Master's Degree Programme

COMPARATIVE INTERNATIONAL RELATIONS (LM-52)

Final Thesis

ANTI-CORRUPTION BEST PRACTICES FOR ITALIAN STATE OWNED ENTERPRISES WITH A FOCUS ON THE PROTECTION OF WHISTLE-BLOWERS

Supervisor

Dr. Sara De Vido

Co-supervisor

Avv. Alessia-Ottavia Cozzi

Graduant

Marina Milocco (988463)

Academic Year

2018/2019

"When all are guilty, no one is; confessions of collective guilt are the best possible safeguard against the discovery of culprits, and the very magnitude of the crime the best excuse for doing nothing".

(H. Arendt)

ABSTRACT

Il fenomeno corruttivo ha acquisito negli ultimi decenni un importante rilevo sul piano internazionale, sia per gli studi sulla natura della corruzione in sé quale fenomeno capillare e sistemico nella storia del genere umano, sia per quanto riguarda l'approntamento sovraordinato di misure atte a prevenire e reprimere gli atti corruttivi in ambito pubblico e privato.

Il presente documento si colloca nell'ambito degli studi sul tema della corruzione ed in particolare affronta l'analisi dei maggiori contributi anti-corruzione internazionali, regionali e nazionali, al fine di individuare un novero di buone pratiche attuabili dagli enti italiani soggetti sia agli obblighi stabiliti dal legislatore in materia di anti-corruzione (L. 190/2012 e s.m.i.), sia quanto raccomandato all'interno del sistema legislativo italiano in materia di responsabilità degli enti (D.Lgs. 231/01 e s.m.i.), alla luce della ratifica da parte dello Stato italiano delle Convenzioni adottate sul piano internazionale e Europeo indicanti le principali misure di prevenzione e repressione del fenomeno corruttivo, entrate così a far parte a tutti gli effetti della regolamentazione italiana in un sistema normativo, seppur abbastanza completo, piuttosto complesso e stratificato. Nel corso del lavoro di studio lo sviluppo e la diffusione del fenomeno della corruzione emergono come saldamente intrecciati all'evolversi delle misure di repressione e prevenzione del fenomeno stesso. In tal senso per l'approfondimento ci si è affidati alle fonti ufficiali di *hard-law* e *soft-law* dei maggiori organismi di riferimento internazionali, regionali e nazionali e ad argomentazioni quanto più possibili condivise dagli studiosi di numerose discipline che si sono interessati a tali temi nel corso degli ultimi decenni.

La prima metà del lavoro, di carattere più narrativo, ha lo scopo primario di costruire per il lettore un opportuno quadro di conoscenze e norme riferibili al fenomeno della corruzione, al fine di apprezzare al meglio la seconda metà della discussione, frutto di un lavoro di settore di carattere pratico per un risultato maggiormente fruibile dal punto di vista operativo.

Preliminarmente il lavoro si concentra sulla corruzione come fenomeno di carattere endemico e sistemico connaturato nella natura umana, che ha permeato a diversi livelli le attività della sfera pubblica, degli enti privati e della società civile nel suo complesso sin dai tempi antichi. Il primo capitolo approfondisce innanzitutto le cause, le caratteristiche, gli stadi, le conseguenze e lo sviluppo storico del fenomeno della corruzione nella storia dell'uomo. Per quanto concerne le cause, le stesse sono da ricercare storicamente

nell'attitudine diffusa dei rappresentanti delle alte sfere politiche a condotte di natura illecita per l'ottenimento di vantaggi primariamente personali, ma si sviluppano poi in più specifici profili di carattere socio-economico in maggior misura presenti nei paesi in via di sviluppo, ma altrettanto congeniti nei paesi sviluppati. In linea generale il contesto socio-culturale in cui la corruzione si manifesta in modo più determinante è quello in cui il sistema educativo garantisce solo scarsi standard di preparazione di base, il sistema economico è caratterizzato da una diffusa povertà ed evidenti disuguaglianze tra la popolazione, il sistema politico funziona su pratiche spesso opache e in mano a pochi, il sistema giuridico non garantisce un sistema punitivo e sanzionatorio adeguato ai crimini commessi, infine, la pubblica amministrazione è incardinata in una burocrazia di stampo tradizionale. In contesti di questo tipo non giova la presenza di figure politiche e manageriali interessate allo sfruttamento di pratiche corruttive nell'ambito della propria attività lavorativa, ma volte ad ottenere benefici perlopiù di carattere personale. Il rischio di corruzione si insidia, nello specifico, in quei settori che prevedono la figura di pubblici ufficiali che si relazionano con il pubblico, per esempio nell'ambito del rilascio di autorizzazioni, licenze, permessi, affidamenti di lavori, servizi e forniture, assunzioni di personale sostenuti per interessi di carattere pubblico. In tal senso la corruzione si manifesta difficilmente, rimanendo invece un insieme di pratiche silenti basate su mutui obblighi e benefici coinvolgendo in modi diversi i pubblici ufficiali per l'ottenimento di utilità, pecuniarie o meno.

Per ciò che attiene le caratteristiche del fenomeno, le stesse scaturiscono dai medesimi contesti socio-culturali ampiamente diversificati. Al contrario, le conseguenze non sembrano identificabili in modo differenziato nelle molteplici situazioni spazio-temporali, ma appaiono perlopiù diffuse a livello globale, in particolare la limitazione dello sviluppo socio-economico con conseguente impoverimento della popolazione e l'emersione di disuguaglianze sociali.

Lo studio fornisce, altresì, gli stadi di avanzamento nella società in rapporto alla diffusione del fenomeno da gradi di corruzione più deboli a manifestazioni più insidiose, anche per quanto riguarda l'entità degli effetti negativi sul contesto in cui si sviluppano.

Infine, lo sviluppo storico dell'attitudine a comportamenti illeciti a sfondo corruttivo è studiato dall'antichità per arrivare agli anni 90', protagonisti della nascita di un vero e proprio movimento di lotta alla corruzione. È appassionante come già nell'antichità vi fosse una particolare attenzione al fenomeno e ai tipici atti criminali di derivazione, così come risulta di grande interesse lo sviluppo di una vera e propria coscienza in comune

sull'importanza del fenomeno nel corso della storia, fino al 1990, anno che ha determinato l'avvio di una vera e proprio proliferazione di atti, soprattutto di carattere internazionale e regionale, fini a regolamentare in modo coordinato e condiviso la prevenzione e la repressione del fenomeno.

In tal senso il capitolo prosegue con la presentazione dei principali attori coinvolti nel fenomeno della corruzione e nell'adozione delle misure anti-corruttive sul piano internazionale e regionale, dalle istituzioni, quali emissari delle principali fonti normative, passando per l'ambito pubblico e privato, quali enti attuatori della legislazione vigente, fino alla società civile, quale maggiore cartina al tornasole dell'influenza del fenomeno nelle attività di carattere quotidiano. Le organizzazioni internazionali e le istituzioni europee rappresentano, infatti, solo due grandi gruppi degli attori interessati dalla lotta alla corruzione analizzati nel prosieguo del capitolo, ai quali vanno aggiunte le istituzioni nazionali, ma anche le sfere pubblica e privata coinvolte direttamente nell'implementazione di specifici sistemi anti-corruttivi. Ai fini dello studio a questo proposito vi è una successiva specifica dei soggetti presi ad esame nel corso del contributo, ossia gli enti italiani soggetti agli obblighi previsti dalla normativa anticorruzione (L.190/12 e s.m.i.) e le disposizioni in materia di responsabilità degli enti (D.Lgs. 231/01 e s.m.i.). Il D.Lgs. 231/01 si applica in particolare "agli enti forniti di personalità giuridica e alle società e associazioni anche prive di personalità giuridica" (art.1 c.2). Al contrario la L.190/12 si applica "alle amministrazioni pubbliche di cui all'articolo 1, comma 2, del decreto legislativo 30 marzo 2001, n. 165, e successive modificazioni, agli enti pubblici nazionali, nonché alle società partecipate dalle amministrazioni pubbliche e dalle loro controllate, ai sensi dell'articolo 2359 del codice civile, limitatamente alla loro attività di pubblico interesse disciplinata dal diritto nazionale o dell'Unione europea" (art.1 c.34). In tal senso gli enti privati che si occupano in regime di controllo parziale o totale da parte della pubblica amministrazione di attività di interesse pubblico costituiscono i precursori nel processo di sviluppo di un sistema anti-corruzione interno completo, seppur per certi aspetti di incerta costruzione.

La società civile, infine, rappresenta la sfera maggiormente coinvolta sul piano pratico dai fenomeni a sfondo corruttivo che permeano la realtà quotidiana.

In seguito, lo studio analizza la diffusione e la percezione del fenomeno attraverso i dati emersi da recenti rilevazioni sul tema compiute dall'esperienza di Transparency International nell'ambito del *Corruption Perception Index* del 2018 e del *Global Corruption Barometer* del 2017, rilevando l'importanza degli esiti. Inoltre, il primo

capitolo compie una panoramica dello sviluppo della comune consapevolezza del problema della corruzione e dello sviluppo delle forme preventive anti-corruttive nella storia fino al 1990, che, come detto, ha rappresentato una vera e propria affermazione della sensibilità globale sui rischi ed effetti del fenomeno corruttivo e la conseguente richiesta alle istituzioni di maggiore trasparenza e iniziativa, fino alla comparsa di sempre più numerose disposizioni in tema di prevenzione e repressione della corruzione. Infine, il testo esegue una ricognizione dei principali aspetti chiave sul tema, soffermandosi sulle definizioni dei concetti cardine maggiormente interpretati e condivisi, in particolare nell'ambito delle Convenzioni oggetto di studio e dei relativi commentari e protocolli emanati dalle organizzazioni internazionali, nonché dai glossari elaborati dall'O.C.S.E. e da Transparency International.

La seconda sezione dell'elaborato è interamente dedicata allo scenario legislativo e ai principali strumenti anti-corruzione adottati primariamente dall'O.C.S.E. (es. Convenzione O.C.S.E. sulla lotta alla Corruzione dei Pubblici Ufficiali stranieri nelle transazioni internazionali), dalle Nazioni Unite (es. Convenzione delle Nazioni Unite contro la corruzione), dal G20 (es. gli Alti Princìpi del G20 sulla responsabilità degli enti), dalla Banca Mondiale, dal Fondo Monetario Internazionale e da altri enti, quale la Camera di Commercio Internazionale, con la disamina dei principali tratti distintivi delle varie disposizioni. Dallo studio del panorama internazionale emergono innanzitutto i tratti caratteristici che hanno stimolato la crescita di sensibilità delle organizzazioni internazionali sul fenomeno della corruzione e la conseguente proliferazione di iniziative di carattere legislativo volte a regolamentarlo attraverso la promozione di adeguate misure in ambito nazionale. A titolo esemplificativo emerge la singolarità del contesto statunitense dove a partire dal 1977 era già presente una normativa a repressione degli atti di corruzione con coinvolgimento di pubblici ufficiali stranieri nell'ambito delle transazioni economiche internazionali, la quale ha fatto da base per la preparazione e l'adozione della Convenzione O.C.S.E. (1997) che ha permesso di estendere gli obblighi presenti anche alle imprese straniere operanti sul territorio statunitense, forte del coinvolgimento degli Stati Membri. Allo stesso modo l'iniziativa O.C.S.E., precursore dei seguenti trattati sul tema, ha iniziato a stabilire un ordinamento omogeneo condiviso sulla criminalizzazione dei reati di corruzione.

A seguire la Convenzione delle Nazioni Unite sulla corruzione (2003) ha contribuito ulteriormente a portare la corruzione sul piano di discussione transnazionale introducendo disposizioni obbligatorie e raccomandate per l'introduzione nei sistemi legislativi

nazionali degli Stati Membri di precise norme di prevenzione e repressione della corruzione.
Il capitolo approfondisce, inoltre, altre iniziative nate nel panorama internazionale, per esempio grazie al G20, alla Banca Mondiale, al Fondo Monetario Internazionale e la Camera di Commercio Internazionale.
In seguito è analizzato il panorama legislativo Europeo, con particolare riferimento agli strumenti adottati dall'Unione Europea e dal Consiglio d'Europa (es. Convenzioni Penale e Civile sulla corruzione) che, al contrario di alcune Convenzioni internazionali, impongono precisi obblighi sul tema agli Stati Membri che sono, inoltre soggetti a monitoraggio per quanto riguarda l'implementazione delle misure richieste. Mentre la Convenzione dell'Unione Europea (1997) è fondamentalmente incentrata per la natura dell'organizzazione sugli ambiti del commercio comunitario, le iniziative del Consiglio d'Europa sono caratterizzate da un più ampio spettro di provvedimenti nati dai principi fondanti dell'organizzazione ossia la tutela della democrazia, dei diritti umani e dello stato di diritto. A tal proposito, inoltre, mentre la Convenzione Penale riprende pressoché i concetti fondamentali di criminalizzazione delle condotte corruttive già disposti dagli strumenti internazionali, la Convenzione Civile rappresenta una vera e propria novità legislativa prevedendo specifiche tutele per le vittime della corruzione e la previsione di risarcimenti per i danni subiti.
A conclusione del capitolo, per gli obiettivi inizialmente fissati, sono esaminati il contesto italiano e le principali normative costituenti il sistema legislativo anti-corruttivo nazionale vigente. Dalla situazione italiana emerge, seppur in un ambiente non del tutto pronto ad accogliere i valori etici e morali propri dell'anticorruzione, un comune sforzo guidato dall'Autorità Nazionale Anti-Corruzione a voler eradicare il fenomeno, anche alla luce delle vicende politiche tristemente passate alla ribalta negli anni 90 del secolo scorso. Per quanto riguarda il piano normativo, il testo analizza in primo luogo le disposizioni e le modifiche inerenti alla responsabilità degli enti ed in seguito i disposti normativi in materia di anti-corruzione e trasparenza, al fine di individuare i fondamenti degli obblighi imposti agli enti privati controllati o partecipati con attività di pubblico interesse a cui il contributo è dedicato.
Già a chiusura del secondo capitolo è accennata, nel panorama legislativo italiano, la presenza di un idoneo atto che norma la possibilità per il dipendente di segnalare illeciti di cui è venuto a conoscenza nell'ambito della propria attività lavorativa e la protezione

di quest'ultimo da atti ritorsivi e discriminatori a seguito dell'effettuazione di una segnalazione, nonché la sanzionabilità di condotte diffamatorie.
A tal proposito il cd. *whistleblowing* è oggetto principale di studio nel corso del terzo capitolo. Trattandosi di un metodo di lotta alla corruzione relativamente nuovo e di non facile applicazione per i seguiti che sembra avere in talune situazioni nazionali, si è deciso innanzitutto di dettare le origini e gli elementi fondanti del sistema di denuncia, anche attraverso le disposizioni contenute a riguardo negli strumenti anti-corruttivi internazionali in precedenza citati e analizzati. Inoltre, alla luce delle origini di questo metodo di matrice anglosassone spiccate nei paesi di *common law*, si è ritenuto di focalizzarsi sui contesti socio-culturali e normativi di *whistleblowing* degli Stati Uniti e del Regno Unito, dove i sistemi sono ampiamente accettati e diffusi tra la popolazione, così come la reputazione dei soggetti che decidono di denunciare illeciti maturati all'interno dell'azienda per cui lavorano. Fondamentalmente il successo in questi paesi è generato dal supporto fornito dalle istituzioni e da organizzazioni all'uopo istituite molto attive sul campo, nonché dalla chiarezza e accessibilità delle disposizioni normative soprattutto sulle tutele per i segnalanti. Inoltre è analizzato il panorama europeo, in particolare nella misura in cui il Parlamento dell'Unione Europea ha recentemente approvato una Direttiva comunitaria sulla regolamentazione dei sistemi di denuncia, della protezione dei soggetti denuncianti e della sanzionabilità di condotte false o diffamatorie, che risulta ora in attesa del benestare del Consiglio dell'Unione Europea. Tal esperienza è frutto di un ragionamento sulla prospettiva di un comune sviluppo uniforme della normativa su scala globale. Infine ci si concentra sui vari provvedimenti normativi italiani presenti all'interno di atti legislativi più completi e sulla recente L. 179/2017, la prima norma italiana dedicata all'implementazione dei *whistleblowing schemes* nell'ambito della sfera pubblica (con integrazione della L. 190/12) e nell'ambito della sfera privata (con integrazione del D.Lgs. 231/01).
In seguito ci si sofferma sul metodo di denuncia in generale analizzando lo stato d'animo del denunciante e gli attenti ragionamenti che precedono la denuncia, inoltre l'influenza e l'impatto sull'ambiente in cui la denuncia ha luogo. Sono inoltre studiati gli elementi che determinano il successo di tali denunce e del sistema nel suo complesso, quali su tutti l'importanza di informazione e formazione dei dipendenti, non solo volte a stimolare questi ultimi ad esternalizzare la presenza di atti corruttivi appresi nel corso della propria attività lavorativa nell'interesse pubblico, ma anche al fine dell'accettazione della condotta dei soggetti che decidono di agire in tal senso avendo diritto a specifiche tutele.

Infine vi è un accenno ad alcuni casi in cui la discriminazione del lavoratore che riporta illeciti ha costituito un processo di fronte alla Corte Europea dei Diritti dell'Uomo per una violazione di diritti umani, in particolare la libertà di espressione (art. 10).
Infine, con il capitolo quarto, il contributo approfondisce le più diffuse e adeguate buone prassi adottabili dai soggetti, a cui come detto, si applicano le misure anti-corruzione e di responsabilità degli enti del sistema legislativo italiano, in particolare alla luce degli standard Europei e internazionali. Tali prassi si potranno ritenere maggiormente applicabili da tutta la sfera privata, nel momento in cui il legislatore italiano dovesse promuovere l'estensione degli obblighi anticorruzione anche a quei soggetti. In tal senso sono approfonditi alcuni rilevanti e condivisi strumenti di *soft-law* adottati da organizzazioni internazionali e da associazioni italiane, nonché dall'attiva Autorità Nazionale Anti-corruzione.
Primariamente è importante fissare le fasi di sviluppo del processo di implementazione del sistema anti-corruzione nel suo complesso. In questa fase risulta fondamentale un impegno comune che deve nascere dai più alti livelli societari e deve essere trasposto sui livelli maggiormente operativi, con particolare riferimento alle aree a maggiore rischio di reato corruttivo. Questo forte senso comune verso un comune valevole obiettivo può essere anche diffuso grazie alle figure del R.P.C.T. incaricato degli adempimenti interni anti-corruzione e dell'Organismo di Vigilanza che ha potere di controllo sull'efficienza ed efficacia del Modello Organizzazione di Gestione promosso nell'ambito della normativa in materia di responsabilità degli enti.
La fase più delicata e che determina il successo dell'intero programma anti-corruzione è il *risk-assessment,* ovvero la valutazione dei rischi di matrice corruttiva in relazione alla probabilità di accadimento e all'eventuale impatto in relazione alle attività di cui l'azienda risulta incaricata. In tal senso si procede con una attenta valutazione delle varie categorie di reati determinando il grado di rischio effettivo che si misura con la valutazione della probabilità di accadimento e l'impatto del reato se commesso. A ciò segue un'attività di *gap analyses,* ossia lo studio del sistema aziendale esistente con una valutazione delle funzioni e attività maggiormente coinvolte per categorie di reato con la previsione degli interventi di miglioramento per il raggiungimento del fine ultimo della prevenzione e repressione dei rischi di reato del catalogo corruttivo. In seguito è approntata una panoramica sull'attività di mitigazione del rischio con un nuovo rimarco all'immancabile impegno comune che deve permeare il processo di implementazione e le attività di controllo del quotidiano. È garantita una corretta attenzione, inoltre, alla necessità di

registrazione delle attività svolte nell'ambito del *risk-assessment* anche alla luce dei futuri aggiornamenti di sistema, seppur nel contesto italiano gli esiti dello stesso risultino spesso per scelta interna documenti per "gli addetti ai lavori". A questo punto si approfondisce la costruzione del sistema vero e proprio, che per gli enti in esame, è rappresentato dal sistema di *compliance* che comprende sostanzialmente le basi fondanti del Modello ex D.Lgs. 231/01 integrate dagli obblighi aggiunti in seguito dalla legge anti-corruzione e successive modificazioni. Il Modello è solitamente costituito da una parte generale e da un numero di parti speciali per le categorie di reati rilevanti, in cui la sfera anti-corruzione con il Piano Triennale Anti-corruzione costituisce una particolare parte speciale. Si valuta inoltre l'apposizione di allegati mobili al Modello per quegli atti che vengono spesso modificati con conseguenti ricorrenti necessità di aggiornamento.

Inoltre il Modello deve prevedere necessariamente un sistema disciplinare condiviso che dimostri l'efficace punibilità delle condotte considerate illecite che deve essere chiaro e accessibile, nonché commisurato alle fattispecie di reato e alle disposizioni già previste all'interno dei Contratti Collettivi Nazionali di Lavoro. Risulta poi fondamentale la programmazione di opportune attività formative volte alla sensibilizzazione dei funzionari dell'ente rispetto il fenomeno corruttivo e i relativi rischi di reato in capo ai singoli e all'azienda, nonché all'applicazione delle procedure di prevenzione in essere; il monitoraggio e il controllo sull'efficacia del Modello e del Piano e la loro periodica rivisitazione.

È inoltre valevole la valutazione dell'opportunità di introdurre un sistema premiale, già diffuso in alcuni paesi, che incentivi la denuncia di fatti illeciti e il recupero del denaro pubblico grazie all'intervento di dipendenti. Tuttavia questa scelta va adeguatamente ponderata sia a livello politico, che a livello aziendale, al fine di valutare con cautela il contesto socio-economico in cui si opera, per evitare la proliferazione di denunce infondate, false o diffamatorie.

Fondamentale risulta altresì quanto esplicitato nell'ultima sezione del quarto capitolo che risalta i controlli di monitoraggio del sistema e del Modello come occasioni di confronto e miglioramento. Allo stesso modo è rilevante l'analisi delle eventuali violazioni al Modello e la loro registrazione per scopi futuri, nonché la valutazione di apporre le specifiche sanzioni.

In chiusura si pone l'accento sulle necessità di rivisitazione e aggiornamento del programma e modello di *compliance* in caso di sopravvenute novità normative o modifiche all'assetto organizzativo.

La sezione comprende, infine, alcune riflessioni sull'approccio trasversale alla protezione del dipendente che segnala illeciti.

LIST OF ABBREVIATIONS

A.C.W.G.	G20 Anti-Corruption Working Group
A.N.A.C.	Autorità Nazionale Anti-corruzione
C.o.E.	Council of Europe
E.U.	European Union
G.R.E.C.O.	Group of States against Corruption
I.C.C.	International Chamber of Commerce
I.T.	Transparency International
M.O.G.	Modello di Organizzazione, Gestione e Controllo
O.d.V.	Organismo di Vigilanza
O.E.C.D.	Organization for the Economic Cooperation and Development
P.A.C.I.	Partnering against corruption initiative
P.N.A.	Piano Nazionale Anti-corruzione
P.T.P.C.T.	Piano Triennale di Prevenzione alla Corruzione e Trasparenza
R.P.C.T.	Responsabile per la prevenzione della corruzione e trasparenza
U.N.	United Nations
U.N.O.D.C.	United Nations Office on Drugs and Crime

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- *Bribe* *46*
- *Corruption offences* *47*
- *Acts* *47*
- *Offering, promising or giving a bribe* *48*
- *Requesting, soliciting, receiving or accepting a bribe* *48*
- *Trading in influence* *49*

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INTRODUCTION

On 10th December every year we celebrate Human Rights and the previous day, the 9th December, it is the world International Anti-Corruption Day. Every year on that day the global community symbolically recognizes the process made to affirm the prominence of the fight against the widespread cancer of corruption and its impact on the everyday life of all of us and in particular the common effort to powerfully prevent and repress it. As a matter of fact this is a remarkable achievement, not only for citizens and enterprises but, above all, for institutions that represent the historical and legitimate foundation of the social, professional, religious, educational values and purposes of the civil society.

Actually many researches and studies have proved that corruption, although being considered first of all a moral offence, has devastating consequences on economic growth and social development. On the one hand the protracted global process of understanding this aspect of the phenomenon made emerge the urgent necessity to face the problem transnationally through organizations and institutions, speaking the same voice, and has brought anti-corruption on the international agenda between the more shared objectives. On the second hand the development of a growing awareness against corruption fostered governmental institutions and non-governmental organizations to adopt a complex body of international and regional instruments, made up by both binding and non-binding provisions for member States and Parties. Therefore these legal acts, giving details to States to implement their domestic legal orders creating a common anti-corruption legal framework, enforced the coordination and collaboration in the global initiatives for the fight against corruption.

In this way the anti-corruption transnational approach became a new expression of the multilateral approach embracing the main features of the development of the well beings of the international community, together with human rights, education, health, environment, science and peace. Furthermore thanks to the numerous international Conventions, corruption is treated as a transnational crime.

International and regional treaties mainly address bribery, meaning the abuse of public or private office for personal gain, perpetrated or involving national and foreign public officials in business transactions but, at the same time, being different and multilateral in features and purposes they create a common effective legal background originated on mutual principles and values.

Although corruption is still first of all a national matter and corrupted crimes take place mainly on national territory, the effects of those crimes generate transnational consequences requiring an international initiative. For this reason the role of States is fundamental in the enactment of preventive and repressive measures to eradicate corruption. Together with States, in the contemporary social setting, the business sector emerges to be prominent for the achievement of global anti-corruption aims representing the driving force of economic development, due to the globalizing process of growing influence of the multinational companies.
Therefore the main purpose of this contribution is to set the main best practises emerging from hard-law and soft-law international, regional and domestic instruments to be applied in the business sector to take part in the common effort against corruption. More specifically, the study analyses the context in which operate the Italian State owned enterprises that, for the nature of the legal obligations to which are subject, represent the forerunners of a particularly detailed and complete anti-corruption system, potentially becoming a model of internal anti-corruption policies' implementation for other organizations.
In conclusion the business sector is made up by the individuals representing the civil society that faces corrupted attitude in every day working activity having a key role in the prevention and repression of corrupted tendencies. For this reason the contribution examines also the main features of the whistleblowing schemes.

The first chapter analyses the development of the main causes, characteristics, stages, consequences and history of the phenomenon of corruption that is described as endemic and systemic emerging as a capillary social and economic disease. Then, the main actors involved in the fight against corruption are studied. The inquiry of the spread and perception of the phenomenon through international standards is the subject of the third section of the chapter. In addition the prevention process is deepen. In the last section are studied and presented the main common and debated features of the anti-corruption legal framework thanks to keywords and definitions.

The second chapter is dedicated to the analyses of the international, regional and Italian background and it is centred on the study of the main instruments enacted by international, regional and Italian institutions, in order to regulate the implementation of a common anti-corruption framework.

The third chapter is dedicated to the opportunity for workers to report illicit conduct emerging from their working activity to specific internal or external functions, meaning the whistleblowing system. In particular the origin and the features of this fundamental method of curbing corruption are presented analysing the experiences of different countries and the factors that determine the success of the role of relators. A particular attention is dedicated to the explanation of the measures of protection of whistle-blowers.

The final chapter sets the main best practises applicable in the private sector, more specifically in Italian State owned companies, in order to properly comply with legal obligations and positively achieve anti-corruption objectives. In this respect the stage of risk-assessment is deeply studied, together with the implementation of the internal anti-corruption programme and compliance model. Once again the whistleblowing system emerges to be a fundamental part of all the phases that constitute the internal integrating process.

I. THE ENDEMIC AND SYSTEMIC PHENOMENON OF CORRUPTION

Since the ancient times, corruption is a phenomenon that societies have always suffered, mostly unconsciously; however aware initiatives against it sporadically arose throughout history and have become quite common and widespread in recent times. Similarly, in history societies have gradually developed moral and scientific consciousness, both on the existence of the phenomenon itself and on its negative effects. Thus, consequently, civil society has actively started, on the one hand, to ask to pursuit knowledge on corruption and, on the other hand, to ask for transparency and accountability, especially in terms of public spending; in other words, to curb it. In this respect researchers and institutions, especially in these decades, have accepted the posed challenge generating a proliferation of specific studies and international, regional and national instruments, in order to fight against corruption.

The aim of this first chapter is to introduce corruption as a phenomenon, with its specific causes, characteristics, stages, consequences and historical development, together with some notions on the main actors involved, the results of the more reliable approaches developed on the spread and perception of the phenomenon, the development of the concept of prevention and the main keywords and definitions of the issue.

It is beyond the scope of this section to describe exhaustively all the features of the phenomenon; only the more significant and shared ideas will be object of study, in order to introduce a basically common background to appreciate the whole dissertation.

1.1 Causes, characteristics, stages, consequences and development

Corruption is recognized as a multifaceted issue, as it will emerge in the following pages; however there is a range of multiple causes that should be basically considered in studying the origin of the phenomenon as the most shared between researchers ”the absence or weakness of leadership in key positions capable of inspiring and influencing conduct mitigating corruption […]. The weakness of religious and ethical teaching. Colonialism […]. Lack of education. Poverty. Absence of severe punitive measures. Absence of environment conducive to anti-corrupt behaviour. Structure of government. Radical change. The state of society. Corruption in bureaucracy reflects the total society” (Alatas, 1968: 48). Although these reasons were defined in the early studies on the issue and the

following studies has integrated the catalogue, these causes are still very actual and easily adaptable to different contexts, in terms of time and space.

Hence, it is significant that Wang An Shih, a famous Chinese reformer (A.D. 1021-1086), anticipated the two main successful anti-corruption measures as “power-holders of high moral calibre and rational and efficient laws”, adding a classification of human beings between the morally high and the morally mediocre: according to him corruption finds a breeding ground where the morally mediocre gain control and power at high levels of institutions (Alatas, 1968:8). The main idea was, once again, predicted by the Islamic scholar Ibn Khaldun (A.D. 1332-1406), who mentioned as the principal and driving cause of corruption “the passion for luxurious living of the ruling group” (Alatas, 1968:9).

As a matter of fact, factors promoting corruption are generally in some way directly connected with state’s activities, especially when those activities are discretional of the state and where laws and procedures are not transparent or sufficiently composed: licenses, permits, regulations and authorizations, taxation, spending decisions, provision for goods and services at below market price, financing of parties. In addition it is possible to count a number of factors that affect indirectly state’s activities: quality of the bureaucracy, level of public sector wages, penalty systems, institutional controls, transparency of rules, laws a processes, leadership (Tanzi, 1998:9).

All these contributions, though with slight differences, demonstrate the general common thought of corruption’s experts and researchers on the main causes of the phenomenon, which could be shaped on concrete and different socio-historical contexts.

Actually, due to the multifaceted nature of corruption, also its characteristics are numerous, but it is anyway possible to focus on the most shared features that permit to the observer to recognize it: “Corruption always involves more than one person […]. Corruption on the whole involves secrecy […]. Corruption involves an element of mutual obligation and mutual benefit […] not always be pecuniary. Those who practise corrupt methods usually attempt to camouflage their activities by resorting to some form of lawful justification […]. Those who are involved in corruption are those who want definite decisions and those who are able to influence those decisions. Any act of corruption involves deception […]. Any form of corruption is a betrayal of trust. Any form of corruption involves a contradictory dual function of those committing the act […]. A corrupt act violates the norms of duty and responsibility within the civic order. It is based on the deliberate intent of subordinating common interest to specific interest.” (Alatas,

1968:14). In addition corruption includes a causal-effect characteristic that generates a circular and exponential course, in which corruption stimulates the development of greater corruption causing a higher degree of the phenomenon (Alatas, 1968:35). This is an additional condition that is important to take into account studying corruption.

As previously seen and as it will be confirmed in the following pages, the study of corruption, also in terms of development in history, could be quite challenging due to the compound and shady nature of the phenomenon. However some important data emerge from analytic researches and studies also on this aspect. On this matter, the studies that have developed, especially from the 1960s, originated from the following assumptions: "social causation, historical continuity, emergence of new cultural values, identification and interpretation of social phenomena" (Alatas, 1968:18).

What it is surely possible to determinate is that bribery was the first kind of corruption that was condemned in history, however it had been perceived as normal, remarkably in Europe, until the nineteenth century. In addition other conducts that are today legally and culturally considered corrupted behaviours were accordingly accepted. As a matter of fact in history "bribery constituted a form of mutually beneficial exchange […]" (Bacio Terracino, 2012:27). It was mainly thanks to religious values that corrupted conducts started to be rejected by societies, especially in the Western world, where ethic principles were deeper. In this respect, first "references to the condemnation of bribery can be found in several ancient sources, such as the Code of Hammurabi (Babylon, 2200 B.C.) [and] Roman emperors in the fourth century legislated on several occasions between 316 A.D. and 398 A.D, against judicial corruption, and held numerous trials on corruption […]" (Bacio Terracino, 2012:28).

In sum, from eleventh to sixteenth century (1000 A.D. – 1550 A.D.) the Catholic Church and all the more important religions began to condemn corruption as one of the fundamental values contributing in the development of a common ethic against bribery.

