E-JOURNAL OF LAW

Anti-Corruption Compliance Programs in Europe: Towards the Development of a New European Paradigm?

Dimitris Liakopoulos*

Abstract

The work investigates, in a comparative perspective, the relationships between the subjective attribution of responsibility to the institution and models of organization and management in the field of fight against corruption. The survey, in the field of fight against corruption in public and private sectors, reveals a convergence of deeply different regulatory realities, under the pressure of supranational and comparative sources (United Kingdom, France, Spain, Italy) and through the circulation of legal models, highlighting the link between the lack of organization and the "belonging" of the crime to the institution of the currently prevalent imputation models.

Keywords: anti-corruption, institution's offenses, Bribery Act 2010, compliance program, mens rea, corporate criminal liability; anti-corruption plan, deferred prosecution agreement.

Received: November 4, 2019 ***Accepted:*** November 18, 2019

---

* Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at the De Haagse Hogenschool-The Hague. Attorney at Law a New York and Bruxelles. ORCID ID: 0000-0002-1048-6468. The present work is updated until November 2019.

Anti-Corruption Compliance Programs in Europe: Towards The Development of a New European Paradigm?

Introduction

In the European area there are also traditionally ordered arrangements based on indirect or derivative models, in which the responsibility of the body passes through the fact and guilt of the physical person responsible for the crime, such as the British doctrine identification or the par ricochet theory in France that have shown significant openings towards other paradigms. From this visual angle, (also) with reference to the responsibility of juridical persons, the anti-corruption field has proved to be one of the most interesting fields of experimentation on a positive level and a privileged terrain for the comparison between different experiences, being a phenomenon with a transnational vocation, influenced by numerous soft law conventions and tools, as part of a comprehensive prevention and repression strategy.

The dynamic analysis of the single systems through the illustration of the criteria for attribution of responsibility in the jurisprudential application in a comparatistic context, even in reality refractory to accept "personalization" coefficients of charge, ferments are recorded in this direction, symptom of a dissatisfaction towards models of heterose responsibility. In particular, even with a variety of accents, emerges the theme of "lack of organization" as a possible basis for the rebuke addressed directly to the body, independent from that criticized by the perpetrator; this profile is linked to the increasing importance assumed in complex structures by the compliance function, called to govern and also contain criminal risk.

The analysis continues taking into consideration the multiple functions of the organizational model in the "231 system" economy, to address the investigation to the peculiarities of the anti-corruption compliance program.

1. The English Anti-Corruption System And The Bribery Act 2010: A Forerunner Law In The European Scene

The analysis of the system to combat corruption implemented by national legislators has revealed a very complex discipline, both on public and on private organizations side, highlighting aspects of considerable interest, especially after the profound revision in 2010, in speciem in United Kingdom: “(...) despite the longstanding existence of bribery offences in the UK, neither the traditional identification theory nor the Meridian test has given rise to any known convictions of legal persons for domestic or foreign bribery under the common law, the 1889 Act or the 1906 Act. There is also scant evidence of any prosecution of legal persons (...)"[1]. This is how the Working Group on Bribery expressed itself clearly in 2005: even on the ground of the fight against corruption - in the context of broader censorship of British legislation and recommendations for action on the matter - it was indeed clear that it was difficult to try and condemn collective parties on the basis of the identification theory, object of attention since the first phases of monitoring on the state of implementation of the OECD Convention on the fight against corruption of foreign public officials in the international economic operations of 1997[2].

[1]C. ROSE, The UK bribery act 2010 and accompanying guidance. Belated implementation of the OECD anti-bribery Convention, in International & Comparative Law Quarterly, 61 (2), 2012, pp. 488ss. A. KRAAY, P. MURRELL, Misunderstanding corruption, in Review of Economics and Statistics, 98 (3), 2013, pp. 456ss.

[2]This was the severe judgment expressed by the Working Group on Bribery in 2005 on British anti-corruption legislation with reference to the liability of legal persons. Continue the report Report: "(...)After the on-site visit, the UK authorities identified one case involving an unsuccessful prosecution of a company for domestic bribery. [See R. v. Andrews-Weatherfoil Ltd., [1972] 1 WLR 118, 1 All ER 65 (C.A.) (overturning conviction of company for bribery because judge wrongly instructed jury on the applicable legal test).] Convictions or prosecutions of corporations for analogous offences also appear to very rare or non-existent, and none have been cited; during the on-site visit, prosecutors were unable to point to any convictions in any area "close to bribery". While the identification theory could conceivably apply to small companies where top management are the actors, it appears unlikely ever to apply to a large company with decentralised operations, or operations away from the corporate head office. As noted, there was very limited confidence that Meridian would be of much help in this regard (...)". See, OECD WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, United Kingdom: Phase 2, Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transaction, March 2005, §197ss. pp. 63ss. For further details see: M. PIETH, L.A. LOW, N. BONUCCI, The OECD Convention on Bribery: a Commentary, Cambridge University Press, London-New York, 2014. K. BETZ, Proving bribery, fraud and money laundering in international arbitration, Cambridge University Press, Cambridge, 2017. F. HEIMANNN, M. PIETH, Confronting corruption. Past concerns, present challenges and future strategies, Oxford University Press, Oxford, 2018. R. O'KEEFE, International criminal law, Oxford University Press, Oxford,

Initially, the request for adaptation had not been accepted by British authorities, which had not followed up the observations made in the supranational forum, opposing the fact that they exceeded the limits of the purpose of art. 2 of the Convention. This inertia led the OECD to launch a further monitoring phase, noting that the position expressed by the United Kingdom showed a lack of political will to comply with the Convention, ratified on December 1998[3].

With the Bribery Act 2010[4] (BA 2010), it was indeed decided to

2015, pp. 298ss.

[3]OECD WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, United Kingdom: Phase2-bis, Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transaction, 16 October 2008, §79 ss, pp. 22ss. Bribery Act 2010, approved from 8 April 2010 and entry into force by 1st July 2011. The Ministry of Justice then published the guidelines, pursuant to Section 9 of the legislation in question, to provide operational guidance to organizations on the procedures to be implemented: UK MINISTRY OF JUSTICE, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, 30 March 2011. For more details and analysis see: M. RAPHAEL, Blackstone's guide to the Bribery Act 2010, Oxford University Press, Oxford, 2010. E. O'SHEA, The Bribery Act 2010. A practical guide, Jordans Publishing, Bristol, 2011. G.R. SULLIVAN, The Bribery Act 2010: (1) An overview, in Criminal Law Review, 2011, pp. 87ss. J.R. BOLES, The two faces of bribery: International corruption pathways meet conflicting legislative regimes, in Michigan Journal of International Law, 35, 2014, pp. 679ss. C.K. WELLS, Who's afraid of the Bribery Act 2010?, in Journal of Business Law, 5, 2012, pp. 420ss. S. MANACORDA, F. CENTONZE, G. FORTI (a cura di), Preventing corporate corruption. The anti bribery compliance model, ed. Springer, 2014, Berlin, pp. 505ss. B.W. BEAN, E.H. MACGUIDWIN, Unscrewing the Inscrutable: the UK Bribery Act 2010, in Indiana International & Comparative Law Review, 23, 2013, pp. 64ss. V. MONGILLO, The Bribery Act 2010. Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, vol. I, ed. Jovene, Napoli, 2013, pp. 304ss. A.P. SIMESTER, J.R. SPENCER, F. STARK, Simester and Sullivan's criminal law theory and doctrine, Hart Publishing, Oxford & Oregon, Portland, 2016.

