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CASSA DEPOSITI E PRESTITI AND ITS BEING "JANUS-FACED" IN URBAN REGENERATION PROCESSES[1]

Vanessa MANZETTI[2]

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[1] This contribution represents an extended reflection of a brief analysis carried out for the Italiadecide 2024 Report "*Il futuro della città tra mercato, diritti, innovazioni*".

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1. *CASSA DEPOSITI E PRESTITI* PRIVATE ACTOR WITH PUBLIC OWNERSHIP IN URBAN REGENERATION PROCESSES

Addressing the role of the *Cassa Depositi e Prestiti* (CDP) in the urban regeneration processes that should involve cities, between the global system and the local system, means emphasizing all those actions and interventions aimed at the urban, environmental, and social regeneration of run-down urban areas, through programmes for the recovery and redevelopment of public and private real estate and urban spaces.

Such an analysis is by no means straightforward, both because urban regeneration policies cover a wide range of actions, being closely connected with those for the protection of the territory, environment, and landscape and with the reduction of land consumption, and because there are many roles that CDP can take on[3].

The reference to CDP's multiple guises demonstrates how complex CDP's intervention in city governance is as a necessary state-controlled private actor: from the more traditional role of Cassa financier or even "bank of the municipalities", to that of Cassa guarantor, Cassa shareholder, Cassa investor, Cassa emergency operator up to that of Cassa promoter and consultant[4].

[3] V. MANZETTI, *Cassa Depositi e Prestiti paradigma italiano delle banche di promozione*, Napoli, 2021, 56.

[4] It is worth mentioning the important role played by Cassa as an advisor to local and regional authorities, in particular, in school building, energy efficiency, renewable energy, and healthcare construction projects. A role that was strengthened in the NRRP season, and which led to the signing of the framework agreement between Cassa Depositi e Prestiti and the Ministry of Economy and Finance in December 2021, as a result of which Cassa undertakes to provide technical-financial advisory services throughout the life cycle of interventions in favor of central governments and implementing entities of NRRP measures and the Complementary National Plan. Activities that took concrete form already in the first years in supporting the implementation of more than 62 measures worth more than 70 billion investments.

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A role that, since the privatization process operated *ex lege* in 2003, has configured the CDP as a joint stock company with a legal, singular and special character with necessary state control, more than eighty percent owned by the Ministry of Economy and Finance (MEF), and by the Foundations of banking origin as minority shareholders with a strong social and special character[5].

And it is precisely this mingling of public and private that has led to the qualification of the work of *Cassa Depositi e Prestiti* as an indirect form of public intervention in the economy with singular connotations, aimed at the pursuit of primary public and general interests.

These are alternative forms of intervention to the traditional ones (which are in a crisis), thus leading to a wider use of CDP as a primary instrument of economic, financial, industrial, and even territorial governance policy, on the European model of a national promotion bank, an expression of a continuous balancing of public and private interests in constant becoming[6].

[5] To date, the shareholding of the majority shareholder Ministry of Economy and Finance amounts to 82.77 percent, while that of minority shareholders Foundations of Banking Origin amounts to 15.93 percent. To these must then be added Cassa's own shares in the amount of 1.30 percent.

[6] According to a partnership model that can be defined as institutional public-private partnership (or also public-private-social partnership), an expanded PPP model extended to private or institutional operators with a strong social mission (national promotional banks, infrastructure funds, banking foundations, insurance companies, pension funds, Social Security Funds, etc.), transparent and accountable. Cfr. F. MEROLA, *Le infrastrutture per uno sviluppo sostenibile. Il passaggio dal Partenariato Pubblico Privato al Partenariato Pubblico Privato-istituzionale e Pubblico Privato-sociale. Poche modifiche, grandi cambiamenti*, in *Astrid*, 2018.

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In the case of territorial governance and urban regeneration policies, this means paving the way for forms of intervention aimed at giving effect to a real right to the city[7], as a right that encompasses the idea of a sustainable city at the urban-building, environmental, social, cultural, and economic levels, a vector of synthesis of a plurality of public interests, but also private[8].

The conditional, however, is a must, given that while there are many guises in which CDP operates as an institutional actor of territorial government, it is not certain, however, that in the face of the complex "reality of things", CDP's work is always responsive to the concept of urban regeneration in its *lato sensu* meaning and difficult to define.

In fact, there is a profound difference-especially from a social point of view-between putting in place land governance interventions and putting in place urban regeneration interventions, given that the latter include the most varied interventions of recovery, reuse, redevelopment, and renovation for the improvement of the quality of urban decorum and the social and environmental fabric, as well as the reduction of the phenomena of marginalization and social degradation.

This is the reason why, if there are few doubts in recognizing CDP as having a major role in the processes of territorial government, a role that recalls its distant origins in pre-unification Italy[9] as an institution aimed at supporting the growth of local communities, the

[7] Cfr. H. LEFEBVRE, *Il diritto alla città*, Verona, 2014. An expression that has seen important interest and development by the doctrine, including P. STELLA RICHTER (ed.), *Ripensare la città e il suo diritto*, Milano, 2022.

[8] F. GIGLIONI, *La sostenibilità ambientale come vincolo giuridico per la rigenerazione urbana*, in *Riv. quad. dir. amb.*, 2020,1, 16.

[9] It is worth noting that the Cassa Depositi e Prestiti was established by Act of the Parliament of the Kingdom of Sardinia No. 1097 of November 18, 1850. For more on the history of the Cassa Depositi e Prestiti Cfr. M. DE CECCO, G. TONIOLO, *Storia della Cassa Depositi e Prestiti. Dalle origini alla fine del novecento*, Roma-Bari, 2000.

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identification of *Cassa* as the main actor in the processes of urban regeneration, considering the plurality and differentiation of the interventions in which it operates, is less obvious.

This is the case of CDP's establishment of an ad hoc company, called "CDP Immobiliare Srl.", wholly owned by CDP itself, with the exclusive mission of actively intervening in the valorization of publicly owned and publicly sourced real estate assets through urban development and redevelopment operations; or the case of the ex lege valorization of CDP's role in the development of public-private partnership operations (art. 22 of Decree Law No. 185 of 2008 and subsequent MEF Decree of March 12, 2009), as well as the establishment of the Public Private Partnership Fund, so-called Fondo PPP Italia, and of that "spider web" of real estate investment funds managed by CDP *Immobiliare SGR*, including also those specifically for social housing (FIA, FAS1 ...) aimed at a new dimension of the "right to housing".

The *millefleurs* of interventions that CDP carries out in "strategic and sensitive sectors" for an economic, social and territorial cohesion, concern, therefore, in addition to the infrastructure sector (railways, roads, local public transport, ports, interports, networks, etc.), also the sphere of energy, waste, environment, supplies of national interest, public or social housing, as well as more generally the activities of urban transformation and redevelopment, as a container of many and varied strategic and sensitive interests, sometimes in contrast with each other.

The complexity and plurality of aspects that characterize the work of CDP in urban regeneration processes deserve, therefore, a careful critical-reconstructive analysis, not least because, if in common and even legal perception, the margins of state intervention in the economy have been shrinking over the years compared to the past, indeed, it is precisely the role of CDP that opens up new forms of public intervention that go to qualify a role in the making, where public and private interpenetrate and balance each other, and that should lead to a meeting point in the territory-community as a common good to be governed.

This means that the ultimate goal, and the "node" of a new model of public intervention aimed at urban regeneration, should be to systematize and balance social

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expectations with political, market and financial perspectives, in order to give effectiveness to that right to the city as a "set of many things: of memory, of desires, of signs of a language ...places of exchange, as all the books of economic history explain, but these exchanges are not only exchanges of goods, they are exchanges of words, desires, memories", lest cities be "images of happy cities that continually take shape and vanish, hidden in unhappy cities"[10].

This means that when *Cassa* operates according to the instruments of CDP lender, CDP guarantor, CDP shareholder, CDP investor, etc., it must at the same time manage to reconcile in-financial return, with an environmental and social return, in the medium to long term, given that *Cassa*'s bylaws legally bind its mission toward investments with high public purposes, including sustainable development, that nevertheless have some profitability. So much so that in 2021 *Cassa* amended its bylaws to expressly introduce the principle of "sustainable development", then well outlined in an ad hoc document, so-called sustainability framework[11].

According to the principle of sustainable development, *Cassa* and the companies subject to the direction and coordination of CDP,[12] must pursue the promotion of long-term

[10] I. CALVINO, *Le città invisibili*, Milano, 1972.

[11] The so-called "Sustainability Framework," published on Cassa's website in the Sustainability - Governance, Reporting and Performance section, outlines the strategy and ways in which Cassa integrates the principles of sustainable development into its actions, both in its operating model and in its business areas. Specifically, it is composed of ten sections, which illustrate the role of sustainability in the current context and the inspirational and methodological principles adopted by Cassa in the management of sustainability within its organizational system, going on to identify the tools deployed by CDP to integrate environmental, social and governance principles into its actions in order to pursue an inclusive and sustainable growth model. Cfr. CDP, *Framework di sostenibilità*, Roma,11 January 2023.

[12] The Sustainability Framework defines that "the CDP Group recognizes the value of sustainability as a guide for the definition of its strategic choices and for the direction of its operations and is committed to ensuring that all companies subject to the direction and coordination of CDP pursuant to Articles 2497 et seq. of the Civil Code, integrate environmental, social and governance principles into their business and operating model in order to create

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economic, social and environmental sustainability, taking into account the interests of its shareholders and relevant stakeholders, in order to achieve that process of seeking a dynamic balance between economic growth, social equity and environmental quality, as well as the rights of future generations[13].

A test-bed for this mission is found precisely in urban regeneration interventions, as these call into question relevant and very different problems depending, for example, on the distribution over the different realities of the territory, from the central areas, which obviously have a more important real estate value, to the more peripheral areas in a situation of serious difficulty between depopulation and lack of essential services.

And again from the difficulty of putting in place interventions of built on the built, which do not involve the consumption of new land, although the redevelopment of buildings in a state of decay finds a strong limitation in economic-financial sustainability, urban regeneration being economically much more expensive than building on vacant land[14].

On the other hand, urban regeneration interventions should respond to much broader logics, bringing forward models of "city transformation" that, through the redevelopment of dilapidated buildings, should redevelop not only the property affected by the intervention, but also everything around it.

long-term value for the company as a whole and for the social community within which it operates", Cfr. CDP, *Framework di sostenibilità*, cit., 3.

[13] Cfr. R. BIFULCO, *Diritto e generazioni future, Problemi giuridici della responsabilità intergenerazionale*, Milano, 2008.

[14] Cfr. A. MANDANARO, Intervention at the Seminary "*Territorio: un bene (in)comune, conoscere per governare*", Milano, 4 march 2024.

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These are somewhat difficult processes, as economics and urban regeneration often do not seem to find an easy balance, and it is not easy to pursue the goal of going to invest in those projects that have not only an economic-financial impact, but also a lasting social impact, according to an approach based on three fundamental pillars, that of environmental sustainability, that of collective-social impact, and that of economic-financial impact.

A so-called variable geometry approach, which involves a "case-by-case" assessment.

Hence the choice to outline *Cassa*'s work in urban rehabilitation and regeneration processes by bringing to attention two cases (one referring to public properties, the other referring to private properties) that seem to move in very different ways, although both affect and intertwine events related to the deterioration of the existing building stock, the lack of services and situations of social distress.

The first intervention concerns the rental needs of the Enel company, whose main shareholder is the MEF[15], and involves the rehabilitation of the *Istituto Poligrafico e Zecca dello Stato* located in the *Piazza Verde* complex in Rome; the second, concerns the rehabilitation of the former "*Casone*" on *Via dell'Osteria* in the *Piagge* district of Florence to meet the new housing needs dictated by changes in society.

[15] As of 2023, the shareholders holding more than 3 percent of the Company's capital were the Ministry of Economy and Finance (with 23.585 percent of the share capital) and BlackRock Inc. (with 5.114 percent of the share capital, held by way of asset management).

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2. COMPARING EXPERIENCES: FROM THE RECOVERY OF THE *ISTITUTO POLIGRAFICO E ZECCA DELLO STATO* TO THE *OSTERIA SOCIAL CLUB*

These are two interventions that at least "on paper" seem to be accumulated by the same *raison d'être*, namely that of countering urban decay, which is not to be circumscribed to only the physical or material degradation of the existing built heritage (abandoned spaces and dilapidated buildings), but which goes to affect in a global perspective the presence or absence of public services , the presence of socio-economic distress, up to and including "...the cultural decadence of vast parts within urban settlements"[16].

This demonstrates that the power of urban planning can be an essential tool for the realization of a plurality of public interests and constitutional values: from the right of the landscape, to the right of the environment, to the right of health, to the right to housing, to the right of private and public property, according to that process in the making that also invests the new emerging needs and the ongoing transformation in society related to energy poverty[17].

[16] P. URBANI, *Sulla pianificazione urbanistica: modalità di acquisizione dei suoli, garanzia dei servizi pubblici e rigenerazione dei beni comuni*, in *Rivista giuridica dell'edilizia*, fasc. 4, 2019, 309.

[17] Cfr. C. Stato, sec. IV, 10 may 2012, n. 2710, in *Urbanistica e appalti*, 1, 2013, 59, according to which a development process of the places should take into account "both of the building potentials of the soils - not in the abstract, but concerning the actual housing needs of the community and the concrete vocations of the places - and of environmental and landscape values, as well as of health protection requirements and thus of the healthy life of the inhabitants, and the economic - social needs of the community rooted in the territory, and, ultimately, of the development model that is intended to be imprinted on the places themselves, given their history, tradition, location and a reflection "de futuro" on its essence, carried out - by self-representation and self-determination - by the community itself, through the decisions of its elective bodies and, before that, through the participation of citizens in the planning process."

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2.1 The recovery of the Istituto Poligrafico e Zecca dello Stato *as an emblem of critical issues in the processes of privatization of public real estate assets*

The intervention of recovery and redevelopment of the building *Istituto Poligrafico e Zecca dello Stato* in Rome, based in *Piazza Verde*, leads to address not only the recovery of one of the most important monumental assets of the Art Nouveau style in Italy, but also the general issues related to the processes of privatization of public real estate and in particular those involving *Cassa*, since the building is now owned by *Cassa Depositi e Prestiti*.

Ownership structure not neutral for the purposes of public-private governance of the territory, as it calls into question the main transformations that have affected the excursus of public intervention with reference to the processes of privatization of public real estate, which have given rise to processes of sale (or perhaps it would be better to say "sell-off") to meet the economic-financial needs of public budgets.

It is in fact a long story, which began at the end of 2005, when Fintecna, then a joint-stock company wholly owned by the Mef[18] purchased - as part of the new regulatory framework of reference and the new ways of implementing privatization and public real estate - from the *Agenzia del Demanio*, a compendium of real estate assets to be valorized

[18] Fintecna S.p.A. was established as a joint-stock company wholly owned by the Mef in July 1993 under the company name Fintecna - Company for Industrial Plant and Land Use Planning (changed in 1998 to Fintecna - Financial for the Industrial and Service Sectors) with the objective of managing the restructuring and liquidation of Iritecna, a company controlled by IRI and deputed to the management of state holdings in the infrastructure sector, and through its subsidiary Fintecna Immobiliare S.r.l. active, also, in real estate redevelopment and development.

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and divested for a value of about 360 million euros, among which were important valuable buildings, such as the *Palazzo in Piazza Verdi* used by the *Poligrafico dello Stato*.

The reference to Fintecna is not irrelevant given that this company has gone on to distinguish itself as a veritable "Chinese box", a "container" of both shareholdings in strategic companies (also following the incorporation of IRI itself, and the consequent contribution of all the residual assets of the IRI privatization process), and of numerous public properties.

So that Fintecna took a leading role in the redevelopment and divestment of public real estate, following, first with the transfer free of charge of all the shares of *Patrimonio dello Stato S.p.a.* held by the MEF (*i.e.*, the company set up ad hoc for the divestment of public real estate)[19], then, with the contribution of real estate owned by the state or its subsidiaries (including those previously owned by the State Monopolies) by the *Agenzia del demanio*, as part of the policies of divestment and reduction of public debt.

Properties that, in most cases, Fintecna has transferred to specific special purpose vehicles - created in partnership with private investors and promoters - charged with carrying out redevelopment and marketing projects, as in the case of "*Residenziale Immobiliare 2004 s.p.a*", whose main asset is precisely the *Istituto Poligrafico e Zecca dello Stato*.

In fact, this company, controlled with equal shares by Fintecna (50%) and Finprema (50%), was in charge of the so-called "*Pentagramma Project*", an initiative, launched in 2007, having as its object the redevelopment of 4 real estate assets located in Rome - with a

[19] G. NAPOLITANO, *La Patrimonio dello Stato s.p.a tra passato e futuro. Verso la scomposizione del regime demaniale e la gestione privata dei beni pubblici?*, in Aa.Vv., *Titolarità pubblica e regolazione dei beni. La dirigenza nel pubblico impiego, Annuario 2003 - Associazione italiana dei professori di diritto amministrativo (AIPDA)*, Milano, 2004.

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total book value of about 406 million euros -, aimed at initiating important interventions in terms of development, reconversion and regeneration[20].

Experience that, inevitably, saw an important moment of transformation following *Cassa*'s acquisition in 2012 of the entire stake in Fintecna S.p.A., which was followed by *Cassa*'s acquisition of control of *Residenziale Immobiliare 2004 S.p.A* by *Cassa immobiliare*[21]. So much so that *Residenziale Immobiliare 2004 S.p.A.* has been included as of 2014 in the scope of *Cassa*'s consolidated financial statements.

It is within this framework that the new season of the recovery of the real estate complex of the *Istituto Poligrafico e Zecca dello Stato*, owned by the company *Residenziale Immobiliare S.p.A.* 75% controlled by CDP Immobiliare (from 2020 100% owned by CDP immobiliare)[22], is taking place.

A recovery marked by a convulsive history since its incipit, also in view of the incidence of the large financial debt of the company *Residenziale Immobiliare* on the total financial debt of CDP *Immobiliare*[23], which led *Cassa* to the launch of a whole series of real

[20] In addition, the portfolio includes the former Geological Institute and the Scalo San Lorenzo real estate complex, both of which are earmarked for tertiary conversion projects, and the Valcannuta area, for which residential development is planned.

[21] Following the agreement reached by Cassa with its shareholder Finprema S.p.A. and the Maire Group (Finprema's shareholder), and the subsequent amendment of the shareholders' agreements, on April 7, 2014. The acquisition of control took place through the purchase of an additional 15% share of the share capital, at a price of 11,483 thousand euros, to which, subsequently and up to December 31, 2014, four separate capital increases took place, which, as they were not subscribed by the minority shareholder, brought the shareholding to 74.47%.

[22] Cfr. Cassa Depositi e Prestiti, *Relazione Finanziaria Annuale 2020*. As of the 2019 Report there is a purchase of additional shares of Cassa in the company Residential Real Estate (as of 2019 of 82.62 percent).

[23] In this regard, it should be recalled that Cassa's Financial Report as of 2018 noted that out of a total financial debt, amounting to about 568 million euros, about 11 million euros were attributable to CDP Immobiliare (debt allocated

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estate operations in which the balance between the need to "monetize" the real estate for the purposes of the company's financial equilibrium and the desire to put in place public interventions aimed at a real regeneration of the territories could not -inevitably- be easy. This is demonstrated by the fact that the process involved in the work of recovery and regeneration of the *Zecca* palace is still ongoing.

And this despite the fact that the recovery of the *Zecca* palace had begun in 2015 following the signing of a letter of intent by the hotel chain Rosewood Hotels and Resorts, which declared its interest in the transformation by 2018 of the historic palace into an *ultra-luxury* hotel with about 200 rooms, conference center, restaurants, swimming pool, SPA, as well as about 50 private residences managed by the same hotel operator. Negotiations ended with a "step back" by the hotel chain, due (it seems) both to some financial criticalities of the company and timing issues that prevented the hotel chain from having the property available on time, due to the lack of documents of the building, found late even in the basement, reflecting the well-known difficulties in the reconnaissance and documentation of assets belonging to the public heritage that have always marred processes of sale and redevelopment of public properties[24].

The affair closed with the signing of a new agreement between *Cassa* and Enel for the construction and subsequent 24-year lease of the Enel group's new operational headquarters, *i.e.*, in a long-term lease of 30,000 sq. m. of space with high energy and environmental *standards* , out of a total space of 70,000 sq. m., with the other half of the

to some properties in the direct portfolio) and about 558 million euros were attributable to the investees (of which 302 million euros related to the Residenziale Immobiliare partnership).

[24] AA. VV., *Zecca, la fuga dei cinesi che volevano costruire l'hotel di superlusso*, in *Il corriere della sera – l'Economia*, 18 June 2019.

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building earmarked for additional *tenants*, again for executive use, in addition to the construction of a four-story underground parking lot for a total of 285 parking spaces[25].

It is, therefore, an important operation that sees *Cassa* invest 120 million euros for the work of recovery and redevelopment of a historic building that should be of interest not only to Enel (a company, it should be recalled, exercising activities of public interest, of which the Mef is the main shareholder with all that follows at the level of *governance*), but also to *Roma Capitale* and the entire community. Well, such an operation requires reflection, given that the fact that both *Cassa* and Enel are private entities subject to the control of the MEF (albeit in different forms)[26], should have called in question - in principle - models of the so-called good public-private governance of cities, such as those of participatory urban planning, which see the active involvement of citizens in order to respond to the real needs of the territory[27].

[25] The lease agreement with the Enel group is for a term of 24 years, with the rent amounting to about ten million euros per year, this is in line with "prime" rents in the downtown area. Cfr. P. DEZZA, *Gli uffici dell'Enel traslocano nella sede dell'ex Poligrafico a Roma. Contratto di locazione*, in *Il Sole24Ore*, 28 February 2020.

[26] As far as Cassa is concerned, an expression of its complex *ex* lege qualification as a national promotion bank, as far as ENEL is concerned, the "de facto control" by the Mef, which has so far disposed of sufficient votes in Enel's ordinary shareholders' meeting to designate the majority of directors, should be explicitly noted, even though the Ministry itself does not exercise management and coordination activities, as the Company takes management decisions in full autonomy and in compliance with the competences of its bodies. See on this point Cfr. Corte dei conti, *Determinazione e relazione sul risultato del controllo eseguito sulla gestione finanziaria di Enel società per azioni (enel s.p.a.) 2022*, Rome, 2024. In this regard, it is recalled the well-known judgment No. 466 of December 28, 1993, of the Constitutional Court, in which the Court stressed that "la semplice trasformazione degli enti pubblici economici (...) non può essere (…) ritenuto motivo sufficiente a determinare l'estinzione del controllo" della Corte dei conti fino a quando permanga inalterato nella sostanza l'apporto finanziario dello Stato alla struttura economica dei nuovi soggetti, cioè fino a quando lo Stato conservi nella propria disponibilità la gestione economica delle nuove società mediante una partecipazione esclusiva o prevalente al capitale azionario delle stesse".

[27] D. CIAFFI, A. MELA, *Urbanistica partecipata. Modelli ed esperienze*, Roma, 2013.

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And instead, this was not the case, so the urban planning process for the recovery of the *Palazzo della Zecca* appears somewhat questionable both on the side of transparency and democratic participation in the choices[28]. The intervention of the *Cassa*, a necessary state-controlled company, thus seems to leave in the background the pursuit of primary public interests, such as the objectives of social sustainability involving citizen participation and the reduction of inequalities[29].

It is no coincidence that further doubts also vitiate the same listening process, which materialized downstream of important contractual commitments already signed, as well as an expression of limited participation, seeing the involvement of only a few stakeholders, such as the Chamber of Commerce of Rome, the association of Roman builders (Acer-Ance), Cna *Roma* (Crafts and Commerce) and *Confcommercio Roma*, evidently an expression of the large trade associations. In addition, these associations exclusively represent the economic world. And in fact it is quite evident how these cannot be considered representative of the

[28] In this regard, one recalls the Motion submitted by some councilors to the Municipality of Rome, in which the petitioners objected to the passive role taken by the Municipality in the administrative procedure prior to the approval of the urban planning variant, which limited itself to approving the request without getting involved, thus determining the absence of a preliminary strategic assessment on the possible reuse of the public building for new public functions. Or again recall the numerous complaints in the case brought forward by Citizens' Committees and recognized and unrecognized associations, as well as the various questions addressed in particular to the Minister of Culture and the Minister of Finance Economy by various political groups, aimed at pointing out how in the long process of recovery, made up of permits and authorizations, the citizenship was not involved, not even in the urban redevelopment project of the Square. In addition, the intervention did not take into account the requests formulated by the numerous citizens' committees for new public parking, greenery, services and renewal of the road system. In other words, in the reality of things, it does not seem that citizens were called upon to participate in the transformations taking place, let alone involved in the implementation of the work of raising the two-story building, or involved in the redevelopment of the adjacent spaces.

[29] CDP, *Framework di sostenibilità*, cit, 7, the reference is the sustainable development goal SDG 10.

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entire social fabric of the inhabitants and constant users of the area, and thus a participation that cannot be considered aimed at those who live the area 365 days a year[30].

So much so that according to the study commissioned by *Cassa* itself, among the "benefits" of the redevelopment would also include seeing a (speculative) increase in the prices of apartments, offices and commercial properties in the area where the building stands[31].

As if to explicitly state that social purposes are extraneous to the redevelopment of the building, going to highlight how the intervention of *Cassa* in the operation of rehabilitation and redevelopment of the *Zecca* building, despite the fact that the project provides for high energy and environmental standards[32], leads, from the side of sustainability in the broadest sense, to make the hues of the urban picture even bleaker, affecting an area where the level of rental prices is already very high, thus going to exclude a large segment of the population from being able to reside there.

Critical issues that lead to highlight how despite the progress made "at least on paper" by urban planning legislation in moving over time toward increasing citizen participation in urban transformation choices with urban, economic and social value, still rare are the cases in which such participation is effective (understood not only as the participation of the private economic operators involved, but of the entire community).

[30] Cfr. M. PICCHI, *Il diritto di partecipazione: note preliminari (per l'effettività dei diritti sociali)*, in *www.gruppodipisa.it*, 2012.

[31] According to the Scenari Immobiliari study presented by Cassa Depositi e Prestiti Immobiliare, buying and selling of residential properties is expected to rise 3.4 percent, office properties 5.9 percent, and commercial properties 4.5 percent.

[32] Cfr. CDP, Press release "CDP realizzerà i nuovi uffici Enel nello storico palazzo di Roma che fu sede del Poligrafico dello Stato", 4 december 2019.

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Public administrations and even private companies with necessary state control, such as CDP, have in fact more often than not limited themselves to publicly exposing their plans, receiving the resulting comments, and then disregarding them, despite the fact, as in the case of *Cassa*, that there is an explicit reference to the principle of sustainable development in its bylaws and the adoption of a well-delineated sustainability framework, which identifies the discussion with stakeholders as an essential element of the *Cassa*'s actions[33].

These are all considerations that make it clear that urban regeneration operations should not only be an experience of recovery of the existing, but also a "barrier" to old and new poverty, and therefore functional to a harmonious development of the various social components by going to counter the depopulation of neighbourhoods.

This reveals the complexity of urban recovery and regeneration processes, given the difficult reconciliation between social-sustainable urban planning and the economic interests of the public and private entities whose task it is to actually carry out the intervention.

[33] Cfr. Sustainability Framework "For the purpose of creating shared value, it is essential for the CDP Group to involve its stakeholders in a structured process of listening, dialogue and discussion, aimed at anticipating and managing their legitimate expectations and changes in the context in which the CDP Group operates. In fact, the CDP Group considers the involvement of its stakeholders, internal and external, to be a fundamental aspect in developing its strategy and operations from an inclusive and collaborative perspective, consistent with its commitment to issues related to sustainable development." CDP, *Framework di Sostenibilità*, cit., 8.

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2.2 The recovery of Florence's Osteria Social Club *as an example of good public-private city governance*

Instead, the idea of urban regeneration as an essential piece of human regeneration[34] seems to lead us toward the Tuscan case of the rehabilitation of the former *Casone* in Florence, as a model of public-private partnership according to the real estate-based "fund of funds" process developed by CDP, particularly in the social housing sector[35].

The history of the c.d. *Casone* is, in fact, the one involving the intervention by the company Investire SGR on behalf of the Tuscan Housing Fund[36], a fund whose reference investor is the *Fondo Investimenti per l'Abitare* managed by CDP *Investimenti Sgr* (*Cassa Depositi e Prestiti* group), and as minor investors a conglomerate of public investors, the social private sector, and private investors (respectively, the Tuscany Region, some foundations of banking origin in the Tuscan territory-*Fondazione CR Firenze*[37], *Fondazione CR Prato, Fondazione CR Livorno*-, some Tuscan cooperatives, the *Istituto Diocesano per il*

[34] Cfr. P. URBANI, *Sulla pianificazione urbanistica: modalità di acquisizione dei suoli, garanzia dei servizi pubblici e rigenerazione dei beni comuni*, in *Riv. Giur. dell'ed.*, cit., 309 who cites for this expression S. SETTIS, *Com'è bella la città di qualità*, in *Il sole 24 ore*, June 3, 2018, which highlights how "urban regeneration is today, therefore, conditio sine qua non for human regeneration".

[35] M. ALLENA, M. RENNA, *L'housing sociale*, in F.G. SCOCA, P. STELLA RICHTER, P. URBANI (a cura di), *Trattato di diritto del territorio*, Torino, 2017, 35.

[36] The Tuscan Housing Fund (FHT), operational since 2012 and expiring in 2036, provides for the implementation of social housing interventions in the territory of Tuscany, also supporting and complementing the sector policies of local authorities. Its management aims at the realization of a housing and social context in which it is possible to access adequate affordable housing and at the same time a social community characterized by rich and meaningful human relationships. The current portfolio consists of approximately 24 initiatives.

[37] Fondazione CR Firenze participates in the Tuscan Housing Fund with a share of 10 million euros.

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Sostentamento del Clero di Firenze, the Mutualistic Fund *Lega Coop*, and an insurance company-*Unipol Sai*).

Experience that, therefore, calls into question the role of *Cassa* investor, which is committed to promoting and supporting the development of social housing, particularly through the *Sgr Cassa Depositi e Prestiti Investimenti*, whose shareholders, in addition to Cassa with 70 percent, include the Association of Foundations of Banking Origin (ACRI) and the Italian Banking Association (ABI) with 15 percent, respectively, and which has created the aforementioned closed-end real estate investment trust called "*Fondo Investimenti per l'Abitare*" (also FIA).

The FIA is a long-term fund, with a duration of 35 years (plus possible extension of no more than 3 years), reserved for qualified investors, which has seen the subscription for a total amount of the fund of 2 billion and 28 million euros, 50% coming from the Fund (1 billion)[38], and the remaining 50% from banking and insurance groups and private pension funds (for 888 million), as well as resources from the Ministry of Infrastructure and Transport (for 140 million)[39] .

[38] Cassa is thus a reference investor with 1 billion euros capital, accounting for about 50 percent of the total endowment.

[39] In general terms, therefore, the FIA operates through an Integrated Fund System (IFS): 29 local real estate funds, managed by 9 SGRs, which have the FIA as the reference investor (with shares of between 33 and 80 percent of the total capital) and as co-investors local stakeholders, primarily local foundations of banking origin, but also regions, provinces, municipalities, housing cooperatives and private developers. The total resources mobilized by the SIF amount to about 3 billion euros (3X multiplier compared to CDP's investment), thanks to which the SIF can be considered one of the most important interventions in terms of size, active in the field of impact investing. SIF's offerings pursue the goal of creating 20,000 housing units in addition to beds in temporary and student residences. To date, more than 220 interventions have been realized or are in progress, throughout the country. The social housing program promotes, in particular, three distinct types of interventions: (i) new social housing neighborhoods in cities that offer housing mainly for rent, but also for subsidized sale to young couples, large or single-parent families, and legal immigrants; among the most representative examples: Cenni di Cambiamento, Figino Borgo

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The subscription of the Ministry of Infrastructure and Transport is by no means neutral, as it demonstrates, if there was still a need, the particular public mandate of the Fund which comes, in this way, to feed investments in the private social housing sector to support and complement the sector policies of the State and local authorities.

Specifically, the Fund operates throughout the country, investing its assets mainly in shares of social housing mutual funds operating at the local level and managed by other asset management companies, in which banking foundations, local authorities, and private individuals can invest, an example of which is precisely the investment in the Tuscan Housing Fund with a public-private vocation, which is interested in the rehabilitation of the former "*Casone*" housing complex in *Via dell'Osteria* in the *Piagge* district of Florence.

Intervention that goes to affect the regeneration of a place now degraded, so much so that the property was affected by bankruptcy proceedings and squatted.

The synergistic process of urban redevelopment and recovery began with the purchase at auction of the privately owned property by the Tuscan Housing Fund, involving the City of Florence, the Region of Tuscany and some private entities, in particular

Sostenibile, Cascina Merlata Social Village, Redo Merezzate Smart District and 5Square in Milan, Vivo al Venti, Cascina Fossata and Nuova Falchera in Turin, the redevelopment of the former Sadoch area in Trieste, the former Marangoni area in Rovereto (TN), of the former Boero area in Genoa, the former Manifattura Tabacchi in Perugia, Osteria Social Club in Florence, Le Corti di Medoro in Ferrara, the Stadio neighborhood in Lecce, Parco Gentile in Bari, Housing Città dei Sassi in Matera, Olbia Social Housing; (ii) university and temporary housing, which provides beds and services to off-campus students and those who are forced to face a time-limited housing need; among the most relevant interventions: Campus Santa Marta in Venice, Padova via Delù, Ivrea24, Campus Sanpaolo and the EX MOI in Turin, Campus Milano Internazionale, BSC Bicocca and Campus Monneret in Milan, and the We Bologna hostel in Bologna; (iii) social and health care facilities and the sheltered residences for the self-sufficient and non-self-sufficient elderly, including Villa Fastiggi in Pesaro and Civitas Vitae Marche, based on an innovative model that sees longevity as a community resource. https://urbanpromo.it/2022/progetti/fia-fondo-investimenti-per-labitare/

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Fondazione CR Firenze, to which we owe the analysis and research carried out upstream of the process of redevelopment of the property.

Specifically, this is a redevelopment that has seen the allocation of significant public and private resources aimed at a real estate development of an area of about 6,000 square meters reserved for housing, developed on four floors with 83 apartments of different sizes and about 1,200 square meters dedicated to common spaces for collective activities and services to the residence[40].

A process that calls into question those models of circular subsidiarity[41], as a contribution to a new right of cities, as demonstrated by the implementation of the important urbanization works related to the intervention, which led to the creation of parking lots and a public park. In fact, it should be remembered that redevelopment and regeneration processes should also be strongly linked to compliance with so-called urban standards, aimed at ensuring a better balance between man and the environment, as well as the preservation and enjoyment of the traditional urban landscape, even if a strong balance between these must often be put in place.

The regeneration process is, in fact, a complex process, especially when understood in a broad sense, that is, when its strong social value is placed at the center, which in the case at hand seems to be highlighted also by *Investire sgr*'s decision to entrust the management of the former *Casone* complex to *Abitare Toscane s.r.l*, a so-called social manager (a qualification with a hybrid character) that brings together "local housing cooperatives in an attempt to pursue a revolutionary model of property management, based on the active

[40] As for the Common Spaces present, these are a courtyard with a play area and event space (steps), a common room, and a lockers area. A Common Spaces management body has also been identified in the Osteria 2021 Housing Committee. The full involvement of the community occupying the living space also through informal and unrecognized forms of horizontal subsidiarity subjects should also be highlighted.

[41] S. ZAMAGNI, *Mercato, Stato, Società Civile*, in *Rivista di Teologia Morale*, 22, 1991, 301-312

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participation of residents ...a perfect combination of public and private", as an important innovation and paradigm shift in the right to housing[42].

All these models are the expression of new dimensions of "public" intervention, as a strong hybridism between "public substance" and "private form", in a word "public in purpose, private in management rigor, public and private in funding sources".[43]

And in fact, the project is aimed at creating new social housing units, at a controlled rent, to be assigned by means of a call for bids[44] (promoted by the City of Florence) to families and households belonging to the so-called "gray bracket," that is, to people who do not meet the access requirements for public housing, but who nonetheless have difficulty finding housing on the open market.

And it is precisely the reference to the subsidized rent that represents, therefore, that balance between social and market, so much so that in this regard it seems interesting to note what is meant by subsidized rent in the notice, both from an objective and subjective point of view.

[42] G. MIMMO, *La rivoluzione del social housing*, in *labsus.org*, 10 december 2010.

[43] M. MUCCHETTI, *Cassa Depositi e Prestiti, il nuovo centauro*, in *Italianieuropei*, no. 2, 2017, who with reference to the hybridism that characterizes Cassa's work points out how this has earned it the name "Centauro ... a little bit bank and a little bit holding company."