However it was in the nineteenth century, with the raise of modern State and the introduction of bureaucracy in State administration, that developed, on the one hand, corruption in terms of quantity and quality of the phenomenon and, on the other hand, its condemnation (Bacio Terracino, 2012:29). In that period, thanks to social and political movements like the French Revolution, grown the idea of the protection of public interest and, as a result, the first legal instruments were enacted: the French Napoleonic Code,

above all, contained penalties in order to combat corruption in public offices (Bacio Terracino, 2012:30).
Even though the first examples of fight against corruption were adopted, until twentieth century the problem of corruption had continued to be mainly faced with a moralistic approach, like an incidental problem of society referred to the dishonest figures responsible for power and trust, especially in the high political sphere.
It was in the middle of twentieth century that studies on corruption became more based on statistical and empirical information, highlighted for the first time the inevitable connection between corruption and its negative consequences on a multitude of aspects. Generally speaking, from the studies emerged deficiencies in economic grown and development, due to the misallocation of public funds and the generated costs for society (for example on health, education, etc.). In practise such studies became to analyse not only the figure of the public official involved in corrupted conducts, but the relationship between the public official and the public. And from this moment onwards one of the main interests of researchers became the classification of corrupted behaviours, recognizing, in this way, that bribery was only one of the displays of the phenomenon (Bacio Terracino 2012: 31).
In addition, 1970s researchers underlined a new relationship raised between corruption and the distribution of wealth and income and the connected social and economic inequalities.
As the studies became more complex and widespread, in 1980s, it emerged the focus on the detriment effect of the phenomenon on democracy, justice rule of law, and even the exacerbation of conflicts; this field of research is still very monitored today (Bacio Terracino 2012: 33).
"As has been suggested, the 1990s could be to corruption what the 1850s were to slavery: a decade of irreversible change." (Bacio Terracino, 2012:41). Thus, the 1990s are generally recognized as the years of the anti-corruption spread, characterized by a massive prolific production of researches and policies, due to a growing awareness on the issue by institutions and civil society. Nations started to promote more transparency[1] and

[1] According to Transparency international, transparency is a characteristic of governments, companies, organizations and individuals of being open in the clear disclosure of information, rules, plans, processes and actions. As a principle, public officials, civil servants, the managers and directors of companies and organizations and board trustees have a duty to act visibly, predictably and understandably to promote participation and accountability (T.I., 2009:2).

accountability[2] in the political and economic processes and good governance became a fundamental principle for the functioning of both the public and the private sector.
Multiple aspects generated this authentic anti-corruption wave.
First of all at that time took place an unprecedented historical event: the end of the Cold War, that had started the day after the end of the Second World War freezing the political and economic relations between Western and Eastern developed World for more than forty years. “With the end of the Cold War, Western governments […] increasingly demanded good governance. Corruption was no longer part of an advisable political strategy; rather, it was identified as a crucial cause for global poverty. Economically […] the costs of corruption had become unacceptably high. Finally, many governments in developed nations came to regard transnational corruption as a danger for their own societies […]” (Kubiciel, 2009:140).
Secondly, it should be taken into consideration that numerous scandals involving corrupted behaviours emerged since 1970s to 1990s in different parts of the world.
For instance in Italy, in 1992, after decades of acceptance of certain levels of political corruption, the investigations called “Mani Pulite” brought to the famous examination of an impressive number of Italian politicians representing the entire political system[3].
Furthermore, in the field of corruption’s studies in the 1990s started to emerge the results of the data collected and analysed with regard to 1970s and 1980s, showing warning results about the spread and the effects of corrupt practices, both in developing and developed countries; in the same time many researches on corruption newly developed mostly demonstrated the same thesis.
The editorial of 31st December 1995 of the Financial Times characterized that year as the year of corruption, and the following years could be labelled in the same way (Tanzi, 1998:4).
Continuing in the study the main features of the phenomenon, it is relevant to focus on the social stages in which it should be recognized the development of the phenomenon: “the stage at which corruption is relatively restricted without affecting a wide area of social life […] [where] Rights and regulations are implemented without public suffering […]. At this stage corruption is restricted to a section of the upper circle in government

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[2] According to Transparency international, accountability refers to the concept that individuals, agencies and organizations (public, private and civil society) are held responsible for executing their powers properly (T.I., 2009:44).
[3] Further remarks on this scandal and the Italian background are provided in the II chapter.

and in big business. The second stage is where corruption has become rampant and all-pervading […]. The third stage of corruption is the most interesting, and at times difficult to notice. This is when corruption becomes self-destructive, having destroyed the fabric of society (Alatas, 1968: 32).

In the end, let's consider the main consequences of corruption.

The main common consequence emerged in the early studies on corruption is the scarce socio-economic development with consequent poverty, because of inequalities in the division of wealth, in particular due to some individuals taking advantage at the cost of the rest of population. However, recent studies have revealed other effects, as for instance the massive brain drain to more meritocratic countries, disincentives for hard work and integrity, gender inequalities, imbalanced competition, unequal access to public resources and public spending (Mangiu-Pippidi, 2015:3).

Furthermore corruption reduces public revenue and increases public spending distorting markets and reducing the ability of the government to enforce controls; distorting incentives; in other words, it acts as an arbitrary tax; distorts the role of the government; reduces legitimacy of democracy (Tanzi, 1998:27).

In conclusion, with regard to the economic costs of corruption, they have to be searched in individual transactions and their consequences: fluid illegal payments preferred in the short term brought to global inefficiencies in the long term; although bribes can seem more cheap and easy, at least they represent an expensive way to gain results, primarily because the funds deviate from official channels (Johnston, 2005:27).

1.2 Actors

Concerning the actors involved in corruption and its criminalization it is possible to observe the phenomenon from different points of view.

With regard to the actors that are concretely involved in corrupted behaviours, meaning the instigator, the perpetrator and other intermediaries, they will be address in a specific following section.

Let's focus on a higher level of players of the anti-corruption playing field.

"The first wave of anticorruption initiative occurred at regional level" (Webb, 2005:192). Firstly, the effects of corruption were recognized at regional level (for example in the 1970s in the United States), involving as a consequence regional and national institutions. Thus, the globalization process, the beginning of the flow of information, money, people

across borders started to reduce the idea of corruption as a mere domestic issue; the regional and national measures arranged the background for an effective transition from national and regional framework to an international order. Secondly, especially from the 1990s, the international institutions became the main protagonists of the anti-corruption wave. Thirdly, States are always the more concretely involved actors, because with the implementation of domestic legal instruments can inspirit values and principles on their territory. Thus, the first group of actors to take into consideration in this respect are international, regional and national institutions.

In addition, corruption has always been associated to the public sector, but during the creation of the anti-corruption framework, Parties started to gain awareness about the importance of the involvement of private sector in anticorruption system. This occurred primarily for several reasons: the extension of the private sector with respect to public sector; the limit between private and public sector always more blurred; the need of harmonization between different legal instruments, the growing influence and power of multinational corporations (Webb, 2005:212). In fact, during the last decades the world has faced a process of massive privatization[4] or/and semi-privatization of the utilities sector and this process was also invoked by institutions like for instance the World Bank. Corporate world is also powerfully linked with the concept of liability or responsibility of legal persons that will be deeply studied in the following sections. In order to understand the importance of the endless discussion on this legal institute and, accordingly, on the role of private entities, in particular in the criminalization of corruption offences, it is interesting to make a digression on the draft works for the establishment of the International Criminal Court[5]. It was established by the Rome Statute, drafted in 1998, but entered into force in 2002 and revised in 2010. The act refers merely on the individual criminal responsibility: "the Court shall have jurisdiction over

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[4] The process of selling companies or organizations that are owned by the government to private investors (Cambridge Business English Dictionary). "The Economist" magazine introduced the term during the 1930s from the German expression *Privatisierung* referred to Nazi's economic policy, which introduced a mass privatization of state property. Thanks to Thatcher and Reagan privatization gained worldwide relevance during the 1980s. Eastern and Central Europe governments engaged a process of privatization of state-owned companies in the 1990s with the support of the World Bank and other organizations.

[5] The International Criminal Court (I.C.C.) is an international tribunal located in The Hague that has the jurisdiction to persecute individuals for the international crimes of genocide, crimes against humanity, war crimes and crimes of aggression. It was established by the Rome Statute beginning to functioning in 2002. At the time of the writing has 144 member States (see https://www.icc-cpi.int/asp visited on March 2019).

natural persons" […] "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law"[6]. Actually, in the elaboration of the drafts the theme was very debated: the *Draft Statues for an International Criminal Court*[7] of the U.N. drafted between 1951 and 1953 do not comprehend any reference to legal persons; conversely, the *Draft Statute* of 1993 provided the term "individuals" to include in the jurisdiction of the Court both natural and legal persons; anyway, the *International Law Commission Draft Statute for an International Criminal Court*[8] of 1995 appears to use again the term "persons" referred to natural persons; in the end, the *Report of Preparatory Committee on the Establishment of an International Criminal Court* of 1996 included a dual proposal comprehending the possibility for the Court to persecute the crimes perpetrated by both natural and legal persons. During the Conference of Rome the debate continued on the issue, but in conclusion any reference to legal entities was included in provisions defining the jurisdiction of the Court and today anything has changed in this respect. As a matter of fact, the Court in its activities has faced several cases in which the legal entities were somehow involved[9], meaning that the active debate is still actual and open (Artusi, 2014:162). This example underlines properly the debate on the role of private entities in international law that is perfectly reflected also in the sphere of corruption.

At international level the U.N. Global Compact[10], the International Chamber of Commerce (I.C.C.), Transparency International (T.I.)[11] and the World Economic Forum-Partnering against Corruption Initiative (P.A.C.I.) have recently activated a campaign for

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[6] Art.25 of the Rome Statute.

[7] Annex to Report of the 1953 Committee on International Criminal Jurisdiction on its Sessions held from 27 July to 20 August 1953.

[8] Report of the International Law Commission on its Forty-Sixty Sessions, 2 May-22 July 1994.

[9] Proceedings against Carl Krauch and other 22 (Nuremberg, 1948) and against Bruno Tesch (Hamburg, 1946): cases in which was invoked the involvement of private entities in the illicit activities of death camps.

[10] The U.N. Global Compact is the world's largest corporate sustainability initiative with 13000 corporations and over 170 countries (see https://www.unglobalcompact.org/what-is-gc visited on March 2019).

[11] Transparency International defines itself a global independent movement/organization created by a few individuals in 1993, taking an initiative against corruption, sharing a vision of a world in which government, business, civil society and the daily lives of people are free of corruption. It is now present in more than 100 countries and works on collective awareness of the effects on corruption collaborating with governments, business, and civil society. Their values are transparency, accountability, integrity, solidarity, courage, justice and democracy. See https://www.transparency.org/ (visited on February 2019).

the adoption of a resolution by the Conference of States Parties of U.N. including the private sector in the monitoring and reviewing phase of the Convention adopted by the U.N. against Corruption[12].

Concerning the private sector, corruption has different and specific effects: "impacts the costs of goods and services provided by government, decreasing their quality and directly increasing the cost for business, reducing access to services by the poor, ultimately increasing social inequality; discourages foreign investment by creating an unpredictable and high risk (financial and reputational) business environment; reduces healthy competition through deterring the entry of additional market players, thereby lowering incentives for innovation; distorts decision making at the highest level and can cause severe economic damage through the ineffective allocation of public resources, particularly when diverted to benefit private and not public interest; the laundering of corruption proceeds can impact the national economy and the integrity of the international financial system; may reduce the impact of development assistance and hinder our collective ability to reach global development goals; facilitates, and is fuelled by, other forms of criminal activity including transnational organized crime, money laundering and tax crime which may represent significant threats to global and national security and to national budget"(Tartaglia Polcini, 2018:160).

In addition, for the purpose of the contribution, it is central to introduce a third hybrid subject[13]. Following the privatization wave of last decades that interested mainly Europe, a multitude of private companies with a public mission (ex. health, education, infrastructures, etc.) develop in the regional scenario representing a mix of public activities and objectives reached by private organization and networks. Actually these private entities with a public purpose represent a good alternative, in order to facilitate activities that otherwise would be engaged in the public administration's bureaucracy. For this reason they usually develop in national contexts where the bureaucratic organization is still based on traditional and static systems of management. Conversely these companies are often totally of partially controlled by the public administration with a consecutive lack of independence and autonomy. With regard to anti-corruption measures, State Owned Enterprises should often face and apply both public sector's and

[12] The U.N.C.A.C. Convention will be studied in next chapter.

[13] The characteristics and functions of State Owned Enterprises are studied in the section dedicated to the Italian background in the II Chapter.

private sector's obligations developing a very specific and distinctive system of internal anti-corruption measures.
In the end the last protagonist of the development of both corrupted practises and anti-corruption measures is undoubtedly civil society that at the same time displays and observes the manifestations of the phenomenon and arise, helped by institutions, new values and principles and contributes to their spread.

1.3 Spread and perception

Corruption is a plague that has affected all societies throughout the history, at the point that it is not possible to determinate the beginning of its general effective development and expansion, since it is an often, still today, hidden and embedded phenomenon. In other words it is something illicit characterized by secrecy perpetrated by someone who has the interest to avoid reporting it and even with a not clearly identified victim. For this reason it is interesting to focus on the study and research developed on the spread and perception of the phenomenon, analysing the main sources. In particular with regard to sociological analyses of corruption, already in the 1960s it was recognized that due to the shady aspect of corruption, the researchers in this field need to first of all observe the development and the effects of the phenomenon and secondly to take into account history, culture, language and circumstances, in other words the background knowledge (Alatas, 1968:3). As a matter of fact it seems that corruption is a universal disease existing in all societies and even present in human nature, rather than depending only from the political, social, economic background. Accordingly the study of the extent and insight of corruption must be focused first of all on the reasons and motivations from which corrupted behaviours arise. In this way in the following stage it would be possible to understand which specific measures could allow to reach the ground level of population, with efficient information and training about the effects of corruption and the remedies to curb it; this mechanism needs to be then placed also to the levels of population that have more responsibilities. In addition the mapping of the phenomenon of corruption could be useful to effectively adapt and shape anti-corruption measures to the context emerged.
Actually, the commonplace and impression seem to recognize corruption as a problem of third world countries, meaning developing and least developed countries. Corruption in

these contexts is in fact more visible, but it is a phenomenon that being systemic and embedded in culture is more hidden, and maybe though to curb, in developed countries.

Recent studies remark a concrete diagnosis of the symptoms of the perceived phenomenon. “[…] we find consistently that a high perception of corruption is frequently associated with low public expenditure on health […] and education, but high on various infrastructural projects[…], reduced absorption of assistance funds […], low tax collection […], and low participation of women in both the labour market and politics” (Mangiu-Pippidi, 2015:2). Still today in most countries of the world, people do not think anti-corruption system as reliable, especially where citizens perceive high levels of favouritism, where there is a difficult relationship between corruption victimization and perception of corruption and where people with some experience of bribery, surprisingly, is the more unsatisfied with the public service. “Perceptions are important as they reflect popular experiences in all aspects of school, career, public life, exposing the mechanism of advancement of society and the way the state operates” (Mangiu-Pippidi, 2015:5).

Perception is, indeed, influenced by the media exposure of the corruption’s news of every day life with an increase of the perception of the phenomenon till about 3.5 per cent and a decrease of civic trust of about 5.2 per cent, mainly due to the casual relationship of persuasion of media (Rizzica and Tonello, 2015:3).

The better-known evaluation of the perceived levels of public sector corruption is elaborated every year by T.I., ranking 180 countries and using a scale from 0 to 100 (a very clean country).

T.I., making the study of corruption as objective as possible, analyses a number of indicators like country’s crime statistics, number of complaints and prosecutions for corruption and corruption related offences; the examination of these information permits to analyse the following statements with regard to the country studied and rank the perception and spread of corruption:

- “culture of complaint/disclosure of fraud,
- legislation criminalizing various forms of corrupt behaviour such as bribes and trading in influence,
- corruption and corruption related offences are listed separately and not subsumed under other offences such as fraud, embezzlement or extortion,
- effective investigation and prosecutorial system that is trusted by the citizens,
- easy access to justice,

- the country maintains an efficient database of complaints, prosecutions and convictions, and
- the statistics are reliable and publicly available" (Carr, 2007:125).

The sources that T.I. embraces in its monitoring process are institutions, non-governmental organizations and private actors.

Actually, even when the jurisdiction of a country meets the principles listed above many events of corrupted behaviours do not emerged and be reported because of reasons such as: "fear of reprisal from the recipient of the bribe, apathy, ignorance of legal rights, lack of access to justice, lack of trust in the police, lack of transparency in the judicial system and fear of involvement in a long drawn out process" (Carr, 2007:125).

The 2018 Corruption Perceptions Index (C.P.I.) was released by T.I. on 29th January 2019 with the following highlights: the improvers (that have bettered their level) are Estonia, Cote D'Ivore, Senegal Guyana; the decliners (that worsened their level) are Australia, Chile, Malta, Turkey, Mexico; the countries to watch are United States of America, Czech Republic, Brazil. In addition, the report argues that there is a link between corruption and the health of democracies and, thus, the study reveals a worldwide crisis of democracy, in terms of rule of law and political rights, generated by the failure of various countries to control corruption. "More than two-thirds of countries score below 50, with an average score of only 43. […] To make real progress against corruption and strengthen democracy around the world, T.I. calls on all governments to:

- "strengthen the institutions responsible for maintaining checks and balances over political power, and ensure their ability to operate without intimidation;
- close the implementation gap between anti-corruption legislation, practice and enforcement;
- support civil society organizations which enhance political engagement and public oversight over government spending, particularly at the local level;
- support a free and independent media, and ensure the safety of journalists and their ability to work without intimidation or harassment."[14]

Although the studies of T.I. give merely a partial picture, it is a reliable collection of data that helps understanding the impact of the endemic and global phenomenon of corruption.

[14] See https://www.transparency.org/news/pressrelease/corruption_perceptions_index_2018 (visited on February 2019).

In addition, T.I. publishes also the Global Corruption Barometer[15] that represents the world's largest survey based on asking citizens direct personal experience of corruption in their daily lives showing how far countries have to go to fight corruption; from 2017 data emerges that nearly 1 in 4 world's citizens said that they paid a bribe when accessing public services in the last 12 months and the 57% of people around the world think that government are not doing enough to fight corruption, but hopefully half of the people agrees that citizens could make a difference.

1.4 Prevention

At the beginning of this section dedicated to the development of the forms of prevention to corruption it is essential to consider the most shared socio-political conditions that can mitigate corruption: firstly the attachment and the involvement in the process of national progress from both the public and the public sector; secondly an efficient administration. In addition the third fundamental element is a favourable historical and sociological situation together with an anti-corruption value system promoting high moral and intellectual standards within the leading group. (Alatas, 1968:62).

For the purpose to understand how the prevention of corruption has developed in the above conditions, it is important to define how politics regulated in ancient societies initial specific systems of anticorruption and how those systems have become so prominent in recent decades in a real process of proliferation. Multidisciplinary researchers studied in the past the phenomenon of corruption in every aspect and in various disciplines, analysing the way and in which contexts countries developed anti-corruption systems and which failed or success in their purposes.

Transversally in the field of anti-corruption research has been highlighted the incognisance of the ahistorical and general approach, focusing on the importance of the analyses of the characteristics of corruption and its development related to specific times and places in which it occurred. In addition, corruption had always been related to the abuse of public power and public interest and its social and legal connotation has been deeply recognized too. In sum it is fundamental to adapt a multidisciplinary approach; in other words political, cultural, intellectual, economic approaches together.

As a matter of fact, the main issue of such study should be the relationship between modernity and corruption, in fact after the Second World War emerged a distinction

[15] See https://www.transparency.org/research/gcb/gcb_2015_16/0 (visited in March 2019).

between "the well-developed corruption free- modern societies of the West and the relatively corrupt traditional societies to be found in the non-Western world. […] The differences in the level of corruption which may exist between modernized and the politically developed societies of the Atlantic World and those of Latin America, Africa and Asia in large part reflect their differences in political modernization and political development" (Kroeze et al. 2018:2). In fact, as emerges from many studies, societies had everywhere been characterized by nepotism, bribery and clientelism till the introduction of bureaucracy and market economy. More recently the common idea and hope of civil society that has developed is that the rise and spread of international organizations' development projects could help developing countries to eliminate corruption in those areas. In this same reasoning also the liberalization, democratization and good governance are recognised and considered a potential arm against corruption[16]. As this approach grew also accountability and transparency became part of the anticorruption's effective remedies and fundamental principles.

Researchers in last decades had deeply studied the relationship between modernization and corruption, meaning the pre-modern zoning of corruption, too. The findings revealed in the same phase a sort of moral degeneration influencing the whole society. As a result it is necessary to add to the idea of corruption the notion of political deviance in private and public spheres, although rather than effective differences in early modern and modern societies, the spread and perception of corruption is more an issue of interpretations and ideals. In other words, a difference both in corruption and anticorruption phenomenon are clear in pre-modern and modern societies, but their characteristics and development were without doubt influenced by the perception in the time and the place where those practices occur and were studied by contemporaries. Furthermore it has to be recognized that corruption and anticorruption are evolving processes, rather than static elements.

Focusing on antiquity, especially from Classical Greek period (V to IV century BCE) to the Roman era, it can be affirmed that anti-corruption measures were still present. In particular, in Athens corruption had been already inquired and punished at that time; the political system in Athens was based on the active participation and real power of civil society and on the trust in institutions (Assembly, law courts, etc.) and corruption was considered an act causing "the detriment of the city" (Kroeze et al. 2018:23); in the specific case involving foreigners, the principle of democratic equality and sovereignty

[16] See Johnston, 2014 and Mungiu-Pippidi, 2015.

of the citizen body of Athens was threatened. In Roman Republic, instead, emerged various corrupted practices: bribery, theft of public funds and maladministration of provinces. For this reason, the late Republic enacted specific legislation in order to establish a supervisory body of public morality, preventive and punitive measures, reform the senate, the jury courts and the popular assemblies. Although the creation of specific laws and procedures, corruption appeared even as one of the consequences of the failure of republican Rome. Furthermore at that time it emerged the presence of anticorruption procedures and institutions, but also a tension between public and private sphere, due to the lack of trust in the institutions by the citizens (Kroeze et al. 2018:46).

Middle Ages highlighted a time of proliferation of corrupted practices and a scarce effort in combating them or, better, a problem between preventive measures and their enforcement (Kroeze et al. 2018:8).

Early Modernity was a period in which the interest of the political sphere in corruption was scarce and as a consequence there was less attention in the effectiveness of anti-corruption measures. In the late medieval period, in particular, the attitude to anticorruption measures of government was connected with the distribution of power and wealth that was an issue emerging in that period. Corruption was not tolerated only when it was particularly disproportionate. “Maybe it is more constructive to see corruption more as a reflection of, and a creative response to, the human condition as men (and women), and companies and corporations, strive to live within political societies and resolve their disputes over wealth and power. Patronage and the giving of gifts have, after all, been with us much longer than modern bureaucratic states and certainly longer that modern notions of corruption” (Kroeze et al. 2018:138).

In sum, the ancient regime in general was weak and not able to punish corrupted behaviours, however the presence of measures assured honesty in the members of king’s staff.

The transition between early modern to modern ages is the focal period interested by the implementation of modern reforms with the introduction of the rule of law, the separation of powers and public and private spheres and the bureaucracy. This transition is known as a repentant process enforced by revolutionaries, who were powerfully aware of the damages on society of corrupted conducts (Kroeze et al. 2018:11). In addition in this historical period emerged the relationships between corruption and anticorruption, in which the latter contributed to define the former, for instance “the embezzlement of public money, the sale of office, the abuse of the justice system, illicit plunder from imperial

ventures, sexual immorality and even the diffusion of corrosive ideas and beliefs […] Anticorruption thus helped to define the nature of religious, political, economic, imperial, sexual, legal and cultural corruption. Anticorruption and corruption were linked together in a synthetic process that was continually evolving" (Knights in Kroeze et al. 2017:194). In modern European society the fundamental pillars of corruption were demolished by adequate measures, mostly liberal and state-building measures, like Britain (before the First World War) (Kroeze et al. 2018:14).

In conclusion the study of the historical roots of corruption confirms some fundamental ideas with regard to the relationship between corruption and anticorruption. Firstly corruption and anticorruption are embedded in the context in which they developed, in terms of time and space. For this reason corruption and anticorruption building processes cannot be easily considered completely failing or successful. Secondly these studies underline the influence of the political sphere. Actually, the political attitude in the place and time taken into consideration is determinant in the proliferation or elimination of corrupted practice, as well as in the enforcement of measures. Thirdly, anticorruption includes elements of legitimacy and trust, and, at the same time, political, economic and judiciary practices.

In the end, it is worth considering the integrity pillars that emerge in the recent studies as the modern key institutions that permit to control corruption: "an elected legislature, an honest and strong executive, an independent and accountable judicial system, an independent auditor general, an ombudsman, a specialized and independent anticorruption agency, an honest and monopoliticized civil service, honest and efficient local government, independent and free media, a civil society able to promote public integrity, responsible and honest corporations, an international framework for integrity" (Mangiu-Pippidi, 2015:76).

1.5 Main features: conducts and crimes, perpetrators and intermediaries, sanctions and other preventive and repressive measures

The main purpose of the present study requires an analytic study of the main international and regional treaties as fundamental instruments adopted by international organizations and institutions against corruption, that provide to implementing States not only a homogenous legal framework, but also a shared language of anti-corruption. These relevant legal tools will be deeply studied in the following chapter, but it is worth taking them into account for the aim of this section to describe the main features involved in

corruption crimes and anti-corruption measures. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (O.E.C.D. Convention) was adopted by the O.E.C.D[17] on 21st November 1997 representing the first step towards the transnational action against the phenomenon of corruption. However the more relevant instrument, in terms of States and Parties that ratified it, is the United Nations[18] Convention Against Corruption (U.N.C.A.C. Convention) adopted, following the treaty promoted by the O.E.C.D., on 31st October 2003. In addition the European institutions adopted the more important regional initiatives: the Convention of the European Union[19] on the Fight Against Corruption involving officials of the European Communities or official of member states (E.U. Convention) was adopted on 26th May 1997; the Criminal Law Convention on Corruption (C.o.E. Criminal Convention) was adopted by the Council of Europe[20] on 27th January 1999 and the Civil Law Convention on Corruption (C.o.E. Civil Convention) was adopted on 4th November 1999.

In this respect in 2008 the O.E.C.D provided A glossary of international standards in criminal law (O.E.C.D. Glossary) related to corruption, in order to support lawmakers of signatory members in the process of implementation of domestic law according to the

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[17] The Organization for Economic Cooperation and Development (O.E.C.D.), established in 1961, promotes policies to improve the economic and social well-being and it is centered on the values of objectivity, openness, ethic, pioneering. It is an open forum with 36 member States, where governments deal with common problems, in particular with issue related to economic, social and environmental change. For this purpose the O.E.C.D. observes productivity and flows of trade and investments, setting international standards (see http://www.oecd.org/ visited on February 2019).

[18] The United Nations is an international organization founded in 1945 with 193 Member States that has a fundamental role in promoting issues related to humanity such as peace, security, climate, development, human rights, gender equality, governance and so on. It is a forum where Members dialogue and negotiate on several issues. It has a complex structure composed by different bodies and services in order to support member States facing together the main challenges of the 21st century (see https://unic.un.org/aroundworld/unics/en/index.asp visited on February 2019).

[19] The European Union is a unique economic and political union between 28 countries; its predecessor, the European Economic Community (name till 1993), was created for the European economic cooperation towards the creation of an interdependent single market. Soon the countries started to face together not only their economic interests, but also other policy areas like climate, health, security, and justice (see https://europa.eu visited on February 2019).

[20] The Council of Europe is an international organization founded in 1949 as a first step towards the process of European construction, based on the values of human rights, democracy and the rule of law. It has 47 member States and 6 observers States. The organization promotes actively its main values launching campaigns, helping members in the process of implementation and promoting the enactment of Conventions on issues of common interests, such as the Convention on Preventing and Combating Violence against Women and Domestic Violence. It eventually monitors the achievements of the member States through monitoring bodies (see https://www.coe.int/en/web/portal/home visited on February 2019).

mandatory and non-mandatory provisions of the Conventions regulating the transnational fight against corruption. For this reason, in drafting the Glossary, the O.E.C.D. took into consideration not only the O.E.C.D. Convention, but also the C.o.E. Criminal Convention and the U.N.C.A.C. Convention, that are considered at international level the more relevant instruments against corruption. Thus, the O.E.C.D. provided a key document based on the main legal instruments released on the subject collecting all the definitions and explanations of the main contents of the Conventions for the Parties involved in the achievement of the implementation process.

Similarly, in 2009 T.I. issued the Anti-Corruption Plain Language Guide (I.T. Guide) with the specific purpose to assure a common anti-corruption understanding and language, in order to guarantee a better future prevention of abuses within governments, private sector and civil society.

Actually these contributions moved from the assumption that, though the countries' common political effort to combat corruption is fundamental, the proper application of Conventions' provisions to the local context and in particular in domestic legal orders is central too. Firstly, these contributions respond to a real need of implementation' experts. Secondly, they provide a common guide for action: countries can develop national legal systems reflecting at the same time the peculiarity of the domestic order and the homogeneity of the international framework against corruption. In brief, thanks to these initiatives, the enforcement of the different domestic legal orders would speak the same language and meet the same standards running together for effective results.

For the purpose of the dissertation, the notions of the O.E.C.D. Glossary and of the T.I. Guide are integrated in this section with the concepts of other significant anti-corruption instruments and with the ideas of relevant authors. Nonetheless, for the purpose of the contribution, only more essential and debated notions will be taken into consideration.

1.5.1 Corruption

Corruption is a term that encompasses a wide range of contents and meanings. Accordingly, it is a common knowledge that there is not an accepted and firm definition of corruption. As a result, in the past decades and still today, many researchers have accepted the challenge offered by the term and mostly started their contributions trying to define corruption. However, the interpretations of the researchers, although having some focal ideas in common, mostly differ from one to another.

Corruption comes from the Latin *corruptio* that has the general meaning of "moral decay", in fact from ancient times onwards corruption has primary been perceived as a problem of social morality. As a matter of fact, the interest for the notion "corruption" is not a recent topic; in history various influential political philosophers focused their reasoning on the concept of corruption, for instance Plato in "The Republic", Aristotle in "The Politics" and Machiavelli in "The Prince" and in "the Discourses", Montesquieu in "The Spirit of the Laws". For instance, Machiavelli argued "the rulers might need to cultivate dispositions, such as ruthlessness, that are inconsistent with common morality. And Plato doubted that the majority of people were even capable of possessing the requisite moral and intellectual virtues required to play an important role in political institutions; […] Moreover, these historically important political philosophers were concerned about the corruption of the citizenry: the corrosion of the civic virtues" (Stanford Encyclopaedia of Philosophy https://plato.stanford.edu/index.html). Similarly in modern societies the term is used most of the times to address the "decay of the moral and political order" (Bacio Terracino, 2012:8). More recent approaches highlighted the moral aspect together with the legal feature, defining corruption "as the abuse, according to the legal or social standards constituting a society's system of public order, of a public role or resource for private benefit" (Bacio Terracino 2012:12)[21]. A slightly different definition provided is focused on the concept of power: "the abuse of entrusted power for private gain or the exercise of improper influence over those entrusted with power" (Rose, 2015:7)[22].

Since with the gradual development of the Western modern States in nineteenth century, countries became the major moral entity and the exercise of public authority a civic concern, so public officials turned in the main and recognized expression of social trust. As a consequence corruption started to be mainly connected with the behaviours of these figures and defining corruption became, above all, an exercise to identify corrupted conducts. In this context is relevant to quote the legalistic definition: "Corruption is behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behaviour as bribery (use of a reward to prevent the judgement of a person in a

[21] See also Kroeze et al., 2012 and Johnston, 2005.
[22] See also Vignoli, 2016.

position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding use)" (Bacio Terracino 2012:11).

Another important contribution in this respect is the following: "According to the common usage of the term corruption of officials we call corrupt a public servant who accepts gifts bestowed by a private person with the object of inducing him to give special consideration to the interests of the donor […] Extortion demanding of such gifts or favours in the execution of public duties, too […] officials who use the public funds they administer for their own benefit, who in other words are guilty of embezzlement at the expense of a public body. Another phenomenon which can be described as corruption is the appointment of relative, friends or political associates to public offices regardless of their merits and the consequences on the public weal. For the present purpose we shall call this nepotism. We have thus three types of phenomena contained in the term corruption: bribery, extortion, nepotism." (Alatas, 1968:11).

As seen, corruption can be considered an "umbrella concept" that includes a wide range of conducts (Rose, 2015:7). Most importantly it is fundamental to consider the main distinction of corrupted behaviours, between grand and petty corruption that are today shared classifications. Grand corruption usually refers to corruption of heads of state, ministers and high-level officials, which frequently involves large values and distorts policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. On the other hand, petty corruption is everyday corruption at the lowest levels and refers to the corruption of junior officials, customs clerks, and traffic police and generally involves relatively small values and an interaction with ordinary citizens, who often are trying to access basic goods or services (Bacio Terracino, 2012:13)[23].

Furthermore in the study of the meaning it is important to take into account that the definition of corruption consists of a descriptive and a normative element: the former is referred to the abuse of entrusted power for private gain, the latter is referred to the law, which determines what actions constitute abuse of power for private gains. (Bacio Terracino, 2012:14)

Thus, the definition is different in every country depending on the domestic connotation of the term corruption. However international instruments, asking States for

[23] See also T.I. Guide.

implementation of domestic legal orders accordingly to specific common indicators, help in the process of harmonization: definitions mainly come, as a consequence, from international instruments, although every Convention obviously reflects its main purpose. At this point becomes crucial to deliver what the main anti-corruption Conventions express on the term. In this phase we will analyse only the primary meaning of corruption; others details will be examined in following sections.

The U.N.C.A.C. Convention addresses as corruption multiple corrupted acts, but, above all, "the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties" and "the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"[24]. In addition this Convention provide a provision for every other corrupted behaviour for which criminalization is needed: embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, bribery and embezzlement of property in the private sector, laundering of proceeds of crime, concealment, obstruction of justice[25].

The O.E.C.D. Convention's "indirect definition" of corruption referred to the act of "any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business"[26].

The C.o.E. Criminal Convention indirectly defines corruption as active bribery of domestic public officials " […] when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting the exercise of his or her functions"[27] and as the passive bribery of domestic public

[24] Art.15 of the U.N.C.A.C. Convention.
[25] Art.22-25 of the U.N.C.A.C. Convention.
[26] Art.1 of the O.E.C.D. Convention.
[27] Art.2 of the C.o.E. Criminal Convention.

officials “when committed intentionally, the request or receipt by any of its public officials, 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”[28]. The following provisions adapt the articles 2 and 3 also to members of domestic public assemblies[29], foreign public officials [30], members of foreign public assemblies [31], officials of international organizations [32], members of international parliamentary assemblies [33], judges and officials of international courts[34]. The articles 7 and 8, instead, adjust the same provisions to the private entities. In addition this Convention provides two specific articles on the corrupted crimes of trading in influence and money laundering[35].

The C.o.E. Civil Convention, on the contrary, directly[36] addresses corruption for the purpose of the Convention as “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 recipients of the bribe, the undue advantage or the prospect thereof”[37].

The E.U. Convention, instead, refers to active bribery as “the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him 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”[38] and passive bribery as ”the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, 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 shall constitute passive corruption”[39].

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[28] Art.3 of the C.o.E. Criminal Convention.
[29] Art.4 of the C.o.E. Criminal Convention.
[30] Art.5 of the C.o.E. Criminal Convention.
[31] Art.6 of the C.o.E. Criminal Convention.
[32] Art.9 of the C.o.E. Criminal Convention.
[33] Art.10 of the C.o.E. Criminal Convention.
[34] Art.11 of the C.o.E. Criminal Convention.
[35] Art. 12 e 13 of the C.o.E. Criminal Convention.
[36] The C.o.E. Civil Convention is the only instrument that explicitly provides an article entitled to the “definition of corruption”.
[37] Art. 2 of the C.o.E. Civil Convention.
[38] Art. 3 of the E.U. Convention.
[39] Art.2 of the E.U. Convention.

Actually, the various Conventions, although reflecting their own specific purpose, display a proper harmonization of the use and meaning of the term corruption. Neverthless a group of Conventions, the C.o.E. Civil Convention above all, use the terms corruption and bribery as synonyms, even though corruption has a general connotation embracing more than one corrupted conducts and bribery represents only one of this behaviours. In other words, those Conventions address merely bribery and it seems an initial mistake to mention corruption as the main purpose of the Conventions (Bacio Terracino, 2012:18). Furthermore some Conventions, mainly the U.N.C.A.C. Convention, postulate a wide range of corrupted behaviours that should be criminalized, in order to offer a more clear designation to the implementing Parties. However, a second group of Conventions, in which is included the C.o.E. Criminal Convention, do not provide an explication of the acts and the related offences that are classified as corruption, enumerating acts that have to be criminalized without a clear and explicit description (Bacio Terracino 2012: 19).