[4]It should also be noted that in order for the cases of active and passive corruption referred to in Section 1-2 to be integrated, additional requirements must be met, symptomatic of the centrality attributed to the duties of the agent, rather than the qualification covered. The conduct must be carried out in the exercise of a relevant function or activity (among the relevant functions or activities, pursuant to Section 3, include activities of a public nature, commercial activities, work activities or activities carried out on behalf of an institution) and must be an illicit/incorrect conduct ("improper performance") within the meaning of Section 4, in the sense of

reorganize the types of corruption to align the internal law with indications and standards of international source, introducing very significant innovations on the side of corporate criminal liability[5].

BA 2010 abrogated the bribery offenses provided by common and statute law and introduced in this field a more extensive form of corporate liability than was previously anticipated. The scheme of provision regulates four types of corruption: active and passive corruption of a public official and corruption between private parties (Section 1-2), active corruption of a foreign public official (Section 6) and, with regard to the responsibility of the new offense of failure of commercial organizations to prevent bribery (Section 7).

The first case incriminates the offer, the promise or the giving of an economic or other benefit (active bribery, Section 1), while the second contemplates the request, the consent to receive or the acceptance of said benefit (passive bribery, Section 2); these are two general hypotheses. The third offense referred to the corruption of a foreign public official in order to obtain, secure or maintain a business or an unfair advantage in relation to the business activities (bribery of a foreign public official, Section 6)[6].

Each of these crimes requires that the public prosecutor demonstrates the existence of a mens agent (intention, knowledge, belief that the acceptance of the bribe constitutes improper performance)[7], and the expected penalty is imprisonment up to ten years

determining a "breach of relevant expectation". The verification of the requisites referred to is carried out through the expectation test foreseen by Section 5 ("a test of what to a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned").

[5]N.M. JENSEN, E.J. MALESKY, Non state actors and compliance with international agreements: An empirical analysis of the OECD anti-bribery Convention, in International Organization, 72 (1), 2018, pp. 37ss.

[6]Regarding the jurisdiction in relation to these three offenses, "(...) [it] extends to bribery committed anywhere in the world by persons with a close connection to the UK, which includes those ordinarily resident in the UK as well as UK nationals and UK corporate bodies (s. 12(4)) (...)", See, C.K. WELLS, Corporate responsibility and compliance programs in the United Kingdom, in P. HARDI, P. HEYWOOD, D. TORSELLO, Debates of corruption and integrity. Perspectives from Europe and the US, Palgrave Macmillan, London, 2015, pp. 60ss

[7]The possible responsibility of the body on the basis of organic identification does not exclude the responsibility of the offender who is qualified as directing mind. It should

in the maximum, and/or an unlimited pecuniary sanction in the amount. It should be noted, however, that the offenses in question may be committed by individuals and even by corporations, in accordance with the principles of common law, in this case on the basis of the identification doctrine and, therefore, after verifying that the fact has been realized by a subject qualifying as a senior officer or directing mind of the entity in possession of the necessary mental state to respond to the illicit[8].

It will be understood that the case of greater interest introduced by the 2010 BA, relevant not only on the internal regulatory level but in the comparative scenario, is that provided by Section 79, addressed to the corporations that have failed to prevent the crime of corruption. The offense of failure of commercial organizations to prevent bribery can be framed within the omissive paradigm, and it is a case of the offense proper to the entity[9], which can be committed exclusively by the juridical person along the lines of the planned corporate murder by CMCHA 2007. It is added to the other hypotheses foreseen by BA 2010, which, as mentioned, can however also commit the responsibility of the collective subject by virtue of the criterion of identification.

In this case Section 7 (1) provides that "(...) a relevant commercial organisation ("C") is guilty of an offence under this section

---

also be noted the provision of Section 14, which introduces a form of secondary responsibility for the director or senior officer who has allowed the activity carried out directly by the institution, or has been conniving: v. to know more see V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit., pp. 322ss.

[8]S. GENTLE, The Bribery Act 2010: (2) The Corporate Offence, in Criminal Law Review, 2011, pp. 101ss. V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit., pp. 307ss. C.K. WELLS, Corporate Responsibility and Compliance Programs in the United Kingdom, cit., pp. 507 ss.

[9]The Section 7(5) states that: "(...) "relevant commercial organisation" means-a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business (...)".

if a person ("A") associated with C bribes another person intending-to obtain or retain business for C, or to obtain or retain an advantage in the conduct of business for C (...)"[10]. The literal tenor of the law shows that the alleged offense is the only active corruption, so the conduct referred to in Sections 1 and 6 in relation to corruption of public official and among private parties are recalled. With regard to the subjective scope of application of the provision, Section 7 (5) of BA 2010 includes among the active subjects of the offense the relevant commercial organization[11]: these are entities or partnerships similar to partnerships established under British law carrying on business in the United Kingdom or elsewhere, as well as legal entities or partnerships established anywhere in the United Kingdom (or part of it). Central is therefore the commercial character of the latter, and the subjects that do not carry out an activity that qualifies as a business remain excluded-yet Section 7 (5) clarifies that "a trade or profession is a business"-those non-profit organizations and public entities; but it goes without saying that the subjects referred to above may eventually be considered commercial organizations where they also carry out economic activities[12]. The "commercial connotation" unites the failure to prevent

[10]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,

[11]According to UK MINISTRY OF JUSTICE, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, 30 March 2011, pp. 15ss : "(...) so long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made (...)".

