financial Interests, so called PIF Convention and, in 1996, the first Protocol to the Convention was adopted. This Protocol is the first European instruments specifically dedicated to corruption and it contains definitions of corruption and provide also harmonized penalties for the crime. The third recital underlines that financial interests of the Union can be threatened not only by frauds, but also by corruption acts involving official of the Union or official of Member States that manage European funds.

The situation slightly changes with the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union adopted on May 1997. This convention, in

¹¹⁴ GRECO, Evaluation report on Greece, GRECO EVAL I Rep (2001) 15E (17 May 2002).

¹¹⁵ M. KAIAFA-GBANDI, *op.cit.*

the third recital, recognizes that, in order to improve judicial cooperation in criminal matters, it is necessary to go beyond the 1996 protocol and to punish corruption even if it does not directly affect the financial interests of the Union.

In addition to those specific acts, provisions on anticorruption are constantly integrated in a wide range of internal and external policies which we will analyze in the third chapter and which concern, among others, the trade treaties between the EU and third countries, the protection of whistleblowers, the monitoring of corruption before the approval of access by new Member States and the improvement of public procurement procedures for anti-corruption purposes.

Article 83 of the Treaty on the Functioning of the European Union recognizes that corruption is a serious crime with a cross-border dimension which Member States are not fully equipped to tackle themselves.

Notwithstanding those premises, the implementation of the anticorruption legal framework is very fragmented¹¹⁶ since it mostly remains among Member States for the specific reasons that we will discuss in the next paragraphs, one for all, the resistance of States to cede competence on the criminal matter, which is considered one of the most typical, and one of the last, manifestations of national sovereignty¹¹⁷.

Even if, as we said, the situation is very fragmented and instruments specifically addressing corruption itself are quite few, European Union, especially at the beginning of the fight against international corruption, took some remarkable initiatives: it defined active and passive corruption, asked Member States to provide for effective, proportionate and dissuasive punishments for certain types of corruption and asked also to introduce criminal liability of legal persons for corruption related offences.

In 2008, European Union joined the United Nation Convention Against Corruption, which is, by now, the most complete and extensive anti-corruption legal instrument.

In the Stockholm programme¹¹⁸, published in 2009 and named “an open and

¹¹⁶ L. FEROLA, *op.cit.*

¹¹⁷ For further information on Sovereignty of States in this field see: N.BOISTER, *An Introduction to Transnational Criminal Law*, Oxford University Press, 2018.

¹¹⁸ *The Stockholm Programme - An open and secure Europe serving and protecting citizens*, OJ C-115, 4.5.2010.

secure Europe servicing and protecting the citizens”, the Council requested the commission to develop an integrated system of both anticorruption indicators, based on existing ones, in order to measure the level of corruption and of anticorruption policies among its territory, and of anticorruption policies to develop a comprehensive anticorruption system in several area of intervention. Therefore, the program looked for an effort to strengthen coordination between Member States in UNCAC, GRECO and OECD frameworks.

Several time the European Parliament asked the commission¹¹⁹ to develop an index capable of measuring anticorruption efforts of Member States.

Given those premises, the Commission answer to the Stockholm programme and to the resolutions of the parliaments gave birth to the so-called “*anticorruption package*”¹²⁰, setting out the Union policy in the fight against corruption for the next years.

The anticorruption package consists in a Commission Communication on Fighting Corruption in the European Union¹²¹, which outlines the goals and the functioning of the EU anticorruption Report; an internal Commission Decision establishing the European Union Anti-Corruption Report¹²² for a periodic evaluation of level of corruption and of anticorruption enforcement in Member States; a Report on modalities of participation of the European Union in the Council of Europe GRECO¹²³; the Second Report on Council Framework Decision on combating corruption in the private sector¹²⁴.

¹¹⁹ European Parliament resolution *on the communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - On a Comprehensive EU Policy Against Corruption*, P5_T(2003)0542, paragraphs 14–15, and Written Declaration no 2/2010 *on the Union's efforts in combating corruption*, adopted by the European Parliament in May 2010, P7_TA(2010)0176.

¹²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors *on the Commission Anti- Fraud Strategy* of 24 June 2011, COM/2011/376 final.

¹²¹ Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee *on Fighting Corruption in the European Union* of 6 June 2011, COM (2011) 308 final.

¹²² Commission Decision *on Establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report")*, C/2011/3673 final.

¹²³ Report from the Commission to the Council *on the modalities of the European Union participation in the Council of Europe Group of States against Corruption (GRECO)*, COM/2011/307 final.

¹²⁴ Report from the Commission to the European Parliament and the Council *based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector*, COM/2011/309 final.

The Commission identified three major problems associated with corruption in the European Union: low confidence of EU citizens in public institutions and the proper functioning of the market because of corruption; lack of a common strategy for implementing anti-corruption instruments by Member States; high levels of corruption in some Member States.¹²⁵

With regard to the implementation by the Member States of the EU anti-corruption strategies already in force, it is to be noted there are still persistent differences in the Member States' legal systems, most of them concern the definition of public official, the immunity of elected officials, Ministers or Members of Parliament and the aim of bribing. In several legal system, indeed, no crime is committed if an official accepts a bribe in order to simplify the proceeding for a company which in any case should have got the contract¹²⁶.

Some Member States have not yet signed or ratified the main international anti-corruption instruments and, even if they have, they have not implemented them in a satisfactory way.

Moreover, the risk of double incrimination is one of the most problematic profiles arising from the extraterritorial aspect of international corruption¹²⁷: with regard to transnational corruption crimes committed inside the European Union borders, several provisions that ensure *ne bis in idem* and that resolve conflicts of jurisdiction have been enacted.

The action of the Commission and in general the European institutions in the area of anti-corruption is guided by the consideration that, in lack of any action, the impact on society would continue to grow. However, the most recent EU initiatives are not based on legislative acts specifically aimed at combating corruption, but in monitoring mechanisms or in the inclusion of broad-spectrum anti-corruption measures in a number of EU policies. This is because it has been found that, despite a proper legislative and institutional framework, the implementation process is in a substantially unsatisfactory state due, often, to the lack of political will of the individual Member States, as evidenced by the fact that,

¹²⁵ R. STEFANUC, *op.cit.*

¹²⁶ L. FEROLA, *op.cit.*

¹²⁷ M.L. DI BITONTO, *Sulla Ricostruzione Giudiziarica della Corruzione Internazionale*, in A. DEL VECCHIO, P. SEVERINO (EDS.), *op.cit.*

although many of them have ratified the OECD Convention and/or the UNCAC convention, requiring to be implemented in internal legislation, their enforcement is in fact irregular.¹²⁸

2.3 The protection of the EC financial interests: the 1995 PIF Convention and its protocols

As we said, the Union started to deal with anticorruption issues with the development of a policy of protection of its financial interests in 1995. Initially the protection of those interest was not an EU affair, because, since the community budget was entirely dependent on Member States contributions, those “*carried the burden of negative financial consequences of fraud*”¹²⁹.

In the 80s the Court of Justice introduced a new principle in the Community legal order: the principle of assimilation. According to this principle “*the obligation of sincere cooperation will be breached if a Member State fails to penalize those who infringe Union law in the same way as it penalizes those who infringe national law*”¹³⁰. Therefore, the crimes that hinders the financial resources of the union shall be punished in the same way as the crimes that hinders the financial resources of the Member States. In practice, the principle had limited scope, since the degree of protection varied from State to State.

In 1995, EU Member States adopted the PIF Convention, in order to improve the fight against the fraud, introducing a common definition of fraud accepted by all Member States.

However, the matter of the protection against fraud is not properly of our concern since there is a difference between fraud and corruption, in fact, as literature frequently states: “*corruption is an exchange of relationship [...]*,”

¹²⁸ TI's reports on the implementation of OECD Anti-bribery convention, shows that several EU member States, have not implemented correctly, or have not implemented any measures provided for by the convention.

¹²⁹ A. NIKODEM, The Evolution of Anti-Fraud Policy in the European Community from a Constitutional Law Perspective, in *Managerial Law*, Vol.44, No. 4. 2002

¹³⁰ The principle was introduced in the so-called *Greek maize* Case, *Commission v. Hellenic Republic*, *Greek maize*, Case 68/88, ECLI:EU:C:1989:339

whereas fraud can be committed as a solitary act”¹³¹ since it can be accomplished “*without the involvement of external beneficiaries*”¹³².

Nevertheless, it is necessary to mention the PIF Convention because it is precisely in the First Protocol to that Convention that the EU addressed the corruption issue for the first time.

In 1995 Transparency International issued a memorandum to the EU institutions, pointing out that the “*EU was not aware of the role it was able to play in countering international corruption*”¹³³. However, the EU initiatives were not late if compared to other regional and international bodies. In fact, it was the first in Europe to focus on transnational bribery. And we should also anticipate, as we will further analyse in the third paragraph, that EU gained a competence in criminal area only with the entry into force of the Treaty of Maastricht in 1993 so, before that date, it was impossible to adopt an effective anti-corruption instrument.

Even in the case of cross-border corruption, there was the necessity to ensure the convergence of national criminal laws of Member States, since the major problem was the lack of a common definition of what constituted corruption. Moreover, a growing number of Community officials involved in the distribution of funds increased the opportunities for corruption. Also, national criminal laws of Member States were often limited to the punishment of nationals and did not apply to Community or foreign officials and, as already mentioned, some Member States allowed for the deductibility of bribes.

In 1995 the Parliament adopted a resolution on combating corruption in Europe, stating that the Union must adopt “*its own policy of combating corruption that would enable it to establish both the requisite preventive and repressive measures*”¹³⁴. The Parliament asked Member States for a general action against corruption, beyond the protection of the financial interests. The response was the

¹³¹ P. VAN DUYNE, *Will “Caligula” Go Transparent? Corruption in Acts and Attitudes*, Forum on Crime and Society, vol.1, No.2, 2001

¹³² L.W.J.C. HUBERTS, *What Can Be Done Against Public Corruption and Fraud. Expert Views on Strategies to Protect Public Integrity*, in Crime, Law and Social Change, 1998, issue 29

¹³³ Transparency International, *The fight against international corruption: what the European Union can do*, 1995

¹³⁴ EUROPEAN PARLIAMENT, *Resolution on combating corruption in Europe*, (1995), A4-0314/1995, OJ C 17, 22.1.1996

adoption of the First Protocol¹³⁵ to the PIF Convention, adopted in 1996.

Of course, it introduced common definition of corruption, which we will see in the next paragraph, but it also lists a detailed number of situations in which Member States shall establish their jurisdiction¹³⁶. First of all, this is mandatory for Member States when the offence is committed in whole or in part within its territory, when the offender is one of its national or one of its officials, when the offence is committed against one of its nationals and when the offender is a Community official working for a European Community institution or body which has its headquarter in the Member State concerned.

This situation may lead to a problem of conflicting jurisdiction, solved, at least theoretically, by Article 7 which requires Member States to cooperate in order to decide which one should prosecute.

The Second Protocol to the PIF Convention, signed in 1997, extended the scope of the offence of corruption introducing: the criminalization of laundering of proceeds of corruption¹³⁷, the legal liability of legal persons for active corruption and an adequate system of sanctions¹³⁸ and the obligation for Member States to enable the seizure, confiscation or removal of the instruments and proceeds of corruption¹³⁹.

It is evident from what we said, that, at that time, the Union was not interested in addressing the problem of corruption in general, but the development of such instruments was a way to better protect the Community financial interest.

2.4 Beyond the protection of community budget: EU Convention on Corruption

The most relevant instrument dealing with anticorruption in the European Union is the Convention on the Fight Against Corruption Involving Officials of the

¹³⁵ *Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests*, OJ C 313, 23.10.1996

¹³⁶ Article 6 of the First Protocol

¹³⁷ Article 2 of the Second Protocol

¹³⁸ Article 3 and 4 of the Second Protocol

¹³⁹ Article 5 of the Second Protocol

European Communities or Officials of the Member States of the European Union, drawn on the basis of article K.3, par.2, lett. c) of the TEU, signed in Brussels on 26 May 1997 and entered into force only in 2005. Clearly the EU Convention is more limited *ratione loci* than the purely international instruments, since it applies only within Member States of the EU and it's not opened to accession of non-EU Countries.

The text of the Convention is modelled on that of the first Protocol to the Convention on the Protection of the Financial Instruments of the Union and many of its provisions stems the PIF Convention and its First Protocol. However, there is one big, fundamental difference: this Convention is not restricted to the protection of the community budget, in fact, it also protects the “*impartiality and the good governance of European administrative system*”¹⁴⁰.

The Convention, in its very first chapters establish the minimum principles for what concerns the definitions of the core elements of the crime. First of all, it must be said that, according to Article 1, the convention applies both to domestic officials, including those of other Member States, and to Community officials. Here, as for the other instruments analysed, there must be made also some clarifications regarding the definition of a public official. This is because the EU convention, unlike that of the OECD and the UN, refers primarily to the criminal law of the country of belonging of the public subject involved, thus rejecting the autonomy principle.

So, if an official of another EU Member State is involved, the definition of public official adopted by that Member State, should be applied by the prosecuting one. Moreover, another important difference between the EU Convention and the other international conventions in this area, is the fact that, in the first one, the concept of “national official” does not necessarily includes ministers, members of the parliament and members of the supreme courts, so, as outlined in the explanatory report of the convention¹⁴¹, these officials may be subject to different anticorruption regimes from State to State.

¹⁴⁰ See G. DE AMICIS, *op.cit.*, p.57.

¹⁴¹ *Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, OJ C 391, 15 December 1998.

The aim of the convention is to reach full transparency in public and private commercial relations, both internally and internationally, and to achieve it, the EU Convention deals with both passive and active corruption. It defines the first as “*the deliberate action of an official, who [...] requests or receives advantages of any kind whatsoever, [...] or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties*”¹⁴², and the latter as “*the deliberate action of whosoever promises or gives, [...] an advantage of any kind whatsoever to an official [...] to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption*”¹⁴³. Therefore, active corruption it’s the conduct of the subject that leads to corruption by promising or giving money or other benefits, while passive corruption is the conduct of the *intraneus* that solicits or receives payment or its promise.

Therefore, a unilateral nature of the corrupt conduct is adopted, with the possibility of simply punishing the solicitation or offering of a bribe, even if the counterpart did not accept it. However, it is important to underline that the convention does not adopt important innovative profiles compared to other international instruments. Here, too, only the *ex ante* corruption is punished, leaving *ex post facto* corruption outside the scope of the convention and adhering to the traditional model of corruption as an exchange of utility between the corrupt and the corrupter

As a matter of fact, the scope of the convention is quite limited in this area, since it does not cover the so-called ancillary crimes. Therefore, the EU Convention, neither assess the corruptive phenomenon in all its facets, neither design preventive measure, to be added to repressive ones¹⁴⁴.

However, the most relevant aspects of this convention are the extensive obligation of judicial cooperation in relation to the investigation, to judicial proceedings and to the execution of the sentence, provided for in Article 9 which calls on Member States to cooperate in order to decide which Member shall

¹⁴² See Article 2

¹⁴³ See Article 3

¹⁴⁴ In this sense see, V. MONGILLO, op.cit., p.480 that cites A. SPENA, *La corruzione: paradigmi e strategie di lotta nella normazione inter- e sovranazionale*, in VV.AA., *Criminalità transnazionale fra esperienze europee e risposte penali globali*, Milano, 2005

prosecute, with a view to centralising the cooperation in a single Member State, when more than one claims jurisdiction over the same fact

Article 10 then introduces the principle of *ne bis in idem* that prohibits that a person already subject to a definitive judgment in one State, is prosecuted in another State for the same facts.

3. Fight against corruption in the context of an emerging criminal law competence of the Union

To understand the scope of the previously mentioned instrument and the change of approach of the European Union when dealing with corruption, it is necessary to analyze the evolution of the EU competence in criminal law.

In the very first phase, the EU criminal law was covered by Justice and Home Affairs (JHA) provisions on cooperation¹⁴⁵ but, since it was designed as an intergovernmental cooperation, and not a supranational procedure, European Union bodies were not involved in a great level.

Initially, the development of European criminal law was slow mainly because it was seen as unnecessary. It was only during the 1980s, with the development of the Schengen Area, which abolished borders, that the need to create measures in the criminal law area saw the light, since free movement of person, alongside with the benefits in economy, may also increase the risk of transnational criminality and EU institutions became acquitted with the idea that Member States can no longer tackle certain problems in dispersed order, but must combine their efforts¹⁴⁶.

It was the Treaty on the European Union (TEU), signed in Maastricht in 1992, which formalized the pillar structure including the JHA provisions in the Third Pillar under Title VI.

The Amsterdam treaty provided a more precise definition of the JHA cooperation, such as building of an Area of Freedom, Security and Justice.

¹⁴⁵ In particular, Article 34 of the Amsterdam Version of the TEU

¹⁴⁶ See P. CRAIG, G. DE BÛRCA, *EU law: text cases and materials*, Oxford, 2016, p.928.

However, given the resistance of the Member States against the approximation of their national criminal laws, the idea at the ground of the Amsterdam Treaty is to limit the Union's intervention only to those situations where it was necessary for the functioning of the principle of mutual recognition¹⁴⁷.

So European criminal law and the harmonization of certain norms sanctioning transnational crime, is a product of the evolution of the integration. The difference between legal systems, not only in economic and social areas, but also in the criminal one, is harmful. But, since criminal law involves the core powers of a sovereign State, the issue for it to belong to the exclusive competence of the EU was rejected and the Union should only act when MS cannot deal with the matter by themselves. However, in the TFEU there are some situation in which the inability of the States to tackle certain situation is an assumption¹⁴⁸.

3.1 Maastricht and Amsterdam Treaties: the three-pillar structure and the limits of the Justice and Home affair pillar

When the Union was established, the already existing European Communities were joined by two more pillars of political cooperation. Only the EC had a supranational character, while the new fields on Common Foreign and Security Policy and on Justice and Home Affairs were not intended to be inserted into the supranational legal system. The introduction of the Amsterdam Treaty shifted part of the judicial cooperation to the supranational level and confined the third pillar to Police and Judicial Cooperation in Criminal Matters.

This non-supranational structure is reflected in the instruments provided for in Article 34 of the Amsterdam version of TEU: Conventions and Framework Decisions.

Since those conventions are practically international treaties, each Member State had to ratify the conventions following its constitutional requirements, meaning that conventions fit in a different way in each legal system, according to

¹⁴⁷ K. NUOTIO, *European Criminal Law*, in M.D. DUBBER, T. HÖRNLE (EDS.), *The Oxford Handbook of Criminal Law*, Oxford University Press 2014.

¹⁴⁸ Article 83(1) Treaty on the Functioning of European Union.

the provisions governing their efficiency. Thus, framework decisions were more effective because, similar to directives, could impose obligation to Member States to approximate provisions of their national law but, unlikely directive, which can have direct effect in specific cases, TEU rejected the direct effect of framework decisions.

For what concerns framework decisions, this instrument was introduced by the Amsterdam Treaty. It was created as a hybrid between a pure legislative act and an intergovernmental agreement. Mostly similar to a Directive, lacked a Commission Control on its application via infringement procedures. Article 29¹⁴⁹ of the old version of the Treaty on the European Union, explicitly affirmed that the creation of a high level of security in a space of freedom, security and justice is a core goal for the Union. In order to reach that goal is necessary to prevent and combat, among the others, corruption.

In this new context, the fight against corruption, as every other criminal law intervention, takes two different directions: the mutual recognition of judicial decisions and the harmonization of criminal substantive law.¹⁵⁰

In the first direction: the framework decision on European Arrest Warrant includes corruption among that crimes that involves automatic recognition of judicial decisions among Member States.

In the direction of harmonization, the only framework decision in this field concerns Corruption in Private Sector¹⁵¹.

The European Court of Justice, in the original structure of the Third Pillar, did not play any role, but starting from the nineties, it started to carve out, or rather to build a role in this sector too, already at the entry into force of the Lisbon Treaty, the Court had already managed to effectively escape its limitations by its own case-law¹⁵². The third pillar was originally reserved to political considerations and was protected from any possible encroachment by the ECJ. The only mention of the

¹⁴⁹ Now, Article 67 TFEU.

¹⁵⁰ G.M. ARMONE, *La corruzione nel settore privato*, in VV.AA., *Diritto Penale Europeo e Ordinamento Italiano, le Decisioni Quadro dell'Unione Europea, dal Mandato di Arresto alla Lotta al Terrorismo*, 2006, p.271 *et seq*

¹⁵¹ Framework Decision 22 July 2003 (2003/568/GAI). For further explanation on EU fight against corruption in private sector, see, among the others, G.M.ARMONE, *op cit*.

¹⁵² I. GRIGORIEV, *Role of the European Court of Justice in the Third Pillar: Does Not it Grow Too Fast?*, 2014, Higher School of Economics Research Paper No. WP BRP 11/IR/2014 .

Court in the Maastricht Treaty was in relation to the conventions that the Council may draw up and that may themselves “*stipulate that the Court of Justice shall have jurisdiction to interpret their provisions*”¹⁵³. The Amsterdam version of TEU introduced, in Article 35, new provisions that allowed for the Court judicial review of decisions, framework decisions and conventions adopted under the third pillar previous declaration made by the Member State.

The main case that has allowed the Court to play a role in the creation of a European criminal law, is certainly the *Pupino* case¹⁵⁴.

With regard to this case, first of all, it must be said that the EU had adopted a framework decision, as part of the third pillar, for the strengthening of the defensive rights to protect victims of crime, as that which is relevant in this case, on the possibility to be heard, in the criminal trial, with specific precautions that, in addition to ensuring the acquisition of the proof, guaranteed the protection of the victim.

In the Italian system, there is the possibility of hearing victims, including minors, in pre-trial hearing, when they are victims of crimes of sexual character, avoiding the “weak side” the tension of having to appear in front of a court in the course of a public debate to describe a traumatic event.

In front of the *Procura* of Florence, it was initiated a proceeding against a school teacher investigated for the crime of misuse of means of correction on minors¹⁵⁵. As part of this procedure, the prosecutor would have liked to hear some minors, victims of the alleged offense, in pre-hearing trial, but the Italian code of criminal procedure did not provide for this possibility, not being the offense included in the list of crimes for which the procedural code provided for this mode of hearing.

The *Giudice per le indagini preliminari* of Florence then raises the question of the conformity of this last rule, which limits the possibility of the pre-trial hearing only to sexual crimes, with the European framework decision, which, although it was not yet incorporated into our system at that time, it was in force, and expresses a principle of protection of victims of crime that appears wider than that which is

¹⁵³ Article K.3, paragraph 2, TUE, Maastricht Version.

¹⁵⁴ Judgment of the Court of 16 June 2005, *Pupino case*, Case C-105/03, ECLI:EU:C:2005:386

¹⁵⁵ Article 571 of the Italian criminal code

derived from the limits of national legislation on the specific aspect of the protected hearing.

The Court of Justice, deciding on the question referred, affirmed the important principle that framework decisions, although not directly effective, are, however, similar to the directives, binding on the Member States “*as to the result to be achieved but shall leave to the national authorities the choice of form and methods*”¹⁵⁶. This “*places on national authorities, and particularly national courts, an obligation to interpret national law in conformity*”¹⁵⁷

The Court stated the law adopted under the third pillar penetrates national law just the way this happens within the first pillar. Thus, we see that the Court, starting from a situation of extreme discreteness in its jurisdiction, erased the difference between the first and third pillar treaty provisions, both in preliminary ruling procedures, and somehow also in the legal nature of the legislation.

As we have seen, the ECJ itself started a case-law that allowed it to gain a space within the third pillar that it has been formally recognized by the Treaty of Lisbon with the suppression of the pillar structure¹⁵⁸.

3.2 Abolishing the Third Pillar: European Union competence in Criminal Law after Lisbon

There is not another subject that, such as criminal law, has been so radically altered by the Lisbon Treaty. Actually, the treaty establishing a Constitution of Europe was the first attempt to abolish the three pillars and to transfer the Police and Judicial Cooperation in Criminal Matter to a supranational level, but it was rejected in two referenda in Netherlands and France.

So, the entry into force of the Lisbon treaty is a point break on the evolution of European Criminal Law, especially with regard to the harmonization of substantive criminal law. It resulted in the end of the three-pillar structure, meaning

¹⁵⁶ Ibidem, Paragraph 33

¹⁵⁷ Ibidem, Paragraph 34

¹⁵⁸ For further clarification on ECJ role see, I. GRIGORIEV, *op cit* and V. MITSILEGAS, *EU Criminal Law*, Oxford–Portland, Oregon, 2009

the “*communautarisation*”¹⁵⁹ of the EU criminal law.

The treaty of Lisbon continued the project of reform of the pillars structure carried out by the Amsterdam Treaty, and completed it with the formal abolition of the third pillar. The third pillar provided for the adoption of EU criminal law provision under the intergovernmental method. The Lisbon treaty changed this structure.

The provisions of Article 34 of the Amsterdam version of the TEU, that was placed under the former third pillar, are now included in title V of the TFEU which reformed the decision-making procedure, now mostly based on the ordinary legislative procedure.

Some exceptions are provided by the norms of the TFEU, *i.e.* the adoption of the legislation establishing a European Public Prosecutor’s Office which, according to Article 86 TFEU, requires unanimity, and the harmonization in areas not mentioned in Article 82 paragraph 1 TFEU, which requires unanimity among the Council and the consent of the Parliament.

As a consequence of the abolition of the pillar structure, the legal instruments of EU Criminal Law are now Regulations, Directives and Decisions¹⁶⁰. That means also that the ECJ role in criminal law is now formalized and equal to its role in every other sector of EU law.

For what specifically concerns harmonization in EU criminal law, it’s important to reference Article 67 paragraph 3 TFEU since it is useful for determining the scope of the harmonization, which is “*to ensure high level of security of the Union*”. But, unlikely other instruments to be employed in the establishing of the *area of freedom security and justice*, this one it is restricted by an unclarified condition of necessity.

Moreover, Article 82 TFEU states that “*Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83 so the principle of mutual recognition of judgements prevails and it’s*

¹⁵⁹V. MITSILEGAS, *EU Criminal Law after Lisbon*, Hart Publishing, 2016, p.4.

¹⁶⁰ See Art.288 Paragraph 1, TFEU.

seen by the doctrine as “the motor of the European integration in criminal law”¹⁶¹, while, as we will see, harmonization is limited to specific offences or connected to other policies of the EU.

Article 83 reflects a double approach to the EU criminal law. The first paragraph reflects the so-called securitised approach, whilst paragraph 2 reflects the functionalist approach¹⁶².

Paragraph 1 gives the Union the competence to establish, “by means of directives, minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”, these areas of crime are exhaustively listed in the next part of Article 83 paragraph 1.

Paragraph 2 brings a functionalist view of criminal law. That means that criminal law has to be useful for the effective implementation of other Union policies. This article directly flows from the Court of Justice’s case law on the interpretation of the Community’s criminalisation competence under the first pillar in the *Environmental Crime*¹⁶³ and *Ship Source pollution*¹⁶⁴ rulings.