In sum, the majority of the Conventions taken into account provide the offences related to a variety of corrupt behaviours, rather than define the term corruption; in addition every Convention has a different approach related to its specific purpose and consequently comprehends different terms of usage. Anyway, thanks to the examination of the legal instruments it is possible to affirm that in the international scenario the most common definition of corruption is the one used for policy purposes, "abuse of public or private office for personal gain", that directly or indirectly emerges in every text and it is also the definition used by the World Bank and the T.I. Guide. According to the authors of the O.E.C.D. Glossary the general connotation of this definition represents the perfect compromise, in order to develop awareness and to elaborate specific strategies, action plans and preventive measures.

In conclusion of this section it is necessary to focus briefly on the relationship between corruption and the private sector, which is one of the central issues of the current debate on corruption. Essentially corruption involves in practice a private and a public party. The debate grows on the possibility to consider as corrupted conducts the behaviours that take place in the private sphere having the same characteristics of corrupted behaviours of the public context. In this respect recent studies mostly consider these conducts as a different type of corruption, threatened the development of society as the corrupted acts of public sphere (Bacio Terracino, 2012:20). Accordingly, some international instruments target corruption in private sector, for instance the C.o.E. Criminal Convention and the "Framework Decision on Combating Corruption in the private sector of 2003 of European

Union", asking Parties to take effective measures against corruption in private entities. Clearly the features involved in the criminalization of corruption of private sector are different: "the property and assets of the enterprise involved, the employment relationship in terms of loyalty, the integrity of the labour relationship between the employee and employer, the integrity of duties in business matters, or the integrity of fiduciary relationships, and free or fair competition and the proper functioning of the market" (Bacio Terracino, 2012:22). In brief, corruption exists and should be recognized in private sector activities and even in private initiatives regulated by the government (Tanzi, 1998:8).

1.5.2 Corruption Conducts and Crimes

- *Bribe*

According to the majority of international Conventions bribe is associated to an undue advantage[40], meaning something prohibited and illegal; the characteristics of the bribe are pecuniary or non-pecuniary, tangible or intangible. Anyway, this concept has to be necessarily adapted to the national context, since for many countries, as previously said, a sort of advantages are legally recognizes and culturally accepted. On the contrary, in some areas gifts of any kind are strictly forbidden and punished, as for instance in Kazakhstan (Bacio Terracino, 2012:101). Furthermore the concept of undue advantage is also connected to the figure, which receives the advantage, since in some countries certain figures that are internationally target as public officials, are not considered in this way by domestic law and by people's perception.

In conclusion it is important to remember the concept of facilitation payments that are a kind of bribe, that consist of small payments to secure or expedite the public officials to perform their functions. Basically it is something associated to bribery, but in some countries it is recognized as socially accepted and some jurisdictions have introduced provisions to exclude facilitation payments from corrupted behaviours. The difficult element of facilitation payments to be identified is the amount that can be considered legal and the amount that should be consider illegal (Bacio Terracino, 2012:100).

[40] Art. 1 of the O.E.C.D. Convention, art.2 of the C.o.E. Criminal Convention, art. 15 of the U.N.C.A.C. Convention.

- *Corruption offences*

"The term corruption has grown to include all unaccountable public spending" (Mangiu-Pippidi, 2015:2).

Both the C.o.E. Criminal Convention and the U.N.C.A.C. Conventions include a range of specific offences with the aim of a clear identification of the conducts that should be taken into consideration in the implementation of domestic legal instruments for criminalization, although not all the provisions are in this case mandatory.

Embezzlement, misappropriation or other diversion of property by a public official[41] and obstruction of justice are mandatory[42]; abuse of functions[43], illicit enrichment[44], bribery in private sector[45], embezzlement of property in the private sector[46], concealment of property resulting from corruption[47] are not mandatory. Embezzlement, misappropriation or other diversion of property by a public official is also called peculation in some legislation and consists of the act of illegal appropriation of property or funds or any value by virtue of a public official.

Illicit enrichment is also called the unexplained or excessive increase of the assets of a public official. It is, therefore, an indirect crime of corruption, since it is not directly proof with the acceptance of bribes. In the end, from academic contributions emerge further characteristics of corrupted behaviours: "Bureaucratic or political […]; cost-reducing or benefit-enhancing; briber-initiated or bribee-initiated; coercive or collusive; centralized or decentralized; predictable or arbitrary; involving cash payments or not (Tanzi, 1998:19).

- *Acts*

International Conventions mostly target both acts and omissions by an official[48], but it is not specified if the acts or omissions should be illegal or in breach of duties. Thus the act

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[41] Art. 17 of the U.N.C.A.C. Convention.
[42] Art. 25 of the U.N.C.A.C. Convention.
[43] Art. 19 of the U.N.C.A.C. Convention.
[44] Art. 20 of the U.N.C.A.C. Convention.
[45] Art. 21 of the U.N.C.A.C. Convention and art.7-8 of the C.o.E. Criminal Convention.
[46] Art. 22 of the U.N.C.A.C. Convention.
[47] Art. 24 of the U.N.C.A.C. Convention.
[48] Art. 1 of the O.E.C.D. Convention, art.2 of the C.o.E. Criminal Convention, art. 15 of the U.N.C.A.C. Convention.

targeted as an offence can be not illegal, if acted without the involvement of any undue advantage and bribe and without a direct link between the two.

- *Offering, promising or giving a bribe*

The aspect of the physical corrupted act is covered in particular by the C.o.E. and U.N.C.A.C. Conventions that require Parties to criminalize such behaviours, as active corruption.

The O.E.C.D. Glossary helps in defining those acts and highlights the difference between them. "Offering" occurs when a briber declares that can provide a bribe; "promising" supposed a sort of agreement between the briber and the official on the fact that the bribe can be provided and accepted; "giving" supposed instead the material transfer of an illicit advantage from the briber to the official. Thus, only promising supposed an explicit agreement between the two actors, in the other two cases the official can be even unaware of the circumstances. In addition the described offences can took place also in an international situation; in the case of the U.N.C.A.C. and the O.E.C.D. Conventions the conducts enter the purposes of the Convention only if committed in international business.

At this point it is essential to underline the traditional administrative role of gifts in some cultures, especially in the Far East, where it was present in the past, but it is still somewhere part of common culture. Apparently that practise is not illegal, but it seems to have somehow influenced the development of corruption in the past: "it was not committed in secrecy. It was not a violation of duty nor the rights of the public. It was not a form of revenue in which the government benefitted. […] It was not an embezzlement of government funds or public extortion" (Alatas, 1968:54)[49]. In sum, this tradition needs to be considered in the proper socio-historical context, in order to study how a proper practice turn into an effective abuse and to protect the cultural heritage. Surely this transformation from practise to abuse could be considered more risky and frequent where this institution is present and common.

- *Requesting, soliciting, receiving or accepting a bribe*

[49] Alatas referred in his contribution mainly on the Vietnamese case.

Generally speaking, bribery conducts took place when an official requests a bribe and when the official receives it, meaning passive corruption. At the stage of requesting and soliciting the official obliges or invites the other actor to pay or provide a bribe, so there is no necessary agreement between parties. On the contrary, in the case of receiving and accepting the offence materially occurs. Finally, like in the previous case analysed, the offences can took place also in an international situation; once again in the case of the U.N.C.A.C. and O.E.C.D. Conventions the conducts enter the purposes of the Convention only if committed in international business.

- *Trading in influence*

According to the O.E.C.D. Glossary "Trading in influence occurs when a person who has real or apparent influence on the decision-making of a public official exchanges this influence for an undue advantage". In this case, as seen previously in the case of primary corrupted behaviours, it is necessary to consider the element of the demanding and the element of the acceptance. In addition the peculiarity of this conduct is that the criminal offence addresses not directly the decision-maker, but those persons who are in the same staff or community and have the possibility to try to obtain indirectly some advantages by influencing the decision-maker. Thus, the instigator in this case can or cannot be a public official and the public official involved in the decision-making process could be even unaware. For this reason the O.E.C.D. Glossary defines this crime as "background corruption".

The C.o.E. Criminal Convention takes into consideration the trading in influence in article 12 referring to the figures present in the previous provisions as decision-makers and identifying as criminal "who asserts or confirms that he or she is able to exert an improper influence over the decision-making" process.

The U.N.C.A.C. Convention considers this offence in article 18 addressing in the same way the person who abuses of his or her real or supposed influence to obtain an undue advantage.

In conclusion, in order to make a clear distinction between the trading in influence and legal acknowledge types of lobbying, the Conventions clearly referred somehow to the act of illegal influence or abuse.

1.5.3 Perpetrators and intermediaries

- *Public official*

The notion of public official is maybe the more crucial keyword debated in the contributions, since it is specifically related to the actors involved in the corrupted conducts and therefore in proceedings.
The U.N.C.A.C. Convention defines, for the purpose of the Convention, national public official in article 2 as follows: “public official shall mean any person holding a legislative, executive, administrative or judicial office of a state party, whether appointed or elected; whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority or any other who performs a public function, including for a public agency or public enterprise or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; or any other person defined as a “public official” in the domestic law of a State Party”.
The C.o.E. Criminal Convention, for the purpose of the Convention, in its article 1 affirms that a public official shall be understood by reference to the definition of “official, public officer, mayor, minister or judge in the national law of the State in which the person in question performs that function and as applied in its criminal law”; in article 4 the Convention integrates the definition with members of any domestic public assembly exercising legislative or administrative powers.
According to the O.E.C.D. Glossary the national public official includes a definition that is particularly wide and addresses any person who holds a legislative, executive or administrative office, including heads of state, ministers and staff; is a member of a domestic public assembly exercising legislative or administrative powers; holds a judicial office, including a prosecutor; performs a public function, including for a public agency; performs a public function for a public enterprise as executives, managers and employees; performs any activity in the public interest delegated by a signatory, such as the performance of a task in connection with public procurement; provides a public service as defined in the signatory’s domestic law and as applied in the pertinent area of law of that signatory (ex. teachers and doctors); meets the definition of a “public official” in the domestic law of the signatory, including the definitions for “official”, “public officer”, “mayor”, “minister” or “judge”. It also includes law enforcement officers and the military. Furthermore the Glossary specifies that in determining whether a person is a

national public official, it is irrelevant whether that person is: appointed or elected; permanent or temporary; paid or unpaid, irrespective of that person's seniority.
The notion of foreign public official is primary defined in the O.E.C.D. Convention in article 1 as follows: "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization where foreign country means all levels and subdivisions of government, from national to local".
The U.N.C.A.C. Convention definition of foreign public official is perfectly shaped on the notion provided by the O.E.C.D. Convention.
The C.o.E. Criminal Convention's definition of foreign public official emerges from the regional competence of the document and it is, for this reason, quite different. The C.o.E. Criminal Convention first of all determines in article 1 that the persecuting State may apply the definition of public official only insofar as that definition is compatible with its national law, limiting in some way the proceedings to the domestic notion of public official. Meanwhile, in the articles 5,6,9 and 11 the Convention targets various figures: "a public official of any other State; any person who is a member of any public assembly exercising legislative or administrative powers in any other State; any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organization or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents; or any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party". Moreover in article 10 it targets members of parliamentary assemblies of international or supranational organizations of which the Party is a member.
According to the O.E.C.D. Glossary the notion of foreign public official is, in the Conventions, target on the wave of the notion of national foreign public official with the difference that it is a representative figure of a foreign autonomous territory.
In summary, in the study of the definition of the public official involved in bribery is needed to focus on for whom the actor works, on his or her function, on the domestic law notion.

- *Intermediaries and third parties*

The Conventions mostly address direct and indirect bribery, meaning that in the corrupted act it is involved an intermediary or a third party[50] that has the role to mediate between the briber and the official. This figure could be not connected with the other actors by any relationship; in fact this third part can be an agent, but even a financial institution or a company. For this reason, it is relevant to take into account that the intermediary can be innocent; however in these cases sometimes emerged a culpable accomplice, when the intermediary is conscious.
In addition the Conventions considered the possibility of a third party beneficiary[51].

1.5.4 Responsibility of Legal Persons

The provisions that address the responsibility of legal persons in the international instruments[52] are still debated, in particular because it is a concept that has gradually developed in connection with the role of private entities in the criminalization of corruption offence. On the one hand it is recognized that nowadays companies and private entities in general have a crucial role in the economic development of societies for the global achievements of anti-corruption objectives; on the other hand the involvement of those actors in the anti-corruption measures is still seen as a treat to the role that they detained. As a matter of fact economy is today driven at international, regional and national level mainly by legal persons, meaning commercial entities; large corporations dominate transportation, construction, telecommunication, mining, energy, production of chemicals (Tartaglia Polcini, 2018:165).
The notion of legal persons covers a wide range of entities that are recognized in this way by the applicable national law. The O.E.C.D. Glossary, in particular, targets corporations, partnerships, societies, associations, foundations and not-for-profit bodies. The C.o.E. Criminal Convention integrates this group with "states or other public bodies in the exercise of state authority and public international organizations", in other words should be included enterprises in which any level of government has an ownership interest or a dominant influence, whether directly or indirectly.

[50] Art. 1 of the O.E.C.D. Convention, art. 2 of the C.o.E. Criminal Convention, art.15 of the U.N.C.A.C. Convention.
[51] Art. 1 of the O.E.C.D. Convention, art. 2 of the C.o.E. Criminal Convention, art.15 of the U.N.C.A.C. Convention.
[52] Art. 2 of the O.E.C.D. Convention, art.18 of the C.o.E. Criminal Convention, art. 26 of the U.N.C.A.C. Convention, art. 3 of the Protocol to the E.U. Convention.

Concerning the criminalization of conducts, many jurisdictions impose liability against a legal person only if the crime is committed for the benefit of the legal person (ex. Italy[53]). Furthermore many jurisdictions contemplate, in proceedings, if the legal person has exercised due diligence in supervising and controlling its employees, providing preventive and effective procedures, in order to avoid illicit conducts. In addition, there are some different shades linked to the concept of liability of legal persons, for instance the "administrative liability" is used in various countries to label both punitive liability for administrative offences or to refer to administrative sanctions.

Concerning the origin of the term, the corporate criminal liability was firstly adopted by the United States and the United Kingdom (common law countries) and the Netherlands was the first civil law country to adopt it in 1950. Other countries continued for decades to sustain the principles of *societas delinquere non potest*, rejecting the opportunity to consider legal persons as perpetrators of crimes. In last decades, also thanks to the pressure of international instruments and institutions, most European countries and other legislations adopt the concept in their domestic legal systems. In conclusion there are four types in which the concept is legally declined: criminal liability, quasi-criminal liability, administrative punitive liability for criminal offences, and administrative punitive liability for administrative offences (not matching international standards that require the criminalization of the offences) (Tartaglia Polcini, 2018:166).

1.5.5 Repressive and preventive measures

- *Sanctions*

Generally speaking, the international Conventions require the imposition of "effective, proportionate and dissuasive sanctions"[54]. In other words, those sanctions should be suitable to the gravity of the offence, but at the same time, sufficient to curb the crime.

Thus, one aspect that should be take into consideration determining the sanctions is that sanctions can be different for the briber and the public official, having, instead, common characteristics of the sanctions provided for other similar criminal act. In this respect sanctions can be criminal penalties or civil and administrative sanctions. Some examples

[53] The approach of Italian legal system will be studied in the following sections.

[54] Art. 3 of the O.E.C.D. Convention, art. 19 of the C.o.E. Criminal Convention, art.30 of the U.N.C.A.C. Convention.

are: disqualification from participation in public procurements or other commercial activities, exclusion from entitlement to public benefits, removal or suspension from office.
Confiscation of the bribe is the sanction more target in the Conventions[55], meaning the sequestration of the economic advantage or/and the reduced expenditure. However, the object of the bribe, however, can be also a non-physical advantage, like a specific result, and can be even intangible or shared with more than one entity. In addition, confiscation is referred also to any property used in the corrupted conduct, making the role of the national institutions very complex, due to the generalization of this concept in the international instruments. As a result it is usually permitted to confiscate an equivalent value of the bribe itself or the transformed or converted property or any other benefit generated by the main act.

- *Defence and immunity*

The specific aspect of defence is covered only by the U.N.C.A.C. Convention, in a flexible way, at the article 30: "Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of the State Party and that such offences shall be prosecuted and punished in accordance with the law".
Conversely, immunity it is considered both by the C.o.E Criminal Convention (art.16) and the U.N.C.A.C. Convention (art.30); U.N.C.A.C. Convention is more incisive asking Parties for "an appropriate balance between any immunities or jurisdictional privileges". As a matter of fact certain public officials are nationally protected with the granted immunity from malicious prosecutions and this could make investigations and prosecution more complex. Hence, it is fundamental the evaluation of the countries of the correct balance between immunity and effective prosecution of public officials eventually involved in corrupted conducts.

- *Statue of limitation*

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[55] Art. 3 of the O.E.C.D. Convention, art. 19 of the C.o.E. Criminal Convention, art.2 of the U.N.C.A.C. Convention.

The provision on the statue of limitation is included in the art. 6 of the O.E.C.D. Convention: “any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of the offence”. The U.N.C.A.C. Convention addresses the issue at the art. 29 asking Parties to “establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence [...] “. In this respect, for signatory Parties it is important to consider the nature of the crime commented, for example if it involves investigations abroad or particularly complicated analyse; limitations period vary from country to country, even if they mostly begin with the commitment of the offence and last longer in case of aggravated crimes (ex. 5 years and 10 years). In addition that period can be suspended under certain circumstances through specific procedures.

- *Extradition, Mutual Legal Assistance and Asset Recovery*

The concept of Mutual Legal Assistance is part of the Conventions studied.[56] Generally speaking what it is required to State Parties is “prompt an effective legal assistance” or “widest measure of mutual (legal) assistance” in case of concerning offences, underlining that it is not possible to decline to render assistance invoking the ground of bank secrecy. In addition the Conventions include specific provisions on extradition[57]. These aspects are frequently arranged in specific multilateral or bilateral treaties including detailed procedures and parameters, providing precise forms of cooperation.
Only the U.N.C.A.C. Convention at art. 51, 54, 55, 57 postulates provisions on asset recovery. The Convention considers asset recovery a fundamental principle and can be requested by a domestic order of competent authorities of the requested state for freezing and confiscation or can be, if provided by legislation, to be directly recognized and enforced. This second option is surely less expensive and more effective. The I.T. Guide defines asset recovery as the legal process of a country, government and/or its citizens to recover state resources stolen through corruption by current and past regimes, their families and political allies, or foreign actors.

[56] Art. 9 of the O.E.C.D. Convention, art. 26 of the C.o.E. Criminal Convention, art. 46 of the U.N.C.A.C. Convention.
[57] Art. 10 of the O.E.C.D. Convention, art. 27 of the C.o.E. Criminal Convention, art. 44 of the U.N.C.A.C. Convention.

II. THE MAIN LEGAL INSTRUMENTS OF THE FIGHT AGAINST CORRUPTION

2.1 International background

"Since the end of the Cold War, corruption has become an item on the international agenda. This is partly due to the removal of the compelling need to support corrupt regimes for national security reasons, the visible corruption and organized crime in former Eastern bloc and other parts of the world and the new corrupt opportunities created by moves towards privatization and deregulation[58]" (Webb, 2005:193).

As a matter of fact, there are complex and multifaceted reasons that have driven the internationalization's process of the action against corruption. Firstly, the "result of a change of heart" of private entities, in particular multinational corporations and international organizations like the World Bank that for decades since its institution agreed on the idea that corruption was something to be treated outside of their mission. At a certain point, however, they faced the problem of corrupted conducts in beneficiary countries of their programs or businesses with a consequent mismanagement of committed resources. For this reason from this point onwards the World Bank introduced binding conditions of good governance for the countries asking for aid (Bacio Terracino, 2012:43).

Secondly, the prominence of globalization, together with democratic governments with free and active media, promoted the process of growing awareness on corruption. In this respect, it created the perception of a more widespread and ramified phenomenon that should be treated undoubtedly, at international and transnational level.

The growing role of nongovernmental organizations is also relevant in this process, due to the publicizing the phenomenon trying to create civil and civic anti-corruption movements. In addition, two more aspects were involved: the growth of international trade and business and economic changes both in developed countries and in economies in transition: the payments of bribes to foreign officials guaranteed to the companies beneficial business conditions. European newspapers[59] confirmed in those years that the

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[58] The process of removing government controls or rules from a business or other activity (Cambridge Business English Dictionary). It became common in advanced industrial economies in the 1970s and 1980s due to the new trends in economic thinking about the possible inefficiencies of governmental regulation. Thatcher and Reagan in the 1980s promoted the process till worldwide development.

[59] Le Monde in 1995 and the World Business in 1996.

bribes paid, for instance by Germany and France per year, were estimated in billions and billions. Thus, this tendency had a contagious effect and made people sceptical about market economy (Tanzi, 1998:5). As a result, it emerged powerfully the necessity of a multilateral law enforcement approach. In the end, the commercial interest, especially of American private actors that started to make pressure on institutions to create a homogenous background and obligations for international business transactions. Actually, the socio-political context of United States had been surely a breeding ground for the development of the new common awareness about the impact of corruption, firstly due to corruption scandals, secondly because of the pioneering role of the Foreign Corrupt Practises Act (F.C.P.A.)[60], the first domestic law combating bribery in commercial trade. Anyway such need of accountability and transparency in business was not the only reason for the development of the first anticorruption international instrument; the United States business lobbies required an equal playing field, since the domestic legislation obligated American companies to avoid bribery of foreign officials since 1977, but the exporting States were, at that time, not to be subject to those rules with an evident discrepancy in terms of obligations between American and foreign companies.

As a result and as previously highlighted, since the 1990s the world has started to focus attention on the problem of corruption with a great effort. International instruments are considered by institutions the main vehicles for combating corruption, thus international and regional institutions began to draft and adopt different instruments of legislation, with the aim to transmit the importance of combating corruption primarily to States, the more deeply involved actors, secondly to private entities, that were consequentially involved, and finally to civil society. Therefore the result of that period of legislation's enacting was a rich agenda combined by hard and soft law initiatives with different characteristics, various recipients and multiple scopes. As a matter of fact, the several new legal instruments that composed the so-created global anti-corruption framework represent a widespread and complex measures' system, although they did not originated from a process of harmonization (Carr, 2007: 129): the Conventions comprehend various substantive and procedural provisions.

[60] The Foreign Corrupt Practises Act is a U.S. federal law that was enacted in 1977 for the purpose to introduce accounting transparency requirements and to make illegal bribery of foreign officials, meaning payments offered to foreign government officials to assist in obtaining or retaining business. It was mainly directed to American companies involved in international business (see www.justice.gov visited on March 2019).

With regard to the addressees of the Conventions, they mostly target the public sector that is generally more permeated with corrupted practice in terms of "abuse/misuse of power by those in public office for private gain" (Carr, 2007:131). Meanwhile, some Conventions and some integrative documents and protocols "focus on the abuse/misuse of power in the decision making process for obtaining an undue advantage and are broader in scope" (Carr, 2007:131), addressing the private sector too.

In conclusion the amount of ratifications of the various Conventions is remarkable. Even thought this was also the sign of an initial enthusiasm, easily slow down by the difficulties of the States in implementing domestic legal order, the significant list of signatory Members and Parties could be considered without doubt a real symptom of the new consciousness about the necessity to take part at the international initiatives supporting the fight against corruption.

This chapter is dedicated to the analyses of the most relevant of these instruments.

2.2 International legal order

2.2.1. The Organization for Economic Cooperation and Development initiative

The O.E.C.D Convention was adopted by the Negotiating Conference on 21st November 1997, was signed on 17th December 1997 and entered into force on 15th February 1999, with the contribution of all the O.E.C.D. countries and 8 non-O.E.C.D. countries[61]. Today it has 44 signatories[62]. Influenced by the F.C.P.A. of 1977 and preceded by the "Anti-bribery recommendation" of 1994, the Convention addresses transnational bribery as an offence and focused, in fact, on criminal active bribery of a foreign official in international business transactions, more precisely "transactions where parties to a business agreement are located in different jurisdiction" (Carr, 2007:154).

The peculiarity of the Convention is characterized by the nature of the O.E.C.D. members that "represent 70 per cent of world exports and 90 per cent of foreign direct investment. […] The Convention therefore represents an effort to guide the anticorruption activities of governments that influence the flow of most of the world's investment, trade and goods" (Webb, 2005:195). Thus, the O.E.C.D. environment was proper to extend the

[61] Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa.

[62] See http://www.oecd.org/corruption/oecdantibriberyconvention.htm (visited in February 2019).

principles of the F.C.P.A. to the international business community, under the pressure of U.S. that was in those decades facing an atmosphere of distrust and cynicism due to the Watergate investigations[63]. At that time the O.E.C.D. became the leading international forum on the issue (Kubiciel, 2009:140).

In the years that preceded the adoption of the Convention, the O.E.C.D. did a hard preparatory work: this process was a "gradual legalization as a focal process" (Bacio Terracino, 2012:67), thanks to the adoption of the new approach by steps giving O.E.C.D. member States time to become aware of the convergence and divergence of domestic legal framework with respect to supposed obligations and supporting them with soft law measures. In 1994 the Council released non-binding recommendations on bribery in international business transactions in order to prudently call for the first time members to take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.[64] In 1997 those recommendations were revised[65], with a new small step onwards in negotiations, in order "to include specific suggestions for criminal procedure, tax laws, business accounting practice, banking provisions and making bribery illegal under civil, commercial and administrative laws" (Webb, 2005:197). At this point of the preliminary process the main challenges became clear and the divergent issue were temporally eliminated from the shared purposes (Wouters et al., 2012:9).

Afterwards, the adoption of the Convention, moved to a more specific central objective: the use of domestic law to establish a specific criminal offence in order to combat bribery involving foreign public officials in international business transactions[66]. More specifically, the Convention is not applicable to mere domestic bribery or to bribery committed without a direct, indirect or intended involvement of a public official. In addition, it do not address either bribery unrelated in any way to international business activities.

[63] The Watergate scandal started in June 1972 in the Democratic National Committee located in the Watergate building in Washington D.C., when an apparent ordinary burglary and consecutive investigations revealed multiple illicit acts by the Nixon administration, especially during the reelection campaign and investigations (es. illegal espionage, abuse of power, deliberate obstruction of justice), till 1974 when President Nixon resigned (www.history.com).

[64] Preamble of the O.E.C.D. Convention.

[65] Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organization for Economic Co-operation and Development (O.E.C.D.) on 23 May 1997, C(97)123/FINAL.

[66] Art.1 of the O.E.C.D. Convention.

With regard to the contents of the Convention, it adopts specific definitions of foreign public official, foreign country and act or refrain from acting in relation to the performance of official duties, to support the Parties in the process of implementation of domestic law.

Moreover, according to art.2 of the Convention, the signatory Parties are invited, for the first time, to adopt domestic principles to establish the liability of legal persons related to the bribery of a foreign public official.

Concerning sanctions and penalties, the O.E.C.D. Convention expects them to be "effective, proportionate and dissuasive" and provides some indicators to help members in providing an appropriate sanctions' system for both legal persons and individuals.[67]

The art.8 of the Convention provides instructions with regard to measures of accounting and relative sanctions. With regard to preventive measures, the O.E.C.D. Convention "requires contracting States to adopt measures in terms of better accounting practices" (Carr, 2007:139).

Furthermore the Convention provides for mutual legal assistance for the purpose of criminal investigations and proceedings and extradition[68].

In conclusion, for the main purposes of the Convention, it is established that each Party has to communicate the responsible authority for the domestic initiatives in combating corruption.[69] At the same time the Convention asks Parties to comply with the standards that the Convention issued, however they are not expected to do so in uniform ways with uniform instruments and not applying changes in fundamental characteristics or principles of the domestic legal systems.

Actually, the implementation of the Convention by the signatory Parties is rigorously monitored and promoted by the institution of a Working Group on Bribery in International Business Transactions, in accordance with art.12, that works on the basis of questionnaires and visits, in order to evaluate the level of implementation in domestic law of the signatory countries and support them in the process of enactment; the Group has the possibility to adopt reports and recommendations for the Parties. Each Party has the possibility to propose amendments, adopted by consensus, in accordance to art.16.

[67] Art. 3 of the O.E.C.D. Convention
[68] Art.9-10 of the O.E.C.D. Convention.
[69] Art.11 of the O.E.C.D. Convention.

In 2009 the Council of the O.E.C.D. adopted a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions to specify some further areas, in which it was necessary to intervene with concrete measures, like awareness-raising initiatives; tax legislation; regulations and practice; reporting illicit conducts; accounting in private sector; public procurements contracts and small facilitations payments; international cooperation. The Recommendation provides also the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, on the one hand, for signatory Parties and, on the other hand, the Good practice guidance on internal controls, ethics, and compliance for companies, addressing the private sector.
Later O.E.C.D. decided also to define with *ad hoc* Recommendations specific issue, like export credits, tax measures, cooperation and there were adopted the O.E.C.D. Guidelines for Multinational Enterprises. In 2008 the institution issued a Recommendation on Enhancing Integrity in Public Procurements[70].
With regard to the domestic influence of the Convention in the Parties' legal systems, some remarks are worthwhile. Firstly, it is significant to take into account the specific scope of the Convention, due to the participation only of States that were able, in terms of power and position, to create obligations on corporations involved in international business transactions, above all, the multinational corporations. In addition, this Convention represents a unique example of the O.E.C.D. transformation of recommendations in a biding instrument, with the following adoption of integrative non-binding instruments, in order to shape the implementation in domestic systems and raising the effectiveness of the Convention itself. As a matter of fact, this is a sign of the capacity to evolve of this instrument, according to the development of new requirements of the issue or of State Parties (Rose, 2015: 69). Similarly, the Recommendations and the mutual evaluations of the Working Group, that followed the Convention, actually updated or modified the Convention, extended the former obligations to be implemented by member-States. This aspect represents, once again, a way to make evolve obligations together with awareness in a step-by-step process within Parties. In other words, non-binding instruments help the effective implementation of domestic systems according to provisions of binding instruments.

[70] O.E.C.D. Recommendation C(2008)105.

In the end, it is significant to underline that the O.E.C.D. issued some other soft law measures in addition to the convention and the instruments already object of the dissertation, for example in 2006 OECD issued the Principles for Donor Action in Anti-Corruption[71] and the Policy Paper on Anti-Corruption: Setting an Agenda for Collective Action.
In 2016 the O.E.C.D. issued the document Liability of Legal Persons for Foreign Bribery, tracing the implementation of Parties with regard to this specific issue.
In particular from the report emerges a quite homogenous adoption of domestic legal instruments on the matter, although only 27 countries implemented the liability of legal persons for foreign bribery in their criminal legislation. Furthermore 35 countries on the amount of 41 accepted to consider the company liable in case of crimes perpetrated by managers. However if the manager is not directly involved, even without proving the attempt to avoid the crime, the liability is no more taken into consideration for the majority of States. Moreover the role of the Compliance Model is variable: in some States it completely avoids the involvement of the company in the proceedings, in others it is simply a significant method to guarantee adequate controls.
In addition, the relation reported significant data about the perpetration of crimes by national companies abroad, highlighting in this sense the primary role of State owned enterprises (Tartaglia Polcini, 2017:36).

2.2.2. The United Nations Initiatives

In 1975 the U.N. General Assembly adopted the Resolution Measures against Corrupt Practises of Transnational and Other Corporations, their Intermediaries and Others Involved including recommendation against corrupt practices. Between this first attempt and the adoption of the main Convention, the U.N. adopted also a Code of Conduct for Law Enforcement Officials (1979); a Recommendation on International Co-operation for Crime Prevention and Criminal Justice in the Context of Development (1990); the International Code of Conduct of Public Officials (1996).
In 1997 the U.N. issued the resolution United Nations Declaration against Corruption and Bribery in International Commercial Transactions that for the purpose is compared to the O.E.C.D. Convention adopted the same year.

[71] O.E.C.D. DCD/DAC(2006)40/REV1.

Moreover in 2001 the U.N. adopted a Resolution containing the U.N. initiative to work on an Effective International Legal Instrument against Corruption.
The United Nations Convention against Transnational Organized Crime (U.N.C.T.O.C.) is the United Nations' first legally binding instrument partly targeting corruption, signing the transition from regional initiatives to international achievements on the issue. This Convention was adopted by the U.N. General Assembly on 15th November 2000 by Resolution 55/25 and entered into force on 19th September 2003. Today it has 147 signatures and 189 parties[72]. In the following years the Convention has been integrated by specific Protocols dedicated to multiple issues.
More specifically, the Convention addresses organized crime groups, including, at the same time, the issue of corruption and dedicating several specific provisions to it.
Primarily it provides that members "shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions"[73]; in other words the Convention invites to law enforcement in domestic legal systems.
With regard to the main objective, the Convention has a limited purpose, in fact it covers only transnational corruption cases if they involve in some way, directly or indirectly, an organized criminal group. It addresses both active and passive bribery but excludes the various forms of corrupted conducts, remaining limited to corruption in general; in this respect it referrers to money laundering and obstruction of justice[74]. Moreover the "require to States" to criminalize active and passive bribery referred merely to domestic civil servants[75].

THE ADOPTION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION [...] WILL REAFFIRM THE IMPORTANCE OF CORE VALUES SUCH AS HONESTY, RESPECT FOR THE RULE OF LAW, ACCOUNTABILITY AND TRANSPARENCY IN PROMOTING DEVELOPMENT AND MAKING THE WORLD A BETTER PLACE FOR ALL.**[76]**

[72] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en (visited in February 2019).
[73] Art.9 of the U.N.C.T.O.C.
[74] Art. 5,6,23 of the U.N.C.T.O.C. Convention.
[75] Art.8 of the U.N.C.T.O.C. Convention.
[76] Secretary General Kofi Annan, Forward of the U.N.C.A.C.

After the 1990s, that represented a phase of vibrant initiative for the regional institutions, the international community was determined to make a shared effort in order to provide the prevention and the control of corruption towards an international instrument. Thanks to the influence of this grown common consciousness for the issue, at the end of the decade the General Assembly of U.N. started to draft an international legal instrument dedicated entirely to the global fight against the phenomenon of corruption and its prevention. Hence, it was established a "Committee for the negotiation in Vienna at the Centre for International Crime Prevention, the U.N. Office on Drug and Crime" and the text of the Convention was negotiated between 2002 and 2003.

The U.N.C.A.C. Convention was adopted by the General Assembly of the United Nations on 31st October 2003 by Resolution 58/4 in New York and it was opened to all States for signature, in accordance with art.67, in December 2003 at a Conference in Merida, Mexico, where 95 States signed it. It entered into force on 14th December 2005, in accordance with art.68 of the Convention, and today it has 140 signatories and 186 parties.[77]

"The U.N.C.A.C. represents the first binding global agreement on corruption" (Webb, 2005:191). As a matter of fact, the Convention can be considered a "truly" international achievement, since it was negotiated under the support of the most representative international organization, the United Nations, and its adoption was sustained by other international institutions too, as for instance the World Bank and the International Monetary Fund. At the same time no one State or group of States made pressure for the multilateral negotiation of this treaty as, instead, occurred during the negotiation of the O.E.C.D. Convention. In addition this Convention represents the peak in the process of development of international legal instruments to combat corruption started 10 years before (Kubiciel, 2009:140); as said the Convention arose in an historical moment of growing global perception of corruption as a transnational significant problem. Therefore it was expected to be more powerful than previous agreements in encouraging involved States and Parties in achieving consensus about the no-borders consequences of the phenomenon and thus to collaborate in generating multilateral initiatives to combat corruption.

