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ANTI-CORRUPTION DISCIPLINE IN ITALY. BETWEEN POLICIES OF PREVENTION AND REPRESSION

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SUMMARY: I. *Introduction: the double side of the fight against corruption*. II. *Anti-corruption institutions from a diachronic perspective*. III. *Corruption prevention measures: from representation to prevention*. IV. *The network of anti-corruption programs*. V. *Administrative transparency, a pillar of the anti-corruption system*. VI. *Regulatory framework regarding labor disqualification and incompatibilities and codes of conducts*. VII. *The repression of corruption*. VIII. *Conclusions*.

I. INTRODUCTION: THE DOUBLE SIDE OF THE FIGHT AGAINST CORRUPTION

For a long time, the prevention of corruption has been situated on the margins of the elaboration of strategies and policies for the fight against corruption. Traditionally, the Italian legal system has dealt with the issue of corruption only under the repressive function: for a long time, the instrument of criminal repression, promoted by the Judicial Authority and the Police

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Forces has been used exclusively to fight corruption. Historically, intervention policies, instead of having a global vision aimed at preventing corruption, have responded to a logic of emergency and reactive action, consistent with the idea of corruption as a "bureaucratic-branched" phenomenon of an occasional nature and involving only public officials who do not occupy high positions.[1] Previously, corruption, which was not systematic at the time, was limited to cases of illicit contract between the public administration and a private individual: a contract that was developed according to numerous forms typified in the criminal code and that was intended for the sale of an act of the public official (or the person in charge of the public service) in favor of the individual. Therefore, the fight against corruption ended with the repression of the synallagmatic act and fraud, in which there was a submission of the individual against the coercion of the official.[2]

The increased awareness of the changing behavior of corruption, with increasingly frequent, systematic acts that involved the different levels of institutions up to the highest political and administrative spheres, gave rise to the creation of a preventive strategy with rules of administrative law, which was added to the criminal sanctions that already existed. As can be seen in daily life through the news and information that are transmitted, corruption in Italy has long exceeded the limit of vigilance, since the same sectors of public life have been involved in corrupt acts, thus transcending the eminently criminal dimension of the phenomenon.[3]

With Law 190/2012 (known as *Legge Severino*), a preventive function is established, together with criminal intervention, through a set of administrative law regulations capable of attacking corruption from the initial planning phase to the final phase of execution.

The knowledge that has been acquired about the systematic nature of corruption, a phenomenon that can endanger the impartiality and proper development of public administrations and its legitimacy, has led to rethinking the entire administrative mechanism through a logic, that is above all, for prevention and valorization of the guidelines that come from international and supranational sources. Starting in 1997, there are numerous international normative acts that have fed one of the most important *corpus*

[1] Cingari, Francesco, *Possibilità e limiti del diritto penale nel contrasto alla corruzione*, in Palazzo, Francesco (Ed.), *Corruzione pubblica. Repressione penale e prevenzione amministrativa*, Florence, Firenze University Press, 2011, p. 13.

[2] Flick, Giovanni Maria, *Governance e prevenzione della corruzione: dal pubblico al privato o viceversa?*, *Cassazione penale*, No. 9, 2015, p. 2982.

[3] Spangher, Giorgio, *Il "contrasto" alla corruzione nell'orizzonte della politica criminale*, *Percorsi costituzionali*, 2012, p. 43.

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of political-criminal normative.[4] The OECD (Organization for Economic Cooperation and Development) Convention of 1997, the UN Convention against corruption of 2003, the two Conventions, criminal in 1998 and civil in 1999, against corruption of the European Council and, in general, the anti-corruption policy promoted by the European Union, has progressively insisted on the need for States to develop administrative prevention policies to coordinate harmoniously with the instrument of criminal repression.

Specifically, in addition to intervening through criminal repression, Law 190 has reinforced the coordination of anti-corruption policies at the central, regional, and local levels, and has promoted prevention activities by introducing the obligation for all public institutions to adopt anti-corruption programs. Higher integrity standards have been established for elected public officials, and to ensure transparency of public spending and access to information. Codes of conduct have been drawn up, measures for the protection of public officials who report illegal acts, and the regulatory framework relating to conflicts of interest, incompatibility and disqualification from positions have also been strengthened. For this purpose, Law 190, in art. 1, section 49, has delegated to the Government the task of elaborating one or more legislative decrees aimed at modifying the discipline of attribution of managerial positions and high positions of administrative responsibility in public administrations and in private law institutions subject to public control, as well as , the activity of production of goods and services in favor of public administrations or management of public services, in addition to modifying the discipline related to the incompatibility of the aforementioned positions and the development of elected public positions or the ownership of private interests that may have conflict with the impartial exercise of assigned public functions. All oft he above, obviously, has the objective of obtaining a greater guarantee of impartiality and proper development of administrative activity.

Always bearing in mind this strategic vision of prevention, the rules on transparency that have represented one of the fundamental pillars of the recent reforms are evident: the new discipline of civic access aims to mark a true "ideological" turning point in relations between individuals and the public administration.[5]

[4] Manacorda, Stefano, *Normativa internazionale e scelte politico-criminali di contrasto alla corruzione: il "piano inclinato" della riforma*, *Riciclaggio e corruzione: prevenzione e controllo tra fonti interne e internazionali,* Milan, Giuffrè, 2013, p. 172.

[5] Massaro, Antonella and Sinisi, Martina (Eds.), *Trasparenza nella p.a. e norme anticorruzione: dalla prevenzione alla repressione*, Rome, Roma Tre Press, 2017.