[12]Guidance specifies, by way of example, that the mere fact that the securities of a company have been admitted to trading on the London Stock Exchange, not sufficient, per se, to place this company in the definition of "relevant commercial organization" for of Section 7. Likewise, having a subsidiary in the United Kingdom does not in itself imply that the parent company is carrying on business there, since a subsidiary can act independently of its parent company or other group companies: See , UK MINISTRY OF JUSTICE, Guidance on procedures as relevant commercial organizations can put into place, op. cit., p. 15ss. of the document. On the point v. however the observations of C.K. WELLS, Corporate responsibility and compliance programs in the United Kingdom, op. cit., pp. 510, which notes how Richard Alderman, the then Director of the Serious Fraud Office (SFO)-the agency responsible for investigating and prosecuting relation to cases of bribery-even without

bribery hypothesis with that of Section 615 in terms of corruption of the foreign public official, while in the active and passive corruption referred to in Section 1 and 2 the agent's purpose is to obtain a personal advantage.

It is essential to establish what is meant by the expression "carry on a business, or part of a business, in any part of the United Kingdom", used in Section 7 (5): there is no definition, and on the point the Bribery Act Guidance confines itself to saying that it will be up to the courts, in short, to recognize or not the existence of the requirement, adding-laconically that the expression must be understood in the light of common sense, for which entities must be considered as having a demonstrable business presence[13].

One of the most significant profiles of the Bribery Act 2010 is highlighted, that of the extra-territoriality of the legislation. If the conditions set forth in Section 12 (territorial application) are fulfilled, the British jurisdiction extends to offenses committed outside the territory of the United Kingdom. This profile, in the present case, makes Section 7 very relevant, since it is a discipline with which all companies that British or not lead or intend to undertake an activity in the United Kingdom are called to confront.

Some provisions of the BA 2010 state that if a court considers the business presence test to be satisfied, the British jurisdiction will be able to take root in cases of corruption committed anywhere in the world, even in the absence of a connection with an economic activity carried out in the UK. Consider the provisions of Section 12 (5), according to which "an offense is committed under section 7 irrespective of whether the acts or omissions which form part of the offense take place in the United Kingdom or elsewhere"[14]. The setting

contradicting the contents of the Guidance, he stated that in case of economic engagement of a company it would be possible to consider some profiles in order to decide whether the activity satisfied the test, including the reasons for the listing, obtaining financing, negotiations with shareholders, possible negotiations and the presence of certain company functions in the United Kingdom.

[13]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,

[14]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit., pp. 324ss.

outlined in Section 7 (5) also confirms that based on the place of incorporation of the commercial organization is irrelevant, so it is not necessary to the associated person who commits the fact of corruption to be a citizen of the United Kingdom, or resides there[15].

This last reference to the associated person, however, introduces the theme of physical person and the relationship between individual and collective responsibility. The rule to be taken into consideration is Section 8, which identifies the persons performing a service in the name or on behalf of[16] the commercial organization, stating that it does not detect the capacity in which this service is performed. The associated person can be an employee, a representative or a subsidiary of the commercial organization: a broad concept, therefore, not limited only to those in a top position. To make a parallel, it is possible to observe that the choice marks the difference with the corporate manslaughter hypothesis envisaged in the Corporate Manslaughter and Corporate Homicide Act 2007 in which Section 1 (3) refers only to senior management approaching, for this aspect, to the model outlined by Decree 231, namely the Italian law n. 190 of 6 November 2012[17].

The list of subjects included in Section 8 is not exhaustive, and

[15]"Thus, an associated person for these purposes may also be a foreign company that performs services on behalf of a British parent company: although the foreign company may not be held liable for one of the acts pf bribery established by the BA, pursuant to s. 7 it will be able to cast liability on the UK parent (...)". See, V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit., pp. 324ss. According to a Section 8 (Meaning of associated person): "(1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C. The capacity in which A performs services for or on behalf of C does not matter. (3) Accordingly A may (for example) be C's employee, agent or subsidiary. Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C. (...)".

[16]Section 8 (5) also establishes a relative presumption ("unless the contrary is shown") that employees perform services for their employers. "Person" is a term that can encompass both physical persons and legal entities: See, V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit., pp. 310ss.

[17]S. PARSONS, The corporate manslaughter and corporate homicide act 2007 ten years on: Fit for purpose, in The Journal of Criminal Law, 82 (4), 2018, pp. 307ss.

the link between physical person and body must be determined in a substantial way, without having regard to the tangent that is considered as specified in Section 8 (1), also referring to all relevant circumstances and not only to the nature of the relationship[18].

With regard to the conduct of natural person: the institution is liable for the offense under Section 7 of the BA 2010 if the associated person, in addition to perform the service in the name or on behalf of the organization, commits the crime of corruption in order to obtain o maintaining an activity or obtaining or retaining an advantage in managing an activity for the institution. In other words, it is required that the individual acts in the interest of the entity and therefore the conduct of the associated person is excluded from the scope of the crime of failure to prevent bribery.
On the side of the relationship between individual and of the collective subject responsibility, the one delineated by Section 7 is a hypothesis of autonomous responsibility, the crime of failure to prevent bribery cannot be committed by an individual, and the commercial organization also responds to case in which the associated person has not been prosecuted for the crime committed. However, it is required that the alleged offense be established in its materiality and that therefore the prosecutor demonstrates beyond any reasonable doubt that a fact of active corruption (pursuant to Section 1 or Section 6) has been committed.

The penalties provided for by the legal person are of a pecuniary nature and no maximum limit is set: pursuant to Section 11 (3) "[a] person guilty of an offense under section 7 is liable on conviction on indictment to a fine". No further sanctions are called, such as the publication of the sentence or the remedial order, as seen instead in the discipline of corporate manslaughter (...)[19].

---

[18]Section 8(4) states that: “Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C (...)”. According to C.K. WELLS, Corporate responsibility and compliance programs in the United Kingdom, op. cit., pp. 508, which points out that this could be a limitation, where the sole proof of the service rendered by the associated person is the bribe at the base of the crime.

[19]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,

Thus we arrive at the novelty profile of the Bribery Act on which we focus our attention on our purposes. Having established the conditions for the liability of collective subject for the crime of failure to prevent bribery in the first part of the provision, Section 7 (2) states that "(...) it is a defense for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct"[20].

Through this provision the possibility that the institution does not respond for the crime is therefore positivized if it is able to demonstrate that it has put in place preventive measures, called "adequate procedures", to avoid that the associated person commit facts of corruption. This is a provision that certifies the exemplary relevance attributed to the compliance program adopted before the commission of the offense: the collective subjects will not be held responsible if they demonstrate that they have adopted adequate procedures to prevent corruption.
It should be said that BA 2010 offers fewer indications than those contained in articles 6 and 7 of Decree 231[21] on the contents of these models, offering no definition whatsoever. The expression "adequate procedures" seems to allude to a judgment of proportionality between the criminal conduct to be prevented and the means put in place for this purpose; however, in order to have a reference in this regard it was necessary to await the guidelines for the preparation of the models, drawn from the aforementioned Guidance of 2011. There are no systems or policies that the collective subjects must follow and adopt compulsorily; instead, the guidelines propose six basic principles that can help the commercial organization of all sizes, operating in the various sectors of activity, to understand which procedures to implement to prevent corruption. To allow a more precise examination, it seems useful to summarize them briefly.