[77] See https://www.unodc.org/unodc/en/corruption/ratification-status.html (visited in February 2019).

In particular the U.N.C.A.C. Convention "criminalizes bribery of national officials, foreign public officials, officials of public international organizations, bribery in the private sector, embezzlement of property both in the public and private sector, trading in influence, illicit enrichment, abuse of function and laundering and concealing the proceeds of corruption" (Carr, 2007:137).

The Preamble of the Convention constitutes itself a representation of the consciousness that was growing at the time of the adoption in the international community about corruption. In particular the Preamble talks about corruption as a serious transnational phenomenon affecting stability and security of societies and economies, which required a multidisciplinary approach. Furthermore it addresses States, but also individuals, groups, civil society, non-governmental organizations and community-based organizations in general, inviting all the actors involved to collaboration and cooperation[78]. Moreover, it represents the recognition of the link in corruption between governance and business (Wolters et al., 2009:17).

The Convention is composed by 71 articles and covers three main aspects: prevention, in terms of promotion of efficient and effective preventive policies for public and private sector and establishment of anti-corruption authorities[79]; criminalization, within domestic legal systems; international cooperation, in terms of investigation activities, prosecution and extradition (Webb, 2005: 206). The Convention also provides a list of definitions useful to Parties to set the correct context of implementations' action: public official, foreign public official, official of a public international organization, property, proceeds of crime, freezing or seizure, confiscation, predicate offence, controlled delivery.[80]

The art.5 of the Convention reflects the requirement of good governance in the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Concerning the prevention of corruption, the provisions, that are mostly non-mandatory, include the introduction of codes of conduct for public officials, transparent and accountable systems of procurement, public reporting, participation of society[81]; the art.14 is completely dedicated to preventive measures for private sector, which at the time

[78] Preamble of the U.N.C.A.C. Convention.
[79] Art.5-6 of the U.N.C.A.C. Convention.
[80] Art.2 of the U.N.C.A.C. Convention.
[81] Chapter 2 of the U.N.C.A.C. Convention.

of the drafting constitutes a new approach of the international framework against corruption.
The art.15 of the Convention is dedicated to bribery of national public officials that represents “the hard-core form of corruption” (Kubiciel, 2009:141) and it is the broadest provision in terms of range of offences. The provisions of this article include both active bribery and passive bribery, providing the criminalization, on the one hand, of individuals that promise, offer or give directly or indirectly an illicit advantage to a public official for himself, another person or entity, in order to make the public official to act or refrain in the exercise of his duties, on the other hand, the public official who solicits or accepts, directly or indirectly, and illicit advantage, for himself or another person or entity, in order to act or refrain in the exercise of his/her duties.
Art.16 reflects the idea that economic and political development powers the circulation of economic crime based on corruption (Kubiciel, 2009:141). Thus, the provisions of the article 16 referred to transnational and international trade threated by corruptive behaviours against competition and development; the Convention reflects this new state of mind of the transnational and international community. In conclusion it is the result of the growing influence of international organizations in the global economic and social framework.
The chapter III is dedicated to criminalization and law enforcement, representing the centre of the Convention, and lists several corrupt conducts, as bribery, but also embezzlement, misappropriation, trading in influence, abuse of functions, illicit enrichment, liability of legal persons, obstruction of justice. A quite new introduction in the legal order for combating corruption is represented by art. 32, 33, 34, 35, which include provisions on protection of witnesses, experts, victims; protection of reporting persons; consequences of acts of corruption; compensation for damage: this Convention considers also threats and intimidation as offences. However, this section could be considered the softer of the Convention, in terms of implementation and enforcement in domestic systems. In this respect, the objective of the treaty was to determine “the extent to which the treaty will influence their legal systems”, rather than “ensure that this instrument will influence domestic legal systems by bringing about implementation and enforcement of its criminalization provisions”(Rose, 2015:99).
Cooperation, which is one of the main purposes of the convention, is mandatory only for criminal matters, not for civil and administrative issues, instead for private sector is only

encouraged. This is, once again, a quite soft provision, due to the importance that such entities, banks for instance, can have in tracing corrupt conducts in the economic sphere. The Convention provides a chapter for the issue of asset recovery, which emerged as fundamental issue during negotiations.

Concerning the mutual legal assistance[82] it is interesting to notice that the provisions are quite completely reflecting the Convention against Transnational Organized Crime.

With regard to sanctions, the Convention states that the gravity of the offence must be taken into account in determining properly the sanction.

The process of monitoring the implementation of the Convention is based on the establishment of a Conference of States that intervenes in periodical sessions; in 2009 in Doha has adopted a Review Mechanism based on the role of the Implementation Review Group. Basically it is provided a sort of self-assessment mechanism that member States have to produce on the basis of a check-list, though the whole process is documental and do not include active initiative of member States of the Group.

At the art. 6.2 the Convention introduced the innovative role of the domestic authorities responsible for corruption prevention and monitoring, giving some requirements in order to establish these bodies: independence, adequate resources, training and specialization. The Convention does not specify any other detail on the characteristics of the body, however an O.E.C.D. study clears that the national authorities should act under the principles of rule of law and human rights providing periodic reports and allowing public access to their information (Wolters et al., 2009:17). In addition the O.E.C.D. distinguished the areas of action of the national bodies:

- "policy development, research, monitoring and coordination;
- prevention of corruption in power structures (including prevention of conflict of interests, assets declaration by public officials, anti-money laundering regulations, public procurement standards, etc.);
- education and awareness raising;
- investigation and prosecution (including coordination with auditors, tax authorities, the banking sector, public procurement authorities, foreign law enforcement bodies, etc.)" (Wolters et al, 2009:18).

[82] Art. 46 of the U.N.C.A.C. Convention.

Some authors[83] agree on the point that many signatory States of this Convention had to implement their criminal codes in content rather than on form, also the States that had ratified international or regional instruments previously adopted, since this Convention diverges. The first challenge for lawmakers involved in the judicial implementation and transformation process concerned the definitions of the keywords of the Convention, which could represent a serious problem, because the Convention has not been integrated with a commentary.

The opinion of other authors[84], instead, is that the Convention addresses many issues related to corruption in a weak manner, as a result to reach the interests of the nearly 200 member States. For example, the chapter III, positively contains a wide range of criminal conducts, but, at the same time, the concept of "protection of sovereignty" of States is widely present in the treaty, especially in art.4, emphasizing the reluctance and the possibility of Parties to avoid criminalizing such conducts. This article seems to have a symbolic function, rather than a practical one, embedded the supremacy of the U.N. Charter on the Convention in case of conflict[85] underlining the principle of non-intervention in the domestic affairs of Parties (Rose, 2015:131).

In conclusion, the Convention, due to its general but vague formulation implies a scarce effectiveness with regard to the process of implementation by member-States. In other words the majority of provisions that are non-mandatory facilitate member States in avoiding implementation and enforcement on certain issues, rather than creating a flexible instrument easy to adapt to any domestic legislation. The same issue arises also from the lack of non-binding norms with the role to integrate of modify the Convention in the following years, giving excessive steadiness to the provisions. This creates two main problems: on the one hand in case of need of clarification of some concepts included in the Convention, there are not instruments that can help Parties, on the other hand, the provisions, especially the illegal conducts, cannot be integrated with new eventual behaviours recognized as criminal in future socio-economic global contexts. The origin of the problem could be maybe searched in the drafting process of the Convention, that aimed to adopt a wide text soon, rather than a shared text later, lacking in the development of a proper Parties' consensus on the obligations provided (Rose, 2015:131).

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[83] See Carr, 2007 and Kubiciel, 2009.

[84] See Rose, 2015.

[85] Art. 103 of the U.N. Charter.

THE ADOPTION OF THE NEW CONVENTION WILL BE A REMARKABLE ACHIEVEMENT. BUT LET US BE CLEAR: IT IS ONLY THE BEGINNING. […] THIS NEW INSTRUMENT CAN MAKE A REAL DIFFERENCE TO THE QUALITY OF LIFE OF MILLIONS OF PEOPLE AROUND THE WORLD. […] IT IS A BIG CHALLENGE, BUT I THINK THAT, TOGETHER, WE CAN MAKE A DIFFERENCE.[86]

Concerning alternative roles to the traditional legal instruments, the U.N. established the International Labour Organization (I.L.O.)[87], a U.N. agency composed by governments, employers and workers representatives. The forum promotes multiple discussions on the world of labour and adopts practical standards and policies. The I.L.O. focuses also on the issue of corruption and on implementation and compliance to be achieved by corporations in different States.

In addition the U.N. Global Compact encourages the worldwide adoption of business sustainable and socially responsible policies[88], on the bases of ten principles concerning the issues of human rights, labour, environment and anti-corruption. This organization, together with T.I., issued in 2005 a Framework for action – Business against corruption and revised it in 2011, after having published also the Global Compact-Transparency International Reporting Guidance on the 10th principles against Corruption in 2009 and the U.N. Global Compact Management Model of 2010. Actually the guide of 2005 with its revision is the main instrument that addresses the private sphere providing support to companies in implementing their internal regulations to anti-corruption principles. The document offers, in fact, practical tools not only to express corporate responsibility, but also to protect the reputation and the interests of the company itself and its stakeholders. In particular the Framework for action provides instruments to permit to world's companies to address corruption with the main objective of avoiding potential risks and costs (ex. legal risks, reputational risks, financial costs, security risks), together with the pursuit of ethical values. In sum the U.N. Global Compact accompany companies in an

[86] Secretary General Kofi Annan, Forward of the United Nations Convention against Corruption.
[87] The I.L.O. Agency, established by the U.N. in 1919 and representing 186 States, promotes the discussion on international standards of labour, treating in particular social protection and work opportunities (see https://www.ilo.org/global/lang--en/index.htm visited on March 2019).
[88] Further remarks on the concept of Corporate Social Responsibility are given in the following sections.

anti-corruption compliance route composed by six steps: commit, assess, define, implement, measure, and communicate.

2.2.3. The G20[89] initiatives

The High Level Principles on Liability of Legal Persons adopted by the G20 Anti-corruption Working Group (A.C.W.G.) in Hamburg in 2017 consists of a new soft-law international instrument, giving more indications on the adoption of Compliance Models and the criminal offences. The document is directed primarily to the business community that it is required to collaborate with institutions with regard to the anti-corruption controls' system. What makes this document relevant is first of all the institution that promoted it and secondly the important subjects of the act, although non-mandatory, that set the future prospective with regard to the liability of legal persons, but, more specifically to the liability of legal persons on corruption.

Concerning the contents of the Principles, the text provides specific provisions on capacity building, institution building and law enforcement and, for this reason, they should soon become concretely part of Compliance Models.

This document entered a stratified anti-corruption system that is composed by international, regional and national instruments in the form of hard-law of soft-law, where the liability of legal persons is civil, criminal and administrative, though shaped according to domestic legal systems. The hard work made by the Working Group has highlighted a wide collection of flexible and broadly principles that, although non-binding, are suggested to be implemented in domestic legal instruments: adopting a robust legal framework for the liability of legal persons; effective, proportionate and dissuasive sanctions; international cooperation; engaging with the private sector.

The institution had previously issued, in 2015, the High Level Principles on integrity and security in private sector recognizing the fundamental role of corporate world, together with governments, in generating awareness in the global community and achieving

[89] The G20 or Group of 20 is an international forum composed by the governments and the central banks of 20 major economies. The main objective, since its establishment in 1999, was to promote high-level discussions on various issues concerning the international financial stability. The G20 members represent around 85% of the gross world product, 80% of the world trade and two-thirds of the world population.

common anti-corruption objectives: integrity[90] and transparency were added to the priorities identified in the 2015-2016 G20 Anti-corruption Action Plan. The document provides guidelines and principles, in particular for the development of strong, effective, internal controls, ethics and compliance programs and measures based on risk-assessments, in order to fix the risk exposure linked to the business's industry, size, legal structure and geographical area and to allocate resources efficiently and effectively on the pursuit of the objectives of the internal anti-corruption Agenda.

2.2.4. The World Bank and the International Monetary Fund's initiatives

> IN COUNTRY AFTER COUNTRY, IT IS THE PEOPLE WHO ARE DEMANDING ACTION ON THIS ISSUE. THEY KNOW THAT CORRUPTION DIVERTS RESOURCES FROM THE POOR TO THE RICH, INCREASES THE COST OF RUNNING BUSINESSES, DISTORTS PUBLIC EXPENDITURES AND DETER FOREIGN INVESTORS. THEY ALSO KNOW THAT IT ERODES THE CONSTITUENCY FOR AID PROGRAMS AND HUMANITARIAN RELIEF. AND WE ALL KNOW THAT IT IS A MAJOR BARRIER TO SOUND AND EQUITABLE DEVELOPMENT.[91]

Until 1996 corruption was perceived mainly as an economic problem of the international business transactions. For this reason it not entered the programmes and the objectives of the World Bank and the International Monetary Fund that were focused mainly on the purpose of universal development. From this moment onwards, however, the World Bank recognized that corruption affected the countries reached by their programs with effective negative results on development of areas and a risky misallocation of resources. Therefore the World Bank included anti-corruption measures between the conditions to provide aid to countries asking for support. In particular the World Bank, started to use some indicators to test the "health" of States: "voice and accountability, political stability and absence of violence/terrorism, government effectiveness, regulatory quality and rule of law" (Wouters et. al, 2012:28). Actually, the indicators shown, one again, how anti-corruption, especially in developing countries, is considered an issue of good governance.

[90] According to T.I., integrity comprehends the behaviours and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions that create a barrier to corruption (T.I., 2009: 24).

[91] James D. Wolfensohn, President of the World Bank, speech delivered to the Annual Meeting Address, 1st October 1996.

At the same time the World Bank activated also an internal compliance system composed by investigations on a specific process of execution of projects, a code of conduct, a multilingual anonymous line for whistle-blowers, in order to build the necessary framework to fuel anti-corruption ethics from the foundations to the rest of the world.

In the same way, in 1997 the International Monetary Fund (I.M.F.) reviewed the Guidance Note on the role of the fund in governance issues, emphasizing the need for global action against corruption. The institution identifies the fundamental challenge that the global community is facing with regard to corruption, in particular the provisional nature of sources of information; the understanding of transmission channels between corruption and macroeconomics; the quantification of effective measures and their effects.

2.2.5. Other international initiatives

Another institution that early became part of the transnational fight against corruption was the I.C.C. that in 1977 adopted the I.C.C. Rules on Combating Corruption providing a range of self-regulatory rules of good practises' management for corporate entities. The main purpose of the institution, since its involvement on the issue, have been the formulation of model contracts and clauses reflecting best international corporate practise, in order to facilitate business negotiations and transactions, mirroring the anti-bribery international legal instruments.

2.3 European background

European countries have recently emerged to be the oldest group of successful regime's builders based on ethical universalism and an adequate check of corruption displays by rulers and governments founded on rule of law, transparency and accountability, in other words on good governance. The main value from which the actual ideology grew was the equal treatment that had always been professed since antiquity through the Renaissance and the Enlightenment and till today, being reinforced during centuries by religious doctrine and becoming somehow internalized in the common state-building process (Mangiu-Pippidi, 2015:57).

Furthermore in 2012 T.I. developed a case study on corruption risks in Europe analysing the trend of the region, in terms of sustainable and effective achievements in European States. Thus, the key findings of the report highlight a multifaceted map of Europe composed by very different levels of implementation of anti-corruption measures and spread of core values. Central and Eastern Europe, like Czech Republic, Hungary and Slovakia, show a strong progress from the accession to E.U. onwards. Southern Europe, meaning Greece, Italy, Portugal and Spain demonstrate still high levels of inefficiency, maladministration and lack of enforcement, partially due to the consequences of the fiscal crisis. With regard to results on specific actors, political parties, public administration and the private sector emerge as weaker; instead institutions demonstrate higher level of integrity. In this respect, the E.U. has represented in last decades a key protagonist in the development of the European community based on common democratic values. In the early twenty-first century the E.U. accepted the challenge to change governance, becoming the driving force to "Europeanization", not only for European countries, but also for neighbour States, through different instruments of integration: conditions of the pre-accession, assistance, monitoring, coaching, favoured conditions to membership. Those aspects helped first of all in the renovation of national governments through a reformation of judiciary, administration, policy-maker structures, especially for the ex-communist bloc, that mostly represent the more recent good governance achievers, although still facing significant challenges. With regard to the central Europe, most achievements have been already reached at the time of accession. As a matter of fact, the winning aspect of E.U. integration was a proper balance between requested conditions and advantages of membership that make the national efforts valuable (Mangiu-Pippidi, 2015: 197). However, though a first enthusiastic wave, Europe, and in particular the European Union, is facing new challenges in its internal organization and integration. In this respect it seems that in this phase the role of the single countries would be determinant in renovate the first animated values.

2.4 European legal order

2.4.1. *European Union initiatives*

Starting from 1995 the E.U. began to take part to the international effort of the fight against corruption, limiting its target to economic interests and dealing with the conduct of the member States. Although the primary specificity of the instruments enacted by the

E.U., they have become always more wide in scope; the E.U. instruments for combating corruption are mostly binding documents. In particular, the E.U. enacted the Convention on the Protection of the European Communities' Financial Interests in 1995 and two Protocols in 1996 and 1997, in order to fix measures to eliminate fraud with regard to expenditures and revenues. The "Protection Convention" refers to both public and private sector and addresses Member States that should take effective measures to punish illegal conducts by effective, proportionate and dissuasive criminal sanctions. The first Protocol deals with active and passive corruption; instead the aims of the second Protocol are the liability of legal persons, confiscation, money laundering and cooperation between member States and the European Commission.

More importantly, the E.U. adopted on 26th May 1997 the main regional Convention against corruption (entered into force on 28th September 2005), drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union, that basically recalls the principals of the Protocol, limiting the target to the bribery conducts of public officials, while considering both bribe offering and bribe soliciting.[92] In addition in 1998 an Explanatory Report and the Joint Action dedicated to the private sector integrated the Convention. With regard to sanctions, the E.U. Convention, as the previous Protocol, expects sanctions to be effective, proportionate and dissuasive and provide some indicators for member States and, as the main international instruments, contemplates mutual assistance between E.U. Member States.

With regard to soft law instruments the E.U. issued in 1995 the Resolution on Combating corruption in Europe. Moreover, in 2005 the institution issued the Resolution on Aid Effectiveness and Corruption in Developing Countries. In addition in 2003 the European Commission adopted a Communication on a comprehensive EU Policy against Corruption. The document is different from the previous instruments adopted by the E.U. because addresses EU leaders requiring more public efforts to combat corruption through transparent and accountable common standards and invites them to ratify international anticorruption instruments enacted meanwhile.

In 2003 the European Council adopted the Council Framework Decision 2003/568/JHA on combating corruption in the private sector, including in the addresses on the issue of corruption also profit and non-profit companies. Through a Decision in October 2008,

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[92] See https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41997A0625%2801%29 (visited in February 2019).

the European Council intensified the cooperation of institutions and authorities of European member States against corruption. The Programme Serving and Protecting Citizens setting the E.U. Road map 2010-2014 in the areas of justice, freedom and security also scheduled anti-corruption between the main objectives.
In 2011 the European Commission adopted a proposal in order to harmonize procurement rules, including anti-corruption measures and issued the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: fighting corruption in the EU for the enforcement of the instruments enacted on the issue. With the enactment of this document the Commission realized that the European framework was still inadequate with respect to the development of multiple forms of corrupted conducts, but appreciated the enforcement as a first step towards a more effective common anti-corruption action. In order to pursue this new challenge, the Commission established the EU anti-corruption report mechanism that provided a biennial report highlighted the general European challenges and the specific objectives of the member States; the mechanism is based on a fruitful collaboration with the G.R.E.C.O.

2.4.2 Council of Europe Conventions

The Council of Europe, being the oldest European organization founded in 1949 and grouping together 45 countries (6 Observer States) also from Central and Eastern Europe, gave its contribution to the fight against corruption enacting two instruments open to the subscription also of non-European members.
The C.o.E Criminal Convention was adopted on 27th January 1999 and entered into force on 1st July 2002 and it is permeated by the C.o.E. values promoting human rights, democracy and the rule of law. Today it has 48 signatures, 2 not followed by ratification (The United States of America and Mexico)[93].
The C.o.E. Criminal Convention was the first convention targeting both the public and the private sector focusing on "the abuse of power in return for an undue advantage regardless of the context in which it occurs" (Carr, 2007:135). In particular, the Convention dedicates specific provisions to transnational active and passive bribery

[93] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=0whrTht0 (visited on February 2019).

involving domestic[94] and foreign public officials[95], members of domestic public assemblies and foreign public assemblies[96], international parliamentary assemblies[97], officials of international organizations and judges and officials of international courts[98]. A specific Protocol[99] (adopted in 2003) extends the obligations of the Convention to domestic and foreign arbitrators and domestic and foreign jurors. Moreover the treaty is mainly dedicated to the offences of active and passive bribery, although trading in influence and laundering are also taking into consideration[100]; acts of nepotism, extortion, and embezzlement are not directly addressed. In addition the Convention provides a mechanism to protect informants and to establish specific authorities dedicated to the adoption of measures to curb corruption. In conclusion, the C.o.E. Criminal Convention requires cooperation between national authorities, mutual assistance, extradition defining the common principles and measures for international cooperation. An Explanatory Report that helps countries in practical implementation of domestic systems accompanies the Convention.

The C.o.E. Civil Convention was adopted by the C.o.E. on 4th November 1999 and entered into force on 1st November 2003; today it has 35 signatures, 7 not followed by ratification[101]. This treaty represents a unique paradigm, between the anti-corruption instruments, since the central scope is specific and different from the others: "it represents the first attempt to define common international rules for civil litigation in corruption cases" (Webb, 2005:198). In particular, it requires signatory States to provide domestic law effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage. As the C.o.E. Criminal Convention, the Convention is applicable to both private and public sector.

According to the Convention, in case of an effective link between the material act and the damage, the damage can be recovered against every subject that had committed the act

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[94] Art. 2-3 of the C.o.E. Criminal Convention.
[95] Art. 5 of the C.o.E. Criminal Convention.
[96] Art. 3-6 of the C.o.E. Criminal Convention.
[97] Art. 10 of the C.o.E. Criminal Convention.
[98] Art. 9-11 of the C.o.E. Criminal Convention.
[99] Additional Protocol to the Criminal Convention on Corruption (ETS No. 191).
[100] Art. 12-13 of the C.o.E. Criminal Convention.
[101] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174/signatures?p_auth=EWi4SziT (visited on February 2019).

of corruption or had failed in preventing it, even the State. Furthermore the Convention provides specific provisions to guarantee protection to employees that report information about corruption, helping to reach the scope of the Convention itself.

The C.o.E. provided also a monitoring system through the Group of States against Corruption (G.R.E.C.O.), established in 1999 under Resolution (99)5 adopted on 1st May 1999, according to the art.24 of the Criminal Convention and art.14 of the Civil Convention; today it has 49 member-States and a number of observers institutions[102]. The G.R.E.C.O., established to monitor compliance of the States according to the standards fixed by the Conventions, works through a mechanism of both evaluation and pressure on implementations, drafting specific reports based on questionnaires, examination of information and visits to the evaluated country. In particular G.R.E.C.O. proceeds with evaluation's round in which all the members are tested on specific issues with recommendations and observations as a result. A work of follow-up and report is required to members the months that followed the report according to the GRECO's Rules of Procedure.

In the end, the C.o.E. adopted also soft law measures on corruption; those complete the regional framework, even being non-binding for States. In particular, in 1997 it was adopted the Resolution on the Twenty Guiding Principles for the Fight against Corruption[103] in the form of practice guidelines for States, especially on preventive measures, as limiting immunity, denying tax deductibility, ensuring free media and providing the liability of legal persons. In 2000 the same organization issued the Model Code of Conduct for Public Officials[104]and in 2003 it was adopted the Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns[105].

2.5 Italian background

The situation of corruption in Italy had not been taken into account by the international and European civil society until 1990s, when Italian politics powerfully appeared on the

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[102] See https://www.coe.int/en/web/greco/structure/member-and-observers (visited on February 2019).
[103] Council of Europe, Resolution (97)24.
[104] Council of Europe, Recommendation Rec (2000)10.
[105] Council of Europe, Recommendation Rec (2003)4.

international scenario on the first pages of all the main newspapers, due to the scandals that covered, step by step, its entire political class of that period.
Taking a step backwards, the period between the Second World War and the early 1990s was an era of relatively stability in which fifty governments succeeded to one another. Those government were mostly ran by the coalition of parties Christian Democrats (D.C.), a sort of national "super-party", with stable power guaranteed by positive electoral results. Although the common consensus mostly spread between Italian citizens, the main aspects that should be considered with regard to that era are: inefficient public administration; little moral laws; common tax evasion; massive debts; organized crime especially in the southern part of the State. Actually, at the day after the end of the War, Italy started its economic rebirth from traditional poverty to the global economy. As a matter of fact in that era political parties dominated the political sphere, but also policy, business and media; in particular the presence in bureaucracy was pervasive at the point that bribes on contraction contracts were the norm. However those parties were not able to assign political roles properly, integrating people and creating public policy, becoming always weaker in their widespread influence. Even though Parties themselves emerged in the years later to be collusive, corrupt revenues were used to stabilise the hegemony of the Party and its networks, rather than for mere enrichment of individuals. In particular, corruption had never been considered part of the political functioning of that period, since 1992 when t*angentopoli* scandal and *mani pulite* investigations took the attention of all Italians and their neighbourhoods. In 1992 political parties and the spheres strongly influenced by them where already weak and corrupted, even some private entities. In this respect corruption ultimate took the First Republic to definite failure, but corruption foundations and effects are still, often silently, eradicated in Italian background (Johnston, 2005:93-96).
In the same years took place also the main terror attacks (many minor attacks took place throughout the First Republic) by the Sicilian Mafia under the astonished eyes of the entire peninsula: "Capaci bombing" in which was killed the anti-Mafia judge Giovanni Falcone and the "via d'Amelio massacre" where also his friend, and collaborator in the famous Maxi-Trial, the judge Paolo Borsellino, lost his life. The following investigations revealed the links between corruption and violence with the inference of organized crime, even in suspicious deaths; the protagonists were mostly members of the P2 Masonic Lodge, a secret body composed by a thousand people of police, security, and politicians. The P2 was involved, according to inspections, with tax scandals, murders of

investigating journalists and oil-related bribery. The criminal group was also influencing the major state-owned enterprises and public-private companies: the two enterprises ENI and ENEL emerged to be between the financiers of some political Parties; the chemical sector emerged to be accordingly part of the corrupted system with a handling of huge assets between the private and public spheres.

In this way in 1994 shacked and shocked voters of Italy made disappear the political class that had been protagonist of such period of stability guaranteed by an integrated corruption's system till definite collapse. From 1992 onwards a new political class and an independent judicial system developed, together with an initially fragmented attitude to anti-corruption, changing the asset of Italy also at the eyes of international and European observers (Johnston, 2005:98).

After the scandal, the Second Republic appeared on political Italian scene being, conversely, dominated by media magnates and new politicians; in the same time participation of business in parties decline as well as the costs of public contracts. An important role in this phase of political and economic reborn was the role of the European Union, which thanks to its policies and changes stimulated the renovation of the entire system. As previously anticipated, in 1994 voters elected a new government, whose Prime Minister became Silvio Berlusconi that was reselected in 2001. In 2004 he was accused of bribery, bringing again Italy at the attention of international observers. Although the new generation of individuals involved in politics and the adoption of adequate laws, some deepen practises permeated. However a change in culture had hopefully began (Johnston, 2005:102).

In this respect the man of the change should be recognized in the judge Raffaele Cantone, the figure responsible for Italian anti-corruption agenda conducting the National Anti-corruption body (*Autorità Nazionale Anticorruzione* - A.N.A.C.) since its establishment in 2014. In his previous career he took part to important investigations on the crimes perpetrated by the Camorra, at the point that in 1999 an attack against him was thwarted. Since 2011 he has collaborated with the government in the drafting works for the first proposals of measures against corruption and organized crime. The efforts of the authority of these years have made Italy arise from the 69 to the 53 level of the T.I. Corruption Perception Index, adopting a new approach to prevention rather than merely on repression of the phenomenon; in addition his energised commitment has demonstrated that he is a man of great integrity who has the anti-corruption future of the nation at heart. Thanks to the efforts of the body that leads, anti-corruption measures have entered the political and

economic spheres becoming part of everyday life of civil society. Actually corruption, especially connected with organized crime, remains a serious problem that has also implications on the transnational scenario. Anyway his systematic and concrete activity has permeated the soul of Italians.

Nowadays Italy is facing a new socio-political phase, in which anti-corruption and other ethic issues sadly seem not to be part of the political agenda.

2.6 Italian legal order

2.6.1 Liability of legal persons

Anti-corruption measures entered officially and legally the Italian legal system with the enactment of the *L. 29 settembre 2000, n. 300* [106] that represented the formal implementation of the national system in the light of the ratification of the main legal instruments against corruption enacted by the E.U. and the O.E.C.D. and, in this respect, delegating to the government the regulation of liability of legal persons.

As a matter of fact it was only in 2001 that the Italian State concretely adopted its first anti-corruption measures with the enactment of the *D. Lgs. 8 giugno 2001, n. 231*[107] that entered into force on 4th July 2001 representing the main objective of the L. 300/2000. Firstly, the act defines the subjects[108] to which the obligations are directed, generally speaking, including private entities and associations legally recognized or not as legal persons and excluding the public administration. Thus, it is central the following act that

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[106] *Ratifica ed esecuzione dei seguenti Atti internazionali elaborati in base all'articolo K. 3 del Trattato dell'Unione europea: Convenzione sulla tutela degli interessi finanziari delle Comunità europee, fatta a Bruxelles il 26 luglio 1995, del suo primo Protocollo fatto a Dublino il 27 settembre 1996, del Protocollo concernente l'interpretazione in via pregiudiziale, da parte della Corte di Giustizia delle Comunità europee, di detta Convenzione, con annessa dichiarazione, fatto a Bruxelles il 29 novembre 1996, nonché' della Convenzione relativa alla lotta contro la corruzione nella quale sono coinvolti funzionari delle Comunità europee o degli Stati membri dell'Unione europea, fatta a Bruxelles il 26 maggio 1997 e della Convenzione OCSE sulla lotta alla corruzione di pubblici ufficiali stranieri nelle operazioni economiche internazionali, con annesso, fatta a Parigi il 17 dicembre 1997. Delega al Governo per la disciplina della responsabilità amministrativa delle persone giuridiche e degli enti privi di personalità giuridica.*

[107] *Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300.*

[108] *Art. 1 of D.Lgs. 231/01.*

was adopted the same year that is the main source clarifying the actors categorized as public administration: *D. Lgs. 30 marzo 2001, n. 165*[109].

In addition, the D.Lgs. 231/2001 built the foundations for a more complex anti-corruption system defining the cases of crimes perpetrated abroad[110] and the cases in which the legal person should be responsible for the crimes: when crimes are perpetrated by representative or functional figures in the undue interests or advantage of the company itself and not merely for a private interest of the perpetrator[111]. Furthermore and, above all, the act defines for the first time the possibility for legal persons to adopt a Model (*Modello di Organizzazione, Gestione e Controllo* - M.O.G.) that, if efficiently adopted and properly revised, could safeguard the company to legally respond for crimes perpetrated in order to obtain an undue advantage for the legal entity itself, especially by high level managers[112]; for the first time it emerged also the opportunity for companies to appoint a body called *Organismo di Vigilanza* - O.d.V. uncharged to control and verify the efficiency of the M.O.G. and the activities more risky in terms of perpetration of crimes[113]. As a matter of fact, taking into account all these composed measures, the crimes could be only fraudulently perpetrated. Furthermore, a recent revision integrated the requirements concerning the necessary measures for the protection of the whistle-blowers, in particular a proper and reserved system of communication of detailed illicit conducts violating the obligations of the Compliance Model; the prohibitions of acts of discrimination against whistle-blowers; appropriate sanctions for such discriminating conducts or for malicious reporting.

In addition, the act provides also specific sanctions and detailed instructions for the proceedings and the consecutive investigations[114].

Concerning the criminalization of the illicit conducts, the act provides a list of crimes, already part of the national criminal legislation, for which the legal person could be directly responsible at the legal level: this list is constantly revised and integrated with

[109] *Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*. The issue of the subjects involved in the criminalization of liability of legal persons and corruption offences is one of the more debated matters, due to the blurred border imposed by legislation.

[110] Art. 4 D.Lgs. 231/01.

[111] Art. 5 D.Lgs. 231/01.

[112] According to art. 6 and 7 of D.Lgs. 231/01 the M.O.G., periodically revised, should: detect the risky activities, provide proper procedures on training and decision-making, provide appropriate sanctions.

[113] Art. 6 D.Lgs. 231/01.

[114] Artt. 9-23 and 64 and following provisions D.Lgs. 231/01.

new crimes as the national legal system evolves; it was integrated in January 2019 for the last time with the *L. 9 gennaio 2019, n.3*[115]. Generally speaking, the crimes listed referred to information technology' crimes, crimes against environment, organized crimes, industrial safety' crimes, corruption offences, crimes against business and industry, money laundering, crimes of violence on women and racism[116].

In conclusion the D.Lgs. 231/01 is correctly shaped to the G20 High Principles of Liability of legal Persons previously studied in this contribution and has become an efficient legal model to be adopted also abroad. However the application of the measures in many cases is not still completed, due to the evolving of the legal system itself (as said the list of crimes is constantly revised and integrated) and because of the needed gradual endorsement of the issue.

It was only in 2006 that was enacted the L. *16 marzo 2006, n. 146*[117] in order to formalize the ratification of the U.N. initiatives against corruption and organized crime.

With regard to liability of legal persons it is central to underlying the role of industry and trading associations and federations that have adopted a wide range of documents in form of guidelines from 2001 onwards, in order to clarify the legal anti-corruption concepts and offer practical details for the implementation of companies' internal systems. In this respect *Confindustria*[118] adopted on the 7th March 2002 the *Linee Guida per la costruzione dei modelli di organizzazione, gestione e controllo ai sensi del D.Lgs. 231/01*, that were revised last time in March 2014. In particular the document clarified the addressees of the act, the characteristics of the crimes, the sanctions, the phases of the activity of risk-assessment and the activities for the implementation of the procedures to avoid perpetration of crimes and other activities with the same objective and finally the characteristics of the monitoring system. In addition the guidelines deeply studied the role and the characteristics of the codes of conduct, the disciplinary system, the O.d.V. and, in the end, specify a case study in which provide a scheme of the M.O.G. In 2018

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[115] *Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in materia di prescrizione del reato e in materia di trasparenza dei partiti e movimenti politici.*

[116] Artt. 24-26 D.Lgs. 231/01.