[44] Cfr. Comune di Firenze, *Bando pubblico per la formazione di una graduatoria per l'accesso alla locazione di 66 alloggi di edilizia residenziale sociale a canone convenzionato posti in via dell'Osteria*, Firenze, 24 January 2020.

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From the objective point of view this is in fact embodied in the identification of a maximum annual rent for housing[45] that is parameterized to not exceed 30 percent of the total gross income of the household[46].

From the subjective point of view, this instead invests the identification of the perimeter of potential beneficiaries, and calls into question the Isee value, residence or the performance of work activity in the regional territorial area, as well as the openness to new social phenomena, such as newly formed family units, i.e. married couples, couples cohabiting *more uxorio* for at least two years, de facto cohabiting couples or civilly united under Law No. 76 of May 20, 2016, with or without children, the single person with or without fiscally dependent children, and the single person who is the recipient of an enforcement order for the release of housing as part of separation or divorce proceedings[47], and also the so-called couples of future formation[48], i.e., single persons who intend to form a new and autonomous family unit, and who although residing at the time of application in different households, would, in the event of a possible housing assignment, go on to form a new couple within 4 months from the date of the contract stipulation.

[45] It is specified in the call for bids that during the term of the lease, the annual rent will be subject to annual revision (to the extent) of 75 percent of the consumer price index for blue- and white-collar households (Art. 12, c. 5, of the call for bids).

[46] Cfr. Article 12 of the Call for Bids, which specifies that the annual rent for each housing unit and its appurtenances may not exceed 6.60 euros per square meter in accordance with the provisions of the Territorial Agreement on Housing Rents in force for the municipality, and in particular the supplementary agreement signed on 1.2.2019 between the Operator and the most representative tenants' unions in the area.

[47] These may participate in the Call for Bids by submitting a separate application from the original household, and in this case, the subjective eligibility requirements must be met by only the members of the newly formed household (Art. 3 Call).

[48] Cfr. Art. 4 of the Call for Bids according to which the admission requirements must be met only by the individuals who will constitute the prospective couple.

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Thus, the reference is to a very broad perimeter aimed at responding to emerging needs and new social phenomena, as evidenced by the allocation (even) of an additional 5 points for new or soon-to-be-formed families. And this also leads to the point that thanks to the recollection of innovative public-private partnership models, it is possible to provide a response to important social changes and new emerging needs, such as those affecting single-parent families and newly formed families that are increasingly struggling to access credit.

In general, therefore, the project seems to initiate a real experimentation of a community welfare through the implementation of collaborative services and social inclusion activities, in order to improve the living conditions of tenants and of the entire city, just to highlight the strong "territorial" vocation of the intervention, moreover responding to the purpose identified ex lege for the Foundations of banking origin, as an expression of that model of social democracy, called to enhance the solidarity and sustainable development of territories.

This was also achieved through the free use of digital tools, with the provision to all members of the community of the APP "*Abito* in Community", which sees the development of an application for smartphones, which allows free management of services such as car-pooling, buying groups, time bank, space management and event organization, helping tenants to live as neighbours part of a real community, in order to obviate that now unfortunately well-known phenomenon of the c. so-called digital divide, intervening on countering digital poverty as an engine for providing answers to new emerging poverty[49]. This means, therefore, drawing attention to how the digital divide is now increasingly the

[49] There is now a very large gap between the segments of the population that are able to use technologies and the portion of the population that is excluded, which highlights a serious discrimination for the effectiveness of rights that can be exercised online in the digital age. See for further discussion P. PIRAS, *Innovazione tecnologica e divario digitale*, in *Il diritto dell'economia*, year 68, no. 108 (2 2022), 111-134. For general insights on new poverty, Cfr. C. FRANCHINI, *L'intervento pubblico di contrasto alla povertà*, Naples, 2021.

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cause of socioeconomic and cultural divides[50], even in light of the critical issues in the urban-building system that have emerged in the wake of the epidemiological emergency from Covid-19.

If, indeed, human habitat and cities have entered a major crisis after the pandemic, due to the increasingly evident fractures in society that undermine its cohesion, urban planning cannot but take this into account, as a discipline that studies specifically cities and the government of the entire territory, including their development and functioning, as well as planning their renewal and growth, in whole or in part, in a global dimension, in relation to similar subjects.

Following this key of interpretation, it is therefore possible to highlight the strengths of the regeneration and recovery project that involved the former "*Casone*" as a "post pandemic" housing model where architectural designs of innovative, sustainable and digital residential models are sought, to be then complemented by collaborative service formulas, which are the result of both experiences of residence services carried out in a self-managed manner and with the support of Third Sector subjects, in order to promote social cohesion, quality of life and a new quality of collaborative living[51].

[50] Among the groups most threatened by digital exclusion are the elderly (so-called "intergenerational digital divide"), women who are not employed or in special circumstances (so-called "gender digital divide"), immigrants (so-called "linguistic-cultural digital divide"), people with disabilities, people in prison, and in general those who, having low levels of schooling and education, are unable to use IT tools.

[51] In this regard, it is recalled that three social housing communities in Florence, Sesto Fiorentino and Scandicci, with participatory pathways, were established precisely during the hard periods of social distancing. The reference is to the Pieve degli Orti Association, the Stephen Biko Committee and the Osteria 2021 Committee, which have taken possession of the common spaces present in the housing complexes to carry out collaborative activities, such as innovative community pathways, in which the social manager, acting in an integrated and multidisciplinary manner with cooperative and third sector partners, is an integral part of projects that also come to life thanks to

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In fact, the former *Casone* project is part of the panorama of interventions supporting "sustainability", contributing in particular to the achievement of the Sustainable Development Goals of the United Nations 2030 Agenda such as "Zero Poverty", "Reducing inequality within and among Nations", and "Making cities and human settlements inclusive, safe, durable and sustainable".

Last but not least, we would like to emphasize, how the expectations of regeneration did not disappoint in this case even in the timeframe for the realization of such an ambitious project, and this in stark contrast to the well-known phenomenon of delays in the execution and delivery of works that affects interventions put in place by public entities: started in 2019 it was concluded as per the schedule in 2020[52].

In the case of the project of the former *Casone*, renamed *Osteria Social Club*, the urban regeneration put in place thanks to the public-private partnership is in fact aimed at enhancing, amplifying and innovating the housing offer, responding to the needs of specific groups of people in a condition of a different fragility than that which intercepts social housing, also providing for the allocation of spaces for the implementation of community projects managed by Third Sector subjects and more precisely by subjects of horizontal subsidiarity.

That is, it opens to new horizons, whereby the idea of urban regeneration evokes the image "of the end of the territory" which represents, "always figuratively, the breaking down of the boundaries between knowledge and that our time is rather the era of overlapping and

public-private partnerships and investments of resources with social impact. Cfr. S. TOSSANI, *Comunicato stampa FHT - Inaugurazione mostra sulla Qualità abitativa post-pandemia*, Firenze, 25 november 2021.

[52] For more on delays and more generally in public works Cfr. A. CANCRINI, *30 problemi da risolvere nei lavori pubblici*, in *www.formiche.net*, 10 October 2020.

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disciplinary contamination,"[53] in which, therefore, ideas that come from other sciences (from sociology, economics, urban planning, political science, ...) are valued. Urban regeneration passes through the idea of the smart city, as a city that integrates digital technologies into its networks, services and infrastructure to become more efficient and liveable for the benefit of its inhabitants and businesses, and more generally through the idea of a community that finds new opportunities in a reorganization of the city's size.

The result is the idea of a public intervention aimed at the right to housing, which is not reduced to so-called public housing, often located in the suburbs and separated from the rest of the community, going to affect a right to the city in which an attempt is made to enhance the opportunities and potential that can be derived from social housing models as models of social inclusion, recalling the best practices that are being developed in some foreign experiences of real cohousing[54].

3. CONCLUSIONS

Wanting to put forward some concluding reflections, it seems possible to highlight how the examination of these two cases brings before us models of recovery of the existing and urban regeneration that are very different from each other, so much so as to lead us to question whether it is really possible to consider both of these experiences true hypotheses of urban regeneration, as an expression of new models that transcend - at least in part - the

[53] A. MASSERA, *Lo Stato che contratta e che si accorda*, Pisa, 2012.

[54] Countries with housing stock for social rent above the EU28 average are concentrated in Central-Northern Europe (Sweden, Denmark, Czech Republic, Poland, Austria, the Netherlands, France, Finland, Ireland and the United Kingdom).

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individual-private dimension, to go towards a dimension with an urban, building and social character.

And in fact, on the one hand we are faced with the experience of the recovery of the former *Zecca*, whose history seems to focus on the desire to put in place works of modernization of architecturally valuable assets, paying particular attention to the high energy and environmental standards of the building complex, while neglecting that approach to urban "regeneration" and "redevelopment" attentive to a social dimension of recovery, as evidenced by the numerous citizen protests and political interpellations.

On the other hand, we are faced, instead, with the case of the recovery of the former *Casone*, which seems, instead, to put in place a "virtuous" example of *Cassa*'s intervention with a broad urban and social scope, involving new forms of the right to housing as an idea of an urban regeneration that passes through the idea of a smart city and of a community that finds new opportunities in a reorganization of the size of the city as a moment of enhancement of the opportunities that can be derived from forms of social inclusion.

This thus leads to highlight how the relationship between economic interests and urban regeneration operations is difficult, and how regeneration and rehabilitation processes with social and non-speculative purposes are not always the "beacon" of the *Cassa*'s actions, despite its "public mandate" as a national promotional bank.

This calls into question the blurry boundary between public interest and general interest activities, which underlies the idea of the city as a "common good,"[55] so that, in an

[55] For an examination of the commons, see V. CERULLI IRELLI, L. DE LUCIA, *Beni comuni e diritti collettivi. Riflessioni de iure condendo su un dibattito in corso*, in *GiustAmm.it*, 8, 2013, 3; S. RODOTÀ, *I beni comuni. L'inaspettata rinascita degli usi collettivi*, Napoli, 2018; P. MADDALENA, *Cosa sono i beni comuni e come si difendono*, in *AmbienteDiritto*, 2, 2023; G. ARENA, *Beni comuni, la nuova frontiera*, in *www.labsus.org*, 2011; G. ARENA , C. IAIONE (a cura di), *L'Italia dei beni comuni*, Roma, 2012; U. BRECCIA, G. COLOMBINI, E. NAVARRETTA

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attempt to distinguish, we come, in the play on words between social utility and public interest to overlap them, opening up to a holistic vision of regeneration that also embraces the social dimension of living, taking into consideration not only the interior spaces, but also the spaces surrounding the property, that is, those in which community life is fully carried out, those in which networking takes place.

This also leads one to reflect on the profound difference between urban regeneration and redevelopment processes, where the latter could even lead to the social expulsion of the original inhabitants, in the face of the rising market value of the properties in the area and the lack of services and infrastructure necessary for everyday living in the neighbourhood, or even volumetric increases related to redevelopment interventions[56].

All, then, in the name of an economic "regeneration" only, if "regeneration" in these cases is possible to speak of. Where, as in the case of the Reclamation of the *Zecca*, even the intervention of a private entity marked by a strong public mandate runs the risk of clashing between being and having to be, giving rise to an idea of a city made up of segregated and segregating neighbourhoods, failing to acknowledge the teaching of authoritative doctrine that points out that "urban regeneration is today, therefore, *conditio sine qua non* for a human regeneration."[57]

, R. ROMBOLI (a cura di), *I beni comuni*, Pisa, 2015; M. BOMBARDELLI (a cura di), *Prendersi cura dei beni comuni per uscire dalla crisi. Nuove risorse e nuovi modelli di amministrazione*, Napoli, 2016

[56] As has recently emerged in some cases regional urban regeneration laws go on to create additional complexity, not to say real distortions to the very raison d'être of interventions, going on to alter the faces of cities, as in the cases of volumetric incentives related to redevelopment interventions. Cfr. Constitutional Court, Judgment No. 202 of 2021. P. BERDINI, Intervention at the Seminar "*Territorio: un bene (in)comune, conoscere per governare*", Milano, 4 march 2024.

[57] Cfr. P. URBANI, *Sulla pianificazione urbanistica: modalità di acquisizione dei suoli, garanzia dei servizi pubblici e rigenerazione dei beni comuni*, cit. 309 who quotes S. SETTIS.

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So, what considerations can be drawn from such a regeneration intervention?

Firstly, that urban regeneration interventions are not always hinged in a "vision of the city," but in punctual interventions on the existing, in the wake of the so-called *Piano Casa*, which in response to the economic-financial crisis of 2008 accentuated the shift from the idea of the city as a whole to that of the building, providing the possibility of demolition and reconstruction interventions with bonuses, but in derogation of urban planning instruments and building regulations (as in the case of the 2-story elevation of the recovery of the *Zecca* building)[58].

Secondly, that such operations are left in the hands of the needs of the market and not of the communities of reference, and that public powers are increasingly "weak contractors" in the face of strong private powers, which paradoxically seem to include even those private entities that operate with a "public mandate," such as the *Cassa Depositi e Prestiti* company.

This demonstrates that the underlying problem is precisely that of the absence of a public vision of the city, in which the recourse to punctual interventions prevails, not capable of measuring the problem of achieving urban quality, even if only at the neighbourhood level, not structured according to that general vision made up of all those conditions aimed at improving the city as a whole, such as concentration of services and the set of social, cultural and environmental infrastructures.

To all this is added that urban regeneration interventions such as that of the *Zecca* Palace, not being an expression of an overall vision that takes into account public participation, also go on to be characterized by a lack of transparency, for the reason that it

[58] P. URBANI, *Ripensare la città o la città contemporanea? Note a margine*, in *Dir. e proc. amm.*, No. 4, 2021, 831-859, esp. 842-846, the a. points out that the multi-purpose conversion of the building saw the addition of a 20 percent volume premium thanks to the so-called Piano Casa.

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does not appear easy to find the acts of such proceedings on the CDP website, let alone on the websites of the municipalities involved[59].

The hope, therefore, is that the implementation of the NRRP may turn out to be an opportunity to enact urban regeneration processes that take into account new models of living at the national level, given that there are many measures that affect these areas[60], among which it is necessary to recall in particular measure 5, in component 2, entitled "infrastructure, families, units and third sector," in which several investments are linked to urban regeneration projects, integrated urban plans and the so-called PINQuA, the National Innovative Program for Housing Quality[61].

Implementing urban regeneration interventions as an interpenetration of the social, environmental, cultural, building and urban planning dimensions not only falls within the scope of art. 41 and 42 of the Constitution, but it also goes to affect and guarantee, on a territorial scale, conditions of substantial equality, as measures through which we aim to

[59] This is, it is clear, a certainly pathological aspect that contrasts with the evolution of transparency and anti-corruption legislation, which highlights, instead, the strong value of the principles of transparency, proceduralism and reviewability, which although they represent typically public constraints, should also direct those entities, such as CDP, whose actions do not lend themselves to be read according to the "great dichotomy" public interests and private interests

[60] For example, Mission 4, Component 1 - Investment 1.7, which affects the problem of housing for college students.

[61] Cfr. Ministry of Infrastructure and Sustainable Mobility Decree No. 383 of October 7, 2021 approving the lists of beneficiaries and proposals submitted by Regions, Municipalities and Metropolitan Cities, for the implementation of the National Innovative Program for Housing Quality (PINQuA). The interventions envisaged by the decree are aimed at reducing housing hardship by increasing public housing stock, regenerating the socioeconomic fabric of urban centers, and improving the accessibility, functionality and safety of degraded spaces and places, often located in the suburbs, totaling 2.82 billion euros. The lists are drawn up taking into account the reservation of 40 percent of the resources for the regions of the South and the obligation to fund at least one proposal from each region.

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remove obstacles of an economic and social order, necessary to guarantee the essential rights that find their realization in the urban dimension[62].

Reference to the national level could in fact lead to intervention in the current "patchy" regional context, in which, for example, citizen participation and the model of participatory and supportive urban planning is left to the sensitivity of individual regions, or even more often of individual public-private collaborations, affecting increasingly isolated experiences, such as the virtuous case of the *Osteria Social Club* in Florence[63].

Also interesting in this regard are the considerations of those in the doctrine who have noted in relation to public assets of architectural merit, built in recent times, and now in a state of degradation or abandonment, how "tools of protection can be recovered from the theory of common goods", as assets that realize the interests of a community and are functional to the exercise of fundamental rights and the development of individual citizens, given that once the architecturally valuable artifact is qualified in terms of common good, the administration could promote the involvement, through transparent and participatory procedures, of local associations or committees, in implementation of the principle of horizontal subsidiarity. So as to "return" in this way the asset to the community, while ensuring its preservation, re-functionalization, regeneration of the same and the neighbouring area[64].

[62] A. GIUSTI, *Che cos'è la rigenerazione urbana*, in AA.VV., *Dossier IFEL - Riprendiamoci la città*, Roma, 2023.

[63] A. SIMONATI, *Rigenerazione urbana, politiche di sicurezza e governo del territorio: quale ruolo per la cittadinanza?*, in *Riv. giur. edilizia*, 2019, 31.

[64] M. CALABRÒ, *Nuove prospettive di tutela per l'architettura contemporanea: il ruolo dell'urbanistica*, in *Rivista Giuridica dell'Edilizia*, n. 2, 2023.

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Certainly, given the complexity of such a paradigm shift in the public-private governance of cities[65], it only remains to recall that famous popular saying, which reminds us that "there is a sea between saying and doing", and that, therefore, there is still a long way to go toward a sustainable and visible city[66].

Abstract. *The* Cassa Depositi e Prestiti *(CDP) plays a crucial role in urban regeneration processes, focusing on actions and interventions aimed at urban, environmental, and social regeneration of run-down urban areas. The CDP's multiple guises demonstrate its complexity as a state-controlled private actor, with its role ranging from financier to promoter and consultant. In this article, we present two different cases of urban regeneration: the recovery of the* Istituto Poligrafico e Zecca dello Stato *in Rome and the* Osteria Social Club *in Florence. The recovery of the former Zecca seems to focus more on modernizing architecturally valuable assets. It paid particular attention to the energy and environmental standards of the building complex, while neglecting, in part, the social dimension of recovery, marked by concepts of urban "regeneration" and "redevelopment". Numerous citizen protests and political interpellations followed the intervention, highlighting these limitations. On the other hand, the recovery of the former "*Casone*" is a "virtuous" example of* Cassa*'s intervention, displaying a broader urban and social scope. It involved new forms of community participation and inclusion, linking the right to housing to urban regenerations in the context of a smart city.*

[65] The hope, therefore, is that it is still possible in the case of the former Zecca project that is still in the process of completion (due to countless delays largely due to community opposition) to put in place a new model of urban development aimed at giving effect to a "good" public-private governance of the city based on community involvement, so that Rome, like many large cities is not the city of unfinished and unsustainable works.

[66] V. MANZETTI, G. COLOMBINI, *Una chiacchierata (a due voci) su urbanistica e città (in)visibili*, in G. Corso, M. Immordino, *Scritti in onore di Filippo Salvia*, 231-247.

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PUBLIC PROCUREMENT PLATFORMS IN SPAIN: DECENTRALISATION AND INTEROPERABILITY[1]

Javier MIRANZO-DÍAZ[2]

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[1] This paper has been developed within the framework of the research project "Desafíos estratégicos de la contratación pública en la era de la 4a revolución industrial: sostenibilidad, gobernanza e inteligencia artificial» (PID2020-117707RB-I00), financed by the Science Ministry of Spain.

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1. INTRODUCTION

Digital procurement is closely linked to the wider notion of electronic or digital Administration, although with certain notable specialties and particularities[3]. The process of promoting and regulating e-Government experienced a turning point in Spain with the approval of the Act 11/2007, of 22 June, regarding citizens' electronic access to public services. For the first time, this regulation included the rights of citizens in their relations with the Administration and the challenges posed by digitalisation from a legal point of view[4]. Subsequently, complementary regulations, such as the Act 56/2007, of 20 December, on Measures to Promote the Information Society, or Act 25/2013, on the promotion of electronic invoicing and the creation of the accounting register of invoices in the Public Sector[5], had a clear impact in the procurement sector. Finally, the consolidation of the current regulations on electronic Administration came with the approval of Acts 39/2015 and 40/2015, which integrated within the basic general regulations of the Public Administrations

[3] R. MARTÍNEZ GUTIÉRREZ, *La contratación pública electrónica. Análisis y propuestas de transposición de las Directivas Comunitarias de 2014*, Tirant lo Blanch, València, 2015, 286.

[4] I. MARTÍN DELGADO, *La administración electrónica como problema actual para la investigación y la docencia en el Derecho Administrativo*, in *Revista Aragonesa de Administración Pública*, 180, 2009, 353-386. See also Id., *Naturaleza, concepto y régimen jurídico de la actuación administrativa automatizada*, in *Revista de Administración Pública*, 180, 2009, 353-386.

[5] A. GARCÍA JIMÉNEZ, *La articulación de la factura electrónica en la contratación pública local*, in *Revista catalana de dret públic*, 49, 2014, 114-129.

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all those issues related to the Electronic Administration previously contained in Law 11/2007. This Acts also added other novelties regarding electronic signatures, mandatory electronic relations between Public Administrations and legal entities, as well as certain modifications in relation to deadlines and notifications[6], which have been fully consolidated after the approval of the Royal Decree 203/2021, of March 30, 2021, approving the Regulations on the performance and functioning of the public sector by electronic means.

E-procurement, in addition to being affected by the aforementioned provisions, underwent a somewhat parallel development[7]. Thus, the currently repealed Law 30/2007, of October 30, 2007, on Public Sector Contracts, included some important provisions that represent the first steps in electronic public procurement[8]. With regard to the issues discussed in the present paper, we must highlight that this regulation created in its article 309 the State Procurement Platform (Plataforma de Contratación del Estado) to allow "to publicize on the web the calls for tenders and their results, any information they consider relevant related to the contracts they conclude, as well as to provide other complementary services associated with the computer processing of these data".

However, for none of the above regulations the technological perspective was of paramount importance, so that electronic contracting and the use of procurement platforms

[6] A. CERRILLO I MARTÍNEZ-S. GONZÁLEZ AGUILERA-S. MORO CORDERO, *A las puertas de la administración digital. Una guía detallada para la aplicación de las Leyes,* 39, 40, 2015, Madrid, INAP.

[7] I. MARTÍN DELGADO (ed.), *Contratación pública vs. Administración electrónica. Hacia la plena aplicabilidad de la LAE en materia de contratación pública* (J. M. GIMENO FELIÚ dir.), *Observatorio de los contratos públicos 2010,* Madrid, Civitas, 2011.

[8] J. A. MORENO MOLINA, *Administración electrónica y contratación pública* (J. L. PIÑAR MAÑAS dir.), *Administración electrónica y ciudadanos*, Madrid, Civitas, 2011, 743-772.

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found their definitive boost with the approval of the 2014 package of directives[9], which together with their transposition by the LCSP make up the current main legal framework for electronic contracting (Moreno Molina, 2014: 19).

2. REGULATION OF PROCUREMENT PLATFORMS AT THE NATIONAL LEVEL

As it has been mentioned, the basic reference standard in the field of public procurement is Act 9/2017, of 8 November, on Public Sector Contracts. Leaving aside the poor legislative technique in the regulation of electronic contracting denounced by the doctrine[10], the aspects related to the Public Sector Contracting Platform (PCSP) are mainly contained in article 347, which provides that an electronic platform will be made available to all public sector contracting bodies that would allow the distribution of their contractor profiles through a unique website[11]. In this sense, it obliges all contracting entities of the state public sector to host their contractor profiles on this central platform with the aim of ensuring a minimum unification to guarantee effective transparency and eradicate the previous

[9] J. VALERO TORRIJOS, *La transformación en España de la normativa europea sobre contratación pública electrónica: una oportunidad para la innovación tecnológica* (I. MARTÍN DELGADO eds.), *La nueva contratación pública: actas del I Congreso de la Red Internacional de Derecho Europeo*, *Red Internacional de Derecho Europeo*, 2015, 29-46.

[10] J. M. GIMENO FELIÚ, *La transposición de las directivas de contratación pública en España: una primera valoración de sus principales novedades*, in *Documentación Administrativa, Nueva Época*, 4, 2017, 7-30.

[11] I. MARTÍN DELGADO (eds.), *Contratación pública electrónica e innovación administrativa,* (M. Fernández Salmerón-R. Martínez Gutiérrez dir.), *Transparencia, innovación y buen gobierno en la contratación pública,* Valencia, Tirant Lo Blanch, 2018, 75-100.

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discrimination[12]. At central State level, therefore, the relationship between the contractor profile and the PCSP (Plataforma de Contratación del Sector Público, or Public Sectro Procurement Platform) is marked by the need to guarantee a minimum interoperability and efficiency in active disclosure and transparency[13], which is materialized in the need to publish the tender notice in the contractor profile hosted on the Public Sector Procurement Platform. However, due to the decentralised nature of the Spanish state, the national law expressly enables Autonomous Communities (sub-central regions) to create equivalent or similar information services. In these cases, the regional public authorities would publish the tender notices and other documents in the regional platforms, which must be interlinked with State Platform. The failure to comply with this requirement, either by absence of publication or by lack of connectivity with the Central Government platform, would render the tender null and void (Article 39.2c).

It is therefore required for the contracting authorities' profiles be hosted in the national platform or in the regional contracting platform (347.2 and 347.3 LCSP). And in order to guarantee this unity and avoid the dissemination of essential information, it is foreseen that the Autonomous Communities public sector, in any case, must publish, either directly or – in the event that they have their own regional information services – by interconnection with electronic data aggregation devices, the call for tenders and their results on the Public Sector Procurement Platform. Local authorities, for their part, will be able to choose, as mentioned, between hosting their profiles on the regional or national platform (in

[12] A. CERRILLO I MARTÍNEZ, *Las compras abiertas y la prevención de la corrupción. Gestión y Análisis de Políticas Públicas,* 2016, 15.

[13] I. GALLEGO CÓRCOLES, *Contratación pública e innovación tecnológica*, in *Revista Española de Derecho Administrativo,* 184, 2017, 193-219.

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case of coexistence), so that the use of regional platforms excludes any obligation with respect to the PCSP for local contracting entities.

Thus, the LCSP creates a basic legal framework that allows the development of regional platforms provided that the following requirements are met:

(1) there must be a time-stamping system that allows to certify public disclosure of the information included therein (article 347.4 LCSP);

(2) interested parties must be able to access the Public Sector Procurement Platform through a single portal (art. 347.6 LCSP);

(3) the information should be published in open and reusable standards (art. 347.8 LCSP);

(4) regional platforms should host their procurement profiles on a mandatory basis in the PCSP, either by integration or interconnection.

Finally, it should be clarified that these paragraphs from Article 347 constitute basic legislation within the meaning of Article 149.1.18 of the Spanish Constitution regarding 'bases of the legal regime of public administrations'. This means that this content is fully applicable to any Autonomous Community and the local authorities, and that no regional or local regulation could contradict it or preclude its application. However, paragraphs 1 (which creates obligations for the Ministry of Finance to create and make available to contracting authorities a free electronic platform), 2 (on the obligation for the state public sector to host its profiles in the PCSP) and 7 (on the specifications relating to the operation and use of the services provided by the Public Sector Procurement Platform) of Article 347 are of not considered basic legislation. A fact that, on the other hand, does not have transcendental effects since, as has been explained, these sections regulate obligations or precepts expressly addressed to the Central Government Administration.

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3. THE INFORMATION COLLECTED IN THE PLATFORM: THE CONTRACTOR'S PROFILE

All that is described in the previous section is, essentially, what the Spanish Public Procurement says about the contracting platform. There is no direct reference, for example, to the content of the information that is collected by the platform or the way it should be done. These details are contained in the provisions that regulate the contractors' profiles and websites. The regulator seems to assume that, provided that article 347 compels to host the contracting profile within the national or one of the subcentral platforms, there is no need for clarification.

The regulation contained in article 63 of the of the Public Procurement Act indicates that it is mandatory to publish the following information

> a) All information contained in the contractor profiles shall be published in open and reusable formats, and shall remain accessible to the public for a period of time not less than 5 years, without prejudice to the fact that access to previous files may be allowed upon requests for information. This obligation, however, is being generally unobserved –probably due to the lack of further specifications, as we will explain later on–, and most of the information contained in the contracting websites is still provided in potentially non-readable formats such as PDF.
>
> b) The memorandum justifying the contract, the report of insufficent resources in the case of service contracts, the justification of the procedure used for the award of the contract when a procedure is other than the open or restricted procedure, the administrative specifications and the technical requirements governing the contract or equivalent documents.
>
> c) The detailed subject matter of the contract, its duration, the base tender budget and the award amount, including Value Added Tax.
>
> d) Notices of prior information, calls for tenders, award and conclusion of contracts, notices of modification and their justification.

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e) The means by which, if any, the contract has been advertised and the links to those publications.

f) The number and identity of the tenderers participating in the procedure, as well as all the minutes of the contracting committee relating to the award procedure or, if the committee does not act, the decisions of the relevant contracting unit or contracting authority.

g)The report assessing the award criteria quantifiable by means of a value judgement of each of the tenders

h) Where applicable, the reports on the bids made in the presumption of abnormality.

i) In any case, the resolution awarding the contract, with the information detailed in article 151.2 of the Public Procurement Act:

In the case of rejected candidates, a summary statement of the reasons why their candidatures were rejected.

With regard to tenderers excluded from the award procedure, the reasons why their tender has not been accepted, including, in the cases referred to in Article 126(7) and (8), the reasons for the decision of non-equivalence or the decision that the works, supplies or services do not comply with the performance requirements or functional requirements; and a breakdown of the valuations assigned to the various bidders, including the successful bidder.

In any event, the name of the successful tenderer, the characteristics and advantages of the successful tenderer's proposal determining whether the successful tenderer's tender has been selected in preference to those submitted by the other tenderers whose tenders have been accepted; and, where appropriate, the conduct of negotiations or dialogue with tenderers.

j) The decision not to award or conclude the contract, the withdrawal of the award procedure, the declaration of nullity, as well as the lodging of appeals and the possible suspension of contracts on the grounds of the lodging of appeals.

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k) Information relating to minor contracts shall be published at least quarterly. The information to be published for this type of contract will be, at least, its purpose, duration, the amount of the award, including Value Added Tax, and the identity of the successful tenderer, with the contracts being ordered by the identity of the successful tenderer. Contracts with an estimated value of less than five thousand euros are exempt from publication, provided that the payment system used by the contracting authorities is a fixed cash advance or another similar system to make smaller payments.

l) The annulled procedures.

m) The composition of the contracting committees assisting the contracting authorities, as well as the designation of the members of the committee of experts or of the specialized technical bodies for the application of award criteria that depend on a value judgement in the procedures in which they are necessary.

n) In any case, the position of the members of the contracting committees and the committees of experts must be published, and generic or indeterminate allusions or references that refer only to the Administration, body or entity that they represent or in which they provide their services are not permitted. The reasons for the selection of the selected external advisors will also be published (art. 115.1).

o) The formalisation of orders to in house resources whose amount is greater than 50,000 euros, excluding VAT. Information relating to orders of more than €5,000 must be published at least quarterly. The information to be published for this type of assignment will be, at least, its purpose, duration, applicable rates and the identity of the media recipient of the order, ordering the orders by the identity of the own medium.

p) Contracting authorities that have amended a contract during its term, regardless of whether or not it is subject to harmonised regulation and the reason justifying the modification, must in any case publish a notice of modification in the contracting authority's contractor profile within 5 days of its approval; which must be

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accompanied by the contractor's allegations and all the reports that, if any, have been obtained prior to its approval, including those provided by the successful bidder or those issued by the contracting authority itself (article 207.3 Public Procurement Act).

However, these transparency obligations only cover the publicity that serves competition or remedies –towards potential or excluded bidders– and direct transparency –towards interested citizens–, forgetting a vital role of information in nowadays Administration: oversight, evaluation and analysis. The obligations mentioned in previous pages leads to a set of quite complete, but unstructured and disseminated information.

These public tasks require big sets of readable data to be analysed, and this would entail a system to collect, process and classify information from the procurement documents. This is partially being done by the Central Administration in different initiatives through the central contracting platform, requiring mandatory fields with key information to be fulfilled by the contracting authorities when providing the information to the platform, generating readable data.

But the problem remains that there is no real regulation as to which information should be present in the national platform and in which formats, neither legal consequences of non-compliance. Therefore, most of the information provided by contractors' profiles is frequently inf PDF or other non-reusable and nonreadable formats. Consequently, the open data contained in the national platform is frequently incomplete and access to these PDF documents is highly problematic to automate. Further legal and technical development when it comes to the collecting and processing of open and reusable data in public procurement might be needed.

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4. THE ROLE OF SUBNATIONAL PROCUREMENT PLATFORMS IN SPAIN

At regional or subcentral level, there are some regulatory and/or administrative initiatives carried out by different autonomous communities that should be pointed out. In the development or execution of the provisions of the national Public Procurement Act some of these territories have created their own regional platforms[14]. However, there is a significant asymmetry when it comes to the regulatory and administrative development among regional contracting platforms, so that we can divide the experiences into different categories:

- The first classification would divide them depending on their relationship with the national platform (PCSP): regional platforms that replace the PCSP vs. those with complementary nature.

- The second category would classify them depending on their relationship with the local public sector: there are some regional platforms with a vocation to absorb the local public sector vs. those for exclusive use of the regional administration.

Thus, within the first classification, some Autonomous Communities, such as the Basque Country, Madrid, Navarre or Catalonia, have created highly developed procurement platforms, which have the expectation to substitute the State's PCSP not only as a tool for disseminating information, but also as a true management tool for the electronic public procurement procedure. In the Basque Country, for example, the hole procedure is managed through the regional platform, including loading and submission of bids. This system also makes it possible to implement the opening of the bids electronically, to award the contracts,

[14] M. A. BERNAL BLAY, *El desarrollo autonómico de la normativa sobre contratos públicos,* in *Revista Aragonesa de Administración Pública*, XVIII, 2018, 91-138.

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or carry out the final stage of sign or agreement of the contract. It is also provided with a robust training and supporting activity both for contracting entities and tenderers. Madrid, for its part, has a Public Procurement Portal that is regulated by the Decree 69/2017, of July 18, 2017, which also acts as a true contracting platform for the processing of public contracts that incorporates the means and processes that allow the fully electronic processing of procurement procedures and the use of electronic media in the acts of administrative bodies. tenderers and contractors (Article 4.3).

Other autonomous communities, such as Aragon[15] or Castilla-La Mancha[16], have created applications or platforms that act as a complement to the state platform, so that they use some elements of the state platform and complement it with other more or less accessory tools; but in no way they can replace the central platform.

On the other hand, in a second category, there are also important differences in the strategy of implementing regional platforms with respect to its relation to local authorities. Thus, some cases show a far-reaching inclination towards the absorption of local entities into the regional corporate model (Navarre or Catalonia). In these cases, the regional platforms are intended to appeal local contracting authorities towards the regional platform, displacing thus the national platform. Meanwhile, others are more neutral in this aspect – Euskadi or Aragon[17]. A third group of regions actually boost their local public sector to use the State platform by expressly excluding the use of the regional platform by local authorities (Castilla-

[15] Such services include, for example, the Tender Management tool, access to the Official Register of Bidders, etc.

[16] Decree 28/2018, of May 15, 2018, provides for an electronic management system for procurement files – integrated into the PCSP (article 7).

[17] Article 68.1 of Decree 116/2016 of 27 July 2016 on the public sector procurement regime of the Autonomous Community of the Basque Country provides for the creation of the Kontratazio Publikoa Euskadin-Public Procurement in the Basque Country Platform, the use of which is mandatory for regional public sector contracting bodies and voluntary for local entities.

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La Mancha, Madrid[18], among others). Navarre, for example, which by virtue of its regional regime has exclusive competence in the matter of contracts and administrative concessions with no limit other than respect for the essential principles of the State legislation –therefore with slightly wider powers than other regions in Spain–, provides in article 95.1 of its Act 2/2018, that the Navarre Electronic Bidding Platform is the official means for the submission of offers and requests for participation in the tenders of entities subject to this law, which includes, according to its article 4.1.c) all the Local Entities of Navarre and their Autonomous Bodies. In other words, Navarre chooses, in the exercise of its exclusive powers, to impose the express obligation for local entities to use the regional platform, which will not be able to choose, therefore, to host their contractor profile in the national platform. This element, as mentioned, cannot be adopted, at least in this way, by other autonomous communities, since the Public Procurement Act expressly includes freedom of choice at the local level. This point, however, will be developed later.