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Finally, the latest legislative interventions have dealt, to a considerable extent, with the public contracting sector, which, historically, has also been subject to a high risk of corrupt conduct: in particular, we refer to the new Code established by the Decree Law n. 50 of April 18, 2016, subsequently modified by Decree Law no. 56, of April 19, 2017 (known as "*correcttivo al Códice*"). As we know, corruption has been particularly widespread in the public contracting sector and has been present in each of its phases, from the granting to the final moment of its execution. The seriousness of this phenomenon, together with international requests, have led the legislator to suppress the Authority for the surveillance of public contracts and attribute the relative functions to another new Authority, defined as the National Anti-Corruption Authority, thus providing semantic evidence to the recognized systematicity of the phenomenon.[6]

II. Anti-corruption institutions from a diachronic perspective

The introduction of the first competent figure to carry out the anti-corruption functions appears in Law 3/2003, which established the High Anti-Corruption Commissioner, a figure directly dependent on the Presidency of the Council. It was an institution endowed with relatively weak powers: it could order investigations to verify the "existence, cause and factors" of the corruption phenomenon and illicit acts, it could carry out analyzes and studies on the suitability and consistency of the regulatory framework, and on eventual administrative measures aimed at dealing with corruption and other illicit acts, and could also supervise the procedures from which fiscal losses or damages could be derived, such as those related to public contracts.[7] But, nevertheless, the High Commissioner was not the holder of regulatory or sanctioning functions, only, he could present complaints about relevant illicit behaviors before the judicial authorities and before the Auditors Court. This institution proved to be inadequate to combat corruption effectively since it was endowed with very incisive powers.[8]

[6] Racca, Gabriela Margherita, *Dall'Autorità sui contratti pubblici all'autorità nazionale anticorruzione: il cambiamento del sistema*, *Diritto Amministrativo*, No. 2-3, p. 346.

[7] Cristina, Fabio Di, *L'Autorità nazionale anticorruzione nel diritto pubblico dell'economia*, *Il diritto dell'economia*, No. 29, 2016, p. 501.

[8] Giuffrè, Felice, *Le autorità indipendenti nel panorama evolutivo dello stato di diritto: il caso dell'Autorità nazionale anticorruzione*, in Nicotra, Ida (Ed.), *L'Autorità nazionale anticorruzione. Tra prevenzione e attività regolatoria*, Turin, Giappichelli, 2016, p. 26.

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The functions of the High Commissioner, abolished in 2008, were transferred to the Anti-Corruption and Transparency Service of the Civil Service Department, an office under the Presidency of the Council. This Service was assigned tasks of study and analysis of the phenomenon of corruption and other forms of illicit acts, with the aim of preparing an annual Report that would be transmitted to Parliament and an annual Plan for the transparency of administrative action.

With Decree Law 150/2009, a new institution came to light, the Commission for the Evaluation, Transparency and Integrity of Public Administrations (CIVIT), which was given powers in matters of integrity and transparency. However, such powers were quickly absorbed by the discipline related to the evaluation of performance within public administrations, a central theme of the reform carried out by the Government of the time.[9] Together with the CIVIT, the Presidency of the Council-Department of the public function continued to maintain some powers of the already abolished High Commissioner, thus provoking a two-headed corruption prevention system, weakened by an insufficiently clear distinction between political direction and administrative management.[10]

Law 190/2012 established that the CIVIT was the body in charge of carrying out the functions of the National Anticorruption Authority. The tasks conferred on this Commission were based on collaborative activities with the equivalent foreign organizations and with the competent regional and international organizations, to adopt a National Anti-Corruption Plan, of a consultative nature, and which resulted in the preparation of reports, activities to analyze the causes and factors of corruption, and the identification of interventions that could promote prevention. Also, the Commission carried out surveillance and control activities on the effective application and efficiency of the measures adopted by public administrations and on respect for the rules of transparency of administrative activity. Instead, sanctioning powers were absent. Law 190 maintains that double structure that had characterized the previous phase (2009-2012). In fact, together with the CIVIT, there was the Department of Civil Service of the Presidency of the Council of Ministers, which had functions of coordinating the methods and strategies to fight corruption, based on the guidelines adopted by the Interministerial Committee (established with Decree of the President of the Council of Ministers, on January 16, 2013). Therefore, as of 2012, the

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9 Cristina, Fabio Di, *op. cit.*, p. 502.

10 Macchia, Marco, *La corruzione e gli strumenti amministrativi a carattere preventivo*, in F. Manganaro, Francesco *et al.*, *Diritto amministrativo e criminalità,* Milan, Giuffrè, 2014.

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body is identified to be granted anti-corruption functions, which still appear shared with a government referral structure. In addition, each of the administrations is assigned the figure of the person responsible for the Prevention of Corruption (RPC), chosen by the management body from among the leaders in service.

With Law Decree 90/2014, converted into Law 114/2014, the CIVIT becomes the National Anti-Corruption Authority (ANAC) and also assumes the functions of the Authority for the surveillance of public work, service and supply contracts (AVCP), and those of the Department of the Civil Service in matters of prevention of corruption and promotion of transparency in public administration.

The relationship between the different subjects in charge of developing corruption prevention functions is clarified in the following Law Decree 97/2016, which modified Law Decree 33/2013 and Law 190/2012 itself: ANAC adopts the National Anticorruption Plan (PNA) and "exercises the powers of inspection through requests for news, information, acts, and documents to public administrations". Each one of the administrations has the obligation to send its three-year anti-corruption program (PTPC) to the ANAC before January 31 of each year; and before December 15 of each year, the Corruption Prevention Officer (RPC) of each administration must transmit to the Independent Evaluation Body (OIV) a report on the results of the activity; and the latter (OIV) will have to verify the coherence of the PTPC (triennial anti-corruption programs) with the other programming acts and will notify the ANAC of the status of application of the measures they contain.

The functions of the national anti-corruption authority

Decree Law 101/2013, converted into Law 125/2013, which contains urgent provisions to achieve optimization objectives in public administrations, has attributed to the CIVIT the name of Authority National Anticorruption for the evaluation and transparency of public administrations.[11] Therefore, the National Anti-Corruption Authority replaces the CIVIT, and not only are the functions of evaluating performance transferred to it, but it also —with subsequent legislative interventions— has precise surveil-

[11] Article 5 of law No. 125/2013 establishes that "According to art. 1, paragraph 2 of the law of November 6, 2012 No. 190, the Commission for Evaluation, Transparency, Integrity of Public Administrations takes the name of National Anticorruption and Evaluation and Transparency Authority of Public Administrations *(A.N.A.C.)*".

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lance powers in matters of public contracts.[12] Decree Law 40/2014 redefines the name of the Authority, which becomes the current National Anti-Corruption Authority, and transfers to it all the duties and functions that were previously the responsibility of the Authority for the supervision of public employment contracts, service, and supply (art. 19 section 2 of Law Decree 90/2014).