[117] *Ratifica ed esecuzione della Convenzione e dei Protocolli delle Nazioni Unite contro il crimine organizzato transnazionale, adottati dall'Assemblea generale il 15 novembre 2000 ed il 31 maggio 2001.*

[118] Confindustria is the Italian Manufacturers's association that has a significant role in the economic sphere of the country.

Confindustria integrated its guidelines in order to include specific instructions for the implementation of measures for the protection of whistle-blowers.

2.6.2 *Anti-corruption and Transparency*

Specific and more compound anti-corruption measures were adopted in Italy only in 2012 with the *L. 6 novembre 2012, n. 190*[119] entered into force on 28th November 2012. Actually this is the more relevant anti-corruption legal instrument that provided a series of central indications and obligations on the issue. In particular, it defines the bases for the fight against corruption in public sector[120], based on more transparency and accountability as features of civil and social rights (Vignoli, 2016:120). First of all, the act establishes the national anti-corruption body, the A.N.A.C.)[121], guided by the *Responsabile Nazionale Anti-Corruzione*, and defining the main characteristics and the primary functions of the authority. In particular the A.N.A.C. is responsible for the adoption of the national Anti-corruption Plan (*Piano Nazionale Anti-Corruzione*-P.N.A.) that has to be adopted every three years and revised every year[122]. Accordingly, every public administration (and every satellite entity) should appoint within its structure a figure, the *Responsabile della prevenzione della corruzione e della trasparenza* (R.P.C.T)[123], accountable for the definition and revision of the internal Anti-corruption Plan (*Piano Triennale per la prevenzione della corruzione* - P.T.P.C.), issued every three years and revised once a year (in addition every year it is provided a report on the anti-corruption activities and resulting information).

Furthermore from that moment onwards the public administration have started to maintain a perpetual interrelation with the national anti-corruption body and the civil society in general, due to the free access through websites to the main information with

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[119] *Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione.*

[120] Once again it is fundamental to remember that the issue of the subjects involved in the criminalization of corruption offences is one of the more debated matters, due to the blurred composition imposed by legislation, even though the D.Lgs. 165/2001 clarifies the actors involved in the public sphere.

[121] Artt.1-3 L. 190/12.

[122] Artt.1-2 and 1-9 L. 190/12.

[123] Artt.1-7 and 1-9 L. 190/12.

regard to contracts and acts generating public expenditure[124], with the general aim of accountability and transparency.

Instructions on the enactment of Codes of conducts of public employees are also provided by the law. In addition, corruption offences are identified and the proceedings are regulated. Actually, the L.190/12 links its obligations with the provisions of the D.Lgs. 231/01 and in particular with regard to the role of the O.d.V. and the implementation of the M.O.G, that becomes strictly connected with the P.T.P.C. A specific issue that is regulated by both instruments is the reporting of illicit conducts and the adoption of preventive and repressive measures for the protection of the whistle-blowers[125].

In conclusion the L.190/12 represents a first important pillar of the Italian anti-corruption system adopting a totally new approach for the first time on prevention, rather than a mere criminalization and repression of the phenomenon (Vignoli, 2016:112). Even though this new contribution, the Italian legal framework against corruption lacks on the anti-corruption measures for parties and the political sphere[126] that, as previously studied, in the recent past had took the worldwide attention due to serious scandals. Moreover the Italian anti-corruption law at present took into consideration only the public sphere (and the controlled private entities with public functions), not providing the essential relationship between private entities and the fight against corruption. In the end the law, in an optimistic approach, do not fix specific datelines for the implementation of the measures provided and do not provide randomized controls on public administration (Del Vecchio e Severino, 2014:302).

With regard to accountability and transparency, in the Italian legal system emerged as priorities with the adoption of anti-corruption legal instruments; the Italian government enacted the *D. Lgs. 14 marzo 2013, n. 33*[127] providing specific obligations for public administration in terms of transparency and access to information, even integrating the L.190/12.

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[124] Artt.1-15 and following provisions L.190/12.

[125] Art. 1-54 L.190/12.

[126] A step onwards in this respect is the recent law of 2019, previously quoted. However effective results have not already been studied.

[127] *Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni.*

Concerning revisions, the *D.L. 24 giugno 2014, n. 90*[128] represents another step in the creation of the compound Italian legal framework, even though constitutes a contribution on several issues. Actually, the main innovation of this act is the possibility for the A.N.A.C. to run on its own the activities connected to contracts revelled as compromised by illegal corrupted procedure, in order to properly conclude such public works (Cantone, 2017:4).

In 2016 the Italian government simplified and revised the previous legal instruments with the *D. Lgs. 25 maggio 2016, n. 97*[129].

The enactment of the *L. 30 novembre 2017, n. 179*[130] completes the Italian anti-corruption system with specific provisions on the protection of whistle-blowers both in public and private sphere.

At this point it is central to focus the attention on the key role of soft-law measures adopted by the A.N.A.C., in order to clarify the public administration's obligations, in terms of anti-corruption measures, especially on transparency and accountability, but also to define the national anti-corruption main outlines. Actually, since its establishment the authority has made a very hard work adopting a wide range of instruments that provide the main guidelines on the subject deeply fixing specific issues. The *Delibera n.1134*[131] of the 8th Novembrer 2017 entered into force on 5th December 2017, above all, revised all the previous guidelines provided on the application of anti-corruption and transparency' measures in public administration and all the controlled public and private entities. As a matter of fact, the act drafts the future of these challenging issues clarifying the legal obligations adopted. In particular, the main issue studied is the integration of the addresses of the measures, accordingly to the *D.Lgs. 175/2016* that integrates the definition of public administration for the purpose of the matter[132] with private entities

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[128] *Misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari.*

[129] *Revisione e semplificazione delle disposizioni in materia di prevenzione della corruzione, pubblicità e trasparenza, correttivo della legge 6 novembre 2012, n. 190 e del decreto legislativo 14 marzo 2013, n. 33, ai sensi dell'articolo 7 della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche.*

[130] *Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato.*

[131] *Nuove linee guida per l'attuazione della normativa in materia di prevenzione della corruzione e trasparenza da parte delle società e degli enti di diritto private controllati e partecipati dale pubbliche amministrazioni e dagli enti pubblici economici.*

[132] The term public administration is defined by the D.Lgs. 165/2001 including together with the "traditional" public administration all the satellite entities and organizations like schools,

with certain characteristics: professional associations, public economic entities, public or semi-public entities if not publicly listed companies, associations, foundations. In addition the act underlines that transparency and anti-corruption measures and controls are mandatory only for the acts and activities directly linked with the expenditure of public funds. Moreover the A.N.A.C. delimits that the national Anti-corruption Plan P.N.A. is the document that primary provides the main contents for the adoption of the internal Anti-corruption Plan P.T.P.C. for the entities involved and previously displayed. Furthermore the institution provides specific details concerning transparency's measures that mainly comprehend the disclosure on the websites by the public administration of a list of all the controlled entities and their activities: the lack of publishing generates a violation than can be persecuted and determines the impossibility for the public administration to transfer funds to the entities not listed. According to the law, it outlines the A.N.A.C., it is also necessary to similarly public all the financial data referred to the contracts stipulated for public activities by public and private entities listed, accordingly to the D.Lgs. 33/2013 partially revised with the D.Lgs. 97/2016. The authority is also responsible for controls on the involved entities and for consecutive sanctions.

Furthermore the *Delibera n.1134* arranges for a formal connection between the Anti-corruption Plans (P.T.P.C. - L.190/2012) and the Model (M.O.G. - D.Lgs. 231/01), for which the adoption is not compulsory, defining that a link between the two documents is necessary in order to properly activate both anti-corruption preventive measures and the obligations imposed by the liability of legal persons' law. In practise the recent adopted anti-corruption measures should be part of the Compliance Models previously implemented, in order to inhibit the perpetration of crimes in the advantage of the company itself (regulated by the D.lgs. 231/01) or in prejudice of it (regulated by the L.190/2012).

As a matter of fact the legal framework, recent and often revised, represents a structured legal system composed by a wide range of fragmentised and stratified dispositions, in which Italian public administration and its controlled entities are absorbed.

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agencies, associations, universities, chambers of commerce, the health sector with national, regional or local competences.

III. The whistleblowing approach within the fight against corruption

THE WHISTLE-BLOWER ON THAT $50,000 A MONTH CALL-GIRL STORY WAS A WITCH, WHO TRIED TO TAP BEA GARFIELD, ALLEGED MADAM, FOR $250.[133]

Corruption is often associated and characterized by inertia, secrecy and silence, however "the international legal framework against corruption follows the growing trend of recognizing that the encouragement of the reporting of corrupt practises […] and the protection of the reporting persons […] and of any witnesses to the case, are key factors in breaking this secrecy surrounding corrupt practises" (Bacio Terracino, 2012:231). International organizations, in fact, recognise the importance of the whistleblowing mechanism in the process of promoting accountability and integrity within the civil society, in particular in the business sector. More specifically the international instruments require to States to introduce new methods to incentivise reporting of perpetration of corrupted crimes by individuals that for some reasons come to know about such breaches, both to the internal functions of the companies or public administration and to the public authorities. In the same way States are expected to adopt effective measures to provide the proper protection to those individuals that report "in good faith and on reasonable grounds" (Bacio Terracino, 2012:234), in order to avoid any kind of retaliations and discrimination. In this respect the implementation of the domestic legal systems is not regulated in methods and forms by the international treaties, therefore States introduce a differentiation of measures of distinctive levels of obligation and impact on the public and private actors.

As a matter of fact some States more than others recognize the importance of whistle-blowers in the prevention and repression of corrupted conducts both in the public and private sphere and this attitude seems to be embedded, above all, in the socio-cultural background. In the United Kingdom the 72% of workers consider whistle-blowers as positive or neutral figures, instead in the Italian language there is not at present even a positive word used to define whistle-blowers (Liguori, 2015: 155).

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[133] The term firstly appeared on the Mansfield News-Journal (Ohio) on 10th October 1958 with a negative connotation.

3.1 Origin and main features

Primarily the whistleblowing system consists of the opportunity to report for workers, usually through dedicated and alternative channels, illicit, corrupted or/and non-ethical conducts, in particular of employees or managers of public and private organizations[134], in order to permit the application of required preventive and repressive measures. T.I. choose a even more significant definition for whistleblowing: ”the disclosure by organization members (former or current) of illegal, immoral or illegitimate practises under the control of their employers, to persons or organizations that may be able to effect action” (T.I., 2009:3).

“There is an agreed-upon definition that has four component parts: (1) an individual acts with the intention of making information public; (2) the information is conveyed to parties outside the organization who make it public and a part of the public record; (3) the information has to do with possible or actual nontrivial wrongdoing in an organization; and (4) the person exposing the agency is not a journalist or ordinary citizen, but a member or former member of the organization” (Johnson, 2003:4).

The reporting should be as reliable as possible: precise, circumstantiated and possible based on concrete and accessible proofs. In this respect it is very debated the anonymous reporting. The whistle-blower acts in good faith moved by the central objective that should be the integrity of the company. Therefore the whistleblowing system includes mechanisms of protection of these workers to reprisal and retaliation generating by his/her collaborative behaviour with internal and external authorities, mostly by the individuals connected with the consecutive investigations or to the act reported in general. This necessity of protection arises, in particular from the fact that individuals that report are usually assigned or have interactions with the more risky areas of the company, since “the nearer to the risk you work, the better you can detect violations and consequently report”. At the same time, in order to avoid “egoistic-blowers” moved by incorrect and personal reasons, the whistle-blowing mechanism should include specific procedures to detect and sanction malicious report and defamation.

At present the origin of the word whistle-blower is still unclear; however the term appeared in the Anglo-Saxon world in 1960s, to distinguish “dissenters or inside informants from informants who provided evidence against Mafia, or former

[134] The mechanism of protection is usually dedicated and limited to those categories, meaning internal workers, excluding the public/citizens, with regard to reporters.

communists" (Johnson, 2003:4) or to define informants that report scandals. Since its origin the term was connected with the reporting of information of wrongdoing, fraud or abuse of office in public health, safety etc.

Concerning the implementation in the domestic legal order of States that ratified the treaties providing whistleblowing mechanism and protection, the process and the outcomes are very different: the majority of countries have adopted the whistleblowing protection within sectorial legislation (ex. labour, anti-corruption); some countries limit the protection to a range of individuals and employees, as for instance public officials and/or workers of the private sector and/or contractors. In the same way every State identifies differently the conducts that are encompassed within the whistle-blower disclosure, that are not always strictly connected with corrupted conducts, for example "abuse of authority, violation of laws and ethical standards, danger to public health or safety, gross waste and maladministration" (Bacio Terracino, 2012:135), since it is important to consider not only the corrupted acts, but also the behaviours that can require proper investigations.

In addition, according to every national legislation on the topic, the whistle-blower can choose the function within the company or the external authority for receiving her/his reporting. In this respect usually States provide a double or multiple opportunity, for example the internal bodies or the external authorities and national anti-corruption bodies.

With regard to the specific threats that a whistle-blower may encounter, it is relevant to underline that States should provide proper measures of protection in order to avoid: "dismissal, suspension, disciplinary and other forms of workplace sanctions and discrimination, including petty harassment and stigmatization (Bacio Terracino, 2012:136)". Furthermore it is important to guarantee:" career protection, institutional recognition of reporting, transfer within the same organization or relocation to a different organization (Bacio Terracino, 2012:136)". In this respect national labour legislation should guarantee workers' safeguard to those consequences. In the same time sectorial law should prevent defamation, meaning a false insult, and malicious report, since these represent a risk of the whistleblowing system to be exploited for the wrong reasons.

Above all in order to understand the origins of the mechanism of whistleblowing it is interesting to analyse the single provisions of the main international instruments previously studied. "The reasons given for encouraging and protecting whistleblowers were mixed – to protect freedom of speech, encourage democracy, increase citizen responsibility and address problems of corruption" (Johnson, 2003:115).

As seen in previous sections, the O.E.C.D. was the first organization that adopted a legal instrument to support the fight against corruption as a common cause of all the States involved in international business transactions. Although the O.E.C.D. Convention does not mention the whistleblowing mechanism as a formal instrument against international corruption, the organization traced the breeding ground for the following international initiatives supporting the issue. In particular such reporting system could be considered embraced by the art. 5 of the Convention on the enforcement: ”Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”. In 1998 the O.E.C.D. adopted the Principles for Managing Ethics in the Public Service including some general principles on which a whistleblowing scheme can be based, in particular in the art.4: ”Public servants should know their rights and obligations when exposing wrongdoing - Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility. Public servants also need to know what protection will be available to them in cases of exposing wrongdoing”. Accordingly in 2003 the O.E.C.D. adopted the Recommendation of the Council on Guidelines for managing conflict of interest in the public service reinforcing the fundamental role of implementation of disclosure procedures and with the same objective in 2009 it was adopted the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

In 2010 the protection of workers reporting illicit conducts emerged as a topic of global interest on the international scenario at the G20 Anti-corruption Working Group Summit in Seoul that recommend to States the application of the principles contained in the document issued by the O.E.C.D. Protection of Whistle-blowers - study on whistle-blower protection frameworks, compendium of best practices and guiding principles for legislation.

In conclusion the O.E.C.D. framework on the implementation of whistleblowing systems in domestic legal orders requires the adoption of specific legal policies and practises promoting the integration of the principles on the importance of disclosure and the

protection of whistle-blowers within the public and private sphere[135]. In particular the O.E.C.D. promotes within the member States the adoption of proper initiatives in order to incentive companies and public administration to implement alternative channels to accept disclosures and incentives' plans to reward integrity. In addition the O.E.C.D. recommends to member States to assure within companies the investigations needed and the opportunity for the whistle-blower to receive a feedback, in order to develop a common trust in the system of detecting violations. At the same time both the contents of the reports accepted and the protection assured should be included in clear internal procedures of the companies.

Conversely to the O.E.C.D. Convention, the U.N.C.A.C. Convention addresses the issue of the whistleblowing at the art. 8 "Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions" and at the art. 33 "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".

In addition the U.N.C.A.C. Convention remarks the importance of the implementation of specific legislative acts regulating the promotion of whistleblowing schemes in the document issued in 2004 The global programme against corruption - an anti-corruption toolkit.

Very similarly the C.o.E. Civil Convention, instead, mentions the concept in its art. 9: "Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities". More interesting should be considered the instructions provided by the Explanatory Report of the Convention that add some notions to the art. 9 including the opportunity to compensation for victims of unjustified sanctions and the idea that every sanction against individuals who report illicit conducts should be considered non justified.

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[135] See also http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm (visited in May, 2019).

On the contrary, the C.o.E. Criminal Convention refers mainly to the protection of witnesses, due to different nature of the treaty; the art. 22 provides that “each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities; witnesses who give testimony concerning these offences”.

Accordingly the G.R.E.C.O. outlined relevant dispositions with regard to whistleblowing systems in the respect of the Conventions adopted by the C.o.E.. In its Lessons learnt from the three Evaluation Rounds (2000-2010) gave significant suggestions for the implementation of domestic legal orders underlying the importance to establish an autonomous legislation act on the issue to avoid duplication and overlapping.

Although the U.N.C.A.C. Convention’s provision on this particular feature is not mandatory, the requirements of regional treaties do not leave any different option to States that are supposed to adopt effective measures in this respect.

In particular with regard to the reporting itself and its contents it is relevant to mention the role of the Working Party on the Protection of Individuals, at present the European Data Protection Board (E.D.P.B.)[136]. At the European level the body guarantees a proper application of the rules on confidentiality of the reporting and the privacy of the reporter. In particular in 2006 the European body powerfully clarified the protection of the reporter with regard to the perpetrator, with the exception of malicious reports[137].

A problem of greater importance is the aspect connected with the perception of whistleblowing and the common idea that surrounds whistle-blowers, even though depending from the contextual situation. Similarly to the perception of the phenomenon of corruption on the whole, also on this particular sector becomes relevant to promote information and education, in order to develop a common social awareness on the importance and effectiveness of the whistleblowing system and on the attention on the public interest that primarily should move reporters. Therefore States, public and private sector should incentive the stimulation of a growing global consciousness regard not only

[136] The Working Party on the Protection of Individuals, established by the Directive 95/46/CE, has recently been substituted by the European Data Protection Board that composed by representatives of the national data protection authorities, is an independent European body that supervises on the application of data protection rules within the European Union. It was established by the E.U. General Data Protection Regulation in 2016 (applicable by 2018). See https://edpb.europa.eu/edpb_en (visited in May 2019).

[137] The Italian authority confirmed the European idea for instance in the *Provvedimenti* 1402759/2007 and 1192365/2005.

the idea of the public on who decides to report illicit conducts, but having also the aim to positively influence employees that decide to collaborate with the authorities for a personal duty on public interest. In conclusion in this process it becomes fundamental, once again, to understand the particular context in which it is necessary to operate founding any preventive or repressive initiative on the characteristics of the socio-cultural background and the actors involved.

3.2 From different national approaches towards a global system

3.2.1. European Union

In last decades the E.U. has demonstrated to be not exempt to financial crisis causing huge losses of public funds that could be avoided by the reporting of the quantifiable wrongdoings occurring both in the private and public sectors. In this respect in 2017 the Commission estimated a loss of € 5,8/€ 9.6 billions per year, due to the lack of adequate measures in terms of whistleblowing legislation[138].

Actually the fragmentised and differentiated legislation on whistleblowing across the member States, that mostly ratified the international instruments regulating the fight against corruption, could be dangerous for the development and expansion of national and European violations and breaches. The uniformity of such legislative field could avoid "distortions of competition, increase costs for doing business, violate the interests of investors and shareholders and, overall, lower attractiveness for investment and create an uneven level playing field for all businesses across Europe, thus affecting the proper functioning of the internal market"[139].

At the same time the member States try to cope with the lack of a common legal regulating system on the issue at regional level, following the international provisions on the promotion of reporting of illicit conducts and the protection of those who report.

In this context, thanks to a spirit of common effort towards this recognized instrument sustaining the transparency and accountability in the E.U., in 2018 was elaborated a proposal[140] for a Directive of the European Parliament and the Council on the protection

[138] See https://europarl.europa.ey (visited in May, 2019).
[139] Art.6 of the Memorandum.
[140] (COM(2018)0218).

of persons reporting on breaches of Union law for the approval of the European Parliament and the European Council.

On the basis of the proposal on 16th April 2019 the European Parliament adopted[141] the Directive[142] comprehending a set of EU-wide standards, in order to protect and encourage revealing breaches of E.U. law in the interest of the Union's integrity. As a matter of fact the contents of the Directive are influenced by the traditional common initiative of the E.U. institutions to promote the strengthen of the values of integrity and rule of law within the E.U., in this case incentivising also a financial equilibrium and the protection of the rights of European workers. The contents of the regional instrument are supposed to guide the member States in the implementation in the domestic legal order of a system that consists of a fundamental tool not only for the detection of corrupted behaviours, but also for the creation of a more ethical professionalization of work and business within the common market.

"This Directive provides for protection against retaliation for those who report on evasive and/or abusive arrangements that could otherwise go undetected, with a view to strengthening the ability of competent authorities to safeguard the proper functioning of the internal market and remove distortions and barriers to trade that affect the competitiveness of the companies in the internal market, directly linked to the free movement rules and also relevant for the application of the State aid rules"[143].

A real novelty of the Directive is that it addresses both public and private sectors and both internal (ex. workers) and external (ex. contractors) whistle-blowers. In addition it is surprisingly applicable also to "reporting persons whose work-based relationship is yet to begin in cases where information concerning a breach has been acquired during the recruitment process or other pre-contractual negotiation"[144].

In addition the act introduces a double channel of functions and bodies that can accept reporting, internally and externally, giving informants the opportunity to evaluate in which case his/her disclosure would be more influential and effective. In this respect in every context becomes fundamental to appoint specific functions or bodies that can accept the disclosure, take the necessary initiative of investigation and inform the reporter about

[141] 591 votes in favour, 29 against and 33 abstentions.

[142] See http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-whistle-blower-protection-proposal/05-2019 (visited on May 2019).

[143] Art. 18 of the Memorandum.

[144] Art.4 of the Directive.

the development of their activities and the outcomes, as well as the adequate measures that the organization decide to activate.
Moreover it is integrated the safeguard of employers against acts of discrimination and reprisal through the implementation of effective, confidential and secure reporting channels that guarantee the protection and the privacy of both the contents of the disclosure and of the whistle-blower.
In sum the Directive standardizes rules on reporting information about non-ethical or illicit behaviours within areas of public procurement, financial services, money laundering, product and transport safety, nuclear safety, public health, consumer and data protection of public administration or private enterprises.
Concerning the protection of reporters, the E.U. safeguards them to be suspended, demoted and intimidated together with their facilitators, colleagues and relatives. In particular the aim of the empowerment of the concept of protection of whistle-blowers is also to preserve the universal freedoms like the freedom of expression, the right to labour, the protection of private life, personal data, health, environment, consumers. In this respect the Directive clearly asks member States to provide effective procedures and remedies on the whistleblowing system that should be independent, clear and available to the public.
Concerning legal proceedings a novelty consists of legal aid and financial and psychological support for whistle-blowers.
In conclusion the Directive provides that member States can evaluate the opportunity to adopt "more favourable treatment"[145] to whistle-blowers, even though not required by the E.U. institutions.
T.I. issued a report in 2009 "Alternative to silence – Whistle-blower protection in 10 European Countries", which outcomes seem to be still quite actual in depicting the European context with regard to the implementation of adequate measures to regulate the system of individuals' disclosures on non-ethical or criminal mismanagement. The study brought to light the European background where the obligations of the European Directive would be applied in future. For this reason this contribution offers relevant cues for the future development: there are rare examples of comprehensive and effective legislation, limited by stronger legislative instruments prohibiting release of information and defamation; the measures that guarantee protection are weak with inadequate

[145] Art. 19 of the Directive.

channels and processes and even weak sanctions; the protection through labour legislation often does not assure protection to consultants, contractors, third parties, suppliers; compensation for retaliation is a very rare institution. Hence, T.I. recommended the adoption of a single legal framework regulating not only the disclosures but also the protection and compensation for reprisal for whistle-blowers within public and private sectors (T.I., 2009:4).

Similarly, T.I. issued a position paper 1/2018 on the whistle-blower protection in the European Union, analysing the proposal of the Directive previously studied providing some recommendations for its adoption. With the opening dissertation T.I. emphases the fundamental role of the informants of misdeeds that threaten the public interests stressing the risks they face, even physically and for this reason need the adequate protection assured via common rules legally recognised. In addition T.I. positively evaluate the coverage of the Directive of private and public sector, the wide range of whistle-blowers and abuses taken into consideration, the accessible system of protection required, the shared participation of the whistle-blower to the investigative procedures provided, the penalties provided for individuals who obstacle, interfere or threaten, the legal and financial assistance guaranteed to reporters. Conversely T.I. recommends improvement on some provisions regarding the protection of whistle-blowers: the irrelevancy of the truth of the disclosure, the importance of the protection of the identity, the contemplation of anonymous reporting, the obligation to implement internal mechanisms to promote whistleblowing and protect whistle-blowers in public sector, the importance of collection of data that should be mandatory (T.I. 2018:2).

3.2.2. United States

“Benjamin Franklin is listed as the first notable whistle-blower in the United States, as he exposed the corrupt practises of the Massachusetts governor” (Berkebile, 2018:3). This statement proofs that whistleblowing system is not new in the American background and it has existed since a time when there were even not legal acts regulating it. However “during the last three decades, whistleblowing had become a prominent part of U.S. vocabulary, culture and organizational life. In fact, citizens in the United States blow the whistle on waste, fraud, and abuse more than anywhere else in the world” (Johnson, 2003:3). Since 1960s the Americans started to embrace the mechanism of whistleblowing

in their culture celebrating informants and powerfully spreading its fundamental principles to the rest of the world.

Five reasons could explain the successful experience of United States in this respect: "(1) changes in the bureaucracy itself; (2) the wide range of laws that encourage whistleblowing; (3) the federal and state whistle-blower protections; (4) institutional support for whistle-blowers, and (5) a culture that often values whistleblowing" (Johnson, 2003:4).

The first legal experience of the U.S. with disclosure of illicit behaviours to the prejudice of the United States had its origin in 1863, when the Congress adopted the False Claims Act[146], the "Lincoln Law", in order to protect the U.S. army from fraud and illicit financial conducts. In fact this law permitted "private citizens with knowledge of fraud against the federal government to sue in its behalf and receive a portion of the recovered proceeds" (Shimabukuro and Paige Whitaker, 2012:1). In addition to employees, contractors, agents of an organization received some additional protection. "Essentially, that employee, contractor, or agent cannot be fired, demoted or discriminated against in any manner because of their whistleblowing activities" (Berkebile, 2018:9).

Its obligations were soon applied to other governmental spheres with a high risk of financial wrongdoings. At this initial stage the relator could receive a reward of the 50% of the money recovered thanks to the whistle-blower's initiative. An amendment of 1943 reduces the possible reward to the 25% of the amount of money reclaimed.

United States provided, then, a first legislative instrument exclusively regulating the protection of whistle-blowers in 1912, the Llloyd-La Fayette Act[147] that protected the federal agents from unfair dismissal in case of reporting of wrongdoings or illicit behaviours to the Congress. As a matter of fact the act added modern relevance to whistle-blowers applying specific provisions to the entire U.S. federal employment, unfortunately not providing retaliatory protection (Berkebile, 2018:10). During the 1970s that protection was guaranteed to other sectors of public employment, because of great environmental and agricultural scandals (Liguori, 2014: 112).

On 27th October 1986 the U.S. Congress proposed an amendment to the False Claims Act, in order to incentivise the investigations and detections of fraud conducts within government organizations. More precisely, the law admitted to individuals (according to

[146] The False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733.

[147] The Lloyd-La Fayette Act § 6, 37 Stat. 555, 5 U.S.C. § 7511

the False Claims Act, the relators), on behalf of the United States of America, to take actions against those individuals or companies that perpetrated the crime of fraud during their activities. Accordingly to the law, the relator was assured a reward between 15 and 25% of the amount of money recovered thanks to its disclosure. The relator could entrust a public employee or individual connected the U.S. government with its reporting. The law provided sanctions in particular for conscious misrepresentations, personal or leaded. In addition the False Claims Act guaranteed, introducing a real novelty, the protection and the opportunity to petition and ask for relief of the relator: "Any employee, contractor, or agent shall be entitled to all relief necessary […] if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter"[148]. With regard to the proceedings that follow the disclosure of the relator, the law fixed specific terms for the government investigations, for the civil actions of both the government and the relator (Liguori, 2014:117).

Then, the False Claims Act was edited in 2009 and 2010 in other to expand its jurisdiction, creating a really powerful instrument promoting whistleblowing. As a matter of fact from 1986 to 2012 the American government has incrementally recovered 24 milliards of dollars thanks to the False Claims Act as emended in 1986 (Liguori, 2014:120).

The Sarbanes-Oxley Act[149] was adopted in 2002, in order to protect not only the governmental investments but also the investments made by citizens, "in response to the massive scandal and corporate fraud in general" (Bekerbile, 2018: 14). The aim of the act was to protect investments through accuracy and reliability of corporate disclosures. Defined by the President Bush as "the most far reaching reform of American business practise since the time of Franking Delano Roosevelt" (Liguori, 2014:124), the act integrated new financial safeguarding requirements for the American enterprises, in order to facilitate the surfacing of illicit behaviours and conducts and to arise the American citizens' trust in financial investments and intermediaries. Concerning the whistleblowing schemes the act prohibits companies from "discharging, demoting, suspending, threatening, harassing or in any other manner discriminating" (Shimabukuro and Paige

[148] Section 3730 (h).

[149] Public Company Accounting Reform and Investor Protection Act of 2002 S. 2673 (107th).

Whitaker, 2012:12) employees that provide information or assists in investigations. In addition the act promotes the implementation within the companies providing the required protection to the whistle-blowers: "the act authorizes the U.S. Department of Labor to protect whistle-blower complaints against employers who retaliate and further authorizes the Department of Justice to criminally charge those responsible for the retaliation"[150]. In the same time the whistle-blower has also the opportunity to take action against the company in case of proofed discrimination. More precisely, the employee who reports "may be awarded all relief necessary [...] including reinstatement [...] back pay with interest, and compensation for any special damages incurred" (Shimabukuro and Paige Whitaker, 2012:12). In particular, the Section 301 of the act provides the implementation of specific procedures regulating disclosures, even anonymous, within American companies.

In conclusion the Sarbanes-Oxley Act "is considered [...] one of the most important pieces of whistleblowing legislation" (Bekerbile, 2018: 15).

During Barack Obama Presidency, in 2010, the U.S. adopted the Dodd-Franck Wall Street Reform and Consumer Protection Act[151] following the financial crash of 2008, in order to stimulate the private investments and the economical growth through a more efficient protection of reporters of illicitness occurred in the financial sector. More precisely, "this act established several new whistle-blowers protections for individuals employed in the financial services industry" (Shimabukuro and Paige Whitaker, 2012:4). Actually, the aim of the act was to prevent other collapses protecting borrowers from the banks' mortgage practises. The more relevant difference with the previous legislation is that the act do not provide direct economical rewards for whistle-blowers. The act provides, instead, for instance an online model that guides the whistle-blower in a circumstantiated and precise disclosure of information, repressing malicious reports, and admitting anonymous reporting through a specific procedure that includes the assistance of a legal intermediary. In addition "an individual who prevails in a whistle-blower action will be awarder reinstatement, back pay with interest, and compensation for any special damages sustained as result of the discharge or discrimination" (Shimabukuro and Paige Whitaker, 2012:5). The Security and Exchange Commission (S.E.C.) follow the

[150] Section 806.

[151] Dodd-Franck Wall Street Reform and Consumer Protection Act 124 Stat. 1376–2223.

procedures of analyses of the disclosures and the possible rewards through the Office of the Whistle-blower, internally established. In addition the S.E.C. offers protection and awards. Being a quite recent introduction, the protection of the S.E.C. seems to be rarely used (Berkebile, 2018:17).

In conclusion, though the whistleblowing system in United States is embedded in people's natural attitude, the protection legislation is still open to progress, in order to gain more effectiveness: the protection measures are in practise not fully perceived and used by American citizens; the protection framework results as stratified and confusing; the legislative differences between public and private sectors represent an obstacle; the protections provided by law seem to be insufficient to stimulate informants (Bekerbile, 2018:21). The main solution, as in other cases emerge throughout this study, is the adoption of a unique and clear legislation on the topic.

In conclusion, though some deficiencies, the American whistleblowing legislation, thanks to the U.S. cultural and historical background, undoubtedly demonstrates to be one the most successful examples of the world functioning of the whistleblowing schemes.

3.2.3. United Kingdom

Between the 1980s and the 1990s occurred in the United Kingdom a series of harmful events mainly caused by negligence or improper parsimony, in which a relevant number of individuals lost their lives; those incidents could be avoided by the detection of enterprises' wrongdoings. For this reason the institutions of the United Kingdom were stimulated to adopt adequate legislative measures, in order to promote the disclosure of illicit behaviours and the protection of individuals who decide to blow the whistle. At present the United Kingdom is globally considered the more successful example of the adoption and the application of the whistleblowing schemes, in particular thanks to the development of powerful campaigns for the promotion of a real public culture on the topic (Liguori, 2014:99).

Actually, the main advantage of the English whistleblowing legislation, the Public Interest Disclosure Act (P.I.D.A.), is that it addresses both the workers of the public and the private sphere strongly encouraging their protection and limiting the cases of economical rewards. The promotion and the spread of the main principles of the protection of possible reporters is delegated to a specific particularly active organization

established in 1993, the Public Concern at Work[152], that collaborated also to the drafting of the legislation on the issue.
The Public Interest Disclosure Act, promoted by the Prime Minister Tony Blair, was approved in 1998 and adopted in 1999 becoming a model for many countries in the world: the 83% of the employees declare to be keen on reporting and the 66% of the workers aware about concrete illicit conducts (Liguori, 2014:101).
Concerning the characteristics of the whistle-blower, the legislation is applicable to the workers of the organization and its contractors and it helpfully defines "worker" and "employer" for the purpose of the legislative act. The legislation takes into account the characteristics of a series of possible reporting considering for instance violations in terms of environment and safety or violations of civil and criminal laws regulations.
Nonetheless the whistle-blower for the English legal order represents a function more similar to a witness that to an American relator, since he/she do not have the burden of proof that is part of the following investigative procedures (Liguori, 2014: 104). In this respect the amendment adopted in 2013 with the "Enterprise and Regulatory Reform Act" completely eliminated the good faith as a requirement of the disclosure, but at the same time stressed the requirement of the whistle-blower's interest in the integrity of the public good.
Concerning the retaliation and discrimination effects, the English legislation promotes the protection of the whistle-blower and his/her opportunity to appeal and to obtain a relief by the Law Court.
The organization Public Concern at Work issues periodically the statistical analyses emerging from its experience in supporting and promoting whistle-blowers, for example the interesting report "Whistleblowing: the inside story" of 2013 that provides a very interesting whistleblowing scenario in U.K.: the 83% of workers blow the whistle at least twice, usually internally; the 15% of whistle-blowers raise a concern externally; the 74% of whistle-blowers say nothing is done about the wrongdoing; 60% of whistle-blowers receive no response from management, either negative or positive; the most likely response is formal action (disciplinary or demotion) (19%); the 15% of whistle-blowers are dismissed; senior whistle-blowers are more likely to be dismissed; newer employees are most likely to blow the whistle (39% have less than two years' service)[153].