The first principle reported is that of the proportionate procedures, in the sense that the preventive mechanisms must be

[20]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,
[21]UK MINISTRY OF JUSTICE, Guidance about procedures which relevant commercial organisations can put into place, op. cit., 20 ss. It is noted, incidentally, that the guidelines in question have indicative value and are not binding.

calibrated on the risk of corruption on which it intends to intervene; in this sense, the risk assessment activity assumes central importance. The second principle relates to the top-level commitment, that is to say, to the efforts put in place by the top management (for example, their degree of involvement in the definition of procedures and decision-making processes in this area), with particular reference to the dissemination of an anti-corruption culture, in view of the effectiveness of the prevention system. The third principle is fundamental in the preparation of any preventive apparatus, being the already mentioned activity of risk mapping, which must be conducted periodically and in an informed way, considering the specificities of the single commercial organization-size, activity carried out, structure, location-to assess internal and external risk-corruption factors. The fourth principle present in the Guidance is that of due diligence, meaning the set of procedures put in place to mitigate the risk of corruption that emerges in the commercial activities conducted by persons acting on behalf of the organization; by way of example, we refer to the use of local intermediaries in foreign countries, or to cases of mergers or acquisitions. Due diligence must be more pervasive when commercial relations are held by legal persons, since in this case a plurality of natural persons may be involved. The fifth principle is related to communication (communication, including training), since it is important to make known the anti-corruption procedures adopted inside and outside the institution; this area includes the setting up of systems that allow to make reports in a confidential manner. Lastly, the monitoring and review principle is referred to: it is not expressly required to identify a subject (compliance officer) responsible for supervision, but it highlights the need for constant monitoring and a periodic review, such as "closure" phases of an effective anti-corruption system.

At this point, it is possible to make some more relaxed considerations on the corporate offense outlined in Section 7. The crime of failure to prevent bribery does not require the existence of a mens rea; for the first time, in the context of crimes as is the corruption case, characterized by the presence of the psychological element, a case of strict liability has been introduced. The possibility for the institution not to be held responsible if it has adopted 'adequate procedures' constitutes a due diligence defense, typical of the regulatory offense scheme: although it is a hypothesis of responsibility in the objective substance, in some cases (so-called hybrid offense) a normatively "defense" is foreseen with the inversion of the burden of proof against the accused which can avoid the imposition of responsibility.

Compliance programs play a crucial role in the regulation of the Bribery Act 2010, representing the only method available to the commercial organization for not responding to the crime of "failure to prevent corruption": in the absence of such models, it will not be possible to resort to due diligence defense referred to in Section 7 (2). In light of this consideration, in our opinion, an interesting space for comparison with the discipline of the organizational models envisaged by Decree 231 is opened. As we have already observed, the latter are considered by most of the doctrine an excuse, in able to elicit the guilt of the collective subject. The fact of not having prepared the measures necessary to avoid or at least minimize the risk of committing certain offenses is traceable, under the dogmatic profile, to the subjective side of attribution of responsibility, in the area of organization fault. The "231 model" is the document in which the organizational activity of the company in the direction of crime prevention is crystallized, constituting the way in which the institution can illustrate the efforts made towards legality.

It does not seem to us that a reconstruction of this fact is fully transposable in the analysis of Section 7 of BA 2010, the guilt of organization is considered, albeit not unanimously, as a constitutive element of the offense of the institution. The crime of failure to prevent bribery, on the other hand, is in substance a case of 'para-objective' responsibility, in the sense that the fact of not having adopted the model does not affect guilt, and the mens rea is not required there. The relevance of this hypothesis and the element of rupture with the other imputatory mechanisms envisaged in the English system, in the perspective of our investigation, must then be sought elsewhere. The hybrid offense can provide different types of defense, and it is significant that in the law of the Bribery Act the requirement to prevent the entity from the criminal responsibility has been identified in the "adequate procedures", ie in the demonstration of having adopted a series of rules, controls, internal controls aimed at avoiding the commission of the corruption offense by the associated person and in the presence of the other assumptions mentioned above. The object of judicial review is both in Decree 231 case and in the Bribery Act 2010 the suitability or adequacy of the procedures adopted; in the first case, the question is intertwined (also) with the guilt of the collective subject, in the second case this profile is not in relief, since it is a case of strict liability, and the ultimate purpose of the defense is-pragmatically-that of allowing a "Loophole" from a mechanism, otherwise, in the objective substance.

However, it was intended to make the most of the criminal principles, first of all that of guilt. The failure to adopt the "231 model" in the application practice ends up being considered symptomatic of the inadequacy of internal procedures, according to the well-known logic of "hindsight", leading to the affirmation of responsibility of the entity; while in the United Kingdom, where it is worth recalling, it is a form of authentically criminal responsibility, this defense introduces the profile of the adequacy of internal structures in order to avoid the imposition of an objective-type responsibility, in which neither is required. there is a mens rea.

Moreover, in order to positivize the precautions, the English system also opts for a 'minimal' choice, postponing, for some indications of principle, to the contents of Guidance; in relation to this aspect, the comparison does not seem to offer particularly relevant points, both because the criteria and measures outlined by the 2011 Guidance referred to anti-corruption procedures accredited at international level, and because in the case of the Bribery Act 2010 we are in the presence of sector protocols, while the "231 models" in the configuration pursuant to art. 6-7 of the Decree are called to embrace and define the precautionary content in relation to the whole range of predicate offenses.

The real issue on which to focus attention, to express an opinion on the effectiveness of Section 7 of BA 2010, however, is linked to the fact that it has never been applied before the introduction of the deferred prosecution agreement, which came into force in 2014. This makes us reflect on the little impact that the anti-corruption system, so devised, had at least in the first phase; and, even more, it shifts the focus on the centrality assumed also in the United Kingdom by the instruments of procedural diversion in the fight against economic crime.

2. Confirmation Of The Criminal Finances Act 2017: The Path From The Principle Of Identification To The Failure To Prevent Model

The evolution of the British system in the peculiar sector of contrast to corporate crime presents other ideas to be considered. In particular, worthy of consideration in the framework of the analysis on the criteria of attribution of responsibility to collective subjects is the very recent introduction of a new corporate offense, modeled on Section 7 of the Bribery Act 2010, by the Criminal Finances Act 2017[22] on tax evasion tax.