The AVCP (Authority for the surveillance of public work, service and supply contracts) as we know, was introduced by Law 109/1994 (known as "*Legge Merloni*") with the aim of inserting, in the system, an authority that assist the existing control bodies to rigorously predetermine the entire process of assigning public works and choosing the contractors, and consequently, limit the exercise of discretion by the public administration as much as possible.[13]

The legislative powers attributed to the ANAC can be classified in the prevention of corruption in the field of public administrations, of the participating companies, and in control through the application of transparency in all aspects related to management, in addition, of the development of surveillance activity in the field of public contracts, assignments of positions, and in short, of any sector of the public administration that may be fertile ground for the appearance of corruption.[14]

In addition to the powers provided in Law 190 and the related decrees, ANAC has been conferred specific powers of intervention whenever there are serious and proven acts of corruption, whose perpetrators are private businessmen who provide their services to public administrations. These powers can also be translated into the application of a judicial administration.

The Public Contracts Code, established by Law Decree 50/2016 and modified by Law Decree 56/2017 and successive amendments, has a detailed discipline on the functions of the ANAC, which is attributed surveillance functions, of regulation, sanctions, and functions prior to the contentious process, and in addition, it has extraordinary legitimacy to take legal action, as the supreme guarantor of legality in this sector.

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[12] D'Alterio, Elisa, *Regolare, vigilare, punire, giudicare: l'ANAC nella nuova disciplina dei contratti pubblici*, *Giornale di diritto amministrativo*, 2016, p. 500.

[13] Sandulli, Di Maria Alessandra, *Natura ed effetti dei pareri dell'AVCP*, in *federalismi.it*, Rome, 2013, p. 2.

[14] In this sense, compare "Missione", cited by D'Alessandro, Niccolò Maria, *L'Autorità nazionale anticorruzione: spunti di riflessione alla luce delle modifiche al Codice dei Contratti pubblici*, *Nuove Autonomie*, 2018, *www.anticorruzione.it.*

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The ANAC has two central functions: to monitor the sector of public contracts and to prevent and combat illegality in public administrations. However, the first mission is essential to achieve the second: the monitoring of public contracts is not an objective, but it is ("also") essential to achieve the purpose of the well-known "anti-corruption" mission.[15]

On the application of Law Decree 50/2016, the legislator has intensified the role of the Authority responsible for surveillance in matters of public contracts, giving it totally new powers that extend, not only, throughout the entire phase of the procedures of public tender, but also reach the stage of execution of the contract. The current functions of the ANAC are, therefore, those that result from the coordination of powers, already in part developed by the previous AVCP, and those new functions attributed by recent regulatory interventions.[16]

Law Decree 97/2016 (known as the Italian version of the *Freedom of Information Act*) has given a new role to the Authority, in terms of transparency, attributing to it the duty to adopt, always in agreement with the Data Protection Guarantor and once the Unified Conference has been heard, guidelines to define the exceptions and limits of the new generalized civic access.

In the public bidding process, ANAC's surveillance function is legally based on art. 213 of the Code, which establishes that the surveillance, control, and regulation of public contracts are the responsibility of the ANAC, which also has a general power of action to prevent and fight against illegality and corruption.

In particular, the surveillance power of the ANAC is understood, on the one hand, in a subjective sense, since the control activity is directed, indifferently, at public and private agents, and, on the other hand, in an objective sense,[17] since surveillance also affects, according to art. 213, sec. 3, letter a), in public contracts excluded, totally or partially, from the scope of application of the *Codice appalti* (Public Bidding Code), in order to concretely verify the legitimacy of such exclusion.

According to a careful doctrine,[18] the surveillance function must be understood as "collaborative surveillance", that is, as a moment of preliminary

[15] D'Alterio, Elisa, *Il nuovo Codice…*", *cit*., p. 436.

[16] Chimenti, M.L., *Il ruolo dell'Autorità nazionale anticorruzione nel nuovo Codice dei contratti pubblici*, in Nicotra, Ida (Ed.), *op. cit.,* p. 47.

[17] Piperata, Giuseppe, *L'attività di garanzia nel settore dei contratti pubblici*, in F. Mastragostino (Ed.), *Diritto dei contratti pubblici. Assetto e dinamiche evolutive alla luce del nuovo codice, del decreto correttivo 2017 e degli atti attuativi*, Turin, Giappichelli, 2017, p. 40.

[18] Frediani, Emiliano, *Vigilanza collaborativa e funzione "pedagogica" dell'ANAC*, *federalismi.it*, 2017, p. 6.

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evaluation that has the objective of verifying the legitimacy and conformity of all the documents of the public bidding procedure, considering the legal provisions.

According to art. 213, par. 3, letter b), such surveillance acts as an instrument capable of guaranteeing economics in the execution phase of the contract and is aimed at verifying that no damage arises for the public coffers when the contract is perfected.

Surveillance activities include supervision, technical controls of economic-accounting regularity, qualitative controls, controls known as collaborative and inspections.

Recently, the ANAC has issued its own Regulation on the exercise of surveillance activity in matters of public contracts,[19] and provides a broad view of the discipline established in art. 213 of the Code.[20] The Regulation in question contains a specific programming on the surveillance activity of the Authority, which is based on two acts approved by the Council: the programmatic directive that must be approved before January 31 of each year, and the Annual Plan of the inspections. This activity can be carried out ex officio or by appointment, through a process, whose phases and results are already specifically defined in the Regulation.

The regulation activity is related, however, to the adoption of directives or standards, tenders-types, awards-types, contracts-types and other instruments defined as "flexible regulation", and its purpose is to guarantee the promotion of efficiency, the development of quality and assistance to the activity of the contracting entities, being able to facilitate the exchange of information and greater homogeneity in administrative procedures.

There is a final category of activity related to the management of the contentious procedure. For this activity, the ANAC has a specific Arbitration Chamber, with a president and an arbitration council (art. 210). The Council and the President are nominated by the ANAC, which also provides a secretariat structure. The Chamber pays attention to the formation and maintenance of the "Registry of arbitrators for public contracts", draws up the code of ethics for chamber arbitrators and manages the procedures related to the constitution and operation of the arbitral college. This body, therefore, performs the fundamental administrative activities for the

[19] Regulation on the exercise of the supervisory activity of public contracts No. 49/2017.

[20] Canaparo, P., *L'attività di vigilanza dell'Anac sui contratti pubblici: i presupposti e le modalità di esercizio*, in *Appalti e contratti*, 2017 according to which: "… The logic of the new Code leads ANAC to a new vision of the supervision of the Authority, in which the ordinary supervisory activity on compliance with the public contract code is increasingly accompanied by prevention of corruption and illegality".