[152] See https://www.pcaw.org.uk (visited in May 2019).
[153] See http://www.whistleblowing.org.uk/law-policy/whistleblowing-commission/whistleblowing-the-inside-story (visited in May, 2019).

3.2.4. Italy

Considering the development of whistleblowing schemes within Italian legal order it is central to consider a common precondition on the topic. Although the Italian citizens and institutions are, in fact, slowly developing a social consciousness on the importance of reporting illicit conducts and the role of whistle-blowers, the Italian background seems to be mostly unfriendly with those issues. One of the reasons of this hostility and indifference has historical origins, in particular in the fascist period (1922-1943). During the fascist regimen it was common to use the reporting to identify the individuals that the regime should consider enemies; thus it has became difficult to introduce any system of reporting, even regulated by legislation, because of the historical prejudice concerning the "sentinel" (Liguori, 2015:162).

Therefore, in Italy, as in other States, the concept of whistleblowing primarily arose from the sphere of treatment and protection of witnesses developing only in a second stage as an independent and different concept. In this respect the Italian legislation mainly considered the protection of who reports illicit conducts within the investigations on organizational crime[154] connected in particular with mafia and terrorism. Actually this legal evolution underlines another major premise on the issue: the crimes perpetrated within this scenario are incorrectly perceived as more frequent and serious, than crimes arisen from the business sector both public and private. Conversely studies and researches underline the great impact of economic illicit behaviours in terms of consequences on the civil society (Liguori, 2015: 155). A concrete example is represented by the scandal connected with the financial crash of the company Parmalat occurred in Italy in 2002 that caused a damage of 10 milliards to investors that were unconscious about the high risk of the financial investment offered. At the same time scandals like this reveal social consequences on the civil society, for instance the failure of public trust (Liguori, 2014:62).

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[154] D.L. 8/1991 *Nuove norme in materia di sequestri di persona a scopo di estorsione e per la protezione dei testimoni di giustizia, nonché per la protezione e il trattamento sanzionatorio di coloro che collaborano con la giustizia* modified by the L. 45/2001 *Modifica della disciplina della protezione e del trattamento sanzionatorio di coloro che collaborano con la giustizia nonché disposizioni a favore delle persone che prestano testimonianza.*

In addition the obligation for a public official to report illicit conducts is provided by the criminal law (art. 361 c.p.[155]), but it remains an obligation connected with the performance of public activities within a public context.
Generally speaking about workers, instead, it is relevant to mention the general provisions of the Italian labour legislation (L. 300/1970) on the freedom of expression of workers shaped on the main constitutional principle protecting the right of free expression of citizens (art. 21[156]). In this respect the civil law integrated the concept of loyalty of the employee in the respect of the company or public administration and its activities in a general connotation (art. 2105 c.c.)[157].
Furthermore the legislation on workspace safety provides the obligation for every worker to immediately report the detected weaknesses (art. 20, c.2, lett. e) D.Lgs. 81/08)[158], in order to prevent or repress dangerous situations.
Although the freedom of expression in general is in the same way regulated by the law, it seems clear also in the Italian legal order that the protection of the "reporters" has to be provided not only in the interest of the company or public administration involved but also in the interests of the society in general, due to the negative impact and consequences that the reported conducts could have on the whole civil society (Liguori, 2015:157).
A specific provision of the D.Lgs. 231/01, art.6, c.2, let. d), has once again suggested the initial process of development of a whistleblowing culture, in this case also in the private sphere, providing the necessity to introduce within the M.O.G. specific obligations in

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[155] *"Il pubblico ufficiale, il quale omette o ritarda di denunciare all'Autorità giudiziaria, o ad un'altra Autorità che a quella abbia obbligo di riferirne, un reato di cui ha avuto notizia nell'esercizio o a causa delle sue funzioni, è punito con la multa da trenta euro a cinquecentosedici euro".*
La pena è della reclusione fino ad un anno, se il colpevole è un ufficiale o un agente di polizia giudiziaria[c.p.p. 57], che ha avuto comunque notizia di un reato del quale doveva fare rapporto [c.p.p. 330-332, 347].
Le disposizioni precedenti non si applicano se si tratta di delitto punibile a querela della persona offesa".
[156] *"Tutti hanno diritto di manifestare liberamente il proprio pensiero con la parola, lo scritto e ogni altro mezzo di diffusione. La stampa non può essere soggetta ad autorizzazioni o censure".*
[157] *"Il prestatore di lavoro non deve trattare affari, per conto proprio o di terzi, in concorrenza con l'imprenditore, né divulgare notizie attinenti all'organizzazione e ai metodi di produzione dell'impresa, o farne uso in modo da poter recare ad essa pregiudizio".*
[158] *"segnalare immediatamente al datore di lavoro, al dirigente o al preposto le deficienze dei mezzi e dei dispositivi di cui alle lettere c) e d), nonché qualsiasi eventuale condizione di pericolo di cui vengano a conoscenza, adoperandosi direttamente, in caso di urgenza, nell'ambito delle proprie competenze e possibilità e fatto salvo l'obbligo di cui alla lettera f) per eliminare o ridurre le situazioni di pericolo grave e incombente, dandone notizia al rappresentante dei lavoratori per la sicurezza".*

terms of information to the O.d.V. Although this provision does not specify the subjects involved and the forms and methods of the access to information and even the contents, it can be considered an initial trace on the importance of report within Italian legal system and an initial incentive to the Italian private companies to introduce reporting systems within their internal regulation.

More specifically, with the adoption of the L.190/2012, "the anti-corruption law", the concept of whistleblowing entered the Italian legislation with the characteristics widely accepted in the international legal order. The law integrated the D.Lgs. 165/2001, previously studied, with the art. 54 *bis* providing a protection for the public employee of public administration[159] that reports corrupted behaviours known during his/her work activities to the internal R.T.P.C. or to the external authorities or to the A.N.A.C; at the same time the confidentiality of the report is also assured. In this respect every discrimination and retaliation is prohibited and every consecutive act is considered invalid and sanctionable. All these provisions are not considered in case of malicious report or defamation. The provisions integrated by the art.54 *bis* move from the principle that the public sphere is characterized by high standards of integrity, morality, rule of law and public spirit (Borsari and Falavigna, 2018:42).

So, from the general overview of the main Italian legal provisions on reporting, a multitude of cues emerge concerning the importance of the reporting of illicit acts and the protection of the reporters.

Nonetheless it is only in 2017 that the Italian legislator adopted a legislative act specifically dedicated to the introduction of whistleblowing schemes in the Italian legal order, in order to promote the reporting of wrongdoings and crimes emerging during the work activity of public and private workers. In this respect the L.179/2017 integrated at the same time the L. 190/2012 dedicated to the public sector in the connotation explained in previous sections of this contribution and the D.Lgs. 231/01 on the private entities, in particular the companies that adopted a M.O.G.

More specifically the relevance of the integrations of the L.190/2012 adopted by the L.179/2017 is clear: the workers for who it is required a special protection are not only the public employees, but also the employees of the controlled entities and of the

[159] The public subjects to which the obligations are applicable are the same of the L. 190/2012, meaning all the entities regulated by the 165/2001; in other words not only purely public administration, but also all controlled entities like state owned companies that constitute the object of study of this contribution. This particular provision is dedicated also to contractors. For further information see previous sections of the research.

contractors; the objective of the reporting should be the integrity of the public administration or controlled body, in order to repress egoistic-blowers (Borsari and Falavigna, 2018:43); the information constituting the reporting should origin from the work activities of the whistle-blower; the whistle-blower can choose for his/her reporting between the R.T.P.C., the A.N.A.C. or the external authorities, but it is excluded the possibility to report to the senior managers; initiatives of discrimination should be immediately communicated to A.N.A.C..

In the same way the Italian legislator with the L.179/2017 intervened with significant novelties to the D.Lgs. 231/01 and in particular with specific instructions for the implementation of the M.O.G., which adoption is non-mandatory. The recent legal act recommends the adoption of alternative channels, also arranged through information technology, to allow the detailed reporting by managers and employees in the interest of the integrity of the company of illicit behaviours or violations based on precise elements and proofs referred to the main objectives of the D.Lgs. 231/01, as long as the information reported have their origin within the work activity of the reporter. At the same time the confidentiality of the reporting and the privacy of the reporter should be provided and acts of discrimination and retaliation should be properly prevented, repressed and sanctioned. In this respect also malicious reports and defamations should be punished. The company should choose the function or the body that accepts the reporting between internal organisms (ex. the O.d.V.) or external experts. Concerning the reporters, the integration to the D.Lgs. 231/01 do not take into consideration contractors, that are instead considered within the public sector legislation.

For the purpose of the contribution, meaning the implementations needed for State Owned Companies in the connotation previously examined, it is relevant to cross provisions dedicated to both the public and private sphere underling common and contrasting dispositions.

Concerning discriminations acts against the whistle-blower in both sectors they are considered invalid and sanctionable.

In addition the art. 3 of the L.179/2017 represents a novelty within the Italian legal order on reporting, introducing a just cause for the reporting that reveals information in violation to the industrial, scientific, professional secret when it originates from the

interests of the integrity of the company[160]. The condition that activates the just cause is the use of the provided internal and dedicated channels of communication.
With regard to soft-law measures some organizations adopted specific procedures and guidelines, in order to incentivise and regulate the whistleblowing mechanism, in particular after di adoption of the L.179/2017[161].
The A.N.A.C. as often happens in the Italian background acted as a forerunner in 2015 adopting specific guidelines on the implementation of whistleblowing mechanism with the *Determinazione n. 6* of 28th April[162], anticipating the following legislative provisions.
Similarly Confindustria adopted in January 2018 a memorandum on the implementation of whistleblowing mechanisms and consecutive protection measures, in order to clarify the provisions of the law and efficiently prevent and repress the illegal conducts perpetrated within companies. More precisely, the organization underlines and explains the main provisions of the integration provided by the legislator concentrating its attention on the adoption's process and on the recommendations provided for the private sphere. Above all it emerges the issue of the body or function that has to accept the reporting. According to Confindustria the M.O.G. should clearly appoint if the whistle-blowers for their disclosure can choose a specific internal but independent organism, an external expert, an internal function responsible for compliance in general, a committee composed by various internal experts. In particular in deciding which body or function has to be involved in the registration of the reporting, the company should take into consideration the role of the O.d.V., that it is anyway responsible for the obligations provided by the M.O.G. and for this reason should be taken into account in the reporting mechanism and in the process of management of disclosures. On the one hand the O.d.V. supervises on the efficiency and effectiveness of the M.O.G. and the reporting can reveal weaknesses in this respect; on the other hand the O.d.V. represents an external and independent professionalized organism that should be adapt in promoting and accepting reporting of illicit conducts.
In the study of the system that provides reporting in the interests of the company and the society in general, it is fundamental to consider the role of anonymous reporting that

[160] The secrecy is regulated in the Italian legal system by the artt. 326, 622, 623 c.p.; art. 2105 c.c.
[161] See for instance the note of the Italian Court of Auditors n. PG 9434/2007/P.
[162] *Determinazione n.6 del 28 aprile 2015 Linee guida in materia di tutela del dipendente pubblico che segnala illeciti cd. Whistleblower.*

represents a debated subject not only with regard to the reporting of corrupted acts, but also reporting in its general implication.

Concerning the acceptability of anonymous reporting, the Italian legislation does not seem to tolerate it. The provisions that exclude the admissibility of information on illicit behaviours in general when emerged from anonymous notification are various: the principle expressed by the art.111 of the Constitution[163] on the right to interview during the fair trial; the art. 240 of the civil law that excludes the possibility to use documents that contain anonymous reports; the art. 195 and 203 of the criminal law on the non acceptability of reporting of anonymous individuals. Conversely A.N.A.C. in the *Determinazione n.6*, giving the example of a particularly detailed and circumstantiated anonymous reporting, traced the path towards the acceptability of anonymous information, especially when supposed to be genuine.

3.3 When and how whistleblowing works

3.3.1. The soul of the whistle-blower: rational and emotional factors

After having studied the origin, the main features and the legislation regulating whistleblowing, it is relevant to analyse specifically the "inside aspects" of whistle-blowers' decision.

Whistleblowing is first of all a matter of loyalty and fidelity that are in some measure expected from employees by companies. However a worker that reports possible or detected wrongdoings of the company where works is not valued as loyal, but as an example of disloyal employee. "Whistleblowing, at least at first blush, seems a violation of these duties and it is scarcely surprising that in many instances employers and fellow employees argue that it is an act of disloyalty and hence morally wrong" (Larmer, 1992:125).

Actually loyalty makes us part of a community and comprehends on the one hand the value of fidelity for every group of which we are part, in this case our organization, that arises thanks to the educational and cultural background that we develop in our life's experience; on the other hand it refers to the principle of justice that let us know what is wrong and what is right. In this respect, although whistle-blowers are often considered

[163] See Cons. Stato, sez. VI, 25 giugno 2007, n. 3601.

wrongly by colleagues and the organization as a whole, they represent a kind of "super-loyal" worker that applies both the two sides of the coin (Johnson, 2003:28).
In addition it is important to take into account that the whistle-blower acts when there are not alternatives for bringing the problem to light. Whistle-blower, in fact, do not usually act following instinct, but carefully consider effects and consequences in a rational and emotional factors' flow. In this respect it is fundamental to mention the Whistle-blower Checklist elaborated by Bok in 1981. According to the author a checklist for whistle-blowers should be constructed in three parts that embraced some central questions: dissent, loyalty, accusation. In particular "when whistle-blowers claim their dissent will achieve a public good, they must ask: what is the nature of the promised benefit? How accurate are the facts? How serious is the impropriety? How imminent is the threat? How closely linked to the wrongdoing are those accused? When whistle-blowers breach loyalty to their organization, they must ask: is whistleblowing the last and only alternative? Is there no time to use routine channels? Are internal channels corrupted? Are there no internal channels? When whistle-blowers are publicly accusing others, they must ask are accusations fair? Does the public have a right to know? Is the whistle-blower not anonymous? Are the motives not self-serving?" (Johnson, 2003:30).
The checklist is an interesting map that emphasises the whistleblowing state of mind and an important tool for researchers or observers that can be adapt to every concrete example in order to capture the main features. An element that it is important to consider in the study of the mechanism is that after having evaluated pros and cons and decide to act, the whistle-blower do not hesitate in writing or reporting his/her disclosure.
In conclusion it is relevant to mention the phenomenon of apathy that always require a deep study of the concrete situation in which it emerges. Wrongdoing are frequently ambiguous and subject to interpretation and for this reason often generate doubts to the actor. This explains the condition of whistle-blowers that do not report, together with the perception that his/her action would not be followed by proper measures (Johnson, 2003:49).

3.3.2. The setting of whistleblowing: the environment

The decision and the act of reporting illicit conducts perpetrated within the organization has a multitude of consequences that undoubtedly arise from the organizational environment (public opinion, group activity, media coverage and legislative receptivity

to change). More specifically “policy impact refers to those events occurring after and as a consequence of whistleblowing that affect the whistle-blower’s issue. There are three dimensions of policy impact: (1) the policy agenda, (2) bureaucratic procedures, and (3) substantive public policy” (Johnston, 2003:53). In addition the environment is fundamental in the whistleblowing process not only because represents the main seeding ground for consequences, but also because influences its success together with the characteristics (ex. status, credibility, political skills) of the whistle-blower and the characteristics of the issue (ex. saliency). Furthermore the environment is crucial in the stages that follow the reporting of the informant representing the playing field of policy change. “Whistleblowing is most likely to have a policy impact when several key conditions are met: when media coverage is supportive, sympathetic interest groups work actively to bring about investigations or corrective actions, and legislators are receptive to the charges and are willing to act” (Johnson, 2003:55).

With regard to the impact and effects of whistleblowing on the organization it is important to distinguish between positive and negative consequences both in the short and in the long term. In the short term most effects seem to be negative: “the publicity from whistleblowing might also cause financial losses for the agency, a reduction in public support, increased management turnover, loss of cohesion within the organization” (Johnson, 2003:75). However what is often less considered is that whistleblowing influences positively the organization of the company on the long term, revealing misleading and creating the opportunity to repress it.

3.3.3. Key features for success

From the American and English experience previously studied it is possible to isolate some key features that if properly reformed could let the whistleblowing mechanism to be incentivise and to be accepted by the civil society: bureaucracy, laws, protection, institutional support, cultural values.

Bureaucracy, meaning the official system comprehending functional rules and organizational processes, embraces in its terminology the reference to bureaucrats, the individuals that in their job experience the system of bureaucracy as a well-established mechanism of functioning of government and business. Concerning whistle-blowers it seems that they are better incentivised in an environment composed by high standards of professional education and training, since experts seem to be more keen on follow

professional codes of conducts and more sensitive to the preservation of public good and resolution of public problems. In the same way whistleblowing seems to be more present in technological environments where the bureaucracy has been positively and slowly reformed starting from previously established policies and procedures (Johnson, 2003:5). In addition laws should sustain this professionalization of bureaucracy and bureaucrats legally and officially promoting within the public sector high principles and values of ethical duty and loyalty through the adoption of specific codes of conduct underling the importance of disclosures on waste, fraud and abuse (Johnson, 2003:7).
Accordingly the domestic legal orders should preserve the protection of whistle-blowers from threats of discrimination and retaliation within sectorial legislation of environment protection, public health and safety and civil rights. On the contrary legislation on the issue seems to be more valuable when represented by and independent, autonomous and updated corpus of law (Johnson, 2003:9). However the European countries are facing "a patchwork of legislation that falls under different sectors and existing laws" (T.I., 2009: 9).
What the majority of researches on the topic of protection of informants reveal is that "instead of the problem raised by the whistle-blower becoming the focus of attention, typically the individual whistle-blower becomes the issue" (Johnson, 2003:91).
Furthermore the stimulation of whistleblowing mechanism should be a common shared objective of media, organizations and institutions. "Newspapers […] engage the public; publicize and sustain interest in the alleged wrongdoing. Television and the popular press nationalize, popularize, and sometimes personalize a whistle-blower story. Whistle-blowers need media coverage […] Media coverage allows whistle-blowers to establish their credibility and legitimacy for their cause while stimulating public interest" (Johnston, 2003:10).
Moreover the whistleblowing mechanism should be sustained by the national institutions with the creation of dedicated bodies and offices and even new organizations in order to incentive, train, support and protect informants (Johnston, 2003:14). In this respect the European countries are still revealing disconnection between the legal initiatives and the concrete development of applicative measures (T.I., 2007:8).
Nonetheless as often happens studying the phenomenon of corruption in its entirely, the cultural component emerges to be fundamental in creating a concrete development in the change of mind of the society. Thus, concerning the whistleblowing mechanism it must be mentioned between the central achievements. This is stressed to be the main problem

in the implementation of whistleblowing mechanisms in countries after years of authoritarian regimes and the existence of secret police channels (T.I., 2009:7). Loyalty to team and group is the first principle that should be stimulated to preserve the collective interest and to let the public to accept informants. At the same time whistleblowing seems to be more spread together with the culture of individualism and the culture of preservation of main topics like public health and safety (Johnson, 2003:17). For instance the author Johnson reports an increase of whistle-blowers in United States following September 11 reflecting a significant relevance of the patriotic duty.

3.4 Whistleblowing as a violation of human rights

A relevant implication of the implementation of whistleblowing schemes within internal regulations of public and private organizations in accordance to national, regional and international anti-corruption initiatives and obligations, consists of the correlation of the violations occurred in corrupted scenarios, especially against individuals who report non-ethical, illicit and corrupted conducts, with possible violations of human rights. Actually the European Court of Human Rights has frequently intervened in cases arisen from these specific situations.

For instance in the case Heinisch v. Germany[164] a nurse reported the scarce assistance guaranteed to the patients of a public retirement home where she was working. In this case emerges the relationship between the principle of the public interest in being informed about the standards of the public services offered to society and the protection against the reputational risk of the organization that does not provide high standards services. In this respect the Court affirmed the supremacy of the public interest on the reputation risk of a single organization or company. Moreover, since the organization dismissed the nurse without any notice as a consequence of her disclosure about the breaches, the Court invoked the art.10[165] of the European Convention of Human Rights providing freedom of expression, to declare the unjustifiability of the act of dismissal.

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[164] European Court of Human Rights, Heinisch v. Germany, n.28275/08, 21st July 2011 (https://hudoc.echr.coe.int/spa#{"itemid":["001-105777"]}).

[165] 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

This case justifies all the reasons motivated in this section on the importance of the establishment of clear and accessible measures of protection of whistle-blowers and sanction of the individuals or organizations that threat them or adopt unjustified acts against them, even violating their freedoms and fundamental rights.

Another significant case on which the European Court of Human Rights passed is the case Guja v. the Republic of Moldova[166]. Guja sent evidence (two documents) to newspapers about police misconduct involving the Vice-President of the Moldovan Parliament and the Prosecutor General. After the publishing of the disclosure, Mr. Guya was wrongly dismissed for the violation of internal regulations. His dismissed was even approved by the national courts. Mr. Guja appealed for the first time at the European Court of Human Rights in 2004[167] for a supposed violation of the art. 10 "Freedom of Expression". In this respect the European Court of Human Rights accepted his case of violation of art.10 of the European Convention of Human Rights verifying that he was in good faith, he had no others alternative channels to report, the public interest had more relevance of the reputational risk of the organization, his sanction of dismissal was unjustified. The Court also provided a just satisfaction to Mr. Guja for pecuniary and non-pecuniary damages.

In addition the cases reveals that various globally recognised rights could be at stake for a relator who reports wrongdoings or mismanagements that occur in the organization or company where he/she works. More specifically the risk regards mainly the freedom of expression as in the Heinisch v. Germany case, the prohibition of discrimination when unjustified acts discriminated the individual in workplace, the right of an effective remedy[168] when it is not guaranteed the remedy for the discriminations perpetrated, the right to liberty and security[169] when even the safety of the individual is in risk, right to

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penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[166] European Court of Human Rights, Guja v. the Republic of Moldova, application no.1085/10, 27 February, 2018 (ECHR 079 (2018) 27.02.2018).

[167] European Court of Human Rights, Guja v. Moldova, application no. 14277/2004, 12 February 2008.

[168] Art. 13 of the European Convention on Human Rights.

[169] Art. 5 of the European Convention on Human Rights.

fair trial[170] when in case of discriminations the institutions do not activate proper proceedings, freedom to respect for private and family life[171] if the alternative and reserved channels of communication does not guarantee the privacy of the reporter, and even right to life[172] in more serious cases.

In conclusion it is important to briefly mention for the purpose of the contribution the difficult and debated relationship not only between whistleblowing systems and violation of human rights, but even between the phenomenon of corruption as a whole with the sphere of the protection of human rights. "Human rights and corruption have usually been linked to illustrate the negative effects of corruption on society and individuals" (Bacio Terracino, 2010: 243). As a matter of fact economic, social, cultural, civil, political rights can be limited by corrupted conducts. The kind of right that is violated depends on the singular case and the kind of corrupted behaviour taken into consideration, for example in the sectors of health, education, security. In some cases the connection emerges since the violation of a human right is a direct consequence of the corrupted practise; conversely in other cases the violation occurred when the access to the proceeding and to the remedy for the corrupted acts suffered is at stake. In addition corruption can be indirectly considered a violation of human rights. In conclusion human rights can be considered tools for the fight against corruption, for example the right to assembly, repressing public apathy and crating a culture of anti-corruption and protection of fundamental rights (Bacio Terracino, 2010: 244).

[170] Art. 6 of the European Convention on Human Rights.
[171] Art. 8 of the European Convention on Human Rights.
[172] Art. 2 of the European Convention on Human Rights.

IV. EFFECTIVE ANTI-CORRUPTION BEST PRACTICES FOR ITALIAN STATE-OWNED ENTERPRISES COMBINED WITH THE WHISTLEBLOWING SYSTEM

BUSINESSES SHOULD WORK AGAINST CORRUPTION IN ALL ITS FORMS, INCLUDING EXTORTION AND BRIBERY.[173]

The international legal instruments against corruption require to the States that decide to ratify their provisions the introduction of effective measures in order to maintain the control of corruption through specific policies. However the implementation of those measures it is not provided by the international organizations in fixed methods and forms, then the development of such policies emerges to be very differentiating between signatory States. Although the States' initiative has the common features of "ownership, stakeholder participation, knowledge-based design, a holistic approach, priority setting, sequencing, coordination and monitoring" (Bacio Terracino, 2012:132), every anti-corruption's national legal order is designed on the country's background.

Since its exordium the international anti-corruption legal framework was primarily focused on the fight against corruption through the implementation of anti-corruption measures within domestic legal systems by States; this aspect was deeply analysed in the previous sections. However member States that ratified the international and regional instruments have never been the only actors involved in the prevention and repression process incentivised by international treaties. As a matter of fact the public and private sphere should work together for the adoption and the application of the provided measures. In this respect, mostly of the anti-corruption international measures include specific provisions dedicated to the private sector; even when not addressed at the adoption's stage, integrative measures have been issued in the years later by international organizations with regard to enterprises. Accordingly mostly of the international instruments previously studied (ex. U.N.C.A.C. Convention, O.E.C.D. Convention, C.o.E. Criminal Convention) include in their obligations and in following initiatives the criminalization of liability of legal persons for corrupted acts in the implementation of

[173] The U.N. Global Compact's 10th Principle added in 2004 following the U.N. General Assembly's 2003 adoption of the U.N. Convention against Corruption.

domestic systems and the possibility for companies to adopt compliance programmes and codes of conducts.

From companies' point of view, anti-corruption programmes have recently become part of the mechanisms to implement to protect both the reputation and the interests of internal and external stakeholders, eliminating the distortion of market opportunities, the costs and the risks connected with the violation of the law caused by corruption.

In this respect recent studies have underlined the development in the sphere of business' governance of a double meaning of the term "liability/responsibility" [174] . More traditionally a company is considered liable, especially in legal terms, for the activities connected to its primary mission, for instance the supply of a product or a service, in order to produce a profit. In the same time, the development of a stronger correlation between business and the global community, due to globalization's process, makes emerge the importance of the influence of corporate' activities on the global community from a social perspective[175]. In other words, the entrepreneur pursues its main economic purpose, being influenced by an "invisible hand" that persecutes the achievement of a range of indirect objectives of social interests[176]; for this reason the entrepreneur in the pursue of its profits should act in the respect of the main principles of capitalistic good governance based on fiscal norms and open competitiveness free from fraudulently conducts and corrupted behaviours in general. Consequently, if the company acts in the proper manner has the opportunity to generate specific benefits for the community, for example in terms of employment, environment, health, human rights, etc. Therefore the adoption of specific norms of corporate social responsibility has been encouraged not only by the firms' new systems based on good governance, but also by international and national organizations and institutions, in particular within anti-corruption measures[177]. As a matter of fact this dualistic concept of legal and social responsibility could be an effective double instrument, although with different origins and features, for the prevention and repression of corruption: corporate liability implemented in domestic legislation provide the legal

[174] It is important to differentiate the liability in the legal meaning, which can be persecuted by the law and the social responsibility that has a voluntary connotation and it is usually non-binding, but recommended by the law.

[175] See Carr, I.M. and Outhwaite, O., 2009.

[176] A. Smith, a*n Inquiry into the Nature and Causes of the Wealth of Nations,* London, 1776.

[177] See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions — A renewed EU strategy 2011-14 for corporate social responsibility (COM(2011) 681 final, 25.10.2011) and the previous section on Global Compact's initiatives.

framework in which also corporate social responsibility's measures should be voluntarily established, especially in the context of fight against corruption.
In Italy the concept of corporate social responsibility has been taken into consideration in 2011 with the adoption by the Ministers of labour and economic development of the document *Piano d'azione nazionale sulla responsabilità sociale d'impresa 2012-2014* providing the following objectives: the development of the common awareness of the social responsibility within citizens and companies, the support to companies in the adoption of social responsibility's measures, the support to the development of market incentives, the promotion of specific initiatives within the private sector and the civil society in general, the promotion of accountability and transparency. Actually, this legal and social compliance is perfectly embedded in the anti-corruption legal system: the adoption of the D.Lgs. 231/01 introducing the liability of legal persons, in order to repress, above all, corrupted and other illegal conducts has represented the gradual development of also a social responsibility within private entities. Accordingly, the adoption of the following anti-corruption norms (L.190/12) confirmed this new attitude (Manacorda, 2017: 132).
In this context Italian State owned companies[178], as previously anticipated, are key actors in opening the route of the achievements on the ground of corporate social responsibility, supported by international and national legal obligations on corruption. State Owned Companies are, in fact, for their nature the only actors that at present need to follow both the obligations imposed by the D.Lgs. 231/01, due to their private nature, and the L.190/12, because they are partially or completely controlled by the public administration, in the establishment of their anti-corruption compliance policies and programmes, adopting the internal more complete anti-corruption system provided in Italy. Since anti-corruption measures are gradually involving always a wide spectrum of private entities, these companies could be considered the forerunners for the application

[178] In recent decades in Italy arose a relevant process of privatization of companies to supply the services usually provided by the public administration, in order to simplify the supply's process of specific services to Italian citizens. This political choice emerged to be an instrument with multifaceted consequences giving birth to very virtuous and very failing experiences. For this reason the Italian legislation has focused attentions on these actors, in order to regulate and rationalize their activities and costs. In this respect the more debated and specific source of regulation is the *D.Lgs. 175/2016 Testo unico delle società a participazione pubblica*. Generally speaking, the context of the Italian State Owned Companies is complex, but their ownership is usually partially or completely controlled by one or more public administration (national, regional or local) with an optional private involvement.

of complete anti-corruption policies not only in the Italian context, but even in a global scenario that incentives the participation of always more players in the ground of fight against corruption. For the purpose of the contribution, although the State Owned Enterprises are part of a very complex scenario with an incredible and debated differentiation of entities and of levels of control by public administration (stately, regionally and locally), only enterprises subject to both D.Lgs. 231/01 and L.190/12 are taken into consideration, meaning companies with a private nature that are partially or completely controlled by public administration and partially or completely designated for activities dedicated to public services (infrastructures, health, education, environment, information technology, etc.) fostered by public funds.

Concerning the Italian background, the *Delibera* n.1074 of 21st November 2018 issued by A.N.A.C. delivered the results of an academic monitoring process of 2018, with regard to the P.N.A. 2015-2017 and the P.N.A. 2017-2019, taking into consideration 536 public administration and 340 satellite entities, in order to study the development and the achievements of the implementation of the anti-corruption measures recommended by the legislation and the authority. In the analyses, all the main activities connected with the anti-corruption implementation process were comprehended: the study of the background and environment, the recording of the activities' processes, the detection of the risky activities and events, the identification and assessment of risks, the prevention and repression of the risky conducts. The outcomes underlined a general improvement in the implementation and revision of the P.T.P.C., in particular with regard to the activities considered compulsory for the risk-mapping process. However, in the entities object of the study emerged the necessity to shape better the dispositions issued by A.N.A.C. to the practical activities pursued and the main characteristics of the public administration or satellite entity, rather than a mere formal application of the instructions and obligations given. In this respect, the area of the study of the background with regard to the corrupted risks and the mapping of specific activities, meaning non-compulsory stages of the process, are still lacking in information and implementation. In conclusion, the actors involved in the study denote a great effort and a significant process of improvement with a gradual implementation and a rising awareness on the phenomenon of corruption: it seems to be more successful where the R.P.C.T. has a more independent and autonomous role and when the achievement of the anti-corruption measures do not require relevant changes of the general organization or are more consolidated.

Therefore, the contents of this section arise from the effective necessity of State Owned Companies to adopt anti-corruption measures in the respect of liability of legal persons and anti-corruption obligations balancing legal and social responsibility with regard to corruption. For the purpose of the contribution various sources, mainly soft-law instruments, are taken into consideration from international to national framework: An Anti-Corruption Ethics and Compliance Programme for Business: a practical guide issued by the U.N. (U.N. Practical Guide) in 2013, Good Practise Guidance on Internal Controls, Ethics and Compliance issued by the O.E.C.D. in 2010, Anti-corruption Clause and Rules of Combating Corruption by the I.C.C. revised in 2011, the Good practise guidelines on conducting third-party due diligence adopted in 2013 by P.A.C.I., the following U.N. Global Compact initiatives Compact quarterly: human rights, labour, environment and anti-corruption (2005-2008), A guide for anti-corruption risk assessment (2013), Business against corruption – a framework for action (2011), the P.N.A. 2018 issued by Italian A.N.A.C., the *Linee Guida per la costruzione dei M.O.G.* by Confindustria revised in 2014. In particular the entire section, although considering multiple contributions, is structured on the units of the U.N. Practical Guide that integrates the U.N.C.A.C. Convention, since this convention represents the wider anti-corruption international instruments in terms of purposes and members.

The main source for the entities that should adopt the annual Anti-corruption Plan, the P.T.P.C., as part of a compliance programme, according to the L.190/12, is the national P.N.A. The last revision of the P.N.A. was issued by the A.N.A.C. in 2018[179], offering to public administration and satellite entities, in particular State Owned Companies, the revised main dispositions and instructions for the adoption of the P.T.P.C. Therefore the *Delibera n.1074/2018* summarizes the compulsory activities for State owned enterprises in terms of anti-corruption measures' implementation:

- Implementation of a specific section of the website for the access to the collection of the data connected with activities generating public expenditure[180], called *Amministrazione Trasparente*;
- Adoption of the M.O.G according to D.Lgs. 231/01;
- Nomination of the R.P.C.T. (or R.P.C. and R.T.);

[179] Delibera n.1074 of 21st November 2018 *Approvazione definitiva dell'aggiornamento 2018 al Piano Nazionale Anticorruzione*.

[180] Further remarks on the obligations connected with the principle of transparency will be given in following sections.

- Adoption of anti-corruption measures according to L. 190/12 based on the P.N.A. in a specific document (P.T.P.C.) or in a section of the M.O.G.;
- Risk-assessment and tracing of the risky activities;
- Adoption of a Code of Conduct (*Codice di Comportamento e Codice Etico*);
- Adoption of whistleblowing system;
- Adoption of necessary measures in order to guarantee the access to information according to the revision of L. 241/1990, that provides a kind of generalized access, with some exceptions[181].

All the practical instruments studied provide an "unbroken circle" process of activities and documents through the achievement of a common commitment of no tolerance of corruption, rather than single steps composing a static anti-corruption policy. Therefore, once that a basic anti-corruption policy is established, businesses are stimulated to constantly monitor, revise and implement their plan for action in a continuous process of improvement that takes into consideration internal and external changes as new opportunities and challenges. The following sections analyse this anti-corruption "vital circle" underlying the practical processes and activities to put in action in every stage. A great importance will be dedicated to the phase of risk-assessment that represents the stage that more than others influences the establishment of a robust anti-corruption system.