Catalonia, for its part, has adopted some measures in this direction that should be highlighted. The Catalan Regulation VEH/172/2017, of July 25, 2017, approving the applications of the Public Procurement Services Platform, applies, at least partially, to all Catalan local entities and to the entire Catalan public sector on a mandatory basis, as can be seen from article 2.2, which provides that the provisions of the Catalan platform will be applicable to the local administration in Catalonia, as well as the entities of its public sector. However, Catalonia does not have full or exclusive competences in public procurement matter as the Basque Country has. Therefore, the law maintains the voluntary nature of the adhesion by local entities to the regional platform. Nevertheless, the act includes an

[18] The Madrid Decree does not refer to the possibility of adhesion of local entities to its scope of application (Article 1), as other similar regulations do. Although it could be understood that the option of hosting their contractor profiles would apply, given the silence of the Madrid Development Decree, based on article 347.3 of the LCSP, the truth is that this option has not been enabled, so that local entities in Madrid must host their contractor profiles in the PCSP.

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obligation for local authorities to inform the Catalan government of the contracts formalized and those that are in tender stage or in other contractual phases. Likewise, the Transparency Portal must facilitate the direct and dynamic consultation of the Registry and the Platform – as it follows from Catalan Act 19/2014, de transparència, accés a la informació pública i bon govern (of transparency, access to information and good government).

In this way, although Catalan local entities are not obliged to host their contractor profiles directly in the Catalan platform, they do have to link their transparency portal, even if it is through interconnection or aggregation for the publication of the information required by Law 19/2014, in the Catalan platform. This means that, if a local entity chose to host its contractor profile in the state platform, it would also have to link it through interconnection for these information purposes with the Catalan platform, something that does not happen in the case of choosing the regional platform, which exempts it from interconnecting its contractor's profile with the national platform since such interconnection is done through the regional platform itself. This, in practice, generates a clear disincentive to host the contractor's profile in the state platform, modulating or conditioning the freedom proclaimed in article 347 of the LCSP. These are measures that, although indirectly, show a clear vocation to cover the local sector in the expansion of the regional platform through material requirements for information and transparency.

In short, we find an important variety of initiatives related to the creation of regional contracting platforms, with very unequal particular characteristics and equally differentiated strategic functions. From this brief analysis of regional experiences, we can draw two main conclusions. On the one hand, the asymmetry and diversity in the subnational reality of the contracting platforms in Spain, and on the other, that far from the possible configuration of the contracting platform as a mere support or infrastructure, its legal and administrative configuration is closely linked to elements of institutional strategy, which are linked to organizational and administrative autonomy.

Faced with this situation, however, two major questions arise with regard to the distribution of competences when creating and regulating platforms at the regional level:

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(1) whether there is any limit to the regional initiative to create the platform or the contracting applications that make it up;

(2) whether, once created, there are barriers to their scope, in particular their relationship with the local public sector.

5. LIMITS ON THE CREATION AND USE OF SUB-NATIONAL PLATFORMS

As we have seen, the Spanish Public Procurement Act limits itself to providing, with respect to possible regional platforms, that they must have a system of sealing in time that allows the start of the public dissemination of the information included to be reliably accredited (article 347.4 LCSP) and to regulate their interconnection relationship with the national platform. This absence of criteria, indicators or prescriptions in the Public Procurement Act on the limits and scope of the autonomy for development, as well as the type of electronic procurement platform that must or may be used by contracting authorities that do not opt for the state platform, means that the possibilities for the development and application of this precept are wide but also uncertain[19].

Despite the apparent freedom that, as we have explained, Article 347 of the Public Procurement Act seems to offer to the Autonomous Communities to create their own procurement platforms, there are other possible limitations in national regulations that must be considered. Particularly those arising from the final provision 4.1 of the Public

[19] A. SÁNCHEZ GARCÍA, *Posibilidades y límites de las medidas de cooperación y coordinación interadministrativa en materia de contratación pública electronica*, in *Gabilex: Revista del Gabinete Jurídico de Castilla-La Mancha*, 25, 2021a, 15-112.

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Procurement Act, which provides for the supplementary application of Act 39/2015 and Act 40/2015[20], is of paramount importance. The interpretation of the distribution of competences of the Autonomous Communities in the field of contracting platforms will depend, to a large extent, on this relationship with general legislation, and particularly with Act 39/2015 (Common Administrative Procedure Act) and Act 40/2015 (Legal Regimen of the Public Sector Act).

In particular, the decision to create or use a new platform, regardless of whether it is a public or private platform, must first comply with the provisions of Article 157 Legal Regimen of the Public Sector Act. Specifically, article 157.3 requires that Public Administrations, prior to the acquisition of a computer application, must consult the general directory of applications, dependent on the General State Administration, to verify if there are public solutions available for its reuse. And in the event that there is a solution available for total or partial reuse, Public Administrations will be obliged to use it, unless a decision not to reuse is justified in terms of efficiency in accordance with article 7 of the Budgetary Stability and Financial Sustainability Act (2012). Additionally, article 64.5 of Royal Decree 203/2021 of 30 March 2021, which approves the Regulations on the performance and functioning of the public sector by electronic means, essentially reproduces this obligation, and adds that "the conclusions regarding the outcome of said consultation [...] will be incorporated into the administrative file."

A very similar provision can be found in the second additional provision of the Common Administrative Procedure Act, which states that the Autonomous Communities and Local Entities "may voluntarily adhere to the platforms and registers established for this purpose by the General State Administration through electronic means. Its non-adherence must be justified in terms of efficiency in accordance with article 7 of Organic Law 2/2012,

[20] J. L. DE JUAN CASERO, *La utilización de los medios electrónicos en el procedimiento de contratación: el expediente electrónico de contratació*, in C. CAMPOS ACUÑA eds., *La nueva contratación pública en el ámbito local. Claves para una contratación electrónica y transparente,* Madrid, Wolters Kluwer, 2018.

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of 27 April, on Budgetary Stability and Financial Sustainability. Moreover, this additional provision imposes the obligation that the justification for the non-use of any of the existing platforms must be made "before the Ministry of Finance and Public Administrations", which raises greater interpretative problems related to the political autonomy and decentralisation of territorial Administrations proclaimed in the Spanish Constitution, for it can be interpreted as granting the Central Administration control over the autonomy of the rest of the regional administrations[21].

However, this apparent prioritization of the use of pre-existing and available applications was somewhat nuanced after the Constitutional Court's pronouncement on the constitutionality of these precepts in its judgments 132/2018, of December 13 – on article 157.3 of the Legal Regimen of the Public Sector Act– and Judgment 55/2018, of May 24, 2018 – on the second additional provision of the Common Administrative Procedure Act.

In these pronouncements, the Constitutional Court understands that this requirement, must be interpreted in a certain way in order to be understood as constitutional. Thus, as established by the Constitutional Court, the requirement to motivate the non-use of pre-existing tools does not require a justification of opportunity or judgement of suitability, but rather: (1) a reasoned explanation that the expenditures to be incurred do not destabilize the public accounts or exceed the deficit limits; and on the other hand, (2) the formal existence of an equally reasoned weighing of the specific benefits and costs (not only economic) resulting from operating with one's own platform compared to the benefits and costs (not only economic) of working with common or central electronic resources[22].

[21] J. FONDEVILA ANTOLÍN, *Estado de Derecho o imperium de la deslealtad institucional: breves consideraciones sobre la imposición por el Estado central a las Comunidades Autónomas de su adhesión a sistemas y plataformas electrónicas estatales„* in I. MARTÍN DELGADO ed., *La reforma de la Administración electrónica: Una oportunidad para la innovación desde el Derecho*, Madrid, INAP, 2017, p. 527-528.

[22] STC 132/2018, of 13 December 2018.

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It has therefore been understood that the requirement to state reasons laid down in those provisions, from a substantive point of view, merely reiterates or recalls the budgetary and efficiency obligations already provided for in the legal system, without imposing any additional obligation ex novo. Moreover, in any case, the supervision, control or verification of compliance with these requirements will not correspond In any case to the National Administration, but to the judges and courts of the contentious-administrative jurisdiction, as well as to the bodies responsible for the audit (external or internal) of public accounts[23].

The Constitutional Court thus converts these requirements into purely formal ones, which can only be reviewed in terms of budgetary justification – and only by the courts – and which, according to the Constitutional Court, would allow the adoption of the regional or local decision to create or use a regional platform even "even if the State considers the reasons given to be insufficient[24]". There is, therefore, an obligation to give reasons for the decision to develop its own regional or local platform, which cannot, however, be audited except in accordance with the budgetary legislation in force and by the competent bodies. Although these requirements apparently seek to give a certain precedence to the public model, and within it to the centralised model, the applicable administrative regulations, interpreted as a whole and in the light of constitutional jurisprudence, grant wide latitude to the contracting authorities to opt for a regional or local public corporate model or for a private outsourcing of the service.

After what has been said so far, we can make a series of statements.

[23] STC 55/2018, of 24 May 2018. See also A. SÁNCHEZ GARCÍA, *Posibilidades y límites de las medidas de cooperación y coordinación interadministrativa en materia de contratación pública electronica*, in *Gabilex: Revista del Gabinete Jurídico de Castilla-La Mancha,* cit., 15-112.

[24] STC 55/2018, of 24 May 2018.

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1. The first is that in Spain there is a strategic component that procurement platforms can engender seems undeniable. From what has been presented in this paper in relation to the different models of regional development, it seems evident that the use of one or the other platform has important strategic components in terms of leadership of the Administrations, corporate image and influence over the local public sector.

2. Secondly, from the Spanish Constitutional Court's case law is can be drawn that the creation or use of one or another digital instrument is part of the organisational autonomy of each Administration, which is only restricted by certain requirements and obligations of a constitutional nature.

3. Thirdly, this freedom in terms of the design of contracting platforms may be limited through regulatory precepts, provided that the requirements imposed are acted on under the principle of proportionality, that administrative autonomy is not emptied and that it has legitimate objectives. This, moreover, has been the ultimate argument of the Constitutional Court to conclude the constitutionality of article 157.3 of the Common Administrative Procedure Act and Second Additional Disposition of the Legal Regimen of the Public Sector Act: these are restrictions on the capacity of self-organization of the Autonomous Communities and local entities, but they are constitutional and consistent with the legal system insofar as they derive from the Constitution itself or from perfectly legitimate legal provisions and insofar as the measures do not go beyond what is necessary to achieve these constitutional objectives[25].

[25] Judgment TC 132/2018, of 13 December.

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6. HORIZONTAL COOPERATION IN THE DEVELOPMENT AND USE OF PROCUREMENT PLATFORMS BETWEEN ADMINISTRATIONS

There is, in sum a broad freedom to create platforms, which derives in a decentralized character in the contracting platforms system in Spain. Faced this situation and the risk of dissemination of information, the system also contains some basic instruments that aim to guarantee a minimum interoperability (publication obligations) and try to promote the efficient reuse of existing digital tools (obligation to consult the application registry[26]). In the event of this reuse, in order to materialize, it must be supported by certain legal-administrative tools aimed at regulating the relations of the Administrations, mainly cooperation techniques[27]. It requires, therefore, an interaction of two entities consisting of two differentiated services: (1) on the one hand, a transfer – in this case free of charge – of the use of publicly owned software and/or hardware; and (2) secondly, technical assistance for installation, support and maintenance.

With regard to the first question, we must remember, in this regard, that the applications developed by the Public Administration, such as the national procurement platform or the regional platforms, are publicly owned, and are therefore subject to the Assets of the Public Administrations Act (33/2003), which in its article 145 provides that the assets and economic rights of the General State Administration may be transferred free of charge. for the realization of purposes of public utility or social interest of its competence, to Autonomous Communities, local entities, public foundations or associations declared of

[26] C. MORO-A. MARÍA, *La interoperabilidad como necesidad*, in I. MARTÍN DELGADO ed., *La reforma de la Administración electrónica: Una oportunidad para la innovación desde el Derecho*, Madrid, INAP, 2017, 519-527.

[27] M. SÁNCHEZ MORÓN, *La coordinación administrativa como concepto jurídic,* in *Revista de documentación administrativa*, 230-231, 1992, 11-30.

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public utility, and that this transfer may have as its object the ownership of the good or right or only its use[28]. What article 157.3 of the Legal Regimen of the Public Sector Act does, therefore, is to convert this option of transfer of use into a preferential option when it comes to publicly owned computer applications, including, of course, the state national public procurement platform or the regional platforms.

With regard to the second of the services to be provided, i.e., the complementary technical assistance to the transfer of the software itself, we must mention that, in addition to the interpretations that can be directly derived from article 157.3 of the Legal Regimen of the Public Sector Act does, the second additional provision from the Common Administrative Procedure, and the rest of the aforementioned precepts, this legal relationship derives from the principles of Administrative Law contained in article 103.2 of the Spanish Constitution and article 3.1.k) of the Legal Regimen of the Public Sector Act: collaboration and cooperation – which derive, in turn, from the constitutional principles of administrative cooperation contained, among others, in article 145.2 of the Constitution. They provide that administrations should assist each other in the fulfilment of the general interest and cooperate with each other to that end. Specifically, it should be recalled that the provision of applications (software and hardware) and the technical assistance necessary for their installation and operation of a contracting platform is contained within the cooperation techniques of article 144.1.d) of the Legal Regimen of the Public Sector Act, which provides as such the provision of material, economic or personal resources to other Public Administrations[29]. In addition, paragraph (g) of the same provision also recognises the

[28] R. FERNÁNDEZ ACEVEDO, *La problemática cuestión de la rentabilidad en la explotación de los bienes y derechos patrimoniales. Su regulación jurídica en la Ley del Patrimonio de las Administraciones Públicas*, in *Revista de Administración Pública*, 171, 2006, 79-137.

[29] A. CERRILLO I MARTÍNEZ, *Cooperación entre Administraciones Públicas para el impulso de la Administración Electrónica*, in J. VALERO TORRIJOS-C. E. GAMERO, eds., *La Ley de Administración Electrónica. Comentario*

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possibility of carrying out cooperation actions in property matters, including changes of ownership and the transfer of assets, as provided for in property legislation[30].

There are, therefore, precepts in the Spanish legal system that allow the transfer of the use of this type of platform between Administrations to be channelled as techniques of administrative cooperation. However, the use of these techniques is also subject to certain limits, as their irregular or abusive use may entail a violation of EU competition law or public procurement law itself[31].

6.1 Transfer of public platforms and competition law

Doubts are therefore raised as to the adequacy of the Spanish system of procurement platforms to the European law due to the fact that this transfer of the national or regional platforms to other administrations is carried out free of charge and provides services that are also offered on the market. This could arguably lead to a public monopoly of the service that violates the regulatory principles and the exceptional nature that the Spanish Constitution

sistemático a la Ley 11/2007, de 22 de junio, de Acceso Electrónico de los Ciudadanos a los Servicios Públicos, Cizur Menor, Thomson Reuters-Aranzadi, 2010, 757-810.

[30] To a lesser extent, it can also be linked to article 142.c) of the LRJSP, which provides, within the collaboration techniques, a duty of assistance and assistance on the part of the Administrations to attend to the requests made by other Administrations for the better exercise of their powers.

[31] J. M. GIMENO FELIÚ, *Administración electrónica, transparencia y contratación pública: algunas propuestas de reforma*, in I. MARTÍN DELGADO-J. A. MORENO MOLINA eds., *Administración Electrónica, Transparencia y contratación pública*, Madrid, Iustel, 2020a, 299-317.

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attributes to these monopolistic situations in its articles 128.2 and 38, engendering a distortion of the market[32].

However, the concept of public monopoly and the application of competition law to the Administration have traditionally been based on two aspects that, in our opinion, have dubious concurrence in the case of procurement platforms. First, public business monopolies have historically been referred to as those in which the state, or a state agency, coercively centralizes the provision of a certain service to citizens or the general public[33] (Cabrillo Rodríguez, 2018: 45) – that is, it operates in the market and provides services to citizens. However, in the case of procurement platforms, what is carried out is the provision of a service that has only an inter-administrative scope. This, together with the non-commercial or lucrative nature of the assignments or services provided, determines that we are dealing with a case of horizontal administrative cooperation, which is a priori enabled by the aforementioned regulations that allow the transfer of use and the provision of services between Public Administrations.

However, this type of inter-administrative cooperation, as we will explain, can also infringe EU competition law if it directly or indirectly leads to imbalances or distortions of competition in the market. It is therefore necessary to assess whether, as a cooperation technique, this practice complies with the requirements of the Spanish Public Procurement Act and European law in relation to cases of horizontal cooperation or whether, on the contrary, we could understand that this type of business and inter-administrative relations are subject to the rules of the market and therefore the actions of the Spanish Administration when ceding the use and providing services with respect to the public platforms would violate

[32] Id.

[33] F. CABRILLO RODRÍGUEZ, *La Economía, el Estado y el Derecho. Regulación de Mercados y Competencia*, 905, 2018, 45-46.

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the principle of free competition in EU law[34]. The fundamental issue is, therefore, the classification of these horizontal cooperation agreements as excluded from the Public Procurement Regulation[35].

6.2 The concept of European horizontal cooperation and its application to Spanish procurement platforms

It is worth remembering here, as a starting point, that in order to consider these transfers of software as anti-competitive practices, the subjects must carry out an economic activity in the market[36]. In other words, public authorities are subject to the prohibition of anti-competitive conduct when they intervene as operators in the market[37]. In this regard, it is worth mentioning the CJEU of 7 November 2019, case C 687/17, in which it was sought to elucidate, in a case affecting the Dutch procurement platform, whether any of its applications, and specifically that relating to the tender submission module, would constitute an economic activity, and therefore, whether State funding for its development could constitute unlawful State aid or subsidy. In this case, the CJEU stated that the activities

[34] C. A. AMOEDO-SOUTO, *En torno al concepto jurídico de autoprovisión administrativa: dimensión europea y desajustes internos*, in *Revista de Administración Pública*, 205, 2018, 81- 129.

[35] J. M. GIMENO FELIÚ, *Las fronteras del contrato público: Depuración conceptual de los negocios Jurídicos excluidos desde la perspectiva funcional del derecho europeo*, in *Revista Española de Derecho Administrativo*, 2015, 2020b, 19-60.

[36] F. MARCOS FERNÁNDEZ, *¿Puede sancionarse a las Administraciones Públicas cuando no actúan como operador económico si restringen la competencia o promueven conductas anticompetitivas?*, in *InDret,* 1/2018, 2018.

[37] J. C. LAGUNA DE PAZ, *Ámbito de aplicación del Derecho de la Competencia*, in *Revista de Administración Pública,* 208, 2019, 17-49.

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carried out on this type of platform, including the submission of bids, do not represent an economic activity, but a service related to the exercise of public power[38]. The CJEU's arguments for reaching these conclusions were based, on the one hand, on the legal obligations that existed, under Dutch law, to publish electronically different contract information (paragraph 41), and on the other hand, on the close link between this obligation and the electronic bidding module, which makes its division ineffective (paragraph 44).

In other words, the CJEU links the consideration of public service with the fact that it is a legal obligation for the Administration, and the need for such a platform or application to observe its compliance. In the Spanish case, the possibility of analogy with the Dutch case seems clear due to the need to publish the information of the contract in the profile of the contractor hosted on one of the regional or national platforms, even more so if we take into account the need for fully electronic processing the files and the submission of bids contained in the Public Procurement Act and the Common Administrative Procedure Act[39]. We can affirm, in our view, that we are dealing with the development of activities in the exercise of public authority which, being financed or carried out by the State, do not entail an infringement of competition law, since no provision of Directive 2014/24/EU obliges Member States to subcontract or outsource the provision of services which they wish to

[38] Previously, as stated in the judgment itself, the European Commission had ruled to the same effect (on 14 January 2013), and the General Court of the EU in a judgment of 28 September 2017, Aanbestedingskalender and Others vs Commission (T-138/15). See also the European Court of Justice – ECJ, 4 June 2020, case C-429/19, Remondis.

[39] R. MARTÍNEZ GUTIÉRREZ, *El uso de medios electrónicos en la contratación pública: La relación entre las Leyes 39 y 40 de 2015 y las Directivas 24 y 55 de 2014 de Contratación Pública y facturación electrónica. Propuestas para su transposición*, in *La reforma de la administración electrónica: una oportunidad para la innovación desde el derecho* (I. MARTÍNEZ DELGADO eds.), Madrid, INAP, 2017, 285-322.

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provide themselves or to organise by means other than public contracts in the sense of the Directive, as stated in recital 5 of the Directive and as has been reiterated by the CJEU[40].

However, there are still some issues to be clarified. To delve deeper into the argument, we must refer to the CJEU judgement of 28 May 2020, case C-796/18, Informatikgesellschaft für Software-Entwicklung. In this case, the question of whether a free transfer, for the benefit of a municipality, of software for the management of fire brigade interventions was in compliance with European law. Specifically, it raised the question of whether this assignment should be considered as constituting a public contract, and therefore subject to European public procurement law, including the requirements of publicity, competition, etc.

As a starting point, the CJEU states that, since public contracts are to be understood as onerous transactions (paragraph 39), the rules of EU law on public procurement are not applicable to gratuitous legal transactions that establish cooperation between public entities with the aim of ensuring the performance of a public service mission, provided that such contracts were concluded exclusively by public entities (para. 64). Up to this point, to a certain extent, it reiterates what was stated in the aforementioned Case C 687/17, where it had already been concluded that procurement platforms can be understood as tools linked to a non-commercial public service. In other words, whether it has the effect, in practice, of reducing, or even eliminating, the private market that may exist for these services, is irrelevant for the purposes of European law.

However, on this occasion, the CJEU also adds that this cooperation, in order to be understood as excluded from the scope of Directive 2014/24/EU, cannot in any way favour

[40] European Court of Justice - ECJ, 3 October 2019, Case C-285/18, Irgita.

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any private provider over its competitors[41]. In the present case, the software had not been developed publicly, but had previously been purchased from a private undertaking (Sopra Steria Consulting), with the particularity that the adaptation of that software to the specific characteristics of the entity is a very complex process whose economic value is considerably higher than that corresponding to the actual initial purchase of the basic software (paragraph 72). As a consequence, the City Council that would be the transferee of that application would have to acquire these software adaptation services, and even if these services were subsequently put out to tender, the plaintiff and the CJEU understand that these public contracts for adaptation and development purposes would be reserved, in practice, exclusively to the author of the software, since he is the only one who can do so effectively. Consequently, it is understood that the free transfer of software, insofar as it entails the need to contract complementary services that will in all probability fall on the manufacturing company, ultimately entails a direct benefit for this company with respect to other competitors.

Returning again to the case of the Spanish public platforms (state and regional), we must clarify that, unlike in the case of Informatikgesellschaft, the Spanish state and regional platforms are of public origin, including their intellectual property and source code, and that neither their existence, on the one hand, nor their free transfer, on the other, imply – a priori– no benefit to an economic operator, and therefore does not entail an infringement of EU competition principles. However, we must be aware that many of the existing public platforms in Spain also have contracted certain services or functionalities with private providers, who therefore have participation in the development of the platform. Thus, it could be considered whether, according to the CJEU's reasoning, to the extent that a public e-procurement system depends on or requires private applications or services, and to the extent that it does not comply with the principle of technological neutrality –that is, that it is

[41] The CJEU also clarifies that the fact that Directive 2014/24 does not refer to the prohibition on contracting authorities participating in a cooperation from favouring a private undertaking over its competitors does not mean that the EU legislature did not in any way intend to depart from the case-law of the previous Court.

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compatible or fully operational with the possible solutions of other providers[42]–, the free transfer of the software could be generating an undue advantage for one of the operators in the market compared to its competitors, in breach of the competition principles and the public procurement rules of Directive 2014/24/EU.

In short, here we enter a context that requires that public solutions that are shared or provided to other Administrations respect the principle of technological neutrality, so that each body can in turn fill, where appropriate, the shortcomings of the public application with the operator it considers to be in the private sector, without being bound by interoperability issues. Otherwise, as has been explained, EU public procurement and competition law would be infringed by indirectly benefiting private third parties.

In our opinion, and after the above, we can conclude that the Spanish multi-platform system and the reutilisation and cooperation scheme do not infringe public procurement law or EU competition law, without prejudice to the fact that the existence of partial private development may, in certain specific cases, it may result in a violation of European regulations by generating an indirect benefit for a certain economic operator.

7. THE CHALLENGE OF INTEROPERABILITY

For all the reasons stated in previous pages, Spain presents a decentralised administrative and political system that derives –as interpreted by the Constitutional Court– into a system of decentralised procurement platforms. Neither the general administrative rules nor the Public Procurement Act impose a specific model, and although the legislator

[42] Let's remember that the principle of technological neutrality does not oblige to ensure total compatibility with each and every one of the software that the human mind can design, but only with (i) those solutions that are widely used and (ii) those that use open standards. On this, see the Judgment of the High Court of Justice of the Community of Madrid, of September 18, 2019, case 590/2019.

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intends to encourage the preferential use of public platforms, the interpretations of the Constitutional Court have resulted in a wide margin of action granted to local and regional administrations. This is specifically true in the case of regional or sub-national platforms, whose creation and use has been widespread in Spain, giving place to a decentralised multi-platform system.

Secondly, the Spanish system of procurement platforms does not decisively chose a public or private model, even though the public system enjoys certain prerogatives that will tend to make it predominant due to the possibility of transferring these platforms or their use among public entities. The private platforms are having each time a less notable presence in the scenario of contracting platforms, but as has been noted, from the perspective of national and European law, there seems to be nothing to prevent the system of free transfer of public platforms between public entities, regardless of its negative effect on private service providers, provided that they do not generate undue profits for a given economic operator compared to the rest of the market operators.

In recent years, it has been seen how the obligation to implement a complete electronic contract, together with the improvements in the services offered by the national platform and its free use, have led to a considerable increase in the percentage of its use by regional and local authorities in recent years. Thus, according to the 2019 Activity Report of the General Directorate of State Heritage of the Ministry of Finance, among the electronic tenders processed by the State PCSP in 2017, 95.84% used external systems, while in 2019 that percentage fell to 44.49%, with the use of the national procurement platform being 55.51%.[43]

This growth of the PCSP, however, has not, as a general rule, been detrimental to the regional platforms. On the contrary, data on the use of platforms such as the procurement platform of Catalonia show an exponential growth in their use, especially by a significant

[43] 2019 Annual Report of the General Directorate of State Heritage, 135.

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part of the local public sector, which shows the clear vocation for integration of this territorial area under regional leadership. Thus, in Catalonia, in 2020 1,885 entities used this platform, including 1,552 local entities[44] – which is a vast majority of them, since Catalonia has around 1,900 contracting authorities according to data from the Secretary of State for Regional and Local Financing.[45]

The legal framework set out, which, we insist, we understand that neither the national nor the European level is opposed, allows the creation of new public platforms, their transfer to other Administrations, or the acquisition of tools on the market –even though this option is being gradually relegated in practice. But this "Spanish model", or rather the lack of it, relies on the effectiveness of a fundamental element: interoperability of the information and technological neutrality. The Constitutional Court has made this clear in its 55/2018, of 24 May 2018, when it states that "full interoperability is not imposed only as an objective; but it is essential in a politically decentralized State (Judgment 55/2018, of May 24, 2018)". A premise that is not completely fulfilled in the Spanish case: firstly, due to the difficulties for the collection of open data pointed out in section 2 of this paper; and additionally, due to the mechanisms of redirection between platforms used to "host" regional platforms in the national ones[46]. This context renders a situation in which there is a good amount of

[44] G. ENFEDEQUE MONTES, Jornada sobre la nova plataforma de serveis de contractació pública, Direcció General de Contractació Pública. September 30, 2020. Available in: https://contractacio.gencat.cat/web/.content/difusio/activitats/activitats-anteriors/jcca/nova-pscp-departaments/20201104-ponencia-ge.pdf.

[45]The updated data can be consulted at the following link: https://www.hacienda.gob.es/es-ES/CDI/Paginas/Inventario/Inventario.aspx.

[46] I. GONZÁLEZ RÍOS, *La transparencia como principio vertebrador de la contratación pública: significado y problemas de articulación normativa*, in *REALA*, 12, 2019, 6-25.

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unreadable or unclassified information, widespread in decentralised platforms that are not appropriately interlinked between them.

In this sense, we must also remember that the design of digital platforms as part of self-organization and administrative autonomy –the basis for the decentralised Spanish system– can be limited by other means, such as technical or interoperability requirements imposed by law[47]. This requires guaranteeing interoperability on an inter-administrative basis – which requires a minimum interconnection between Administrations to guarantee adequate transparency in data management[48] – but also at the intra-administrative level, that is, in such a way as to guarantee the integration of the application(s) developed for the public procurement procedure with all those management systems of the ordinary procedure that are used by the Administration (file management, electronic signature, etc.). The need for interoperability both at inter and intra administrative level requires platforms to be interconnected and technically compatible, especially when it comes to the collecting and processing of big data for its eventual disclosure.

In the same vein, the OECD has gone a step further by stating that e-procurement tools, in addition to being simple to use and appropriate to their purposes, should be, "as far as possible", "homogeneous among all entities involved in public procurement" (OECD, 2021), since this homogeneity reverts to benefits in competition – ease of use by bidders, regardless of the bidding body – and transparency, since greater interoperability and homogeneity will lead to easier access to information.

[47] A. SÁNCHEZ GARCÍA, *Posibilidades y límites de las medidas de cooperación y coordinación interadministrativa en materia de contratación pública electrónica,* in *Gabilex: Revista del Gabinete Jurídico de Castilla-La Mancha,* cit., 15-112.

[48] J. M. GIMENO FELIÚ, *Administración electrónica, transparencia y contratación pública: algunas propuestas de reforma,* in *Administración Electrónica, Transparencia y contratación pública,* (I. MARTÍN DELGADO-J. A. MORENO MOLINA eds.), cit.

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These legitimate objectives, which can be derived from EU law as well as from the Spanish Constitution itself and national administrative legislation, would, in our opinion, enable possible extensions of the interoperability requirements and technical impositions for the development of procurement platforms that would affect both public and private applications, correcting some of the shortcomings that have been highlighted by the doctrine[49]. It is true that these measures could materially restrict the autonomy of the regional and local administrations, but provided that they respect the principle of proportionality and do not go beyond what is necessary to achieve those constitutional objectives, they should be understood as legitimate.

Abstract. *This paper examines the main characteristics of digital procurement platforms in Spain. It particularly addresses the decentralized and interoperable nature public procurement platforms, highlighting the challenges of digitalization, legal frameworks, and the strategic role of regional platforms in a decentralized state structure. It emphasizes the need for interoperability between platforms, standardization, and efficient information processing within the procurement process.*

[49] R. MARTÍNEZ GUTIÉRREZ, *La interoperabilidad como factor clave y estructural en la internacionalización de la contratación pública. Contratación administrativa práctica*, in *Revista de la contratación administrativa y de los contratistas*, 159, 12.

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STRENGTHENING ANTICORRUPTION VIA DIGITAL TRANSFORMATION IN ITALY. CRITICAL ISSUES AND PERSPECTIVES

Francesco GORGERINO[1]

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6. CONCLUDING REMARKS

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1. INTRODUCTION

Although it is quite recent respect to criminal law[2], an analysis of the Italian system of corruption prevention may be interesting for the strengthening of a European anti-corruption strategy[3]. Its digital evolution shows an integration between several tools, to guarantee overall good administration[4].

At an international level a broad notion of corruption ("*the misuse of entrusted power for private benefit*") is widely used[5], and recently shared by the European

[2] Unlike administrative prevention, the repressive strategy against corruption has been known since ancient times. Already in 70 BC., Cicero delivered the *Orationes in Verrem* to accuse the Sicily *propraetor* of the "*crimen de pecuniis repetundis*", one of the most serious crimes in the Roman Republic.

[3] EU Commission, *Proposal for a directive on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371*, COM/2023/234 final; EU Commission, High Representative of the Union for Foreign Affairs and Security Policy, *Joint communication on the fight against corruption*, JOIN(2023) 12 final, 3 May 2023.

[4] A. PIOGGIA, M.G. PACILLI, F. MANNELLA, *Good Administration, Integrity and Corruption*, in E. CARLONI, M. GNALDI (eds.), *Understanding and Fighting Corruption in Europe. From Repression to Prevention*, Springer, Cham, 2021, 73 et seq.; J. PONCE, *Preventing corruption through the promotion of the right to good administration*, and F. MANNELLA, *Corruption and the right to good administration*, in E. CARLONI, D. PAOLETTI (eds.), *Preventing corruption through administrative measures*, Morlacchi, Perugia, 2019, respectively 61 et seq., 137 et seq.

[5] Notion widespread especially by Transparency International and the World Bank, concept so vague to fit into every national context: J. POPE, *Confronting Corruption: The Elements of a National Integrity System*, Trasparency International Source Book, 2000, 1; R. MESSICK, R. KLEINFELD, *Writing an Effective Anticorruption Law*, PREM Notes, no. 58, 2001. See: S.R. ACKERMAN, *Corruption and Government. Causes, Consequences, and Reform*, Cambridge University Press, Cambridge, 1999; M. DE BENEDETTO, *Corruption from a Regulatory Perspective*, HART, Oxford, 2021, 33-34; G.M. RACCA, R. CAVALLO PERIN, *Curruption as a violation of fundamental rights*, in G.M. RACCA, C.R. YUKINS (eds.), *Integrity and efficiency in sustainable public contracts: balancing corruption concerns in public procurement internationally*, Bruylant, Bruxelles, 2014, 42 et seq.

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Commission[6]. In Italy, in addition to crimes against public administration, the notion includes more general violations of impartiality, but also of good performance. These are principles that are enshrined in art. 97 of the Italian Constitution.[7].

The United Nations Convention against Corruption (UNCAC), signed in Mérida in 2003, imposed a radical perspective change[8], integrating the repressive approach of fighting corruption[9] with preventive policies[10]. The Convention was ratified by Italy in 2009[11] and the legislation has been implemented starting from the Anti-corruption Law of 2012[12].

In a decade, some significant events in Italian anti-corruption legal system have taken place: the creation of a specific independent administrative authority (also in charge of monitoring of public procurement); the Covid-19 pandemic and the subsequent implementation phase of the National Recovery and Resilience Plan (PNRR). In particular,

[6] *Joint communication on the fight against corruption*, cit., par. 1.

[7] ANAC, National Anticorruption Plan 2019 (PNA 2019), decision no. 1064, 13 November 2019, 12.

[8] Previous treaties, such as the Council of Europe Conventions (the Criminal one, 1997, and the Civil one, 1999) and the OECD Convention (1997), were dedicated only to the repression of corruption. See: G.M. RACCA, R. CAVALLO PERIN, G.L. ALBANO, *Public Contracts and International Public Policy Against Corruption*, in M. AUDIT, S.W. SCHILL (eds. by) *Transnational Law of Public Contracts*, Bruxelles, Bruylant, 2016, 845 et seq.

[9] R. CANTONE, E. CARLONI, *Limits of Corruption Repression and New Prevention Policies*, in E. CARLONI, M. GNALDI (eds.), *Understanding and Fighting Corruption in Europe*, cit., 5 et seq.; M. DE BENEDETTO, *Corruption from a Regulatory Perspective*, cit., 67-68; B. ROTHSTEIN, *Controlling Corruption. The Social Contract Approach*, Oxford University Press, Oxford, 2021, 152.

[10] Art. 5, par. 1, UNCAC, 867 et seq.

[11] Law 3 August 2009, no. 116.

[12] Law no. 190 of 6 November 2012. See: B.G. MATTARELLA, *The Italian efforts on anti-corruption*, in G.M. RACCA, C.R. YUKINS (eds.), *Integrity and efficiency in sustainable public contracts*, cit., 61 et seq.

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the pandemic had a heavy impact on regulations and performance of public contracts[13]: transparency[14] and digitalisation have been identified as tools to ensure integrity in emergency[15]. The Recovery Plan included the revision of public procurement legislation, which led to the enactment of the new Public Contracts Code[16]. Instead, the reform concerning anti-corruption and transparency, expected by June 2021, has not yet been implemented[17].

Therefore, after such cross-contaminations between national, European, and international principles of administrative law[18], the analysis of the Italian anti-corruption

[13] ANAC, *L'Autorità e l'emergenza Covid-19*, annex to *Relazione annuale 2019*, 2 July 2020; G.M. RACCA, C.R. YUKINS, *Emergency procurement and corruption*, in S. WILLIAMS, J. TILLIPMAN (eds.), *Routledge Handbook of Public Procurement Corruption,* Routledge, Oxon-New York, 2024, 76 et seq.

[14] L. FOLLIOT LALLIOT, C.R. YUKINS, *COVID-19: Lessons learned in public procurement. Time for a new normal?*, in *Concurrences*, 2020, 3, 46 et seq.; E. CARLONI, *La trasparenza come risposta all'emergenza*, in ANAC web site, 29 April 2020, at link.