The Bribery Act 2010 and the choice to adhere to a new imputational paradigm represented a very significant departure from the common law principles for offenses that require a mens rea[23]. The news was welcomed by the operators and also positively evaluated in the anti-corruption public strategy, outlined by the Anti-Corruption Plan of 2014. In particular, the Director of the Serious Fraud Office[24], agency with competence to conduct investigations and to exercise the criminal action in relation to crimes of economic matrix, expressing satisfaction in relation to the model outlined by Section 7 of BA 2010, had called for a wider application and, in particular, the extension also to other types of crime, through the introduction of a responsibility of collective subjects based on the failure to prevent economic crimes.

The idea of providing for an extension of the failure to prevent model with respect to a wider range of economic crime had also been highlighted by the government, in the context of the aforementioned anti-corruption plan; subsequently, the proposal had been examined by a working group established at the Ministry of Justice, undergoing the influences of political events, changes of government and news events and was finally implemented in the Criminal Finances Act 2017, but limited to tax evasion only[25].

---

[22]Criminal Finances Act 2017, approved the 27 April 2017. C.K. WELLS, Corporate Failure to Prevent Economic Crime. A proposal, in Criminal Law Review, 2017, 426. V. UK ANTI-CORRUPTION PLAN, 18 December 2014.

[23]The speech of David Green, Director of SFO, in occasion of Pinsent Masons Regulatory Conference, 23 October 2014.

[24]C.K. WELLS, Corporate failure to prevent economic crime, op. cit., pp. 427ss.

[25]See the test of Section 45 (in particular, lett. 1-5) introduced a new corporate offence di failure to prevent facilitation of UK tax evasion offences: "(...) (1) A relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B. It is a defence for B to prove that, when the UK tax evasion facilitation offence was committed-B had in

The reference standards are Section 45 and 46 of the law, respectively referring to the failure to prevent the facilitation of tax evasion in the United Kingdom (failure to prevent the UK tax evasion offenses) and abroad (failure to prevent facilitation of foreign tax evasion offenses)[26]. The influence of the model envisaged in the Bribery Act is evident here, although the literal formulation of the new offenses is partially different, in particular with reference to the preventive procedures.

More in detail, limiting our considerations to Section 45 structure, since the two hypotheses envisaged by the Criminal Finances Act 2017 are substantially similar2[27], "[a] relevant body" with the understanding of a legal entity or a partnership anywhere registered or constituted, according to the definition of Section 44 withholding responsible for the corporate offense in question if a person commits the crime of facilitating tax evasion in the United Kingdom by acting in the capacity

place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or it was not reasonable in all the circumstances to expect B to have any prevention procedures in place. In subsection (2) “prevention procedures” means procedures designed to prevent persons acting in the capacity of a person associated with B from committing UK tax evasion facilitation offences. In this Part “UK tax evasion offence” means-an offence of cheating the public revenue, or an offence under the law of any part of the United Kingdom consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax. In this Part “UK tax evasion facilitation offence” means an offence under the law of any part of the United Kingdom consisting of-being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax by another person, aiding, abetting, counselling or procuring the commission of a UK tax evasion offence, or being involved art and part in the commission of an offence consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax (...)”.

[26]C.K. WELLS, Corporate failure to prevent economic crime, op. cit.

[27]See Section 46 (Failure to prevent facilitation of foreign tax evasion offences), for the purpose of an easier comparison with Section 45 and for the profiles here in comment: “(...) (1) A relevant body (B) is guilty of an offence if at any time-a person commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with B, and any of the conditions in subsection (2) is satisfied (…) it is a defence for B to prove that, when the foreign tax evasion facilitation offence was committed-(a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or(b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place. n subsection (3) “prevention procedures” means procedures designed to prevent persons acting in the capacity of a person associated with B from committing foreign tax evasion facilitation offences under the law of the foreign country concerned (...)”.

of associated person[28].

However, it is envisaged in paragraph 2 of the provision that constitutes a defense for the entity to demonstrate that at the time of committing the offense of tax evasion, it had put in place those preventive procedures which, in the circumstances, it was reasonable to expect had adopted (letter a); or, show that in those circumstances it was not reasonable to expect that it had adopted any prior procedure (letter b)[29].

Section 45 (3) specifies that "prevention procedures" should be construed as those designed to prevent persons in a qualified position from committing the crime of tax evasion facilitation.

The rule therefore requires that, in order to have the responsibility of the collective subject, a "test of reasonableness" that seems similar to that foreseen by CMCHA 2007[30] is passed; it is expected that the preventive procedures that the institution is called upon to provide are among those that could be reasonably expected to have been implemented (reasonable in all the circumstances to expect to be in place). The normative reference is clear in offering the institution two possible defences-having prepared the prevention procedures or demonstrating that it was not reasonable to expect to have implemented these procedures-what, on the one hand, would seem to bring out a profile similar to taxability of the conduct, and on the other, it seems interesting in comparison with the Bribery Act 2010 (where, as seen the only defensively positivized that of having effectively adopted the proper procedures).

The hypothesis of failure to prevent facilitation of tax evasion

[28]Definition which is used in Section 44(4): “(4) A person (P) acts in the capacity of a person associated with a relevant body (B) if P -an employee of B who is acting in the capacity of an employee, an agent of B (other than an employee) who is acting in the capacity of an agent, or any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services (...)”.
[29]C.K. WELLS, Corporate failure to prevent economic crime, op. cit.
[30]See, Section 4(1)(b) of CMCHA 2007: “that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances (...)”. for more details see P. ASTERLEY JONES, R. CARD, R. CROSS, Card, Cross and Jones criminal law, Oxford University Press, Oxford, 2014, pp. 294ss. R. CARD, J. MOLLOY, Card, Cross & Jones criminal law, Oxford University Press, Oxford, 2016, pp. 282ss.

offenses appears extremely interesting, as it is symptomatic of the new path that seems to have been taken by the English legislator; moreover, further developments in this direction are still ongoing. As already announced during the anti-corruption Summit held in London in 2016, the Ministry of Justice has launched a consultation (call for evidence), open from January to March 2017, on some possible reform options in terms of corporate liability for economic crime. The consultation proposed the following five options: reform of the doctrine identification, evaluating the expansion of the number of qualified subjects as directing mind of the company; strict (vicarious) liability offense, a model according to which the responsibility of the entity passes through the conduct of individuals acting on its behalf (eg. employee, agent), without it being necessary to prove any guilt (fault) of the collective subject. The same consultation suggests that if one were to opt for this possibility it would be necessary to consider the introduction of adequate procedures or due diligence defense; strict (direct) liability offense, which would require the entity to prove that the offense was not committed in its name or on its behalf: this is the model adopted by Section 7 of the Bribery Act 2010. A collective entity would be held responsible for the violation of a statutory duty aimed at ensuring that no crimes of an economic nature are committed in carrying out the activities of the body, without the need to prove the subjective element. If this option were pursued, it would be necessary to evaluate the introduction of a defense; failure to prevent as an element of the offense, the option of greater interest, where the concept of non-prevention of the crime (a failure to prevent) by the company management would become a constitutive element of entity's offense. The prosecution should here prove not only that the crime occurred, but also that it depended on a management failure, namely that no steps were taken to prevent the unlawful conduct, while the defense should prove that the institution has adopted these measures; investigate the possibility of introducing no new general corporate offenses, but leverage on the possibility of adopting sectoral reforms, similar to those implemented in the financial services sector, in order to discourage the commission of wrongdoing and requesting more individual responsibility, especially at the level of senior managers.