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management of the contentious procedure in matters of public contracts, even if it is not called directly to be part of the litigation. The art. 211, sec. 1, however, establishes that the Authority can issue opinions in the phase prior to litigation. Said rule provides that, whenever there is a request by the contracting entity or other parties, the ANAC may give its opinion on the issues that arise during the development of the public procurement procedure, having a period of 30 days, from the receipt of the request, to issue its opinion. Such opinion is mandatory and binding: "it obliges the parties that have previously agreed to respect everything that is established in the opinion"; however, this opinion can be appealed before the administrative judge. In this last case, the activity of the Authority corresponds to a *quasi*-judicial power, since it can rule on the merits of the litigation, and, in this way, it exercises a true decision-making power.[21]

From this tour of ANAC's functions, it can be seen how the Authority is configured, not only as a subject with duties to prevent corruption, but also as an authority predestined to regularize the entire public procurement system.[22]

III. Corruption prevention measures: from representation to prevention

The regulatory evolution that has led to the current structure of the corruption prevention system also responds to the need to comply with the international obligations promoted by the main international organizations, which have insisted on the importance of adopting conventions related to the fight against corruption to harmonize legal systems and avoid those different legal systems that are potential vehicles for the dissemination of phenomena capable of altering competition in national and international markets.

The response of the Italian legal system has been, initially a response limited to the criminal field, and therefore, a response aimed at repressing corruption.[23]

[21] D'Alterio, Elisa, *Regolare, vigilare, punire, giudicare…", cit.*, p. 500.

[22] Pajno, Alessandro, *La nuova disciplina dei contratti pubblici tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*, *Rivista italiana di Diritto Pubblico Comunitario*, 2015, p. 1158.

[23] Clarich, Marcello and Mattarella, Bernardo Giorgio, *La prevenzione della corruzione*, in Mattarella, Bernardo Giorgio and Pelissero, Marco (eds.), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Turin, Giappichelli, 2013, p. 61 and Mattarella, Bernardo Giorgio, *La prevenzione della corruzione: i profili amministrativistici*, in Vecchio, Angela del and Severino,

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Law 190/2012, the first organic discipline on the prevention of the risk of corruption in public administration, arises in a European and international context that is aware of the need to adopt effective instruments to combat corruption. As well explained in art. 1, this Law is born

> In compliance with article 6 of the Convention of the United Nations Organization against corruption, adopted by the UN General Assembly, on October 31, 2003, and ratified in accordance with Law no. 116, of August 3, 2009, and with articles 20 and 21 of the Criminal Agreement on corruption, made in Strasbourg on January 27, 1999, and ratified in accordance with Law no. 110, of June 28, 2012.

The new discipline reflects how the focus of the fight against corruption shifts from the field of repression to the field of prevention, already with the conviction that the objective or institutional dimension of corruption deserves the same attention as the subjective dimension, which affects only the behavior of the individual. The legislator of the year 2012 opted for an objective notion of corruption, declining in concept and Anglo-Saxon matrix, of bad administration, including in the discipline other private behaviors of criminal relevance, but to the degree of provoking situations of illegitimacy, and in any case rejected by the legal system.[24] The risk of corrupt acts is a broad phenomenon in which any act that links the administrative function with private interest will converge. The "corrupt" nature of this phenomenon is linked to the result obtained when, within the organizational sphere, the pursuit of the institutional objective of the administration is diverted.[25] The 2013 National Anticorruption Plan and Circular no. 1 of January 25, 2013 of the DPF (Department of Fiscal Policies) refer to these situations, which they have defined as "situations in which —regardless of the criminal relevance— an incorrect operation by the administration is revealed, as a consequence of the use of the assigned functions for private purposes, or, due to the contamination of the ad external administrative action, without taking into account that the action achieves its objective or is simply an attempt.

In this way, anti-corruption regulations have a double face: on the one hand, administrative law, and on the other, criminal law. Law 190 has con-

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Paola (eds.), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale*, Padua, Cedam, 2015, p. 301.

[24] Clarich, Marcello and Mattarella, Bernardo Giorgio, *La prevenzione della*…, *cit*., p. 61.

[25] Gallone, Giovanni, *La prevenzione amministrativa del rischio-corruzione*, *Il diritto dell'economia*, 2018, p. 352.

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firmed the demand for an "integrated" intervention, which includes, on the one hand, the administrative perspective and, on the other, the penal one, in order to pursue the objective of an organic reform capable of combating the complex phenomenon of corruption.

IV. The network of anti-corruption programs

Among the most innovative profiles that connote the discipline elaborated by Law 190, the introduction of an integrated system for planning and programming interventions to fight corruption and the institution of the National Anticorruption Authority stand out.[26]

Planning, a key instrument in the prevention of corruption, is developed on different levels that are situated within a multipolar objective and subjective prevention strategy. The framework, in terms of prevention, is made up of various planning instruments that give rise to a true anti-corruption "network of programs" and multi-level planning.

In this way, a vertical distribution is planned between the national corruption prevention plan, adopted by the ANAC, and the three-year prevention plans carried out by each of the administrations.

At the national level, the National Anticorruption Plan (PNA) is planned, through which a common contrast strategy is defined for all public administrations. The Plan represents a point of reference for the administrations, and from it, they will obtain useful indications to establish their own prevention strategies.

At the decentralized level, each of the administrations has the obligation to prepare three-year programs for the prevention of corruption (PTPC), through which, following the guidelines of the national plan, a prevention strategy is defined *ad hoc*.[27] The objective of these three-year programs is to identify and classify all the potential risks of corrupt acts, establishing the appropriate organizational measures to prevent and combat them. The situations of corruption that are the object of the measures provided for in the anti-corruption programs take into consideration phenomena that do not necessarily assume the characteristics of a criminal offence, but it is enough that the malfunctioning of the administrative apparatus is revealed.[28]

[26] Cantone, Raffaele, *La prevenzione della corruzione e il ruolo dell'ANAC*, in D'Alberti, Marco (ed.), *Combattere la corruzione. Analisi e proposte*, Rome, Rubettino, 2016, p. 28.

[27] *Ibidem*, p. 29.

[28] Mattarella, Bernardo Giorgio, *La prevenzione della corruzione*, *Giornale di diritto amministrativo*, 2013, p. 123.