[15] ANAC, *Strategie e azioni per l'effettiva semplificazione e trasparenza nei contratti pubblici attraverso la completa digitalizzazione: le proposte dell'Autorità*, 27 May 2020; L. DONATO, M. MARICONDA, M. MIRRONE, *La digitalizzazione possibile degli appalti pubblici. L'analisi della Banca d'Italia per l'Anac sulle prospettive dell'e-procurement*, in *Astrid Rassegna*, 2020, 8.

[16] Legislative Decree 31 March 2023 no. 36.

[17] This reform was not included among the priorities listed in the European decision which approved the Italian PNRR: European Council, doc. 10160/21, 13 July 2021. The transparency and anti-corruption bill, drawn up in last years by a commission chaired by prof. B.G. Mattarella, is still pending at the Department of Public Function.

[18] R. FERRARA, *Introduzione al diritto amministrativo. Le pubbliche amministrazioni nell'era della globalizzazione*, Laterza, Roma-Bari, 2014, 209.

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regulation will be provided. This seems of interest also for other jurisdictions[19] due to its approach[20], its strategies of digitalisation and data analysis[21].

Furthermore, it will be underlined how the Italian anti-corruption system is strongly connected with the monitoring of public procurement, considered a risky area of corruption, together with healthcare and land management[22]. For this reason, the main examples of digital tools to guarantee integrity and efficiency can be found particularly the in procurement sector.

2. CORRUPTION PREVENTION VIA DIGITAL TRANSFORMATION

The digitalisation is a powerful tool against corruption: it is no longer a matter of intuition; there are specific studies on this issue[23]. Comparing the Digital Economy and

[19] See the bilateral and multilateral international relations held by ANAC, in its annual reports to Parliament; R. CANTONE, N. PARISI, *L'Autorità Nazionale Anticorruzione e la vita di relazione internazionale*. *L'esperienza innovativa di ANAC dal 2014 al 2020*, ESI, Napoli, 2021, 101 et seq.

[20] Italian chapters of the *Rule of Law Reports* by the EU Commission (see below, par. 3); B. BOSCHETTI, *Pathways of anti-corruption law in the global arena*, in *JusOnline*, 2018, 1, 366 et seq.

[21] In the sense proposed in the conferences organized by the University of Turin with ANAC: "Semplificare, integrare, digitalizzare. Giornata della trasparenza 2023", 9 March 2023 (video available at *link*) and "L'Autorità Nazionale Anticorruzione e l'Università degli Studi di Torino per nuovi modelli di amministrazione intelligente", 1 October 2019 (video available at link).

[22] On digitalisation as a tool for good administration in these sectors, see: G. SDANGANELLI, *Liability Issues in Data-driven Healthcare and Harmonisation Efforts in Europe*; M. DEMICHELIS, *The Digital Evolution of Urban Planning and Land-Use Management in Italy*, both in this *Journal*, 2022, issue no. 2.

[23] P. COPPOLA, + *Digitale* – *Corruzione* + *Democrazia. La trasformazione digitale della pubblica amministrazione*, Maggioli, Santarcangelo di Romagna, 2022.

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Society Index (DESI)[24] and the Corruption Perception Index[25], a one-to-one deadlock relationship is found. Inefficiency and corruption could be fought through information technology but, at the same time, the development of digital potential is hampered by inefficiency and corruption[26]. The data shows that the rankings on digital transformation and the perception of good administration essentially coincide[27].

Data, traceable and accessible, record all the administrative activities, making monitoring of public organizations and transparency towards citizens feasible[28]. Digitalisation rationalizes the points of contact between public and private, thereby

[24] In the ranking, Italy is gaining points. In 2022, it will be in 18th place among the countries of the Union: EU Commission, *Digital Economy and Society Index (DESI) 2022. Italy*. It remains behind in terms of implementing the once-only principle: *Digital Economy and Society Index (DESI) 2022. Thematic chapters*, 67 et seq.

[25] Italy ranked 42nd in 2023, earning 14 points since 2012: https://www.transparency.org/en/cpi/2023

[26] G. MASSARO, M. MASULLI, G. SGUEO, *Italia interrotta: il peso della corruzione sulla crescita economica*, Studio I-Com per Riparte il Futuro, 2018, 57.

[27] B. BOSCHETTI, B. CELATI, *La buona amministrazione*, Laboratorio Futuro, Istituto Toniolo, RecoveryLab, Università Cattolica, Milano, 6 et seq. The theories according to which corruption promotes efficiency ("*greasing the wheels*") have been refuted: E. CARLONI, P. POLINORI, D. DAVID, *Public Procurement and Corruption: Perspectives, Rules, Experiences,* in E. CARLONI, M. GNALDI (eds.), *Understanding and Fighting Corruption in Europe*, cit., 127 et seq.; M. DE BENEDETTO, *Corruption from a Regulatory Perspective*, cit., 63-64.

[28] OECD, *Analytics for Integrity. Data-Driven Approaches for Enhancing Corruption and Fraud Risk Assessments*, 2019. See: B. PONTI, A. CERILLO-I-MARTÌNEZ, F. DI MASCIO, *Transparency, Digitalization and Corruption*, in E. CARLONI, M. GNALDI (eds.), *Understanding and Fighting Corruption in Europe*, cit., 97 et seq.; M. TRAPANI, *La prevenzione e il controllo della corruzione e dell'etica pubblica mediante l'utilizzo delle nuove tecnologie*, in *Forum di quaderni costituzionali*, 2018, 4 et seq.

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facilitating the improvement of the quality of administrative activity for those who act in an honest manner and reducing the spaces for those who engage in corrupt practices[29].

The native digital formation of documents can streamline administrative activities and processes by reducing duplications, because they allow the direct acquisition and verification of information. From an organizational point of view, the collection and analysis of data are essential for re-engineering administrative processes, and for redistribution of skills among offices. Technological tools could reduce and simplify even the same anti-corruption obligations and controls: one case is the application of transparency by default, which saves officials from the manual uploading work of data or the management of access requests[30].

The digital strengthening of controls, starting from mapping and planning, is part of a risk management strategy, to use them efficiently and effectively[31], and to correct deficiencies in real time[32].

And finally, as other complex systems, public administration finds properly in the use of big data the main tool for governance and correct exercise of (ineliminable)

[29] I. ADAM, M. FAZEKAS, *Are emerging technologies helping win the fight against corruption? A review of the state of evidence*, in *Information Economics and Policy*, 2021, 57, 5.

[30] See below, par. 4.1.

[31] M. DE BENEDETTO, *Corruption and controls*, in *European Journal of Law Reform*, 2015, 4, 488, who underlines that controls have a hybrid nature, a way to fight corruption, but also an opportunity for corrupt transactions.

[32] According to the Deming cycle (PDCA: "*plan, do, check, act*"): G. GALLONE, *La prevenzione amministrativa del rischio corruzione*, in *Dir. econ*., 2018, 357 et seq. In general: B.L. BOSCHETTI, *La de-strutturazione del procedimento amministrativo*, *Nuove forme adattive tra settori e sistemi*, ETS, Pisa, 2018, 195 et seq.

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discretionary powers[33]. For this reason, the organization of public information technology is necessary, avoiding the single agency approach, which undermines the public cognitive function. In this sense, the European Union is creating a common data space which could have significant implications on the corruption prevention[34].

3. DIGITAL PERSPECTIVES IN THE INTERNATIONAL AND EUROPEAN ANTI-CORRUPTION FRAMEWORK

In 190 States Parties, the systems to prevent corruption are based on minimum objectives set by UNCAC. It obliges to establish independent bodies for the prevention of corruption[35], not imposing a particular organizational form. It only states that it must be guaranteed the necessary independence through material resources and specialized staff[36]. Thus, in some cases, the anti-corruption bodies act only with preventive policies; in others, they exercise also repressive powers. The degree of their autonomy may also vary.

[33] P. BORDALO FAUSTINO, *Regulating discretion in public procurement: an anti-corruption tool?*, in G.M. RACCA, C.R. YUKINS (eds.), *Integrity and efficiency in sustainable public contracts*, cit., 147 et seq.; V. BRIGANTE, *Law enforcement against corruption in Italian Public procurement, between hetero-imposed Measures and procedural solutions*, in *Italian Journal of Public Law*, 2019, 1, 334 et seq.; M. DE BENEDETTO, *Corruption from a Regulatory Perspective*, cit., 42.

[34] EU Commission, Communication: *A European strategy for data*, COM(2020) 66, 19 February 2020, *Appendix*, which provides for data spaces in Health; Industrial & Manufacturing; Agriculture; Finance; Mobility; Green Deal; Energy; Public Administration (including procurement); Skills. See below, last paragraph.

[35] Art. 6, par. 1, UNCAC.

[36] *Ibid.*, art. 6, par. 2.

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Sometimes, they are associated with other institutions (Courts, Parliament, ministerial offices, etc.)[37].

The Convention requires these authorities to pursuit two fundamental goals: to apply effective and coordinated corruption prevention policies, also promoting the participation of society[38], and to increase and disseminate knowledge about the prevention of corruption[39]. This apparently secondary function is even placed on the same level as the anti-corruption policies, as part of the mission of the bodies. Against a widespread and elusive phenomenon such as corruption, large public knowledge and information is required to monitor public institutions, and to guarantee transparency towards the whole community[40].

Although the Mérida Convention does not yet expressly mention digitalisation as a tool for preventing corruption, in 2015 the Conference of the States Parties to the Convention reread many of its articles in the perspective of technological progress[41]. Emphasizing the

[37] OECD, *Specialised Anti-corruption Institutions. Review of Models. Anti-corruption Network for Eastern Europe and Central Asia*, Paris, 2008. See: F. MERLONI, *Corruption and Public Administration. The Italian Case in a Comparative Perspective*, Routledge, Oxon-New York, 2019, 9 et seq.; M. PIERRI, *Autorità indipendenti e politiche di contrasto alla corruzione: esperienze europee a confronto*, in *DPCE online*, 2021, 2, 2323 et seq.

[38] *Ibid.*, art. 5, par. 1 and art. 6, par. 1, lett. b).

[39] *Ibid.*, art. 6, par. 1, lett. b).

[40] V. BRIGANTE, *Evolving pathways of administrative decisions. Cognitive activity data, measures and algorithms in the changing administration*, Editoriale Scientifica, Napoli, 2019; M. FALCONE, *Ripensare il potere conoscitivo pubblico tra algoritmi e Big Data*, Editoriale Scientifica, Napoli, 2023; S. ROSSA, *Contributo allo studio delle funzioni amministrative digitali. Il processo di digitalizzazione della Pubblica amministrazione e il ruolo dei dati aperti*, Wolters Kluwer-CEDAM, Milano, 2021.

[41] Sixth session of the Conference of the States Parties to the United Nations Convention against Corruption, Resolution no. 6/7, *Promoting the use of information and communications technologies for the implementation of the United Nations Convention against Corruption*, November 2015.

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importance of respecting and promoting the freedom to seek, receive, publish and disseminate information[42], it required establishing accessible online mechanisms for providing information to the appropriate bodies and open data[43].

In the international context, the OECD also has dealt with the prevention of corruption through recommendations on public integrity, transparency and monitoring tools based on reliable data collection systems[44]. These acts are non-binding but can still have a positive impact as moral persuasion. Moreover, recently, OECD introduced an open digital system of indicators which measure the institutional response of countries in implementing public integrity[45], and conducted a survey on the degree of use of generative AI tools for anti-corruption in 39 countries[46].

[42] *Ibid.*, premises.

[43] *Ibid.*, par. 4-5. Relating to public procurement, UNCAC itself requires the States to create "*appropriate systems*" for the stipulation of contracts "*effective, inter alia, in preventing corruption*", with obligations of publicity, transparency and responsible management of public expenditures (art. 9, par. 1). Recently, see the resolution of the Tenth session of the Conference of the States Parties to the United Nations Convention against Corruption, *Promoting transparency and integrity in public procurement in support of the 2030 Agenda for Sustainable Development*, 15 December 2023.

[44] OECD, *Recommendation on Public Integrity*, 2017, point 3. With a specific focus on infrastructures and public procurement: *Recommendation of the Council on Public Procurement*, 2015; *Reforming Public Procurement: Progress in Implementing the 2015*, 2019; *Recommendation of the Council on the Governance of Infrastructure*, 2020; *Managing risks in the public procurement of goods, services and infrastructure*, 2023.

[45] https://oecd-public-integrity-indicators.org/

[46] OECD, *Generative AI for anti-corruption and integrity in Government. Taking stock of promise, perils and practice*, Artificial Intelligence Papers, no. 12, March 2024, which presents some experiments concern the use of AI to automate operational efficiency, conduct unstructured data analysis, monitor regulatory compliance.

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Until now, the European Union had not established a common legal framework for the prevention of corruption, although the Treaties entitle it of issuing directives to combat transnational crimes (hence corruption)[47], to prevent crime[48] and protects the right of good administration[49].

Nevertheless, an indirect basis for the obligation of Member States to prevent corruption can be identified[50]: such as in the transparency and efficiency standards set by the public procurement directives[51], or in the principle of sound financial management which requires the fight and prevention of fraud and any other illegal activities affecting the financial interests of the Union[52].

[47] Art. 83, TFEU.

[48] Art. 84, TFEU.

[49] Art. 41 of the Charter of Fundamental Rights of the European Union. See: P. CRAIG, *Article 41 – The Right to Good Administration*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, Oxford, 2021, 1125 et seq.; H.C.H. HOFMANN, G.C. ROWE, A.H. TÜRK, *Administrative Law and Policy of the European Union*, Oxford University Press, Oxford, 2011, 143 et seq.

[50] C. BENETAZZO, *ANAC e sistema europeo dei contratti pubblici*, Giappichelli, Torino, 2020, 190-191; G.M. RACCA, *Public Procurement and Corruption: the EU challenges*, in E. CARLONI, D. PAOLETTI, *Preventing corruption through administrative measures*, cit., 95.

[51] R. CANTONE, N. PARISI, *L'Autorità Nazionale Anticorruzione e la vita di relazione internazionale*, cit., 76-77; E. CARLONI, *L'anticorruzione e la trasparenza nel sistema di* procurement *pubblico: tendenze e prospettive ai tempi del PNRR*, in *Dir. amm.*, 2022, 3, 647 et seq.; G.M. RACCA, *The role of third parties in the execution of public contracts*, in L. FOLLIOT-LALLIOT - S. TORRICELLI (eds), *Controle et contentieux des contrats publics - Oversight and remedies in public contracts*, Bruylant, Bruxelles, 2017, 415 et seq.

[52] Artt. 310 and 325, TFEU. See: P. SZAREK-MASON, *OLAF: The anti-corruption policy within the European Union*, in J.-B. AUBY, E. BREEN, T. PERROULD (eds.), *Corruption and Conflict of Interest. A Comparative Law Approach*, Edward Elgar, Cheltenham, 2014, 288-289.

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On 3rd May 2023 the Commission, involved by the European Network for Public Ethics (ENPE)[53], presented the proposal for a directive on anti-corruption[54]. Based on UNCAC[55], the Commission is tasked with providing support and coordination, also through the preparation of an overview of sectoral risks of corruption in the Union and the facilitation of the information exchange among Member States and experts across the Union[56]. In addition to the cooperation in the fight against corruption between national authorities, Europol, Eurojust, the European Public Prosecutor's Office, the European Anti-Fraud Office (OLAF) and the Commission[57], the draft requires Member States to collect, publish and communicate to the Commission statistical data on corruption crimes[58].

These provisions emphasize the information function on corruption. However, the draft limits this data collection only to the repressive phase of investigations, trials, and convictions, not exploiting its potential for prevention[59]. Nevertheless, the communication accompanying the proposal requires the digitalisation and the open competition in a

[53] European Network for Pubblic Ethics, *Position paper of the European Network for Public Ethics on the European Union anti-corruption package*, April 2023. On the ENPE (in French: *Réseau Européen d'Éthique Publique*), established in Paris on 10 June 2022, see: S. LEVSTIK, *Understanding anti-corruption networks: structure and functions*, in this issue of the *Journal*.

[54] EU Commission, *Proposal for a directive on combating corruption*, cit. See: Hearing of President of ANAC, Camera dei deputati, 18 July 2023.

[55] Access to information, management of conflicts of interests, transparency on assets of officials and interaction between private and public sectors are subject of attention: art. 3, par. 3 of the Proposal for a directive, cit.

[56] *Ibid.*, art. 25, par. 2.

[57] *Ibid.*, art. 24.

[58] *Ibid.*, art. 26, par. 2.

[59] Hearing of President of ANAC, 18 July 2023, cit.

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transparent environment, conducted by trained professionals to shutting down opportunities for corruption, especially in public procurement[60].

So far, the Commission has already dealt with corruption in the *Rule of Law Reports*, with attached national chapters, that might have a persuasive role towards the Member States. In the Italian chapter of the 2021 Report, the Commission mentioned among best practices ANAC, as "*the main entity in charge of the prevention of corruption within the public administration supervising the adoption of the local three-year anti-corruption plans*"; the National Anti-Corruption Plan (PNA), as an aid to the definition and implementation of the three-year plans of each administration and the monitoring system of the plans themselves, implemented through a platform for collecting the relevant data; the implementation of the National Database of Public Contracts (BDNCP) in order to prevent corruption risks especially in conjunction with the pandemic emergency[61].

Both the 2022 and 2023 reports highlight the link between the fight against corruption and the access to relevant information and interconnection of databases to carry out financial investigations, with efficient cooperation between financial intelligence units and tax, audit, and competition authorities[62]. With reference to Italy, the first recommends continuing effective operations of prosecution service against corruption, including by enhancing digitalisation and interconnection of registries[63]; the second (apart from the doubts regarding the draft law on the abolition of the offence of abuse of public office, which could

[60] *Joint communication on the fight against corruption*, cit., par. 3.2.

[61] EU Commission, *2021 Rule of Law Report. Country Chapter on the rule of law situation in Italy*, par. II.

[62] EU Commission, *2022 Rule of Law Report*, par. 2.2 and *2023 Rule of Law Report*, par. 2.2.

[63] EU Commission, *2022 Rule of Law Report. Country Chapter on the rule of law situation in Italy*, par. 2.

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impact the effective detection of and fight against corruption[64]), underlines the relevance of connecting BDNCP with the register of beneficial owners to implement anti-money laundering regulations[65].

4. DIGITAL TOOLS OF THE ITALIAN ANTI-CORRUPTION SYSTEM

The digitalisation and data collection have always characterized the Italian institutions dealing with the prevention of corruption. Already the Anti-Corruption Law of 2012 linked the prevention of corruption with the opening of data, permitting also citizens to verify correct use of public resources[66].

The first analysis of public contracts data, using corruption risk indicators, was carried out by a working group established by the Commission on Integrity and Transparency

[64] The Commission refers to the opinions of the National Magistrates Association, the National Anti-Mafia Prosecutor, the former President of ANAC, and the Deputy Prosecutor in Rome.

[65] EU Commission, *2023 Rule of Law Report. Country Chapter on the rule of law situation in Italy*, par. II. See the Decree of 29 September 2023 of the Ministry of Business and Made in Italy on the Italian Register of Beneficial Owners. The operation of the register is currently suspended due to pending disputes (order of the Council of State, no. 3533 of 17 May 2024).

[66] G.M. RACCA, *La prevenzione e il contrasto della corruzione nei contratti pubblici (art. 1, commi 14-25, 32 e 52-58)*, in B.G. MATTARELLA, M. PELISSERO (eds.), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Giappichelli, Torino, 2013, 126.

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(CIVIT) and the Public Contracts Authority (AVCP) in 2013[67], and the current ANAC[68] continues to collect and use data to carry out its functions of prevention and supervision on public procurement[69].

In 2016, the unification of databases required rules harmonization on transparency, publicity, traceability of tender procedures, also to fight against corruption[70]. This was considered a basic element for the legitimation and independence of the new Anti-Corruption Authority[71], in order not to be captured, having a plurality of data sources, as well as for implementing openness towards other institutions, civil society, citizens and scientific research[72].

[67] ANAC, *Rapporto sul primo anno di attuazione della legge n. 190/2012*, 21-22.

[68] Law-Decree 24 June 2014 no. 90, art. 19, which established the merger by incorporation of CIVIT and AVCP, forming the current ANAC. See: F. MERLONI, *Corruption and Public Administration*, cit., 29 et seq.; G.M. RACCA, *Dall'Autorità sui contratti pubblici all'Autorità nazionale anticorruzione: il cambiamento del sistema*, in *Dir. amm.*, 2015, 2-3, 345 et seq.; M. PIGNATTI, *Autorità Nazionale Anticorruzione (ANAC)*, in *Dig. pubbl.*, *Aggiornamento*, 2017, 73 et seq.

[69] Hearing of President of ANAC, Senato della Repubblica, 21 October 2021; B. BOSCHETTI, N. BERTI, *La prevenzione della corruzione nei contratti pubblici a dieci anni dalla l. n. 190/2012: prove di un nuovo diritto amministrativo (tra risultato, fiducia e discrezionalità)*, in *Ist. federalismo*, 2022, 3, 605 et seq.

[70] Law 28 January 2016 no. 11, art. 1, lett. q), no. 2.

[71] M. BOMBARDELLI, *Le autorità amministrative indipendenti. Report annuale 2013 – Italia*, in this *Journal*, 2012, 4, 5.

[72] G.M. RACCA, R. CAVALLO PERIN, *Curruption as a violation of fundamental rights*, cit., 42 et seq.

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4.1 Digital strategies for transparency and corruption prevention

The aims of the Recovery Plan on the reorganization of anti-corruption regulations[73] include the creation of a "Single Transparency Platform," which could have a disruptive effect on the current system.[74], lightening the publication obligations of the administrations, and guaranteeing a single access point to public information. It seems that it should act as a hub[75], in which will be uploaded documents and data subject to publication, connected with the administration websites[76]. This system could relieve administrations from the burden of managing their own portals and encourage controls also by citizens facilitating the comparability of data[77].

[73] PNRR, reforms "*Semplificazione in materia di contratti pubblici*", "*Abrogazione e revisione di norme che alimentano la corruzione*". On the impact of the quality of regulation on the quality of administration, and opportunities for corruption: M. DE BENEDETTO, *Corruption from a Regulatory Perspective*, cit., *passim*; EAD., *Regolazione e anticorruzione*, in *Ist. federalismo*, 2022, 3, espec. 412 et seq.

[74] A. CORRADO, *Il futuro della disciplina di prevenzione della corruzione e della trasparenza amministrativa: una moda destinata a passare? L'ultima parola al Legislatore*, in *federalismi.it*, 2021, 29, 135 et seq.; F. GORGERINO, *L'accesso come diritto fondamentale e strumento di democrazia: prospettive per la riforma della trasparenza amministrativa*, in *federalismi.it*, 2022, 5, 96 et seq. On the excess of information that can compromise the efficacy of transparency: N. RANGONE, *A Behavioural Approach to Administrative Corruption Prevention*, in A. CERRILLO I MARTÍNEZ, J. PONCE (eds.), *Preventing Corruption and Promoting Good Government and Public Integrity*, Bruxelles, Bruylant, 2017, available also at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881878.

[75] ANAC, *Relazione annuale 2021. Presentazione del Presidente avv. Giuseppe Busia*, 23 June 2022, 6.

[76] V. VARONE, *"Amministrazione trasparente" al banco di prova della nuova Governance della trasparenza*, *verso una Piattaforma unica*, in *federalismi.it*, 2023, 5, 265-266.

[77] B. PONTI, *Dieci anni di diritto alla trasparenza amministrativa: caratteri originari, trasformazione e integrazione del modello*, in *Ist. federalismo*, 2022, 3, 651 et seq.

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There is not yet a specific regulatory basis for the Single Transparency Platform[78]. Only the Competition Law and the Decree on Local Public Services of 2022 refer to it[79], as the Code of public contracts of 2023[80]. The project is still at a preliminary stage; nonetheless, on 7th August 2023, ANAC signed an agreement with the National Research Council (CNR) for the experimentation of innovative technologies to the automatic recovery, classification and interpretation of the information that may flow into the Single Transparency Platform[81].

The analysis of the three-year corruption prevention and transparency plans (PTPCT)[82] and of the related reports of the corruption prevention managers (RPCT)[83] can constitute another challenge for increasing ANAC's information assets[84].

Within each administration, three-year plans are drawn up based on the National Plan adopted by ANAC; the Authority collects the data of PTPCTs and reuse them for the

[78] According to the Recovery Plan, the platform could be created in via administrative by ANAC.

[79] Law no. 118 of 2022, art. 8; Legislative Decree no. 201 of 2022, art. 31.

[80] See below, next paragraph.

[81] Agreement available at *link*.

[82] Law no. 190 of 2012, art. 1, par. 8. See: E. CARLONI, A. NIELI, *Bagliori al tramonto. I piani di prevenzione della corruzione tra contrasto della criminalità e assorbimento nel piano integrato*, in *Ist. federalismo*, 2022, 1, 117 et seq.

[83] Law no. 190 of 2012, art. 1, par. 7.

[84] M. GNALDI, *Building knowledge from datasets of public administrations*, in E. CARLONI, D. PAOLETTI (eds.), *Preventing corruption through administrative measures*, cit., 231 et seq.

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drafting of national plans[85]. For this purpose, a platform for the acquisition and monitoring of the PTPCT has been launched since 1st July 2019[86].

The platform developed in collaboration with the University of Rome "Tor Vergata" and University of Campania "Luigi Vanvitelli", is experimental and not binding for administrations, although a considerable number of them (around 2000) joined it. Mentioned in 2021 as good practice by the European Union[87], it allows the uploading of information relating to anti-corruption plans[88]. Analysing this data, ANAC found critical issues but also a general acceptance of the anti-corruption measures, as the participation of managers and staff in training and the overall prevention strategy, the integration of control and risk management systems[89].

The recent incorporation of the anti-corruption plans in the integrated plans of activity and organization (PIAO)[90] has prompted concerns among some observers that it may pose a risk to the system[91] or alternatively, that it necessitates a rethink of the aforementioned

[85] F. MERLONI, *Corruption and Public Administration*, cit., 34 et seq.

[86] ANAC, *Relazione annuale 2021*, 23 June 2022, 127 et seq.; *Relazione annuale 2019,* 2 July 2020, 88 et seq.

[87] See above, par. 3.

[88] Law no. 190 of 2012, art. 1, par. 14.

[89] ANAC, *Relazione annuale 2022*, 8 June 2023, 83 et seq.; PNA 2022, Annex 11.

[90] Law-Decree no. 80 of 2021, art. 6, converted by Law no. 113 of 2021.

[91] A. CORRADO, *La difficile strada della semplificazione imboccata dal PIAO*, in *federalismi.it*, 2022, 27, 186 et seq.; C. TUBERTINI, *La nuova pianificazione integrata dell'attività e dell'organizzazione amministrativa*, in *Giornale dir. amm.*, 2022, 5, 614 et seq. The Decree of the President of the Republic no. 81 of 2022 included in the new PIAO, the plan for the use of ITs, the performance plan, the organizational plan for remote working, the anti-corruption and transparency plan. See: Italian Council of State, opinions no. 506 and 902 of 2022.

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system. While making some recommendations, ANAC welcomed the reform[92], because the prevention of corruption constitutes a transversal dimension for the creation of public value (primary goal of the PIAO)[93], to be balanced with the needs of efficiency and high performance[94]. The Authority considers positively also the integration in unitary asset the data relating to each section of the PIAO[95]. Likewise, the integration between the plan monitoring tools could have benefits[96], also as a knowledge base for the future design of measures and the improvement of the risk management system[97].

Thus, the PIAOs might constitute a fundamental compliance model for public administrations[98]. However, they must be structured in digital forms[99] (and drawn up, in case, with the support of AI tools[100]), directly connected to the monitoring authorities (ANAC and

[92] ANAC, PNA 2022, 31.

[93] Decree of the Minister for public administration, 30 June 2022, containing the standard scheme of PIAO.

[94] ANAC, PNA 2022, cit., 23-24.

[95] *Ibid*., 29.

[96] A. CORRADO, *La difficile strada della semplificazione imboccata dal PIAO*, cit., 203-204.

[97] ANAC, PNA 2022, cit., 41.

[98] Italian Council of State, opinions no. 506 and 902 of 2022, cit.

[99] To date, the PIAO must be published on the institutional website of the administration and sent to the Department of Public Function portal by 31 January every year (at the *link*).

[100] OECD, *Generative AI for anti-corruption and integrity in Government*, cit., survey dedicated in particular to use of Large Language Models (LLM); F. MERENDA, *Legalità, algoritmi e corruzione: le tecniche di intelligenza artificiale potrebbero essere utilizzate nel e per il sistema di prevenzione della corruzione?*, in *Rivista italiana di informatica e diritto*, 2022, 2, 23 et seq.

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the Department of Public Function)[101]. This can allow checks, so that they are not just formal requirements that give the appearance of compliance[102].

5. PUBLIC PROCUREMENT DATABASES AS A FUNDAMENTAL INSTRUMENT FOR INTEGRITY AND EFFICIENCY

According to EU Commission, transparency and digitalisation always constitute the first aim of public contracts registers[103]. The second goal is the possibility of experimenting with analyses of the data collected[104].

In 2018, 17 Member States were equipped with a national contract register[105]. Managed by public bodies (Ministries or Procurement Agencies), they generally deal with the publication and award phases, more rarely also payments and contractual implementation[106].

[101] Law-Decree no. 80 of 2021; Decree of the Minister for Public Administration, 30 June 2022.

[102] G.M. RACCA, *La responsabilità delle organizzazioni pubbliche nella trasformazione digitale e i principi di collaborazione e buona fede*, in *Dir. amm*., 2022, 3, 634; EAD, *Abuso d'ufficio e contratti pubblici*, in *federalismi.it*, forthcoming; M. DE BENEDETTO, *Corruption from a Regulatory Perspective*, cit., 20 et seq.

[103] EU Commission, *EXEP Report on Contract Registers*, Bruxelles, 2018, 1.

[104] EU Commission, Communication: *Making Public Procurement work in and for Europe*, COM(2017) 572 final, 3 October 2017, par. 4, lett. d).

[105] EU Commission, *EXEP Report on Contract Registers*, cit., 2.

[106] M. MENDES, M. FAZEKAS, *DIGIWHIST Recommendations for the Implementation of Open Public Procurement Data. An Implementer's Guide*, DIGIWHIST, 2017, 10; W. HARTUNG, K. KUZMA, *Article 51. Form and manner of publication of notices*, in R. CARANTA, A. SANCHEZ-GRAELLS (eds.), *European Public Procurement. Commentary*

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Given the results of the survey, the Commission recommends that they keep track of information regarding the contract and its modifications, to provide an overall view of the procurement cycle[107], and that documents must be native digital to obtain structured data and to allow textual analysis[108], directly connected with TED[109].

With reference to enforcement mechanisms, instead of imposing sanctions or legal conditions, the Commission recognizes that the most effective solution consists in the automatic acquisition of data, without burdening officials with further information obligations, respecting the once-only principle[110].

on Directive 2014/24/EU, Elgar, Cheltenham, 2021, 534. Similar problems are found with reference to Open Contracting Data Standard (OCDS): A. SANCHEZ-GRAELLS, *Procurement Corruption and Artificial Intelligence: Between the potential of enabling data architectures and the constraints of due process Requirements*, in S. WILLIAMS, J. TILLIPMAN (eds.), *Routledge Handbook of Public Procurement Corruption,* cit., 34.

[107] EU Commission, Communication: *A data space to improve public spending, boost data-driven policy-making and improve access to tenders for SMEs*, 16 March 2023, 2023/C 98 I/01, par. 5.; resolution of UNCAC Conference, *Promoting transparency and integrity in public procurement*, cit., premises.

[108] EU Commission, *EXEP Report on Contract Registers*, cit., 7-8.

[109] *Ibid.*, 10-11. TED is the procurement supplement of the Official Journal of the European Union: annexes V and VIII to Directive 2014/24/EU. Once a year, the Commission publishes TED data in CSV format: www.data.europa.eu. TED data is also available on www.opentender.eu, a platform delivered by the DIGIWHIST project. See: V. POLTORATSKAIA, M. FAZEKAS, *Data analytics for anti-corruption in public procurement*, in S. WILLIAMS, J. TILLIPMAN (eds.), *Routledge Handbook of Public Procurement Corruption,* cit., 55; I. ADAM, M. FAZEKAS, *Big data analytics as a tool for auditors to identify and prevent fraud and corruption in public procurement*, in *ECA Journal*, 2019, 2, 175. The European Court of Auditors highlighted the poor quality of TED data, recommending the Commission to improve it: *Special report 28/2023: Public procurement in the EU – Less competition for contracts awarded for works, goods and services in the 10 years up to 2021*, parr. 71 et seq.

[110] R. KRIMMER, A. PRENTZA, S. MAMROT (eds.), *The Once-Only Principle. The TOOP Project*, Springer, Cham, 2021, in which a chapter is dedicated to Italy: F. GORGERINO, *Legal Basis and Regulatory Applications of the Once-*

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The Italian national procurement register is the National Public Contracts Database (BDNCP), reinforced by recent reforms[111]. Hub for interoperability with public and private procurement platforms and databases, BDNCP is being consolidated to the effective monitoring of whole life cycle of public procurement[112]. In parallel, another section of BDNCP, the Virtual Company Dossier, is evolving to reduce the documentary burden for the qualification of economic operators[113].

BDNCP was established in 2010, with the purpose of the reduction of administrative burdens and effectiveness, transparency, and real-time control of public spending; the respect of rule of law, good administration, and the prevention of corruption[114]. It has been included among the databases of national interest[115], connected with the National Data Platform

Only Principle: The Italian Case, 104 et seq. Now, for public procurement, Legislative Decree no. 36 of 2023, art. 19, par. 2, states that data is sent only once to a single information system, and cannot be requested from other systems, but is made available by the receiving information system.

[111] New Public Contracts Code (artt. 19 et seq.). Hearing of President of ANAC, Camera dei Deputati, 3 March 2022.

[112] According to art. 21, par. 1 of Legislative Decree n. 36 of 2023, the digital life cycle of public contracts is divided into: programming and design, publication, award and execution.

[113] Legislative Decree no. 36 of 2023, art. 24. See: G.M. RACCA, *Digital Transformation for an Effective E-Procurement*, in C. RISVIG HAMER, M. ANDHOV, E. BERTELLSEN, R. CARANTA (eds.), *Into the Northern Light. In memory of Steen Treumer*, Ex Tuto Publishing, Copenaghen, 2022, 215 et seq.

[114] Legislative Decree no. 82 of 2005, art. 62-*bis*, introduced by art. 44 of Law no. 235 of 2010.

[115] *Ibid.*, art. 60, par. 3-*bis,* lett. c).

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(PDND)[116]. The Public Contracts Code of 2016 attributed to ANAC the governance on public procurement system and so the management of BDNCP[117].

The database was designed to track all the procurement procedures' phases, marked by a primary key (CIG), from the publication of the tender notice or the transmission of the invitation letters, until execution and payments[118]. Thus, the civil servant charged with the procedure (RUP)[119] is required to progressively upload in the electronic reporting sheets the information relating to all the phases of awarding and execution of the public contract[120].

From 1st January 2024, the new rules regarding the digitalisation of public procurement[121] came into force. According to these provisions, BDNCP will include some

[116] *Ibid.*, art. 50-*ter*. See: I. ALBERTI, *La creazione di un sistema informativo unitario pubblico con la Piattaforma digitale nazionale dati*, in *Ist. federalismo*, 2022, 2, 473 ss.

[117] Legislative Decree no. 50 of 2016, art. 213, par. 8.

[118] R. NAI, E. SULIS, R. MEO, F. GORGERINO, G.M. RACCA, L. GENGA, *Process Mining on a Public Procurement Dataset: a Case Study*, in *Machine Learning and Principles and Practice of Knowledge Discovery in Databases. International Workshops of ECML PKDD 2023*, Springer, Cham, forthcoming.

[119] Legislative Decree no. 36 of 2023, art. 15.

[120] *Ibid.*, art. 222, par. 9.

[121] *Ibid.*, artt. 19-36. ANAC, decision no. 261 of 20 June 2023, in which (art. 10) are listed the information to transmit to BDNCP. The technical specifications of the interoperability services and the information transmission paths are published on the Developers Italia portal in a section dedicated to the "Public contracts platform". See also ANAC, decision no. 382 of 13 December 2023.

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sections: the register of contracting authorities (AUSA), the platform for legal advertising, the Virtual Company Dossier, the "*Casellario*" of public contracts[122].

Many believe that only the direct connection of BDNCP with the procurement platforms[123] can avoid the bad quality of procurement data[124]. Until now, the main gap in the database concerns the names of the economic operators participating in tenders, which makes it impossible to detect collusive behaviour[125]. It should be noted that this data could be already obtained from the websites of administrations[126], as demonstrated[127]. Repealed by the

[122] In which must be noted the exclusions and other events relating to past performance: Legislative Decree no. 36 of 2023, art. 222, par. 10; ANAC decision no. 272 of 20 June 2023.