In order to comment on the proposals presented in the text submitted for consultation, it was noted that the first option would risk incurring the same difficulties that already arose in the definition of senior management envisaged in the Corporate Manslaughter and Corporate Homicide Act 2007; while, as regards the second possibility, a model of strict (vicarious) liability offense would be excessively broad. The last solution, that of a regulation "sector by sector", would in fact correspond to the status quo; the option considered more satisfactory then - the third in the order of consultation - would be that of the failure to prevent model, because less restrictive than the model based on the doctrine identification, disconnected from vicarious mechanisms (as it would allow the organization to demonstrate that it faced the crime risk by adopting appropriate procedures) and, last but not least, analogous to the system already implemented for the hypotheses of corruption through the aforementioned Section 7 of BA 2010, "endorsed and admired by the influential OECD, familiar to compliance officers and legal advisers in multinational and enforcement agencies (...)"[31].

3. The Public Anti-Corruption Strategy In The United Kingdom: An Overview

It is immediately possible to point out that the British system has long relied on the repressive component in combating corruption; also the last significant reform on the matter, with the Bribery Act 2010, as seen, has affected the penal side, rationalizing the regulatory framework in relation to cases of crime, sanctions, liability of bodies for the hypothesis of failure to prevent bribery and enforcement mechanisms.

On the other hand, we do not find a regulatory body of an administrative nature, oriented towards the prevention of corruption, similar to that envisaged in Italy with the experience of ANAC, following the law n. 190/2012. At present, in the United Kingdom there is no single anti-corruption authority, nor a single prosecutor with attributions, and the competence to investigate for corruption is shared: in particular, we refer to the Serious Fraud Office and the National Crime Agency, the latter, moreover, has an International Corruption Unit, established in 2015 and specialized in investigations for international corruption and related recycling assumptions[32].

---

[31] C.K. WELLS, Corporate failure to prevent economic crime, cit., 439.

[32] According to TRANSPARENCY INTERNATIONAL UK, "(...) The UK does not

For an overview see the publication, published at the outcome of a research recommendations of supranational source that required an intervention to change the anti-corruption structure, the British government intervened-as well as on criminal law-also on organization profiles, establishing the Inter-Ministerial Group on Anti-Corruption, a new subject with tasks of control and coordination on the activities carried out by the Government in the fight against corruption at domestic and international level.

The Group is an inter-ministerial committee made up of members of various origins: among them are members of the executive, police officers, the Director of Public Prosecutions, the Director of the Serious Fraud Office, the Director-General of the National Crime Agency and a political figure, the Anti-Corruption Champion also recently introduced with the task of presiding, supervising and coordinating the work of the group, set up to remedy some shortcomings in view of the decentralized approach, typical of the British set-up.

Important in this perspective appears the publication in December 2014 of the UK anti-corruption plan. According to the description of government's website, "the cross-government anti-corruption plan brings together all of UK's activity against corruption in one place"; it is therefore a document that summarizes the government program in relation to the overall public anti-corruption strategy. The British Plan could, in terms of ratios and objectives, recall in some aspects the national anti-corruption plan envisaged by ANAC in the Italian context, but the warning is that these are very different instruments: both have a programmatic character, but the UK anti-corruption plan is more illustrative (in relation to the actions implemented, those to be implemented, the objectives to be achieved, etc. in a public accountability perspective on the executive's choices) and less perceptive, besides being, as already mentioned, of governmental source, and not prepared by an independent Authority.

The anti-corruption plan also clarifies the mission of the inter-

---

have many of the anti-corruption roles that exist in other countries. It does not have an anti-corruption agency, or a single anti-corruption prosecutor, or even a government minister with corruption as an official part of their portfolio. On the contrary, we have sixty-six separate bodies with some responsibility for corruption, plus forty-five police forces (...)".

ministerial group on anti-corruption[33]: the group has the task of supervising the implementation by the executive of the plan, suggesting the strategic lines of intervention, as well as any periodic changes to be made to the same. In order to allow group's control to be implemented effectively, with respect to government's actions, the Cabinet Office is constantly called to report to the inter-ministerial group on anti-corruption on the initiatives undertaken. All results are expected to be published on the government website, in compliance with the principles of administrative transparency, as known strongly rooted in the United Kingdom. Following the launch of the 2014 Plan, at the beginning of 2015 a new cross-departmental unit was set up at the Cabinet Office, the Joint Anti-Corruption Unit (JACU) to support the anti-corruption champion.

There are many public actors involved, in various ways, in policies and strategies to combat corruption: the landscape is very varied and it is difficult to express an impression on the work of these organisms. It can certainly be observed that it is, on the whole, a political structure, while there is no trace of the powers and the typical role of the independent authorities. Looking at the attributions of the inter-ministerial group on anti-corruption and the anti-corruption champion envisaged in the 2014 Plan, they would seem to have been established not only to monitor and assist the government in this matter, but also to ask as interlocutors of civil society. The latest update currently available for the anti-corruption plan, dated May 2016[34], does not provide much more information, merely marking the completion of the actions envisaged in the 2014 Plan and involving the group; while the choice to appoint as an anti-corruption champion a personality without ministerial assignments has recently been criticized, as the ability of this figure to exert an effective influence on government choices has been weakened in this way.

[33]"(...) a new Inter-Ministerial Group has been established to oversee delivery of the actions in this plan and set the strategic direction for the UK's anti-corruption efforts. The UK Anti-Corruption Plan will be reviewed on a regular basis, as part of the Government's commitment to the Open Government Partnership, with new actions developed in collaboration with civil society (...)": UK ANTI-CORRUPTION PLAN, op. cit., pp. 9ss.