¹⁶¹ V. MITSILEGAS, *The constitutional implications of mutual recognition in criminal matters in the EU*, Common Market Law Review, 2006, issue 5, p. 1277

¹⁶² For further explanations about functionalist and securitised approach see V. MITSILEGAS, *op.cit.*, p.53

¹⁶³ Commission v Council, *Environmental crimes*, Case C-176/03, ECLI:EU:C:2005:542. This case is about Framework Decision 2003/80/JHA, under the Third Pillar, that required MS to prescribe criminal penalties for certain environmental offences. The ECJ, confirming the arguments of the Commission, annulled the Framework Decision on the grounds that the power to impose such an obligation on the Member States is a matter for a Community instrument. However the ECJ clarified the distribution of powers between first and the third pillar, and stated that while “as a general rule, neither criminal law nor the rules of criminal procedure fall within EC competence [...] this does not prevent the community legislature, when the application of effective proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it consider necessary in order to ensure that the rules which it lays down on environmental protection are fully effective”. The judgment makes it clear that criminal law as such does not constitute a Community policy, hence, appropriate measures of criminal law can be adopted on a Community basis, at sectoral level, on condition that there is a clear need to combat serious shortcomings in the implementation of the Community’s objectives and to ensure the full effectiveness of a Community policy.

¹⁶⁴ Commission v Council, *Ship Source Pollution*, Case C-440/05, ECLI:EU:C:2007:625. In this case the ECJ reaffirmed the Community competence over criminal matters. The Commission argued for a broad reading of the earlier judgment, so that it is also applicable to other spheres, such as transport, relevant to the case in question. The Council, instead, sought to limit the previous ruling to the Environmental Crimes Case. The ECJ extended the application of the previous judgment to the case but refrained from stating that this principle was applicable to all spheres of the Community

This provision allows the Union to approximate national criminal law if “*proves to be essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures*”.

Coming back to the list of crimes provided by Article 83 paragraph 1 we may see that corruption is listed among them, however up until today, the only instrument adopted in this field under its legal basis, is the PIF Directive on Protection of Financial Interests of the Union, which substitutes the outdated PIF Convention and its protocols, whilst the other instruments are still conventions.

The main problem in Article 83 is that TFEU doesn’t define how the word “minimum”, referred to the rules to be adopted in this area, has to be interpreted. The doctrine suggests that this implies a regulatory intervention exercised in reduced and limited terms – we should bear in mind that we are in an area of shared competence of the Union, thus to be exercised on the basis of the principle of subsidiarity.¹⁶⁵

The indeterminacy of the expressions used in the provisions in question confers a high degree of discretion on the European legislator. This discretion could lead to the arising of conflicts between the organization and the Member States. For that reason, TFEU contains the instrument of the Article 83 paragraph 3, which provided for the so-called “emergency brake”¹⁶⁶. On this legal basis, Member States are entitled to refer the draft directive to the European Council, when it considers that it would affect the “*fundamental aspects of its criminal judiciary system*”. As a consequence, there is the suspension of the ordinary legislative procedure and a *consensus*¹⁶⁷ in the Council is requested in order to restart the procedure.

This mechanism reflects the resistance to the communitarisation of EU Criminal Law¹⁶⁸, and, although it has not been widely used, its presence is of great

policy.

¹⁶⁵ D. RINOLDI, *Lo spazio di Libertà Sicurezza e Giustizia*, in U. DRAETTA, N. PARISI, *Elementi di diritto dell’Unione Europea: Parte speciale, il Diritto Sostanziale*, Giuffrè Editore, 2014.

¹⁶⁶ I. TOPA, *Where do we stand with the harmonization of substantive criminal law in EU? Remarks on the changes introduced by the Lisbon Treaty* in *Silesian Journal of Legal Studies*, Vol.4, 2012.

¹⁶⁷ *Consensus* is the standard mechanism for decisions inside the European Council according to article 15 paragraph 4 TEU. It is a mechanism that tries to reach an acceptable solution for each of the participants to the vote, thus it must not be confused with unanimity which tries to reach the best solution for everyone.

¹⁶⁸ V. MITSILEGAS, *European Criminal Law and Resistance to Communitarisation Post-Lisbon*, in *New Journal of European Criminal Law*, vol.1, 2010, p.458-80.

importance to the national authorities. This provision constitutes a great limit to the development of a European criminal law. However, it comes with the possibility for the other Member States to continue on the implementation of the draft directive by the instrument of the enhanced cooperation¹⁶⁹.

According to some authors¹⁷⁰, this particular “emergency brake” procedure will create, if abused, a group of States among which the criminal norms are harmonized - and possibly more advanced - and another group in which there is a fragmentation of substantive criminal law. This situation could be a huge impediment for the establishment of the “Area of Freedom, Security and Justice”.

Actually, the emergency break fits in the context of a more or less timid approach of the European legislator towards criminal matters. It is clear that TFEU intended to include clauses to safeguard national specificities. In this sense the Article 67.1 TFEU: *“The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and of the different legal systems and the different legal traditions of the Member States”*. And, specifically for criminal matters, art. 82.2: *“[...] the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States”*.

It is clear, however, that the concept of “different legal traditions” as a limit to the exercise of the legislative power of the Union should be built thanks to the clarification of CJEU.¹⁷¹

Article 325 paragraph 4 of TFEU is another ground that could legitimize the adoption of harmonization measures in criminal law. This provision represents the legal basis for the protection of the most important institutional “good”: financial

¹⁶⁹ The conditions for such cooperation are provided by Articles 326-327 TFEU, read together with Article 20 TEU. Article 20 claims that enhanced cooperation shall aim to further the objectives of the EU, protect its interests and reinforce the integration process, however it must be used as last resort when the Council has established that the objectives of such cooperation cannot be reached in a reasonable time by the Union as a whole. For further information on the conditions for enhanced cooperation see TFEU and P. CRAIG, G. DE BURCA, *op.cit.*

¹⁷⁰ See, for instance, A. GREZLAK, *The European Union on the way towards the Area of Freedom, Security and Justice*, Warsaw 2009.

¹⁷¹ I. J. PATRONE, *La dimensione costituzionale del diritto penale dell'UE dopo il trattato di Lisbona*, in *Diritto Penale Contemporaneo*, 2013. Available at <https://www.penalecontemporaneo.it/d/2630-la-dimensione-costituzionale-del-diritto-penale-dell-ue-dopo-il-trattato-di-lisbona>.

interests of the Union. According to several scholars, this norm could have been used for the harmonization of the financial crimes that would have made the emergency break useless and unusable¹⁷². But, when the European legislator intervened in this matter, acted on the basis of Article 83¹⁷³.

The Adoption of a quasi-ordinary legislative procedure, the possibility of infringement procedures for States which do not implement or partially implement Union law, control over acts by the Court of Justice and the generalization of the referral, the transition from “compatibility” between the different procedural systems to their harmonization, the same possibility of establishing the Office of the European Public Prosecutor, are all indices of a significant quality change of the whole subject. Nowadays there is a substantive and procedural criminal law of the Union created directly by the legislation of the European Union, having direct effect in national systems and whose transposition is coercible. We have therefore switched from judicial cooperation between different systems to a regime of at least tendential harmonization.¹⁷⁴

3.3 Harmonization of Criminal Substantive Law: PIF Directive

It is necessary to dwell on the analysis of the PIF Directive since it is the main instrument for defining the competences of the EU Bodies which we will deal with in the next chapter.

After the entry into force of the Lisbon Treaty, the traditionally used instruments, already controversial, for fighting fraud and those, ancillary ones, of fighting against corruption, started to become obsolete. Criminal law competence, introduced thanks to the Treaty, elicited the strain for a new legislation in this subject.

Various acts had been adopted in order to recall the attention on the issue. In 2012, the European Committee of Regions, also addressed it¹⁷⁵.

¹⁷² D. RINOLDI, *op.cit.*

¹⁷³ Directive (EU) 2017/1371, OJ L 198, 28.7.2017, so-called *PIF Directive*, preamble.

¹⁷⁴ I.J. PATRONE, *op.cit.*

¹⁷⁵ EUROPEAN COMMITTEE OF THE REGIONS, *Opinion of the Committee of the Regions on “Package*

According to the Committee of Regions, it was clear, with regards to the data provided by the Commission in 2008 in its Second Report¹⁷⁶ on the implementation of the PIF convention, that the Convention had been incapable of tackling fraud and corruption. Furthermore, the spreading of criminal offences with cross-border dimension¹⁷⁷, required legislative action of the Union.

In 2012, the Commission submitted a proposal for a new Directive in the field of fight against fraud¹⁷⁸, and, in reference to that proposal, two more acts were adopted: a Commission working paper which is the impact assessment to the Proposal and a summary of this assessment¹⁷⁹.

One of the main points on which both documents are concerned has to do with the reason for the need to adopt a new directive. In Particular, it is noted that the Convention did not have the desired success and that this led to a loss of credibility of EU Justice in the field of protecting the Union's financial interests and, in general, of fighting crime.

The Commission, in the working documents accompanying the Proposal for a new Directive, as well as in the proposal itself, selected the harmonization of substantive criminal law as the best tool for solving the problems deriving from the Convention such as the inefficient enforcement and the insufficient deterrent effect of the provisions.

The main problems of the PIF Convention stem from the fact that the Convention relied mainly on the principle of sincere cooperation and, on the other

on protection of the licit economy", December 18th 2012, OJ C 391/14, p. 135.

¹⁷⁶ EUROPEAN COMMISSION, *Second Report from the Commission - Implementation of the Convention on the protection of the European Communities' financial interests and its protocols - Article 10 of the Convention*, COM/2008/77, February 14th 2008.

¹⁷⁷ On this topic, see EUROPEAN COMMISSION, *Report from the Commission to the European Parliament and the Council - Protection of the European Union's financial interests — Fight against fraud – 2013 Annual Report*, COM/2014/474 final, July 17th 2014, pp. 8 *et seq.*

¹⁷⁸ EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law*, COM/2012/363 final.

¹⁷⁹ EUROPEAN COMMISSION, *Commission Staff Working Paper Impact Assessment (Part I) - Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law*, SWD/2012/0195 final; EUROPEAN COMMISSION, *Commission Staff Working Document - Executive summary of the Impact Assessment - Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law*, SWD/2012/0196 final.

hand, the offences provided were not enough to cover all the transnational criminal conducts. Moreover, some other problems concern the sanctioning system. Since sanctions diverged¹⁸⁰ from one country to another, Union interests would have a different grade of protection in different countries.

In 2017, finally, at the end of a complex process, the European Parliament and the Council adopted the so-called PIF Directive¹⁸¹.

With regard to the legal basis for the adoption of this Directive, Article 325 and Article 83 paragraph 2 of the TFEU come to mind. However, the Directive, in the preamble, identifies its own legal basis only in this last Article which, as we have said, confers, to the Parliament and the Council, the competence to adopt “*minimum standards concerning the definition of crimes and sanctions, by means of Directives*”.

Actually, the Commission, in its proposal, suggested the adoption of the act under the legal basis of Article 325 TFEU. In this way, the adopted act would have avoided the requirements and limits imposed by Article 83 and could have taken the form of a regulation, without limiting itself to merely setting minimum standards on the subject but adopting broader and more penetrating rules. Moreover, it would have had the effect of impeding the opt-out of some Member States, by precluding the adoption of the safety procedure of the emergency break.

Therefore, according to part of the doctrine, the adoption on the basis of Article 325 TFEU would have been rewarding from the point of view of the effectiveness of EU action¹⁸². In fact, even the jurisprudence of the Court of Justice seemed to favour such a prospective. Besides, the Article 325 aims to achieve an effective protection against fraud both in the Union and in the Member States.

In *Taricco*¹⁸³ judgment, indeed, the CJEU establishes the disapplication of

¹⁸⁰ On the differences between national sanctioning systems, see A. BERNARDI, *sull'opportunità di una armonizzazione europea*, in L. FOFFANI (ED.), *Diritto penale comparato, europeo e internazionale: prospettive per il XXI secolo. Omaggio a Hans-Heinrich Jescheck per il 92° compleanno*, Giuffrè editore, 2006.

¹⁸¹ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 *on the fight against fraud to the Union's financial interests by means of criminal law*, OJ L 198, 28.7.2017.

¹⁸² For more information on this topic, see L. PICCOTTI, *Le basi giuridiche per l'introduzione di norme penali comuni relative ai reati oggetto di competenze della procura europea*, in *Diritto Penale Contemporaneo*, 13 Novembre 2013, p. 17 ss., and also N. PARISI, *Chiari e scuri nella direttiva relativa alla lotta contro la frode che lede gli interessi finanziari dell'Unione*, in *Giurisprudenza Penale Web*, 2017, 9.

¹⁸³ *Ivo Taricco and Others*, case C-105/14, ECLI:EU:C:2015:555. The *Taricco* case concerns the

some provisions of Italian law, when the “national provision is liable to have an adverse effect on the fulfilment of the Member States’ obligations under Article 325”¹⁸⁴. In the new judgment *Taricco II*¹⁸⁵ the CJEU partially revised the scope of this principle, but it is not of particular relevance for our discourse, since, as mentioned, the directive was adopted on the basis of Article 83.

Moving to analyse the provisions of the directive, Article 2 is of great relevance. It defines financial interests of the Union as: “all revenues, expenditure and assets covered by, acquired through, or due to: i) the Union budget; ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them”. This provision is very important since the notion of financial interests of the Union had never been defined in any instrument, neither by the Treaties, nor by the 1995 PIF Convention.

This definition includes the subject of VAT, putting an end to a long-standing debate on the subject and accepting the position of the Court of Justice in the abovementioned *Taricco* case¹⁸⁶. However, when dealing with VAT, the application of the Directive is limited to “*serious offences against the common VAT system*”¹⁸⁷, where the concept of seriousness is connected to the cross-border nature of the offence and to the high amount of money involved: at least 10 million Euros. Beyond the provisions specifically dealing with fraud offences, we must analyse the provisions that address the so-called ancillary crimes.

In particular, Article 4 includes, among the crimes: money laundering of the proceeds of the crime; active and passive corruption; misappropriation of funds. Moreover Article 4 paragraph 4, provide a definition of public official.

Italian statute of limitation periods in relation to a criminal proceeding in progress against persons accused of criminal association aimed at committing crimes in the field of VAT. For a jurisprudence on the *Taricco* case, see A. VENEGONI, *La Sentenza Taricco: Una Ulteriore Lettura Sotto Il Profilo Dei Riflessi Sulla Potestà Legislativa Dell'unione In Diritto Penale Nell'area Della Lotta Alle Frodi*, in *Diritto Penale Contemporaneo Web*, 29 October 2015, available at: https://www.penalecontemporaneo.it/upload/1445534817VENEGONI_2015a.pdf, accessed on 24 November 2018. And also P. MORI, *La Corte Costituzionale chiede alla Corte di giustizia di rivedere la sentenza Taricco: difesa dei controllimiti o rifiuto delle limitazioni di sovranità in materia penale?* In *Rivista di diritto internazionale*, 2017, p.407.

¹⁸⁴ See, *Ivo Taricco and Others*, *cit.*, paragraph 58.

¹⁸⁵ *Taricco II*, case C-42/17, ECLI:EU:C:2017:936.

¹⁸⁶ See, *Ivo Taricco and Others*, *cit.*, paragraph 38.

¹⁸⁷ Directive (EU) 2017/1371, *cit.*, Article 2 Paragraph 2.

Starting with the latter, this definition is of great relevance both on the vertical level and on the horizontal one. On the vertical level it includes all persons endowed with executive, administrative or jurisdictional prerogatives both at the EU level or at the national one, regardless of official status; on the horizontal one it extended the discipline to “*whoever carries out functions equivalent to those performed by Union officials or other servants*”¹⁸⁸. As it is evident from what we have just said, in this case, as well as in the other conventions examined, the legislator adopted a broad definition of public official comprehensive of the functional and of the substantial view.

The directive then provides for the liability of legal persons. Article 6, in fact states that Member States “*shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 3, 4 and 5*”. This latter, in particular, is an innovation compared to the content of the PIF Convention. The Convention, in fact, did not refer to the liability of legal persons, even though, as we have said, the conventional structure had already been superseded by the Second PIF Protocol, which provided for a regime perfectly coinciding with that of the current directive.

The Directive, from the first words, recognize that “*Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned*”¹⁸⁹.

Obviously, the text of the directive deals with the issue in a more technical way. However, it is sufficient to refer to what has been said about the definitions of active and passive corruption regarding the analysis of the first PIF protocol, since the directive reproduces those provisions verbatim.

It is also important to stress that the directive provides that Member States

¹⁸⁸ See E. BASILE, *op.cit.*

¹⁸⁹ See Recital 8.

*“shall take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences”*¹⁹⁰. This is quite innovative, but this innovation is limited since, as far as the attempt is concerned, the Convention only punishes fraud and misappropriation.

Regarding the system of sanctions, nothing new needs to be said on the request that the States provide for effective, proportionate and dissuasive criminal sanctions. Moreover, when dealing with natural persons and “petty” criminal offences, Member States are not obliged to provide a criminal sanction, since Article 7 Paragraph 4 allows them to provide for other types of sanctions, eventually cumulative to criminal ones as stated in the 17 and 31 recitals.

However, the Directive, in case of great gravity of the offence, provide also for minimum sanctions. It is stated, in fact, that Member States must ensure that those criminal offences are punishable by *“at least four year of imprisonment when they involve considerable damage or advantage”*¹⁹¹.

Article 8 recalls the provision on combating organized crime¹⁹², and requires Member State Member State to consider as aggravating the circumstance that one of the foreseen criminal offenses is committed within a criminal organization.

Article 9, instead, contains the measures applicable to legal persons and mentions both the fines, and a series of other sanction that range from the mildest of the *“exclusion from entitlement to public benefits or aid”* to more penetrants such as the *“temporary or permanent closure of establishments which have been used for committing the criminal offence”*. However, combining Article 6 and Article 9 of the Directive it is evident that the EU legislator is indifferent whether the Member States decide to choose between criminal or non-criminal sanctions, thus respecting the principle *societas delinquere non potest*¹⁹³, which is adopted by many EU Member States.

¹⁹⁰ See Article 5.

¹⁹¹ See Article 7 Paragraph 2.

¹⁹² Namely, Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, 11.11.2008.

¹⁹³ E. BASILE, *op.cit.*, p.69.

Moreover, the PIF directive innovates if compared to the Convention regarding the resolution of conflicts of jurisdiction. The Directive, in fact, on one hand does not provide the criterion of the presence of the offender on the territory of the State, but only that of the commission of the crime, in whole or in part, in the territory of the State or that of the nationality of the offender. On the other hand, provides the faculty for the Member State, upon notification to the Commission, to extend its jurisdiction to crimes committed outside its territory if “*the offender is a habitual resident in its territory; the criminal offence is committed for the benefit of a legal person established in its territory; or the offender is one of its officials who acts in his or her official duty*”¹⁹⁴.

If, on the one hand, it is true that the debate inside the Council and the Parliament has led to some steps back compared to the original proposal of the Commission, it is clear, on the other hand that this Directive marks a decisive step forward in the protection of financial interests of the Union, precisely because it establishes obligations of incrimination against conduct, such as corruption, which can affect more or less severely the whole Union.

The Directive constitutes a remarkable attempt to stimulate the European integration in delicate matters of criminal relevance in order to strengthen the Union. However, from the point of view of anti-corruption, the Directive does not come with any significantly change, except for the fact that, passing from a conventional instrument to a legislative instrument, the provisions contained therein are binding for all the States of the Union.

Surely, for this last point, the most relevant profile is to be found in the harmonization of the definitions of active and passive corruption and of the public official. In this way, it is avoided that the attribution of different meanings from State to State puts at risk the common policy to combat these crimes, damaging the credibility of EU Justice.

¹⁹⁴ See Article 11 Paragraph 4.

CHAPTER II

HOW TO CONTROL CORRUPTION: MONITORING MECHANISMS AND INVESTIGATIONS IN THE EUROPEAN UNION

SUMMARY: 1. Monitoring the implementation of the conventions and anticorruption efforts – 1.1 The different review mechanisms provided by International Conventions: procedures and limits - 1.2 European Union participation in the Group of States Against Corruption: an open debate – 1.3 The first EU Report on Anti-Corruption and its annulment. Is the European Semester an adequate forum? – 1.2 The attempt for an EU Report on Anti-Corruption – 2. The EU system of investigations coordination – 2.1 Administrative investigations of OLAF: structure, competences and the problem of procedural guarantees – 2.2 The creation of EPPO, from the original proposal of the Commission to the enhanced cooperation: a new phase of combating corruption and fraud in the European Union – 2.2.1 The original ambitious project of the Commission: proposal for the Council Regulation establishing EPPO – 2.2.2 The failure of the Commission proposal and the decision to start an enhanced cooperation: Regulation 2017/1939 – 3. The differences between OLAF and EPPO and their future cooperation – 4. Europol and Eurojust: the new Regulations and the cooperation with EPPO – 5. Institutional cooperation: the European contact point network against corruption and the European Partners against Corruption – 6. General considerations on the current situation

1. Monitoring the implementation of the conventions and anticorruption efforts

All the Conventions examined in the previous chapter contributes, as we

said before, to the creation of an extremely fragmented legal framework¹⁹⁵, however, the large number of instrument and conventions adopted is a clear signal of the strong interest of the international community for contrasting corruption. We have seen, indeed, that those instruments differ in several points: definition of the crime of corruption, definition of public official, let alone the strength of preventive and repressing provisions.

Another profile that differentiates these conventions is the monitoring mechanism foreseen by each of them. These mechanisms are designed to periodically check the implementation of the convention and the degree of conformity of national legal systems with international standards. Indeed, one of the main challenges in relation to the international legal framework against corruption is how to ensure implementation.

It is necessary to underline that a correct national transposition of the norms contained in a convention does not necessarily ensure an effective application of the conventional text. In this field, indeed reference can be made to some relatively recent theories that make a distinction between compliance, implementation and effectiveness¹⁹⁶. Compliance is defined as “*a state of conformity or identity between an actor's behaviour and a specified*”¹⁹⁷. Implementation is the process of legislation, creation of institutions if required, and enforcement of rules. Is putting commitments into practice. Effectiveness, instead, has to do with the ability of a norm, inserted in a specific legal system, to make significant changes. Therefore, the mechanism that monitor implementation “*do not simple corroborate legal text, but also monitor the law in operation, including informal rules and practices*”¹⁹⁸

In this paragraph, we will first analyse each mechanism and then briefly review the rules set by the conventions studied in the first chapter. In particular,

¹⁹⁵ I. CARR, *Fighting corruption Through Regional and International Conventions: A Satisfactory Solution?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 15, 2007, pp.121-154 AND J. WOUTERS, C. RYNGAERTT, A.S. CLOOTS, *The International Legal Framework against Corruption: Achievements and Challenges*, in *Melbourne Journal of International Law*, Vol.14, 2013, pp.205-280

¹⁹⁶ In this sense, see K. RAUSTIALA, A.M. SLAUGHTER, *International Law, International Relations and Compliance*, in W. CARLNAES, T. RISSE, B. SIMMONS (eds), *Handbook of International Relations*, Sage Publications, London, 2002, pp.538-558

¹⁹⁷ *Ibidem*, p.539

¹⁹⁸ J.B. TERRACINO, *The International Legal Framework against Corruption: States' obligation to prevent and repress corruption*, Cambridge, Intersentia 2012

bearing in mind the differences that pass between the various Conventions, we can identify four common mechanisms, often used in combination with each other. In order of “invasiveness”¹⁹⁹ for the State that is submitted to it: self-assessment, peer-review, expert review and in-country visits.

The self-assessment procedure is certainly the less incisive for the States and generally includes the obligation to reply to questionnaires or to provide periodic reports on the implementation of the conventional provisions.

In reality, the totally discretionary nature of the information thus collected, constitutes the intrinsic limit of this procedure. In fact, there are no guarantees on the accuracy and veracity of these information. We will see that, generally, the international conventions on corruption requires the completion of this phase of the procedure only as an initial step²⁰⁰.

The evaluation body generally prepares, at the beginning of each evaluation round, a questionnaire that is sent to the competent authority or to the national focal point. Then there is the participation of all the institutions involved in the implementation of the agreement for the response to the self-assessment questionnaire which is then sent back to the evaluation body for a first phase, during which clarifications can be requested to the country under review.

The peer review mechanism consists of an intergovernmental, thus more flexible, procedure. It is therefore a procedure carried out by one or more States against another State. It is not a sanctioning procedure but aims at the exchange of good practices among the States Parties to a Convention, also through the reporting of possible failures to comply.

Obviously, in the case of conventions with a large number of States Parties, it is unthinkable that all States participate as examiners in the procedure, so conventions, or their implementation tools, provide for selection procedures. The choice of the evaluating state is a choice of primary importance if we think about

¹⁹⁹ With invasiveness we mean the degree of interference in the sovereignty of States by those mechanism.

²⁰⁰ In this sense, see for example Article 15 of the “*Terms of reference of the Mechanism for the Review of Implementation of the United Nation Convention against Corruption*”, Resolution 3/1 “*Mechanism for the Review of Implementation of the United Nation Convention against Corruption*”, adopted by the Conference of State Parties of UNCAC in March 2011, as requested by Article 63 of the UNCAC

the differences that occurs between the various legal systems.

A lack of knowledge of the assessed State legal system, or of its socio-political situation may, indeed, undermine the result and the scope itself of the review mechanism. To this end, the conventions often provide that the evaluators, or a part of them, come from the same geographical area as the assessed state.

For example, UNCAC requests that “*one of the two reviewing States parties shall be from the same geographical region as the State party under review and shall, if possible, be a State with a legal system similar to that of the State party under review*”²⁰¹.

Similarly, the OECD provides for the appointment of two lead examiners chosen by rotation among the States but requires also that the rotation takes into account some criteria, such as belonging to a legal system similar to that of the State examined or at least “*the particular knowledge of a country relevant to the review*”²⁰².

However, the international debate has always tried to find a mechanism that is more objective than those just analysed. There are therefore several procedures that support the more traditional peer-review mechanism and that give life to mixed mechanisms.

The first of these procedures is the evaluation of the experts, carried out by impartial experts, competent in matters of anti-corruption. However, governments in this case lose control over the revision, which is why they are often reluctant to provide for “pure” mechanism of this kind to be inserted in the international conventions²⁰³.

The last procedure used in the review mechanisms of anti-corruption conventions is undoubtedly the “country visits”, a real mission conducted by experts or representatives of the States Parties to the convention on the territory of

²⁰¹ See Art. 19 *Terms of reference of the Mechanism for the Review of Implementation of the United Nation Convention against Corruption*, cit.; also, Article 3(d), when delineating the main characteristics of the Mechanism, underline that it should take into account a balanced geographical approach

²⁰² See F. PAGANI, *Peer Review as a Tool for Co-Operation and Change, An Analysis of an OECD Working Method*, African Security Review, Vol. 11, issue. 4, 15-24, p.19

²⁰³ In this sense, it is sufficient to note the limited success of this procedure found only in few regional conventions such as the Inter-American Convention against Corruption and the African Union Convention for the Prevention and Fight against Corruption.

the State under review. From the point of view of invasiveness, this is undoubtedly the most invasive procedure of all. In fact, officials on missions have the right to have access to places or information in a secrecy regime in the national interest.²⁰⁴.