[123] The new Code provides that procurement platforms must be certified by the Agency for Digital Italy (AGID) and included into a register held by ANAC: Legislative Decree no. 36 of 2023, art. 26; AGID, *Regole tecniche recanti Requisiti tecnici e modalità di certificazione delle Piattaforme di approvvigionamento digitale*, 1 June 2023. See ANAC website at *link*.

[124] R. NAI, E. SULIS, P. PASTERIS, M. GIUNTA, R. MEO, *Exploitation and Merge of Information Sources for Public Procurement Improvement*, in *Machine Learning and Principles and Practice of Knowledge Discovery in Databases. International Workshops of ECML PKDD 2022*, Springer, Cham, 2023, 89 et seq.; M. TROÌA, *Data analysis e costruzione di indicatori di rischio di corruzione per la Banca dati nazionale dei contratti pubblici*, ESI, Napoli, 2020, 65.

[125] ANAC, *Relazione annuale 2021*, 23 June 2022, 186; R. NAI, *et al.*, *Exploitation and Merge of Information Sources for Public Procurement Improvement*, loc. cit.

[126] Law n. 190 of 2012, art. 1, par. 32, stated that contracting authorities, for each procedure, were required to publish: the structure proposer; the object of the tender; the list of operators invited to submit offers; the successful tenderer; the award amount; the times of completion of the work, service, or supply; the amounts paid. Every year the administrations had to transmit this information to ANAC.

[127] See: A. MELANDRI, G. BEVILACQUA, F. MORANDO, D. ALLAVENA, *Misurare la corruzione sul grafo dei contratti pubblici italiani*, in M. GNALDI, B. PONTI (eds.), *Misurare la corruzione. Obiettivi, metodi, esperienze*, Franco Angeli, Milano, 2018, 113-135, about the portal *www.contrattipubblici.org*. See also: https://www.ondata.it/esploriamo-i-dati-di-appaltipop/.

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new Code, this open data should now be absorbed into BDNCP data flow in compliance with the once-only principle[128].

BDNCP very rarely registered the awards and names of the winners, as well as the contract conclusion, payments, litigation[129]. To date, ANAC has not collected the documents relating to the award procedures[130]. The new Code provides that the publication of documents is ensured by BDNCP, interconnected with TED[131], with contracting authorities websites[132], and the new Transparency Portal[133].

[128] Legislative Decree no. 36 of 2023, art. 20, par. 2, and art. 28, par. 3.

[129] Using AI tools, it is possible to link BDNCP and sentences issued by the Italian administrative Courts: R. NAI, R. MEO, G. MORINA, P. PASTERIS, *Public tenders, complaints, machine learning and recommender systems: a case study in public administration*, in *Computer Law and Security Review*, 2023, 51, 105887; R. NAI, *et al.*, *Process Mining on a Public Procurement Dataset: a Case Study*, loc. cit.

[130] A. CORRADO, *La trasparenza negli appalti pubblici, tra obblighi di pubblicazione e pubblicità legale*, in *federalismi.it*, 2018, 1, 2 et seq.

[131] Legislative Decree no. 36 of 2023, art. 84 and Annex II.7.

[132] *Ibid.*, artt. 27 - 85.

[133] See above, par. 4.1. A. CORRADO, *Il regime della trasparenza e dell'accesso digitale ai documenti nei contratti pubblici: vantaggi e criticità alla vigilia dell'applicazione delle nuove norme del Codice*, in *federalismi.it*, 2023, 31, 80 et seq.

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Initially BDNCP was not accessible[134], if not on request[135]. From 2020, has become open access, both in the form of raw data[136], and in an easy-to-consult dashboard[137]. Preceded by some experiments[138], driven by the CEF-ENEIDE European project[139], from 2022 BDNCP is accessible also in the Open Contracting Data Standard (OCDS)[140].

5.1 Indicators of corruption risk measurement

Like with the "Golden-Picci" index[141], almost all experiments to objectively measure corruption have so far focused on the use of public procurement data, not only in

[134] F. ADDANTE, *Anac, poco trasparente la banca dati contratti pubblici: ecco perché*, 29 June 2018.

[135] ANAC, decision no. 264, 1 March 2018. On the basis of this regulation, the University of Turin stipulated on 16 January 2019 an Agreement with ANAC for access to BDNCP data for scientific research.

[136] See ANAC website, at *link*.

[137] See ANAC website, at *link*. F. SBICCA, *La gestione degli appalti pubblici: monitoraggio e vigilanza*, in CNEL, *Relazione 2021*, 423 et seq.

[138] F. SAIJA, A. NELSON, Open Contracting*: l'Italia muove i primi passi*, in L. FIORENTINO, A. LA CHIMIA (eds.), *Il* procurement *delle pubbliche amministrazioni. Tra innovazione e sostenibilità*, Il Mulino, Bologna, 2021, 437 et seq.

[139] Based on an Action of the EU Commission: CEF-TC-2018-4 Azione n. 2018 IT-IA-0170.

[140] ANAC website, at *link*. OCDS is an open data model which allows reuse and comparison at an international level, developed by *Open Contracting Partnership*. See: Transparency International Italia, ACT Project, *Open Data On Procurement Procedures*, March 2021.

[141] The "Golden-Picci" index was formulated in 2005 on public works, comparing the infrastructures built in Italy with respect to the public spending dedicated to them. This indicator constitutes a corruption proxies, i.e. an indirect measurement, given the current impossibility to distinguish inefficiencies (maladministration) from criminal

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Italy[142]. In addition to constituting a risky sector, despite the critical issues of the databases[143], in public procurement we have probably the greatest quantity of data at the moment[144].

Among the most significant indicators[145], ANAC lists the comparison among the reference prices developed to identify price overspending[146], prices applied by the same company in the national territory, the quantity of goods purchased and the goods actually needed; the adoption of an anomalous selection procedure; tenders with a single

offenses (genuine corruption): M.A. GOLDEN, L. PICCI, *Proposal for a new measure of corruption, illustrated with Italian data*, in *Economics and Politics*, vol. 17, no. 1, 2005, 37 et seq.

[142] I. ADAM, M. FAZEKAS, *Big data analytics as a tool for auditors to identify and prevent fraud and corruption*, cit., 172 et seq.; F. DECAROLIS, C. GIORGIANTONIO, *Corruption red flags in public procurement: new evidence from Italian calls for tenders*, in *EPJ Data Science*, no. 11/2022; F. DECAROLIS, R. FISMAN, P. PINOTTI, S. VANNUTELLI, *Rules, discretion, and corruption in procurement: evidence from italian government contracting*, in *NBER Working Paper Series*, Cambridge, 2020; M. FAZEKAS, G. KOCSIS, *Uncovering High-Level Corruption: Cross-National Corruption Proxies Using Government Contracting Data*, in *GTI-WP*, 2015, 02, Budapest, Government Transparency Institute; M. TROÌA, *Data analysis e costruzione di indicatori di rischio di corruzione*, cit., 28 et seq. Recently, see the World Bank report, containing 60 indicators relating to risky behaviours in procurement cycle, collusion among bidders, supplier characteristics, political connections, already tested in Brazil: *Governance Risk Assessment System (GRAS). Advanced Data Analytics for Detecting Fraud, Corruption, and Collusion in Public Expenditures*, 2023.

[143] See above, previous paragraph.

[144] See ANAC website, studies and documents.

[145] F. SBICCA, G. MARINO, *Efficienza dei contratti pubblici e sviluppo di indicatori di rischio corruttivo*, 2018.

[146] Law-Decree no. 66 of 2014, converted by Law no. 89 of 2014, art. 9, par. 7, art. 10, par. 3.

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participant[147]; repeated awards to the same company; the illegitimate use of contractual extensions.

In 2022, ANAC opened a business intelligence portal for measuring corruption[148], financed by European funds[149] and based on a plurality of datasets[150]. In the portal[151] it is possible to visualize three categories of indicators of corruption risk, according to scientific literature[152]. The Authority has developed some context indicators, useful for framing the socio-economic reality of areas, collected in domains (education, economy, social capital and crime)[153]. Other indicators concern population density, *per capita* income and the "risk of

[147] I. ADAM, M. FAZEKAS, *Big data analytics as a tool for auditors to identify and prevent fraud and corruption*, cit., 173. This indicator, however, may not be useful where the submission of a single offer is specifically avoided (by mafia organizations): R. MILANI, F. CALDERONI, C. CARBONE, M. ROTONDI, *L'impatto di corruzione e mafia sugli appalti pubblici: un'esplorazione empirica*, in M. GNALDI, B. PONTI (eds.), *Misurare la corruzione*, cit., 147-148.

[148] Available at *link*.

[149] Project "Misurazione del rischio di corruzione a livello territoriale e promozione della trasparenza". See: ANAC, *Relazione annuale 2021*, cit., 170 et seq.; F. SBICCA, *et al*., *La misurazione della corruzione*: *la Banca dati nazionale dei contratti pubblici e la costruzione di indicatori di rischio corruttivo*, in CNEL, *Relazione 2020*, 397 et seq.; S. BROWN, K. GRANICKAS, *Behind Italy's 'small revolution' in the fight for corruption-free contracts*, 21 September 2022, available on Open Conctracting website at *link*.

[150] See the *Memorandum of Understanding* of 20 November 2017, available at *link*. In reality, the project had data sources external to ANAC but not those envisaged by the memorandum: B. PONTI, *Attività amministrativa e trattamento dei dati personali. Gli standard di legalità tra tutela e funzionalità*, Franco Angeli, Milano, 2023, 121 et seq. The components are based on data from ISTAT, the Ministry of the Interior, INVALSI (for the level of education), AVIS (association of blood donors) to measure social capital in terms of solidarity and volunteering.

[151] Available at *link*.

[152] ANAC website, bibliographical references.

[153] ANAC, Dashboard *Territorial Context*.

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contagion" between municipalities dissolved due to mafia infiltration[154]. Finally, indicators based on BDNCP[155] take into consideration: the percentage of procedures awarded at the most economically advantageous offer; the number and value of negotiated procedures; the number of contracts awarded and modified; the variance in costs and execution times; failure to send data to ANAC; tenders with only one offer; offers excluded and exclusions of all offers except one; contracts awarded to the same company[156]; the extension of the notice publication period; the amount of contracts below the European threshold.

Since October 2023, ANAC has published datasets relating to tenders using PNRR and National Complementary Plan (PNC) funds[157]. At the same time, it gave the possibility of searching for contracts with the "PNRR flag" indicator[158]. These are important initiatives to guarantee the transparent management of PNRR funds[159], given that publication of data of the REGIS platform[160] in a reusable open format has only been partially implemented by Government [161].

[154] ANAC, Dashboard *Municipal Indicators*.

[155] ANAC, Dashboard *Tender Indicators*.

[156] Based on the "Gini coefficient", this indicator considers the consecutive awarding of contracts as a general condition of corruption risk.

[157] Law-Decree no. 77 of 2021, art. 47, par. 4. See ANAC website, at *link*.

[158] Available at *link*.

[159] Open Polis, *I nostri nuovi open data sui bandi del Pnrr*, 3 April 2023.

[160] Platform for the monitoring of projects financed by the PNRR: Law no. 178 of 2020, art. 1, par. 1043.

[161] At the moment, only aggregate data on PNRR projects are published: PNRR open data catalogue. See articles on Open Polis website, at *link*.

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5.2 Data analysis by the Italian Anti-Corruption Authority (ANAC)

ANAC has already used databases for the drafting of regulatory documents, to realize market investigations, monitoring of public contracts and the implementation of anti-corruption measures. These are not many cases, but they still represent examples of the potential inherent in the collection and use of its information assets.

The Authority publishes every four months reports on the trend of the public procurement market. They often attract a notable audience, as a tool to understand the impact of public contracts on the national economy[162]. Since 2021, the reports have been integrated with innovative analyses, such as the use of digital awarding procedures[163]. This knowledge is useful to the Authority, e.g. for the preparation of standard tender documents[164].

The public procurement monitoring can be realized for areas, by categories of authorities or by product sectors; in conjunction with specific cases[165]. The outcomes flow into acts transmitted to the contracting authority and, if necessary, to the Public Prosecutor's

[162] G.M. RACCA, *Collaborative and strategic procurement for supporting industrial innovation*, in É. MULLER (eds.), *La commande publique, un levrier pour l'action publique?*, Dalloz, Paris, 2018, 121 et seq.

[163] See the last Report, October 2023, at *link*.

[164] ANAC, *Bando tipo n. 1/2023*, decision no. 309 of 27 June 2023, standard tender document to be adopted in digital awarding procedures of services and supplies, above the European thresholds.

[165] ANAC, *Direttiva programmatica sull'attività di vigilanza dell'A.N.AC.*, decision no. 413, 6 September 2022. See: F. MERLONI, *Corruption and Public Administration*, cit. 58 et seq.; F. MORANDO, *Open data, come usarli nella lotta alla corruzione: il caso di Anac*, in *www.agendadigitale.eu*, 9 March 2021.

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offices and the Court of Auditors[166]. Among the first cases, in 2015 ANAC verified the contracts of the Municipality of Rome, in conjunction with the so-called "Mafia Capitale" criminal investigation[167]. In 2017, was concluded an inspection on Hera and Herambiente, public companies in charge of waste cycle management in some areas of Emilia-Romagna, Marche, Veneto, and Friuli[168].

One of the most comprehensive investigations concerns the procurement of products and services related to the Covid-19 pandemic. The analysis encompasses purchases of products and equipment directly related to the fight against the virus, including personal protective equipment (PPE), reagents, ventilators, and other essential supplies.[169].

In January 2023, ANAC published the survey, realized also through BDNCP, on the methods of managing conflict of interest in direct assignments concerning technical services

[166] ANAC cannot directly punish a contracting authority for the violation of procurement rules; nonetheless, it can sanction failure to respond or challenge tender documents: Legislative Decree no. 36 of 2023, art. 220 and 222.

[167] Analysis involved BDNCP data relating to the contractual period 2012-2014. ANAC discovered a critical situation in the management of procurement procedures, characterized by significant shortcomings, partly due to the organizational structure and partly dependent on superficiality and omissions: ANAC, decision no. 207, 2 March 2016.

[168] In the sector, notoriously at risk of corruption, the Authority found critical issues relating to awarding procedures, the object of assignments, the renewal of contracts. The final resolution criticized the bad quality of the data transmitted to BDNCP, which damages the possibility to realize analysis: ANAC, decision no. 626, 7 June 2017.

[169] ANAC, *Indagine conoscitiva sugli affidamenti in regime emergenziale di forniture e servizi sanitari connessi al trattamento ed al contenimento dell'epidemia da COVID-19*, 4 August 2020. F. SBICCA *et al*., *Appalti pubblici: sistemi di monitoraggio e vigilanza*, in CNEL, *Relazione 2020*, 287 et seq.; G.M. RACCA, C.R. YUKINS, *Emergency procurement and corruption*, cit., 79.

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by municipalities[170]. Nevertheless, the possibility of verifying the truthfulness of self-declarations regarding the absence of conflicts of interest using digital systems remains a distant prospect[171].

BDNCP data have been also used by other institutions, such as Parliament and the Court of Auditors, for monitoring the values, times, and progress of public works, services, and supplies, starting from those most relevant for the relaunch of the national economy[172].

6. CONCLUDING REMARKS

As shown in this study, the digital perspective is part of the anti-corruption strategies. In this respect, the Italian legal system and the development of ANAC functions seem consistent with global standards, both for the prevention of corruption, and for the monitoring of public contracts[173]. In order to avoid ANAC to duplicate existing controls, it

[170] Statement from the President of ANAC n. 1 of 11 January 2023. The new Public Contracts Code imposes the obligation to declare and abstain for the person who manages in the award procedure, or in the execution phase (Legislative Decree no. 36 of 2023, art. 16, par. 3). Contracting authorities must adopt adequate measures to identify, prevent and resolve conflict of interests and ensure that the declaration obligations are respected (art. 16, par. 4). In general, on this topic, see: J.-B. AUBY, E. BREEN, T. PERROULD (eds.), *Corruption and Conflict of Interest. A Comparative Law Approach*, cit., *passim*.

[171] B. PONTI, *Attività amministrativa e trattamento dei dati personali*, cit., 131 et seq.

[172] In November 2023, the Research Service of the Camera dei Deputati published the last report on the national strategic and priority infrastructures. The results are presented into the SILOS portal (https://silos.infrastrutturestrategiche.it/). See: *Infrastrutture strategiche e prioritarie. Rapporto annuale. Stato di attuazione al 31 agosto 2023*, 21 November 2023.

[173] In 2023, the UNCAC Conference (resolution *Promoting transparency and integrity in public procurement*, cit.) encouraged to make use of "*integrated electronic procurement systems that collect, manage, simplify, standardize*

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is essential that its data collection and analysis assume ever greater importance, shared with other institutions, researchers, and citizens.

This perspective aligns with the European framework. The Commission has formulated a first strategy for the creation of a common data space, public and private, with multiple purposes, including transparency, responsibility and quality of public spending, the fight against corruption, the effective application of the European law and the introduction of innovative applications GovTech[174]. However, this implies an improvement of the quality of national data, currently fragmented and available in different formats, which does not make it easily usable in real time[175]. To date, the project has consisted of an experimentation, left to the voluntary participation of the Member States, with Commission opting for a

and publish open data on the whole procurement cycle", "*supporting analysis of procurement data and automated risk indicators*", and called upon the establishment of oversight authorities having "*the necessary resources for assessing, as part of their audits of public bodies, the governance, the processes implemented for public procurement and the quality of internal control*". These statements are very similar to the Italian approach to monitoring public contracts also to prevent corruption.

[174] EU Commission, Communication: *A European strategy for data*, cit., par. 5; *Commission Implementing Decision on the financing of the Digital Europe Programme and the adoption of the multiannual work programme for 2021 – 2022*, C(2021) 7914 final, *Annex*, par. 2.2.1.12.1; *Staff Working Document on Common European Data Spaces*, SWD(2022) 45 final, 23 February 2022, par. 6.8.2. See also, for the general context, the Communication: *Enhancing the European Administrative Space (ComPAct)*, 25 October 2023, COM(2023) 667 final. For the Procurement Data Space, the final objective is to integrate data sources on national sub-threshold contracts with TED data on contracts above the thresholds. An ontology was adopted to define public procurement data within the strategy ISA², and used in the pilot project *eProcurement Analytics*: *Report on policy support for e-Procurement. E-Procurement ontology*, version 1, 2016; EU Commission, *Interoperability in end-to-end eProcurement*, Bruxelles, 2020, 20. See: G. LODI, panel "eProcurement & semantics", SEMIC 2021 Conference, 8 December 2021, video available at *link*.

[175] Communication: *A European strategy for data*, cit., *Appendix*, par. 8; Communication: *A data space to improve public spending, boost data-driven policy-making and improve access to tenders for SMEs*, cit., par. 3.

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flexible approach to governance. The Italian case can represent a best practice from which to start for experimentation.

Thus, this analysis leads necessarily to an open perspective, towards the development of data collection activities at a continental level, not just national, with the aim of preventing corruption and guaranteeing good administration, in the direction clearly identified by the European Parliament[176].

Abstract. *The article highlights some points of interests of the Italian anti-corruption model, particularly its digital transformation, with respect to the international and European regulatory framework. It focuses on the collection and use of data and digital strategies for transparency, integrity, and efficiency in public administration, as the Transparency Portal and the digital evolution of the integrated plans of activity and organization (PIAO). It takes into consideration also the public procurement databases as an instrument for administrative integrity and efficiency, and some early examples of data analysis carried out by the National Anti-Corruption Authority (ANAC) in this sector.*

[176] Resolution of 15 December 2021, *on the evaluation of preventive measures for avoiding corruption, irregular spending and misuse of EU and national funds in case of emergency funds and crisis-related spending areas* (2020/2222(INI)).

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BRIDGING THE RISK ASSESSMENT GAP: A CASE FOR EFFECTIVE COOPERATION IN PUBLIC PROCUREMENT BETWEEN THE EUROPEAN UNION AND THE UNITED STATES

Dmitri GOUBARKOV[1]

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1. INTRODUCTION

In public procurement, risk assessment plays a pivotal role in safeguarding the efficient allocation of public funds and ensuring the delivery of high-quality products. Despite their shared commitment to effective risk management, the United States and European Union approach risk assessment in public procurement differently. These differences pose potential challenges for businesses operating in both markets, as they may face varying risk assessment requirements and uncertainties that limit cross-border procurement opportunities. By bridging the gap in risk assessment practices, the European Union and the United States can enhance the integrity, efficiency, and transparency of public procurement, fostering a more secure and competitive global procurement landscape.

This paper presents a comparative analysis of risk assessment practices in the United States and the European Union, emphasizing the key differences and exploring potential avenues for collaboration. While advocating for cooperation and acknowledging the unique characteristics of each region, this paper emphasizes that a collaborative effort is necessary to facilitate a meaningful exchange of information and establish a shared understanding of

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risk assessment practices. Part II of this paper compares risk assessment approaches in the United States and European Union. This section identifies a common undesirable characteristic within both jurisdictions. Part III highlights recent developments within the United States and European Union that have an impact on risk assessment practices within both regions. Part IV concludes that regulatory cooperation in public procurement to promote mutually recognized objectives in risk assessment and safeguard against trade barriers constitutes an important step towards enhanced global economic integration. Identifying the exact parameters of such cooperation, however, remains the question that requires continued exploration and concerted efforts by both governments.

2. APPROACHES TO ASSESSING RISKS IN PUBLIC PROCUREMENT

In a public procurement system, contractor qualification assessment serves as a critical step, guaranteeing that only those entities possessing the necessary expertise, experience, and financial resources are entrusted with the undertaking government contracts[2]. The United States and European Union public procurement systems share the same common goals in contractor qualification assessment. Both strive to identify competent and qualified contractors capable of delivering high-quality products while adhering to ethical standards

[2] See FAR Part 9. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, 19-2 UrT 47, 2019, 47-49 and 52. See also S. ARROWSMITH, *EU Public Procurement Law: An Introduction*, The EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2010, 140-149.

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and regulatory requirements[3]. However, the distinct emphases of each approach reflect the unique regulatory environments and procurement practices of these respective regions[4].

2.1 Risk Assessment in Public Procurement in the United States

The United States' contractor qualification system is built on a balance between reputation, performance, and fiduciary risks[5]. To uphold public trust, the United States prioritizes performance risk assessment while simultaneously safeguarding its reputation by excluding contractors with a record of questionable practices[6]. The United States views the selection of capable and qualified contractors as crucial to not only the successful execution

[3] See e.g., C. R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-49. See also S. ARROWSMITH, *EU Public Procurement Law: An Introduction*, cit., 140-41. See also R. NOGUELLOU, *Scope and Coverage of the EU Procurement Directives*, in M. TRYBUS, R. CARANTA, G. EDELSTAM eds., *EU Public Contract Law: Public Procurement and beyond*, Bruylant, Bruxelles, 2014, 15-36. See also A. B. GREEN, *International Development Contract Law*, 1:19-1:28 (Thomson Reuters, Apr. 2022 Update). See generally S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, coll. Pub. Cont. L.J., 2016, 449. (Harutyunyan argues that the United States and the European Union have divergent systematic goals. However, she does not contest the ultimate goals of both public procurement systems. Her argument for harmonization of exclusion regimes presupposes that both the United States and the European Union aim at achieving the same goals in public procurement).

[4] See generally S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit.

[5] C.R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 52.

[6] Id.

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of contracts, but also to prudent allocation of public funds and upholding integrity of the whole process[7].

This approach to qualification assessment is largely predicated on the notion of achieving "the best value for money[8]". This concept is a central tenet of public procurement in the United States[9]. The focus on "the best value for money" makes the multifaceted qualification assessment by a United States' procuring official not simply about obtaining the lowest price. Rather, the best value for money is seen as maximizing the overall benefit and fulfilling designated roles in a broader governmental system by the U.S. Government to taxpayers[10].

2.1.1 Responsibility Determination

"A responsible offeror" is a term of art often used in the United Stated public procurement[11]. "A responsible offeror" represents a company or individual who has the

[7] Id. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454.

[8] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454. See also C. R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47. See also C.R. YUKINS, *The U.S. Federal Procurement System: An Introduction*, 2-3, UrT 69, 2017, 83.

[9] C.R. YUKINS, *The U.S. Federal Procurement System: An Introduction*, cit., 83. See also J. TILLIPMAN, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, Briefing Papers, 2011, 1.

[10] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454.

[11] W. NOEL KEYS, *Government Contracts Under The Federal Acquisition Regulations*, §9:1, Thomson Reuters, 2023.

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capability to perform fully and reliably the contract requirements[12]. This means that the offeror must have the financial resources, experience, and expertise to complete a government contract successfully[13]. The offeror must also be able to meet all of the contract's terms and conditions, including any legal or regulatory requirements[14]. In some cases, the government may also consider the offeror's past performance when making a determination of responsibility[15]. If the offeror has a history of poor performance or ethical violations, it may be found not responsible[16]. This concept of "a responsible offeror" is important because it helps ensure that the government is getting the best possible value for its money[17]. By awarding contracts to responsible offerors, the government can minimize the risk of contract breaches, cost overruns, and improper practices, ultimately reducing inefficiencies in public procurement[18].

[12] FAR 9.104-1. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-48 and 52-56. See also C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, 45, coll. Geo. Wash. Int'l L. Rev., 2013, 219 226.

[13] FAR 9.104-1. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-48 and 52-56.

[14] FAR 9.104-1.

[15] FAR 9.104-3(c).

[16] FAR 9.103, FAR 9.104-3, and FAR 9.104-4. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 52.

[17] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454-455. See also J. TILLIPMAN, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, cit. 1.

[18] See e.g., C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 52-53.

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The important aspect of determining responsibility lies in evaluating the current corporate environment and capabilities of a potential contractor[19]. This approach does not mean that the past conduct of an offeror is immaterial. However, a contractor may demonstrate that despite past misconduct, the risk has been reduced or removed, making a non-responsibility determination or exclusion unwarranted[20].

A finding of non-responsibility and exclusion from a particular contract does not necessarily preclude an offeror from competing for other public contracts. Responsibility standards are specific to the needs of a procurement, such as the ability to meet identified milestones or having a requisite level of technical expertise or a record of corporate compliance[21]. However, a finding of non-responsibility in a procurement process may represent a de facto debarment if the contracting officer's decision is used to exclude the offeror from all future government contract opportunities[22].

[19] Id, at 48. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 469-70.

[20] C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-48.

[21] FAR 9.104-1.

[22] See e.g., *Phillips v. Mabus*, 894 F. Supp. 2d 71, 81 (D.D.C. 2012). See also J. CARLO, *Inc. v. Corps of Eng.*, 539 F.Supp. 1075, N.D.Tex. 1982, 1080. See also T. J. CANNI, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, in *Public Contract Law Journal*, vol. 38, no. 3, 2009, 547, 555.

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2.1.2 Suspension and Debarment

The standards for suspension and debarment differ from the criteria for non-responsibility conclusion[23]. Debarment is defined as an administrative action implemented by a designated debarring official to exclude a contractor from participating in government contracts for a specified period[24], while suspension refers to a temporary disqualification of a contractor from engaging in government contracting and government-approved subcontracting initiated by an authorized suspending official[25]. Yet, both sets of standards are complementary guides for assessing risks posed by prospective contractors. Both suspension and debarment aim to safeguard the government from risks presented by individuals or firms exhibiting a lack integrity or having a record of subpar performance[26]. The Federal Acquisition Regulation ("FAR") reinforces this interconnectedness by stating that agencies should only award contracts to responsible contractors and that debarment or suspension "are appropriate means to effectuate this policy[27]".

The United States employs a centralized suspension and debarment system that is subject to judicial oversight[28]. Debarring and suspending officials typically hold senior

[23] Id, at 55. See also W. NOEL KEYS, *Government Contracts Under The Federal Acquisition Regulations*, Thomson Reuters, 2023, at 9:31. See also T. J. CANNI, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule*, cit., at 579-80.

[24] FAR 9.406-1 and FAR 9.406-4.

[25] FAR 9.407-1.

[26] R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 55.

[27] FAR 9.402(a). See also R. YUKINS-M KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 55.

[28] 5 U.S.C.A. §§ 702-704.

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positions and maintain independence from contracting officers[29]. While they exercise a significant degree of discretion, their discretion may be constrained by statutory suspension and debarment mandates[30]. Absent a statutory mandate, debarring and suspending officials may choose any action they deem appropriate, to include taking no action at all[31]. They may also pursue an alternative resolution through an administrative agreement, which outlines specific terms and conditions that a contractor must adhere to in order to maintain its status as a responsible contractor under the FAR[32]. The fundamental principle governing suspension and debarment decisions is that they are only imposed when there is a clear determination that it is in the government's best interest[33].

Suspension and debarment represent a cross-agency action. Once a debarring or suspending official decides that shielding the government from a contractor is necessary to protect government interests, that contractor cannot pursue public contract opportunities

[29] FAR 9.403.

[30] See e.g., 42 U.S.C. §7401 et seq. (The Clean Air Act).

[31] See e.g., Department of Homeland Security, Department of Homeland Security Suspension and Debarment Case Management System, Department of Homeland Security Suspension and Debarment Official Management Directorate (Sept. 28, 2018) [hereinafter DHS Debarment Management]. Available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhsall070-sdcms-september2018.pdf. See also, R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 58. Generally, debarments are for a period of three years. FAR 9.406-4. Suspensions are usually imposed for 12 months but may be extended for up to 18 months. FAR 9.407-4.

[32] FAR 9.406-3(f). See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 58 and 64-65. See also C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 223. See also *DHS Debarment Management*, supra note 13.

[33] FAR 9.406-1(a) and FAR 9.406-1(b). See also N. E. CASTELLANO, *Suspensions, Debarments, and Sanctions: A Comparative Guide to United States and World Bank Exclusion Mechanisms*, Pub. Cont. L.J., 45, 2016, 403, 411.

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across the whole federal government[34]. The exclusion information for the contractor gets posted on the System for Award Management ("SAM.gov") and becomes publicly available[35]. Such publicizing results not only in reputational harm and forfeiture of federal contract opportunities, but also triggers a series of corollary effects. Multiple state and local governments have implemented reciprocal exclusion policies or utilize federal grant funding for certain projects, effectively barring them from doing business with excluded entities listed on SAM.gov[36]. This means that an excluded contractor will face substantial hurdles in obtaining work, even outside the federal government domain[37].

Given the consequences of suspension and debarment decisions, the FAR indicates that debarment or suspension should be considered as options of last resort[38]. The purpose of the U.S. exclusion system is not to punish contractors[39]. Exclusions, whether based on the

[34] See C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 223 (referencing Exec. Order No. 12,689, 3 C.F.R. 235 (1989).

[35] FAR 9.404 and FAR 9.405.

[36] J. A. BERRADA, *Suspension and Proposed Debarment in Federal Government Contracting: A Call for Pre-Exclusion Notice and Opportunity to Respond*, Pub. Cont. L.J., 48, 2018, 165, 173-74.

[37] D. ROBBINS, J. M. CRAWFORD, and L. J. MITCHELL BAKER, *A Scarlet Letter: Do the Exclusion Archives on SAM.gov Violate Contractors' Liberty Interests?,* 106 FED. CONT. REP. 317 (Sept. 27, 2016). Available at https://www.crowell.com/a/web/qNCwKmF3QqccZh8nxj8Ebp/4TtivV/20160927-Scarlet-Letter-Do-Exclusion-Archives-on-SAMgov-Violate-Contractors-Liberty-Interests.pdf. The General Service Administration has revised its procedures since this article was published. Currently, inactive exclusions may only be viewed by federal users. See General Service Administration, Searching Exclusions on Sam.gov, General Service Administration YouTube Channel (Mar. 8, 2022) [hereinafter GSA Searching Exclusions]. Available at https://www.youtube.com/watch?v=dJPuTufLN0c.

[38] FAR 9.406-1(a) and FAR 9.407-1(b).

[39] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 64. See also C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 226.

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contracting officer's qualification assessment or debarment/suspension, are tools to mitigate risk in public procurement[40]. The decision to exclude contractors from competing for federal contracts is typically considered a business judgment, rather than a punitive measure.

2.1.3 SAM.gov as a Contractor Information Repository

As indicated in the previous section, SAM.gov is a consolidated repository of contractor information managed by the General Service Administration ("GSA") that is accessible to the public[41]. The system publicizes contractor information through various means, including the "Contractor Opportunities" section, which lists all federal contracting opportunities, and the "Entity Information" section, which contains information about all businesses registered with SAM.gov[42]. Businesses are required to provide annual information to the GSA and SAM.gov through certifications and representations[43]. This self-reporting process allows the federal government to assess a contractor's responsibility by examining its integrity record, qualifications, volume of business with the U.S. Government, and other

[40] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 64. See also N. E. CASTELLANO, *Suspensions, Debarments, and Sanctions: A Comparative Guide to United States and World Bank Exclusion Mechanisms*, cit., at 406 (referencing Daniel Gordon's statement before the Senate Committee on Homeland Security and Governmental Affairs in 2011).

[41] FAR Subpart. 9.4. See also SAM.gov-Contract Data, General Service Administration (2023). Available at https://sam.gov/reports/awards/static.

[42] SAM.gov-Data Bank, General Service Administration (2023) [hereinafter SAM.gov-Data Bank]. Available at https://sam.gov/reports/ei/static.

[43] FAR 4.1201.

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relevant information[44]. This self-reporting also forms the basis of the information made public[45].

Contractors may opt out of public search, but they are still required to complete the annual certifications and representations[46]. Opting out only means that their record will not be visible to the general public[47]. Opting out does not mean that a contractor gets a pass from the annual certifications and representations requirement. However, only government personnel with access to SAM.gov will be able to see the record for that contractor[48].

Suspensions and debarments are not part of the SAM.gov qualifications record for contractors. Instead, they are maintained in a separate database that only includes active suspension and debarment information[49]. The GSA no longer makes archived or inactive exclusions visible to the general public[50]. The exclusions information that is publicly

[44] See e.g., FAR 52.209-7. See also SAM.gov-Data Bank, supra note 41. See also SAM.gov-Help, General Service Administration (2023) [hereinafter SAM.gov-Help]. Available at https://sam.gov/content/help. See also Shane McCall, Back to Basics: Registering in SAM.gov, SmallGovCon (Feb. 9, 2023). Available at https://smallgovcon.com/federal-government-contracting/back-to-basics-registering-in-sam-gov/.

[45] See SAM.gov-Help, supra note 44. See also McCall, supra note 44.

[46] SAM.gov-Entity Information, General Service Administration (2023). Available at https://sam.gov/content/entity-information.

[47] Id (directing federal users to sign in with a federal email address or federal identification card if they want "to view registrants who have opted out of public search").

[48] Id.

[49] SAM.gov-Data Bank, supra note 42. See also GSA Searching Exclusions, supra note 37.

[50] GSA Searching Exclusions, supra note 37. See also SAM.gov-Entity Information/Exclusions, General Service Administration (As of Nov. 21, 2023). Available at https://sam.gov/search/?index=ex&sort=-relevance&page=1&pageSize=25&sfm%5BsimpleSearch%5D%5BkeywordRadio%5D=ALL&sfm%5BsimpleSearch%5D%5BkeywordEditorTextarea%5D=&sfm%5Bstatus%5D%5Bis_active%5D=true&sfm%5Bstatus%5D%5Bis_inactive%5D=false&sfm%5BexclusionType%5D%5BexclusionType%5D%5B1%5D=true&sfm%5Bexclusi

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available divides excluded businesses into four types: ineligible (proceeding pending), ineligible (proceeding complete), prohibition/restriction, and voluntary exclusion[51]. For businesses that have had an active exclusion for a while and prior to the transition to these four types of exclusions, SAM.gov provides legacy codes that offer some detail about the nature of the exclusion[52]. Overall, the exclusions information is not comprehensive but gives a general idea of imposed exclusions.

2.2 Risk Assessment in Public Procurement in the European Union

Prior to delving into the specifics of risk assessment in the European Union, a caveat is necessary. The following analysis is framed along the risk assessment methodology employed by contracting officials in the United States. This chosen approach is not intended to diminish the complexity of or oversimplify the risk assessment conducted by contracting authorities in the European Union. Instead, this paper seeks to perform a comparative analysis along parallel lines, with the objective of evaluating potential interoperability in public procurement practices between the United States and the European Union.

onType%5D%5BexclusionType%5D%5B2%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B3%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B4%5D=true.

[51] SAM.gov-Exclusion Types, General Service Administration (2023). Available at https://sam.gov/content/entity-information/resources/exclusion-types.