[34]PROGRESS UPDATE ON THE UK ANTI-CORRUPTION PLAN, 12 May 2016, in particular pp. 9 and 26

4. Deferred Prosecution Agreement And "Put To The Test" Of The Collective Subject: An Initial Assessment Of The British Experience

In contrast to corporate crime, the British system has been using, for some years, alternative tools to define investigations with respect to the corporations, known and widely used in the American experience[35], which represent an interesting field of investigation and an occasion for reflection also with a view to intervention on the Italian discipline of corporate liability: the reference is to the deferred prosecution agreement (DPA)[36].

In the European panorama, indeed, the solution adopted by the United Kingdom, where in April 2013 was introduced by law (Crime and Courts Act, 2013, Section 45 and Schedule 17)[37] this mechanism of process diversion, appears of particular interest. Following a public consultation on the subject, the possibility of using the agreements came into force in February 2014, marking a turning point in the British approach to corporate criminal responsibility and alignment with the analogous overseas institution. The choice was dictated by the consideration that the British legal system did not offer sufficient incentives for cooperation between the private sector and the authorities in the initial phases of the investigation.

A deferred prosecution agreement[38] is an agreement on a voluntary basis between the public prosecution and a company, which, if approved by a judge, determines the suspension of the criminal proceedings against the company itself. The company has no right to request or initiate a proceeding aimed at obtaining a DPA; it is the charge to assess whether to offer the agreement to the company on the basis of certain parameters (for example, the severity of the offense).

---

[35]Crime and Courts Acts 2013, approved 25 April 2013. Section 45 entry in force from 2014.

[36]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,

[37]For deferred prosecution agreement introduced in United Kingdom see: P. SPRINGER, Deferred prosecution agreements. The law and practice of negotiated corporate criminal penalties, London, 2014.

[38]UK MINISTRY OF JUSTICE, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements, May 2012, par. 19.

This decision rests only with the offices of the designated prosecutors, who have full discretion in relation to the decision to invite a company to access or not to a DPA.

Following acceptance by the company, the investigating authority initiates the proceedings before the judicial authority; the latter, during a preliminary hearing, expresses an opinion about the launch of DPA. If successful, the investigating authority and the company are allowed to negotiate DPA, which will then return to the judicial authority for final approval, following a public declaration that it was entered into in the interest of justice. and that the terms of the agreement are fair, reasonable and proportionate. As a consequence of the agreement, the procedure is deferred for the duration of the term provided by DPA.

By accessing a deferred prosecution agreement, the company agrees to comply with certain conditions, which may include, by way of example: payment of a pecuniary sanction; the payment of compensation to the victims; the return of the profit obtained by the company in relation to the disputed crime; the implementation of an organizational model or changes to an existing model; cooperation in investigations.

One of the main features of this mechanism is that while the agreement is in progress, the company is protected against further prosecution in connection with the same crime; and the violation of one of the conditions imposed by virtue of a DPA can "restart" the machine of criminal proceedings.

The deferred prosecution agreements introduced in the United Kingdom represent a model to watch as, despite having many aspects in common with the US DPAs, they present some significant differences profiles, both in terms of discipline, and in the approach taken by prosecutors. In the United Kingdom, the prosecution must obtain the approval of a judge to begin negotiations on a DPA, to make it known and/or modify it: for this reason, the non-prosecution agreements, a consolidated instrument in US practice, have not been taken into consideration in the British legal system, since they do not include or contemplate to a minimal extent the involvement of a judge[39]. In the

[39] It deals with fraud, corruption, tax evasion and other crimes of economic matrix:

United Kingdom, the whole process is public and transparent; only collective bodies can access the DPAs, excluding individuals; the possibility of using a DPA is limited to crimes that are strictly provided for in the Crime and Courts Act. The implementation of these agreements is supervised by specially appointed public prosecutors (members of the Serious Fraud Office and the Crown Prosecution Service) and does not repent, in this system, the possibility that they are reserved for that wide margin of discretion that, instead, characterizes the choices of public prosecution in USA.

The scheme here briefly described represents a novelty and therefore, having entered into force for a short time, it is likely that negotiations will be difficult to predict and evaluate: this is an important aspect, since the incentive for the company to resort to this type of agreements also binds to the realistic threat of criminal sanctions, as well as to the possibility for companies to concretely predict what the penalties may derive from their conduct.

The first DPA concluded in United Kingdom concerns the negotiation of an agreement between the Director of the Serious Fraud Office-SFO and the Standard Bank Plc (now known as ICBC Standard Bank Plc, followed by Standard Bank) for incidents of corruption[40]. This first request for application of a DPA by the SFO was submitted to a preliminary judicial screening regarding its consistency and was subsequently approved on 30 November 2015. The statement of facts (document that constitutes the basis of done for the agreement) provides a detailed account of the conduct of DPA and of the investigations carried out by legal advisors of the Standard Bank and the Serious Fraud Office.

The story stems from corruption of government officials in Tanzania. The Tanzanian government began a fund-raising process of $ 600 million through private placement in 2012. Stanbic Bank Tanzania Ltd (the Tanzanian subsidiary of Standard Bank Group Ltd), not authorized to deal with foreign investors in the debt capital market,

---

the catalog is foreseen by the Schedule 17, Part 2 (Offences in relation to which a DPA may be entered into) of Crime and Courts Acts 2013.

[40]According to par. 7(1) of Schedule 17 del Crime and Courts Acts 2013 relating to the preliminary hearing in the context of the approval procedure of the Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement (Case No: U20150854), 30 November 2015.

had involved Standard Bank (another subsidiary of the group, authorized to do so) to jointly request Tanzanian government. Since there was no progress in the negotiations, Stanbic had requested assistance from a Tanzanian company, the Enterprise Growth Market DPA by the Court, it is expected that: "(...) after the commencement of negotiations between a prosecutor and P ['a person'] in respect of a DPA but before the terms of the DPA are agreed, the prosecutor must apply to the Crown Court for a declaration that: (a) entering into a DPA with P is likely to be in the interests of justice, and (b) the proposed terms of the DPA are fair, reasonable and proportionate (...)"[41].

5. (Follows) Advisors Ltd (EGMA)

Two of the three directors and shareholders of EGMA were government officials (a member of the government and the former CEO of the Capital Markets and Securities Authority of Tanzania). The agreement with EGMA stipulated that the latter would be paid a fee of 6 million dollars (1% of funds collected by Standard Bank for the Tanzanian government). Standard Bank and Stanbic therefore received the mandate to act on behalf of the Tanzanian government and the transaction was completed in March 2013. There was no evidence that the EGMA company had actually provided services in connection with the transaction, but the agreed amount came into followed up on an account opened by EGMA at Stanbic, and within ten days almost the full amount was withdrawn in cash. The withdrawals caused concern for the Stanbic staff, who referred the matter to the headquarters of the Standard Bank group. A law firm was commissioned to conduct investigations and within a month the Serious Fraud Office was informed. The lawyers of the company were instructed by SFO to initiate internal investigations and communicate the results; examined the material and conducted independently interview. SFO concluded that there were the conditions required for the opening of negotiations aimed at a DPA.