To increase the degree of objectivity of these mechanisms, it is often considered useful to involve the civil society in the various stages of evaluation. However, this involvement is not always mandatory or binding. In the first sense, the involvement of civil society may require a positive response to that effect from the State which, in some cases, also acts as a mediator between the evaluators and the representatives of civil society. In the second sense, the monitoring bodies are not obliged to include the observations collected by the civil society in the final reports.

1.1 The different review mechanisms provided by International Conventions: aims, procedures and limits

After analysing the different phases which can compose the various monitoring tools, the next section considers, in summary, the review mechanisms of each of the agreements analysed in the previous chapter and their limits when dealing with monitoring corruption in EU as pointed out by the abovementioned Commission Communication “*Fighting Corruption in the EU*”²⁰⁵. In particular, OECD Convention, UN Convention, and CoE Conventions are examined, since those instruments are binding for most Member States of the EU and for the EU itself²⁰⁶.

²⁰⁴ In this sense, see G. NICCHIA, *I Meccanismi di Monitoraggio istituiti dalle convenzioni internazionali in tema di lotta alla corruzione*, in A. DEL VECCHIO, P. SEVERINO, *op. cit.*, pp.451-472, p. 460

²⁰⁵ Communication from The Commission to The European Parliament, The Council and The European Economic and Social Committee, *Fighting Corruption in The Eu*, COM(2011) 308 Final

²⁰⁶ It is worth to briefly recall the provisions regulating the international agreements concluded by the European Union. Article 216 TFEU allows the Union to conclude international agreements “where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope”. Moreover, Paragraph 2 clearly States that those agreements are binding both on Member State and on the Union institutions. However, since according to Article 4 TFEU the area of freedom, security and justice falls within the shared competences of the Union and its Member States, it should be noted that in this area, the EU can stipulate only the so-called mixed agreements,

The review process of the OECD Anti-Bribery Convention is recognized to be one of the most rigorous²⁰⁷. It is carried out by the OECD Working Group on Bribery – WGB – and it is composed of four phases: a self-assessment questionnaire, country visits, peer reviews with lead examiners, and final phase of plenary discussions about the findings.

After the plenary discussion, a detailed report is published with recommendations for a better implementation of the Convention. To monitor the adoption of recommendations, a follow-up process has been appointed, especially in the case of countries performing inadequately. Civil society and the private sector in particular participate actively in the review process typically in the form of meetings during the reviewers' on-site visits.

However, the scope of the convention is very narrow, since it is limited to bribery of foreign public officials in international business transactions, and so it does not cover other areas of great importance for the fight against corruption in the EU. Moreover, the 2011 Transparency International's seventh annual Progress Report²⁰⁸ stated that enforcement of the Anti-Bribery Convention has been irregular: only four EU Member States were actively enforcing the Convention and 12 EU Member States were not enforcing it at all.

For what concerns the UN Convention Against Corruption, as we said, the EU joined in September 2008, after 3 years of the entering into force of the Convention. In November 2009, the Conference of the States Parties to UNCAC

concluded by the Union together with the Member States, and which therefore require the ratification of the single States. This does not mean that all the Member States necessarily participate alongside the Community, on the contrary, it is frequent that only some Member States takes part in the agreement and, of course, only those Member States. It must also be recalled that, pursuant to Article 30 of the Vienna Convention on the Law of Treaties, also referred to in Article 351 TFEU, agreements concluded by the Community cannot prevail over those concluded by a Member State prior to its accession to the Community itself. It should be noted, at last, that in the area of our concern, we are dealing with conventions mainly opened only to sovereign States and the EU accession to which was made possible through protocols, agreements or amendments that would allow the membership of regional integration organizations. The problem, in fact, was to obtain the acceptance, on the part of the other contracting States, that the Community had the necessary characteristics to be part of the agreement.

²⁰⁷ M. TRIVUNOVIC, N. TAXELL, J. JOHNSØN AND R. DE CÁSSIA BIASON, *The role of civil society in the UNCAC review process. Moving beyond compliance?* Bergen, Chr. Michelsen Institute, U4 Issue, 2013 vol. 4.

²⁰⁸ The complete report is available on the Transparency International website, at https://www.transparency.org/whatwedo/publication/progress_report_2011_enforcement_of_the_oecd_anti_bribery_convention, Accessed on 27th December 2018

adopted the Resolution 3/1 which contains the “*Terms of Reference of the Mechanism for the Review of Implementation of UNCAC*” as requested by Article 63 of the Convention.

Today, the Implementation Review Mechanism consists of a three-step procedure carried out with the supervision and the support of the United Nations Office on Drugs and Crime – UNODC –. The mechanism starts with the appointment of a national focal point, by the country under review. The focal point is the only official allowed to communicate directly with the Secretariat and shall coordinate the State’s contribution to the review.

The first step in the review process is a Self-Assessment questionnaire, prepared by the UNODC Secretariat and completed by the country under review. After submission, the questionnaire is reviewed by experts from two reviewing countries that are also States Parties to the Convention, one of which, as we said, shall be from the same geographical area as the country being reviewed²⁰⁹. The answers to the questionnaire are initially clarified and supplemented through distance communication.

The next step is a country visit by a review team consisting of experts from the two reviewing countries, supported by the Secretariat and organised with the agreement of the country being reviewed. The visits typically involve meetings with various stakeholders in the country, in particular state institutions involved in the fight against corruption and in the enforcement of the Convention, and in some cases, with the approval of the State under review, also civil society actors.

It is worth noting that, even if the Convention acknowledge, in the preamble and in Article 13, the important role of civil society in the fight against corruption, the inclusion of civil society in the Implementation Review Mechanism is only optional since it requires a formal statement of the country under review.

²⁰⁹ In reality, the geographical criterion is to be intended in a broad sense since, for example, in the second cycle of revision, Italy was paired to the United States, as a State belonging to the same geographical area, and to Sierra Leone. For a complete overview of pairings for the second review cycle, see the Country pairings for the second review cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, available at http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/2018_11_19_Country_pairings_SecondCycle.pdf, accessed on 10th December 2018

However, once the civil society is involved, has a direct communication channel with the review team, since the declarations are made privately without the participation, not even formal, of the assessed country, in order to avoid that even a passive presence of the State can put the representatives of the civil society in awe state.

As last step, the reviewers produce a written report, which is then completed in agreement with the country under review. The final report also may be published at the discretion of the country.

However, there are several limits of the UNCAC review mechanism with reference to its capacity to address problems associated with corruption in the EU. In particular, the cross-review system leaves out policy areas of particular relevance to the EU.

Moreover, since it is an intergovernmental instrument of such a broad participation, it involves State Parties which may have lower anti-corruption standards than the EU and its Member States. The review cycles duration is very long and the follow-up mechanism of the recommendations to State Parties is limited, since it can only be carried out for a limited number of times²¹⁰.

The last instrument of our concern is GRECO²¹¹, which is also the most relevant for the EU, since all of its Member States are participating. Through GRECO, the Council of Europe control the enforcement of its Conventions on Corruption. The mechanism consists of several thematic evaluation rounds each covering specific themes²¹². Each round includes self-assessment questionnaires,

²¹⁰ In this sense, Communication from the Commission, *Fighting Corruption in the EU*, cit.

²¹¹ From the French: *Groupe d'Etats contre la corruption*

²¹² GRECO Statute, Article 10. The first evaluation round (2000-2002) dealt with the independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption and with the extent and scope of immunities; the second evaluation round (2003-2006) dealt with the identification, seizure and confiscation of corruption proceeds, the link between corruption and public administration, the prevention of legal persons being used as shield for corruption, the tax and financial legislation to counter corruption and the links between corruption, organised crime and money laundering; the third evaluation round (2007-2012) dealt with the incriminations provided for in the Criminal Law Convention on Corruption and the transparency of Party Funding; the fourth (2012-2017) dealt with corruption prevention in respect of Members of Parliament, judges and prosecutors; the fifth round, launched in 2017, address the prevention of corruption and promotion of integrity in central governments and law enforcement agencies. For further information, the evaluation reports of all the rounds and other documents, see [https://www.coe.int/en/web/greco/evaluations#{%2222359946%22:\[0\]}](https://www.coe.int/en/web/greco/evaluations#{%2222359946%22:[0]}), Accessed on 12th December 2018

in-country visits by review teams, plenary discussions. At the end of each round there is the publication of a reports with recommendations, which are verified through follow-up compliance reviews. The publication, however, is subject to an agreement with the country under review, but today there are very few exceptions. In the GRECO mechanism, the Civil society participation is not required, however it has become customary.

However, given the limited visibility of the GRECO evaluation process and its follow-up mechanism, it has, so far, “*not generated the necessary political will in the Member States to tackle corruption effectively*”²¹³. Furthermore, GRECO does not focus on specific areas of the EU legislation. The intergovernmental GRECO mechanism, moreover, does not allow for comparative analysis and so it is not possible to identify corruption trends in the EU.

The European Union conventions, in order to avoid duplication with other instruments, do not contain any separate evaluation and monitoring mechanism. However, Article 10 of the Convention on the Protection of the European Communities’ financial Interests and its Protocols required Member States to transmit the text of the national provisions transposing the obligation imposed on them. Moreover, the Commission has published two reports on the compliance by Member States with these instruments²¹⁴ and one report on the Council Framework decision on Combating Corruption in the Private Sector.

Moreover, we will see that the Union is currently discussing with the Council of Europe on the modalities of its participation to GRECO evaluation rounds and that it also tried to develop an autonomous mechanism for evaluation of corruption efforts in the Member States.

1.2 The difficulties related to the European Union participation in the Group of States Against Corruption: an open debate

²¹³ *Ibidem*

²¹⁴ See, Report from the Commission, *Implementation by Member States of the Convention on the Protection of the European Communities’ financial interests and its protocols, Article 10 of the Convention*, COM(2004) 709 Final and Second Report from the Commission, *Implementation of the Convention on the protection of the European Communities’ financial interests and its protocols, Article 10 of the Convention*, COM(2008) 77 Final

Accession to GRECO was one of the conditions of EU membership and all Member States are party to it. It is undoubtedly recognized that and EU involvement in GRECO evaluation rounds could increase the influence and effectiveness of the monitoring mechanism across the territory of the Union. Moreover, it would allow the Union to identify common problems in the Member States and to address these problems at a supranational European level.

EU participation in GRECO was firstly hypothesized as an essential element for the EU anti-corruption policy in 2003²¹⁵. However, given the limited competence of the EU in this field under the Treaty on the European Union and the Treaty establishing the European community, the issue had to be postponed until the adoption of the Lisbon Treaty. The Treaty on the Functioning of the European Union, in fact, as we said in the first chapter, provide for a more incisive competence on anticorruption.

In 2010, the abovementioned Stockholm Programme expressly referred to the EU accession to GRECO as one of the objectives that had to be reached. In 2011, as requested by the Stockholm Programme, the Commission, in its anticorruption package, submitted to the Council a Report on the modalities of European Union participation in the Council of Europe Group of States against Corruption²¹⁶. In fact, the Communication on an EU policy against corruption, recommends, together with the establishment of an EU report on Corruption, the EU participation in GRECO. In the idea of the Commission, this framework should have been able to stimulate the debate in the issue in the Union Member States, in order to achieve effective results in combating corruption.

In this latter communication, the Commission analyse the possibility of access GRECO as an observer or as a member. However, it finds that an observer status would not allow for *“involvement in the overall preparation of evaluations and hence not facilitate focusing on matters relevant for the EU Consequently, it*

²¹⁵ See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *on a Comprehensive EU policy against corruption*, COM(2003) 317

²¹⁶ Report from the Commission to the Council *on the modalities of European Union participation in the Council of Europe Group of States against Corruption (GRECO)*, COM(2011) 307 final.

*cannot guarantee the needed input for the future EU Anti-Corruption Report*²¹⁷. For what concern the participation as a member the Commission studies the possibility of an accession as a full member or of a membership with limited voting rights. The first poses several problems since the GRECO evaluation system is “*geared to countries rather than organisations*”²¹⁸. It is clear from the words of the communication that the Commission preference lies in a simplified participation, since it would allow for an active participation in the evaluation procedure of its Member States, without be subject to it.

In 2012, the commission added another major step with the communication on the Participation of the European Union in the Council of Europe Group of States against Corruption²¹⁹. However, this communication led to several controversies with regard to the degree of EU participation. The Commission, in fact, intended to step up the cooperation, adopting a two-stage approach. According to the Commission, the very first stage should consist of a “*full participant*”²²⁰ status based on the provision of Article 220 TFEU, which allows the Union to establish “*all appropriate forms of cooperation*” with the organs of, *inter alia*, the Council of Europe. The second stage, to be reached in a short time-frame, should be of full membership.

However, a number of Member States would have preferred that the EU had foreseen the full membership *ab origine*, without passing through the stage of full participant. Moreover, the full participant membership is not provided for in the GRECO’s statutory text, but, for this specific point, the Statute clearly states that the EU’s participation is to be determined in the resolution inviting it to participate, without a specific indication as to the formal type of this participation²²¹.

The main difference between the first and the second phase, lies in the possibility for EU institutions to be subject to GRECO’s evaluation process. In fact,

²¹⁷ *Ibidem*, p. 5

²¹⁸ *Ibidem*, p.7

²¹⁹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Participation of the European Union in the Council of Europe Group of States against Corruption (GRECO)*, COM(2012) 604 final

²²⁰ “Full participant status” is the expression commonly used to refer to situations in which the EU enjoys very similar rights to those enjoyed by members of an international organization, except for voting rights, even if its status is not of full member of the organisation. So, its somewhere in between the status of “observer” and the status of “full member”.

²²¹ See Rule 2 of the GRECO’s Rules of procedure.

the 2012 Communication clearly states that the main objectives of the first stage include: the European Union involvement in the evaluation of its Member States; the possibility to participate in the debates in the plenary assembly, when discussing the draft report of one of its Member States; the access to the information gathered by GRECO in the framework of the evaluation process. One of the scopes of those provisions is to better ensure the synergy between GRECO's evaluation system and the EU Anti-Corruption Report. It is also stated, indeed, that "*the Commission will consider involving a GRECO representative in the expert group on corruption established to help prepare the EU Anti-Corruption Report*".

It is also stated that, after this first phase, no more than four years later, an EU expert working group will prepare an analysis to assess the possibility of a complete involvement in the evaluation rounds, with the EU institution subject to the procedure. Depending on the results of this analysis, the Commission will consider stepping up to a full membership to the GRECO.

Since this latter communication, there have been several calls from the EU's institutions in favour of a complete accession. The European Parliament recommended "*that the EU join GRECO as a current member*" in its Resolution on organised crime, corruption and money laundering²²².

The first Anti-Corruption Report of 2014 was seen as a step to implement the cooperation between GRECO and the EU, since it aimed to promote implementation of GRECO recommendation and it was mainly based on its findings.

Moreover, the European Court of Auditors, commenting the Report, stated that there were "*no convincing reasons [...] why the Union does not participate in [GRECO]*"²²³ and that the "*Union should engage with GRECO with the aim of gaining full membership, the objective being to bring the EU administration onto the same level as the government of its Member States*"²²⁴ since it is "*hard to explain*

²²² European Parliament resolution of 23 October 2013 *on organised crime, corruption and money laundering: recommendation on action and initiatives to be taken* (final report), para 58, 2013/2107(INI)

²²³ The European Court of Auditors' *View on the Commission's Report on Anti-Corruption Measures*, para 25, available at: https://www.eca.europa.eu/Lists/ECADocuments/PL14_LETTER/PL14_LETTER_EN.PDF, accessed on 10th December 2018

²²⁴ *Ibidem*

*to EU citizens that the national institution of all 28 Member States are evaluated against the Council of Europe's anticorruption standards, whereas the EU administration is not*²²⁵.

In 2015 some Members of the Parliament asked the Commission some clarifications on the current status of accession and the Commission, in January 2016 answered that it reiterates its commitment in this sense made in 2012 and that discussion are ongoing on the details for such a participation.²²⁶

From the Council of Europe point of view, in 2018 the Committee of Minister states that such participation would “*contribute to strengthening the coordination of anti-corruption policies in Europe*” but “*regrets that significant progress has not been made since 2011*” even if “*discussions are continuing*” and underlines that “*GRECO stands ready to discuss with the European Union the modalities of its participation as soon as a request for participation has been formally addressed by the European Union to the Committee of Ministers*”²²⁷.

One of the main problems for a full accession however, remains the principle of mutual evaluation.²²⁸ The GRECO Statute clearly recognises that this is a principle of primary importance, and so the Union, in order to enjoy the rights of an ordinary member, should be subject to the evaluation rounds. Indeed, the Commission itself acknowledge that there are corruption risks in the European Union institutions and that these risks has to be assessed through an independent external review mechanism. However, as we have stressed before, the Commission concerns lies in the fact that this evaluation mechanism is built to evaluate States and national institutions and the Union is clearly not a State, nor its institutions can be compared to national institutions. Therefore, an eventual arrangement to permit this participation must take into account the specificity of EU institutions.

²²⁵ *Ibidem*, para 14

²²⁶ See Answer given by Mr Avramopoulos on behalf of the Commission to the Question E-013204/2015, available at http://www.europarl.europa.eu/doceo/document/E-8-2015-013204-ASW_EN.html, accessed on 9th December 2018

²²⁷ Committee of Ministers of the Council of Europe, European Union accession to GRECO, Reply to Written question no.732 (doc.14577), adopted at the 1322nd meeting of the Ministers' Deputies, 2018. Available at this address: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25039&lang=en>, accessed on 9th December 2018

²²⁸ In this sense, see W. RAU, *Group of States Against Corruption*, in S. SCHMAHL, M. BREUER (eds.), *The Council of Europe: Its Law and Policies*, 2017 pp. 444-460, p.455

1.3 The first EU Report on Anti-Corruption and its annulment. Is the European Semester an adequate forum?

Given this situation, and in particular the limitations of regional and international evaluation procedures, the European Union tried to develop its own evaluation mechanism. In 2011, in the anticorruption package, the Commission build the European Union Anti-Corruption Report, a mechanism for period assessment of Member States' effort against corruption.

The idea is that periodic reviews that specifically monitor areas of interest for the Union, will stimulate a debate between States on the measures to be implemented, therefore it would be easier to understand the extent of the Union anti-corruption policy. Surely the mechanism, designed in this way, allows the exchange of expertise between Member States²²⁹

The Report shall be managed by the Commission itself and must use all available source of information, including the reports and the resources of the other monitoring mechanisms, GRECO in particular. It should also include the participation of independent experts and of the civil society.

This mechanism is something entirely new, different from the other mechanisms examined. First of all, it does not require any mission or any self-assessment questionnaire for the Member States, so it doesn't involve an active participation of the States.

The Commission should cooperate with the other monitoring tools and bodies already analysed to ensure that the results of these are taken into account and used in the development of its own report. These data should be analysed by a group of experts and integrated with the contributions of civil society and other sources of information, as well as the indexes of perception of corruption of Transparency International and that, already mentioned in the first chapter, of the Eurobarometer.

²²⁹ In this sense, see R. STEFANUC, *Corruption, or how to tame the shrew with the European Union stick: the new anti-corruption initiative of the European Commission*, in ERA Forum, 2011, issue 12, pp. 427-443, p.436

Moreover, there is not a single report for each Member State, but the result of the evaluation is a unique report which contains chapters specifically destined to single countries.

The report is composed of three parts: a thematic section, which highlights the specific aspects of the fight against corruption in the EU; a section which contains the analysis of the countries and includes “tailor-made” recommendations directed to individual Member States which may be accompanied by recommendations for actions at EU level; a third section that analyzes trends at a European level. In this last section, cross-cutting issues, of particular interest for the whole Union, are also taken into consideration through already existing indicators or new indicators to be developed for the specific case and which can go beyond judicial statistics and perception index traditionally used in this field.²³⁰

It is precisely the fact of containing the weak points and best practices of each country in a single document, that facilitates a comparative analysis of the phenomenon and stimulate the so-called “peer-learning” and the exchange of best practices among the States that can draw inspiration from behaviors of other countries to better implement points, or strengthen institutions, on which they are weak. Moreover, the fact that the main findings are summarized at the beginning of the document, allows, already at a first sight, to understand which are the thematic areas on which both the Member States and the Union must intervene in order to better address corruption.

²³⁰ The issue of the indices of measurement of corruption deserves a discussion of its own but has little to do with this dissertation. Here, it is sufficient to note that most of the indices currently used, such as the Corruption Perception Index of Transparency International and the index developed by the World Bank, are indicators of perceptive nature. The main problem with this type of index is that often they can give a distorted image of reality, since they are going to meet a paradox: the more a country is fighting corruption, the more the corruption news spread in the media, the greater will be the perception of corruption within the country. There are numerous attempts to overcome the mechanism of perceptive indices. In particular, see the high-level seminar on the measurement of corruption, organized by the Italian G7 Presidency in Rome on 27 October 2017, with the aim of developing a more accurate and reliable representation of the actual levels of corruption and tracing the link between corruption and economic and social variables, so as to refine the prevention and repression interventions and reduce the gap existing between subjective perception of the corrupting phenomenon and the actual reality of the legal system. On the importance of an adequate international system for measuring corruption see R. CANTONE, speech at the G7 “*High level Workshop on Corruption Measurement*”, Ministry of Foreign Affairs, Rome, 27 October 2017, available at: <https://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/Interventi/int.Cantone.MinEsteri.27.10.2017.pdf>

When preparing the report, the Commission must be assisted by an expert group and a network of local research correspondents. The first is made up of experienced anti-corruption members who have different tasks, *inter alia*: identifying European trends, making recommendations and proposing appropriate measures at the Euro-level level. The second consists of a network of representatives of civil society and academia, with the specific task of gathering information in each country to complete the work of the expert group.

The Commission published the first report in 2014²³¹. The report identifies some main corruption-related trends across the EU. *Inter alia*, it is stated that rules on conflicts of interest vary across the EU, and the mechanisms for checking declarations of conflicts of interest are often insufficient, with the sanctioning system often remaining unapplied or being weak; it also pointed out that the efficiency of law enforcement and prosecution in investigating corruption varies across the EU. In some Member States it is possible to see outstanding results, while, in some others, successful prosecutions are rare or investigations lengthy; moreover, it underlines that considerable shortcomings remain in the area of financing political parties, even if many Member States have adopted stronger rules, it is very rare to see sanctions in this area.

Certain areas at risk are identified. Among others, special attention must be deserved to: urban development and construction sectors, health care sector and the supervision of state-owned companies which are vulnerable to corruption in a number of Member States.

At last, the special thematic chapter of this report, which, as previously mentioned, analyses Member States' actions on cross-cutting issues of particular relevance to the Union, focuses on public procurement, considered crucial for the internal market, but, at the same time, subject to a significant risk of corruption. The Report calls for stronger integrity standards in the area of public procurement and for an improvement in control mechanism in several Member States.

The Commission was also supposed to look at the level of corruption in the EU institutions but dropped the internal assessment because they “*realised that this*

²³¹ Report from The Commission to the Council and the European Parliament, *EU Anti-Corruption Report*, 2014, COM(2014) 38 final

is something we will have to come back to in a future EU anti-corruption report".²³²

Also for this reason, the second Report, scheduled for 2016, was highly anticipated. However, after a prolonged delay, as early as in January 2017, there were the first signs of the abandoning of the project. Indeed, in a letter, the Commission First Vice-President Frans Timmermans, informed the head of the European Parliament Committee on Civil Liberties, Justice and Home Affairs that he doesn't see any point in publishing the report planned for the coming spring.

In this letter there is a long description of the important steps the EU has already taken and of that still to take, but there is not an effective answer as to why the Commission is not releasing the report, which was almost complete. However, the answer may be found in the fact that at the time of the release of the first report, many Member States expressed some doubts on the necessity of this instruments, and maybe the abandoning of the project was due to the pressure exercised by Member States on the Commission. This conjecture seems to be confirmed also by some words of the Commission chief spokesman who said that "*for the Commission, the fight against corruption is not in any way an attempt to interfere or offer value judgments within the political life in a member state*"²³³.

Apparently, it was a purely political decision, since there was not consultation on the decision to shelve the report, neither with the Commission's expert group, nor with the Parliament²³⁴.

The Commission idea is to deal with anticorruption in the "European Semester"²³⁵. However, according to Transparency International, this forum is not

²³² N. NIELSEN, *EU commission drops anti-corruption report*, EUobserver, Brussels, 2. Feb 2017, available at <https://euobserver.com/institutional/136775>

²³³ *Ibidem*

²³⁴ In this sense, C. DOLAN, *EU anti-corruption report – no answers please, we're the Commission*, Transparency International, 10 May, 2017, available at <https://transparency.eu/no-answers/>

²³⁵ The European Semester was introduced in 2010. During this semester, the Commission undertakes detailed analysis of each country's plans for budget, macroeconomic and structural reforms. At the end of each analysis, the commission provides EU governments with country-specific recommendations for the next 12-18 months. This enables the EU member countries to coordinate their economic policies throughout the year and address the economic challenges facing the EU. It should be pointed out that this is not the semester of presidency of the Council, but a whole different situation, with specific aims and tasks, that takes place annually in the first semester of the year and, for this reason, it is named "European Semester"

For further information on the goals and objectives of the exercise, see:

https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/european-semester-why-and-how_en, accessed on 10th January 2019

adequate for the scope since, in the European Semester, corruption has only been raised with reference to a small number of countries while the report contained a detailed analysis of every single country. Moreover, the European Semester specifically deals with matter that impact on economy, growth and competition, but we have seen, in the first chapter that corruption also impact on rule of law, democracy and human rights.

In fact the NGO and the Members of the European Parliament were quite critical with the decision, and the European Parliament Intergroup on Integrity, Transparency, Corruption and Organised Crime (ITCO) is continuing its work to stimulate the Commission to publish another report, which, it is appropriate to underline, it has not been abolished but formally only suspended, and to accelerate the process of accession to GRECO and UNCAC review processes²³⁶.

It is clear that, at a time when confidence in the institutions of the European Union tends to decrease, it is important to increase the level of transparency of the institutions themselves, which is certainly at odds with the Committee decision, which, as mentioned, appears unjustified and opposite to the international trend.

2. The EU system of investigations coordination

That the action on anti-corruption of the Union raised mainly in relation to the damage to financial interests and only in a second period developed autonomously with the 1996 Convention on Corruption.