4.1 Commit: establishing the process

The first key aspect to remember is that enterprises that are interested in effectively facing and eradicating corruption practises should establish first of all a public and explicit commitment to no tolerance of corruption, that needs to arise from top and senior managers as clear messages on the basic anti-corruption policy open to internal revision and update; mixed messages and weak leadership could easily cause a failure. Then, this common commitment has to permeate policies and procedures, controls, training and communication, reporting and monitoring channels. More specifically the standards and policies, that should be accessible, written and documented, need to be shaped on the company itself avoiding merely a formal execution of legal requirements; setting the anti-corruption system means know and live the company (Confindustria, 2014:4).

[181] Further information with regard to the obligations connected with the access to information will be given in the following sections.

Similarly, also in the commercial or any kind of relationship with third parties acting on the company's behalf or as subcontractors in the field of sales, marketing, contract, licenses, permits, authorizations the company has the duty to instruct on the no tolerance anti-corruption's policy: agents, consultants, sales representatives, resellers, subcontractors, franchisees, lawyers, accountants, intermediaries in general[182]. It is fundamental to remember that the Italian legal order considers those kind of whistle-blowers only for the public sphere, instead limits dispositions to employees of private sector. Anyway the State Owned Enterprises, being part of both private and public spheres, should consider between possible whistle-blowers also contractors.

In the same way communication and training need to be adherent to the company's nature and to the specific target to which are dedicated and should be delivered through channels, standardized or personalized, that can reach the highest audiences.

Another aspect that should be taken into consideration at the beginning of the process is to decide who will be involved and with which effective roles and responsibilities, in order to avoid any misunderstanding that can undermine the process itself. The Italian legislation has determined that with regard to anti-corruption measures according to the L. 190/12, the implementation process should not be transferred to external experts, but should be realized "in house"; for the obligations provided by the D.Lgs. 231/01 like the implementation of the M.O.G. external experts are allowed.

On the responsibility of the programme also the Italian legislation is very clear: it should involve the higher level of governance of the enterprise (Board of Directors) that should be conscious about the risks detected thanks to the risk-assessment and the measures planned to prevent and mitigate it through a gap analyses, in terms of obligations of D.Lgs.231/01 and L. 190/12. The operational duty of the programme, instead, and its performing should be attributed to senior management. In addition the company can also appoint a compliance committee (group)/internal audit (individual) that is concretely responsible for the risk-assessment activities, the gap analyses and the construction of the programme and the model[183] together with necessary audits and final tests. In particular, the committee/internal audit needs to be composed by qualified and independent[184]

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[182] Art.2 of the I.C.C. Rules and see also P.A.C.I., 2013:8.

[183] The various elements of the structure of the various activities (compliance programme, compliance model, etc.) will be studied in the following sections.

[184] The concept of "independence" will be studied in the section dedicated to the nomination of the O.d.V. It is one of the characteristics that the members should have and consists of the autonomy with respect to the functions of the company avoiding conflicts of interests.

members and, if necessary, supported by external experts; the inputs of these operational functions that should be in constant contact with senior management are fundamental for the success of the plan. As a matter of fact, the compliance, audit and risk functions organized in a specific committee or attributed to the internal audit function concretely elaborate the risk-assessment and the following practical stages being in continuous link with a specific audience of employees, in order to shape the programme on the more relevant activities on the bases of the nature and organizational map of the company: legal, accounting, sales, marketing, procurement, shipping, human resources, supply and public relations functions. Also functions operating on work safety and environment in Italy are fundamental, due to the involvement of these spheres in the domestic legislation and the criminalization of connected corrupted or illegal conducts[185].

More specifically, the initiatives that the company is recommended to adopt are a compliance programme/plan that is presented from a documental point of view in a compliance model that is permeated by the no tolerance of corruption policy and includes a description of the company's general mission, activity and its organizational map, especially with regard to the implementation and maintenance of the programme and model (usually in a general section) and all the activities that the enterprise decides to plan in terms of anticorruption measures (usually in a special section): identification and assessment of the risks; mitigating initiatives (the establishment of general and specific procedures, the planning of communication and training events, the introduction of a promotional system, the establishment of a whistleblowing scheme, the supervision on the violations, the introduction of a the code of conducts, the integration of a disciplinary system, the monitoring of the activities and their outcomes); moreover are usually part of the model also special and general proxies and other relevant organizational documents. The plan and the model should be frequently monitored and revised, then their formulation should be clear and easy to update; if some documents are characterized by a frequent revision it could be useful to include them in attachment. As said in the case of Italian state owned companies the programme and the model should represent the application of both the D.Lgs 231/01 and the L.190/12 including the contents of anti-corruption measures and measures preventing the liability of the enterprise.

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[185] The legislative acts regulating these issues are: D. Lgs. 81/08 *Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro*; D.Lgs. 152/06 *Norme in materia ambientale.*

4.1.1.Supporting

As previously anticipated, the effectiveness of a compliance programme is primarily related to the commitment that should be strong and explicit, in order to be perceived by employees and partners establishing a culture of accountability and integrity; otherwise even perfect compliance programme can fail. In particular this anti-corruption culture arise from senior management that should be involved in the implementation of the anti-corruption programme and adopt a no tolerance approach for corruption in an on-going demonstration of principles. For this reason senior managements need to ensure a proper awareness about the problem to hierarchical levels, assign responsibilities of a continuous implementation and improving of anti-corruption measures; guarantee sufficient resources, in terms of financial and human resources; behave as a role model.

Concerning responsibilities the L. 190/12 has introduced in Italy the obligation to appoint a specific function that is responsible for the anti-corruption and transparency compliance programme, the R.P.C.T[186].

More precisely, the role of the R.P.C.T. is to implement and propose internal measures in order to prevent and repress illegal corrupted conducts and to guarantee a high degree of transparency. Primarily the R.P.C.T. prepares the P.T.P.C. for the adoption at the governance level (Board of Directors); communicates non-implementations or violations to the governance level; controls the efficiency and the effectiveness of the program and plan and provides the updates in case of normative or organizational changes and violations; verifies the mechanisms of turnover for risky areas; prepares an annual report on the achievements on anti-corruption measures implemented; verifies the implementation in terms of transparency; assures the access to information; spreads the contents and the principles of the codes of conduct verifying the efficiency and effectiveness and detecting violations. In this respect he/she has the specific authorization to conduct specific examination activities. However those activities should be coordinated with other offices in order to avoid non-useful double-checks; for instance the R.P.C.T. should not be involved in the routine checks of administrative and countable processes. In case of reporting of illicit conducts (whistle-blowing) the R.P.C.T. can examine specific documents and organize audits with employees, in order to collect the elements and data to select the initiatives to adopt.

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[186] The A.N.A.C. clarified the role of the R.P.C.T. in a specific section attached to the P.N.A. 2018 adopted with the *Delibera n.1074/2018.*

In the specific case of companies controlled by public administration, the authority has clarified that, although every R.P.C.T. has his/her own autonomy, a certain degree of coordination is required with the controlling administration and its R.P.C.T.
Concerning the selection of the R.P.C.T., the process should involve an adequate evaluation of the functions of the company within the managements level and their possible connections with the activities that should be controlled with regard to corruption's risks, in order to make the best choice in terms of opportunity and possible conflicts. Moreover the A.N.A.C. suggests considering the managers that in their working experience has demonstrated high integrity and has not been interested by legal or disciplinary dispositions and proceedings[187]. For this reason, even though coordination and collaboration are recommended, it is not possible to nominate the R.P.C.T. within the members of the O.d.V., the Board of Auditors or other controlling organisms. In this respect it could be relevant to clarify the responsibilities of this figure and the relationship with the governance body and other organisms and authorities with control powers within the compliance model (the M.O.G. and/or P.T.P.C. and the code of conducts).
The perpetual coordination and collaboration between the various governance, management and operational functions is considered vital by the authority for the adoption of a shared and adequate compliance programs and models when composed by a single document or more acts (the M.O.G. and/or P.T.P.C. and the code of conducts).
In addition the formal appointment of the R.P.C.T. should be communicated to the controlling public administration and the A.N.A.C., but the satellite company adopts the measures of nomination and removal with internal acts on its responsibility. In this respect the R.P.C.T. represents also the point of contact for the A.N.A.C., for instance with regard to the specific requirements on transparency (D.Lgs. 33/2013) and the communication of potential non-implementations; it is also the figure that the A.N.A.C. can involve in internal investigations in case of detected corruption and transparency's violations.
In conclusion A.N.A.C. provides specific procedures of protection of R.T.P.C. to cases of discrimination and recrimination.
Regarding other anti-corruption supervising functions, the D.Lgs. 231/01 instead recommends to companies the appointment by the board of directors of an organism[188],

[187] In particular A.N.A.C. recommends to take into consideration legal sentences and in particular sentences for crimes perpetrated against the public administration as impedimental (D.Lgs. 235/2012 and D.Lgs. 39/2013).
[188] Artt. 6 and 7 D.Lgs. 231/01.

the OdV that supervises on the effectiveness, suitability, maintenance and revision of the compliance model with regard to liability of legal persons' risks and legal requirements. This organism can be composed by one or more (depending on the size of the company, for small company one member could be enough (Confindustria, 2014:56)) internal or external members, characterized by independence, autonomy, honorability, professionalism in order to assure the general independence of the body. In addition as in the nomination of the R.T.P.C. it should be important to evaluate the integrity of the body, in terms of involvement in legal proceedings for crimes against the public administration (Confindustria, 2014:59). Once that the O.d.V. is selected, the company should inform its staff about the members of the organism, the term, the ways to contact it and the needed coordination and collaboration with it both for preventive and repressive, mandatory and non-mandatory measures. In this respect the O.d.V. elaborates relations about its activity and the outcomes to the Board of Director and Auditors every year or in case of violations or other detected problems.

In conclusion the activities of the body (audits, investigations, analyses on the bases of the flow of information with the main functions) should be properly planned, registered and documented and the organism should fix its own code.

Accordingly the roles and the functions of the R.P.C.T. and the O.d.V. cannot overlap but should be characterized by a relationship, very debated within the experts, of coordination and collaboration: generally speaking the R.P.C.T. controls the activities planned in order to prevent and repress a wider range of corrupted risks that could be perpetrated with a damage for the company (ex. loss of funds) and an advantage of the perpetrator; the O.d.V. controls the activities planned in order to prevent and repress risks, not only risks connected with corruption, that could be perpetrated with an advantage for the company (ex. reduction of costs) and maybe an advantage for the perpetrator.

4.2 Assess and define: elaborating the risk-assessment

DO OUR POLICIES ACCURATELY REFLECT OUR RISKS AND PROVIDE THE NECESSARY GUIDANCE FOR OUR EMPLOYEES? DO WE HAVE THE RIGHT POLICES IN PLACE? (U.N. GLOBAL COMPACT, 2011: 13).

HAS OUR ASSESSMENT IDENTIFIED KEY THIRD PARTY RISKS THAT ARE NOT ADDRESSED BY OUR CURRENT DUE DILIGENCE PROCESS? IS OUR CONTRACT LANGUAGE ADEQUATE TO

PROTECT OUT ENTERPRISE? HOW ARE WE CURRENTLY COMMUNICATING WITH OUR THIRD PARTIES?

(U.N. GLOBAL COMPACT, 2011: 14).

4.2.1. Identifying

First of all, the primary activity for the implementation of an anti-corruption compliance programme for a company is to understand the corruption's risks[189] faced throughout the pursue of the main purpose and to attribute them a priority in an industry neutral risk-based approach: a good compliance programme starts with a complete understanding of corruption risks. For this reason the company should contemplate the opportunity to anticipate the stage of risk-assessment with a workshop dedicated to employees and other stakeholders, in order to give a clear message on the activity that is to begin and to arise the needed awareness not only within the employees that would be directly involved, but also a wider audience (U.N., 2013:11). Actually this stage can help the management to fix reliable future anti-corruption goals based on a clear context emerged from the identification of risks; the stage of identifying "corruption dangers" should be continuous, meaningful and activated especially in case of internal or external, legal or organizational changes. Such detected risks depend from many features: the mission of the company, the size (decentralized structures should be specifically monitored), the geographical and historical background (some areas could be more exposed to risks), the internal structure (informal social norms could influence risks), the internal business organization (intermediaries or subcontractors should be specifically monitored) and specific procedures (U.N., 2013:8). Thus, the compliance programmes, following the shared standards, should be shaped on the company itself in order to be effective and efficient.
The process of identifying corrupted risks comprehends a reasoning on which conducts should be considered not accepted according to domestic legal system and international standards; the I.C.C. at the article Prohibited Practises of the Anti-corruption rules mentions specific kind of corruption behaviours that should be always prohibited in relation with "a public official at international, national or local level, a political party,

[189] For the purpose of the contribution the risk is associated to all the areas or activities that can determinate prejudicial events to the achievement of the anti-corruption objectives mainly based on legal obligations (Confindustria, 2014:28).

party official or candidate to political office, and a director, officer or employee of an enterprise"[190]. Generally speaking those practises, mainly criminalized by the international organizations and national institutions, are bribery, extortion or solicitation, trading in influence, laundering the proceeds of the corrupt practises mentioned above[191]. At this point it is important to emphasise that this first phase of implementation of a functional compliance programme involves a first real challenge for the company: the initial and widespread attitude to avoid a detailed detection of risks, in order to eliminate the possible negative perception between the internal and external stakeholders. Conversely this idea should be gradually eradicated in a company that has the objective to create a common commitment on no tolerance of corruption: every company necessarily faces risks and it is much better to define and monitor them through specific procedures rather then leave them out of control limiting anti-corruption efforts.

In practise the phase of risk-assessment requires, above all, internal definition of roles and responsibilities of the personnel responsible to follow this activity with a formal nomination and empowerment; in this sense employees of the areas more exposed to risks should be involved in the process, in order to make the study detailed and centred on the more risky processes and to take advantage of the opportunity to raise the common awareness on the issue. Furthermore it is important to define some operational stages of the assessing process that should be as much clear as possible: timing, frequency and sources; collection of data; procedures; persons included within employees and stakeholders; identification, compilation and aggregation of information; internal and external reporting of outcomes. The more specific and detailed the assessment is, even in its different stages, the more effective would be the programme and the more clear will be the link with the concrete activities. With regard to risks related to corruption, companies face a wide range of "dangers" and connected costs: legal risks, in terms of sanctions in case of perpetration of corruption's crimes; commercial risks, for instance unfavourable conditions due to corrupted practises; reputational risks, for example connected with corruption's scandals, with consecutive economic consequences (both nationally and internationally) (U.N., 2013:9). Concerning risks connected to corruption attitude it should be consider also the erosion of trust and confidence of internal and

[190] Art. 1 of the I.C.C. Rules.
[191] These conducts are deeply studied in the first chapter of the contribution.

external stakeholders. It is important to accept that every company, whatever anti-corruption system has, is exposed to unavoidable risks.

Actually the choice of the sources is fundamental: firstly it is important to take into consideration all the reliable sources at disposal, above all, the legal instruments and obligations; secondly also internal and external stakeholders should be taken into account, even trade unions and business partners, in order to create a complete assessment, in terms of circumstances and opportunities for corruption's prevention. In this respect it is important to remember that the Italian legislation do not recommend explicitly the involvement of external stakeholders in this stage; however, as previously said, the A.N.A.C. underlined in the P.N.A. 2018 the difficulty of Italian organizations in implementing the risk-assessment with the risks emerging from the background and context. For this purpose it could be positive to begin inviting these subjects to take part at this compliance phase. Indeed, external consultants could be employed in this phase.

With regard to the identification of risks it is relevant to consider which ways to collect the data and information fit for this purpose; U.N. Global Compact suggested some practical instrument. Firstly, the collection of data can be based on a "desktop research", in order to analyse considerable documents and reports provided by different functions, such as periodical reports on the main activities, documentation on the past corruption incidents and the reports of the whistleblowing system, checks on third parties, reports on spending on gifts. During the desktop research it could be useful to consider the mapping of main processes, maybe already mapped for other purposes. Secondly, the method of interviews of key stakeholders can assure a complete view of the company; internal stakeholders may offer relevant insights on process specific issues. Interviews can be conducted one-on-one or in small groups. Another valid method of data collection is the self-assessment that can be standardized or specialized and is elaborated on the basis of a model by relevant functions of the company; the main advantages of this method are the knowledge and the attitude to potential risks of functions involved in the process chosen for the assessment. Workshops, brainstorm sessions and focus groups are another useful method suggested by the U.N. Global Compact to explore risk's exposure through very simple questions like "if you would try to be corrupt, which method would you use and how would you do so?" (U.N. Global Compact, 2011:23). First workshops and seminars could be also a good occasion to introduce some basic principles on the whistleblowing system that should be then part of a specific training programme, in order to begin a step-by-step process of cultural acceptance of the method.

In addition the concrete identification of risks factors consists on the study of the reasons why the company could be interested by corruption attempts. The U.N. Global Compact suggests the three elements and conditions of the fraud occurrence fixed by the Donald Cressey's Fraud Triangle composed by pressure (ex. financial pressure), rationalization or attitude (ex. history of illegal conducts) and opportunity (ex. ineffective controls) A practical application of the three variables of the Triangle may help to identify and map the related risks.

In this stage some specific processes are considered more vulnerable to corruption risk and require an extra effort of anti-corruption activities: procurement, sales, gifts and entertainment, import and export of goods, government interactions, political support, security protocols, social programs, charitable contributions and sponsorships. In the Italian context environment and safety should be added, since the criminalization of crimes connected to these topics and the consecutive responsibilities of perpetrators and companies are serious.

The results emerging from the risks identification stage should be registered in a risk register and constitute the basis for the following stages of gap analysis and of the construction of the compliance model. In particular it is important to list the corruption risk's factors and the related risks that for instance could be shaped on the basis of corruption crimes contemplated by domestic legal system.

A parallel stage within the risk-assessment phase regards the third-party risk-assessment, meaning the identification of the risks connected with, for instance, business relationships that could involve the company in possible risks and consecutive violations. For those partners the company should activate a process of due diligence. In this stage there is fundamental to analyse key risk indicators as geographical location, industry background and identity of the third party, connection with government officials or entities, compensation structure of the proposed arrangements, additional factors related to the scope of the services to be rendered, selection of the third party (P.A.C.I., 2013:9).

4.2.2.Assessing and rating

Once that the risks' identification is completed, the following step is to create a prioritization of risks establishing achieving objectives, in order to allocate resources for the anti-corruption activities.

In practise the exposures to the various risks detected is often defined through a combination of the impact and the probability of occurrence: the impact of occurrence

emerges from the estimation of all negative legal, commercial, operational and reputational consequences for the company, in terms of monetary and non-monetary, direct and indirect costs; the probability of occurrence is connected to the possibility that a corruption-related risk can occur in a specific timeline, where high levels of probability mean possible effective consequences. Therefore the determination of impact and exposure implies subjectivity of the assessment team based on the background in which the company operates.

In addition the probability of occurrence connected to corruption's risks identified should be designated for the following 12 months with regard to possible attempts to perpetrate acts by individuals or groups on the bases on the following suggested topics: "the nature of the transactional process to which the scheme[192] relates; incidents of the corruption scheme occurring in the past at the enterprise; incidents of the corruption scheme in the enterprise's industry; the local corruption culture and environment in the region where the scheme would be perpetrated; the number of individual transactions related to the scheme; the complexity of the scheme and the level of knowledge and skill required for execution; the number of individuals needed to perpetrate the scheme; the number of individuals involved in approving or reviewing the process or transactions related to scheme" (U.N. Global Compact, 2011:30).

In the same way the potential impact of occurrence should be defined, as for the probability of occurrence, for every risk assessed taking into consideration following factors: "impact of past incidents of the corruption scheme at the enterprise; impact of incidents of the corruption scheme at other enterprises; potential amounts of fines or penalties; the opportunity cost arising from regulatory restrictions on the enterprise's ability to operate and expand; impact on operations such as interruption in the enterprise's ability to transport goods or obtain permits or other required approvals; potential impact on financial statements; impact on recruitment and retention of employees; impact on retention of customers and future revenues" (U.N. Global Compact, 2011:31).

Furthermore the rating of the inherent risk resulting from the relationship between impact and probability could be fixed in a qualitative way in high, medium or low level (preferable) or in a quantitative way on a number scale. The quantitative determination of the risk exposure is calculated by linking both values for the impact of occurrence and

[192] The word "scheme" is related in the U.N. Global Compact risk-assessment guide to the potential practise corrupted behaviours identified for every risk factor. For the purpose of the contribution the word scheme is shaped on the word "risk/crime".

the probability of occurrence and it is fundamental to fix a scale of prioritised risks completing the a risk heat map. The calculation has to be done for the risks/crimes identified for every risk factor, excluding from the evaluation the existing controls. The calculation can be elaborated with different methods, for instance during specific workshops where participants are openly or anonymously asked to rate the risks, through online surveys, through an initial rating by the team and the following participation of the involved figures in the rating process.
The prioritization of risks is fundamental also with regard to the third parties identified as partners requiring due diligence and for which exists a specific identification of risks. The due diligence process for third parties within the risk-assessment phase include the data collection (through desktop research and questionnaires), the verification and validation of data, the evaluation of results, including identification of red flags (P.A.C.I., 2013: 11).

4.2.3.Mitigating

At this point the company should decide the best process to manage and hopefully minimize the risks detected. In this respect, a mitigation approach based on multiple preventive activities is suggested, in order to reduce the relationship between probability of occurrence and impact of corruption risks, which is the main purpose of the mitigating process. Actually all risk mitigating efforts, activities, controls and processes are part of the anti-corruption risk mitigating controls. Those activities should be adherent to every risky activity and registered risk and based on its inherent risk. Some processes are already present in other control processes, for example within financial mechanisms and further processes are independent from the routinely activity of the company. In this respect the establishment of mitigating activities is even a good occasion to evaluate the existing procedures and the level of appliance, rethinking some processes if needed. In this respect at the end of the stages of assessment and rating the risks, it is recommended to apply a gap analysis, meaning the assessment of the procedures and activities, if present, evaluating the specific implementation and improvement's needs.
The level of involvement of the different functions in this stage depends mainly from the organizational asset of the company, but it is usually cross-functional. Usually the functions that are involved in mitigating process are environment, safety, sales, procurement, legal, logistics, and human resources. Therefore the mitigating process as the risk-assessment should involve a wide range of internal and external stakeholders.

Accordingly establishing mitigating process it is important to take into consideration every risk and than evaluating the opportunity for a single process or activity to be adapted to more than one risk, rather than create a generalized system of control: a system of processes designed in this way has many advantages, above all it guarantees a more capillary and detailed system of controls and is more easy to update.
The U.N. Global Compact suggests in this stage to keep in mind that "while cataloguing the risk mitigating controls, it may be helpful to keep in mind the purpose of such controls. Not all misconduct is intentional. Some can be the result of negligence or the lack of awareness" (U.N. Global Compact, 2011:35). Actually preventive standardized mitigating measures are useful to reduce unconscious misconducts, but cannot be enough to repress corrupted perpetrators that require specific detective controls. "To have a good corruption detection system, identification of such controls requires a degree of strategic reasoning to anticipate the behaviour of a potential perpetrator" (U.N. Global Compact, 2011: 35). Those detective controls should not be accessible to all the functions, in order to leave the possible perpetrator unaware of them and assure their effectiveness.
Once that the mitigating activities are fixed becomes important to rating the effectiveness of the process to determine the residual risks. As in the rating of risks, both quantitative or qualitative scales can be functional, but objectivity and a fact-based approach is fundamental. Rating methods can be various, U.N. Global Compact suggests: internal document review and evaluation (of business process documentation, written standards, organizational charts, contracts, gift registration, whistleblowing reports, misconduct cases, interview notes, internal and external audit reports), live interviews (to integrate and confirm documental stage), compliance and control environment surveys (as an alternative to interviews), focus groups and workshops (on particular topics for a small audience). More specifically, the residual risk, that should be registered with regard to every risk, consists of the "less-expensive" risk that needs to be accepted, although a fully appliance of mitigation activities planned; it depends from the level of risk tolerance. When a residual risk is detected, it can be also considered worth to be mitigated with further initiatives: introducing changes in the business plan and in the business methods, transferring risks to a third party, integrating anti-corruption controls. Residual risks can be high when they exceed the tolerance of the company, medium when they are considered "observed risks", low when they are acceptable. Therefore the attitudes of the company towards residual risks can be various and depend also from the resources of the enterprise with a specific prioritizing. In this respect a complete reasoning at the

governance level is required, in order to decide which risks process to implement and which method to adopt. In conclusion the response plan to residual risks should be detailed, effective and efficient including: action items, responsibilities, timetable, resources.

4.2.4.Reporting

The results of the risk-assessment, the gap analysis and the mitigation measures should be included in a model providing the basis for the future assessment and the monitoring phase. In this sense it is important also to report residual risks accepted due to the lack of implementation and the current circumstances that have determined specific decisions. More specifically anti-corruption risk assessment needs to be registered in the model in a clear summarized way like a heat map: it includes al risks showing its probability and impact of occurrence in colourful blocks.

In conclusion the company should publicly its risk-assessment process (not necessary results) describing procedures, timelines, responsibilities and units involved, together with practical actions programmed.

Concerning the phase of reporting it is important to deepen the obligations introduced in the Italian legislation in terms of transparency (D.Lgs. 33/2013 and D.Lgs. 97/2016) and access to information (L.241/1990 and D.Lgs. 97/2016)[193].

Within the requirements of international organizations' instruments, as partially seen in the second chapter, emerges the necessity to "enhance transparency in their public administrations, including with regard to their organization, functioning and decision-making processes […] (through) the adoption of procedure or regulations allowing members of the general public to obtain information on the organization, functioning and decision-making processes of the public administration and on decisions and legal acts that concern members of the public; the simplification of administrative procedures to facilitate public access to the competent decision-making authorities; and the publication of information on the risks of corruption in the public administration " (Bacio Terracino, 2012:133). Such implementation aim to develop the social awareness on the phenomenon through active partecipation discussed in previous chapters.

Accordingly, the acts adopted by the Italian legislator have intensified the activities required to public administration in order to assure the commitment to the principles of

[193] A.N.A.C. adopted dispositions and instructions with the *Delibera 1310/2016.*

transparency and accountability making stronger, at the same time, the relationship with citizens. More precisely, these obligation are applicable not only to the public administration in general (D.Lgs. 165/2000) but also all the entities, in some way connected to the public administration due to a partial or complete control, that have between their purposes public service's activities that are the actors on which is focused this contribution.

The first obligation provided by the legal framework on transparency and access to information concerns the internal anti-corruption plan that has to comprehend a specific section on the procedures of assure access to the information required; the anti-corruption plan P.T.P.C. becomes P.T.P.C.T. It has to be adopted within the end of every year on the company's website. In the same way the R.P.C.T. is responsible also for the publication of the required information. Accordingly the contents and the values express by the transparency's policy should be coordinated with the anti-corruption policy previously adopted. In addition A.N.A.C. recommends that the specific section of the model dedicated to transparency should provide the adequate procedures, in order to assure the identification, elaboration, delivery, monitoring of the data on a specific section of the website called *Amministrazione Trasparente*. Similarly it appears fundamental according to A.N.A.C.'s dispositions the appointment of the functions responsible for the various stages connected to the publication of the provided information.

With regard to the structure of data, A.N.A.C. suggests taking into consideration the publication of tables containing the necessary data in order to permit a clear and easy access to information; moreover it recommends adding the date of the information and the following updates. The publication of the information has to be assured for five years[194] and then filed into a different section; from that moment onwards the access to information is assured via different methods.

Concerning the publication, the company should select every act adopted on the organization, functions, objectives, procedures, interpretation of legislation that are focused on the main activities and conducts, in particular the P.T.P.C. and the M.O.G. if integrated in a single document or if structure in different sections. In addition should be considered the publication of procurements and contracts for services, supply, public

[194] Further instructions on the exceptions and deadlines are provided by A.N.A.C.

works[195]; human resources; contracts stipulated with external experts[196]; the recruitment of human resources [197]; administrative acts [198]; budget and annual accounts [199]; properties[200]; payments[201]; public works[202]; relations of controlling organisms; acts concerning the territory and environment. In addition public administration are supposed to guarantee the access to all the information connected with its controlled companies[203]. Furthermore the company or public administration can decide for the publication of further data if provided in its internal procedures, if it guarantees the respect of the general legislation for example in terms of confidentiality and privacy.

In conclusion the A.N.A.C. explicates the cases in which it has to be assured the access to information: every citizen can ask to public administration documents, information or data for which it is required the publication on the website when they are not present in the website section; every citizen has the access to the information and documents for which the publication is not required with the exception of the protection of judicial interests of the company[204]. The petition of access to information has to be delivered to the R.P.C.T.

4.3 Implement: developing self-regulation compliance programme

EACH ENTERPRISE SHOULD IMPLEMENT AN EFFICIENT CORPORATE COMPLIANCE PROGRAMME REFLECTING THESE RULES, BASED ON THE RESULTS OF A PERIODICALLY CONDUCTED RISK-ASSESSMENT OF THE RISKS FACED IN THE ENTERPRISE'S BUSINESS ENVIRONMENT, ADAPTED TO THE ENTERPRISE'S PARTICULAR CIRCUMSTANCES AND WITH THE AIM OF PREVENTING AND DETECTING CORRUPTION AND OF PROMOTING A CULTURE OF INTEGRITY IN THE ENTERPRISE.[205]

[195] For more details see A.N.A.C., 2016:23.
[196] For more details see A.N.A.C., 2016:12.
[197] For more details see A.N.A.C., 2016:13.
[198] For more details see A.N.A.C., 2016:16.
[199] For more details see A.N.A.C., 2016:19.
[200] For more details see A.N.A.C., 2016:20.
[201] For more details see A.N.A.C., 2016:22.
[202] For more details see A.N.A.C., 2016:23.
[203] For more details see A.N.A.C., 2016:14.
[204] For more details see A.N.A.C., 2016:26 and *Delibera n.1309/2016.*
[205] Art.10 of the I.C.C. Rules.

The compliance programme is the core of the anti-corruption measures that a company activates and, as previously anticipated, it should be recorded in a compliance model. For this reason it should be tailored on the company's characteristics, ethics and main purposes. Companies should be first of all aware about the importance to publicly report to internal and external stakeholders their efforts in order to demonstrate the dedication and commitment to anti-corruption values, in particular integrity, accountability, transparency, enhancing credibility and reputation.

Moreover according to the U.N. Global Compact an internal programme should provide reporting activities like: communication, accessibility, cultural appropriateness, openness, screening, collect data, remedial action & feedback, management visibility, employee protection, external communications.

T.I., instead, provided a six-step implementation process that can be revised to shape the process to the characteristics of the company.

1. The first step takes one month; it consists of the decision to adopt an anti-corruption policy by the owner of the company or the board of directors and includes the activities connected with the decision of obtaining and creating commitment through the implementation of an anti-corruption programme.
2. The second step takes from three to six months, it consists of the planning of the implementation process by the senior management and the appointed team and includes the activities to define risks, review legal obligations, prepare anti-corruption policy and programme and register in the model.
3. The third step takes from three to six months, it consists of the development of the programme by senior Management and directors; it includes activities of integration of anti-corruption policy and review ability to support it of the different functions and the development of communication and training plan.
4. The forth step takes one year; it consists of the implementation of the programme by senior management and other functions responsible for support; it includes the activities to communicate internally and externally anti-corruption goals, proceed with communication and training.
5. The fifth step is a continuous process that involves ethics and compliance offices and auditors in order to review the anti-corruption system and communication channels, gain knowledge from violations.

6. The last step takes place annually and involves the owner or the board of directors in order to receive results of monitoring, evaluate effectiveness, develop implementation, and publish process and results.

4.3.1. Developing

The compliance model represents the main document that the company establishes in order to record al the anti-corruption measures implemented due to its commitment to no tolerance to corruption; it embraced the explication of the roles of the functions involved in every stage at any level, the risk-assessment, the mitigation's initiatives (ex. procedures and protocols), instructions for internal and external reporting of results and violations; the control and review mechanisms; the prohibiting mechanism, the whistle-blowing scheme, the training and information plan, the promoting system and all the necessary documents attached.

In particular, the anti-corruption compliance programme is basically composed by specific policies and procedures that translate commitment into action being continuously updated, in order to be effective, efficient and sustainable. More specifically it has various characteristics: consistency with all applicable international and national laws, adoption to specific requirements of the nature's company, participation of stakeholders in the implementation and improvement process, shared responsibility to all levels, accessibility of information, readability, promoting a trust-based internal culture, applicability to all stakeholders, continuity of the revision's process, efficiency of the resources.

According to I.C.C. it is important to consider the integration of the following good practises:

- "expressing a strong, explicit and visible support and commitment … by the board of directors … and … senior management ("tone at the top");
- establishing a clearly articulated and visible policy … binding for all directors, officers, employees and third parties and applying to all controlled subsidiaries, foreign and domestic;
- mandating … to conduct periodical risk assessments and independent reviews of compliance … and recommending corrective measures or policies, as necessary…;
- making it the responsibility if individuals at all levels…;

- appointing one or more senior officers … to oversee and coordinate… with and adequate level of resources, authority and independence, reporting periodically…;
- issuing guidelines, as appropriate, to further elicit the behaviour required and to deter the behaviour prohibited…;
- exercising appropriate due diligence, based on a structural risk management approach, in the selection of its directors, officers and employees, as well as of its business partners who present a risk of corruption…;
- designing financial and accounting procedures for the maintenance of fair and accurate books and accounting records…;
- establishing and maintaining proper systems of control and reporting procedures, including independent auditing;
- ensuring periodical internal and external communication…;
- providing… guidance and documented training in identifying corruption risks in the daily business dealings of the Enterprise as well as leadership training;
- including the review of business ethics competencies in the appraisal and promotion management and measuring the achievement of targets;
- offering channels to raise, in full confidentiality, concerns, seek advice or report in good faith established or soundly suspected violations without fear or retaliation or of discriminatory or disciplinary action. Reporting may either be compulsory or voluntary; it can be done on an anonymous or on a disclosed basis. All bona fide reports should be investigated;
- acting on reported or detected violations by taking appropriate corrective action and disciplinary measures and considering making appropriate public disclosure…;
- considering the improvement…by seeking external certification, verification or assurance;
- supporting collective action… ".[206]

With regard to Italian context, the adoption of the M.O.G according to D.Lgs. 231/01 and the adoption of Anti-Corruption Plan (P.T.P.C.) providing measures according to L. 190/12 based on the P.N.A. should be considered as a single compliance model that should include also specific provisions on transparency and access to information

[206] Art. 10 of the I.C.C. Rules; see also O.E.C.D., 2010.

according to D.Lgs. 33/2013. The special section concerning the anti-corruption measures (L. 190/12) should be adopted every year within the 31st December[207], although it has three-years validity. The P.T.P.C. is the main document providing the anti-corruption measures recommended by the A.N.A.C. and its adoption should be proposed to the governance body by the R.P.C.T, as the M.O.G. that similarly requires Board of Directors' approval. In this respect the Italian state owned enterprises adopt a compliance model that embraced the implementation of compliance measures in terms of anti-corruption and liability of legal persons provisions. As a matter of fact this means that from the legal obligations emerge a practical situation characterized by intersections and integrations with the risk of overlapping of the issues an the activities (Ippolito, 2014:55). For the purpose of the contribution it is relevant to underline some differences of the topics. The main difference between the two instruments is that the adoption of the M.O.G. is not mandatory, but avoids to the company the responsibility of legal person in case of illicit conducts perpetrated by managers and employees, so it is strongly recommended and generally adopted; on the contrary the P.T.P.C. is mandatory. In addition with regard to the perpetration of crimes embraced by the L.190/12 and the P.T.P.C., the judgment is assigned to the Court of Auditors, since the illegal conducts contemplated have disciplinary nature and are part of a more wider scenario of corrupted conducts. With regard to the D.Lgs. 231/01 and the crimes that it embraces the judgement in case of perpetration is assigned to the Criminal Court. Furthermore it is important to remember that the judgement for corrupted behaviours is focused on the fault of the perpetrator, instead the judgement for behaviours that activate the responsibility of legal persons are based on the intent of the perpetrator.
Actually the adoption of a single compliance model is for the Italian state owned companies the more easy and protective solution for both the stakeholders and the enterprise itself.
Concerning the P.T.P.C. the objectives are: identifying areas with a risk of corruption; provide for these areas training and proper decision processes; provide a flow of information from these areas to the R.T.P.C.; monitoring the respect of the procedures adopted; monitoring the connections of the risky areas with stakeholders requiring acts of authorizations when they can be connected to undue advantages; guarantee access to information. The main purposes of the M.O.G. are instead: identifying risky activities;

[207] This obligation was clarified by the President of the A.N.A.C. on 16th March 2018.

implement specific protocols in order to regulate those activities programming training and decision-processes; planning the use of resources for the purposes of the model; provide a flow of information from the main functions of the company to the O.d.V.; provide a disciplinary system (Ippolito, 2014:57).