[52] SAM.gov-Entity Information, General Service Administration (2023). Available at https://sam.gov/search/?index=ex&sort=-relevance&page=1&pageSize=25&sfm%5BsimpleSearch%5D%5BkeywordRadio%5D=ALL&sfm%5Bstatus%5D%5Bis_active%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B0%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B1%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B2%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B3%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B4%5D=true. See also SAM.gov-Legacy CT Codes, General Service Administration (2023). Available at https://sam.gov/content/entity-information/resources/legacy-ct-codes.

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The goals of the European Union's contractor qualification system are not inherently different from the goals of the United States' qualification process. The European Union balances reputation, performance, and fiduciary risks through a system that is designed to keep market polluters away from the European market[53]. The European Union, however, prioritizes market integration[54]. As such, the European Union places a greater emphasis on the interests of the private sector[55]. Although the European Union acknowledges the importance of ensuring value for money[56], prioritizing the interests of the private sector establishes the boundaries for pursuing other objectives[57]. This market-oriented approach also influences the mechanics of risk assessment within the EU.

[53] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 65-66. See also M. STEINICKE, *Qualifications and Shortlisting in EU Public Contract Law: Public Procurement And Beyond*, (M. TRYBUS, R. CARANTA and G. EDELSTAM eds.), Bruylant, 2014, 105-123.

[54] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55. See also K. WAUTERS-S. BLEUX, *A New Generation of Public Procurement Directives: Background, Objectives and Results,* in *Eu Directive 2014/24 On Public Procurement: New Turn For Competition In Public Markets*, (Y. MARIQUE-K. WAUTERS eds.), Larcier, 2016, 8-10.

[55] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55.

[56] Directive 2014/24, of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94) 65 (EU) [hereinafter *Public Procurement Directive*] (discussing the Most Economically Advantageous Tender as a method of evaluation that enables contracting entities to award a contract based on factors beyond price).

[57] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit. at 455.

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2.2.1 Exclusion from Procurement and Competition

In the context of the United States' exclusion determination, present responsibility factors significantly in decisions to exclude a contractor from competing for a solicited requirement in the United States[58]. The European Union's approach does not follow the exact same rationale. While non-selecting contractors based on economic and technical capabilities is not vastly different[59], proportionality of measures taken against contractors and the impact of such measures on market participation assumes a more prominent position in the European Union.

In the European Union's public procurement, proportionality means that the selection criteria and procedures used by contracting authorities must not be more restrictive than necessary to achieve the legitimate objectives of the procurement process[60]. The requirements imposed on contractors seeking to participate in public procurement must be proportionate to the value and complexity of the contract in question[61]. As applied to maintaining a proper level of competition between offerors, this condition is not intrinsically different from the

[58] See e.g., R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 52-53. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 469-70.

[59] See e.g., M. STEINICKE, *Qualifications and Shortlisting in EU Public Contract Law: Public Procurement And Beyond*, cit., at 109-122.

[60] *Public Procurement Directive, Art. 18.* See also P. KUNZLIK, *The 2014 Public Procurement Package: One-Step Forward and Two Back for Green and Social Procurement?*, in *EU Directive 2014/24 On Public Procurement: New Turn For Competition In Public Markets*, (Y. MARIQUE-K. WAUTERS eds.), Larcier, 2016, 192-95.

[61] P. KUNZLIK, *The 2014 Public Procurement Package: One-Step Forward and Two Back for Green and Social Procurement*, cit., at 192-93.

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United States' approach[62]. However, the procedures taken by the European Union contracting officer to assess what the United States would call "responsibility" are more constrained. Unlike in the United States, requests for information to "demonstrate reliability despite the existence of an optional ground for exclusion" must be tied to the specifications identified in a solicitation or come from Member States' internal rules[63]. Thus, the contracting officer in the European Union does not have the same level of discretion that her counterpart in the United States has to assess the degree of risk in awarding a contract to a certain contractor. Considering the overarching goal of market integration, a European Union contracting official must adhere to a strict and clearly defined framework when making decisions about excluding contractors with a record of past misconduct, unless the contracting officer relies on mandatory exclusion grounds[64] or Member States choose to treat discretionary grounds as mandatory[65].

Admittedly, contracting officers in the European Union may exert practical autonomy and use the procurement system to de facto exclude a contractor from future

[62] See e.g., 10 U.S.C. § 2304 and 41 U.S.C. § 3301 (Full and open competition is the norm in U.S. public procurement. However, U.S. law permits restricting competition in certain circumstances). See also FAR 11.002 (stating the policy that chosen specifications should promote full and open competition and should not be unduly restrictive).

[63] See RTS infra BVBA, Aannemingsbedrijf Norré-Behaegel v. Vlaams Gewest, Case-387/19, ECJ (Jan. 14, 2021) (holding that self-cleaning (i.e., corrective) measures taken to rectify past conduct or non-compliance have direct effect, and offerors may be required to provide evidence of corrective actions when submitting offers if this requirement: (i) is explicitly specified in national legislation or (ii) "is brought to the attention of the economic operator concerned by means of the tender specifications").

[64] *Public Procurement Directive, Art. 57 (providing several grounds for mandatory exclusion).*

[65] J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, Bird & Bird Attorneys Ltd. (Oct. 12, 2021). Available at https://www.twobirds.com/en/insights/2021/global/antitrust-and-anticorruption-never-the-twain-shall meet#section7.

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contract opportunities. However, the notion of de facto debarment or suspension takes a very different form in the European Union than in the United States. In the United States, the contracting officer's finding of non-responsibility may form the basis for debarment or suspension[66]. In the European Union, a finding that a contractor lacks capability to perform in a specific procurement does not lead to exclusion from public procurement opportunities per se. But "handicapping" the same contractor through "harsh evaluation" might become a de facto debarment[67] if past performance is used as a threshold to enter competition[68].

Because the European Union sees disqualification of a contractor from public procurement as a different normative measure[69], the limitation on agency discretion in assessing whether to award a public contract to a contractor, as compared to the United

[66] See e.g., T. J. CANNI, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule*, cit., at 55.

[67]See e.g., G. L. ALBANO, B. CESI, and A. IOZZI, *Public Procurement with Unverifiable Quality: The Case for Discriminatory Competitive Procedures*, SOAS Research Online (Oct. 24, 2016). Available at https://eprints.soas.ac.uk/31030/6/Albano_Public%20Procurement%20with%20Unverifiable%20Quality.pdf.

[68] According to *Public Procurement Directive, Art. 57(4)(g):* "Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator… where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions." However, Article 87 of the Treaty Establishing the European Community raises an issue of whether past performance may be used as a discriminative criterion in proposal evaluation. See Consolidated Version of the Treaty Establishing the European Community, Art. 87, 2006 O.J. C 321 E/37. Therefore, contracting authorities may only consider past performance in their decision of whether a contractor may submit an offer in response to a solicitation.

[69] As discussed in Part II.A, the United States requires an "affirmative determination of responsibility" before awarding a contract. FAR 9.103(b).

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States' approach, underwrites the intent to conduct what effectively is the evaluation of continuing market participation potential[70].

The assessment of this potential is not made entirely before making awards. The European Union law provides for self-cleaning mechanism when a contracting authority uncovers a contractor's misconduct. Self-cleaning enables a contractor, who has engaged in behavior that would otherwise warrant suspension or debarment, to take remedial actions to mitigate the consequences by implementing corporate controls after the misconduct has been discovered[71]. The European Union's emphasis on rehabilitation is not fundamentally different from the United States' focus in present responsibility assessment. In the United States, rehabilitation plays a role in determining present responsibility[72]. In the European Union, however, failure to implement rehabilitation measures and make specific self-cleaning commitments results in exclusion[73]. The European Union, therefore, takes a retroactive approach to misconduct that has already occurred and demands specific positive actions to demonstrate responsibility.

[70] See e.g., S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 469 (arguing that the European Union effectively does a rehabilitation assessment to determine whether contractors will qualify for future awards). See also discussion of self-cleaning in Section B.2. below.

[71] *Public Procurement Directive, Art. 57(6). See also* S. ARROWSMITH, H. J. PRIESS, and P. FRITON, *Self-Cleaning- An Emerging Concept in EC Public Procurement Law?,* in *Self-Cleaning In Public Procurement Law*, 4 (H. PüNDER, H. J. PRIESS and S. ARROWSMITH eds.), C. H. VERLAG, 2009, 6-11. See also S. SCHOENMAEKERS, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, coll. 13 Eur. Procurement & Pub. Private Partnership L. Rev., 3, 2018, 6-8.

[72] See e.g., FAR 9.406-3(f) and FAR 9.407-3(e). Self-cleaning is not entirely different from administrative agreements in the United States. By entering into an administrative agreement with the government, the contractor typically concedes to its wrongdoing and may consent to various remedial measures.

[73] *Public Procurement Directive, Art. 57(6) (*Art. 57(6) requires: (i) collaboration with the investigating authorities; (ii) compensation for damages; (iii) removal of bad actors; and (iv) enactment of measures to prevent similar misconduct in the future).

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2.2.2 Suspension and Debarment

In contrast to the prescriptive and uniform U.S. system of debarment and suspension, the European Union exclusion regime exhibits greater flexibility and variation among Member States. Article 57 of the Public Procurement Directive establishes a distinction between mandatory and discretionary grounds for exclusion[74]. These grounds largely mirror the criteria considered by suspending or debarring officials in the United States for assessing performance, reputational, and fiduciary risks[75]. The European Union, however, grants Member States the discretion to deviate from mandatory exclusion grounds under exceptional circumstances or when exclusion would be deemed disproportionate to the objectives of EU treaties[76]. Similarly, Member States have the authority to apply stricter exclusion measures and designate discretionary grounds under Article 57 as mandatory[77].

The European Union's decentralized approach creates varied application of suspension and debarment measures. The Public Procurement Directive lacks specificity regarding the delegation of decision-making authority for suspending or debarring a

[74] DIRECTIVE 2014/24/EU *of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57* (on mandatory grounds, contractors may be excluded up to five years; on discretionary grounds, contractors may be excluded for three years). See also S. ARROWSMITH, H. J. PRIESS, and P. FRITON, *Self-Cleaning-An Emerging Concept in EC Public Procurement Law?,* cit., at 6-11.

[75] Compare DIRECTIVE 2014/24/EU *of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57 to FAR. 9.406-1, FAR 9.406-2, FAR 9.407-1, and FAR 9.407-2.*

[76] DIRECTIVE 2014/24/EU *of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57.*

[77] See J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit.

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contractor. Article 57 mandates that contracting authorities make exclusion decisions on a case-by-case basis[78]. Essentially, decisions to exclude are left to contracting officers unless Member States' national legislation identifies a specific authority for making exclusion decisions[79]. This approach produces divergent application not only among Member States, but also within agencies[80]. Additionally, this approach raises concerns about the availability of the necessary expertise to assess the potential risk posed by a contractor[81].

The European Union's approach to self-cleaning also pre-determines the parameters of suspension and debarment. The European Union treats self-cleaning as a factor to readmit a contactor back into public competition[82]. Such a contractor may continue fulfilling existing contracts and compete for future public contracts if its "reliability is sufficiently established[83]". The Public Procurement Directive does not specify who is responsible for determining the contractor's reliability or to whom the evidence demonstrating the contractor's self-cleaning measures must be submitted. Article 57 delegates the responsibility

[78] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 68-69.

[79] Id, at 69-70 (referring to Recital 102 of *Public Procurement Directive and describing the approach to debarment/suspension in Germany and Hungary)*.

[80] See E. HJELMENG-T. SØREIDE*, Debarment In Public Procurement: Rationales And Realization,* in *Integrity and Efficiency in Sustainable Public Contracts*, (G. M. RACCA-R. YUKINS eds.), Bruylant, 2014, 12-14. Avaialable at https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2462868.

[81] See C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, at 68. See also S. SCHOENMAEKERS, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, cit., at 8.

[82] *Public Procurement Directive, Art. 57(6)*. See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 62 and 67.

[83] *Public Procurement Directive, Art. 57(6).*

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for making reliability assessments to contracting authorities and individual EU Member States[84].

2.2.3 European Single Procurement Document

In 2016, the European Commission introduced the European Single Procurement Document ("ESPD") to streamline the procurement process and reduce the administrative burden on contracting authorities and contractors[85]. The use of the ESPD is mandatory for all public procurement procedures above certain thresholds, which vary by the type of procurement[86]. However, the ESPD may also be used for procedures below the thresholds[87]. The ESPD became an exclusively online platform on April 18th, 2018[88].

[84] *Public Procurement Directive, Art. 57(6).* See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit.

[85] Commission Implementing Regulation of 5 January 2016 Establishing the Standard Form for the European Single Procurement Document, 2016 O.J. (L 3) (EU) [hereinafter ESPD Implementing Regulation]. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0007.

[86] ESPD Implementing Regulation, supra note 85, at L 3/18. See also EU Commission, *Thresholds*, (2023) (providing information on thresholds for different types of procurements and procedures). Available at https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en.

[87] ESPD Implementing Regulation, supra note 85, at L 3/18.

[88] European Commission, European Single Procurement Document (ESPD) (2023). Available at https://ec.europa.eu/isa2/solutions/european-single-procurement-document-espd_en/.

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The ESPD effectively dispenses with a pre-qualification questionnaire solicited from contractors as part of the public procurement process[89]. The ESPD allows contractors to self-certify that they meet eligibility criteria for public procurement contracts by providing information about their commercial capability, qualification for a specific procurement procedure, and existence of exclusion grounds[90]. Additionally, contractors may provide information on quality assurance plans or environmental practices[91]. Contracting authorities must accept contractors' self-declaration[92].

Self-cleaning also factors into the information provided in the ESPD. Through self-certification in the ESPD, a contractor may reveal grounds for exclusions. However, such disclosure will not automatically make the contractor ineligible for participation in a procurement. The contractor may include in its ESPD self-certification the measures it has taken or is taking to self-clean[93]. In essence, the contractor provides the type of information

[89] See ESPD Implementing Regulation supra note 85. See also Understanding the ESPD: A Guide for Suppliers, Achilles Industry Insights (2023). Available at https://www.achilles.com/industry-insights/understanding-espd-guide-suppliers/.

[90] ESPD Implementing Regulation, supra note 86, at L 3/20-3/21.

[91] Id.

[92] See A. SUNDSTRAND, *International Procurement Developments in 2016-Part III: The European Union's New Procurement Rules*, Gov't Contracts Year in Rev. Br. 5 (Thomson Reuters, 2017).

[93] See Guide to Self-Cleaning in European Public Procurement Procedures, Dentons, 38 and 45 (2021) [hereinafter Dentons Guide to Self-Cleaning]. Available at https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/april/13/guidetoselfleaningineuropeanpublicprocurementprocedures#:~:text=Drawing%20on%20the%20knowledge%20and,focus%20on%20what%20%20in%20practice%20–. While discussing the use of ESPD in the case of Poland, Dentons makes an interesting observation about arguments proffered by parties in European courts: "It is also considered by a strong majority of experts to be a general rule that a self-cleaning should be performed at the stage of submitting the ESPD. However, in newer case law a stance to the contrary is sometimes presented, arguing that the contractors should be allowed to perform a self-cleaning procedure at a later stage, as

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similar to what the U.S. government would ordinarily negotiate with contractors in an administrative agreement, albeit without the formality of having both parties specifying the measures to ensure compliance[94].

The European Union does not centrally manage the ESPD database. Member States administer their own ESPD platforms, which allow for access for entities or individuals from outside of the Member State[95]. The European Union sees integration with national databases as a major benefit in transitioning to eProcurement[96]. Unlike SAM.gov in the United States, however, the ESPD is still in development stages but is largely seen as having a major facilitator of "cross-border participation in public procurement procedures[97]".

In the interest of comparing the European exclusion approach to the United States' system and presenting a fuller picture of the European approach to publicizing exclusions, it should be noted that the ESPD does not have a database that lists excluded entities or individuals[98]. The European Union accomplishes what a U.S. practitioner would call

preventing the contractor from carrying out a self-cleaning procedure after a ground for exclusion is established would essentially lead to automatic exclusion."

[94] FAR 9.406-3(f). See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 64 (describing administrative agreements). See also R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 223. See also *DHS Debarment Management*, supra note 14.

[95] See e.g., European Commission, List of European Single Procurement Directive (ESPD) Providers (Feb. 16, 2022). Available at https://ec.europa.eu/docsroom/documents/48856.

[96] European Commission, European Single Procurement Document and eCertis (2023). Available at https://single-market-economy.ec.europa.eu/single-market/public-procurement/digital-procurement/european-single-procurement-document-and-ecertis_en.

[97] ESPD Implementing Regulation, supra note 85, at L 3/16.

[98] Virtual Discussion with M. SHMIDT (Policy Officer and eProcurement Expert at the European Commission), R. YUKINS (Lynn David Research Professor in Government Procurement Law at the George Washington University Law School), G. M. RACCA (Professor of Administrative Law at the University of Turin), P. A. ARANDA

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blacklisting via the Early Detection and Exclusion System ("EDES")[99]. The function of the EDES overlaps with the ESPD, in that the EDES aims at preventing fraudulent actors from receiving public funds[100]. However, the EDES depends on shared management between the European Commission and Member States[101]. And Member States are not transparent about their exclusion practices[102]. The number of blacklisted entities in the EDES is extremely small[103]. The scarcity of data on exclusions from Member States stems partly from the discretion they hold in applying exclusions to public funds they manage[104].

(Knowledge Management Assistant, Publications Office of the European Union), and F. GORGERINO (PhD Student at the University of Turin) via Zoom (Nov. 22, 2023) [hereinafter Virtual Discussion Nov. 22, 2023).

[99] European Commission, Early Detection and Exclusion System (EDES) (2023) [hereinafter EDES Database]. Available at https://commission.europa.eu/ strategy-and-policy/eu-budget/how-it-works/annual-lifecycle/ implementation/antifraudmeasures/edes_en#:~:text=The%20purpose%20of%20the%20EDES,%2C%20bodies% 2C%20offices% 20or%20agencies. Unlike the ESPD, which derives its basis from Directive 2014/24/EU, the European Financial Regulation provides the rules for the EDES. See Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the Financial Rules Applicable to the General Budget of the Union, Amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012. 2018 O.J. (L 193) (EU), Art. 136 [hereinafter Financial Regulation].

[100] Financial Regulation, supra note 97.

[101] See Special Report 11-22, Protecting the EU Budget-Better Use of Blacklisting Needed, European Court of Auditors (2022) [hereinafter EU Court of Auditors Special Report]. Available at https://www.eca.europa.eu/Lists/ ECADocuments/SR22_11/SR_Blacklisting_economic_operators_EN.pdf.

[102] Id.

[103] As of November 22nd, 2023, the EDES contained only five listed entities. Available at https://commission.europa.eu/strategy-and-policy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes/edes-database_en.

[104] EU Court of Auditors Special Report, supra note 101, at 40-44.

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2.3 Comparative summary of Risk Assessment in the United States and the European Union

The United States and the European Union public procurement systems differ in how they prioritize public procurement goals in risk assessment. The United States aims at promoting public trust and integrity to achieve best value[105], while the European Union places more focus on promoting a single European market and recognizing Member States as subsidiary sovereigns with distinct public procurement systems[106]. In furtherance of its goals, the United States relies on a multifaceted approach to assessing responsibility prior to awarding a contract. The concept of responsibility consists of qualification assessment and integrity assessment by ensuring that contractors have adequate compliances systems[107]. The European Union, on the other hand, maintains a system of risk assessment that is largely dependent on proportionality of measures applied to contractors[108]. In other words, the

[105] See e.g., R. YUKINS and M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 52. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55.

[106] See e.g., EU Court of Auditors Special Report, Executive Summary, supra note 101, at 4-6. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55 and 469.

[107] See e.g., FAR 9.402(a). See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 55.

[108] See S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 455-56 (discussing the Treaty on the Functioning of the European Union ("TEFU"), the concepts of proportionality and subsidiarity, and Directive-prescribed exclusions). See also *Public Procurement Directive, Art. 18.* See also P. KUNZLIK, *The 2014 Public Procurement Package: One-Step Forward and Two Back for Green and Social Procurement?*, in *EU Directive*

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measures chosen to exclude must be proportionally related to the clearly denoted contract specifications or methods of procurement. In fact, a European contracting authority would look at the commonly recognized minimum standards for exclusion (i.e., mandatory grounds for exclusion) first and then would conduct what a United States counterparts usually characterizes a qualification assessment[109]. Any decision to exclude in the European Union also takes into consideration a contractor's corrective measures to overcome past misconduct and commitment to ethical and compliant practices[110].

Because the European Union's policies may not be overly prescriptive towards national practices, the European Union's suspension and debarment system includes only the fundamental minimum elements necessary to maintain and promote the goals of its exclusion system[111]. Member States may still enact provisions on exclusion that differ from other Member States, contributing to non-uniform procurement systems throughout Europe[112]. By contrast, the United States' centralized suspension and debarment system is highly prescriptive by design and provides procedural, blacklisting, and due process

2014/24 On Public Procurement: New Turn For Competition In Public Markets, at 192-93. See also RTS infra BVBA, Aannemingsbedrijf Norré-Behaegel v. Vlaams Gewest.

[109] Virtual Discussion Nov. 22, 2023.

[110] *Public Procurement Directive, Art. 57(6)*. See also Dentons Guide to Self-Cleaning, supra note 92. See also S. ARROWSMITH, H. J. PRIESS, and P. FRITON, supra note 70, at 6-11. See also [110] C.R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, at 67. See also S. SCHOENMAEKERS, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, cit., at 7.

[111] See e.g., S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit.at 456 (discussing the TEFU, Article 57 of the *Public Procurement Directive outlining* the minimum exclusion grounds Member States must incorporate in national legislation, and Member States enacting provisions on exclusion that differ from other EU states).

[112] Id.

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requirements[113]. The United States also assigns suspension and debarment decisions to senior personnel who function independently of contracting personnel[114]. Retaining such decision-making within more experienced and independently-functioning personnel ensures uniformity in approach without restricting the discretion vested in debarring and suspending officials. The European Union, on the other hand, largely relies on decisions of contracting authorities made on a case-by-case basis[115].

These differences in approaches do not necessarily indicate that the European Union and the United States have inherently dissimilar public procurement systems. Divergent approaches on incentivizing compliance, agency discretion, responsibility assessment (i.e., present in the United States versus evolving in the European Union), and debarment or suspension regimes do not provide compelling evidence that conceptually both procurement systems differ significantly. The methods or procedures employed to safeguard the integrity of the public procurement process are what set the two systems apart.

Both procurement systems, however, share the undesirable characteristic of lacking meaningful transparency, which hinders the removal of market barriers that impede cross-Atlantic competition. SAM.gov in the United States is meant to serve as a transparent hub for contractor qualification and integrity information[116]. In practice, it is not. The opt-out

[113] See FAR Subpart 9.4. See also R. YUKINS-M. Kania, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 59-65.

[114] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 58. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 458.

[115] See *Public Procurement Directive, Art. 57.* See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 68-69.

[116] See e.g., System for Award Management/Non-Federal User Guide-v.2.7, General Service Administration (Jan. 25, 2020). See also FAR Subpart. 9.4.

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option provided to certain contractors on this database is difficult to reconcile[117]. This practice contradicts existing statutory mandates. The Open, Public, Electronic and Necessary (OPEN) Government Data Act ("OPEN Data Act") explicitly requires that agencies make data available in a machine-readable and open format, meaning they must publicly disclose data that would otherwise be made available under the Freedom of Information Act ("FOIA")[118]. Certifications and representations submitted by contractors to the GSA do not invoke FOIA exemptions[119]. Furthermore, any administrative agreement negotiated between the U.S. Government and a contractor must be published on SAM.gov[120]. This requirement for public disclosure of administrative agreements, coupled with the publicly available exclusion list on SAM.gov and the provisions of the OPEN Data Act, suggests that contractors' records of integrity and other information necessary to assess their qualifications must be made accessible through public search, unless proprietary or confidential information is involved.

The European Union's exclusion database, integrated within the EDES system, is also strikingly deficient and lacking in content. This lack of information on excluded contractors and the limited number of listed entities reflect the delicate balancing act between the European Commission and Member States[121]. Absent meaningful input from Member

[117] One plausible explanation is the GSA's attempt to reduce transaction costs. But the result is the same: the GSA limits access to information that is supposed to be in the public domain.

[118] Pub. L. No. 115-435 (2019) (OPEN Data Act is also referred to as Title II of the Foundations for Evidence-Based Policymaking Act of 2018). See also U.S Congressional Research Service, The OPEN Government Data Act: A Primer (Dec. 29, 2022). Available at https://sgp.fas.org/crs/secrecy/IF12299.pdf.

[119] See 5 U.S.C. § 552 (containing several exemptions, to include exemptions for releasing contractor confidential and proprietary information). See also U.S Congressional Research Service, The Freedom of Information Act (FOIA): A Legal Overview (Aug. 24, 2020). Available at https://crsreports.congress.gov/ product/pdf/R/R46238.

[120] See FAR 9.406-3(f) and 9.407-3(e). See also FAR 52.203-13. See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 71.

[121] See e.g., EU Court of Auditors Special Report, supra note 99.

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States, the EDES exclusion list's minimal content provides negligible utility to contracting professionals on both sides of the Atlantic.

Moreover, both the United States and European Union do not provide a comprehensive list of underlying reasons for exclusions on SAM.gov or the ESPD or the ESPD[122]. Considering divergent mechanisms embedded within integrity assessment in both procurement systems, understanding the underlying grounds for being on an exclusion list or being allowed to continue participating in public procurement via an administrative agreement or implemented self-cleaning measures is crucial in both jurisdictions.

The absence of clear and consistent reasoning behind exclusion decisions – as well as of shared understanding of the distinctions outlined in the previous sections – poses a significant obstacle to the liberalization of trade in the public procurement domain between the United States and the European Union. Consider, for example, a U.S. contracting officer looking at the ESPD and seeing an affirmative statement about grounds for exclusion that were established after the award and during the course of contract performance. Now let us add into the equation the lack of a corresponding administrative agreement and compound confusion of the U.S contracting officer by the fact that the contractor is still performing under its current contract. To make matters even more confusing, the ESPD may also contain a self-certifying statement from the same contractor that it had no exclusion grounds to report. Unless the U.S. contracting officer understands what self-cleaning is and how it allows contractors to avoid exclusion even when they have engaged in misconduct or made an incorrect affirmative representation in the ESPD, she may conclude that the European contractor is not responsible or qualified for the award. Self-cleaning may incentivize

[122] See GSA Searching Exclusions, supra note 37. See also SAM.gov-Exclusion Types, supra note 51. See also, SAM.gov-Legacy CT Codes, supra note 51. See also SAM.gov-Entity Information, supra note 52. See also Virtual Discussion Nov. 22, 2023. See also EDES Database, supra note 98.

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contractor compliance in the European Union, but this remedial and rehabilitation measure is not present in the U.S. system in the same form[123].

Conversely, European contracting officers may encounter similar challenges when accessing information on SAM.gov. Consider, for instance, an entry for a company listed on the exclusion list with a voluntary exclusion or an ineligible status (proceeding pending). Further complicating this scenario is the absence of information in the "Additional Comments" section or the use of boilerplate language copied from an existing U.S. regulation for some contractors[124]. For contracting officers – and not only European contracting officers, but all contracting officers in general – such entries on SAM.gov are meaningless, as they provide insufficient information to make informed decisions regarding the company's eligibility for participation in public procurement. In essence, the information on SAM.gov, while potentially raising additional questions about contractors, fails to provide the necessary guidance for contracting officials to make sound judgments regarding market participation. The outcome in both scenarios is likely similar. At best, contracting officers may resort to requesting further information from contractors, leading to delays in award issuance. At worst, they may reach erroneous conclusions. This lack of translatable standards and consistency in information exchange can hinder cross-Atlantic competition and impede efficient public procurement processes.

[123] See S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 460-476 (discussing incentivizing compliance and using self-cleaning in what the United States calls responsibility assessment).

[124] See e.g., SAM.gov-Search-Entity Information-Exclusions, General Services Administration (2023) (with "Voluntary Exclusions" and "Ineligible Status (Proceeding Pending)" filters chosen). Available at https://sam.gov/search/?index=ex&sort=relevance&page=1&pageSize=25&sfm%5BsimpleSearch%5D%5BkeywordRadio%5D=ALL&sfm%5Bstatus%5D%5Bis_active%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B0%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B2%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B4%5D=true.

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3. RECENT DEVELOPMENTS IN PUBLIC PROCUREMENT IN THE UNITED STATES AND THE EUROPEAN UNION

Notwithstanding the identified distinctions in risk assessment in the United States and European Union, both regions recognize the importance of ensuring efficient public procurement practices. In fact, recent developments in the United States and the European Union reveal a parallel trajectory in their approaches to identifying and mitigating persistent or emerging risks in public procurement, while also navigating the challenges posed by the modern economy.

3.1 Procurement Collusion Strike Force in the United States

In November 2019, the Department of Justice established the Procurement Collusion Strike Force ("PCSF"), a multi-agency collaboration comprising of the Department of Justice ("DOJ") Antitrust Division and U.S. Attorney's Offices, the Federal Bureau of Investigation, the Department of Defense, and Inspector General Offices[125]. The PCSF's mission is to prevent, identify, investigate, and prosecute antitrust offenses linked to government procurement, grants, or other public funding programs[126]. The Biden Administration's

[125] Press Release, Justice Department Announces Procurement Collusion Strike Force: A Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding, Department of Justice Office of Public Affairs (Nov. 5, 2019), Available at https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

[126] Id.

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substantial resource allocation to the PCSF underscores the high priority placed on investigating collusive conduct in public procurement[127].

The PCSF has rapidly emerged as a robust enforcement mechanism. Since its inception, the PCSF has launched over 100 criminal investigations and prosecuted more than 65 companies and individuals, involving more than $500 million worth of public contracts[128]. The DOJ has reported the PCSF's prosecution of anticompetitive offenses in industries ranging from construction and defense contracting to transportation, poultry, aerospace, and healthcare.[129] Additionally, the PCSF has pursued anticompetitive conduct across federal, state, and local procurements[130].

Moreover, the PCSF has expanded its work beyond the U.S. borders and sought cooperation with other governments to eradicate collusive practices from public procurement. In a significant move to uphold fair competition, the United States, Mexico, and Canada have launched a joint initiative against collusive schemes related to the provision of goods and services associated with the upcoming 2026 FIFA World Cup[131]. Alongside

[127] M. A. FREEMAN-E.A.N. HAAS, *Procurement Collusion Strike Force Acts Broadly and Often in 2022*, Foley and Lardner, LLP (Oct. 20, 2022). Available at https://www.foley.com/insights/publications/2022/10/ procurement-collusion-strike-force-2022/.

[128] Press Release, Justice Department's Procurement Collusion Strike Force Holds Its First Summit to Discuss Strategies to Combat Emerging Threats, Department of Justice Office of Public Affairs (Nov. 17, 2023), Available at https://www.justice.gov/opa/pr/justice-departments-procurement-collusion-strike-force-holds-its-first-summit-discuss.

[129] M. A. FREEMAN-E.A.N. HAAS, *Procurement Collusion Strike Force Acts Broadly and Often in 2022*, cit.

[130] Speech, Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights, Department of Justice Office of Public Affairs (Sept. 20, 2022). Available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

[131] Press Release, United States, Mexico, and Canada Launch Joint Initiative to Detect Collusive Schemes to Exploit the 2026 FIFA World Cup, Department of Justice Office of Public Affairs (Sept. 22, 2023), Available at

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Mexico's Federal Economic Competition Commission and Canada's Competition Bureau, the DOJ aims to deter, detect, and prosecute any potential anti-competitive activities that may hinder the seamless organization of this sporting event[132]. This initiative underscores the commitment of the United States to not only safeguarding the integrity of the 2026 FIFA World Cup, but also to ensuring fair competition for businesses seeking to participate in the event. This collaboration also fosters stronger ties between the enforcement agencies, enhancing their ability to tackle cross-border antitrust violations.

3.2 2021 Notice on Tools to Fight Collusion and on Guidance on How to Apply Related Exclusion Grounds in the European Union

In March 2021, the European Commission adopted the Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Grounds ("Notice")[133]. In the introduction, the Notice expressly identified collusion as "a recurring phenomenon… that poses a major risk for efficient public spending, undermines the benefits of a fair procurement market, and discourages participation in" public

https://www.justice.gov/opa/pr/united-states-mexico-and-canada-launch-joint-initiative-detect-collusive-schemes-seeking.

[132] Id.

[133] Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Grounds 2021/C91, 2021 O.J. C.91 (EU) [hereinafter Notice].

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procurement[134]. The Notice recognized that the Public Procurement Directive offered no guidance on the interpretation of Article 57(4)(d)[135] and attempted to clarify its application[136]. The Notice provides various examples of potential indicators of collusion for contracting authorities[137]. It also outlines a set of factors to consider, to include ongoing investigations by Member States[138]. Additionally, it encourages the examination of exclusion decisions made by other contracting officers[139]. While exclusion decisions made in other jurisdictions are not binding and insufficient by themselves to warrant exclusion, they may be considered as relevant evidence[140].

[134] Id, para. 1.1, at C 91/3.

[135] DIRECTIVE 2014/24/*EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57(4)(d), states: "Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator...where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition."*

[136] Notice, paras. 5.2-5.4, at C 91/12-17. See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit. See also W. HARTUNG-K. KUZNA, *EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?,* coll. 16 Eur. Procurement & Pub. Private Partnership L. Rev. 110, 11-12 (2021).

[137] Notice, para. 5.4, at C 91/15-17.

[138] Id, at C 91/15. See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit.

[139] Id, at C 91/15. See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit. See also W. HARTUNG-K. KUZNA, *EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?,* at 113-14.

[140] See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit., (referring to *Delta Antrepriză* de Construcţii şi Montaj, C*ase C-267/18*, ECJ (May. 8, 2019)).

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In fairness, some commentators criticized the Notice for not providing a more concrete guidance and not going sufficiently far to address collusion[141]. However, the true impact of the Notice lies not in its professed simplification of Article 57 of the Public Procurement Directive for contracting authorities. Rather, the Notice underscores the importance of a comprehensive approach to combating collusion in public procurement. By drawing the focus of contracting authorities to addressing collusion, the Notice contributes to safeguarding the integrity of public procurement. The success of this approach will depend on the collaboration between relevant stakeholders, working together to uphold fair competition and efficient allocation of public resources.

3.3 Initiatives to Address Climate Change in Public Procurement

3.3.1 Increased Focus on Sustainability in the United States

The Biden Administration's initiatives expressed in several executive orders have directed the focus of federal agencies to reorienting the federal procurement process towards more sustainable procurement[142]. These executive orders aim at establishing science-based

[141] See e.g., J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit. See also W. HARTUNG-K. KUZNA, *EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?,* cit.

[142] See e.g., Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). See also Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021). See also Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 25, 2021). See also Exec. Order No. 14075, 86 Fed. Reg. 70935 (Dec. 8, 2021). See also N. GREEN-R. YUKINS, *The Inflation Reduction Act: A New Role for Green Procurement,* 64 No. 33 Gov't Contractor 260 (Aug. 31, 2022). See also R. YUKINS, *Understanding Biden's 'Green' Federal Procurement Order*, Bloomberg Law (Jan. 7, 2022). Available at https://news.bloomberglaw.com/ environment-and-energy/understanding-bidens-green-federal-procurement-order. See also R. YUKINS*, International Procurement Law: Key Developments 2020-Part I: Assessing the Trade Agenda for Government Procurement in the Biden Administration*, Government Contracts Year in Review (Thomson Reuters, 2021) (discussing challenges and initiatives to address global warming through procurement). Available at https://publicprocurementinternational. com/2021/01/29/biden-trade-policy-procurement/. See also President Issues

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greenhouse gas ("GHG") emission reduction targets, requiring large federal contractors to disclose their emissions, and overall leveraging federal procurement spending to advance sustainability goals[143].

Notably, the Biden Administration issued a directive on September 21, 2023, instructing federal agencies to integrate interim social cost of GHG estimates into various agency actions, including procurement activities[144]. This directive aligns with Executive Order 13990 and facilitates the Federal Acquisition Regulatory Council's ("FAR Council") efforts to finalize proposed modifications to the FAR aimed at minimizing the risk of climate change impacts from major federal procurements.[145] While the FAR Council has not yet issued a proposed rule, Executive Order 14030 directed the FAR Council to, "*where*

EOs on Contract Prisons, Racial Equity, Climate Change, Pandemic Supplies, 63 No. 5 Gov't Contractor 30 (Feb. 3, 2021).