After the entry into force of the Treaty of Lisbon, however, the European institutions' room for maneuver expanded and, within the Treaties, a competence in criminal matters of the Union is envisaged, even if with the already seen limits. The Union, therefore, through the use of the Directive tool, can harmonize certain crime definitions and also the minimum penalties. But this is not the only novelty for the Treaty of Lisbon in this area. As we shall see, this competence is accompanied by the possibility of creating organs that for the first time Europeanise the law

²³⁶ For further information on the action of the ITCO, see <http://itcointergroup.eu>, accessed on 9th December 2018

enforcement system.

If it is true that several instruments that have paved the way for what some authors define as a substantial criminal law of European origin. It is important here to note that an effective implementation of substantive law necessarily passes through the provision of adequate procedural instruments and law enforcement bodies.

In this sense, the process of European integration has been consolidated through the creation of EU bodies and agencies with competence and responsibility in the field of criminal law. Until a few years ago, we knew only intergovernmental mechanisms useful for coordinating or conducting investigations. Today, thanks to the establishment of the European Public Prosecutor we are also witnessing another important step towards the creation of an integrated system of European criminal justice.

The competences of this office, however, are connected to the already studied PIF Directive, which considers corruption only when it is dangerous for the financial interests of the Union so it is useful to recall the link between corruption and other financial crimes such as fraud, since those offences, as studied in the first chapter, are provided for in the same Directive and are strictly connected.

2.1 Administrative investigations of OLAF: structure, competences and the problem of procedural guarantees

In 1988 the European Commission created the “*Unité de Coordination pour la Lutte Anti-Fraude*”, abbreviated in UCLAF.

This coordination unit has been active for just over ten years. In 1998 the special report 8/98²³⁷ of the Court of Auditors of the European Communities highlighted some aspects which limited its activities. Among the others: organization and procedures were often not clear and were complex or incomplete

²³⁷ COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES, *Special Report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the “unité de coordination de la lutte anti-fraude” (UCLAF) together with the Commission's replies*, in OJ EC, C230, 22 July 1998

in formulation; cooperation with States was hampered by the fact that UCLAF, in carrying out investigations on their territory, faced important limitations related to national legislation; coordination between UCLAF, other Directorates-General and Member States for the common use of databases needed improvement. Furthermore, there were no clear guidelines for the conduct of the investigations.

Moreover, in 1999 a scandal broke out within the European institutions when the report²³⁸ of the Committee of independent experts appointed by Parliament in January to investigate the accusation of “*fraud, mismanagement and nepotism*” in the European Commission was published.

The most striking case was that of the commissioner Edith Cresson, accused of having hired a friend for a fictional position as a scientific advisor and having hired some relatives for important positions, with procedures closed to the public and not transparent. However, beyond the individual scandals, the document highlighted a poorly functioning machine, which escapes any control. On the night following the publication of the report, the Santer Commission²³⁹ resigned.

After the conclusion of the Court of Auditors and the scandal that had invested the commission, the need to establish an independent body with supervisory duties against fraud, corruption and other illegal activities emerged. An “antifraud package” was therefore adopted, consisting of a number of acts entered into force the 1st June 1999: the Commission Decision establishing the European Anti-fraud Office²⁴⁰, the Interinstitutional Agreement concerning internal investigations by the European Anti-fraud Office²⁴¹, the EC Regulation concerning investigations conducted by the European Anti-Fraud Office²⁴² and the Euratom

²³⁸ Committee of Independent Experts, *First report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission*, 15 March 1999

²³⁹ From the name of the Commission President Jean Jaques Santer in charge from 1995.

²⁴⁰ Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 *establishing the European Anti-fraud Office (OLAF)*, OJ L 136, 31 May 1999

²⁴¹ Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities *concerning internal investigations by the European Anti-fraud Office (OLAF)*, OJ L 136, 31 May 1999

²⁴² Regulation (EC) No 1073/1999 of the European Parliament and of the Council Of 25 May 1999 *concerning investigations conducted by the European Anti-Fraud Office (OLAF)*, OJ L 136, 31 May 1999, repealed by Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 *concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999*, OJ L 248, 18 September 2013

Regulation concerning investigations conducted by the European Anti-Fraud Office²⁴³.

In particular the Decision²⁴⁴ of the *ad interim* Marín Commission²⁴⁵ established OLAF as a fully independent organism and dismissed UCLAF. Indeed, if formally the Office exercises the powers and the competences of the Commission in this field, Article 3 of the Decision clearly states that “*the Office shall exercise the powers of investigation in complete independence*”. It operates in full autonomy with respect to the institutions, bodies and bodies of the Union, as well as to the governments of the Member States.

To this end, the Office is subject to the regular monitoring of the investigative functions by a supervisory committee, which however cannot interfere with the ongoing investigations.

Precisely with the aim of guaranteeing this independence, the European legislator, again in Article 2, obliged the Director-General not to request or accept instructions from any government or institution. In addition, if he considers that the Commission has taken a measure challenging his independence, the Director-General has a power of appeal against the Commission before the Court of Justice of the European Union.

The task of OLAF is to “*strengthen the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests*”²⁴⁶ and to investigate serious cases of misconducts in by the members of the EU Staff.

The execution of OLAF's investigative functions is carried out under the responsibility of its Director-General, appointed by the Commission for a period of five years, after the favourable opinion of the supervisory committee and in consultation with the European Parliament and the Council.

Regarding the powers of OLAF, it is still necessary to dwell on Article 2 of

²⁴³ Council Regulation (Euratom) No 1074/1999 of 25 May 1999 *concerning investigations conducted by the European Anti-Fraud Office (OCAF)* OJ L 136 31 May 1999, repealed by Regulation (EU, Euratom) No 883/2013, *cit.*

²⁴⁴ Commission Decision 1999/352/EC, ECSC, Euratom *Establishing the European Anti-fraud Office*, *cit.*

²⁴⁵ From 16 March 1999 to 12 September 1999 the Commission was guided by the former Vice-president Manuel Marín until the appointment of the new “Prodi Commission” on 16 September 1999

²⁴⁶ See Article 2 Commission Decision 1999/352/EC, ECSC, Euratom *Establishing the European Anti-fraud Office*, *cit.*

the Decision and on the Regulation 1073/1999.

The Decision, indeed, at the Article 2, clearly states that, when combating fraud, corruption and other related illegal activities, “*The Office shall be responsible for carrying out internal administrative investigations [...], for providing the Commission's support in cooperating with the Member States [...], for ensuring the collection and analysis of information, [...] for the preparation of legislative and regulatory initiatives of the Commission*”.

Furthermore, the fifth recital of the regulation recognize that the mandate of OLAF is not limited to the conduct of investigations within the institutions but embraces also the contribution to the development of methods for preventing and combating fraud, corruption and related crimes. Moreover, Article 1 of the Regulation, named “*Objectives and tasks*”, states that the Office: exercises the powers of investigation conferred on the Commission²⁴⁷; assists the Member States in organising the cooperation between their competent institutions²⁴⁸; contributes to the development of methods of preventing and combating fraud and corruption²⁴⁹; carries out administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union²⁵⁰.

By “administrative investigation” we mean, according to Article 2 of the same Regulation, the set of checks and operations that the Office's agents perform in the performance of their functions. It is also specified that these investigations do not affect the competence of the Member States with regard to the exercise of prosecution.

The Office is given the power to investigate two categories of subjects: economic operators suspected of irregularities, fraud and corruption to the detriment of Community finances²⁵¹, as well as officials and representatives of the

²⁴⁷ See Article 1, paragraph 1

²⁴⁸ See Article 1, paragraph 2

²⁴⁹ *Ibidem*

²⁵⁰ See Article 1, paragraph 3

²⁵¹ See Article 3 which refers to the the powers of the Commission “*to carry out on-the-spot checks and inspections pursuant to this Regulation: for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States*” as stated in Article 2 of the Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 *concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other*

European institutions suspected of omissions and abuses that adversely affect the Community finances²⁵².

This distinction derives from articles 3 and 4, respectively “external investigations” and “internal investigations”. In fact, some authors are critical of the choice to distinguish these two types of investigations for various reasons: first of all, the two types of investigation do not have homogeneous rules, thus complicating the institutional framework of OLAF; secondly, it is not infrequent that in the same case external economic operators and Union officials are involved, thus merging the internal and external investigations.²⁵³

When conducting external investigations, OLAF exercises its powers of administrative investigation without territorial limits within the European Union, in the sense that it can investigate the entire territory of the Union without having to request any authorization to operate in the Member States. Furthermore, OLAF can also exercise its powers outside the European Union on the basis of commercial agreements concluded by the European Commission with Third Countries, or on the basis of contracts with which the European Commission grants Community funds or contributions.

In the context of internal investigations, on the other hand, the Office carries out administrative inquiries within the institutions, agencies, bodies and bodies.

Moreover, in some cases, OLAF opens a coordination case, to provide assistance to national authorities, even judicial ones, by facilitating the gathering and exchange of information and contacts, without carrying out investigative measures. The file could be open independently of an OLAF investigation already under way, provided that the requests comply with facts that fall within the competence of OLAF, and therefore relating to the protection of the financial interests of the European Union. OLAF, usually, in respect of the subsidiarity principle, opens the so-called coordination cases only when national authorities are in a better position to deal with a specific question, or when for the same facts,

irregularities, OJ L 292, 15.11.1996

²⁵² See Article 4

²⁵³ For further information on this topic, see A. PERDUCA, *L'OLAF, tra potenzialità investigative e limiti normativi (1999-2013)*, in V. BAZZOCCHI (ed.), *La protezione dei diritti fondamentali e procedurali, dalle esperienze investigative dell'OLAF all'istituzione del Procuratore Europeo*, Roma, Fondazione Basso, 2014, pp.83-87, p.84

national investigations are yet in course.

It is, therefore, certainly of fundamental relevance to understand what has to be intended as Union interests. There is a general agreement on the fact that it includes: revenues, expenses and goods covered by the Union budget, and those covered by the budgets of the institutions, agencies, organs and organisms of the EU.

Therefore, the EU budget includes a series of revenues and expenditures. The revenues are made of customs duties, agricultural duties, a part of VAT, a Member States contribution proportionate to their GDP and other revenues. OLAF mainly deals with custom duties and agricultural duties²⁵⁴.

Moreover, OLAF deals with all cases of irregularities in the management of expenditures by the Union, which include: the funds for the development of territorial cohesion, the expenditures for of the Common Agricultural Policy, the funds allocated to developing countries, those for countries candidates for access to the Union and administrative costs for the functioning of the institutions.

Combining the competence on protecting the EU budget and the abovementioned *Taricco* Judgment²⁵⁵, we can easily derive the OLAF competence on VAT issues.

As we said in the first chapter, the Court of Justice of the European Union, in the *Taricco* case, made it clear that VAT is part of the financial interests of the Union, which OLAF is responsible for protecting. However, the ruling did not refer to the investigative powers of OLAF.

The *Taricco* judgment confirms and consolidates the previous jurisprudence, clarifying that the PIF Convention, which harmonises substantive and procedural criminal law, also applies to VAT.

However, the Convention does not directly regulate OLAF's work. In principle, even the PIF Directive does not have an impact on the functions of OLAF, since its powers derive from Regulation 883/2013 and the decision establishing it. According to those instruments OLAF has the task of investigating acts of fraud,

²⁵⁴ In this sense, see https://ec.europa.eu/anti-fraud/investigations/eu-revenue_en, accessed on 12th January 2019

²⁵⁵ Cfr. Judgment of 15 November 2011, Case C-539/09, *Commission v Germany*, ECLI:EU:C:2011:733, par.72; and Judgment of 26 February 2014, Case C-617/10, *Akerberg Fransson*, ECLI:EU:C:2013:105, par. 25, 26

corruption and any other illegal activities that affect the economic interests of the Union. And, according to the abovementioned case-law, VAT, being an own resource of the Union, falls within the scope of the EU's financial interests. So, even if the case referred to the interpretation of the PIF Convention, there is a general agreement on the fact that it is applicable *latu sensu* also to other instrument where there is a reference to the financial interests of the Union.

Therefore, this tax is already part of the interests that OLAF is called upon to protect pursuant to articles 1 and 2(1) of Regulation no. 883/2013. However, as stated by the European Court of Auditors in the special report on the fight against fraud in the field of intra-community VAT (No 24/2015), OLAF does not have the appropriate investigative tools to investigate VAT fraud effectively. In particular, OLAF cannot access Eurofisc, nor VIES, the VAT data exchange system, not even the information on bank accounts.

It is therefore desirable that the skills and powers of the office be strengthened, also to coordinate it with the powers and powers of EPPO.

Surely, however, in the context of a VAT fraud investigation conducted by a Member State, OLAF can, at the request of the latter, coordinate and facilitate the exchange of information with other States.

During the investigations, OLAF can hear the persons under investigation and witnesses, acquire documents and perform the “on-the-spot checks”²⁵⁶, which are practically *in loco* controls, consisting in accesses to the offices of the economic operators suspected of having committed the unlawful conduct or third parties, in the course of which it may acquire copies of documents, including by electronic means. OLAF also has access to the staff offices of the Community institutions.

At the end of the administrative investigations, OLAF draws up a report summarizing the investigations and highlighting the irregularities found and the damage suffered by the European Union. If the investigation has highlighted only administrative irregularities and the need for recovery of sums emerges, the report remains internal to the Community institutions, in the sense that it is sent to the

²⁵⁶ For this method of investigation, the modalities are set Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996, *concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities*, OJ L 292/2 of 15 November 1996

Director-General or to the institution competent for the income or for the expense, which proceeds to recover the sums. OLAF does not deal directly with the recovery of these sums, it just recommends the recovery to the competent institutions.

However, if the administrative investigation has also revealed conducts that can integrate a crime, OLAF will contact the competent judicial authority of the Member State concerned and send it the investigation report with the related evidence acquired. OLAF may continue to remain in contact with the judicial authority with exchange of information, possible appointment of officials who carried out the investigation as auxiliaries of the PM, legal assistance on Community legislation, assistance for procedures for the removal of immunity, if the judicial proceedings concern personnel of the European Union. Moreover, the OLAF officials who conducted the survey can be cited as trial texts.

Regarding the initiation of the investigations, Article 5 of Regulation 883/1999 establishes that there must be a “*sufficient suspicion, which may also be based on information provided by any third party or anonymous information*”. Article 5 also states that the decision is also based on certain principles, such as: proportionality between the investigative burdens and the expected benefits of the investigative results; efficient use of the Office's resources; subsidiarity between OLAF and any other bodies able to investigate the fact and political priority of the office established in the annual management plan.

The term sufficient suspicion is not very definite and precise, and even the rule helps to clarify its scope. Former Director General Kessler, in an interview²⁵⁷, however, made it clear that, in order to assess the sufficiency of the suspect, an analysis of the information and the subject from which they derive takes place. In particular, it must be evaluated: the reliability of the source, the credibility of the information and the adequacy of the same.

To date, an important shortcoming in the OLAF legislative framework concerns the lack of the obligation on the institutions and services of the Union to report on the actions taken following the recommendations made by OLAF after

²⁵⁷ M.F. CUCCHIARA, L. ROCCATAGLIATA, *La lotta alle frodi lesive del bilancio UE. Il ruolo dell'Ufficio Europeo per la Lotta Antifrode (OLAF). Intervista a Giovanni Kessler*, in *Giurisprudenza Penale Web*, 2017, 4

the external investigations, there is not a follow-up mechanism enabling the Office to monitor the development of a situation that is subject to a recommendation by OLAF, without the need for further investigation.

Again, with regard to the outcome of the investigations, it is important to note that, pursuant to art. 11 of Regulation 883/2013, the OLAF investigation report can be used in national judicial proceedings and has the same value as the reports drawn up by the national administrative authorities. Pursuant to this provision, the reports prepared by the Office following the investigations *“shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors”*.

However, this provision must be read together with the national laws of each Member State. In fact, these reports can only be used in countries where the reports written by administrative authorities are admissible in criminal proceedings, which means that, in some Member States, if prosecutors want to use OLAF report as a proof, they must initiate new investigation activity on the same facts aimed at acquiring admissible evidence.

If we consider that, in virtue of its territorial powers as indicated above, in many transnational investigations OLAF acquires documents in all European Member States and very often in non-European countries, that these documents are transferred as annexes of the report to the judicial authorities, and that, pursuant to the aforementioned Regulation, the report can be used in such proceedings, it can be concluded that OLAF's action in this respect, with the abovementioned limits of the national legislations, can exonerate the judicial authority from the need to use the international rogatory to acquire probative material, with significant savings in costs and time.

On the other hand, we must not fall into the equivocation of considering OLAF a sort of European judicial police that, at the simple request of a judicial authority, acquires evidence abroad, avoiding the costs and time of a request for assistance. It must always be kept in mind that the action described above by OLAF, in fact, develops within the administrative investigations of the Office, which have their own autonomous foundation.

OLAF's investigations, despite their purely administrative nature, present some characteristics typical of criminal investigations, in particular the interviews and the *in loco* controls come to mind. Moreover, as we have seen, OLAF can hand over files to the authorities responsible for prosecuting in the individual Member States, and this has posed, and still raises, questions on procedural guarantees for the parties involved in investigations of office.

The question of procedural guarantees soon became a matter of debate for the Court of Justice. Many cases related to the activity of OLAF, in fact, concerned the various expressions of these guarantees²⁵⁸, among others: right to be heard²⁵⁹, right of access to documents²⁶⁰, presumption of innocence²⁶¹, reasonable duration of the process²⁶².

Regulation 883/2013 tried to give an answer to the problem by providing guarantees in interviews and in on-the-spot checks that recall those placed to protect a suspect in the criminal trial.

In particular, Article 9 is named “*procedural guarantees*”. This provision recognizes the right to impartial treatment and the presumption of innocence²⁶³, regulates the interrogation and the formalities to be carried out, moreover, in this sense, recognizes the right to avoid self-incrimination and the right to be assisted by a person of trust²⁶⁴, it includes the right to be informed of the investigation²⁶⁵ and to submit its observations on facts concerning it before the publication of the report²⁶⁶. Finally, the Article mentions the right to use any of the languages of the institutions of the Union²⁶⁷.

In fact, the already mentioned case law confirms that these guarantees existed well before the insertion of Article 9. In particular, the jurisprudence

²⁵⁸ See, J. INGHELRAM, *Garanzie procedurali nelle indagini di OLAF: riflessioni sull'impatto della Carta dei Diritti Fondamentali dell'UE*, in V. BAZZOCCHI (ed.), *L'Ufficio del Procuratore Europeo e le Indagini di OLAF: il Controllo Giurisdizionale e le Garanzie Procedurali*, Roma, 2014, pp.113-121

²⁵⁹ Case T-48/05, *Franchet and Byk v. Commission*, ECLI:EU:T:2008:257, par.145

²⁶⁰ Case T-215/02, *Gomez-Reino v. Commission*, ECLI:EU:T:2003:352, par.65

²⁶¹ Case T-48/05, *Franchet and Byk v. Commission*, *cit.*, par.209, 214

²⁶² *Ibidem*, par. 273-274

²⁶³ Article 9, paragraph 1

²⁶⁴ *Ibidem*, paragraph 2

²⁶⁵ *Ibidem*, paragraph 2

²⁶⁶ *Ibidem*, paragraph 4

²⁶⁷ *Ibidem*, paragraph 5

confirmed that guarantees often derive from the general principles of the Union or, since the entry into force of the Treaty of Lisbon, from the Charter of Fundamental Rights of the EU. It is therefore clear, from the aforementioned jurisprudence, that the Charter also interacts with Article 9 of the regulation, since the Charter also applies to the institutions and bodies of the EU.²⁶⁸

The creation of EPPO raises new questions and problems for OLAF, mainly related to the delimitation of their respective areas of expertise and to the cooperation between these two bodies.

In the next section we will analyse the competences of this new body and then we will see what the theoretical tools of coordination are, with the awareness, however, that in order to be aware of the effectiveness of these structures, we will have to wait until EPPO is fully operational.

2.2 The creation of EPPO, from the original proposal of the Commission to the enhanced cooperation: a new phase of combating corruption and fraud in the European Union

The creation of EPPO was a very controversial topic²⁶⁹ since it is a new supranational institution in the field of law enforcement entrusted with autonomous operational investigative powers. For this reason, in fact, Member States feared a transfer of national sovereignty in criminal law to the supranational EU level.

We have seen, in the first chapter, that criminal law is one of the last bastions of national sovereignty and that its Europeanisation is not so easy. In reality until now, in this field, there was not properly a transfer of sovereignty, but an area of what can be called “shared sovereignty”, where national authorities and institutions are entrusted with European functions and specularly, where supranational institutions cooperates with national ones.

In many areas of EU law, in fact, bodies and institutions have been created.

²⁶⁸ See, For a detailed analysis of the interaction between OLAF Regulation and the Charter of Fundamental Rights of the Union, J. INGHELRAM, *op.cit*

²⁶⁹ See, J.A.E. VERVAELE, *The European Public Prosecutor's Office (EPPO): Introductory Remarks*, in W. GEELHOED, L.H. ERKELENS, A.W.H. MEIJ (EDS.), *Shifting Perspectives on the European Public Prosecutor's Office*, T.M.C Asser Press, The Hague, 2018, pp 12-13

This verticalization does not automatically mean that powers in those fields have been transferred to the Union level, in fact, those bodies act in strong interaction with the national level, either because they apply also national law or because they act in close cooperation with National institutions.

Moreover, some Member States would have preferred the improvement of judicial cooperation via intergovernmental methods rather than the creation of a new vertical institution as EPPO since, according to them, this could constitute a violation of the subsidiarity principle.

Last but not least, Member States feared that the category of crimes under the competence of EPPO will be broadened in order to include, alongside with PIF crimes, also some other offences such as: terrorism, human trafficking, VAT crimes *tout court*²⁷⁰.

From an historical perspective, in 1997, the most famous comparatist study on the national legal systems of the commission, the *Corpus Juris*²⁷¹, which enumerated a series of principles common to the member states in criminal and procedural matters proposed the creation of a *Parquet Européen*, a European Public Prosecutor, thus stimulating the academical debate on this argument.

Although the project saw Parliament's support, at a time when the enthusiasm for greater European integration was still alive, it still lacked a basis in the treaties. Article K was not sufficient, nor was Article 280 of the Treaty of Amsterdam concerning the fight against fraud against EU finances, "*whose concrete expansive potential also in the field of criminal law had been seriously questioned*"²⁷². Without analysing the failed project on the European Constitution²⁷³, which for the first time nominated the European Public Prosecutor Office, it was necessary to wait for the Article 86 TFEU, introduced by the Treaty of Lisbon which, as we have already mentioned, provides, in terms that are possible and not obligatory, the establishment of a Public Prosecutor's Office to fight

²⁷⁰ It will be recalled that the PIF directive limits VAT crimes to a certain monetary threshold, precisely 10 million Euros

²⁷¹ M. DELMAS-MARTY, *Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union*, Paris, 1997; in Italia G. GRASSO, *Corpus juris contenente disposizioni penali per la tutela degli interessi finanziari dell'Unione europea*, Milano, 1997

²⁷² See, L. SALAZAR, *Habemus EPPO! La lunga marcia della Procura europea*, in *Archivio Penale* 2017, n.3

²⁷³ The failure was due to the double referendum rejection, by France and the Netherlands, in 2005.

offenses that harm the financial interests of the Union starting “*from Eurojust*”²⁷⁴.

According to this Article, in order to create the European Public Prosecutor Office, the Council shall adopt a regulation using a special legislative procedure²⁷⁵ which requires the consent of the European Parliament and the unanimity in the Council. Article 86 recognizes the possible difficulties in teaching the unanimity of 25 Member States²⁷⁶ in such a delicate issue and provides that, in case of disagreement, nine Member States can request that the draft regulation be referred to the European Council. Moreover, in case of persistent disagreement also in the European Council, nine Member States can decide to start an enhanced cooperation on the basis of the draft regulation concerned, upon previous notification to the European Parliament, the Council and the Commission²⁷⁷.

Furthermore, the Treaty outlines the essential features of the project. It states that EPPO “*shall be responsible for investigating, prosecuting and bringing to judgment [...] the perpetrators of [...] offences against the Union’s financial interests. [...] It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences*”²⁷⁸.

The choice to intensify the protection of the financial interests of the Union is due to the fact that “*these are legal assets in the proper sense, deserving of criminal protection. They do not constitute the sum of the financial interests of the individual Member States, they are not transnational goods to be regulated in a uniform way to guarantee effective protection; they are rather institutional goods, whose importance goes well beyond the mere economic value of the asset value, because it invests the institutional interests of the Union pursued through the resources allocated in the budget*”²⁷⁹.

Moreover, the last paragraph of Article 86 provides for the possibility of

²⁷⁴ See Art. 86, paragraph 1 TEU

²⁷⁵ It is an exception to the standard procedure of co-decision procedures with a qualified majority which, in the Lisbon Treaty, is also used in this area of cooperation

²⁷⁶ Denmark, United Kingdom and Ireland are excluded *ab origine*, given the fact that they have signed specific exemption protocols in this cooperation field.

²⁷⁷ See Article 86, paragraph 1

²⁷⁸ See Article 86, paragraph 2

²⁷⁹ Trans. From M. PELISSERO, *Competenza della Procura Europea e scelte di incriminazione: oltre la tutela degli interessi finanziari*, in G. GRASSO, G. ILLUMINATI, R. SICURELLA, S. ALLEGREZZA, (EDS.) *Le sfide dell’attuazione di una Procura Europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Giuffrè, Milano, 2013, pp. 109-122, p.115

extending the area of competence *ratione materiae* of EPPO, beyond the crimes against the Union financial interests, including other serious crimes of transnational nature. However, such a decision should be adopted by the Council acting unanimously, previous consent of the Parliament and consultation with the Commission.

2.2.1 The original ambitious project of the Commission: proposal for the Council Regulation establishing EPPO

While the Lisbon Treaty entered into force on 1st January 2010, the first Commission proposal for the regulation sees the light only in 2013. During those three years, the Commission requested long series of studies and consultations with stakeholders. Moreover, the Commission prepared a detailed impact assessment document which analysed every possible option for the institution of the Office. The result was the adoption of the Proposal for the regulation in 2013²⁸⁰ in a package²⁸¹ containing also a proposal for a Regulation on the establishment of the European Agency for Criminal Justice Cooperation – Eurojust –²⁸².

As we said, some Member States feared that this reform, and in particular the creation of EPPO, could constitute a violation of the principle of subsidiarity, and, after the adoption of the package, 14 National Parliaments²⁸³, representatives of 11 Member States²⁸⁴ used, for the second time in history²⁸⁵, the so called “Yellow

²⁸⁰ Commission proposal for a Council Regulation *on the establishment of the European Public Prosecutor's Office*, COM(2013) 534 final

²⁸¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust*, COM(2013) 532 final

²⁸² Commission Proposal for a Regulation of the European Parliament and of the Council *on the European Union Agency for Criminal Justice Cooperation (Eurojust)*, COM(2013) 535 final

²⁸³ Cypriot House of representatives, Czech Senate, French Senate, Hungarian National assembly, both Chambers of Irish House of Oirechteas, Maltese House of representatives, Romanian Chamber of deputies, Slovenian National assembly, Swedish parliament, Dutch Senate, Dutch House of representatives, and UK House of Lords and House of Commons.