At this point it is clear that there are many common activities in both processes and documents, above all the identification and risk-assessment that should include the risks connected with the wider spectrum of corruption and the crimes that can activate the liability of legal persons; the program of training and information; the establishment of a obligatory and continuous flow of information of the main functions of the company, in particular those connected with risky activities, to the O.d.V. and the R.T.P.C and the establishment of specific protocols and procedures. As it is emerging the M.O.G., even though non-mandatory, represents a preventive measure to a wider range of conducts and crimes; for this reason it could be an operational solution to include the P.T.P.C. as a special section of it, in order to avoid a proliferation of documents that can create an uncertain and opaque system of compliance generating confusion to stakeholders.

In this respect, in order to promote a unique compliance model it is fundamental to take into consideration the objectives that emerge to be similar in the two documents: identification of risks and risk-assessment; planning of information and training; providing specific protocols and procedures regulating the activities of the company, mainly the risky ones; planning of the organization of human and economical resources; providing the code of conducts for managers and employees; identification of updating processes; establishment of obligatory flow of information from the main functions; implementation of a disciplinary system (Ippolito, 2014:59).

Summarizing, especially in companies that have already adopted the M.O.G. it is possible to consider a revision with the integration of the following initiatives deriving from anti-corruption obligations introduces more recently: a specific section dedicated to anti-corruption as regulated by the L. 190/12; information and training also on the prevention and repression of corrupted behaviours in a more general connotation; periodical updates of the section dedicated to anti-corruption according to the obligations of the L.190/12; the nomination and attribution of functions to the R.T.P.C. with planned audits with the O.d.V.; flow of information and whistle-blowing system directed to O.d.V. and R.T.P.C.; disciplinary measures in case of violations of anti-corruption measures. (Ippolito, 2014:60). In conclusion the result will be an integrated and unique compliance model responding also to the need of smartness introduced by present good governance policies.

At this point it is important to highlight the general characteristics of the main mitigating measures that should be documented in the compliance model on the basis of the compliance programme.
“States are also required to endeavour to apply within their own institutional and legal system codes or standards of conduct for the correct, honourable and proper performance of public functions (Bacio Terracino, 2012:140)[208].
Above all, the codes of conducts are one of the mitigating measures that the A.N.A.C. recommended, in order to regulate rights and duties of stakeholders. In the specific case of state owned companies the stakeholders are mainly internal, meaning employees and managers and their conducts need to be adherent to the behaviours suggested for the human resources of the public administration, since they all pursue public service’s objectives. For this reason the general code of conduct for public workers has been adopted by the Government[209]. In addition every public administration or controlled company should adopt a specific code: the implementation of an internal code of conduct as a mere application of the general code is equivalent to a non-implementation and consist of a violation of the anti-corruption legal obligations (A.N.A.C., 2018: 26).
In particular, the codes of conducts recommend and prohibits specific conducts that are considered not tolerated not only by the legislation, but also by every company’s ethic principles; the violations of the principles permeating the code can be address with disciplinary proceedings. More specifically the codes should identifying the situations of conflict of interests; regulate gifts and similar initiatives with a specific allowed value; conducts of the employees on the bases of specific principles of integrity and accountability (Ippolito, 2014:69).
In addition the main mitigation acts suggested by the most of the organizations, above all Confindustria, are specific protocols or procedures embraced in a control system that fix the guidelines not only on the main activities pursue by the different functions and offices, but also on the proper conducts to behaviour in the exercise of the different roles, in order to prevent or reduce associated risks. Actually the protocols need to be shaped on the company’s activities and the risks previously identified for every of them (Confindustria, 2014:28).

[208] See also international guidelines adopted by the United Nations, the Council of Europe and the O.E.C.D.
[209] D.P.R. 62/2013 *Regolamento recante codice di comportamento dei dipendenti pubblici*.

Some further activities suggested by the U.N. are: “four-eyes principle for approvals”[210] for hiring of external agents increasing managerial control; specific training for managers exposed to extortion risks; intensification engagement of middle managements in public occasions; automated internal controls to analyse payments’ procedure; increase due diligence on key suppliers or major investments and engagement in collective action initiatives.

Another initiative suggested by the A.N.A.C.[211] is the choice of organizational maps and dispositions that assured a periodical turnover of the functions interested by the more risky activities (ex. sales, procurements). Although this method could have many advantages in terms of corruption’s risks, companies face difficulties to achieve this requirement, due to the lack of resources, human and economical. The mechanism of turnover is powerfully recommended in case of corrupted events and violations.

Furthermore the Corporate Responsibility and Anti-corruption of the I.C.C. adopted since 1977 non-mandatory but supporting rules on combating corruption, in order to permit companies to achieve national, regional and international standards on the implementation of anti-corruption measures. Concerning mitigating actions in the relationship with third parties, the I.C.C. rules recommend policies to support compliance within the relationship with business partners for instance through written agreements informing about the no tolerance anti-corruption policy adopted, the possibility to require accounting records to verify compliance, the necessity to record information on the contract, terms and payments, the necessity to accept the company’s policy and to adopt adherent conducts and initiatives, the possibility to suspend contracts in case of detected corruption’s violations, the necessity to assure general transparency and accountability[212].

The I.C.C. provides also to companies specific solutions for the integration of anti-corruption clauses in their contracts with third parties as mitigating initiatives underlying the commitment of the enterprise, explaining the correct conducts, but also to make accept to business partners company’s policy and the legal consequences and sanctions that may follow the occurrence of violations. In addition I.C.C. suggests the establishment of

[210] According to U.N. Practical Guide to the Convention, this approach is suggested in order to guarantee a managerial double check in the decision-making process that involves the choice of external stakeholders for internal activities.

[211] P.N.A. 2016, 2017, 2018.

[212] Art.3 of I.C.C. Rules.

specific procedures on the non-tolerated offers or receipts of gifts and accommodation[213]; facilitation payments[214]; conflict of interests[215]; human resources[216]; financial and accounting[217]; in accordance with national and international law and standards.

Concerning mitigation's actions with regard to third-parties due diligence P.A.C.I. suggests the introduction of an approval process set on consultations on the possibility to enter in a third-party-relationship with a business partner: the higher the risks, the higher the level of governance involved. In addition it is important to verify the proof of services requirements through monitoring measures and formal contracts protections (P.A.C.I., 2013:14).

The Italian legislation, through the art.6 D.Lgs. 231/01, offers a fundamental additional mitigation initiative, previously listed between the contents of the model: the flow of information from functions to the OdV. More specifically this compulsory activity to inform the O.d.V. concerns the main functions, in particular the functions of risky areas previously highlighted and the information regard periodical relations on the main activities of the area/office and detected irregularities, for instance the flow of public funds, the legal proceedings and investigations, the detected or supposed violations, the disciplinary proceedings, the procurements (Confindustria, 2014:69). Moreover the organism is addressed by individual notification of contingent violations.

In conclusion it is important to consider the introduction of the whistleblowing system. Since the receptivity of this reporting method of illicit conducts and the sensitivity of possible reporters have reached different degrees in different context, it is important to shape its integration on the basis of background notions. In particular the whistleblowing system should be clearly represented and made accessible to employees and stakeholders via anti-corruption policies and model. In this respect it is important to highlight which are the functions that can receive reporting, which behaviours need to be reported and, above all, which protection is assured to the relator in case of discrimination. In the Italian context it would be fundamental to define clearly the alternative and reserved channels of communication introduced by the L. 176/17.

[213] Art.5 of the I.C.C. Rules.
[214] Art.6 of the I.C.C. Rules.
[215] Art.7 of the I.C.C. Rules.
[216] Art.8 of the I.C.C. Rules.
[217] Art.9 of the I.C.C. Rules.

Moreover where the mitigation activities given are not enough proportionate to the company's risk exposure, the U.N. Practical Guide suggests to re-evaluate the business plan abstaining or changing risky activities and/or shifting the responsibility of managing or executing measures for example to an external party service provider.

4.3.2. Prohibiting

In the more general attempt to formalize the engagement of an enterprise in the corruption's prevention, another fundamental stage of the implementation of an adequate compliance programme is the introduction of a proper policy prohibiting corruption within the companies' activities, which has to be necessarily clear and accessible. Actually this anti-corruption policy provides specific principles and rules for employees and partner, in order to formalize the conducts that should not be tolerated by the company in the achievement of its main objectives. For this reason these procedures should be part of the compliance model.

As a matter of fact this stage is necessarily connected with the definition of corruption and with the determination of corruption's crimes; in this respect every company in the elaboration of a prohibiting policy should take into consideration the more general international standards provided by international hard law and soft law measures and the implementation norms adopted by the State within the domestic legal order determining the criminalization of specific corrupted behaviours and other illegal conducts indirectly involved in the corruption sphere. In the case of the U.N.C.A.C. Convention, as previously studied, those conducts are: bribery of national public officials, bribery of foreign public officials and officials of public international organizations; bribery in the private sector; embezzlement of property in the private sector; trading in influence; abuse of functions; illicit enrichment; laundering of proceeds of crime; concealment of proceeds of crime; obstruction of justice. Furthermore in case of dislocation of the enterprise's activities outside the borders of the State, the company should take into consideration multiple domestic legal orders[218]. However the general standards included in the anti-corruption policy need to be fixed and globally, equally applied, mainly for reputation and commitment reasons.

[218] The Legal Library of United Nations Convention against Corruption provides an overview of anti-corruption legislation on the portal "Tools and Resources for Anti-Corruption Knowledge (see http://www.track.unodc.org/Pages/home.aspx).

Accordingly, it is fundamental that the prohibiting policy entered formally the companies' procedures, for instance the code of conducts/ethics, in a comprehensive, clear and easy language supported by concrete examples and translated in the case of headquarters located in different countries. In addition the main contents of the policy need to be accessible and known by the major internal (employees, directors, managers) and external stakeholders (business partners, consultants, suppliers), in order to arise a common consciousness on the problem and the company's reputation.
In establishing the corrupted behaviours that must me persecuted by an internal policy the company may face some important challenges, as for instance the business practises that are illicit but perceived as normal (ex. facilitation payments); the business practises that are legal but include a risk to be abused (ex. misuse of political contributions); business practises based on conflicts of interests. As mentioned in previous sections, facilitation payments are small payments made to low level officials to secure or expedite the necessary action to which the payer is interested and has legally requested, for example in the case of certificates, licences. Although some legislation tolerates facilitation payments, they are assimilated to bribes and for this reason generally considered illegal. However, the choice of a company to avoid facilitation payments in a legal system where they are tolerated can produce competitive disadvantage, even though this may generate a rise in reputation in terms of integrity. The need to exclude facilitation payments from the allowed conducts implies more strong and extra specific internal procedures and training, because of the nature of the issue that is different and more risky. Furthermore it is important to consider the business activities that are perfectly legal, but can be involved in a kind of abuse that generates a corrupted conduct, for instance expenditures related to gifts, hospitality, travel and entertainment; political contributions; charitable contributions and sponsorship. The effort of the company in this case is to make as clear as possible the differentiation between the legal and illegal component with proper procedures divulgated through guidance material and training. Such measures should face some basic issues: "types of gifts, hospitalities, travel modes or entertainment types that are acceptable; limits of monetary value; reimbursement from the counterpart; characteristics of the counterpart; nature of the business relationship and occasion".
Similarly the company may face situations in which a conflict of interest arise, when an individual in a company has professional, personal or private interests that are different from the company's interests. As in the previous case the blurred border of the situation makes this issue relevant for an extra effort in terms of anti-corruption measures.

4.4 "Re-socialization": planning training and communication and promoting

ARE THERE PARTICULAR SUBSECTIONS OF OUR EMPLOYEE BASE THAT NEED ADDITIONAL TRAINING? WHAT ABOUT MID-LEVEL MANAGERS, DO THEY NEED ADDITIONAL TRAINING? HAVE WE MEASURED THE QUALITY AND THOROUGHNESS OF THE TRAINING MATERIALS OR TESTED EMPLOYEE RETENTION OF THE SUBJECT MATTER? WHAT WILL THE FREQUENCY AND TIMING OF THESE TRAINING BE?" (U.N. GLOBAL COMPACT, 2011: 14).

4.4.1.Training

Employees and business partners, generally speaking stakeholders, of a company with an official commitment in the fight against corruption should be, on the one hand, aware of the enterprise's anti-corruption policies made up by the study of the risks and the implementation of specific procedures and, on the other hand, sensitive to identify dangers and challenges that anti-corruption embraces. For this reason communication and training is an important and regular stage of the compliance programme that assures awareness and achievement of anti-corruption measures and should be programmed in a specific section of the compliance model.
First of all communication and training about the commitment of the company for the phenomenon of corruption should be shared during the recruitment process when it is internal and when it is external constituting the first step of a working or business relationship. In addition information activities should be organized regularly on the bases of the risks, in order to decide to which areas of the company the attention needs to be higher.
Concerning the communications activity plan, for instance, the U.N. Practical Guide suggests to organize a specific mandatory training once a year, in order to remember the manifestation of the topic in every day working activity. Once that the initial training has been delivered at the recruitment stage, both for business partners and employees, the annual information should include a general reminding of the basic concepts together with updates in terms of new obligations and new challenges and in terms of objectives and achievements that the company has reached on the issue. Throughout the year becomes important the role of the managers that is fundamental in order to convey the

key messages in every day life. In addition, the areas that are identified as risky need a more capillary, specific and frequent training based on the risk-assessment itself.

Furthermore communication and training should also be extra-organized in case of: organizational changes, updates on internal policies or external legal regulations, new internal guidelines or supporting tools, annual meeting of shareholders, seasonal events, national or international anti-corruption events, joining a voluntary initiative, news about anti-corruption initiatives of civil society organizations and business partners, publication of the company's sustainability or corporate citizenship report.

More precisely, the characteristics of communication and training activities should be effectiveness, efficiency and sustainability and for this reason properly documented, especially with regard to attendance. With regard to the types and formats of coaching the anti-corruption activities can be standardized for more uniform and general formative events or specialized for risky areas on the bases of the risk-assessment. In this respect communication and training should be always organized in a clear and coherent manner. In practise the information to be delivered concern the company's commitment to no tolerance of corruption, policies and procedures sustain with examples, objectives and processes and the reasons why the company has decided to run the anti-corruption path.

Common media channels for self-study[219] as computer-based training courses together with newsletters could be useful to deliver easily and securely the standardized communication. In addition those channels permit a regular update, revision and adjustment of the sources to the objectives and to the audience. Moreover tailored activities should reach risky areas with more specific messages and challenges; in this respect role-play training should be useful. Accordingly cultural element should be taken into consideration.

In particular, discussing situations on individual experiences in classroom teaching, seminars and conferences can increase the understanding and value of the communication stage.

Many options can be taken into consideration in case of resources constraints in developing communication and training activities: participation in supply chain trainings for companies part of a supply chain; use communication and training material freely

[219] See the U.N.C.A.C. and U.N. Global Compact e-learning tools https://www.unglobalcompact.org/library/152 (Visited on April 2019).

available; adopt a train-the-trainer approach dedicated to some employees that can teach to the others, take part in interest groups' initiatives, for example Chamber of Commerce. In conclusion the process of training is essential to re-socialize stakeholders not only with regard to corruption company's risks and its efforts but also to the general concept of fight against corruption as one of the more challenging issues of the civil society. Therefore it is important to educate people also on the global effects of the phenomenon (Carr, 2007:149).

4.4.2.Promoting

Although most of companies adopt properly compliance programme, they often forget to encourage employees and partners to actively participate to anti-corruption measures. In this respect incentives are one of the options that tend to increase correct behaviours and performance. For this reason it is worth taking into consideration the elaboration of an incentives scheme to promote compliance through monetary and non-monetary incentives: financial rewards like bonuses, promotions, vouchers; non-financial rewards like education courses, peer recognition, personal acknowledgment.

As a matter of fact the choice of the introduction of incentives in the compliance programme should arise from a compound reasoning on the nature of the company and on the cultural context where the company operates. Furthermore if the company has an existing human resources policy based on incentives, it would be useful to include the anti-corruption incentives scheme in this previously introduced policy with the establishment of ethic and compliance standards.

In any case the levels and the types of incentives based on an evaluation process of ethic and compliance criteria should be documented and clear, for instance: participation and performance in compliance training, level of active support and development of the company's anti-corruption programme, compliance-related approvals, knowledge of the company's values and norms, willingness to question or reject dubious conduct or proposals.

Surely incentives should be differentiated for employees and managers; the role of managers, as previously studied, is related to promotion of anti-corruption measures, therefore their evaluation should take into consideration the achievements of their staff.

Moreover incentive scheme can be organized on personal rewards or on group or office incentives, for example for risky areas, encouraging the team effort on the topic.

In order to avoid controversial incentives systems it is important to consider: the balance of the performance targets and incentives in order to make them as proportionate as possible; the reward of expected behaviours; the reduction of intrinsic motivations; the subjectivity of evaluating performance through objective criteria and assessment process; the unequal opportunities; the reward of whistle-blowers denouncing illegal behaviours.

4.5 Measure and implement: controlling, recording and reviewing results

"AS PART OF THE FOLLOW-UP ON KEY IDENTIFIED RISKS, ARE THERE CHANGES THAT NEED TO BE MADE TO OUR MONITORING AND AUDITING ACTIVITIES? DO WE NEED ADDITIONAL TECHNOLOGIES OR PROCESSES TO MAKE THIS STAGE OF OUR PROGRAMME MORE ROBUST?

(U.N. GLOBAL COMPACT, 2011: 14).

4.5.1.Controlling and record keeping

The activity of monitoring the efficiency and effectiveness of the compliance programme provided is fundamental and it is based on specific controls and records, in order to avoid negative consequences connected with conducts that can escape for various reasons (negligence, lack of awareness, human error) from compliance provisions. In addition this stage permits to detect the need to update the instruments previously developed. For this reason it is important to implement a proper system of internal controls and record keeping to guarantee the application of the programme, not only in terms of compliance of national or regional laws but also internal regulations. Furthermore internal controls represent a system to detect risks, but also an important support and protection to managers and employees. Therefore the checking process needs the same attention of the other stages of the programme, since the previous activities could lose value without a proper monitoring and controlling system.

A relevant role is once again attributed to managers: in order to create a proper environment the managers should base their relationship with employees and partners on the one hand on trust and on a second hand on adequate controls, trying to avoid excessive controls. According to Confindustria almost two levels of control on the appliance of procedures and protocols are required in order to make the system all-embracing: the first level of control is attributed to managers of different functions with regard to their areas or offices; the second level is attributed, instead, to internal or external independent

experts, meaning in the Italian context R.T.P.C., O.d.V., Compliance Committee, Internal Audit (Confindustria, 2014:36).
More specifically, the main purpose of the internal controls system provided within the compliance programme is to detect and prevent corruption through different channels, for instance automatic computer-based analyses or manual detection controls. In any case the results should be documented due to improvement purposes. In this respect, the maintenance of books and records is essential in order to organize a system of automatic recording of the main activities, mainly financial.

4.5.2.Detecting and reporting

The monitoring process often encounters detected or possible violations of the compliance measures. To be more precise violations are the behaviours of employees or partners that differ from anti-corruption policy and procedures of the anti-corruption compliance programme. Though the implementation of the compliance programme some violations are possible and should be detected in various ways. In this respect internal sources guarantee a more secure and accurate system of detection that does not negatively influence company's reputation. However, in order to maintain a trust-environment with regard to investigations, they should follow principles of transparency and accountability with the establishment of a clear map of investigations' process (conduct of investigations, research and planning of the investigation, reporting and legal evaluation) and the selection of a responsible for it. In addition investigations should follow also general principles of integrity and rule of law assuring the protection of confidentiality. Senior managements should be involved once that the detecting process has given its results.
The internal sources for detecting possible violations are: internal controls, internal investigations, internal audit, internal hotline for guidance and reporting, ombudsman. The external sources for detecting possible violations are: external auditors, complaints and concerns from other external parties, media reports, and ombudsman.
In particular, the reporting of violations is the disclosure of information about effective or perceived corrupted conducts. In this respect whistle-blowing is a recognized anti-corruption source that permit to detect illegal behaviours from inside through channels that cannot be reached by official internal controls and also when information is not enough detailed, they conduct to proper investigations. For this reason it is important to

provide a system of whistleblowing involving the possibility to report possible violations to superiors or to a company's compliance office, or to a trusted person or ombudsman. In addition the company should also provide channels of reporting based on information technology[220]. In the same time it is also important to make possible whistle-blowers aware about the risks of defamatory reporting assuring protection to people who decide to report; the possible discriminations are the main cause of silence. Every report should be taken into consideration seriously and confidentially and a positive image of reporting violations should be promoted through communication and training. Furthermore the process of evaluation and investigations connected to violations reported needs to be clear and effective, in order to not provoke discouragement between whistle-blowers.

4.5.3.Addressing

The addressing of violations detected is fundamental in order to demonstrate the commitment and the credibility of the company to the issue of corruption; violations should be faced as possible learning and improvement occasions.

Primarily in order to assure a clear and accessible system of addressing violations it is important to previously adopt a catalogue of proportionate and effective sanctions to prevent and penalize employees and partners in case of abuses of anti-corruption practises. The catalogue of sanctions should take into consideration some basic principles: sanctions should be consistent with applicable laws, sanctions should be relevant and proportionate, sanctions should be applied in practise, sanctions depend on effective controls, sanctions should exist next to incentives.

In addition some clear principles should be fixed and publicised in order to make the evaluation process of violations as objective and transparent as possible: criteria for the determination of the level of severity of a violation; link between the level of severity and the disciplinary sanctions; mitigation of sanction for self-reporters, assignment of the responsibility to investigate alleged or discovered violations; processes and regulations that are to be observed during the investigation; internal communication of the incident; external cooperation with authorities; monitoring of progress and documentation.

More specifically in case of violation the company should apply sanctions, notifying internal and external authorities and deciding on remedial actions.

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[220] The Italian legislation in this respect has recently introduced in the D.Lgs. 231/01 (art.6 c.2bis) the obligation to provide one ore more channels of reporting, also via information technology.

Once that violation is verified through internal investigations various areas of the company should be informed, for instance human resources, training and legal department for disciplinary and remedial actions; in case of serious violations the authorities should be also informed.
In conclusion the whole process of detecting, investigating and addressing violation should be registered and documented, also for future purposes.

4.5.4.Reviewing

The implementation of the compliance programme and model, as emerged throughout the contribution, should be a continuous activity based on learning and improvement, in order to be always updated and reliable. Actually this implies a continuous monitoring activity together with frequent reviews and evaluations to detect weaknesses or opportunities to improve and optimize the programme contents.
In particular reviews may consist of information and data on specific aspects of the compliance process that should be evaluated for improvements according to specific criteria: introduction of new measures, additional existing measures, reduction of inefficiencies and adaptation of strategies. In this respect it is important to remember that substantial organizational changes usually require a modification of the compliance programme and if this change involves new activities, it would be valuable to integrate them in the risk-assessment. Accordingly the evaluation process should take into consideration all the activities connected with the compliance programme.
In addition the sources for evaluations are various: results of internal monitoring of specific activities, results of internal and external audits, feedback from internal and external parties, assessments, benchmarks or comparison with peer companies. The evaluation of data collected in the review process should be conducted according to the fundamental principles of effectiveness of modifications, efficiency in terms of costs and sustainability in the long run.
In conclusion the results of the evaluation should be documented and discussed in order to decide the further implementation needed and both senior management and board of directors should be involved. In other words the reviewing stage, in a company that has properly implemented a compliance programme and model, represents the initial step of a new cycle of anti-corruption assessments and activities.

Conclusion

The aim of this contribution was to analyse the main international, regional and national hard-law and soft-law measures, in order to classify the best practises in terms of anti-corruption measures to be applicable by Italian state owned enterprises, that represent at present the pioneers of the implementation and application of a complete internal anti-corruption system (according to L. 190/2012 and D.Lgs. 231/01). Primarily this main purpose of the contribution arose from the ratification by the Italian State of the main anti-corruption international and regional instruments with the adoption of consecutive legislative acts in a complete anti-corruption legal framework. Secondly this objective has its origin in the necessity of the public administration and private companies to efficiently implement their internal anti-corruption measures according to national and supranational standards. Thirdly, the ambition of the whole dissertation was also to deeply analyse the phenomenon of corruption.

In sum the international and regional anti-corruption framework emerges to be quite complete in the criminalization of corrupted behaviours and in the provision of repressive and preventive measures to be adopted by Member States. In addition the international and regional treaties, although with different purposes and addressees, represent a homogeneous legal system generating a common breeding ground also for future initiatives.

Concerning the implementation of anti-corruption measures by States in domestic legal orders, consisting of autonomous legal initiatives that should be shaped on the national concept, results as differentiated and fragmented. The transnational treaties, in fact, are based on equilibrium between the obligatory provisions and the freedom of Member States in the forms and contents of implementation process. In this way the domestic measures are correctly designed on the national socio-cultural background. Nonetheless the national example of Italian anti-corruption legal framework, studied in the previous pages, reveals a difficulty of some countries to enact a clear body of laws, in particular applicable to both private and public sectors. Although a common effort is often demonstrated, it seems that countries, in this case the Italian State, proceed by steps facing different needs in subsequent moments, creating a stratified, even confused, legal order composed by specific and detailed but blurring provisions. In the same time the study highlights the differentiation of the various backgrounds of the world that generate different applications of international and regional provisions.

With regard to the application in public and private sector of the national provisions, in particular in the case of Italian State, it results as a continuous process of implementation of legal novelties that sometimes consists of the invalidation or stratification of previous implementations. For this reason in the implementation process companies often risk to lose their main valuable purpose of prevent and repress corruption, operating a mere application of national obligations. In addition the dedication and the interest to the topic by politicians and managers emerge to be not equally distributed. However the Italian legal order, even if stratified, appears particularly complete and complex concerning the provisions for Italian state owned companies that are fortunately and properly accompanied by soft law instruments. More precisely, the case of Italian state owned companies turns to be emblematic also for the importance and the relevant role of soft law tools. Generally speaking in the anti-corruption framework soft-law measures are essential to clarify and integrate hard law measures helping the implementation required to Parties. Furthermore the case of Italian State owned companies is very emblematic because it is characterized by a great effort by the enterprises involved in the implementation process. In this respect the contribution highlights that international and regional standards can be fundamental when national legal provisions are imprecise. The present study, in fact, matches not only transnational hard law and soft law measures, but also national hard law and soft law measures, in order to collect the more shared best practises for State owned enterprises. Thus, it emerges a very complete catalogue of practical instructions that can help companies to implement their compliance programmes and models. In particular the phases of risk-assessment and mitigating activities, when not explicitly provided by national legislation, are properly instructed by international organizations and associations. In addition companies should follow the national legal tools in order to shape international standards to the own background.

Moreover the whistleblowing system represents mainly the introduction of a novelty that needs to be comprehended and accepted, since in the majority of countries it is not part of the socio-cultural attitude. For this reason the experience of the countries where the approach to denounce illicit conducts for the common interest, could encourage successful national experiments. The more frequent legal solution seems to be a clear and unique body of laws, not only on the functioning of whistleblowing, but also providing the effective protection of whistle-blowers. In addition on the topic the contribution outlines the importance of the functioning of the bureaucracy of public administration and the existence of specific associations that guarantee information and training to

employees and, better, to individuals. Hopefully, especially with regard to Italian context, more stakeholders should be involved in the management of whistleblowing, for instance the workers' unions that represent specialized organisms protecting companies' workers. In addition the information and training on corruption in general and on whistleblowing should begin in childhood or for teenagers, in order to guarantee a more ethic future to new generations.

Accordingly the involvement of stakeholders should be considered in future in the development of compliance programme and model, in order to assess properly the risks and provide the mitigating phase.

Although the main objective of the contribution was very precise and directed to specific business actors, the study of the whole phenomenon in its main features and the contents of the main legal instruments make emerge various key findings that it is worth to analyse in this conclusive stage.

The first key concept to consider is awareness. Awareness, meaning the state of knowing something being particularly conscious, represents the first fundamental understanding that should be considered approaching the anti-corruption fight. Since the first sections, where the historical roots of corruption and anti-corruption were traced, it turns to be evident that the fundamental condition that is needed to efficiently curb corruption is not only consciousness on corruption as a spread and dangerous phenomenon, but also its serious consequent impacts and effects. Actually institutions represented the first actors to have reached a certain degree of acceptance of both premises that determine the common decision to enact the legal instruments fully studied in the previous pages. Accordingly institutions maybe represent the primary promoters of ethic and moral principles, which have the opportunity to adopt also acts, in order to determine legally what is right and what is wrong. In this respect it is significant the role of the private sector in the process of growing awareness, for instance within the O.E.C.D. scenario. The O.E.C.D., in fact, adopted the first legal instrument with a transnational mission because of the pressure of American lobbies requiring a common playing field in terms of anti-corruption obligations. In this particular case the interest of the business sector was moved by economic reasons, however the role of the private sector in growing global awareness on anti-corruption is crucial, since business represents a driving force of the globalized world. At the same time the private sphere can raise awareness within employees and stakeholders, above all, on whistleblowing's opportunities. From the

contribution emerges the importance of this relatively new tool of anti-corruption that seem to be more successful where individuals are informed about whistle-blowers' initiative and protection. Whistle-blowers, in fact, need to be conscious about the importance of their role in combating internal corrupted conducts representing a personal contribution for the common good. Similarly they should be aware about the possible consequences of their action and the protection that it is reserved to them.

The future development of the common awareness of anti-corruption initiative should involve powerfully the civil society, possibly through specific associations organizing information and training, in order to spread a culture of moral and ethic principles that would move individuals to recognize corrupted practices in their every day life denouncing them and choosing different behaviours. Accordingly media and other actors like workers' unions should be part of the common effort in promoting a culture of corruption, through new instruments, for example generated by information technology. The arising of the common interest in anti-corruption by society should enter the plans for action of other relevant topics that are transversal for the preservation of well being, like fundamental freedoms and human rights.

The second key understanding of the contribution is commitment. Commitment, meaning the effort in being powerfully involved in an activity, in anti-corruption becomes primarily a global effort. When an acceptable common or individual consciousness is reached, it needs to turn into a concrete commitment towards a no tolerance approach. In this respect the international and regional institutions demonstrate their common and strong effort in anti-corruption initiatives. Once again the institutions appear to be the main promoters of a common dedication on the topic that should be very powerful and homogeneous in their activity. Hence, many actions demonstrating commitment proliferate on the international and regional context. More specifically emerges to be fundamental not only the role of international organizations, but also the function of special bodies established for the purpose within them; it is worth considering also the private initiative.

Furthermore a more strong effort is required in the States were this importance of common duty is not widespread due to socio-cultural conditions and obstacles. Accordingly the private sector should contribute to the promotion of the individual and common commitment, since business, in particular multinational companies, represent the exporters of social principles from countries where the culture of anti-corruption is more developed to developing States. In the same way also the application and

implementation of anti-corruption measures within the private sector emerges to be strictly connected with commitment. In this case a specific and real dedication is required to managers of the top level, in order to inform and train employees. The role of commitment, in fact, emerges to be fundamental for the success of internal anti-corruption programmes.

The future process of raising the global commitment need to invest attention and energy in the political sphere and high levels of business management that nowadays seem to cross a particularly strong crisis with regard to ethic values and universal freedoms. The commitment in these spheres appears as fundamental for the growing dedication of society to the fight against anti-corruption.

The last understanding, quite predictable, is action. Action is only the third of the key concepts emerging from the study, since without awareness and commitment cannot exist an effective action. However action represents the more important phase, in order to reach common results in every process and also in the global fight against corruption.

International organizations are the main protagonists of initiating action building the bases for the consecutive regional and national initiative. Once again appear to be relevant not only the legal instruments enacted starting from 1990s at international and regional level, but also explanatory reports, protocols and guidelines, meaning soft-law measures. Yet the playing field of real action are countries. States are, in fact, promoters of the enactment of practical and operation action within domestic contexts and for this reason should adopt clear legal instruments, possibly one. A future perspective should consider in this sense a simplification of measures, in order to make action more concretely. Public and private sectors represent the subsequent levels interested by action composed by every internal initiative against corruption. Business nowadays represents, as said, a driving force of every global activity also because it usually as more resources than public sector. In the same way business is also keener on the integration of new technologies and new tools in general. For this reason the private sector is a relevant ground for planning actions against corruption to take advantage from new and different channels, for example in the implementation of compliance programmes and models and monitoring techniques. In this respect it is important to underline the role of whistle-blowers that represent a unique case of private action in the anti-corruption scenario. For this purpose future studies on the topic are recommended in order to follow the process of development of new perspectives on whistleblowing schemes. In this sense private

action should be cultivate and promoted representing the ground of action more close to every day life where the more diffused types of corrupted conducts arise.

In conclusion anti-corruption action in future should be capillary, from global to individual, in order to guarantee a complete control of the phenomenon, taking into consideration that this common effort should be constant and persistent with the main purpose of the common good of future generations.

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