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The adoption of the three-year programs corresponds to the person in charge of the Prevention of Corruption (RPC), each of the administrations has to choose their person in charge among the leaders of the entity. The RPCs have to control the performance of the anti-corruption programs, modifying and updating the measures provided for in them, whenever they are considered not suitable for preventing illicit conduct. The RPCs, which are the main interlocutors of the ANAC, are also responsible for monitoring compliance with anti-corruption provisions and guaranteeing legality in each of the administrations. The provision of this figure of control responds to the requirement to "personalize" the function of anti-corruption planning, thus identifying the relative center of responsibility in a certain natural person. The RPC is also responsible for taking care of every aspect of the planning, from the adoption of the program to the control of its application and the respect of forecasts.[29] It seems, therefore, that this figure constitutes species of that of the person responsible for the procedure established in art. 6 of Law no. 241 of 1990.[30]

According to art. 1, sec. 2 letter b), of Law 190, the following National Anticorruption Plans have been issued so far: the 2013 PNA, prepared according to the directives contained in the Guidelines of the Interministerial Committee and approved by CIVIT Resolution no. 72, on September 11, 2013; the 2015 modification of the PNA, approved by the ANAC (which replaces the CIVIT), with Resolution no. 12, of October 28, 2015; the PNA 2016, approved by the ANAC with Deliberation n. 831, of August 3, 2016 and, the 2017 modification of the PNA, approved by the ANAC with Deliberation no. 1208, of November 22, 2017, and successive modification in 2018 adopted with the Deliberation no. 1074, of November 21, 2018. For the preparation of the PNA 2019, the Authority has established, with orders from the Secretary General, the ANAC internal working group and the working group on the risk assessment and management system.

V. Administrative transparency, a pillar of the anti-corruption system

The anti-corruption strategy as a whole is completed with administrative transparency, which at the beginning was mainly related to access to documents and has now become a generalized control tool over administrative

[29] Gallone, Giovanni, *op. cit.*, 362.

[30] *Idem.*

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action for the purpose of prevention and fight against corruption and mismanagement.[31]

Transparency, in fact, considering the formulation contained in art. 1 of Legislative Decree 33/2013,

> contributes to the application of the democratic principle and the constitutional principles of equality, impartiality, proper functioning, responsibility, effectiveness and efficiency in the use of public resources, and integrity and loyalty in the service to the nation. Transparency is a condition for guaranteeing individual and collective freedoms, as well as civil, political and social rights, it also helps the right to have a good administration and contributes to the realization of an open administration that is at the service of the citizen.

Transparency, although it is closely connected to the anti-corruption strategy, is not reduced to this function: it dialogues with the numerous constitutional principles and allows the application, above all, of the democratic principle.[32]

Transparency, understood as a value that must reach the entire legal system, is confirmed in Italy as a rule of procedure and administrative organization thanks to a series of legislative provisions that culminate in Legislative Decree 33/2013 and Legislative Decree 97 /2016. Transparency is proposed, on the one hand, as an objective to publicize the administrative action, and, on the other hand, to prevent the violation of competition rules and avoid illegal and corrupt agreements.[33] The administrations have the obligation to ensure access to information to an indeterminate number of subjects, and to disseminate it through any institutional means, in order to achieve, in this way, the promotion of the right of participation of citizens in decision-making processes of public administrations.

The transparency of administrative activity is considered one of the most important anti-corruption principles, because it allows for the most effective control in modern democracy, or in other words, the generalized

[31] D'Alterio, Elisa, *I controlli "anticorruzione" nelle pubbliche amministrazioni*, *Studi parlamentari e di politica costituzionale*, 2014, p. 9.

[32] Merloni, Francesco, "Trasparenza delle istituzioni e principio democratico", in Merloni, Francesco (ed.), *La trasparenza amministrativa*, Milan, Giuffrè, 2008, pp. 3 et seg.; Carloni, Enrico, "I principi del codice della trasparenza", in Ponti, Benedetto (ed.), *La trasparenza amministrativa dopo il d.lgs.* March 14, 2013, No. 33: *analisi della normativa, impatti organizzativi ed indicazioni operative*, Roma, Maggioli, pp. 29 et seg.; Carloni, Enrico, *Alla luce del sole. Trasparenta amministrativa e prevenzione della corruzione. Diritto amministrativo*, 2019, fascicle 3, p. 500.

[33] Manganaro, Francesco, *L'evoluzione del principio di trasparenza amministrativa*, *www.astrid-online.it.*

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control of citizens.[34] The relationship between transparency and democratic principle has been evidenced by the Constitutional Court, which has revealed the constitutional basis[35] of the principle of publicity and transparency, and its multiple relationships in the field of participation and generalized control: "the principles of publicity and transparency are not only understood as a consequence of the democratic principle (art. 1 Const.), but are refer to all aspects of public and institutional life, and also, according to art. 97 of the Constitution, to the proper functioning of the administration".[36]

Specifically, Legislative Decree 33/2013 establishes the obligation of publicity for three types of information: those that seek to favor the generalized control of personnel and administrative action (for example, articles 13 to 22), those that are directed to reinforce the accountability of public administrations in their financial management (for example, arts. 26 to 31), and finally, those aimed at simplifying relations between individuals and administrations (arts. 32–34).[37] To such obligations is added the famous civic access (art. 5) that allows citizens to obtain a copy of those documents that the public administrations have not published.

The adoption of Legislative Decree 97/2016, known as the "FOIA Decree (Freedom of Information Act)", marks a new stage in the development of administrative transparency, which begins with Law 241/1990. The provision falls within the scope of the Public Administration Reform, and pursues the dual objective of optimizing the information obligations provided for in Legislative Decree 33/2013, and expanding the variety of means to publicize the administrative action through the recognition, to any person, of the right of "generalized" civic access to the public informative heritage. For this, the model of the Freedom of *Information Act* of American origin,[38]

[34] Colapietro, Carlo, *Trasparenza e democrazia: conoscenza e/è potere*, in Califano, Licia and Colapietro, Carlo (Eds.), *Le nuove frontiere della trasparenza nella dimensione costituzionale*, Editoriale scientifica, Naples, Editoriale scientifica, 2014, pp. 13 et seq.; I. Nicotra, Ida and Mascio, Fabrizio Di, *Le funzioni dell'ANAC tra cultura della trasparenza e prevenzione della corruzione*, in R. Cantone, Rafaelle and Merloni, Francesco (Eds.), *La nuova Autorità nazionale anticorruzione*, Turin, Giappichelli, 2015, pp. 56 et seq.