²⁸⁴ Cyprus, Czech Republic, France, Hungary, Ireland, Malta, Romania, Slovenia, Sweden, Netherlands, UK

²⁸⁵ This is only the second yellow card since the entry into force of the Lisbon Treaty. The first yellow card ever was used against a Commission proposal on the right to strike in September 2012, after which the European Commission decided to drop its plans.

Card” procedure²⁸⁶, provided for in Article 7, paragraph 2, of protocol number 2 to the treaties on subsidiarity and proportionality. For the first time the Commission had to revise the proposal in order to control the fulfilment of the principle of subsidiarity. However, the Commission stated that the proposal was in conformity with this principle and neither retired it nor modified it.

The principle of independence permeated the whole Commission project. At the central level there was a pyramidal structure composed of a European prosecutor assisted by four Deputies, appointed by the Council after approval by the Parliament²⁸⁷. At a local level, the proposal required the appointment of European Delegated Prosecutors, at least one per Member State, competent to carry out investigations and to prosecute “*under the exclusive authority of the European Public Prosecutor*”²⁸⁸.

Another fundamental profile that emerged from the Proposal was the principle of mandatory prosecution, as it is clear from the words used by recital 20 of the Proposal, which declares that “*in order to ensure legal certainty and zero tolerance towards offences affecting the Union's financial interests, the investigation and prosecution activities of the European Public Prosecutor's Office should be based on the principle of mandatory prosecution[...]*”, and from a careful reading of Article 16, which states that “*The European Public Prosecutor or [...] the European Delegated Prosecutors shall initiate an investigation [...] where there are reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office is being or has been committed.*”

The Proposal determined the *ratione materiae* competence of the Office *per relationem*, referring to the offences against the financial interests of the union foreseen within a hypothetical PIF Directive²⁸⁹, which at the time had not yet been

²⁸⁶ According to the Yellow Card procedure, national parliaments of EU Member States can object to a draft legislative act on grounds of the principle of subsidiarity. National Parliaments have eight weeks from the date of forwarding of a draft legislative act to send, to the Presidents of the European Parliament, the Council and the European Commission, an opinion containing the reasons why it considers that the draft violate the principle of subsidiarity. The institution that produced the draft may decide to maintain, amend or withdraw it, giving reasons for that decision. See: <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/yellow-card-procedure>, accessed on 3rd January 2018

²⁸⁷ See Article 5 paragraph 1 of the Proposal *on the establishment of the European Public Prosecutor's Office*

²⁸⁸ See Article 6 of the Proposal

²⁸⁹ See Article 12 of the Proposal

adopted. Moreover, Article 13 provided for an ancillary competence relating to offences “*inextricably linked*” with the PIF offences. Furthermore, Article 13 paragraph 3, it provided that any conflicts of jurisdiction between the prosecutors of the Member States and the European Public Prosecutor's Office should be resolved by the “*national judicial authorities competent to decide on the attribution of competences concerning prosecution at national level*”

Furthermore, the Proposal considered the territory of the Union's Member States “*as a single legal area in which the European Public Prosecutor's Office may exercise its competence*”²⁹⁰.

One of the most particular provision of the Commission proposal, stated that “*when adopting procedural measures in the performance of its functions, the European Public Prosecutor's Office shall be considered as a national authority for the purpose of judicial review*”. If at first this rule may seem of little relevance, in reality, it constitutes an exception to the principle of Community law, which entrusts the review of the legality of the acts of the organs of the Union to the Court of Justice of the European Union. In fact, the law subtracts this jurisdiction from the Luxembourg court and transfers it to the national courts. In reality, this choice, if it may seem strange, derives from the choice of relying on the procedural rules of the Member States, and is also provided for by Article 86, paragraph 3 TFEU which provides that the regulation of the prosecution may regulate, inter alia, “*the rules applicable to the judicial review of procedural measures taken by it in the performance of its function*”

2.2.2 The failure of the Commission proposal and the decision to start an enhanced cooperation: Regulation 2017/1939

During the discussion in the Council, there were numerous changes to the original proposal for a regulation, the original vertical structure was immediately transformed into a collegial model, providing for a College composed of a European Public Prosecutor for each Member State, in this way modified the DNA of the

²⁹⁰ See Article 25 of the Proposal

EPPO through the progressive link with the national level, which will constitute the *file rouge* of the debate²⁹¹. A large part of the agenda of the 2014 Italian Presidency of the Council was dedicated to the development of the proposal²⁹². All the negotiations used the method of the so-called “partial general approach”, which consists in reaching successive agreements on separate groups of articles, while invoking the principle “nothing is agreed until everything is agreed”.

In the second half of 2016²⁹³, after 6 presidencies, which correspond to 3 years, the text was consolidated. Sweden, however, announced the willingness not to take part in the adoption of the regulation. Therefore, it was noted that there was a lack of unanimity which, it will be recalled, is at the base of the special procedure for the establishment of the Office.

In February 2017, representatives of 17 Member States²⁹⁴ invested the European Council of the project. Following the discussion in the European Council, the procedure was reopened within the Council of the Union and a new group of 16 States, the same as before, but without Estonia, Latvia and Austria, with the addition of Portugal and Cyprus, notified the Parliament, the Council and the Commission the wish to proceed with enhanced cooperation, as provided for in paragraph 1 of Article 86.

The text, adapted to the new procedure of the enhanced cooperation, was the basis for the final compromise which, however, provides for the reinforcement of the obligations to exchange information between EPPOs and national bodies. This made it possible to reach an agreement on the text that also stimulated access by States that initially had not joined. To date, alongside Denmark, the United Kingdom and Ireland, at least for the moment, Poland, Sweden and Hungary remain outside the initiative.²⁹⁵

²⁹¹ L. SALAZAR, *op.cit.*, p. 14

²⁹² L. SALAZAR, *Il negoziato sulla procura europea nell'agenda della presidenza italiana dell'Unione europea 2014*, in G. GRASSO, G. ILLUMINATI, R. SICURELLA, S. ALLEGREZZA (EDS.), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milano, 2013.

²⁹³ Slovak presidency of the Council.

²⁹⁴ Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxemburg, Romania, Slovak Republic, Slovenia, Spain

²⁹⁵ Originally, in April 2017, only Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain proposed the establishment of an enhanced cooperation. In addition, by letters of 19 April 2017, 1 June 2017, 9 June 2017 and 22 June 2017 respectively, Latvia, Estonia, Austria and Italy

The final text of the regulation was adopted on 12 October 2017 by the Council of Ministers of the Union²⁹⁶.

After reviewing the legislative process leading to the adoption of the current Regulation, and outlining the features of the Commission's proposal, it is time to reconstruct the current system of the Office, both from the structural point of view and from that of its skills. Subsequently, during the course of the chapter, we will deal with outlining the prospects for collaboration between EPPO and other EU bodies such as OLAF, Eurojust and EUROPOL.

In EPPO, as in OLAF, independence is an essential aspect of the office. In fact, Article 6 of the regulation states that all the organs of EPPO “*neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union*”, which, indeed, must respect the independence of the public prosecutor and not try to influence it in the performance of its tasks.

This independence is accompanied, naturally, by the responsibility before the Parliament to the Council and the Commission for the "general activities" provided for by Article 7²⁹⁷.

As already anticipated, a central collegiate structure has been substituted to the original vertical structure. EPPO is now composed of the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, at least one per Member State, and from European Delegated Prosecutors, who are located in Member States.

The collegial model is articulated in meetings of the college and in the activity carried out by the permanent chambers.

The college is provided for in Article 8 and governed by Article 9. The

indicated their wish to participate in the establishment of that enhanced cooperation. On 14 May 2018, the Netherlands notified the Commission of its intention to participate in the enhanced cooperation on the establishment of the EPPO. On 14 June 2018, Malta did the same.

²⁹⁶Council Regulation (EU) 2017/1939 of 12 October 2017 *implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')*, OJ L283, 31 October 2017

²⁹⁷ In order to facilitate the control on the accountability of EPPO, Article 7 provides that “*every year the EPPO shall draw up and publicly issue an Annual Report on its general activities [...] and transmit it to the European Parliament and to national parliaments, as well as to the Council and to the Commission. Moreover, “the European Chief Prosecutor shall appear once a year before the European Parliament and before the Council, and before national parliaments of the Member States at their request, to give account of the general activities of the EPPO”.*

plenary meetings of the college are intended to discuss strategic or general matters, and its decisions, which cannot therefore refer to specific cases, are taken simple majority.

Permanent chambers are set up in a non-predefined number by Article 10 of the founding regulation but left to the internal regulations. Their main task is to monitor and direct the investigations and prosecutions conducted by the delegated European prosecutors, adopting, on the proposal of the latter, all the main procedural decisions: referral to trial, filing, conclusion of transactions, desist in favour of national authorities, etc.

As we mentioned above, the *national link* was strengthened in this Regulation. In particular, this is clear if we read Article 10 paragraph 9 together with Article 12 paragraph 1, which respectively state that “*the European Prosecutor who is supervising an investigation or a prosecution in accordance with Article 12(1) shall participate in the deliberations of the Permanent Chamber*”, and that “*the European Prosecutors shall supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible*”.

The supervision power on the European Prosecutor of the Member State, and not on the European Chief Prosecutor, and its participation in the voting in the Permanent Chambers, albeit with limits²⁹⁸, are representative of the will of the States to abandon the vertical structure and to strengthen the connection with the national level.

The conduct of the investigations by the EPPO rests, therefore, essentially in the hands of the national authorities of the same Member State in which the investigations are conducted or of a subject, the European Prosecutor in charge for the supervision, which of that State will have the nationality however, it is still issued directly because of the manner of appointment²⁹⁹ provided for in Article

²⁹⁸ Those limits are provided in Article 12 paragraph 9 which clearly states that “*the European Prosecutor shall have a right to vote, except as regards the Permanent Chamber’s decisions on delegation or withdrawal of delegation in accordance with paragraph 7 of this Article, on allocation and reallocation under Article 26(3), (4) and (5) and Article 27(6) and on bringing a case to judgment in accordance with Article 36(3), where more than one Member State has jurisdiction for the case, as well as situations described in Article 31(8)*”

²⁹⁹ L. SALAZAR, *Habemus EPPO*, op.cit. p. 21

16³⁰⁰.

In this case too, the competence of the European Public Prosecutor's Office is also identified and delimited *per relationem*³⁰¹ through the reference to the already mentioned PIF directive. In each participating State, the EPPO will then be competent to prosecute all offenses affecting the EU financial interests introduced for the purpose of implementing the Directive.

For this reason, as we have anticipated in the first chapter, investigations on VAT fraud will be under the responsibility of the Public Prosecutor only if the offence is connected with two or more States and amount to at least 10 million euros

Similarly to the abovementioned Article 13 of the Proposal, the Regulation also provide for a an ancillary competence. The EPPO can also proceed against any other crime “*inextricably linked*” to a PIF offence³⁰². It should be noted, in this sense, that with “*inextricably linked offences*”, the regulation it is not referring to the ancillary offenses envisaged by the PIF directive, such as corruption, which fall already within EPPO's competence under Article 22 paragraph 1, but to a whole series of cases, not better identified, connected with those foreseen by the 2017/1371 directive.

Article 25, named “*exercise of the competence of EPPO*”, states that “*the EPPO shall exercise its competence either by initiating an investigation under Article 26 or by deciding to use its right of evocation*” in relation to notice of crimes transmitted by national authorities according to the provisions of Article 27. In this case, “*if the EPPO decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct*”³⁰³.

However, the possibility for EPPO to exercise its competence does not come without limitations. The second paragraph of the same Article states that when dealing with PIF crimes that caused damage to the Union's financial interests of

³⁰⁰ Article 16 provide that “*each Member State shall nominate three candidates for the position of European Prosecutor*”, who must fulfil some requisites of experience and independence described in the Article. Then, the selection panel produces an opinion on each of them and transmit it to the Council which, acting by simple majority, shall select and appoint one of the candidates to be the European Prosecutor of the Member State in question.

³⁰¹ See Article 4 of the Regulation

³⁰² See Article 23, paragraph 3 of the Regulation

³⁰³ See Article 25, paragraph 1 of the Regulation

less than 10 000 Euros, the EPPO may only exercise its competence if “*the case has repercussions on the Union level*”³⁰⁴ such as to justify his intervention, or when “*officials or other servants of the Union, or members of the institutions of the Union could be suspected of having committed the offence*”³⁰⁵.

Furthermore, stronger limits are provided for in Article 25 paragraph 3 for the exercise of the ancillary competence. In fact, there is an obligation for EPPO to refrain from the exercise of its competence if “*the maximum sanction provided for by national law for an offence falling within the scope of Article 22(1) is equal to or less severe than the maximum sanction for an inextricably linked offence as referred to in Article 22(3) unless the latter offence has been instrumental to commit the offence falling within the scope of Article 22(1)*”, in other words if the ancillary crime is punished by national law with less severe sanction than the PIF crime; or if “*the damage caused or likely to be caused to the Union’s financial interests by the offence does not exceed the damage caused, or likely to be caused to another victim*”.

The delegated prosecutors, as we have anticipated, shall start the investigation in the presence of a *notitia criminis*³⁰⁶ and, if they do not, the permanent chamber to which they belong must instruct them to do so³⁰⁷. The case will be the responsibility of the European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed³⁰⁸.

Moreover, Article 26 paragraph 4 states that there are limited derogation possibilities to the general principle. In particular, a European Delegated Prosecutor of a different Member States can initiate investigations when a deviation from the general rule is justified from criteria of the habitual residence or nationality of the accused, and from the criterion of the place where the main financial damage has occurred.

However, the possibility of reassigning the case to the Delegated Prosecutor

³⁰⁴ *Ibidem*, paragraph 2

³⁰⁵ *Ibidem*

³⁰⁶ See Article 26 paragraph 1 of the Regulation

³⁰⁷ *Ibidem*, paragraph 3

³⁰⁸ *Ibidem*, paragraph 4

of another Member State or the reunion or separation of proceedings remains open to the permanent chamber until the criminal prosecution has not been exercised, under the specific conditions laid down in paragraph 5, and that is that it is one decision “*in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor*”.

The innovative provision of Article 25 of the Commission Proposal³⁰⁹ does not find a specular provision in the definitive regulation. However, at least in cases where the offense under investigation is punishable by a maximum penalty of at least four years of imprisonment, Article 30 of the Regulation states that the Member States shall ensure that a number of measures are available to the delegated prosecutor, *i.e.*: freezing of instrumentalities or proceeds of crime³¹⁰, interception of electronic communications³¹¹ and others. In every other situation, the European Delegated Prosecutors must use the measures “*that are available to prosecutors under national law in similar national cases*”³¹².

Furthermore, Article 31 very important in our field. It deals with cross-border investigations, which are essential to combat crimes with a strong transnational component, as it is corruption. the prosecutor in charge of the case decides on the adoption of the measure by assigning it to a European Delegated Prosecutor established in the Member State in which it is to be executed.

The basic rule in such situations is therefore the direct execution by the delegated prosecutor on the sole request of the one in charge of the investigations.

Moreover, Article 33 contains the restrictive measures, and provides that the European Delegated Prosecutor may directly dispose or request the preventive arrest or detention of the suspect or of the accused person according to the provisions of national law. In the case of a requested subject who is not in the Member State of the appointed prosecutor, the latter will have to use the instrument of the European arrest warrant³¹³, with the specific modalities provided for by

³⁰⁹ We are referring to the already mentioned provision which considered the territory of the Union's Member States “*as a single legal area in which the European Public Prosecutor's Office may exercise its competence*”

³¹⁰ See Article 30, paragraph 1, letter d) of the Regulation

³¹¹ *Ibidem*, letter e)

³¹² *Ibidem*, paragraph 4

³¹³ It is a cross-border judicial procedure which simplify the lengthy extradition procedure. It consists in a request for transferring criminals or suspected persons for prosecution or execution of

national law.

After the conclusion of the investigations, the European Delegated Prosecutor must produce a report containing a summary of the case and a draft decision containing its requests to the supervising European Public Prosecutor, which, in turn, forward it to the competent Permanent Chamber, accompanied by its own assessments. It may consist in the request of prosecuting or not prosecuting before a national court, in considering a referral of the case, a dismissal or even in the use of a “*simplified prosecution procedure*”³¹⁴.

If the Permanent Chamber agrees with the Delegated Prosecutor, this one may proceed as agreed. Otherwise, the Chamber may review the case file before taking a final decision or giving further instructions to the Delegated European Prosecutor.³¹⁵ In any case, it will have to adopt its decision within 21 days, considering otherwise the decision proposed by the delegated European Public Prosecutor.³¹⁶

Before the decision to bring a case to court is taken, and always at the request of the Delegated Prosecutor in charge of the case, the Permanent Chamber may decide, if necessary, to join, in front of the courts of a single Member State, several cases carried out by different Delegated Prosecutors against the same person, provided that this State has jurisdiction for each of them³¹⁷. With regard to the choice of the competent body and the stage of the proceedings, the regulation naturally refers *in toto* to the discipline of the entire process provided by national law of the Member State in which the prosecution has to be conducted.

The only, important, exception is provided by the art. 37, as regards the test regime, which cannot be excluded by the judge “*on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State*”.

After having analysed the structure, the competence, the methods of

a custodial sentence or of a detention order. It is regulated by Council Framework Decision 2002/584/JHA of 13 June 2002 *on the European arrest warrant and the surrender procedures between Member States*, OJ L 190, 18 July 2002

³¹⁴ See Article 35 paragraph 1 of the Regulation

³¹⁵ *Ibidem*, paragraph 2

³¹⁶ See Article 36 paragraph 2 of the Regulation

³¹⁷ *Ibidem*, paragraph 4

carrying out the investigation and the prosecution of the EPPO, it is opportune to frame the relations of the office with the other actors of the Union in this field. In particular with OLAF, Eurojust and Europol. Chapter X of the Regulation is entirely dedicated to this aspect. During the following paragraphs, the order of the articles will not be followed, but the relationship between EPPO and OLAF will be assessed first, and then we will assess the role that Eurojust and Europol will take towards EPPO.

3. The differences between OLAF and EPPO and their future cooperation

In the current framework, EPPO and OLAF are the two main actors in the field of PIF. Given the “*complementarity between the administrative and criminal justice tracks in protecting the Union’s financial interests*”³¹⁸, it is clear that the two bodies are strictly interconnected, and thus they can appear as very similar actors. However, there are several differences.

First of all, OLAF is competent for conducting administrative investigations for fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union, and so it deals with administrative irregularities; while EPPO carries out criminal investigations, prosecutions and bringing to judgement of the criminal offences affecting the financial interests of the Union provided for in the PIF Directive.

Moreover, OLAF’s investigative powers are mainly defined in Regulation 883/2013 and include, as we said, the possibility to conduct interviews, on-the-spot checks and inspections in the EU institutions, bodies, agencies and offices, or in the locals of economic operators in the Member States, and eventually in third countries, and in premises of international organisations. On the contrary, the investigative measures at the disposal of EPPO are provided for in its founding Regulation and they are way more extensive than the ones at the disposal of OLAF since they, on a certain measure, are equals to the ones at the disposal of national

³¹⁸ EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT D: BUDGETARY AFFAIRS, *The future cooperation between OLAF and the European Public Prosecutor's Office (EPPO)*, in-depth analysis, PE 603.789, 26 June 2017

prosecutors.

Furthermore, for what specifically concerns the results of the investigations, OLAF can only prepare a report and make recommendations on the actions to be taken, but it is not entitled with prosecutorial powers and so the decision whether to initiate a criminal proceeding remains on the national judicial authorities, while the EPPO, in particular the European Delegated Prosecutor, can decide, with the procedure that we have seen in the previous paragraph, to bring the case to judgement in front of national courts.

According to some authors, however, even with those differences, since OLAF it is the only body of the Union, before the EPPO, which has the task of carrying out actual investigations in the so-called “PIF area”, although of an administrative nature, but with the right to transfer the proof at the criminal level, “*it is perhaps to be considered the true progenitor of the new organ, despite the formula of art. 86 TFEU*”³¹⁹ which, instead, refers to Eurojust.

Article 101 of Regulation 2017/1939 specifically deals with Relations between EPPO and OLAF. Paragraph 1 states that EPPO “*shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange*”.

From the following paragraphs of the Article, three areas of cooperation between the two institutions can be traced³²⁰. The first is provided by paragraph 2 and aims at avoiding the duplication of efforts by stating that “*where the EPPO conducts a criminal investigation in accordance with this Regulation, OLAF shall not open any parallel administrative investigation into the same facts*”. This provision is important in two directions: first of all, it is necessary avoid the application of the principle of *ne bis in idem* in those Member States that does not allow for the combination of administrative and criminal sanctions³²¹; secondly it

³¹⁹ A.VENEGONI, M. MINÌ, *I nodi irrisolti della nuova Procura Europea*, in *Giurisprudenza Penale Web*, 2017, 12

³²⁰ Those three areas of cooperation are described in the cited analysis of the European Parliament. However, it must be noted that the study did not refers to a definitive version of the regulation since it is dated June 2017, while the regulation was adopted in October of the same year. See, EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT D: BUDGETARY AFFAIRS, *op.cit.*, pp.17-19

³²¹ The case law of the CJEU allows the combination of administrative and criminal sanctions, except where the administrative sanctions imposed are to be considered as criminal sanctions according to the *Engel* criteria, which derives from *Engel and others v. The Netherlands* case, in

is useful for avoiding that two different institutions deals with the same facts using their own resources, which would clearly constitute a misuse of funds of the European Union.

A second area of cooperation deals with OLAF's support to the EPPO's activities and can be found in Article 101 paragraph 3. According to this provision, EPPO may request OLAF to "*support or complement*" its activities by the provision of information, analyses – including forensic analyses –, expertise and operational support; the facilitation of coordination of specific actions of the competent national administrative authorities and EU bodies; and the conduct of administrative investigations. The idea is not that OLAF start another investigation, which would be contrary to the second paragraph, but rather that OLAF use its expertise and powers to assist EPPO.

Moreover, a third area of cooperation specifically concerns the exchange of information. paragraph 4 and paragraph 5 deals with this issue. In particular the first one states that if the EPPO decide not to conduct investigations or to dismiss a case, it can transmit "*relevant information*" on the case to OLAF, in order to enable it to consider administrative action. The second one, instead, guarantees that each institution has access to the other's case management system. Furthermore, OLAF is bound by the general provision of reporting provided for in Article 24 which States that "*the institutions, bodies, offices and agencies of the Union and the authorities of the Member States competent under applicable national law shall without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence*".

However, a revision the founding regulation of OLAF is desirable in light of the establishment of the EPPO. It should provide, also for OLAF, similar or even stronger mechanisms for coordination, as, as we will see, it happened for the

which the European Court of Human Rights enounced three criteria to determine whether a sanction should be considered as a criminal sanction: the classification in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring. Besides, not every national legal order accepts such combination, so that the adoption of administrative sanctions could jeopardise the legality of the EPPO's investigations, depending from the MS concerned. See, in this sense, EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT D: BUDGETARY AFFAIRS, *op.cit.*, p.17

Eurojust regulation.

4. Europol and Eurojust: the new Regulations and the cooperation with EPPO.

Apart from the direct enforcement of EPPO and from the centralized investigations of OLAF, there are organisms and bodies of the Union competent for multilateral cooperation. Reading the Treaties, and in particular the TFEU, we can delineate several levels of multilateral cooperation in the field of law enforcement³²². In particular we will deal police level and prosecutorial level. The police level is certainly the oldest, since Europol has been established in 1995. Instead, the main actor in the prosecutorial level is Eurojust. The whole structure and functioning of those bodies reflects the fact that they work with an intergovernmental perspective, since their establishment dates back to the pillar structure of Maastricht and Amsterdam Treaties. We will briefly delineate the tasks of both institutions, and we will focus on the innovation introduced in light of the creation of EPPO and on the cooperation between each of them with the latter

Starting with the cooperation on police level, The Europol was created in 1995, thanks to the Europol Convention³²³, but its formal establishment was delayed because, since this instrument was a Convention adopted under the third pillar, it was necessary to wait for the ratification by all the Member States. The Convention entered into force in 1998 and Europol started its activities in 1999.

The Europol convention has been amended several times with protocols, but it was impractical to modify the core provisions of the convention, due to the fact that in order to modify a Convention is required again the ratification of all Member States. For this specific reason, Europol convention was substituted with secondary law, and in particular with a Council Decision on the basis of the Treaty of Nice³²⁴.

³²² Chapter 4 deals with judicial cooperation in criminal matters, while Chapter 5 deals with police cooperation

³²³ Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, Europol Convention, OJ C316, 27 November 1995

³²⁴ Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ [EU] 2009 No. L 121/37

Finally, on 10 May 2017, the new Regulation establishing the agency entered into force³²⁵, based on Article 88 TFEU³²⁶ which is the Treaty provision that constitutes the legal basis of Europol. However, in this Article, there is an open clause for what concerns the competence of this organism. Article 88, indeed, states that the Europol competence extends to “*serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy*”. But the Treaty does not provide a definition of these other crimes. However, Article 3 of the Europol Regulation refers to an annex to the regulation itself. This annex contains a list which clarifies the competence of Europol including, *inter alia*, drug trafficking, human trafficking, swindling, fraud and, most importantly corruption.

Since Article 88 (1) states that Europol mission is to “*support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating*” those crimes, is evident that the European Police Office “*is not (yet) an operational police with executive authority*”³²⁷.

Article 4 of the Regulation contains the complete list of tasks of Europol. It is worth noting, in addition to the already mentioned coordination functions, that the European Police Office “*cooperate with the Union bodies established on the basis of Title V of the TFEU and with OLAF, in particular through exchanges of information and by providing them with analytical support in the areas that fall within their competence*”³²⁸. Specularly, Article 102 of the EPPO regulation provides that the relations between Europol and EPPO are “close” and that the two institutions shall conclude a working arrangement to establish the modalities of cooperation. Moreover EPPO, if it is necessary for the investigations, “*shall be able to obtain, at its request, any relevant information held by Europol, concerning any offence within its competence, and may also ask Europol to provide analytical*

³²⁵ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135/53, 24 May 2016

³²⁶ Article 88 is in Chapter 5 of the TFEU, which is titled “police cooperation”

³²⁷ H. SATZGER, *International and European Criminal Law*, C.H.Beck – Hart – Nomos, 2017, p.111

³²⁸ See Article 4, paragraph 1, letter j of the Europol Regulation

support to a specific investigation conducted by the EPPO”³²⁹.

It is important to note that, although adopted at a time when the negotiations for the adoption of the EPPO regulation came to an end³³⁰, the Europol regulation never names the European Public Prosecutor Office. It is very likely, as well as desirable, therefore, that a review of the same will be carried out to insert an article that allows for more effective coordination of those institutions and that, perhaps, allows EPPO to better use the expertise of Europol or to directly activate the office, as it happens in the relations between the Prosecutor Office and Eurojust.