[143] Exec. Order No. 13990. See also Exec. Order No. 14008. See also Exec. Order No. 14030. See also Exec. Order No. 14075. See also Implementing Instructions for Executive Order 14057 Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, The White House Council on Environmental Quality (Aug. 2022). Available at https://www.sustainability.gov/pdfs/EO_14057_Implementing_Instructions.pdf.

[144] Presidential Statement, Fact Sheet: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis, The White House (Sept. 21, 2023). Available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/21/fact-sheet-biden-harris-administration-announces-new-actions-to-reduce-greenhouse-gas-emissions-and-combat-the-climate-crisis/. This directive also compels the Interagency Working Group on the Social Cost of GHG, established under Executive Order 13990, to substantially increase the monetary valuation of damages associated with each component emission contributing to the social cost of GHG.

[145] See Exec. Order No. 13990, Sec. 5. See also Federal Acquisition Regulations: Minimizing the Risk of Climate Change in Federal Acquisitions, 86 Fed, Reg. 57404 (Oct. 15, 2021) (opening FAR Case 2021-16) [hereinafter Proposed FAR Rule]. See also P. FREEMAN and L. M. CAMPOS, *Biden Administration Moves Closer to Establishing Framework for Giving Preference to Bids and Contractors with Lower GHG Emissions*, Crowell & Morning, LLP (Oct. 3, 2023). Available at https://www.crowell.com/en/insights/client-alerts/biden-administration-moves-closer-to-establishing-framework-for-giving-preference-to-bids-and-contractors-with-lower-ghg-emissions.

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appropriate and feasible, giv[e] preference to bids and proposals from suppliers with a lower social cost of GHG emissions[146]". In other words, sustainable considerations will likely become part of qualification and responsibility assessment in the U.S. federal procurement process. There is a growing consensus within the U.S. Government recognizing importance of sustainable procurement and stricter regulations for federal contractors to procure environmentally friendly goods and services[147].

3.3.2 Increased Focus on Sustainability in the European Union

The European Union has adopted a comprehensive approach to environmental sustainability in public procurement, guided by its treaty-based commitment to environmental protection[148]. Procuring authorities leverage public procurement to achieve

[146] Exec. Order No. 14030, Sec. 5. See also Proposed FAR Rule, supra note 144.

[147] See e.g., R. YUKINS, *International Procurement Law: Key Developments 2020-Part I: Assessing the Trade Agenda for Government Procurement in the Biden Administration*, cit. See also P. FREEMAN and L. M. CAMPOS, *Biden Administration Moves Closer to Establishing Framework for Giving Preference to Bids and Contractors with Lower GHG Emissions*, cit.

[148] See Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 26, 2012 O.J. (C326/49), Art. 7 and Art. 11 [hereinafter TFEU]. When read together with Article 11, Article 7 necessitates balancing of various objectives against the fundamental EU objective of sustainable development. Consequently, the EU must ensure that policies and institutional actions are implemented with consideration of impacts on environmental quality. See also B. SJÅFJELL, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, in *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously*, (B. SJÅFJELL-A. WIESBROCK eds.), 2014, 51-72. See also M. ANDRECKA-K. P. MITKIDIS, *Sustainability Requirements in EU Public and Private Procurement – a Right or an Obligation?*, Nordic J. Com. L, 1, 2017, 56 (arguing that sustainability represents an obligation in EU law).

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environmental benefits by prioritizing the acquisition of goods and services with minimal environmental impact[149]. This necessitates businesses to adapt to meet these requirements.

To encourage businesses to adopt sustainable practices, the European Union has implemented new corporate sustainability reporting regulations in alignment with the European Green Deal[150]. These regulations aim to achieve a net GHG emission reduction of at least 55% by 2030[151]. The Corporate Sustainability Reporting Directive ("CSRD"), effective January 5, 2023, mandates companies to disclose their environmental risks and the environmental impact of their operations[152]. The CSRD applies not only to EU companies, but also to non-EU entities with substantial operations within the European Union or seeking

[149] See M. WREDE, Sustainable Purchasing in the Aftermath of the ECJ's "Max Havelaar" Judgement, 7-2 Eur. Procurement & Pub. Private Partnership L. Rev. 110 (2012) (discussing the development of sustainable purchasing in the ECJ's case law). See also B. M. ROMERO-R. CARANTA, *EU Public Procurement Law: Purchasing Beyond Price in the Age of Climate Change*, Eur. Procurement & Pub. Private Partnership L. Rev., 12-3, 281, 284-92, 2017 (discussing integration of climate change objectives into EU law).

[150] The European Green Deal, European Commission (2023) [hereinafter EU Green Deal]. Available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. See also Briefing-Implementation Appraisal, Non-Financial Reporting Directive, European Parliament (2021). Available at https://www.europarl.europa.eu/RegData/ etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf.

[151] See EU Green Deal.

[152] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) EU) [hereinafter *CSRD*]. Prior to the CSRD, the European Union required reporting of scope 1 and 2 emissions by publicly traded companies. The CSRD introduced reporting of scope 3 emissions, which involve indirect emissions (excluded from scope 2) in the value chain of the reporting company, upstream and downstream. Scope 1 emissions include direct emissions. Scope 2 emissions include indirect emissions from controlled energy generators. See FAQ, Greenhouse Gas Protocol (2023). Available at https://ghgprotocol.org/sites/default/files/standards_supporting/ FAQ.pdf

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to establish substantial operations in the region[153]. The new rules will be implemented gradually, commencing in 2024 for applicable companies[154].

A noteworthy feature of the CSRD is a significant shift in corporate reporting practices by broadening its application beyond a company's immediate operations to encompass the environmental and social impacts of its material value chain partners[155]. This expanded reporting obligation applies to value chain partners who are not directly subject to CSRD reporting requirements[156]. To ensure the availability of relevant data, the CSRD thus empowers contracting authorities to request information, including the potential introduction of contractual terms specifically mandating the provision of this data[157].

4. CONCLUSION: TOWARDS A MEANINGFUL COOPERATION

The overarching objective of this paper was to advocate for cooperation in risk assessment within public procurement between the United States and the European Union. By conducting a comparative analysis of risk assessment methodologies employed in both systems, the paper highlighted that both systems pursue similar goals, albeit through distinct

[153] CSRD. See also G. NORMAN, S. TOMS, and K. GAMBLE, *The EU Corporate Sustainability Reporting Directive: To Whom Does it Apply and What Should EU and Non-EU Companies Consider?*, Skadden, Arps, Slate, Meagher & Flom LLP (Jan. 9, 2023) [hereinafter Skadden Analysis], Available at https://www.skadden.com/insights/publications/2023/01/qa-the-eu-corporate-sustainability-reporting-directive. See also Client Alert-Commentary, The EU Corporate Sustainability Reporting Directive – How Companies Need to Prepare, Latham & Watkins LLP (Ja. 27, 2023) [hereinafter Latham & Watkins Commentary]. Available at https://www.lw.com/admin/upload/SiteAttachments/Alert%203059.pdf.

[154] CSRD. See also Skadden Analysis, supra note 152. See also Latham & Watkins Commentary, supra note 153.

[155] CSRD. See also Latham & Watkins Commentary, supra note 153.

[156] CSRD. See also Latham & Watkins Commentary, supra note 153.

[157] Latham & Watkins Commentary, supra note 153.

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mechanisms. One common shortcoming identified in both systems is the absence of meaningful transparency in the implementation of publicly accessible digital platforms designed to facilitate translation of standards and information essential for informed risk assessment decisions. Subsequently, the paper examined recent developments on both sides of the Atlantic that have ramifications for risk assessment approaches and are poised to shape future practices. These parallel developments exhibit remarkable similarities and have evolved in tandem. Considering this backdrop, regulatory cooperation in public procurement to foster mutually recognized objectives in risk assessment and prevent the erection of trade barriers through the distortion of public procurement practices represents a crucial step forward.

However, the precise form of such cooperation remains an open question. Further research is warranted to assess the feasibility of establishing a system that enables seamless and transparent data exchange between the United States and the European Union. Encouragingly, progress towards creating an information-sharing database has already been initiated. The European Union has developed a system to provide information on third-country procurement practices through Access2Markets, a tool designed to facilitate enhanced cross-border transactions[158]. Similarly, the University of Cambridge and University College London have established Tender-X with the aim of compiling summaries of public procurement data for entities involved in public procurement activities[159]. Neither platform provides a comprehensive solution to the concerns expressed in this paper. However, these

[158] Access2Markets, Exporting from the EU, Importing into the EU – All You Need To Know, European Commission (2023). Available at https://trade.ec.europa.eu/access-to-markets/en/home.

[159] Tender-X Overview, Tender-X Risk Consultancy (2023). Available at https://www.tenderx.eu. Tender-X generates reports on businesses and public organizations. These reports essentially make a risk assessment for each analyzed entity and assign overall scores based on collected data. Some of this data seems to be transposed from the Tenders Electronic Daily, a European Union electronic platform that provides public access to procurement notices and other public procurement information.

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initiatives could serve as a foundation to expand from for a potential information-sharing database.

Moreover, cooperation between the United States and the European Union could manifest in the form of a bilateral treaty. Both governments may consider reviving the negotiation of the Transatlantic Trade and Investment Partnership ("TTIP"). The TTIP sought to enhance market access through regulatory cooperation that promoted the harmonization of standards between the European Union and the United States[160]. Alternatively, both governments could look to the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union[161]. The CETA fosters a more open, transparent, and efficient public procurement environment, potentially leading to increased competition, reduced costs, and greater value for governments and taxpayers[162].

[160] See e.g., C. R. YUKINS - H. J. PRIESS, *Feature Comment: Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement*, 56-27 Gov't Contractor 235 (Jul 24, 2014). See also C. R. YUKINS, *The European Procurement Directives and the Transatlantic Trade and Investment Partnership (TTIP): Advancing U.S.-European Trade and Cooperation in Procurement*, Gov't Contracts Year in Review Briefs 3 (Thomson Reuters, 2014).

[161] Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part, Can.-E.U., Oct. 30, 2016 [hereinafter CETA]. Available at https://www.international.gc.ca/tradecommerce/tradeagreementsaccordscommerciaux/agracc/cetaaecg/texttexte/toc-tdm.aspx?lang=eng. See also CETA Chapter by Chapter, European Commission (2023). Available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-andregions/canada/eucanada-agreement/ceta-chapter-chapter_en. See also P. LALONDE, *International Procurement Developments in 2017-Part III: the Comprehensive Economic Trade Agreement (CETA) Between Canada and the European Union as a Model for International Procurement Agreements Between Most Developed Nations*, Gov't Contracts Year in Review Briefs 5 (Thomson Reuters, 2018). See also E. HUSH, *Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements*, 43 Colum. J. Envtl. L. 93 (Ja. 11, 2018).

[162] CETA. P. LALONDE, *International Procurement Developments in 2017-Part III: the Comprehensive Economic Trade Agreement (CETA) Between Canada and the European Union as a Model for International Procurement Agreements Between Most Developed Nations,* cit. See also EU Commission, *The EU-Canada Agreement Explained*, (2023). Available at

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Further research may inform specific means by which both governments can reconcile the fragmented approach to risk assessment among European Union Member States with the centralized yet occasionally impenetrable risk assessment practices in the United States. What is evident is that the parallel developments in both regions and the persistent issues surrounding transparency should not be overlooked.

Abstract. *In public procurement, risk assessment plays a pivotal role in safeguarding the efficient allocation of public funds and ensuring the delivery of high-quality products. Despite their shared commitment to effective risk management, the United States and European Union approach risk assessment in public procurement differently. These differences pose potential challenges for businesses operating in both markets, as they may face varying risk assessment requirements and uncertainties that limit cross-border procurement opportunities. By bridging the gap in risk assessment practices, the European Union and the United States can enhance the integrity, efficiency, and transparency of public procurement, fostering a more secure and competitive global procurement landscape. This paper presents a comparative analysis of risk assessment practices in the United States and the European Union, emphasizing the key differences and exploring potential avenues for collaboration. While advocating for cooperation and acknowledging the unique characteristics of each region, this paper emphasizes that a collaborative effort is necessary to facilitate a meaningful exchange of information and establish a shared understanding of risk assessment practices. Part II of this paper compares risk assessment approaches in the United States and European Union. This section identifies a common undesirable characteristic within both jurisdictions. Part III highlights recent developments within the United States and European Union that have an impact on risk assessment practices within both regions. Part IV concludes that regulatory cooperation in public procurement to promote mutually recognized objectives in risk assessment and safeguard against trade barriers constitutes an important step towards enhanced global economic integration. Identifying the exact parameters of such cooperation, however, remains the question that requires continued exploration and concerted efforts by both governments.*

https://policy.trade.ec.europa.eu/eutraderelationshipscountryandregion/countriesandregions/canada/eu-canada-agreement/agreement-explained_en.

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UNDERSTANDING ANTI-CORRUPTION NETWORKS: STRUCTURE AND FUNCTIONS

Sonja LEVSTIK[1]

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9. CRITICAL ISSUES AND STRENGTHS OF ANTI-CORRUPTION NETWORKS
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1. INTRODUCTION

Anti-corruption networks, i.e. networks composed of the Anti-Corruption Authorities (ACAs) or by them and the Law Enforcement Authorities (LEAs) of different countries, are no longer an institutional novelty, but a constantly growing phenomenon that characterises international cooperation in preventing and combating corruption.

The first study on anti-corruption networks, published in 2020, looked at twelve networks to assess their activities and effectiveness in achieving their goals[2].

The main objective of this article is to provide a summary of the literature on networks in the public sector, with a view to identifying possible ways of reconstructing anti-corruption networks, given that networks have been studied from different perspectives that have led to the identification of different concepts and definitions - including those of *policy network*, *network management* and *network governance* - that are particularly relevant for the analysis of their structure, content, actors, relationships and functions[3].

[2] S. SCHÜTTE, *Networks of anti-corruption authorities*, in *Bergen: U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute* (U4 Brief 2020:2), 2020, https://www.u4.no/publications/networks-of-anti-corruption-authorities.

[3] M. DAL MOLIN, C. MASELLA, *Networks in policy, management, and governance: a comparative literature review to stimulate future research avenues*, in *Journal of Management & Governance*, 2016, 823-849.

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2. THE CONCEPTS OF POLICY NETWORK, NETWORK MANAGEMENT, AND NETWORK GOVERNANCE

Networks, such as those for the delivery of services to citizens, are no longer new from an institutional perspective.

The tendency for the public and private sectors to work together stems from common goals and challenges, and the need to meet growing user demands and expectations with limited resources. Indeed, the joint provision of certain services, the integration of methods and procedures, the exchange of information and the sharing of working tools can ensure greater effectiveness and efficiency in the delivery of services and information.

The network logic requires, on the one hand, maintaining a citizen-centred perspective and, on the other hand, overcoming the single-competence perspective.

From an academic perspective, the network concept has attracted the attention of several public sector researchers who have analysed policy networks, management and governance of networks.

The definition of public policy as 'a series of intentionally coherent decisions or activities taken or carried out by various public - and sometimes – private actors, whose resources, institutional links and interests vary, with a view to resolving in a targeted manner a problem that is politically defined as collective in nature'[4] , is now widely accepted[5], and

[4] P. KNOEPFEL, C. LARRUE, F. VARONE, M. HILL, *Public Policy Analysis*, in *Bristol University Press, Policy Press*, 2007.

[5] F. VARONE, K. INGOLD, M. FISCHER, *Policy Networks and the Roles of Public Administrations*, in A. LADNER, N. SOGUEL, Y. EMERY, S. WEERTS, S. NAHRATH (eds.), *Swiss Public Administration. Governance and Public Management*, Palgrave Macmillan, Cham, 2019: https://doi.org/10.1007/978-3-319-92381-9_20.

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in policy science there is detected a growing interest in the idea of *policy network* as a concept for describing and analysing the context in which policy is developed and implemented[6].

Networks are described in several ways[7]. A key common element of these descriptions is that they concern more or less long-term patterns of relationships and interactions between dependent actors, both public and private, who exchange information and other action-relevant resources in order to increase their influence on the final outcome of the decision-making process[8].

This exchange is organized within *policy networks* and is often presented as a non-hierarchical approach to public sector decision-making[9]. It emphasises the horizontal relationships between different actors, where there is no clear hierarchy between them, and focuses on the influence of administrative units in the formulation of public policy.

A network is characterised not only by its actors and their relationships, but also by the rules to be observed. Rules are procedures that the actors create together in the course of their interaction in order to regulate their behaviour. They specify issues such as what is

[6] E.H. KLIJN, J. KOPPENJAN, *Managing Networks in the Public Sector: A Theoretical Study of Management Strategies in Policy Networks*, in *Public Administration* 73(3), 2007, 439-440 https://www.researchgate.net/publication/229927151_Managing_Networks_in_the_Public_Sector_A_Theoretical_Study_of_Management_Strategies_in_Policy_Networks.

[7] E. PERKIN, J. COURT, *Networks and Policy Processes in International Development: a literature review*, *Working Paper 252, Overseas Development Institute*, London, 2005. https://www.files.ethz.ch/isn/22716/wp252.pdf. According to Perkin and Court, networks are broadly defined as 'formal or informal structures that link actors (individuals or organizations) who share a common interest on a specific issue or who share a general set of values'.

[8] P. LEIFELD, V. SCHNEIDER, *Information Exchange in Policy Networks*, in *American Journal of Political Science*, John Wiley & Sons, vol. 56(3), 2012, 731-744.

[9] P. KENIS, V. SCHNEIDER, *Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox*, in B. MARIN, R. MAYNTZ (eds.), *Policy Networks: Empirical Evidence and Theoretical Considerations*, Campus Verlag, Frankfurt am Main, Westview Press, 1991, 25-59.

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allowed and what is not, what positions actors can take, what action is associated with which position, how decisions or policy products are to be realised, and what costs and benefits are associated with a particular behaviour[10].

The concept of *network management* refers to the strategies, activities and leadership skills used by network managers to guide the interactions of actors, solve problems, build consensus among participants, and coordinate activities to achieve network objectives[11].

In network management, leadership values are crucial because public managers have to manage different organisations with conflicting objectives. The ability of network managers to develop collaborative working practices and to define a credible compromise between different organisations is crucial to the efficient delivery of public services.

In principle, network management does not have a central purpose, but has a more facilitating role. Managers can be government actors, but also actors from outside the government. Although managers are interested in how the policy process unfolds within the network, it would be a mistake to think that they do not have their own interests at stake[12].

Finally, *network governance* refers to the process, often in the hands of public authorities, of directing and governing networks according to specific rules and procedures, with the ultimate goal of producing and delivering public services[13] . In other words, network

[10] See, for example, E. OSTROM, *An Agenda for the Study of Institutions*, in *Public Choice*, vol. 48, no. 1, 1986, 3-25.

[11] M. MCGUIRE, R. AGRANOFF, *The Limitations of public management networks*, in *Public Administration* 89(2), 2011, 265 - 284.

[12] See, again, E.H. KLIJN, J. KOPPENJAN, *Managing Networks in the Public Sector: A Theoretical Study of Management Strategies in Policy Networks*, cit., 441-442.

[13] E. SØRENSEN, J. TORFING, *Making Governance Networks Effective and Democratic Through Metagovernance*. in *Public Administration*, 87(2), 2009, 234 - 258.

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governance thus refers to the setting of network objectives as well as the allocation of resources and funds managed by network managers at the network level.

In network governance, the relevant value is the allocation of power among governing actors, enabling them to act as legitimate controllers over others. Power refers not only to traditional authoritative power (e.g., allocation of resources, law making), but also includes the skills and capabilities that can confer authority on specific actors[14] .

3. ANTI-CORRUPTION NETWORKS AS POLICY NETWORKS

Based on the analysis of the different concepts that have developed around networks, it seems appropriate to examine their applicability to anti-corruption networks.

Anti-corruption networks composed of ACAs from different countries are *policy networks* that contribute to the global public policy-making process of preventing and combating corruption.

The willingness to cooperate and exchange among the network's ACAs stems from common goals and challenges: working together on specific issues, exchanging information, and sharing working tools can ensure greater effectiveness in identifying innovative policy proposals.

Anti-corruption networks also follow a multi-subjective organisational model, characterised by horizontal interdependence between network participants, to which vertical-hierarchical logics are consequently extraneous. What is missing is the element of possible conflict of interest between the actors, in relation to which the joint action of the network would play the fundamental role of finding a compromise on the best solution for each

[14] J. TORFING, *Governance Network Theory: Towards a Second Generation*, in *European Political Science* 4(3), 2005, 305-315.

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actor[15]. Indeed, the ACAs themselves, as actors in the networks, represent their own national anti-corruption policies, in relation to which there can clearly be no conflicting interests among the members of the networks themselves.

The reasons for ACAs to establish or join anti-corruption networks are mainly collaborative, aimed at finding innovative ways to overcome the difficulties of implementing anti-corruption policies.

In anti-corruption networks, the modalities of interaction and the rules guiding the actors' behaviour are laid down in the respective charters.

3.1 Management and Governance of Anti-Corruption Networks

Only anti-corruption networks that receive funding can make use of the network manager, who must ensure that the activities are adequately funded and that the funding is obtained in a way that guarantees the credibility and sustainability of the network[16] .

In terms of governance, anti-corruption networks can be divided into two main organisational models: one in which the chair is taken on a rotating basis by one of the members of the network, who also provides secretariat activities and services; or one in which the secretariat is established as an autonomous and permanent component of the network, linked to a larger ACA or regional organisation or donor.

In general, networks with sufficient resources to afford a permanent secretariat and dedicated staff are more likely to build and maintain effective collaborations within networks.

[15] See, again, M. DAL MOLIN, C. MASELLA, *Networks in policy, management and governance: a comparative literature review to stimulate future research avenues*, cit.

[16] Some networks are funded by a larger regional or international organization, such as the United Nations, or by donors.

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However, it has been observed that while this organisational model provides a more stable normative-political framework, it can also lead to a kind of inertia on the part of members, leaving little room for peer-to-peer discussion[17].

Conversely, the model in which each member of the network takes over the chair on a rotating basis and ensures the fulfilment of the secretariat's own tasks would guarantee the networks their *'structured informality'*[18], and avoid the creation of new bureaucracies.

4. THE FUNCTIONS OF ANTI-CORRUPTION NETWORKS

The institutional model of anti-corruption networks is very well established at international and European level, but the networks do not constitute a homogeneous category and differ in the type of functions they perform (prevention, repression, awareness-raising campaigns, training, etc.) and in the areas of intervention (conflicts of interest, lobbying, declaration of assets, whistleblowing, public procurement, etc.), which makes it difficult to define or typify them. In fact, they were created at different times and are regulated according to criteria that are not always homogeneous; moreover, they have developed largely independently of each other[19].

[17] See, on this point, S. SCHÜTTE, *Networks of anti-corruption authorities*, cit., 9.

[18] See, to this effect, W.H. REINICKE, F.M. DENG, *CRITICAL CHOICES - The United Nations, networks, and the future of global governance*, 2000, 64. https://www.gppi.net/media/Reinicke_Deng-2000-Critical_Choices.pdf.

[19] Interesting in this respect is the approach proposed by E. MENDIZABAL, *Understanding Networks: The Functions of Research Policy networks*, *Working paper 271, Overseas Development Institute*, 2006, London; https://www.files.ethz.ch/isn/22841/wp271.pdf , according to which, in order to avoid the difficulties posed by traditional network definitions - which are not always applicable to the variety of existing networks - reconstructive efforts should be directed towards enucleating the functions exercised by networks.

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However, their common denominator is that they bring together people and institutions from different countries and continents who are involved in promoting and implementing anti-corruption policies and who perform a variety of functions.

The mapping of the networks (*see below*) and the direct observation of three networks dealing exclusively with corruption prevention[20] made it possible to identify four main functions, although no single typology does justice to the full range of activities carried out by the networks. Most networks perform several of these functions, but not every network necessarily performs all of them.

First, the networks are committed to *putting new issues on the global anti-corruption agenda* or highlighting issues that have been neglected.

The most common means of communicating new issues is to participate in major international events dealing with the phenomenon of corruption, for example by presenting research findings[21], or by advocating to international organisations to adopt certain measures.

The networks also aim to *develop and promote an international culture of integrity, transparency and ethics in public life*, thereby contributing to the fight against corruption and strengthening public confidence in institutions and public officials, particularly in their dealings with the private sector.

This type of activity is often carried out in cooperation with anti-corruption stakeholders (media, leading NGOs, universities and other organisations). Such cooperation

[20] Network for Integrity - Réseau pour l'Intégrité (NFI), Network of Corruption Prevention Authorities (NCPA), European Network for Public Ethics - Réseau européen d'éthique publique (ENPE).

[21] See, for example, the participation of an anti-corruption network in a side event organized under the Conference of the States Parties to the United Nations Convention against Corruption (COSP). The Conference is the principal decision-making body of the United Nations Convention against Corruption (UNCAC). It supports States Parties and signatories in their implementation of the Convention and provides policy guidance to UNODC to develop and implement anti-corruption activities.

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is useful for gathering information, developing knowledge, obtaining technical and political support and creating synergies for specific initiatives.

Another important function of anti-corruption networks is to *contribute to the establishment of common standards*, which are essential for the practical application of the main conventions and other international instruments.

The role played by networks in identifying common standards reflects the weakness of the international treaty system, which struggles to adapt quickly to new scenarios, creating a regulatory gap. Indeed, any change requires the consensual action of governments and must contend with its rigid bureaucratic structure: two features that undermine the treaty system's ability to produce common policies and respond effectively to global challenges[22].

Similarly, the United Nations Convention Against Corruption (UNCAC), the only legally binding international multilateral anti-corruption treaty, is struggling to deal with new forms of corruption. Indeed, the manifestations of corruption are constantly evolving, and new vulnerabilities - such as those created by the pandemic crisis or ongoing conflicts - increase the opportunities and incentives for corruption.

Finally, networks build bridges that allow different participants to exploit the synergies of these different resources, *pooling knowledge and exchanging experiences between members* belonging to different national legal traditions, and also creating new ones as consensus emerges even on issues that are still controversial.

Moreover, working together in networks brings regularity and predictability to the relationships between participants, creating an institutional framework that is conducive to new forms and modalities of cooperation and assistance.

[22] O. PEREZ, *Transnational networked authority*, in *Leiden Journal of International Law*, 35, 2022, 266. Published online by Cambridge University Press. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/30BA2BEFDFBE84C9AC01390B92E1B534/S0922156521000728a.pdf/transnational-networked-authority.pdf.

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5. THE MAPPING OF ANTI-CORRUPTION NETWORKS

As previously pointed out, the phenomenon of anti-corruption networks has become very widespread in the last twenty years. Indeed, the various networks are present in the public sector, as well as in the private sector[23] and there is no shortage of networks composed exclusively of civil society organizations[24] .

In order to make the mapping of anti-corruption networks as close as possible to the basic approach of this study, which focuses on the preventive aspects of public anti-corruption policies, only networks composed of - predominantly - public institutions were analysed and mapped. These are therefore formal networks[25].

Furthermore, the analysis was limited to networks dealing with preventive policies and multipurpose networks, which bring together institutions with preventive (Anti-Corruption Authorities - ACAs) and repressive (Law Enforcement Authorities - LEAs) functions.

[23] The following are mentioned as examples only: Africa Business Integrity Network https://www.cipe.org/projects/africa-regional/; MENA-OECD Business Integrity Network (MOBIN) https://www.oecd.org/mena/competitiveness/business-integrity/ .

[24] See, for example, the UNCAC Coalition which is a global network of more than 350 civil society organizations (CSOs) in over 100 countries committed to promoting the ratification, implementation and monitoring of the United Nations Convention Against Corruption (UNCAC) https://uncaccoalition.org/about-us/about-the-coalition/.

[25] For an interesting distinction between *formal* and *informal networks* in the public sector, see the following article: D. LAZER, I. MERGEL, *Searching for Answers: Networks of Practice Among Public Administrators*, in *The American Review of Public Administration*, 2012, 3.

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As a result, neither networks composed exclusively of members of the judiciary or law enforcement agencies with repressive functions[26], nor networks dealing exclusively with specific anti-corruption measures, such as asset recovery[27], were the subject of further study.

Therefore, the mapping of the networks, which is based on an in-depth analysis of the information reported on their respective websites, is by no means exhaustive, but it is a valuable guide to reconstructing and understanding the role of anti-corruption networks.

In particular, the year of establishment, composition, objectives and organisational structure of the 20 networks analysed are reported in order to outline their prevailing characteristics.

ANALYSIS	
Name	Name and acronym
Year of establishment	1998 - 2023
Composition	Presence within them of anti-corruption authorities (ACAs), states (ministries, departments, commissions), law enforcement agencies (LEAs).
Objectives	Prevention and/or repression, information exchange, capacity-building, identification of common standards, etc.
Governance	Permanent secretariat, rotating presidency, other.

[26] See, for example, the Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE Network) https://globenetwork.unodc.org/.

[27] See, for example, Camden Asset Recovery Inter-agency Network (CARIN) https://www.carin.network/ ; Asset Recovery Inter-Agency Network of Southern Africa (ARINSA) https://new.arinsa.org/.

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Table showing the mapping of 20 anti-corruption networks

Name	Year	Composition	Objectives	Governance
OECD Anti-Corruption Network for Eastern Europe and Central Asia **(OECD/ACN)**	1998	The OECD/ACN is open to the countries of Eastern Europe and Central Asia. The main counterparts are the national governments and anti-corruption authorities (ACAs and LEAs) of the participating countries [28].	Provides a regional forum for the promotion of anti-corruption activities (prevention and repression), information exchange, development of best practices, and donor coordination. The OECD/ACN works through general meetings and conferences, sub-regional initiatives and thematic projects.	The Secretariat is based in the Anti-Corruption Division of the OECD Directorate of Financial and Corporate Affairs. It is responsible for the development and implementation of the work program.
Southern African Forum against Corruption **(SAFAC)**	2001	The SAFAC is composed of 14 member states [29] and anti-corruption authorities, where they exist.	The network promotes cooperation, the adoption of anti-corruption strategies and the exchange of information; makes recommendations to the governments of the region (SADC)[30] and its members on anti-	The network has adopted an organisational model in which the presidency is held in turn by one of the members who organises the

[28] OECD/ACN Participating countries: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Latvia, Lithuania, FYR of Macedonia, Moldova, Mongolia, Montenegro, Romania, Serbia, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

[29] SAFAC Member countries: The Republic of Angola, Botswana, The Democratic Republic of Congo, The Kingdom of Lesotho, The Republic of Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, The Kingdom of Swaziland, The Republic of Zambia and The United Republic of Tanzania.

[30] Southern African Development Community (SADC).

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			corruption policies (preventive and repressive); and organises training courses.	annual conference.
South East Asia Parties Against Corruption **(ASEAN-PAC)**[31]	2002[32]	The network consists of anti-corruption authorities and police forces from 10 countries[33].	The network provides a platform to promote and strengthen cooperation among its members to improve their capacity to prevent and combat corruption.	The network has adopted an organisational model in which the presidency is held in turn by one of the members who organises the annual conference.
European Partners against Corruption **(EPAC)**	2004	The EPAC is composed of anti-corruption authorities and police control bodies of Council of Europe member states.	The network establishes, maintains, and develops contacts between specialised anti-corruption agencies and law enforcement agencies; supports the development and promotion of common working standards and best practices for its members, etc.	The General Assembly is the highest decision-making body of EPAC/EACN and brings together all members. It consists of the President, two Vice-Presidents and two Assistant Vice-Presidents. The activities of the Secretariat

[31] (formerly SEA- PAC).

[32] https://www.sprm.gov.my/admin/files/sprm/assets/pdf/korporat/INFO/ASEANPAC.pdf.

[33] Brunei Darussalam, Cambodia, Indonesia, the Philippines, Laos, Malaysia, Myanmar, Singapore, Thailand, and Vietnam.

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				are carried out in turn by the members.
European Contact Point Network against Corruption **(EACN)**[34]	2008	The EACN, on the other hand, is a more formal network, established by a decision of the Council of the European Union and comprising nearly 50 anti-corruption authorities and police forces from EU Member States.	The objectives of the EACN include improving co-operation between authorities and agencies in preventing and combating corruption in Europe; providing a forum for the exchange of information on effective measures and experiences; and facilitating the establishment and active maintenance of contacts between its members.	The General Assembly is the highest decision-making body of EPAC/EACN and brings together all members. It consists of the President, two Vice-Presidents and two Assistant Vice-Presidents. The activities of the Secretariat are carried out in turn by the members.
International Association of Anti-Corruption Authorities **(IAACA)**	2006	A total of 166 members (43 African states, 44 Asia-Pacific states, 37 Eastern European states, 19 Latin American and Caribbean states, 23 Western European states and others) representing anti-corruption agencies, prosecutors' offices, police forces, departments of justice and interior ministries, etc. are part of the network.	The IAACA promotes the effective implementation of the UNCAC and assists international anti-corruption authorities in preventing and combating corruption, promotes the exchange of experience and best practices among anti-corruption authorities and practitioners around the world; organises tailor-made conferences, symposia, workshops and training programmes in	The IAACA is an independent and non-political anti-corruption network. Its governing body is the Executive Committee (ExCo). It consists of a Chair, four Vice-Chairs, thirteen members, two advisors and one observer. The activities of the Secretariat

[34] The two EPAC/EACN organizations mostly work together stating the identity of mission and goals. Most anti-corruption authorities are actually members of both.

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			cooperation with member authorities and relevant international and regional organisations.	are carried out in turn by the institution holding the Presidency.
East African Association of Anti-Corruption Authorities **(EAAACA)**	2007	The EAAACA comprises the anti-corruption agencies of eight countries in the region. Membership is open to all anti-corruption agencies of the East African Community Partner States.	The overall objective of the EAAACA is to promote and facilitate regional cooperation, mutual legal and technical assistance to prevent and combat corruption in the region, exchange information, organise training and conduct joint research.	The network has three main bodies: the General Assembly, the Executive Committee - which is the governing body - and the Permanent Secretariat. The President is the chief executive of the Association and serves for a two-year term. The presidency rotates.
Arab Anti-Corruption and Integrity Network **(ACINET)**	2008	ACINET currently includes 49 ministries and government agencies from 18 Arab countries[35] , two observer members and the Non-Governmental Group, which consists of 28 independent organisations from civil society, the	Its objectives include capacity building through joint training courses, legislative harmonisation among member states, promotion and implementation of international and regional anti-corruption conventions, and the organisation of seminars, courses, conferences, and other events.	The network has a permanent secretariat; the presidency rotates among the members and lasts for 2 years. Funding comes from the organisations with which they are affiliated, although members may

[35] Algeria, Bahrain, Comoros, Egypt, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Sudan, Tunisia, United Arab Emirates, Yemen.

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		private sector and academia.		contribute additional funds.
Network of National Anti-Corruption Institutions in West Africa **(NACIWA)**	2010	NACIWA brings together national anti-corruption institutions from 14 ECOWAS member states in West Africa[36]. Members are concerned with the prevention and repression of corruption.	The network promotes cooperation among anti-corruption agencies; encourages the strengthening of systems and procedures for the prevention of economic and financial crime; strengthens the independence of existing national institutions and encourages West African states that do not have such institutions to establish them; supports the harmonisation of legislative, regulatory, and administrative provisions among national anti-corruption authorities, etc.	NACIWA's organisational structure includes three bodies: 1. The General Assembly; 2. The Executive Committee; 3. The Permanent Secretariat. The President, Vice-President, Secretary General and Treasurer are also appointed.
Association of Anti-Corruption Agencies in Commonwealth Africa (**AAACA**)	2011	Brings together the anti-corruption prevention and law enforcement agencies of Commonwealth African countries.	The network promotes engagement and cooperation among African Commonwealth countries in the fight against corruption through peer review, exchange of information and best practices on anti-corruption strategies, and other initiatives.	The network's organisational model includes a permanent secretariat and an executive committee. Funding comes from the organisations with which they are affiliated, although members may

[36] Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Ghana, Guinea Conakry, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

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				contribute additional funds.
Asset Recovery Inter-Agency Network for Eastern Africa **(ARIN-EA)**	2013	ARIN-EA is an informal network established under the EAAACA[37] to share information on individuals, assets and businesses regionally and internationally to facilitate the tracing and recovery of illicit assets.	ARIN-EA promotes regional and international cooperation to effectively trace and recover assets of illicit origin within and beyond East Africa's territorial borders. It facilitates the exchange of information and best practices. It promotes training and research activities.	The Network has adopted the organisational model of a rotating presidency among its members. It has a permanent secretariat.
African Association of Anti-Corruption Authorities / Association des Autorités Anti-Corruption d'Afrique **(AAACA)**	2013	The network brings together anti-corruption authorities from several countries, divided as follows: East Africa (8), North Africa (4), Southern Africa (9), West Africa (13), and Central Africa (6).[38]	The Network promotes cooperation among its members on the preventive and repressive side of corruption, encourages the development of research and training centres in the field of prevention and investigation techniques, and promotes the adoption of measures aimed at increasing transparency and good governance.	The network has a permanent secretariat. Funding comes mainly from membership fees. The Executive Committee consists of the President and two Vice-Presidents.
Regional Anti-Corruption Initiative	2013	The RAI is a regional intergovernmental	The network provides a common regional platform for discussion	The Secretariat is the executive body, headed by

[37] EAAACA members: Burundi, Ethiopia, Djibouti, Kenya, Rwanda, South Sudan, Tanzania, Uganda.