[35] In general terms, on the constitutional basis of the principle of transparency, compare Donati, Daniele, *Il principio di trasparenza in Costituzione*, in Merloni Francesco (Ed.), *La trasparenza amministrativa…*, *cit.*, pp. 83 et seq.

[36] Constitutional Court, judgment 20/2019.

[37] Cantone, Rafaelle, *op. cit.*, 2016, p. 32.

[38] About the topic compare Marchetti, Andrea, *Il Freedom of Information Act statunitense: l'equilibrio "instabile" di un modello virtuoso di pubblicità e trasparenza amministrativa*, in Califano, Licia and Colapietro, Carlo (Eds.), *op. cit.*, pp. 69 et seg.

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and considered the vehicle through which a "third generation" of administrative transparency is consolidated.[39]

Legislative Decree 97/2016 expands the notion and scope of the principle of transparency, defined as "full access to data and documents held by public administrations", and does not only have the objective of "favoring generalized forms of control in the development of institutional functions and in the use of public resources", but also has the purpose of guaranteeing greater protection of the rights of citizens, as well as promoting their participation in the development of the administrative activity. Therefore, the principle of transparency is aimed at guaranteeing rights and promoting the participation of citizens in administrative activity, whose participation is recognized as a "means of explanation of the rights established in article 2 of the Constitution".[40]

The recent reforms that have been carried out show that transparency is presented as an essential core of the legislator's anti-corruption strategy.[41] It is evident that the full application of this principle entails favorable consequences for the containment of risks related to corruption. Transparency helps to limit those gray areas in which corruption can appear, breaking the veil of misinformation that surrounds administrative action. In this way, the visibility of any discrepancy that may arise between the formal-organizational data and the real structure of powers is allowed.[42] Equally important is the "generalized control" of the work carried out by the administrations and that the principle of transparency allows: free access to data, information and documents opens the door to debates in which citizens participate

[39] Colapietro, Carlo, *L'"importazione" del diritto di accesso civico generalizzato nel nostro ordinamento in bilico tra legittime pretese e impossibili (o quasi) imprese*, in Massaro, Antonella and Sinisi, Martina (Eds.), *op. cit.*, pp. 11 and 12.

[40] Council of State, section of regulatory acts, opinion of February 24, 2016, No. 515, point 7.

[41] Law 190/2012 has already identified transparency as a pillar in the fight against corruption, granting a mandate for the adoption of a regulatory reorganization text. Legislative Decree 33/2013 places among its declared purposes the implementation of the principles of "responsibility, effectiveness and efficiency in the use of public resources, integrity and loyalty in the service to the nation" (article 1, paragraph 2).

On transparency as an instrument to fight corruption compare Orofino, Angelo, Profili giuridici della trasparenza amministrativa, Bari, Cacucci, pp. 157 et seg.; Merloni, Francesco and Ponti, Benedetto, "La trasparenza", in Merloni, Francesco and Vandelli, Luciano (eds.), La corruzione amministrativa. Cause, prevenzione e rimedi, Rome, Passigli, 2010, pp. 403 et seg.

[42] Gallone, Giovanni, *op. cit.*, p. 355.

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on the objectives and results that should be pursued, thus contributing to a more complete realization of the principle of democracy.[43]

VI. Regulatory framework regarding labor disqualification and incompatibilities and codes of conducts

law 190/2012 has delegated to the Government the function of establishing cases of labor incompatibility and disqualification. With Legislative Decree 39/2013, the Government has developed a regulatory framework that establishes a series of cases in which the individual's condition is an obstacle to holding a position in the public administration. The job disqualification measure, which assumes the logic of the incapacity for elections and political candidacies in the assignment of administrative positions, will be applied in three situations: in case of conviction for crimes against the public administration, regardless of whether the conviction is final or not; in the case of positions awarded to individuals who come from private law entities regulated or financed by public administrations; and in the event that the subject had previously held functions in political bodies. In general, disqualification is not conceived as a permanent exclusion from accessing certain positions, but rather it is a temporary measure. The common ratio in the three cases of disqualification described is, in fact, to establish a period that begins when the impeding condition is verified and ends with the assignment of the position in the public administration. In this way, a "cooling" and neutralization of all those elements that could condition the impartiality of public officials is achieved. In the first case, when there is a conviction that is not final, the application of this period of time has the objective of preventing the image of the position assigned to the person who has been convicted from being damaged, since, if the latter were to continue occupying his position, such an image would be affected. In the second case, when there are conflicting private interests, the "cooling off" period helps to reduce the applicant's ties to the conflicting private interests. And in the third case, when the person has performed functions in public bodies, applying the period of time contributes so that when it ends, the election of the person for the determined position

[43] Marino, I., *Autonomie e democrazia. Profilo dell'evoluzione dell'autonomia e della sua ricaduta sul sistema giuridico*, *Nuove autonomie*, 2007, pp. 197 et seq.; Arena, Gregorio, *Trasparenza amministrativa e democrazia*, in Berti, Giorgio and Candido de Martin, Gian (eds.), *Gli istituti della democrazia amministrativa*, Milan, Giuffrè, 1996, pp. 17 et seq.

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is carried out considering their own professional merits and not membership in political bodies.[44] Impartiality is not simply a characteristic of the administrative act, nor a generic characteristic of the entire administrative structure: impartiality must be guaranteed by making a specific reference to administrative positions and their holders.[45]

The incompatibility regime usually reproduces the causes of disqualification, but in terms of incompatibility. However, this has been a necessary action to be able to cover situations that were not foreseen in the scope of disqualification. For example: a) incompatibilities between political positions in State bodies and administrative positions (which exist); b) the incompatibilities that may arise when the functions of the position are performed, including cases of conflicts of interest, by people who are not holders of the position, but who are directly related to it because they are relatives or close people.[46]

The figures of disqualification and incompatibility have a mutually complementary nature in relation to the unitary objective of achieving greater efficiency in guaranteeing the impartiality and proper functioning of the administration. The holders of high administrative positions cannot also accumulate political positions, and the holders of political positions, when their mandates end, cannot be nominated as holders of high positions in administrations, public entities or private entities under public control, if not previously a certain time and space has elapsed.[47]

The position adopted by Legislative Decree 39/2013 is quite innovative, and allows impartiality to be achieved through the introduction of a general and horizontal limitation, which extends to each political body in relation to all the most important administrative offices that are located. within the scope of its territorial sphere of influence, without the need to impose new links or special prohibitions (related to particular categories of politicians —parliamentarians, mayors, ministers— in relation to the specific offices of public administrations).[48]

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[44] Merloni, Francesco, *Il regime delle inconferibilità e incompatibilità nella prospettiva dell'imparzialità dei funzionari pubblici*, *Giornale di diritto amministrativo*, 2013, pp. 808 and 809.