If Europol deals with police coordination, on the side of judicial cooperation, on the other hand, there is Eurojust, founded in 2002 by the Council Decision. 2002/426/JHA³³¹.

From December 2019 the new Eurojust Regulation³³² will be fully operational. It revises the list of crimes which are the responsibility of the agency and envisages new mechanisms to activate it.

The new regulation was necessary in light of the establishment of the European Public Prosecutor Office, also to regulate the relationship and division of competences between these bodies, at least in reference to those States that took part to the enhanced cooperation that established EPPO. Furthermore, after the reform of Europol and Frontex as well as the creation of the European Public Prosecutor’s Office, the Regulation 2018/1727 completes the new EU criminal justice landscape by setting up Eurojust as the EU Agency for Criminal Justice Cooperation.

The first and fundamental task of Eurojust is to strengthen coordination and cooperation between national authorities in the fight against serious forms of transnational crime. Furthermore, Eurojust “*proposes itself as a specialized*

³²⁹ See Article 102, paragraph 2 of the EPPO Regulation

³³⁰ It will be remembered that, since the already mentioned method of the “partial general approach” was used, on that date, agreement had already been reached on almost all the points of the project, but not on the definitive text.

³³¹ Council Decision 2002/187/JHA of 28 February 2002 *setting up Eurojust with a view to reinforcing the fight against serious crime*, OJ (EC) 2002 No. L 63/1, amended by Council Decision 2009/426/JHA of 16 December 2008 *on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, OJ (EU) 2009 No. 138/14.

³³² Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 *on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA*, OJ No. L 295/138 of 21 November 2018.

judiciary centre and main interlocutor in the adoption of effective measures against transnational organized crime within the European Union”³³³.

Article 2 of the Regulation states that “*Eurojust shall support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime which Eurojust is competent to deal [...], where that crime affects two or more Member States, or requires prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities, by Europol, by the EPPO and by OLAF*”. It is therefore clear that we are dealing with a body in charge of co-ordination between two or more Member States of investigations relating to transnational crimes. Moreover, already from the first articles, the connection of this agency with EPPO and with OLAF it is evident.

Since, as we said, Article 86 TFEU wants the EPPO created “*starting from Eurojust*”, both regulations contain detailed provisions on the respective competences and on the relations between the two bodies.

Starting from EPPO regulation, Article 100 is about the relations with Eurojust. “*EPPO shall establish and maintain a close relationship with Eurojust based on mutual cooperation within their respective mandates and on the development of operational, administrative and management links between them*”. Moreover, in operational matters, the EPPO “*may associate Eurojust with its activities concerning cross-border cases by sharing information on its investigation*”³³⁴.

Alongside with that, the point of greatest interest for EPPO, emerges with reference to the possibility of using Eurojust to “communicate” with the States that do not participate in the enhanced cooperation envisaged by the letter b of the paragraph 2 of the Article 100, which states that EPPO can “*invite Eurojust or its competent national member(s) to provide support in the transmission of its decisions or requests for mutual legal assistance to, and execution in, Member States of the European Union that are members of Eurojust but do not take part in the establishment of the EPPO, as well as third countries*”.

³³³ Trans. from Eurojust website: <http://www.eurojust.europa.eu/Pages/languages/it.aspx#>, accessed on 19th December 2018

³³⁴ See Article 100, paragraph 2 of the EPPO regulation

The Eurojust Regulation, on its side, provides for more detailed provisions on the cooperation between the two institutions. And it is precisely here that one of the most innovative profiles emerges. Indeed, Article 2 paragraph 3, which contains the “triggering methods” for the exercise of the competence of Eurojust, provides that “*Eurojust shall carry out its tasks [...] at the request of the EPPO within the limits of the EPPO’s competence*”.

Moreover, when delineating the competence of the agency, Regulation 2018/1727 considers the forthcoming entry into functions of the European Public Prosecutor Office and states that “*as soon as EPPO assumes its investigative and prosecutorial tasks [...], Eurojust shall not exercise its competence with regard to crimes for which the EPPO exercises its competence*”, with the exception, of course, of those cases where there is the involvement of Member States which do not participate in enhanced cooperation.

However, even in the case of involvement of Member States participating in EPPO, Eurojust will exercise its competence if “*EPPO does not have competence or decide not to exercise its competence*”³³⁵.

Moreover, anche also article 50 deals with the relations between Eurojust and EPPO. Paragraph 1 reproduces the previously seen paragraph 1 of Article 100 of the EPPO Regulation. It is also provided that, when dealing with matters relevant to EPPO’s competence, “*Eurojust shall inform the EPPO of and, where appropriate, associate it with its activities concerning cross-border cases*”³³⁶ by sharing information and requesting support. Moreover, it is provided in paragraph 6 that EPPO may rely on the support and resources of the administration of Eurojust.

It is clear, from what we have just said, that, given the overlap of competences, the link between Eurojust and EPPO is much stronger than that of the latter with Europol. This however, can be dictated simply, as already mentioned, by the timing of adoption of the respective regulations.

It remains to be seen, only after the full operation of all the institutions analysed, how concretely these organs will interact with each other. As of today, it

³³⁵ See Article 3, paragraph 2 of the Eurojust Regulation

³³⁶ See Article 50, paragraph 4 of Eurojust Regulation

can be noted that, at least for the participating States, EPPO has a preponderant and guiding role in investigating financial crimes.

However, it should not be forgotten that Annex 1 to the Eurojust Regulation provides for a much wider jurisdiction for this agency than that foreseen for EPPO, so that, at least until a possible widening of the latter's competences, as foreseen by Article 86 paragraph 4 TFEU, we can consider the jurisdiction *ratione materiae* of EPPO as a subset of that of Eurojust.

It is therefore necessary that the European institutions find the most efficient and effective solution to ensure that the new system of protection of financial interests functions as much as possible, coordinating the contribution of the four institutions with competence in the PIF area: EPPO, OLAF, Europol and Eurojust.

What is certain is that the role of Eurojust and OLAF will continue to be necessary, if only as long as EPPO will continue to maintain the characteristics of enhanced cooperation. In fact, we can identify three categories of States with which the office will have to interact: the "EPPO States" which, of course, are Member States of the EU; "non-EPPO States", but Members States of the Union; the "non-EPPO States", not even Members States of the Union. For investigations involving the second and third category of States, in whose territory the EPPO cannot directly carry out investigative measures, the coordination and facilitation action of the Eurojust and OLAF will remain essential³³⁷.

5. Institutional cooperation: the European contact point network against corruption and the European Partners against Corruption

In the effort to develop a comprehensive EU policy against corruption, in 2008 the Council established the European contact-point network against corruption (EACN)³³⁸.

The Decision is based on Article 29 of the Maastricht version of the TEU which stated that "*the Union's objective shall be to provide citizens with a high*

³³⁷ In this sense, see A. VENEGONI, M. MINÌ, *op.cit.*, p.18

³³⁸ Council Decision 2008/852/JHA of 24 October 2008 *on a contact-point network against corruption*, OJ L 301, 12 November 2008

level of safety within an area of freedom, security and justice [...] by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud”.

The EACN is not an institution, a body or an agency of the Union. Instead it is an informal network, comprising more than 50 anti-corruption authorities of the European Union Member States, which aims at improving cooperation within authorities involved with preventing and fighting corruption in the EU.

The European Commission, Europol and Eurojust are fully associated with activities of the Network³³⁹. Furthermore, OLAF is also a member.

Its main tasks are described in Article 3 of the Decision. In particular it shall constitute a forum for the exchange of information on effective measures and experience in the prevention and combating of corruption and it shall the establishment of contacts between its member.

Certainly peculiar, is the fact that its organisation entirely relies on the organisation of EPAC, acronym for European Partners against Corruption, which is an “*independent, informal network bringing together more than 70 anti-corruption authorities and police oversight bodies from Council of Europe Member Countries*”³⁴⁰. So, the networks share the organizational structure. For this reason, the Council Decision on EACN is very brief, since it is made of only 6 articles.

EPAC was initiated in 2001 by the 15 European Union Member States of the time. As a first step, they decided to convene for meetings on an annual basis. In 2009 the EPAC Constitution was adopted and EPAC membership was opened to anti-corruption authorities and police oversight bodies from Council of Europe Member Countries³⁴¹. Up until now it counts more than 70 anti-corruption authorities and police oversight bodies from Council of Europe Member Countries.

Article 2 of the EPAC Constitution contains the objectives and goals of EPAC which are “*of operational nature only*”, and include, among the others: the establishment and development of contacts between specialised authorities; the promotion international legal instruments and mechanisms from a professional

³³⁹ See Article 1 of the Decision

³⁴⁰ See <https://www.epac-eacn.org/about/epac>, accessed on 21st December 2018

³⁴¹ See Article 1 of the Constitution

perspective; the creation of a platform for the exchange of information and expertise and the possibility to provide support to other countries and organisations that are looking to establish or develop oversight mechanisms and anti-corruption authorities.

Every year the networks held a meeting, the Annual Professional Conference, at the end of which, the General Assembly adopts a declaration on the work and strategic trajectory of the network. In particular, the 2018 Pannonia Declaration³⁴², among other things, for what concerns us, focused on the necessity that the States Parties of UNCAC promote the prevention of conflict of interests and commit themselves to improve the mechanisms of asset recovery. Moreover, called for action to strengthen existing channel for international cooperation and exchange of information such as the Europol existing tools³⁴³.

Apart from the annual meeting and the exchange of best practices and information between the competent authorities, the networks adopted a number, very few in reality, of recommendations, in particular it is worth mentioning: the *Anti-Corruption Authority Standards*³⁴⁴ and the *Police Oversight Principles*³⁴⁵.

The first one designed to render the work of anti-corruption authorities more effective by promoting “*independent anticorruption bodies through sustainable modes of operation*”³⁴⁶, the second, designed to “*promote accountable policing systems which take human rights and the rule of law into highest account*”³⁴⁷.

6. General considerations on the current situation

We have seen in this chapter that the EU has recently established a system of investigations on corruption, only if it involves damage to the financial interests

³⁴² Available at: <https://www.epac-eacn.org/downloads/declarations>, accessed on 15th December 2018

³⁴³ The Declaration refers to the Europol’s Secure Information Exchange Network Application (SIENA) and to the Europol Platform for Expert (EPE).

³⁴⁴ EPAC General Assembly, *Anti-Corruption Authority (ACA) Standards*, adopted in November 2011

³⁴⁵ EPAC General Assembly, *Police Oversight Principles*, adopted in November 2011

³⁴⁶ Available at: <https://www.epac-eacn.org/downloads/recommendations>, accessed on 15th December 2018

³⁴⁷ *Ibidem*

of the Union. Investigations on cross-border corruption, where there is no threat to such interests, instead remains on the judicial and police cooperation bodies, Eurojust and Europol, which have existed for many years, and whose undoubted effectiveness has been demonstrated by the numerous coordination activities undertaken by them.

Nevertheless, many pending points remain: the EU access to GRECO and its assessments, the restoration of the Anti-Corruption Report, the extension of EPPO's jurisdiction to other forms of serious cross-border crime, the strengthening of the coordination between Europol and EPPO are just some of these.

However, given the recent establishment of the Prosecution and the strong expansion of participation in enhanced cooperation, as well as the recent initiatives, still in an embryonic phase, concerning the extension to other crimes of the competence of the EPPO³⁴⁸, we can only wait to see the practical developments of the rules.

³⁴⁸ See, Communication from the Commission to the European Parliament and the European Council, *A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes*, COM(2018) 641 final, of 12 September 2018.

CHAPTER III

EU ACTION IN FIGHTING CORRUPTION IN INTERNAL POLICIES

SUMMARY: 1. Internal Policies of the EU containing relevant anticorruption provisions – 2. Managing conflict of interest: cutting the roots of corruption. The 2018 Codes of Conduct for the Members of the Commission – 3. Tackling corruption and increasing transparency in Public Procurement: the 2014 Directives – 4. Whistle-blowers protection at EU level: the current situation and the Commission proposal

1. Internal policies of the European Union containing relevant anticorruption provisions

A large part of the European Union's anti-corruption efforts is to be found in the inclusion of anti-corruption clauses in internal and external policies, in areas of EU activity that do not specifically address anti-corruption, but where a strong commitment to countering corruption can only bring major benefits.

We will see that the new code of conduct for the Members of the Commission is committed also with managing and resolving conflicts of interest, either actual, potential or perceived. Proper management of these situations, in fact, is a very useful tool to prevent corruption, going to act directly on one of its roots.

Furthermore, one of the sectors most vulnerable to this offence, also because of the large number of people and money involved, is the sector of public procurement. Since, at the same time, this is also one of the most important sectors to pursue the interests of the Union, it is vital that both the Union itself, but especially the Member States, intensify their efforts to fight corruption and increase transparency.

Moreover, The EU, after a strong public campaign to this effect, has recently

begun, with a proposal from the Commission, the legislative process for adopting a Directive aimed at protecting whistleblowers, that are, extremely simplifying, those people, employed at an office, reporting irregularities of which they had knowledge, which occurred in that office.

The protection of these subjects, in fact, represents an important and effective way to discover cases of corruption, since, as we have mentioned several times in the first chapter, breaking the *pactum sceleris* between the corrupt and the corruptor is certainly not a simple operation. In the crime of corruption, in fact, given the absence of a victim properly understood, it lacks that factor that triggers the prosecutor's investigations.

2. Managing conflict of interest: cutting the roots of corruption. The 2018 Codes of Conduct for the Members of the Commission

Corruption cannot exist without a conflict of interest. All corruption cases, indeed, lies on the common denominator of the conflict of interest. This is particularly clear if we look at the structure of both offences.

A conflict of interest exists when an individual has the opportunity to exploit his position for personal benefit while corruption occurs when the individual takes advantage of that opportunity. A conflict of interest is not *ipso facto* corruption but, if inadequately managed, it can result in corruptive phenomenon.

In the conflict of interests, therefore, there is only a high-risk situation in which the secondary interest could, potentially, interfere with the primary interest. In other words, a conflict of interest exists where an official could abuse its position in order to obtain private gain, whereas corruption exists where this official does abuse its position.

However, the fact that the situation is merely potential: a person in conflict of interest may not act improperly must be stressed. Anyhow, it is clear that a public administration, and an institution in general, cannot simply be content with the

possibility that this pollution of the public interest by the private³⁴⁹ does not occur.

For this reason, mechanisms to identify the conflict of interest and prevent its degeneration must be provided for in legislative instruments, particularly when it comes to officials who manage large amounts of money or are involved in high-level decision-making processes.

Understanding the close connection between the two cases can help to provide more effective means of preventing and identifying fraudulent activities. However, there has been, for a long time, a lack of attention to this link. Even the UN Convention against Corruption makes only few references to conflict of interests.

Surely this can be due, as with corruption, to differences about the exact nature of the conflict of interest. For example, this is clear if we think to realities that are traditionally based on familiar, or even tribal, relationship.

First of all, we must draw a distinction between: actual conflict of interest, i.e. the one that occurs during the decision making process, when the agent, the official or the employee is required to act independently; potential conflict of interest, which is the situation when there is no conflict but there is an actual foreseeable possibility for it to arise in the future; and perceived conflict, which exists where there is no conflict, but third parties believes that it does. The latter is a situation which, for the point of view of anticorruption, is not dangerous at all. However, the perception could damage the reputation and, in our case, thrust in the EU institutions.

There are certainly preventive steps that can be undertaken, in order to prevent conflicts of interest from morphing into corruption. First of all, employers need to create an environment in which staff members feel at ease in declaring potential conflicts of interest. Moreover, it is necessary to identify a method for the management of these situations, which may also involve the removal of the conflicted employee from the specific situation or his reassignment to another office. Furthermore, the staff must be instructed to ensure that they are able to identify all types of conflicts of interest that may occur in the procedures to which

³⁴⁹ The reference is made to the definition of corruption as "*pollution of the public by the private*" made by Dennis Thompson, already mentioned in the first chapter.

they are assigned.

The Juncker Commission, following the impulse to increase the transparency, occasionally mentioned during the previous chapters, in 2018 approved the new code of conduct for the Members of the European Commission³⁵⁰.

The new code of conduct defines for the first time the concept of conflict of interest and establishes the principle for which commissioners are required to avoid not only situations of conflict of interest, but also those that could be perceived as such.

Recital 2 declares that “*members of the Commission are chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. They shall be completely independent and neither seek nor take instructions from any Government or other institution, body, office or entity, they shall refrain from any action incompatible with their duties or the performance of their tasks and they may not engage in any other occupation, whether gainful or not*”.

Article 2 paragraph 1 is particularly emphatic when it sets the obligation for the Members of the Commission to “*devote themselves fully to the performance of their duties in the general interest of the Union*”. It is clear that this Article establish the fundamental principle that the interest to be pursued is only that of the Union.

Paragraph 6 is the core general provision with regard to conflict of interest, since it contains its definition that covers also the perceived conflict. It states the “*Members shall avoid any situation which may give rise to a conflict of interest or which may reasonably be perceived as such. A conflict of interest arises where a personal interest may influence the independent performance of their duties. Personal interests include, but are not limited to, any potential benefit or advantage to Members themselves, their spouses, partners or direct family members. A conflict of interest does not exist where a Member is only concerned as a member of the general public or of a broad class of persons*”.

The Code obliges all Members of the Commission to annually declare any

³⁵⁰ Commission Decision of 31.1.2018 on a Code of Conduct for the Members of the European Commission, C(2018) 700 final

situations which might create a conflict of interest in the performance in their duties³⁵¹.

The content of the declaration is provided for by paragraph 4 of the same Article and must identify: financial interests capable of constituting a conflict of interest; all activities, professional or otherwise in which the Member is involved or has been involved in the last ten years; every entity in which the Member has an interest or in which or for which he or she exercised an activity; membership of associations, political parties, trade unions, nongovernmental organisations or other bodies, if their activity may influence the exercise of public functions; property owned, with the exception of homes reserved for their use; and the professional activity of the spouse or of the partner³⁵². Annex 1 to the Code of Conduct contains a sample of the declaration.

The declaration submitted shall be scrutinised under the authority of the president³⁵³, which may consult the Independent Ethical Committee³⁵⁴ in order to decide on the measure to be taken.

Article 4 sets the specific procedure to be used in order to manage conflict of interest.

The provision starts with a general obligation for Members of the Commission to abstain from decisions, instruction of files and participation in debates, vote and discussions in relations to situations of conflict of interest as described by Article 2 paragraph 6³⁵⁵. Moreover, the President can “*take any measure he considers appropriate*” in order to manage those situations. For example, paragraph 4 states that he can decide for “*the reallocation of a file to another Member or to the responsible Vice-president*” or he can ask the Member to sell or place in a blind trust the financial interests mentioned above.

These two measures, however, must not be considered to be the only two

³⁵¹ See Article 3 Paragraph 1

³⁵² For each of those element, Article 3, paragraph 4 of the Code of Conduct sets specifics requirements and, in some cases, exceptions.

³⁵³ See Article 4, paragraph 2

³⁵⁴ The Independent Ethical Committee is provided by Article 12 as a body responsible to “*advise the Commission on any ethical question related to the Code and provide general recommendations to the Commission on ethical issues*”. The Article set an obligation to Members or former Members of the Commission, to cooperate with this body.

³⁵⁵ See Article 4, paragraph 1

that the President may take, since, as we said, he can adopt “*any measure*”, so the list provided by Article 4 is not exhaustive.

Certainly, the signal given by the Commission is important and well structured, given the provision of all possible forms of conflict of interest, the possibility of modulating the measures on the basis of the gravity of the fact, without having crystallized the possible answers from the president in an exhaustive list. However, it must be recognized that still much must be done, not only within the Commission, but also in the other institutions of the Union, which could follow this lead example, in the Member States, but also at the international level in the competent *fora*. A strong commitment to fight corruption, indeed, necessarily start with a zero-tolerance policy against these situations. Preventing corruption, indeed, can be in many ways easier and more effective than identifying and contrasting it once verified, if only for the reasons related to the difficulties to break the *pactum sceleris*, which were mentioned several times in the first chapter.

3. Tackling corruption in Public Procurement: the 2014/24/UE Directive and other instruments

Public procurement is one of the sectors most vulnerable to corruption, and considerable financial losses occur due to corrupt practices. In the first chapter it was reported that corruption in the area of public procurement is a barrier to competition in the internal market, since economic operators of some Member States may be reluctant to operate in markets that they consider to be prone to corruption.

Moreover, a study conducted in 2008 showed that an amount between 20 to 25% of the value of public procurement contracts is lost because of corruption³⁵⁶ and, since one fifth of the EU’s GDP is spent every year in procuring goods, works

³⁵⁶ See R. STEFANUC, *op.cit.*, p.433, that cites T. MEDINA ARNÁIZ, *EU Directives as an Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts* in K. THAI (Ed.), *International Handbook of Public Procurement*, CRC Press, 2008, 105 – 130.

and services³⁵⁷, it is evident that the problem is quite relevant in order to prevent a misuse of the resources of the Union. A 2013 study on corruption in public procurement in eight Member States found that corruption costs in 2010 amounted up to 2.2 billion Euros³⁵⁸. A more recent study found that the cost of corruption in the public procurement sector amounts to 5.33 billion Euros³⁵⁹.

The public procurement procedure is very complicated, made up of many phases and corruption can occur at any stage of the process: in the assessment of needs phase, in the preparation phase, in the award phase, in the implementation phase and even post implementation in the final accounting phase.

There are several ways in which corruption can infiltrate public procurements: investments for unnecessary or inexistent public works; collusive bidding; unclear evaluation criteria; poor quality of goods and services; the division of tenders into smaller tenders to avoid competitive procedures; the unjustified and frequent use of emergency procedures; amendments to the contract terms after the conclusion of the contract; tailoring criteria for specific companies are only few of them.

As the first anticorruption report, and in particular the individual country assessment, pointed out, given the fact that corruption risk level in the public procurement process is rather high in some Member States, as illustrated by numerous high-level corruption cases in this field, anti-corruption safeguards in public procurement should be a matter of priority for both EU Member States and EU institutions.

The problem with public procurement is that at a significant percentage of EU funds for procurement are allocated at regional and local levels where local authorities are given strong discretionary powers, usually not accompanied by

³⁵⁷ See Section IV of the first *Anticorruption report*, COM(2014) 38, *cit.*

³⁵⁸ The study, conducted by PriceWaterhouseCoopers and ECORYS, considered eight EU Member States (France, Italy, Hungary, Lithuania, Netherlands, Poland, Romania and Spain) and five public procurement sectors (road and rail, water and waste, urban/utility construction, training, research and development). See, PRICEWATERHOUSECOOPERS AND ECORYS, *Identifying and Reducing Corruption in Public Procurement in the EU – Development of a methodology to estimate the direct costs of corruption and other elements for an EU-evaluation mechanism in the area of anti-corruption*, 30 June 2013.

³⁵⁹ This study, conducted by RAND Europe, includes all Member States and all the areas of public procurement. See, RAND Europe, *The Cost of Non-Europe in the area of Organised Crime and Corruption*, 2016

strong check and balances and those powers often escape the controls of the Union.

The public procurement legislation is one of the most long-lived in the Union, since it has existed for more than 40 years, with, of course, several changes and amendments.

The entire system of public procurement was revised in 2014. However, up until then, the main European Union Directives on public procurement were Directive 2004/18/EC³⁶⁰; on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts Directive 2004/17/EC³⁶¹; coordinating the procurement procedures of entities in the water, energy, transport and postal services sectors and Directive 2009/81/EC³⁶², on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, which is the only one still in force.

It is worth mentioning those directives, even if they are no longer into force, since they somehow clarified and simplified the existing procedure and introduced mandatory provisions requiring the exclusion of corrupt suppliers from public contract.

In 2011, however, the EU Commission proposed to revise the exiting directives, in order to covers lacunas in the EU legislation, such as a weak protection of vulnerable section³⁶³ and the lack of provisions governing the transnational work concessions. In 2014, Directive 2014/23/EU on the award of concession contracts³⁶⁴, Directive 2014/24/EC on public procurement³⁶⁵ and Directive 2014/25/EC on procurement by entities operating in the water, energy,

³⁶⁰ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, OJ L 134, 30.04.2004

³⁶¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 *coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors*, OJ L 134, 30.4.2004

³⁶² Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 *on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC*, OJ L 216, 20.8.2009

³⁶³ E.g.: water, construction, energy, postal service, transport, concessions

³⁶⁴ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 *on the award of concession contracts*, OJ L 94, 28.3.2014

³⁶⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*, OJ L 94, 28.3.2014

transport, and postal services sectors³⁶⁶ entered into force, repealing the old provisions.

The new directives address a number of sensitive issues relevant to tackle corruption in this area, namely: prevention of conflict of interest, monitoring and reporting of procurement activity by Member States, e-procurement and others.

For the first time, the new Directives define the concept of conflict of interest by stating that it should “*at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure*”³⁶⁷.

However, this is not the only provision on this topic, since Directive 2014/24 and Directive 2014/25 also provide that contracting authorities must take “*appropriate measures to effectively prevent, identify and remedy conflicts of interest*”. A similar provision is contained in Article 35 of the Directive 2014/23 however, in this case, the article states that the appropriate measure to be taken shall aim “*to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest*”.

Those Directives do not contain a list of appropriate measures, however, for instance, all procurement officers could be asked to sign a declaration for each procurement procedure to confirm that they do not have any shared interest with tenderers, or to spontaneously make declaration in the event that interests of this kind should come to light.

Since even the post-award phase is sensitive to corruption, another important provision useful to prevent this offence is Article 43 of the Directive 2014/24 which contains very detailed rules for modifying contracts during this period. In particular a new call for tenders can be avoided only if the modifications

³⁶⁶ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 *on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC*, OJ L 94, 28.3.2014

³⁶⁷ See, Article 24, paragraph 2 of the Directive 2014/24; Article 35, paragraph 2 of the Directive 2014/23; and Article 42, paragraph 2 of the Directive 2014/25.

have been provided for in the initial procurement documents in “*clear, precise and unequivocal review clauses*” and only if the changes to the contract do not “*alter the overall nature of the contract*”, i.e. do not change the nature of the contract.

Moreover, the Directives provide that economic operators found guilty of corruption, or other crimes such as, among the others, participation in a criminal organization, or fraud or money laundering, must be excluded from participation in a concession award procedure³⁶⁸.

In particular, the definition of corruption for the purpose of those directive is made *per relationem* to Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the Union, to Article 2 paragraph 1 of the Council Framework Decisions 2003/568/JHA on combating corruption in the private sector³⁶⁹ and to national law of the contracting authority, of the contracting entity or of the economic operator.

Moreover, the Directive on the award of concession contracts contains monitoring and reporting obligations for Member States that states that if monitoring authorities identify violations of the rules for the award of concession contract “*such as fraud, corruption, conflict of interest and other serious irregularities, or systemic problems, they shall be empowered to indicate those violations or problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof*”³⁷⁰. They also have an obligation to make the result of their monitoring available to the public.