[38] They hold Partner status: Banque Africaine de Développement (BAD), African Union Advisory Board On Corruption (AUABC), United Nations Office On Drugs and Crime (UNODC), United Nations Economic Commission for Africa (UNECA or ECA).

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(RAI)		network that focuses exclusively on anti-corruption issues and brings together nine member states [39].	between governments and civil society through the provision of tailored training, peer-to-peer learning, and the exchange of knowledge, communication tools, and sharing of best practices in a multidisciplinary context.	the Secretary General, while the Steering Group is the decision-making body of the Network. The Network also elects its own Chair.
Réseau des Institutions Nationales Anticorruption d'Afrique Centrale **(RINAC)**	2015	RINAC is a sub-regional platform that brings together different countries [40].	The network is committed to promoting regional, continental and international cooperation in the implementation of policies to prevent and combat corruption, including through the sharing of knowledge, information and best practices.	The network has adopted the organisational model of a rotating presidency among its members.
Network for Integrity (NFI)	2016	The Network for Integrity is a cooperative space that brings together 20 institutions (+ 2 observers) that carry out tasks related to the promotion of integrity, transparency, and	The Network aims to develop and promote an international culture of integrity, transparency, and ethics in public life; to encourage the exchange of information and best practices among its members; and to provide advocacy to	The Presidency and Vice-Presidency are held alternately by the members and last for two years. The activities of the Secretariat are ensured by

[39] Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Moldova, Montenegro, North Macedonia, Romania and Serbia.

[40] Angola, Burundi, Cameroon, Chad, Gabon, Equatorial Guinea, Central African Rep., Rep. Congo, DR Congo, Rwanda, and São Tomé and Príncipe.

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		ethics of public officials.	international organisations and civil society.	the institution holding the Presidency or Vice Presidency.
Council of Europe's Network of Corruption Prevention Authorities (NCPA)	2018	The Council of Europe's Network of Corruption Prevention Authorities brings together 32 member institutions, 2 observers and 5 partners.	The Network is committed to: (i) improving the systematic collection, management, and exchange of information among anti-corruption authorities, including their respective experiences and best practices; (ii) promoting the operational independence of its members; (iii) recognising and implementing international standards for the prevention of corruption; and (iv) cooperating with other international stakeholders.	The NCPA follows a rotating chair model, with a member institution chairing the meetings. In addition to the Chair, the Network elects up to 3 Vice-Chairs and the Steering Committee. The secretariat is provided by the chairing institution.
Network of European Integrity and Whistleblowing Authorities **(NEIWA)**	2019	The network consists of 29 authorities specialising in the protection of whistleblowers, representing 23 European countries [41].	NEIWA provides a platform for the exchange of expertise and experience at the theoretical, practical, and strategic levels to ensure the protection and/or monitoring of whistleblowers, to develop tools and programmes and to promote cooperation	The network has adopted the organisational model of a rotating chairmanship among its members. It does not have a permanent secretariat.

[41] Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Romania, Slovenia, Slovakia, Spain, Sweden, Montenegro.

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			with the institutions of the European Union.	
Global Operational Network of Anti-Corruption Law Enforcement Authorities **(GlobE)**[42]	2021	Specialised anti-corruption authorities, as defined in Article 36 of the UNCAC, operating in a UN Member State or a State Party to the UNCAC, may be members of the GlobE network.[43]	The GlobE Network provides a platform for peer-to-peer information sharing and informal cooperation to better identify, investigate and prosecute cross-border corruption crimes and recover illicit assets.	The organisational structure of the GlobE Network includes 3 bodies: (a) The Plenary Assembly; (b) The Steering Committee; (c) The Permanent Secretariat. The Chair and Vice-Chair of the Steering Committee are also the Chair and Vice-Chair of the Plenary Assembly.
European Network for Public Ethics (ENPE)	2022	The European Network for Public Ethics (ENPE) brings together 18 institutions from EU Member States that are active in the field of integrity and transparency in the public sector. Of these, 15 are members of the network and 3 have observer status.	In addition to promoting a culture of public integrity and pursuing the harmonisation of legislation in the EU Member States, the network aims to develop specific expertise in preventive policies, enabling it to act as a privileged interlocutor with the European authorities on	The ENPE charter stipulates that the network is chaired by a member elected to the presidency for a period of two years. The secretariat of the network is provided by a member institution for a

[42] "Anti-corruption Law Enforcement Authorities" shall mean specialized authorities as referred to in Article 36 of the Convention.

[43] It currently includes more than 170 corruption enforcement authorities (law enforcement authorities).

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		Since 2023, the European Ombudsman has also joined the network as an observer.	issues of integrity, transparency, and public ethics.	period of three years.
African Anti-Corruption Research Network **(AACRN)**	2023	Membership of the network is open to African Union member states that have ratified the African Union Convention on Preventing and Combating Corruption (AUCPCC)[44] .	The network's objectives are to develop the clearest possible definition of corruption; to analyse the role of multilateral institutions in combating corruption; to assess the efficiency and effectiveness of national anti-corruption bodies; to apply a systematic approach to combating corruption, including the impact of social and cultural characteristics; to compare anti-corruption measures at the continental level; and to map existing anti-corruption research.	At its launch (May 9-11, 2023), an Interim Executive Committee was appointed consisting of: AUABC[45] , Stellenbosch University, Kenyatta University, Association of African Anti-Corruption Authorities, Cameron Anti-Corruption Commission, African Association for Public Administration and Management.

[44] African Union Convention on Preventing and Combating Corruption (AUCPCC) https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption.

[45] African Union Advisory Board Against Corruption (AUABC) https://anticorruption.au.int/.

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5.1 The Mapped Anti-Corruption Networks: Composition, Objectives, and Governance.

In the light of the above mapping, initial considerations can be made, as well as insights for further future research on anti-corruption networks.

Scrolling down the first column of the table, three networks can be identified that can be traced back to three international organisations: the Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE) was established within the United Nations, specifically at the United Nations Office on Drugs and Crime (UNODC); the OECD Anti-Corruption Network for Eastern Europe and Central Asia (OECD/ACN) is an OECD network; and the Network of Corruption Prevention Authorities (NCPA) can be traced back to the Council of Europe.

In this context, the question has been raised whether the role of international organisations is comparable to that of the state in some public networks.

The literature on networks, which has developed primarily around service delivery networks, has also examined the role of the state within them, highlighting that in policy networks and network governance, the state often retains a central role in guiding decision-making processes, targeting activities and network operating mechanisms.[46] .

Well, analysis of the respective sites and direct observation lead us to conclude that only UNODC and OECD maintain a central role in the two reference networks. Although the NCPA is the network of the Council of Europe, the support offered by the organisation is in fact only logistical and does not influence the content choices of the network in any way.

Geographically, only 4 networks (IAACA, NFI, NCPA, GlobE) can be defined as global, as they bring together institutions from different continents. The remaining 16 are

[46] See, again, M. DAL MOLIN, C. MASELLA, *Networks in policy, management and governance: a comparative literature review to stimulate future research avenues*, cit., *3.4.2 Actors*.

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regional networks, with Africa having the highest density of regional anti-corruption networks (8).

The vast majority of the anti-corruption networks analysed are composed of ACAs and LEAs. Only 4 networks (NFI, NCPA, NEIWA, ENPE) include only ACAs and 1 (GlobE) only LEAs.

15 networks can be identified for the promotion of preventive and repressive anti-corruption policies; 1 (GlobE) focuses on strengthening cross-border cooperation and implementing repressive measures; 4 networks (NFI, NCPA, NEIWA, ENPE) deal exclusively with and promote corruption prevention policies.

In general, however, the objectives of most networks are similar.

Promoting cooperation among members, developing anti-corruption strategies, capacity building, harmonising legislation among members, providing technical assistance and training, and promoting and implementing international and regional conventions are at the top of the list.

As far as the organisational structure is concerned, 9 of the networks analysed have adopted the model where the chair is taken in turn by one of the members who also provides the secretariat; 11 networks, on the other hand, can rely on a secretariat which is set up as an autonomous and permanent part of the network, usually linked to an international or regional organisation or to a larger ACA.

In the light of the concepts outlined above, we now proceed to an in-depth examination of three mapped networks that deal exclusively with the prevention of corruption: the Network for Integrity - Réseau pour l'Intégrité (NFI), the Network of Corruption Prevention Authorities (NCPA), and the European Network for Public Ethics - Réseau européen d'éthique publique (ENPE).

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6. IN-DEPTH STUDY: THE NETWORK FOR INTEGRITY - RÉSEAU POUR L'INTÉGRITÉ (NFI)

Launched in Paris on 9 December 2016 on the occasion of the International Day against Corruption, the Network for Integrity is a cooperation space that brings together 22 institutions[47] with missions related to the promotion of integrity[48], transparency and ethics of public officials[49].

The institutional structure of the network is characterised by a horizontal organisational model, with the participation of several members operating on an equal footing[50].

Any public institution, other than a judicial body, that is committed to the prevention of corruption and to transparency and is independent of government interference can become a member of the network[51]. Institutions that do not meet these criteria may have 'observer' status, while the role of 'partner' is given to organisations that support the operation and activities of the network[52].

[47] 20 members and 2 observers.

[48] See the 2023 Plenary Meeting Declaration.

[49] Article 2(1) of the Network's Charter which states, *"The Network pursues the objective of developing and promoting an international culture of integrity, transparency and ethics in public life, in order to contribute to the fight against corruption and the strengthening of citizens' confidence towards public office holders, notably in their relations with the private sector."*

[50] According to Article 4 of the Charter, "*All votes cast by members are equal*".

[51] Article 4 of the NFI Charter.

[52] Article 6 of the Charter.

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The NFI does not receive any external funding and membership of the network is free of charge.

The management and governance of the Network for Integrity follows a network governance model in which the chairmanship is taken in turn by an institution that is a member of the Network, represented by its President or his/her delegate for a period of two years[53]. In addition to the president, a Vice-president is elected who becomes president at the end of the term[54].

Although the Network Charter defines its secretariat as permanent, it is in fact provided by the institution holding the rotating presidency or vice-presidency[55].

The NFI contributes to the global anti-corruption agenda by fostering partnerships with international organisations such as the United Nations, the World Bank, the OECD, and non-governmental organisations, while promoting the Network's participation in international forums and conferences on integrity[56], as reflected in the Charter, website and strategic plan proposed by the current Presidency.

The Network also fosters relations with other international networks that promote the prevention of corruption[57] and offers its members the opportunity to count on greater and better visibility through the Network's awareness-raising and advocacy work with civil

[53] Article 9 of the Charter.

[54] At the Fourth Plenary Meeting of the Network, held in Bucharest on 5 May 2023, the National Institute for Transparency, Access to Information and Protection of Personal Data - INAI (Mexico) was elected Chair for the period 2023-2025, while the National Anti-Corruption Authority - ANAC (Italy) was elected Vice-Chair for the same period.

[55] Article 11 of the Charter.

[56] See Network for Integrity Action Plan 2023-2025, p.9.

[57] Article 3(6) of the Charter.

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society and international organisations[58]. For example, members may decide to adopt common positions in response to specific events[59] or on the network's participation in the work of other organisations promoting particular policies.

The NFI also encourages innovation and creativity in the development of new strategies and tools to strengthen transparency and integrity measures, as shown in an interesting Network publication on digital tools and open data[60], which is also a compelling testimony to what international cooperation can offer: by collecting best practices and identifying common challenges, this document shows how Network members have been able to harness the ever-growing power of technology to promote a culture of integrity in their countries.

While recalling the different national legal traditions in which its member institutions are embedded, the Network reiterates the importance of establishing international cooperation mechanisms that allow the identification of common standards and best practices[61].

[58] Article 2 of NFI Charter.

[59] Article 16 of the Charter. On the occasion of the 4th plenary meeting, held in Bucharest on 5 May, the authorities that make up the network expressed their support and solidarity with the National Institute for Transparency, Access to Information and Protection of Personal Data (INAI), the current president of the network, in the face of the accumulated delays by the competent institutions in completing the process of appointing the vacant commissioners, which is preventing the INAI board from reaching the legal quorum required to fully carry out its mission.

[60] Developing digital tools to promote transparency in public life, December 2020, https://networkforintegrity.org/wp-content/uploads/2020/12/Networkforintegrity_Developing-Digital-Tools-and-Open-Data-dec-20.pdf.

[61] In this sense, reference is made to the general guidelines drawn up and published by the Network, which develop common minimum standards relating to the principles of integrity, impartiality and objectivity, honesty and discretion. The rules and guidelines contained in this document apply to all officials, whether or not they belong to a specific institution. The guidelines also include an interesting self-assessment manual which can help officials to assess their institution's level of commitment to ethical values, as well as their own. See Ethics and integrity in the

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One of the other key functions of the NFI is to identify relevant issues and commonalities between Network members and to facilitate information sharing and mutual learning.[62] .

To this end, the Network organises working meetings on specific topics, facilitates the development and delivery of training among members, provides a platform for members to exchange information with other institutions, and offers specific support to members wishing to develop new activities or countries wishing to establish institutions to promote integrity, transparency and ethics in public life[63]. These activities include the organisation of seminars on topics of common interest and training courses, the production of publications, articles or press releases[64].

7. IN-DEPTH STUDY: THE NETWORK OF CORRUPTION PREVENTION AUTHORITIES - NCPA

The Network of Corruption Prevention Authorities is the network of national anti-corruption authorities that was established - on the initiative of Italy, France, and Croatia -

public sector - Guidelines, September 2019, https://networkforintegrity.org/wp-content/uploads/2019/09/Guidelines_sept2019.pdf.

[62] *Network for Integrity Action Plan 2023-2025*, 13.

[63] Article 3 of the Charter.

[64] Article 16 of NFI Charter.

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on 18 October 2018 in Šibenik[65], during a plenary session of GRECO[66]. Initially signed by 16 authorities (15 from Council of Europe member states and one from an African country), the declaration now has a rich and articulated membership of 32 national authorities, including 2 members with observer status and 5 partners.

The NCPA is a policy network that contributes to the development of anti-corruption policies through the exchange of technical information, the sharing of best practices and the identification of concrete solutions to common challenges, which are many and varied in the field of anti-corruption.

Although conceived within the framework of the Council of Europe[67], the Network is based on horizontal relations between the various ACAs that make it up, to which hierarchical logic is alien. Indeed, all members operate independently and autonomously, without undue influence or interference[68], on a completely equal footing[69].

Unlike the Charter of the Network for Integrity, the Charter of the NCPA does not list the requirements that institutions must fulfil in order to become members. In the absence of their identification, we must therefore assume that it is necessary and sufficient to include what is encapsulated in the Network's name, i.e. to be an authority/agency/department/commission dealing with the prevention of corruption at the national level.

[65] Declaration for a Network of Corruption Prevention Authorities, 15-16 October 2018, https://rm.coe.int/declaration-for-a-ncpa/168098e817.

[66] https://www.coe.int/en/web/greco.

[67] See the section of the Council of Europe website dedicated to the network of anti-corruption authorities: https://www.coe.int/en/web/corruption/ncpa-network.

[68] Article 8(5) of the Charter.

[69] Article 10 of the NCPA Charter.

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This circumstance, i.e. that only national authorities can be members of the NCPA, is confirmed by the case of Spain, where, in the absence of a national anti-corruption authority, the autonomous bodies responsible for preventing and combating corruption at regional level can only join the network as observers[70], a role currently played by the Agency for the Prevention and Combating of Fraud and Corruption of the Valencian Community[71] and the Office for the Prevention and Combating of Corruption of the Balearic Islands[72].

On the contrary, there is nothing to prevent more than one authority from joining, provided that they are equally responsible for preventing and combating corruption at national level[73]. However, this should not undermine the principle of "one country, one vote"[74].

Similarly, the Charter does not specify the requirements for the status of observer or partner in the Network, but only allows their presence[75]. This issue was raised at one of the first meetings of the Network, where it was clarified that "observer" status coincides with the initial/exploratory phase of an institution's participation in the Network's activities, with a view to later full membership; that of "partner", on the other hand, is the status that can be

[70] See NCPA plenary meeting, 6 September 2022, minutes, https://rm.coe.int/minutes-ncpa-pl-6-9-2022/1680a85ba5.

[71] Agència de Prevenció i Lluita contra el Frau i la Corrupció de la Comunitat Valenciana (AVAF) https://www.antifraucv.es/en/inicio-en/.

[72] Oficina de Prevención y Lucha contra la Corrupción en las Illes Balears (OAIB) https://www.oaib.es/.

[73] This is the case of Ukraine, which has two full members: the National Anti-Corruption Bureau of Ukraine (NABU) https://nabu.gov.ua/en/ and the National Agency on Corruption Prevention (NACP) https://nazk.gov.ua/en/.

[74] See Article 10, which states that decisions of the Network shall be taken by a majority of the votes cast and that each country shall have one vote.

[75] See Article 1(4) of the Charter, which states that the Network also accepts observers and partners.

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held by other organisational entities, such as international and regional organisations, think-tanks, universities, NGOs and other civil society organisations (CSOs), which, while supporting and working to strengthen the prevention of corruption, are not equivalent to public institutions, the only ones that can become full members of the Network[76] .

The NCPA receives no external funding. Technical and logistical support is provided by the Council of Europe Secretariat. Members are committed to ensuring the cost-effectiveness of the network by actively using all available resources and existing communication channels[77].

The organisational structure of the Network follows the model that the chairmanship of the network is taken on a rotating basis by a member institution, which chairs the meetings and helps to ensure the continuity of the network's work[78] .

The NCPA elects its Chairperson and up to three Vice-Chairpersons in plenary session by secret ballot[79] and simple majority, for a period of one year[80]. The Steering Committee is composed of the Chairperson, the Vice-Chairpersons and a minimum of 4 to a

[76] See, Summary of the second meeting of the Network of Anti-Corruption Authorities (held in Strasbourg in June 2019). https://rm.coe.int/minutes-prevention-network-meeting-public/168098f193.

[77] See, Article 8 (6), of the Charter.

[78] The current Chairmanship (since 2024) is represented by France - Agence Française Anticorruption (AFA). Previous Chairs: 2023: Croatia - Conflict of Interest Commission (Sukobi Interesa); 2022: Greece - National Transparency Authority (NTA); 2021: Serbia - Agency for the Prevention of Corruption (APC); 2020: France - Agence Française Anticorruption (AFA); 2019: Italy - National Anticorruption Authority (ANAC).

[79] During the COVID-19 pandemic, plenary sessions were held remotely, and the President was elected by consensus without a vote. See Virtual Plenary 16 December 2020: The Serbian Anti-Corruption Agency (ACAS) was elected by consensus as Chair of the NCPA. https://rm.coe.int/minutes-ncpa-plenary-meeting-december2020-public/1680a16ab7.

[80] See Article 3 (1), of the Charter.

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maximum of 12 members, each representing a member of the Network, considering gender and geographical balance as well as multidisciplinary expertise[81].

The member chairing the Network also ensures during his or her term of office the activities of the Secretariat[82], which is responsible for providing strategic, administrative, and other support to the structure and general activities of the Network[83].

The global nature of the NCPA has been clear from the outset, as the signatory authorities and those who have subsequently joined the Network include national institutions from countries that are neither members nor observers of the Council of Europe[84].

Moreover, one of the Network's first major publications is the result of fruitful cooperation between a Network member, the OECD and GRECO[85].

The NCPA also participated in the Eighth Session of the UNCAC Conference of States Parties (COSP), which was held in Abu Dhabi in 2019, taking part in two side events

[81] See Article 5 of the Charter.

[82] See, Article 7 of the Charter.

[83] At a plenary meeting, one member raised the idea of creating a permanent secretariat to manage the activities currently carried out by the rotating NCPA chair. However, concerns were expressed about the lack of specific resources for the network and the feasibility of the project in the near future. See Virtual Plenary 29 September 2020 https://rm.coe.int/minutes-ncpa-plenary-meeting-september2020-public/1680a022ac.

[84] Benin, Brazil, Chile, Ecuador, Egypt, Jordan, Kazakhstan, Morocco, Palestinian Authority, Moldova, Tunisia.

[85] Agence Française Anticorruption (AFA); OECD; GRECO. (2020) Global Mapping of Anti-Corruption Authorities. Analysis Report. https://rm.coe.int/ncpa-analysis-report-global-mapping-acas/1680a16ab9.

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focusing on the role of ACAs[86] and international initiatives to prevent corruption[87] . Likewise, at the Ninth Session of the COSP held in Sharm El-Sheikh in 2021, the Network presented the results of a research on the importance of information and communication technologies in preventing and combating corruption[88].

In the course of 2022, the rotating presidency organised several webinars involving not only representatives of NCPA member institutions, but also representatives of international organisations, the public sector, business associations and academia[89]. In particular, the webinar on a truly global issue such as whistleblower protection attracted over 100 participants from Europe, Asia, Africa, and Latin America[90].

Spreading and reinforcing a culture of integrity is a core function of the NCPA, as evidenced by the three-pronged approach the Network takes to promoting it.

Indeed, the beneficiaries of the activities and efforts aimed at achieving this fundamental mission are not limited to the ACAs that are members of the Network. In this sense, the Network has indeed implemented a real strategy of involving key stakeholders in the promotion of integrity in the public sector, the private sector and society at large, initiating

[86] From theory to practice: What do anti-corruption authorities really look like? https://www.unodc.org/unodc/en/corruption/COSP/session8-specialevents.html.

[87] International initiatives for the prevention of corruption: short to long-term perspectives https://www.unodc.org/unodc/en/corruption/COSP/session8-specialevents.html.

[88] Challenges and opportunities of ICT to prevent and detect corruption and to foster integrity and transparency https://www.unodc.org/unodc/en/corruption/COSP/session9--special-events/14-Dec-2021.html.

[89] The four webinars on strengthening public integrity organised by the 2022 Presidency covered the following topics: i) Trends and challenges in lobbying regulation; ii) Designing and implementing effective whistleblower protection systems; iii) Fighting corruption in sport in the 21st century; iv) Fighting corruption in public procurement; see NCPA Annual Report 2022, pp. 8-9. https://rm.coe.int/ncpa-annual-report-2/1680a9db18.

[90] NCPA Newsletter 2022, p. 3. https://rm.coe.int/ncpa-newsletter/1680a9db16.

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important collaborations with a wide range of stakeholders, such as international and regional organisations, think tanks, universities, and civil society organisations, as well as business associations[91].

Since its creation, the Network's efforts have focused on defining minimum standards common to the various instruments of a preventive nature and on identifying best practices in this field[92].

The exchange of information between anti-corruption authorities has become an increasingly important and valuable tool in the prevention of corruption. With this in mind, as stated in the Network's Charter, its member ACAs are joining efforts to further improve the collection, management and exchange of information among themselves.

The NCPA has made a significant contribution to raising awareness of ACAs through two major projects. The results of the first show that the size, powers, activities, and visibility of anti-corruption agencies vary widely around the world. In some cases, they play an important role in developing anti-corruption strategies and policies for their countries, translating international standards into national action. In others, they do not yet exist[93]. Instead, the second project focuses on analysing 11 ACAs that are members of the NCPA, looking at their institutional arrangements, mandates, activities, cooperation and limitations. This initiative was conceived as a continuation of the global mapping of anti-corruption

[91] The Network has also addressed the challenges of corporate integrity by adopting guidelines on "facilitation payments" with the aim of offering concrete solutions, without being too detailed, so that they can be applied in the different contexts in which companies operate.

[92] This intense activity has resulted in the publication of several guidelines, including the Guide to the Design, Implementation and Monitoring of National Anti-Corruption Plans and Strategies, the Guide on Cooling Periods and the Prevention of Conflicts of Interest, and the Guide on the Gender Dimension of Corruption.

[93] Global Mapping of Anti-Corruption Authorities. https://rm.coe.int/ncpa-analysis-report-global-mapping-acas/1680a16ab9.

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authorities, in that it sought to increase knowledge of the functions of anti-corruption authorities and, consequently, to identify opportunities for cooperation within the NCPA[94] .

8. IN-DEPTH STUDY: EUROPEAN NETWORK FOR PUBLIC ETHICS - RÉSEAU EUROPÉEN D'ÉTHIQUE PUBLIQUE (ENPE)

The European Network for Public Ethics (ENPE), launched in June 2022 on the initiative of the French High Authority for Transparency in Public Life[95], brings together 18 institutions from EU Member States active in the field of integrity and transparency in the public sector. Of these, 15 are members of the network and 3 have observer status. Since 2023, the European Ombudsman has also joined the Network as an observer[96].

The ENPE is certainly a policy network, as its actions contribute to the policy-making process of corruption prevention. In addition to promoting a culture of public integrity and pursuing the harmonisation of legislation in the EU Member States, the network aims to develop specific expertise in preventive policies that will enable it to act as a privileged interlocutor with the European authorities on issues of integrity, transparency, and public ethics[97].

[94] Report on the similarities and differences in the mandates of the members of the Network of Anti-Corruption Authorities (NCPA) https://rm.coe.int/75-1-17-10-2022-correo-anexo-informe-mandatos-ncpa-eng/1680a90ce1.

[95] Haute Autorité pour la transparence de la vie publique (HATVP) https://www.hatvp.fr/.

[96] European Ombudsman https://www.ombudsman.europa.eu/it/home.

[97] Article 2 of the ENPE Charter.

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ENPE is also characterised by its networked organisational structure, which is embodied in horizontal workflows and processes that facilitate cooperation and ensure a good level of information symmetry between members.

Any authority may become a member of the Network upon request, provided that it is a national authority or a ministerial department of an EU Member State or an EU institution, body or agency, that it performs functions and tasks related to transparency, ethics or public integrity, and that it has functional guarantees of independence to ensure the impartial exercise of its powers, in particular in the conduct of investigations and the execution of any decisions taken[98].

The Network is a non-profit organisation. Members are financially responsible for their participation in Network activities. However, they may individually seek external contributions to fund such participation[99].

ENPE has also adopted the model whereby one institution, a member of the network, chairs the work for a predetermined period. At the end of this period, there is a rotation with another institution of the network, which is elected as chair for the same period. The effect of this system is not only to ensure the permanence and continuity of the Network's work, but also to ensure formal equality between its members. Specifically, the ENPE Charter states that the Network is chaired by a member elected to the Presidency, for a two-year term[100].

The Network Secretariat is provided by a member institution, for a period of three years[101]. Although, according to the wording of the Charter, the activities of the Secretariat

[98] Article 4 of the Charter.

[99] Article 12 of the Charter.

[100] https://www.hatvp.fr/english_news/the-high-authority-elected-as-president-of-the-european-network-for-public-ethics/.

[101] Article 9 of the Charter.

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may be carried out by a different member from the one who holds the Chair, in practice the two functions may be carried out by the same member. The originality of the statutory provision lies in the fact that the duration of the two mandates has been differentiated: two years for the Chair and three years for the Secretariat, with the clear aim of ensuring the continuity of the Network's work.

Although the Network has been active for just over a year[102], it has already shown great internal dynamism and a strong inclination to be a major player in the international context. An analysis of the Charter, the documents published on the website[103] and the minutes of meetings allows us to identify the various functions carried out by the Network and to see if they can be traced back to the four main functions outlined above.

While the ENPE was established with the primary objective of promoting public ethics and harmonising legislation on the prevention of corruption among EU Member States, it recognises the importance of involving international organisations active in the fight against corruption in its work in order to stimulate discussion, strengthen cooperation and support multilateralism[104].

In this context, the international conferences organised by the ENPE should certainly be mentioned, which dealt with highly topical issues and were attended by important representatives of the EU institutions, the OECD, GRECO and Transparency International[105].

[102] The Network was launched in Paris on June 9, 2022, by the High Authority for Transparency in Public Life as part of the French Presidency of the Council of the European Union.

[103] ENPE does not, at present, have its own site, but relies on that of the Haute Autorité pour la transparence de la vie publique (HATVP), which holds the current presidency. https://www.hatvp.fr/en.

[104] Article 3(1) of the Charter.

[105] The first, held in Paris on 9 June 2022, entitled "Ethics and transparency: which tools to ensure citizens' trust?" addressed the issues of transparency, conflicts of interest and the regulation of lobbying. https://www.hatvp.fr/english_news/a-european-conference-on-ethics-and-transparency/. The second, the "Conference on revolving doors and the cooling-off period", held in Zagreb on 9 November 2022, addressed the

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The ENPE is also proving to be a very capable interlocutor with the European authorities on issues related to the prevention of corruption and is in constant dialogue with the EU Commission to represent the interests of its members.

In addition, the Network aims to promote a culture of public integrity[106], including through meetings and seminars organised with its members on a specific topic related to ethics, transparency, or the enablers of corruption.

In this context, it is important to mention the results of the technical meeting of ENPE members held on the occasion of the Zagreb Conference, where the Network Secretariat presented a reasoned document based on data provided by all members on the subject of revolving doors[107].

On the other hand, at the Network's plenary meeting in Ljubljana on 5 October 2023[108], the ENPE Secretariat presented a document summarising the Network member authorities' responses to the questionnaire on asset declarations[109].

phenomenon of revolving doors and the issues related to the length of the cooling-off period. On 4 October 2023, the "European Conference on Strengthening Public Integrity and Countering Undue Influence in Democracies" was held in Ljubljana, which, in addition to aspects related to the implementation difficulties of anti-corruption policies, also highlighted the importance of countering foreign interference in democratic processes.

[106] Article 2 of the Charter.

[107] The main findings of the study show that several member countries of the network have adopted specific measures to limit, for a certain period of time, the negotiating autonomy of a civil servant who, after leaving the administration, wishes to accept assignments offered by the beneficiaries of his or her decision-making power, as expressed in the functions he or she previously held. However, the national rules differ as regards to control/supervision and sanctioning powers. The length of the cooling-off period also varies from 1 to 3 years.

[108] https://www.hatvp.fr/english_news/meeting-of-the-european-network-for-public-ethics-on-4-and-5-october-in-ljubljana/.

[109] In terms of scope, most systems cover high-level elected and non-elected officials, such as ministers and members of parliament: in 3 countries (Lithuania, Portugal, and Romania) the President of the Republic is subject to the

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However, the main function for which the ENPE was created is to identify common standards for the various legal instruments that have a preventive function with regard to the phenomenon of corruption, in order to contribute to the harmonisation of the respective practices and regulations adopted by the Member States[110] .

In this context, the ENPE has published a position paper[111] on the anti-corruption package[112], calling on the European Commission to include in the European Anti-Corruption Directive common standards for legal instruments designed to prevent situations that facilitate corruption, arguing that only a legislative approach to preventive measures can guarantee full effectiveness[113].

reporting obligation. However, in some countries this obligation is extended to a wider range of officials, including local government representatives, members of regulatory bodies, members of state-owned enterprises and civil servants. In terms of frequency, however, it was found that civil servants tend to submit declarations at the beginning and end of their term of office. In most countries, they are also required to declare any changes in their circumstances during their term of office; these regular updates help to track changes in their financial situation and identify any sudden accumulation of assets. In some countries, the declaration of interests or assets must be updated annually during the term of office.

[110] See Article 2 and Article 3 (1) of the Charter.

[111] https://www.hatvp.fr/wordpress/wp-content/uploads/2023/04/ENPE-position-anticorruption-EU_EN_final.pdf.

[112] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516.

[113]The members of the network stress the importance of preserving the specificity of the models adopted by each Member State. However, they agree on the need to establish common minimum standards in order to place personal and public integrity at the heart of the principles of the European Union. Strengthening the independence, powers and resources of public integrity authorities is also important for the credibility of public action and public confidence in their institutions, both national and European. The Network suggests: harmonising the definition of conflict of interest in Member States; approximating Member States' legislation on declaration of assets; and improving the regulation of "revolving doors" between the public and private sectors.

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The content of the ENPE position paper would have been included in the proposed anti-corruption directive, according to some[114].

In addition, ENPE promotes and encourages stable collaborative relationships between its members, including the exchange of information and knowledge[115]. It also provides long-term support to members wishing to develop new missions or to countries planning to establish corruption prevention authorities.

Confirming the Network's strong European vision and vocation, the Charter provides, among other things, for the identification of experts among its members to be involved in twinning projects or partnerships with EU candidate countries.

9. CRITICAL ISSUES AND STRENGTHS OF ANTI-CORRUPTION NETWORKS

The most critical issue identified in the work of these networks is probably related to the quality of their performance, which does not always appear to be linear and constant.

This phenomenon is mainly due to structural problems, as networks that cannot count on a stable and autonomous secretariat concentrate a large part of their activities on the chairing authority, which does not always have sufficient internal human resources to carry out the 'overtime' work required by the network in addition to its normal workload.

In part, however, the fluctuating trend in the networks' activities, which is particularly noticeable in outdated sites, is probably due to a largely physiological

[114] In that sense, see *ENPE Position Paper and the Proposed European Directive on Anti-Corruption*, Compliance Observatory 231, May 8, 2023, https://www.osservatorio-231.it/2023/05/08/il-position-paper-dellenpe-e-la-proposta-di-direttiva-europea-in-materia-di-anticorruzione/.

[115] See Article 3 of the Charter.

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phenomenon. Indeed, as is sometimes the case with national anti-corruption authorities or reforms of greater impact, an initial phase of conception and launch of a new anti-corruption network is followed by a phase of stabilisation, if not - sometimes - inertia.

Although there are no studies that can determine the ideal size of an anti-corruption network, it is believed that a very large number of participants can be an obstacle to the full involvement of all members. In fact, networks are natural 'focus groups', as meetings convened around a particular issue bring together a variety of opinions, perceptions and ideas on the subject.

On the contrary, the research activity carried out within the networks is favoured by a large number of participants, as it mostly takes the form of analysing the answers to questionnaires sent to their members or the results of international online surveys.

Since they - the anti-corruption networks - are not regulatory networks[116], the documents they adopt have no regulatory effect, not even indirectly. However, they can contribute to the international and national debate and provide valuable insights for national ACAs when reporting to parliament and government on anti-corruption policy issues.

10. CONCLUSIONS

The study of anti-corruption networks first shows us that a legal reconstruction of these networks is not only possible, but technically plausible, in the light of the partitions drawn from the literature on public networks.

[116] S. SALVADOR IBORRA, A. SAZ-CARRANZA, X. FERNANDEZ-I-MARIN, A. ALBAREDA, *The Governance of Goal-Directed Networks and Network Tasks: An Empirical Analysis of European Regulatory Networks*, in *Journal of Public Administration Research And Theory*, 2018, 270-292.

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The concepts of policy network, network management and network governance have been analysed separately and recombined to make them easily applicable to anti-corruption networks.

In particular, with regard to the notion of network governance, it was found that networks that can rely on sufficient financial resources to maintain a permanent secretariat and dedicated staff are more likely to develop and maintain effective collaboration within the network than those that adopt the organisational model in which it is the chairmanship - rotated among the members - that ensures the activities and services proper to the secretariat.

Although the latter model has the advantage of not creating additional bureaucratic structures, thus ensuring that networks have the necessary 'structured informality', it suffers from the variable of an undynamic or insufficiently proactive chairmanship, which can lead to long periods of inertia.

Our findings also allow us to attribute a more effective overall action to anti-corruption networks composed only of ACAs than to multi-purpose networks (ACAs + LEAs), and a more incisive promotion of advocacy strategies towards international organisations.

Moreover, the mapping of 20 anti-corruption networks - over a long period of time - not only helps us to understand their structure and functions, but also allows us to define them as a constantly growing phenomenon.

This trend can be attributed to the need for network participants to acquire information, knowledge and tools that are essential to address the complex challenges of anti-corruption policy, with a focus on implementation aspects.

In addition, the networks address the need to fill a participatory gap, as not always and not all national ACAs are involved in decision-making processes at the international level.

In different ways, all the networks are trying to bring new anti-corruption issues onto the global agenda or to revisit those that have not received the attention they deserve.

The fact that these networks are forming around specific issues suggests that there is a general consensus among participants that these issues need more international attention.

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Finally, these networks are designed to complement, not replace, the work of public institutions and policymakers.

Abstract. *The phenomenon of anti-corruption networks is growing but remains an underdeveloped topic. There is a wide variety of network concepts and applications in the public sector literature, which offers us possible ways of legal reconstruction of these specific networks. This article attempts to provide a framework that helps to clarify what anti-corruption networks are and what they do and seeks to understand the role they play in the international arena.*

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