[45] *Ibidem*, p. 807.

[46] Merloni, Francesco, *Nuovi strumenti di garanzia dell'imparzialità delle amministrazioni pubbliche: l'inconferibilità e incompatibilità degli incarichi*, in Mattarella, Bernardo Giorgio and Pelissero, Marco (Eds.), *La legge anticorruzione…*, *cit.*

[47] Cavallo, Maria Barbara, *Incompatibilità e inconferibilità di incarichi*, en Massaro, Antonella and Sinisi, Martina (eds.), *op. cit.*, p. 35.

[48] *Ibidem* p. 38.

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The administrative positions that are intended to be protected through the institutions of disability and incompatibility in relation to political positions, are established in the *legge-delega*[49] ((section 50, letter d) and are classified into four categories that the *decreto delegato*[50] specifically specifies (art. 1, letter i), j), k), l)), that is: a) senior administrative positions; b) executive positions (internal and external); c) administrators of public entities; d) administrators of private law entities subject to public control.[51] The positions are established horizontally, that is, they are not based on competencies, but on the nature of the functions that derive from them. In fact, these are positions that, although they are heterogeneous, have the common characteristic of complementing the main activity of the administrative structure, which is required to perform management functions in accordance with the guidelines established by the political bodies.[52]

Surveillance of compliance with the provisions of the decree corresponds, in the first place, to the RPC of the administration that assigns a position or that of the one in which an incompatible position has been held. Secondly, surveillance corresponds to the ANAC, which can carry out inspections and verifications, as well as exercise powers of order (according to art. 1, section 3 of Law 190/2012).

Another instrument for preventing corruption consists of adopting codes of conduct aimed at employees of public administrations: a national Code and the codes of each public administration. The new National Code was issued with Decree of the President of the Republic n. 62, of April 16, 2013. The codes, national and of the administrations, far from assuming a merely deontological or ethical value, have had a certain legal relevance, since they contain numerous important norms related to the disciplinary responsibility of employees. The adoption of codes of conduct responds to the requirement not to reduce exclusively to an ethical dimension, the fulfillment of the duties of diligence, loyalty, impartiality, and good conduct that public officials are obliged to respect.

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[49] The *Legge-delega* is an instrument by which Parliament attributes to the Government the power to regulate a matter through legislative decrees.

[50] The *delegato* decree It is the legislative decree issued by the Government based on the power (*delega*) that Parliament has given it.

[51] Cavallo, Maria Barbara, *op. cit.*, p. 38 and 39.

[52] Sirianni, G., *La necessaria distanza tra cariche politiche e cariche amministrative*, *Giornale di diritto amministrativo*, 2013, p. 816.

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VII. The repression of corruption

The field of repression of corruption has been deeply influenced by the growing demand to reinforce the repressive structure by international sources. Criminal discipline is the result of the interrelation between international political-criminal options and internal criminal enforcement policies, which have progressively accepted international incrimination instances through the introduction of new typified circumstances, have also accepted the extension of their scope, objective and subjective, and sanctioning responses have been consolidated.[53]

After almost twenty years of judicial investigations of "*Mani pulite*",[54] A deep and organic reform of the regulatory microsystem of corruption/concussion was carried out in order to obtain greater efficiency in the fight against illegality and malpractice in the activity of the public administration. This reform was made possible thanks to Law 190/2012, and the subsequent Anti-Corruption Law of 2015 (Law no. 69/2015), to the reform of the Antimafia Code of 2017 and, finally, to Law 3/2019, known as *Legge Spazzacorrotti*.

The reform initiated with Law 190/2012 does not intervene organically in the matter of crimes against the public administration, although it contains quite significant interventions both in the field of the configuration of the different cases, and in the field of the sanctioning system. Among the most significant novelties, in the field of substantive law, the law introduces some modifications that redefine the normative type, as happens in the case of corruption during the exercise of functions, established in art. 318, which goes from being a minor figure of corruption to an archetype of the crime, for which corruption, according to art. 319, becomes a special case, or rather, it becomes a crime of concussion by induction, unrelated to the old content of art. 317, and becomes inducement to deliver or promise benefits (art. 319 *quater*).[55]

As you can see,[56] The new configuration of the regulatory subsystem of corruption/concussion has three key points: a) the abandonment of the

[53] Manacorda, Stefano, *op. cit.*, p. 178.

[54] *Mani pulite* (Clean hands): famous judicial process of the nineties that exposed a corrupt system in which Italian politicians and businessmen participated in collusion.

[55] Lelo, Paolo, *La legge n. 190 del 2012 e il contrasto alla corruzione*, *Questione giustizia*, No. 1, 2013, p. 122.

[56] Gambardella, Marco, *Le nuove fattispecie di corruzione e concussione*, in Massaro, Antonella and Sinisi, Martina (eds.), *op. cit.*, p. 65.

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mercantile model of corruption —on which the distinction between improper corruption (act of legitimate trade, art. 318 PC) and own corruption was based (act contrary to the duties of office, art. 319 cp)— and the reformulation of the crime established in art. 318 cp, replaced by the figure of corruption in the exercise of functions, b) the articulation of the crime of concussion in two large autonomous figures: the authentic concussion (currently only by coercion, it is maintained in art. 317 cp) and the unprecedented crime of improper inducement to deliver or promise benefits (art. 319-quater PC), c) the tightening of the sanctioning system.

Almost three years after the 2012 reform, anti-corruption policies have undergone a new legislative approach, which consolidates on the one hand and modernizes the previous regulatory framework on the other. With Law no. 69, of May 27, 2015 on "Provisions regarding crimes against the public administration, mafia-type associations and false accounting", the Parliament has returned to the criminal discipline of public corruption and related circumstances, toughening the penalties main and those accessory (arts. 32 ter, 32 quinquies and 35 cp).