Furthermore, Member States, at the request of the Commission, have to submit a report to the Commission every three years on the most recurrent sources

³⁶⁸ See Article 38, paragraph of the Directive 2014/23 and Article 57 paragraph 1 of the Directive 2014/24. Directive 2014/25 does not contain a specific provision on the exclusion grounds, however, Article 80 allows for the use of the exclusion grounds proved under Directive 2014/24.

³⁶⁹ Article 2 of the Framework Decision is named “*Active and passive corruption in the private sector*” and states that “*Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities: (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties*”.

³⁷⁰ See Article 45 paragraph 2 of the Directive 2014/23.

legal uncertainty, both on prevention measures as well as on the detection, and they also have to report cases of fraud, corruption, conflict of interest and other irregularities in public procurement³⁷¹.

One of the most innovative, albeit the most postponed over time³⁷² aspect of the Directives, however, is the use of e-procurement. Recital 52 of the Directive 2014/24 recognise that “*electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes*”.

Article 22 of the same Directive provides for the abandonment of paper communication mechanisms between contracting authorities and companies in all tender phases. Use of the e-procurement procedures, reduces the possibility of unfair interactions and makes it easier to detect irregularities and corruption. indeed, according to the OECD, the digitalisation of procurement processes is capable to strengthen internal anti-corruption controls³⁷³. Paragraph 1 lays down that “*Member States shall ensure that all communication and information exchange under this Directive, in particular electronic submission, are performed using electronic means of communication*”.

The electronic system, if on the one hand stimulates the participation of companies, given the considerable simplification of procedures, on the other hand, as highlighted by the third paragraph of the Article, ensures the confidentiality of tenderers until the final stages of the procedure. In this way the discretionary phases are not influenced by possible elements of recognition of the bidding companies that could increase the possibilities of conflicts of interests.

The Directive entered into force in its entirety only a few months ago, but many States had already been implementing Article 22 for some time. However, it is unthinkable that by the mere fact of having activated e-procurement mechanisms,

³⁷¹ *Ibidem*, paragraph 3.

³⁷² Article 90 of the Directive 2014/24 clearly states that “*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016*” however, an exception is made with regard to Article 22 whose implementation, in derogation to the general provision, according to paragraph 2 of the same Article, may be postponed until 18 October 2018

³⁷³ OECD, *Preventing Corruption in Public Procurement*, 2016. The study provides the example of the integrated e-procurement system KONEPS in Korea, which increased participation in public tenders and improved transparency, eliminating instances of corruption, by preventing collusive acts.

we will see immediate effects on corruption. It will need to be constantly implemented and updated with new technologies in the name of digital safety and to be constantly monitored by an adequate control mechanism. Moreover, without a high digital literacy of the public officials involved in the procedures, it is likely that the norm, even if noble in its intentions, will only bring costs for public finances, complications and delays in the proceedings.

4. Whistle-blowers protection at EU level: the current situation and the Commission proposal

Reporting by the public or private employee of illicit workplace work is one of the most important tools to prevent and combat corruption. However, practice shows that employees are often unwilling to report since they fear possible retaliation. For these reasons, the importance of ensuring effective protection for informants for the protection of the public interest is increasingly recognized at both European³⁷⁴ and international³⁷⁵ level.

A Directive to protect whistleblowers would create the conditions to make corruption cases emerge more easily.

Currently, whistleblower protection has been included in the laws of several EU Member States. However, the legislation is very fragmented and often deficient and chaotic, not only on the whistleblower protection side, but also on the characteristics of the disclosure and on its probative value³⁷⁶.

There is a general awareness that the legislation applicable to disclosure

³⁷⁴See, Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014, *Protection of Whistleblowers*; and also Resolution 2171 (2017) of the Parliamentary Assembly of the Council of Europe of 27 June 2017, *Parliamentary scrutiny over corruption: parliamentary cooperation with the investigative media*.

³⁷⁵ The rules relating to the protection of informers are defined in International instruments and guidelines such as the United Nations Convention of 2004 against Corruption, of which all the Member States and the European Union itself are Parties; the G20 Anti-Corruption Working Group Action Plan 2017-2018; the OECD Paper, *Committing to Effective Whistleblower Protection* of 2016; the Council of Europe Recommendation, *Protection of Whistleblowers*.

³⁷⁶ See the findings of F. SPIEZIA, *How to improve cooperation between Member States and European Union institutions so as to better ensure the protection of whistleblowers*, in ERA Forum, 2011, vol.12, pp.387-407, pp. 397 *et seq.* The fifth part of the study analyse the legislation on the protection of whistleblowers of the EU Member states.

must follow certain criteria such as: it must be made by an employee; the employee must be in good faith; and it must be made to responsible person or to an employer. However, the legal regime varies considerably from State to State and, only in a few countries, we find regulations concerning the probative value of disclosure both in the investigative and in the trial phase³⁷⁷.

Moreover, also the legal implication of the protection of whistleblowers if the case has an international dimension and judicial cooperation is concerned should be addressed. Which is the case where there was a need to protect a whistleblower in different Member State when, for instance, the person must be moved among different Member States for procedural reasons.

A whistleblowing legislation could help prevent corruption, thus helping to recover large amounts of money, as demonstrated by a recent study of the European Commission³⁷⁸ according to which, in the public sector, the protection of whistleblowers would allow the recovery of up to 9.6 billion Euros annually, only in the sector of public procurement on the European territory.

The 2017 Special Eurobarometer survey on corruption³⁷⁹ found that 81% of Europeans said they had not reported cases of corruption that they knew happened.

The EU institutions, the private sector and all anti-corruption actors have long been calling on the Commission to take action in this direction. In particular, we refer to the resolution of 24 October 2017 “*on legitimate measures to protect whistleblowers acting in the public interest*”³⁸⁰ and that of 20 January 2017³⁸¹ “*on the role of whistleblowers in protecting the financial interests of the EU*”. In both of them, the European Parliament called on the Commission to present a legislative proposal to ensure a high level of protection for whistleblowers in the EU, both in the public and private sectors, as well as in the European and national institutions. The Council then encouraged the Commission to examine the possibility of

³⁷⁷ *Ibidem*

³⁷⁸ EU COMMISSION, DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP AND SMES, *Estimating the economic benefits of whistleblower protection in public procurement*, Final Report, July 2017

³⁷⁹ Special Eurobarometer 470 on Corruption, *cit.*

³⁸⁰ European Parliament resolution of 24 October 2017 *on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies*, 2016/2224(INI)

³⁸¹ European Parliament Resolution of 20 January 2017 on the role of whistleblowers in the protection of EU’s financial interests, 2016/2055(INI)

intervention in this area³⁸². Furthermore, civil society and trade unions have constantly called for EU-wide legislation on the protection of whistleblowers.

The debate intensified as a result of various events that occurred in recent years, such as the so-called *LuxLeaks*, when two whistleblowers employed in a financial company in Luxembourg were legally prosecuted in 2016 for disseminating data on illicit ties of the small state with large financial companies.

Soon, other cases occurred, such as: *Panama Papers*, *Dieselgate* and, lastly, the recent case of *Cambridge Analytics*.

To answer to this call for action, On April 23, 2018, the European Commission published a proposal for a Whistleblowing Directive³⁸³. The proposal aims to guarantee whistleblowers more protection and greater legal certainty in relation to their rights and obligations.

In the text, the Commission recognizes that a higher level of protection for whistleblowers contributes to a positive impact on the fundamental rights recognized by the EU Charter of Fundamental Rights³⁸⁴.

The third recital of the Proposal considers that whistleblower protection is useful in order to enhance the enforcement of Union law in some policy areas. In this sense, the sixteenth recital states that “*the protection of the financial interests of the Union, which relates to the fight against fraud, corruption and any other illegal activity affecting the use of Union expenditures, the collection of Union revenues and funds or Union assets, is a core area in which enforcement of Union law needs to be strengthened*”.

³⁸² See, in this sense the press release on the 11 October 2016 ECOFIN conclusion answering the commission communications on further measures to enhance transparency and the fight against tax evasion and avoidance, COM(2016) 451 final, available at: <https://www.consilium.europa.eu/it/press/press-releases/2016/10/11/ecofin-conclusions-tax-transparency/?j=1877099>, accessed on 29th December 2018

³⁸³ EU Commission, Proposal for a Directive of the European Parliament and of the Council *on the protection of persons reporting on breaches of Union law*, COM(2018) 218 final

³⁸⁴ The European Court of Human Rights, in the case *Guja v. Moldova*, considered the relationship between the protection of whistleblowers and the protection of freedom of expression. The case concerned a whistleblower who, after sending a few letters containing evidence of corruption regarding attempts by high-ranking politicians to influence the judiciary, was fired, charged and sentenced, along with the newspaper that published them, because they have revealed secret documents. In this case, the Court ruled that Moldova breached Article 10 of the European Convention on Human Rights when it dismissed the civil servant. However, the court emphasized that a case-by-case analysis of the context is necessary. See, ECHR, Case of *Guja v. Moldova*, application no. 14277/04, Judgment of 12 February 2008.

Chapter 1 of the Proposal delineate the scope of the Directive and provides for the definitions. Article 1, following the idea of the recital, when dealing with the objective scope of the proposal, recognize the link between enhancing the enforcement of Union law in the area of protection of the financial interests of the union, and so also of anticorruption, and the protection of whistleblowers³⁸⁵.

Moreover, Article 2 concerns the personal scope of the directive and states that the it covers a wide range of potential whistleblowers, including individuals outside the traditional employee-employer relationship, such as contractors, subcontractors and suppliers, but also “*persons whose work-based relationship is yet to begin*”³⁸⁶.

Chapter 2 contains the obligation for the Members States to ensure the establishment, both in public and private sector, of internal reporting channels and of adequate mechanism of follow-up. It also sets the technical requirements of those instrument by requiring also reporting channels “*ensure the confidentiality of the identity of the reporting person*”.

For what specifically concerns the private sector, the Directive makes it mandatory for all medium-sized and large entities to establish those procedures³⁸⁷. The reason for exempting small businesses is to be found in the potential financial and administrative burden attached to such mechanisms. Similarly, with regards to public entities, municipalities with less than 10,000 inhabitants are not obliged to establish such mechanisms³⁸⁸. This exemption however, apparently, does not come with justifications of any kind and it would be desirable that, during the legislative process, this provision is extended to all public entities, regardless of their dimension.

Specularly, chapter 3 deals with external reporting channels and ask Member States to ensure that the competent authorities set those channels in order to receive reports and, as well as the previous chapter, it also sets out minimum rules to follow when designing them³⁸⁹ and procedure applicable to the

³⁸⁵ See Article 1, paragraph 1, letter c of the Proposal

³⁸⁶ See Article 2, paragraph 2

³⁸⁷ See Article 4 paragraph 1 for the obligation and paragraph 3 for the exclusion of small entities.

³⁸⁸ See Article 4, paragraph 6, letter c

³⁸⁹ See Article 7

procedures³⁹⁰.

Chapter IV deals specifically with the protection of reporting persons. Article 13 defines the requirements to establish whether a reporting person is entitled for protection under the Directive. In particular, as a safeguard against possible abuses, it states that *“a reporting person shall qualify for protection under this Directive provided he or she has reasonable grounds to believe that the information reported was true at the time of reporting and that this information falls within the scope of this Directive”*.

Moreover, it indirectly creates a sort of hierarchy between the various reporting mechanisms. From the words of the Article, indeed, it seems that whistleblowers must use internal channels first, only if these channels do not work or it is reasonable to expect that they will not work, whistleblowers are entitled to report to competent authorities and, again. Only if neither this channel works, they can contact the media. The aim is to allow the recipient of the alert, to remedy the potential situation of danger for the public interest and at the same time to avoid unjust reputational damages.

The norm, thus formulated, constitutes a good balance between the needs mentioned above, the freedom to choose the most suitable means for the specific case and the protection of fundamental rights and freedoms such as freedom of expression and information.

Article 15 prohibits any retaliation form, not only those contained in the non-exhaustive list of Article 14³⁹¹. It is also the core provision with regards to the measures that Member States must take in order to protect whistleblowers. *E.g.*: they must exempt the reporting person from any liability for breach of restriction

³⁹⁰ See Article 9

³⁹¹ Article 14 claims that the forms of retaliation includes: “a) suspension, lay-off, dismissal or equivalent measures; b) demotion or withholding of promotion; c) transfer of duties, change of location of place of work, reduction in wages, change in working hours; d) withholding of training; e) negative performance assessment or employment reference; f) imposition or administering of any discipline, reprimand or other penalty, including a financial penalty; g) coercion, intimidation, harassment or ostracism at the workplace; h) discrimination, disadvantage or unfair treatment; i) failure to convert a temporary employment contract into a permanent one; j) failure to renew or early termination of the temporary employment contract; k) damage, including to the person’s reputation, or financial loss, including loss of business and loss of income; l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which entails that the person will not, in the future, find employment in the sector or industry; m) early termination or cancellation of contract for goods or services; n) cancellation of a licence or permit”

on disclosure of information³⁹²; they must invert the burden of proof in legal proceeding against case of possible retaliation³⁹³; ensure that “*in judicial proceedings, including for defamation, breach of copyright, breach of secrecy or for compensation requests based on private, public, or on collective labour law, reporting persons shall have the right to rely on having made a report or disclosure in accordance with this Directive to seek dismissal*”³⁹⁴.

Moreover, Member States may provide for “*further measures of legal and financial assistance and support for reporting persons in the framework of legal proceedings*”. This provision, although very positive, it’s not mandatory. Transparency International’s position paper on this Directive Proposal welcomes this point, but “*strongly encourages all Member States to provide for legal and financial assistance measures*”³⁹⁵.

Furthermore, Article 17 prescribe that Member States must provide for a system of penalties both for the reporting person in case of “*malicious or abusive reports*” and for natural and legal persons that “*hinder or attempt to hinder reporting; take retaliatory measures against reporting persons; bring vexatious proceedings against reporting persons; breach the duty of maintaining the confidentiality of the identity of reporting persons*”

The abovementioned Transparency International’s position paper is very positive on this Directive proposal, it clearly states that it “*provides strong foundations for the protection of whistleblowers in Europe*”. However, it also identifies some points and provisions that needs to be changed or strengthened.

Among the others, the NGO considers that Employees “*should be able to report breaches of law directly to the competent authorities*”. But, as it will be remembered, Article 13 of the Directive establishes a form of hierarchy between the reporting methods and makes it mandatory to use the internal reporting channels as first instruments, with some exceptions. According to Transparency International, however, “*there are many valid reasons why a whistleblower might prefer to report a wrongdoing directly to the authorities rather than use internal*

³⁹² See Article 15, paragraph 4

³⁹³ See Article 15, paragraph 5

³⁹⁴ See, Article 15, paragraph 8

³⁹⁵ Transparency International, *Whistleblower Protection In The European Union, Analysis Of And Recommendations On The Proposed Eu Directive*, Position Paper 1/2018

reporting mechanisms – for example, if they fear or have reason to believe that they would experience unfair treatment, that their identity cannot be protected or that the wrongdoing might be covered up". Therefore, it recommends the removal of this obligation for employees.

Moreover, the paper is concerned with the fact that the Directive does not explicitly address anonymous reporting and suggests that the Directive addresses at least some aspect of anonymous reporting, namely: the non-automatic discard of a report for the sole fact that it is made anonymously and the full protection to anonymous whistleblowers who have been identified.

More points to be strengthened concerns: the material scope of the Directive which require an extension in order to include every area of European Union law; the personal scope of the Directive which must be extended too in order to include also ex-workers or persons who experience retaliations because of their association with the whistleblower; the lack of an obligation to include procedures for protecting whistleblowers in the internal reporting mechanism; and the lack of an obligation to acknowledge receipt of internal reports, since the Directive includes the obligation to acknowledge receipt of the report for external reporting procedures but not for internal reporting procedures and *"the whistleblowers reporting internally should not be left to wonder for three months³⁹⁶ whether their report was actually received"*³⁹⁷.

However, this is still a proposal and we have seen, speaking of the EPPO Regulation, that the legislative dialogue can radically change the structure of the final text, impoverishing it or, hopefully, taking into account the demands of civil society and of all the other actors involved in order to produce a Directive that is as complete and effective as possible.

³⁹⁶ This is the maximum timeframe, set by the Directive, within which the whistleblowers must receive feedback about the follow-up of the report.

³⁹⁷ For a comprehensive study of the weaknesses of the Directive according to Transparency International and the respective recommendations, please refer to the cited position paper.

CHAPTER IV

EU ACTION IN FIGHTING CORRUPTION IN EXTERNAL POLICIES

SUMMARY: 1. Combating corruption through EU relations with third states – 2. Anti-corruption provisions in EU trade agreements: an analysis of the main texts – 2.1 CETA: dealing with transparency as a mean to prevent corruption – 2.2 Cotonou Agreement and the specific consultation procedure in case of corruption – 2.3 Modernising the EU-Mexico Global Agreement: the 2018 Agreement in Principle – 2.4 EU-Chile ongoing negotiations for the modernisation of the 2002 Association Agreement – 3. The EU enlargement policy: addressing corruption as a fundamental stage to accession

1. Combating corruption through EU relations with third states

In the previous chapter, we analysed the most recent development of the fight against corruption in the internal policies of the EU. The Union, however, does not counter corruption only at a purely internal level, but deals also with preventing and combating it when relating to third countries.

In particular, we will deal with two major areas of the Union's external policies that have intertwined with anti-corruption efforts.

We will note that the Union has included anti-corruption clauses in the most recent treaties, especially those with developing countries, conforming to a practice that has been adopted for some time in other countries, see for instance the USA.

This can be intended in two different ways: on the one hand it is certainly a way to protect the EU budget from possible misuse of money due to corruption; on the other hand, given that we are talking about general agreements useful for development purposes, EU became aware of the fact that corruption in developing

countries is a serious problem and a serious limit to the integration of these countries into the world economy, as we mentioned in the first chapter.

We will briefly see the mechanism for accession to the European Union, and, in particular, that the Union requires candidate countries to adopt a number of structural reforms, in order to prevent access by an unprepared country from destabilizing the whole Union.

It will be noted that anti-corruption has become one of the fundamental points on which the European Union demands improvements from the acceding country. However, the lack of adequate post-accession follow-up mechanisms often led to backsliding in countries that had also shown improvement during the pre-accession period.

2. Anti-corruption provisions in EU trade agreements: an analysis of the main texts

By removing tariff barriers and aiming towards the creation of fairer business environments, international trade agreements play fundamental roles in the economic development of countries.

However, corruption has been identified as a major impediment to free trade and investment. For this reason, as an answer to the “*dark side of globalization*”, over the last two decades, as we have seen in the first chapter, several anticorruption initiatives have been taken.

The WTO trade system does not have a large number of provisions on good governance. It is precisely in order to face this absence, that the main world actors have decided to take charge of the insertion in their commercial agreements of measures to improve transparency and reduce bribery in international trade and in international investment.

The United States have been the pioneers in this field, since their bilateral trade agreements contains such clauses for 15 years ³⁹⁸.

³⁹⁸ A. MUNGIU-PIPPIDI, *Fostering good governance through trade agreements An evidence-based review*, in POLICY DEPARTMENT FOR EXTERNAL RELATIONS DIRECTORATE GENERAL FOR EXTERNAL POLICIES OF THE UNION, *Anti-corruption provisions in EU free trade and investment*

Today, a general consensus has been reached on the best practice on anti-corruption and transparency, and on the inclusion in trade agreements of provisions explicitly referring to international anti-corruption conventions, of commitments to criminalise active and passive bribery, or to introduce non-criminal sanctions for legal persons and to strengthen whistleblower protection.

In the next subparagraphs, we will analyse the anticorruption, or anticorruption related, norms, inserted in trade agreements between EU and third countries.

This is a matter of great relevance for the Union, in 2018, in fact, the European Parliament, in the annual report on the implementation of the common commercial policy³⁹⁹, “*reaffirms its support for the inclusion in all future trade agreements of ambitious provisions on combating corruption within the Union's exclusive competence*” moreover, it “*welcomes the inclusion of anti-corruption provisions in the ongoing negotiations on updating the EU-Mexico FTA and EU-Chile Association Agreements*” which we will discuss about later in this chapter.

First of all, we will briefly examine the agreement between Canada and EU, since, even if it does not contain any specific provision on anticorruption, it contains some reference to this issue. Then we will analyse the special consultation procedure of the Cotonou agreement and the innovative sections specifically dealing with corruption of the abovementioned agreements with Mexico and Chile

2.1 CETA: dealing with transparency as a mean to prevent corruption

Chapter 27 of The *EU – Canada Comprehensive Economic and Trade Agreement*⁴⁰⁰, which provisionally entered into force in September 2017⁴⁰¹, is entirely dedicated to transparency provision, dealing with the publication of

agreements: Delivering on clean trade, PE 603.867, April 2018

³⁹⁹ European Parliament resolution of 30 May 2018 *on the Annual report on the implementation of the Common Commercial Policy*, procedure 2017/2070(INI), P8_TA(2018)0230

⁴⁰⁰ *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, OJ L 11, 14.1.2017

⁴⁰¹ It will enter into force fully and definitively when all EU Member States parliaments have ratified the Agreement.

information and to consultation procedures. Moreover, the section on procurement contains very detailed provisions regarding the transparency of procurement information, requiring the electronic publication of the entire procurement process, from the tender announcement to the award of contract.

As far as corruption is concerned, however, CETA does not contain a chapter specifically designed to counteract the corrupt cases. Despite this, some references to corruption can be found in the text.

In particular, Section F of the agreement, aimed at resolving investment disputes between investors and States, provides for the establishment of a multilateral investment tribunal to which national investors of a State Party submit a claim that the other Party has breached an obligation. However, Article 8.18 states that “*an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process*”.

Moreover, Article 19.4 provides for the obligation of governments to conduct procurement procedures in a manner that will “*prevent corrupt practices*”⁴⁰². This sentence, however, from the point of view of effectiveness is not very incisive, since it does not identify any possible method of prevention and puts the question totally at the discretion of the states.

However, it must be remembered that, as universally recognized, greater transparency leads to a reduction in the possibility of corruption. The communication of all the information allows, in fact, a greater effectiveness of the control of competent authorities.

In particular, then, a failure to implement transparency rules could be the basis for investors to dispute with a government using procedures for dispute settlement. Therefore, it is obvious that by ensuring publication of all the criteria and information of the selection the concrete possibilities that corruption acts occur when the contract is awarded are reduced.

2.2 Cotonou Agreement and the specific consultation procedure in case of

⁴⁰² See Article 19.4 paragraph 4, letter c of CETA

Corruption

The agreement between the EU and the African, Caribbean and Pacific group of States, so-called APC countries, called Cotonou Agreement⁴⁰³, is certainly one of the most complete from our point of view.

Its origins are to be found in commercial agreements between European countries and their former colonies. In 2000, the EU concluded the Cotonou Agreement, to date the most complete partnership agreement between developing countries and the EU, to create an EU's framework for cooperation with 79 countries: 16 in the Caribbean, 48 in Africa and 15 in the Pacific.

The agreement is intended to contribute to the progressive integration of the developing countries of the ACP into the world economy and to reduce, and gradually eliminate, poverty from them. Precisely for this reason it is not a commercial agreement in the strict sense. The agreement, indeed, is made of three pillars⁴⁰⁴ and only one of them directly concerns trade.

Since the agreement will expire in February 2020, negotiations for the future agreement have already begun. On 22 June 2018, in fact, the Council adopted the negotiating mandate⁴⁰⁵, closely following the ACP countries, which adopted their own on 30 May.

The Cotonou Agreement contains various norms on corruption, albeit in an unorganized way. Article 9 is about essential and fundamental elements of the partnership. It deals also with good governance⁴⁰⁶ and assesses the link between corruption and good governance, since it states that “*in the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes*

⁴⁰³ *Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part*, signed in Cotonou on 23 June 2000 - Protocols - Final Act – Declarations, 2000/483/EC, OJ L 317, 15 December 2000

⁴⁰⁴ Namely: development cooperation, economic and trade cooperation and political dimension

⁴⁰⁵ See press release, at: <https://www.consilium.europa.eu/it/press/press-releases/2018/06/22/eu-african-caribbean-and-pacific-countries-future-partnership-council-adopts-negotiating-mandate/>, accessed on 7th January 2019

⁴⁰⁶ See Article 9 paragraph 3 of the Cotonou Agreement

of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption”.

Article 30, which is about regional cooperation and integration, states that “Cooperation shall, in the area of regional cooperation, support a wide variety of functional and thematic fields which specifically address common problems and take advantage of scale of economies”⁴⁰⁷ including, among several others⁴⁰⁸, “bribery and corruption”⁴⁰⁹.

Moreover, Article 33, which is about institutional development and capacity building, claims that “the Parties shall work together in the fight against bribery and corruption in all their societies”.

As we said in the first chapter, corruption is often endemic in developing countries, and is considered to be one their major problems, since it contributes to the misuse of funds. For this reason, the Agreement has been endowed with a specific consultation procedure to be used in case of corruption.

Furthermore, Article 97 lays down a specific consultation procedure and measures to be taken in cases of corruption. In particular the Article refers to situations in which the European Union is a significant partner in terms of financial support to economic and sectoral policies and programmes. In this case, if a serious case of corruption occurs, it should “give rise to consultations between the Parties”⁴¹⁰. It is clear from the text of the norm and from what it has been said in the first chapter, that the main scope of this procedure is the protection of the budget of the Union from misuse of funds.

Under the conditions laid down in Article 97, each Party is entitled with the possibility to invite the other to enter consultations which shall last no longer than

⁴⁰⁷ See Article 30, paragraph 1

⁴⁰⁸ Article 30 paragraph 1 contains a list of areas which includes the most disparate sectors: infrastructure, environment, health, technological development, organized crime, and others. However, letter f) contains an opening clause, therefore the list is to be considered merely illustrative and not exhaustive.

⁴⁰⁹ See Article 30, paragraph 1, letter f

⁴¹⁰ See Article 97 paragraph 1

60 days. If at the end of the consultation procedure a satisfactory solution has not been reached, or if the consultation is refused, the Parties of the agreement may take “*appropriate measure*”. The Agreements does not provide any lists of these measures, either exhaustive or exemplary, but traces, very briefly, their essential features.

It merely states that those measures should be proportional to the seriousness of the situation, should consider the integrity of the agreement and, only as a last resort, can consist in the suspension of the agreement⁴¹¹. However, reference can be made to the procedures of the dispute settlement mechanisms of the Article 98, which consists in the use of the Council of Ministers, or, failing that, in arbitration.

In any case, the Party where the offence has occurred must take immediate measures to remedy the situation⁴¹².

However, it must be noted that this consultation procedure has been used only once, against Liberia in 2002, with subsequent unsuccessful attempts against other States. That leads to the conclusion that the effect of the agreement, although very strong on paper, has been minimal in practice in fighting corruption.