As a result of important legal cases and serious current events (cases such as Mose, Expo, Mafia-Capitale, etc.),[57] The regulatory frameworks edicts have been increased, raising the maximum penalty for the crime of corruption in the exercise of functions, and increasing the minimum penalty and the maximum penalty for crimes of own corruption, corruption in judicial acts and undue inducement to deliver or promise benefits.[58]

Finally, the last legislative intervention on the matter was carried out with Law 3/2019 (known as Legge Spazzacorrotti), whose ratio lies in the toughening of the sanctioning response, and which continues, under certain profiles and partially, with the reform established by law 69/2015.[59] It is an intervention that has had a great scope, since it affects the general and special part of the criminal code, the prison system, the criminal process, the institute of prescription and the discipline of the responsibility for crime of the entities established with Decree Law 231/2001. The Constitutional Court has already intervened on this discipline, censoring the provision that extended to crimes against the public administration, the preclusions established in art. 4 bis, of the Penitentiary System on the granting of benefits

[57] Mongillo, Vincenzo, *Le riforme in materia di contrasto alla corruzione introdotte dalla legge no. 69, 2015*, *Diritto Penale Contemporaneo*, 2016.

[58] *Cfr.* Cingari, Francesco, *Una prima lettura delle nuove norme penali a contrasto dei fenomeni corruttivi*, *Diritto Penale e Processo*, 2015, pp. 808 et seq.

[59] Gaito, Alfredo and Manna, Adelmo, *L'estate sta finendo…*, *Archivio Penale*, núm. 3, 2018.

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and alternative measures to detention. In particular, as can be seen in the Press Office statement (since a sentence has not yet been issued), the lack of a transitory discipline that prevents the application of the new rules to those convicted of a crime committed before entering in force of Law 3/2019, it is considered incompatible with the principle of legality.

VIII. Conclusions

The complex anti-corruption system is articulated in a plurality of normative interventions that have followed one another over time and that have addressed the profiles of the prevention and those of the repression of corruption.

The profile of prevention, which for a long time has been abandoned by part of the political agenda, starting in 2012, begins to occupy a central place in the normative interventions of the legislator. Experience has shown on the one hand that it is insufficient to resort to the instrument of criminal repression to combat corruption, as a consequence of its systematic nature, and, on the other, the difficulty in getting to know this type of situation. And it has also confirmed the need to move from ex post prevention through repression to prevention *ex ante*.[60] On the other hand, investigations and criminal proceedings have been taking shape thanks to the verification of individual facts, and not by facts of the system.[61]

The importance of the role of prevention in the fight against corruption has recently been confirmed. The European Commission, in this regard, has stated that

> in the last twenty years, the strategy to combat corruption in Italy has been developed, to a large extent, on the repressive aspect. The new Anti-Corruption Law, adopted on November 6, 2012, has rebalanced the strategy by reinforcing the preventive aspect and enhancing the responsibility (accountability) of public officials".[62]

As is clear from the title, "Provisions for the prevention and repression of corruption and illegality in the public administration", Prevention

[60] Flick, Giovanni Maria, *op. cit.*, p. 2997.

[61] Mattarella, Bernardo Giorgio, *Recenti tendenze legislative in materia di prevenzione della corruzione*, *Percorsi costituzionali*, 2012, p. 18.

[62] Report from the Commission to the Council and the European Parliament - Union Report on the fight against corruption, February 3 2014.

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represents the innovative point of Law 190, through which the traditional approach to corruption and mismanagement based on repression has been overcome. Before this Law, there were also some normative references related to the prevention of corruption, for example, Law 3/2003 had established the High Commissioner for the prevention of corruption, and Legislative Decree 150/2009 attributed functions to combat corruption to the Independent Commission for Evaluation, Integrity and Transparency (CIVIT). Even so, they were specific provisions that did not allow to delineate an organic regulatory system, and they have not established an administrative system either *ad hoc*.[63]

The complexity of this phenomenon calls for a wide range of different legal contrast measures: from codes of conduct for public officials to annulment of contracts concluded as a result of illegal acts, as well as administrative transparency measures or criminal sanctions.[64]

The legislator has recognized that corruption, understood, in a general sense, as maladministration, is a multiform and varied phenomenon, which, however, still follows logics and patterns that are repeated over time, and therefore, for its prevention it is necessary to develop an articulated strategy within a unitary framework.[65] For this reason, the central nucleus of the Italian anti-corruption system is also represented from the moment of its planning. And to this, a large part of the normative structure specified in Law 190/2012 is dedicated. In particular, the central core of the entire system appears in the National Anticorruption Plan, which represents the reference framework for each of the administrations (national, regional and local) to adopt its three-year Anticorruption Program. On the other hand, the new figure of the person responsible for the prevention of corruption is the engine to achieve the application of anti-corruption policies in each of the administrations, he will constantly verify the degree of effectiveness of the established measures, and will propose, whenever necessary, the modifications and eventual updates of the three-year plan, which will be proposed by the person in charge and approved by the political management body.[66]

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[63] Gullo, Nicola, *La politica di contrasto alla corruzione in Italia ed i soggetti responsabili della prevenzione della corruzione*, *Nuove Autonomie*, 2014, p. 523.

[64] Manganaro, Francesco, *La corruzione in Italia*, *Foro Amministrativo (II)*, No. 6, 2014, p. 1863.

[65] Gullo, Nicola, *op. cit.*, p. 524; Vannucci, Alberto, "La corruzione in Italia: cause, dimensioni, effeti", in Mattarella, Bernardo Giorgio and Pelissero, Marco (eds.), La legge anticooruzione…, *cit.*, pp. 25 et seg.

[66] Giupponi, Tomas Francesco, *Il contrasto alla corruzione a cavallo tra due Legislature*, *Quad. Cost.*, 2013, pp. 334 and 335.

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The strength of the anti-corruption system is based on the virtuous dynamics between preventive administrative action and the repressive model. In any case, before preventive and repressive intervention, it is essential to promote and spread among citizens a culture of legality and ethics that allows higher "moral costs" than those of illegality, thus ensuring that the latter is perceived as a reprehensible phenomenon capable of arousing social disrepute.[67]

[67] G. Spangher, *Il "contrasto" alla corruzione nell'orizzonte della politica criminale*, *cit.*, pp. 43 and 44.

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