2.3 Modernising the EU-Mexico Global Agreement. The 2018 Agreement in Principle

In 2000 the “Global Agreement”⁴¹³ between the European community and the United Mexican States entered into force. It covers “*political dialogue, trade relations and cooperation*”⁴¹⁴. In 2013, during the EU - Community of Latin American and Caribbean States Summit, leaders decided to explore the possibility for a major update of the Agreement. EU Started negotiations with Mexico in 2016

⁴¹¹ See Article 97, paragraph 3

⁴¹² *Ibidem*

⁴¹³ *Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part*, OJ L 276, 28 October 2000

⁴¹⁴ <http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/>, accessed on 5th January 2019

and an Agreement in Principle⁴¹⁵ on the trade part was reached in April 2018.

The Global Agreement did not contain anti-corruption clauses and confined the issue of transparency to Article 10 dealing with public procurements, merely stating that the Joint Council⁴¹⁶ should have taken a decision in order to permit a “*gradual and mutual opening of agreed government procurement markets*” which includes, among others “*fair and transparent procedures*”⁴¹⁷.

The new agreement instead, will contain an entire chapter dealing with anticorruption, so that, once finalized, it will be the very first EU trade agreement to include provisions to fight corruption.

Bearing in mind that the text is still under negotiations, it is not finalised and may undergo further modifications during the process, an analysis of the core principles is possible by referring to the provisional text published by the Commission in compliance with the its transparency policy⁴¹⁸.

The anti-corruption provisions aim at preventing bribe and corruption in trade and in investment since it “*undermines good governance and economic development and distorts international competitive conditions*”⁴¹⁹. Moreover, the Parties recognize that corruption could constitute a non-tariff barrier for investors that seeks to participate in trade.

References to the UN Convention against Corruption are frequent in the text of the agreement: the whole third part of the anti-corruption chapter, which concerns the specific measures to combat corruption, it is entirely build *per relationem*. It recognises the necessity to transpose the UNCAC rules on: active and passive bribery of public officials, active and passive bribery in the private sector, liability of legal persons and money laundering.

Moreover, the agreement dedicates the following two sections to preventing

⁴¹⁵ Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>, accessed on 5th January 2019

⁴¹⁶ The Joint Council is established by Article 45 and consist in a body responsible for the supervision on the implementation of the Agreement

⁴¹⁷ See Article 10, paragraph 2, letter d of the Global Agreement

⁴¹⁸ Since the legally binding text of the agreement is still provisional, the legal review phases are underway, and must be part of the global agreement, we cannot refer to specific articles, thus we must use of the provisional numbering of the text available today.

⁴¹⁹ See Art. XX.1, *Provisions on Anti-corruption in the context of the Modernisation of the EU-Mexico Association Agreement*, available at: http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156826.%20Anti-corruption%20-%20Agreement%20in%20Principle%20REV.pdf,

corruption respectively in the private sector and in the public one. In particular, in the first one we can find a rule specifically dedicated to anti-money laundering which ensures that the identity of the real owner of a bank account, trust or fund, the so-called “beneficial owner”, is always known and that the relevant enforcement or tax authorities can access that information⁴²⁰.

For what concerns the prevention of corruption in the public sector, the fifth section of the agreement contains other recalls of UNCAC. In particular it is stated that the Parties must engage under the issues of: application of codes of conduct for public officials; facilitation the reporting by public officials of acts of corruption to appropriate authorities; and management of conflict of interest via the obligation, for public official to declare potential risk situation of that kind.

Moreover, the importance of transparency in the public administration to prevent and combat corruption in international trade and the participation of the civil society are reiterated. This latter, indeed, as emerged from the analysis of the United Nation conventional text carried out in the first chapter, is a very important feature of the UNCAC. Furthermore, also with regard to the protection of whistleblower, Article XX.14 states that the reporting of acts of corruption should be facilitated and that “*the Parties reaffirm [...] their commitment under Article 33 of UNCAC to consider establishing appropriate measures to provide protection against any unjustified treatment for any reporting persons*”.

However, one the most relevant aspects of the whole chapter on anti-corruption concerns the mechanism envisaged for disputes resolution which ensures, at least theoretically, the effectiveness of the provisions.

It will allow the Parties to initiate a consultation procedure in order to find an amicable, diplomatic solution to any disagreement on the interpretation or on the implementation of the anti-corruption provisions.

In the consultation procedure, if no agreement is reached within 90 days, the Party that sought consultation can request the assistance of a Group of Experts⁴²¹,

⁴²⁰ *Ibidem*, Article XX.10

⁴²¹ See the Article “*expert assistance*”. This Article defines also the procedure to appoint the group of experts, stating that: “*the Group of Experts shall be composed by three experts. The Parties shall consult with a view to agree on the experts that will be part of the group of experts within [XXX] days from the date of receipt of the written request referred in paragraph 1. For that purpose, each Party shall designate an expert, who may be a national of that Party, and propose to the other Party*”.

which would issue its Opinion with a proposed solution within 90 days. This Opinion must contain “*the findings of facts, the applicability of the relevant provisions and the basic rationale behind the solution it has proposed*”⁴²². Such Opinion would be made public and would require the Parties to discuss, with the help of their civil society if appropriate, ways of implementing such recommendations. Moreover, the final paragraph of the article on the “*Experts’ Opinion*” contains also a follow-up mechanism, to be carried out by the Sub-Committee on Anti-corruption on Trade and Investment⁴²³, to ensure that the solutions contained in the opinion are implemented.

This is a landmark text for what concerns anticorruption in EU since, as we mentioned before, but it is worth stressing again, it is the first time that an autonomous detailed section on anticorruption, even if written *per relationem*, is inserted in a trade agreement of the Union. Especially, the provision not only of a dispute settlement mechanism specific to the anti-corruption norms, but also of a follow-up mechanism, reinforces the agreement and guarantees, for now only theoretically, greater effectiveness.

However, it must be remembered that this is only an agreement in principle and it is a provisional text. So, there are still several steps, which could, although probably not drastically, partially change the structure.

In particular, negotiations from both sides will continue, in order to resolve the remaining technical issues and finalise the full legal text. Then, the Commission will proceed with the legal verification and translation of the agreement into all the

up to three candidates to serve as Chairperson. The Parties shall endeavour to agree on the Chairperson from among the Chairperson candidates”. Moreover, the following Articles are respectively about the “List of Experts” and the “Qualification of Experts” whom shall “shall have expertise in law or practice in matters covered under this [protocol/annex] or the resolution of disputes arising under international agreements. They shall be independent, serve in their individual capacities and shall not take instructions from any organisation or government with regard to issues related to the disagreement, or be affiliated with the government of any Party”

⁴²² See Article “*Experts’ Opinion*”

⁴²³ The text of the agreement, in the sixth section “*Final Provisions*” requires the parties to establish a Sub-Committee on Anti-Corruption on Trade and Investment, with responsibility in anticorruption-related matters, which shall facilitate and monitor the effective implementation of the agreement and discuss any difficulties which may arise in its implementation; promote cooperation between the Parties on issues covered by the Anti-corruption section of the agreement, as well as promote the exchange of information on developments in non-governmental, regional and multilateral fora on issues covered by the agreement; identify issues covered by the agreement that would benefit from greater bilateral cooperation, in particular possible improvements of the agreement itself.

official EU languages and will subsequently submit it for approval by the European Parliament and Council of the European Union.

2.4 EU – Chile ongoing negotiations for the modernisation of the 2002 Association Agreement

The EU and Chile concluded an Association Agreement in 2002, which includes a comprehensive Free Trade Agreement (FTA), that entered into force in February 2003. This agreement, as it is for the one with Mexico, does not contain provisions for fighting corruption in trade and investment.

And, as it happened for the Mexico Agreement, the EU and Chile have undertaken negotiation to modernise the trade part of their existing Association Agreement. Up until now, however, the negotiations are at a much lower stage than the Mexican ones.

The mandate to negotiate is available⁴²⁴. It contains the directives to be followed throughout the procedure and the EU negotiating positions. Within the text of the directives we find a small paragraph dedicated to anti-corruption that simply states that “*the Agreement should include specific provisions targeting and discouraging corruption affecting trade and investment. Such provisions should be based on European and agreed international standards and agreements relating to anti-corruption*”.

Commission textual proposals for the negotiations are also available⁴²⁵. However, nothing new can be added to what already said when analyzing the new text of the EU-Mexico agreement. The provisions contained in the proposal are in fact perfectly identical, with the only difference that, for now, they do not go beyond the section dedicated to the prevention of corruption in the public sector.

⁴²⁴ Council of the European Union, *Directives for the Negotiation of a Modernised Association Agreement with Chile*, 8 November 2017, 13553/17 ADD 1, full declassified text available at: http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156550.pdf. This is the first time that the Council has decided to make public the entire mandate for an association agreement covering political and trade aspects. It responds to calls for greater transparency.

⁴²⁵ Available, divided per section, at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1793>, accessed on January 2019.

However, the negotiations, or at least the available texts, are in a too early to be able to make hypotheses on the final text of the agreement, and it is likely that the final draft will depend on the results of the negotiations with Mexico.

However, even if many steps forward have been made on levelling the anti-corruption principles in trade agreements, their effectiveness remains unclear, especially in regional agreements which do not provide for a dispute resolution mechanism.

In these cases, in fact, the implementation and enforcement of State obligations on the matter remains at the purely national level. Anyhow, in this sense, there are promising prospects, even if the last trade agreement concluded by the EU namely the EU-Japan Trade Agreement, does not contains any reference to corruption. The reason for the exclusion is to be found in the fact that the necessity for the insertion of anticorruption clauses raises mostly in cases when a developing country is involved, since it is recognized that those countries are more prone to corruption than developed ones.

3. The EU enlargement policy: addressing corruption as a fundamental stage to accession.

It is necessary to briefly retrace, for fundamental points, the Union's enlargement process and the principles governing it.

The question is governed by Article 49 TEU which states that “*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*

The conditions of admission and the adjustments to the Treaties on which

the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements”.

The reference to Article 2 concerns the respect of the values of “*human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”

In particular, to justify the implementation of anti-corruption rules, we have to refer to the respect of the rule of law, but also, as we have seen from the most recent theories on the subject, to the respect for human rights.

The first step for each candidate country is to meet the accession criteria, as defined in 1993 at the Copenhagen European Council, and for this reason called “*Copenhagen criteria*”.

The Copenhagen criteria establish a set of democratic, economic and political conditions for countries wishing to join the EU: political criterion, dealing with stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; economic criterion, meaning a functioning market economy and the capacity to cope with competition and market forces; and the administrative and institutional capacity to effectively implement the *acquis communautaire*⁴²⁶ and ability to take on the obligations of membership.

The criteria have a dual purpose: on the one hand they guide the candidate states, on the other, they reassure the Member States that the disruption risks are minimal⁴²⁷.

However, the Copenhagen criteria are very general in their formulation. This vagueness permits the adaptation case by case to the socio-political structure of the candidate country, so that it can take account of its specificities, while allowing the union to push candidate countries to adopt various policies.

However, only one of the three criteria relate to the *acquis*, a term which indicates all the legislation, policy and case-law determinations of the Union which

⁴²⁶ The *acquis communautaire*, or, in English, Community *acquis*, all the legislative, political and jurisprudential determinations of the Community taken in the various stages of European integration, which new members are required to accept at the time of their accession.

⁴²⁷ H. GRABBE, *Enlarging the European Union: Challenges to and from Central and Eastern Europe*, in *International Political Science Review* Vol. 23, No. 3, July 2002, pp. 249-268

the new Member States are obliged to accept at the time of accession

These criteria constitute the basis for the chapters on which Member States and candidate countries negotiate the conditions for accession. As it is evident from the words of Article 49, the conditions for access are then dictated by an agreement between the Member States and the requesting State. The conditions and concessions established therein are what is commonly referred to as conditionality

In other words, the conditionality sets the legal, political and economic conditions for joining the EU. It was designed to ensure that a candidate country's political, economic and regulatory development converged with the values and the norms within the EU⁴²⁸ in order to avoid that accession destabilise the Union, perhaps allowing the entry of States with a dictatorial regime or do not have a market economy.

The Copenhagen criteria paved the way for the Union's fifth enlargement, namely the enlargement towards the countries in Central and Eastern Europe of 2004.

Surely this was the most important and difficult of all the enlargements of the Union, but it came with political and psychological means, having entailed the “*return to Europe*”⁴²⁹ of CEE countries, after the end of the Cold war system.

In particular, in the expansion of 2004, the contrast to corruption has become an important element, as well as the most difficult to implement.

Despite good results in a number of countries, this enlargement showed that transformation of a country in the rule of law area, can be a difficult process. Accession negotiations with Bulgaria and Romania revealed that shortcomings in key areas such as reform of the judiciary and the fight against organised crime and corruption had not been fully overcome⁴³⁰.

The accession negotiations for Croatia and Turkey have therefore led to the introduction of a new chapter in the *acquis*, chapter 23, named “*judiciary and fundamental rights*” which is added to the previous “*justice, freedom and security*”.

⁴²⁸ M. CREMONA, *EU Enlargement: Solidarity and Conditionality*, in *European Law Review*, 2005 Vol 30 issue 3, pp.3-22, p.8

⁴²⁹ SZAREK-MANSON, *op.cit.*, p.135

⁴³⁰ W. NOZAR, *The 100% Union: The rise of Chapters 23 and 24*, in SVODOB H., STETTER E., WIERSMA J.M. (EDS.), *EU enlargement anno 2012: A progressive engagement*, Brussels, 2012, pp.87-96

Both chapters deal with rule of law, in particular with the reform of the judiciary system and with the fight against corruption and organized crime.

Chapter 23 states that “*Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption*”. Chapter 24, instead, covers the fight against all types of organised crime.

Therefore, the European Commission, in its 2011 Enlargement Strategy⁴³¹, proposed a new approach to chapters 23 and 24. This would focus on extending the timeframe of negotiations on the two chapters. The implementation of those two chapter will be the first to be opened and the last to be closed since appropriate reforms in this field usually require longer terms.

The anticorruption measures described in chapter 24 are the so-called soft anticorruption *acquis*⁴³². Those provisions include the necessity to ratify a number of international instruments such as the two Council of Europe conventions on corruption and the OECD anti-bribery convention. However, other chapters of the *acquis* contain legal requirements useful for dealing with corruption in the areas of, among the others, public procurement⁴³³, judicial reform⁴³⁴ and financial control.

In 2015, the Juncker Commission published his medium-term strategy for EU enlargement policy⁴³⁵, that will remain valid until the end of his mandate in 2019, with the intent to provide for a “*clear guidance*” and to “*set out the framework and tools to support the countries concerned to address the core issues and*

⁴³¹ Communication from the Commission to the European Parliament and the Council *on Enlargement Strategy and Main Challenges 2011-2012*, COM(2011) 666 final. The commission, dealing with Croatia accession, recognize that “*difficult negotiating chapters such as those on the judiciary and fundamental rights and on justice, freedom and security should be tackled as early as possible to allow adequate time for the candidate country to build the necessary track record of reform*”.

⁴³² M. BEBLAVY, E.SICAKOVA-BEBLAVA, *The Changing Faces of Europeanisation: How Did the European Union Influence Corruption in Slovakia Before and After Accession?*, in *Europe-Asia Studies*, vol. 66 No.4, 2014, pp.536-556

⁴³³ Of course, the reference is to the European procurement directives which we will discuss in the second paragraph of this chapter speaking about the internal policies on anti-corruption.

⁴³⁴ The Commission ask the candidate countries to develop an independent judiciary, stating that this requires full “*commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training*”. See, chapter 23 of the *acquis*.

⁴³⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Enlargement Strategy*, COM(2015) 611 final

requirements of the accession process". This document refers to the accession of the countries of the West Balkans and of Turkey but is very useful to understand the importance that anti-corruption has taken in the accession process.

In particular, anti-corruption, being linked to the development of the rule of law and human rights, is included among the so-called "fundamentals" which consists in the core issues of rule of law, fundamental rights, strengthening democratic institutions, including public administration reform, as well as economic development and competitiveness, and which remain key priorities in the enlargement process.

The first section is dedicated to the rule of law. The Commission states that it is at the heart of the accession process since it is not only a fundamental democratic principle, but it is also linked with the stabilization of the business environment and the stimulation of investment, jobs and growth. However, the Commission recognize that "*corruption remains widespread in all countries, with continued impunity, especially for high level corruption*" and that "*further progress in these fields will require strong political will, leading to tangible results*"⁴³⁶.

Reference to corruption can be found also in the third section dedicated to "*economic development and competitiveness*". Here it is stated that legal certainty, an effective judicial system, a functioning public administration and a uniform application of rules are preconditions to attract investors and that, on the contrary, "*weaknesses with the rule of law, the enforcement of competition rules, public financial management and frequent changes in permits and taxes exacerbate the risk of corruption, negatively impacting on the investment climate*"⁴³⁷. The perfect functioning of the public administration is able to reduce the temptation to corrupt officials to "oil" the system and to accelerate processes that would otherwise require longer times. It must be remembered that we are talking about countries where the influence of the State in the economy is strong and therefore an inefficient judicial system and a weak public financial management, increasing the risks of corruption, discourage investors who are afraid of not competing under the same conditions as others.

⁴³⁶ *Ibidem*, p.5

⁴³⁷ *Ibidem*, p.7

Moreover, the fourth section deals with the “*functioning of democratic institutions and public administration reform*” and recognize that “*the quality of administration also directly impacts governments’ ability [...] to prevent and fight against corruption*”⁴³⁸.

The 2018 annual communication on EU Enlargement Policy⁴³⁹ recalls the commitments of 2015, considers the progresses in the implementation of enlargement policy, and encourages the candidate countries to continue their modernisation through political and economic reforms, in line with the accession criteria.

It states that “*the countries must root out corruption without compromise*” and recognize that the efforts of the Union and the candidate countries are not enough when states that “*corruption remains widespread, despite continuous efforts to bring legal and institutional frameworks in line with the EU acquis and European standards*”. In particular it claims that “*strong and independent institutions are crucial to prevent and tackle corruption, in particular at high level, and to conduct more effective investigations and prosecutions, leading to final court rulings that are enforced and that include dissuasive sanctions. More transparency is needed in the management of public funds especially at all stages in public procurement, an area particularly prone to corruption*”⁴⁴⁰. Moreover, the communication recognises that “*The limited progress shows a lack of genuine political will in combination with still limited administrative capacity. More transparency and accountability, the separation of powers and stronger independent oversight bodies remain essential*”⁴⁴¹.

Despite the Commission efforts, the trends in the Central and Eastern European states show post-accession backsliding. Although many of them were able to strengthen control of corruption during the candidacy period, many of them

⁴³⁸ *Ibidem*, p.9

⁴³⁹ Communication from Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, *2018 Communication on EU Enlargement Policy*, COM(2018) 450 final

⁴⁴⁰ *Ibidem*, p.2

⁴⁴¹ *Ibidem*

faced major problems after formalizing access⁴⁴². The data show that Hungary, Lithuania, Poland, Slovakia, and Slovenia, Bulgaria and Romania experienced negative changes⁴⁴³. This concept, however, according to some authors⁴⁴⁴, does not “*give justice to reality*”, since accession brought a strengthening of EU influence in term of direct enforceability of EU rules, At least for the possibility of the Commission to open an infringement procedure and for the CJEU to interpret in a preliminary ruling the compatibility of the national laws with EU law.

In addition, it should be noted that this does not mean that those countries have become more prone to corruption than they were before, but only that their level of corruption has increased with reference to the pre-accession period.

This can be traced back to political reasons. During the pre-accession period, indeed, citizens’ support for EU policies is high, which allows the union “*to offer high electoral incentives to opposition parties*”⁴⁴⁵ to maximize their vote share among the pro-EU electorate. Those parties, indeed, in order to receive the political support of the Union, accept to carry on the requests of the Union. After accession, however, this influence of the EU decreases significantly and the already implemented EU policies lose their power to control corruption due to the lack of political will⁴⁴⁶.

It would therefore be important to evaluate the feasibility of more effective follow-up and perhaps sanction mechanisms against countries that have just acceded the Union in order to avoid their backsliding, which constitutes a worrying trend, at least in certain groups of countries⁴⁴⁷.

⁴⁴² In this sense, see M. KARTAL, *Accounting for the bad apples: the EU’s impact on national corruption before and after accession*, in *Journal of European Policy*, volume 21 issue 6, 2014, pp.941-959.

⁴⁴³ *Ibidem*, p.955

⁴⁴⁴ See, BEBLAVY M., SICAKOVA-BEBLAVA E., *The Changing Faces of Europeanisation: How Did the European Union Influence Corruption in Slovakia Before and After Accession?*, in *Europe-Asia Studies*, vol. 66 No.4, 2014, pp.536-556, p.552

⁴⁴⁵ See M. KARTAL, *op.cit.*, p.942

⁴⁴⁶ For further studies on the post accession backsliding, see: M. KARTAL, *op.cit.*; BEBLAVY M., SICAKOVA-BEBLAVA E., *op.cit.*; and also A. DOIG, *Asking the Right Question? Addressing corruption and EU Accession*, *Journal of Financial Crime*, Vol.17 No.1, 2010, pp- 9-21

⁴⁴⁷ Specifically in the Balkans, as demonstrated by the abovementioned studies. See, among others, M.KARTAL, *op.cit.*

CONCLUSIONS

It has been noted that the instruments of the Union to combat *strictu sensu* corruption have been, in a certain way, abandoned. This certainly does not mean that they are no longer in force, but simply that they have not been updated for many years or are still anchored to an intergovernmental cooperation mechanism typical of the pre-Lisbon structure.

However, recent developments towards the creation of a criminal law of European derivation, albeit with resistance, could presage a greater interest of the Union and its Member States towards the harmonization of the anti-corruption discipline. Indeed, it has been seen that a greater Union commitment would certainly bring benefits both on the protection of the budget and on the protection of the common market.

Moreover, apart from damage to financial interests, corruption also undermines democracy, rule of law and trust in institutions. Countering corruption would therefore lead to an increase in the trust of citizens in democratic institutions and also, if we engage in certain theories already mentioned in the first chapter, to improve the protection of human rights by better guaranteeing access to the essential services.

The analysis of the main international and regional conventional texts and the comparison with the European instruments have highlighted the synergies of the efforts, but also the differences between the various instruments, largely dependent on the different purpose of each of them and therefore on the different definition of corruption adopted. Certainly, as we have said, the Treaty of Lisbon has opened new possibilities to fight corruption, but development is very slow, given the resistance of some states to cede sovereignty in this field.

We then proceeded to an analysis of the main monitoring mechanisms. The main issue is certainly the age-old problem of the Union accession to the GRECO evaluation mechanism. The question is still open, and a resolution is not expected in a short time. It would certainly be desirable to have unconditional access, in which the bodies of the Union are subject, as well as the national ones, to the assessment by the Group, naturally taking into account their special nature.

Unconditional access to monitoring mechanisms, bringing the EU administration on the same level as the national ones, would also have indirect benefits on the trust that citizens place in the institutions of the Union, as well as, of course, greater control over of them so as to better prevent and combat the high-level corruption.

Furthermore, the EU anti-corruption report should be resumed and improved, since it is a very useful tool to provide an overview of the current state and thus to stimulate the debate within the European institutions on the weaknesses of the system to combat corruption. The reasons for the abortion of this mechanism are not clear, and Member of Parliament have repeatedly requested, often in vain, explanations to this effect from the commission. It is clear that this is a negative signal from the European institutions and the attempt to move the issue within the European Semester is certainly an inadequate solution.

It is evident, however, that until now the monitoring system remains ineffective. As we have seen, some recent theories have linked the effectiveness of the conventions to an adequate non-sanctioning, but collaborative, monitoring mechanism, in which recommendations are elaborated and, through a follow-up mechanism, the implementation is assured.

There are still some question marks about law enforcement mechanisms and their coordination, at least because we must wait to see the real effectiveness of the new European Public Prosecutor's office after its full entry into force. This is certainly a milestone of European integration, even if, unfortunately, it has been established through an enhanced cooperation mechanism and the changes undergone during the parliamentary debate have greatly reduced the innovative scope of the committee's proposal.

It is to be hoped that, once EPPO will begin its activity, it will be able to overcome the resistance of the most reluctant Member States to greater integration in the criminal area, so as to make this office effective throughout the whole territory of the Union. An enlargement of EPPO's jurisdiction would also have to be assessed, so as to include corruption *latu sensu*, not only when it harms the financial interests of the Union. However, a Directive would first be needed to harmonize the definition of the crime of corruption.

Very positive, on the other hand, are the most recent trends seen dealing with internal policies. We must look with favour to the proposal for a Directive on the protection of whistleblowers, but also on the new code of conduct for the Members of the Commission. Surely this is an innovative provision. As we have said, in fact, references to the conflict of interests in conventional texts are scarce or even non-existent. However, a correct management of these situations is of fundamental importance to prevent corrupt situations. However, it would be desirable, as we have already mentioned, that the other European institutions would adopt, along the lines of this one, codes of conduct that specifically manage the problem of conflict of interests.

We must also welcome the inclusion of anti-corruption clauses in trade agreements with third countries, since it is an important tool both for the protection of European finances, and for the growth of developing countries. Although it is a practice that other countries have been adopting for more than a decade, the level of detail of the anti-corruption section within the 2018 Agreement in Principle between EU and Mexico is remarkable.

It is recognized that corruption may represent a non-tariff barrier to trade, which therefore must be countered and, as far as possible, eliminated. Furthermore, the fact of having built the section with a constant reference to the principles of UNCAC is certainly positive. In this way, in fact, it pushes towards the adoption of widely recognized and accepted standards, contributing to building a fair level playing field, and to greater clarity and simplicity in an extremely fragmented picture.

However, the most recent treaty with Japan, which has recently come into force, contains no anti-corruption clauses of any kind. While it is true that studies have shown that developing countries are more prone to corruption, advanced countries are certainly not exempt from it. For this reason, consideration should also be given to the inclusion of anticorruption clauses in the trade agreements with developed countries.

In conclusion, it can be said that the action of the Union in the field of anti-corruption is constant and has undergone considerable development. We can identify different structures: in the first, by now dated, there was an

intergovernmental cooperation; in the second one there is an attempt to connect the issue to the European competence in criminal law; in the third, instead, corruption is countered in relation to specific sectors of great importance for the Union, providing for preventive and repressive measures.

Certainly, as we have seen, a remarkable development of the Union's action in this area can be noted, however much must still be done to align with international standards, but we must bear in mind that anti-corruption is a constantly evolving sector in which there is a constant pursuit between criminal organizations and the supervising bodies. The former always looking for new methods to commit a crime, the latter committed to designing repressive mechanisms adapted to the evolution of crime.

However, a directive harmonizing the definition of corruption *latu sensu* is essential. A criminal definition, even if it is difficult to realize, is an important and fundamental step both at the Union level and at the national level and would constitute an important milestone in the international scenario. It would ensure greater uniformity and clarity on the scope of the instruments adopted by the Union, and would allow, at the very least, to prevent existing defining differences from being exploited for criminal purposes.

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