Beyond the transnational relevance of the matter, it is significant to note that the charge against Standard Bank includes the accusation in relation to the corporate failure to prevent bribery offense, pursuant to

[41]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,

Section 7 of the Bribery Act of 2010. This crime does not it had never been challenged by the entry into force of the Bribery Act and this DPA has made it (also) the first application opportunity. The implementation of the examined process shows that, under certain circumstances, companies can avoid criminal prosecution through rapid internal investigation and timely self-reporting, aimed at co-operation with the competent authorities.

Standard Bank also stresses the importance for companies required to comply with the Bribery Act to implement sound anti-corruption policies and procedures tailored to the risks they are exposed to based on their activities: internal policies in this area, where applied, they may indeed provide a full defense (defense) against a charge under Section 7 of the Bribery Act.

In general terms, however, it seems to be possible to state that the full potential of DPAs has not yet been explored in terms of compliance. The main focus of this first agreement is the sanction, while the corporate governance solutions imposed seem to follow a repetitive and not particularly incisive scheme (imposition of external auditors) on the wake of what has already been experimented in USA (with the experience of monitors). In a more coherent manner with the rationale behind their introduction, the DPAs should perhaps leave behind the inevitable sanctioning moment (a result that can also be achieved through an ordinary process) and encourage the diffusion of a different mentality and corporate culture, placing itself as a bench. of testing for the testing of new, more effective and customized compliance solutions.

In this regard, the second deferred prosecution agreement approved in the United Kingdom in July 2016 was signed. The agreement was concluded between the SFO and the company XYZ Limited66, whose name was not disclosed (in order not to prejudice ongoing proceedings charged to the natural persons involved).

This story also originates from corruption: in particular, the crimes of conspiracy to corrupt and bribe have been contested at XYZ Limited, in violation of Section 1 of the Criminal Law Act 1977 and the aforementioned failure to prevent bribery pursuant to Section 7 of the Bribery Act 2010, which occurred between 2004 and 2012 and related to the payment of bribes to guarantee supply contracts to company[42]. The complete documentation will be published when the procedure has been completed.

The proceeding is suspended for a minimum of two and a half years and a maximum of five years, on the basis of the time that will be used for the full payment of the pecuniary sanction. In this case the penalty imposed is equal to 6.5 million pounds and has been reduced considerably due to the very timely self-report and the conduct of collaboration by the company, called "exemplary".

The indication that seems to be able to draw from the contents of this second agreement is that of a substantial continuity with the principles established by Standard Bank, but through a greater exploitation of the cooperation by the company blamed, in an initial reward: “(...) it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company’s shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile (...)”[43].

The reconnaissance of the British DPAs cannot fail to take into account the latest agreement published in January 2017, ie Rolls-Royce PLC. The agreement with the company follows investigations by the Serious Fraud Office for four years, in relation to twelve counts (conspiracy to corrupt, false accounting and failure to prevent bribery). To give the measure of the story, the disputed facts span three decades and involve seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia, in relation to Rolls-Royce activities in the civil and military aeronautics sectors, as well as his previous activities in the field of energy, with reference to the sale of aeronautical engines, energy systems and related services.

This is an agreement that has had wide media coverage as it is the largest survey so far carried out by the SFO, conducted in collaboration with trusted partners all over the world, and coordinating

[42]Serious Fraud Office v XYZ Limited (Case No: U20150856), 11 July 2016.
[43]SFO v Rolls Royce PLC: Deferred Prosecution Agreement (Case No: U20170036), January 2017.

with the American Department of Justice and the Brazilian Federal Minister Público. DPA was followed by the infliction of a Rolls Royce fine of £ 497, £ 25 million, plus interest and payment of charges incurred by the prosecution (£ 13 million), the highest ever applied in UK in the criminal law against a corporation. The sum reflects the severity of the behavior, but also the full cooperation of Rolls-Royce PLC in the investigations and the program of internal reform and compliance implemented by the new leadership of the company.

At the end of this excursion on the "state of the art" of the DPAs in the United Kingdom three years after their entry into force, it is possible to observe that the instrument has assumed considerable importance in the context of fighting economic crime and that very positive are the evaluations of operators in this regard[44]. The introduction of this hypothesis of "putting to the test" of the institution in the British system has allowed to "activate" the investigations in relation to the corporate offense of failure to prevent bribery and to implement the action to combat the phenomenon of corruption. Moreover, as we have seen, all the three agreements published concern investigations for corruption issues: which seems to confirm what has been said so far, namely that the terrain of the fight against corruption is a privileged field of experimentation for new regulatory solutions, and which must also become the flywheel for the circulation of virtuous models, well being able to represent an advanced model with a view to extending some measures, which proved particularly effective, beyond the perimeter of anti-corruption.

The further element on which attention is focused regards the enhancement of cooperation in investigations by collective subjects, able to detect both as a prerequisite for access to the agreement, and in terms of mitigating the sanctioning process. This seems to be a model of public-private partnership that, with a view to reform, cannot be ignored by the Italian system: even with the inevitable differences that characterize the Anglo-Saxon systems (starting with the discretionary nature of the prosecution), we believes that serious consideration should be given to more effective ways of encouraging self-reporting and cooperation, including in the "231 context". The "stick-carrot" approach with a prevalence of the repressive aspect with respect to the reward

[44]See the speech of Director of Serious Fraud Office, David Green, in occasion of Cambridge Symposium on Economic Crime 2017, of 4 September 2017.

logic above all in the reading provided by the "living right" which, as we have explained, does not recognize in almost any case the preventive suitability of the compliance program. This represents an excessive burden for the recipients of the discipline and a distortion of the system originally foreshadowed by the legislator, whose functionality should have also been based on the possible benefits recognized for the adoption of organizational models and for the conduct of business policies in the respect for legality.

6. Loi Sapin II Of 2016 And Introduction Of The Anti-Corruption Compliance Program In France

If the analysis of the anti-corruption system in United Kingdom has revealed many profiles of interest and has consolidated the impression of a legislative trend aimed at enhancing the organizational flaw as a criterion of ascription[45] which, in addition to having found space in accident prevention with the CMCHA 2007, already before the Bribery Act 2010, has recently assumed an imputative model even in the hypothesis of significant failure to prevent facilitation to tax evasion offenses, if possible, even more appears the innovation introduced in France by Loi Sapin II.

The French response to the criminality of the institutions has always been based, since the introduction of this form of responsibility in criminal code in 1994 on the ascriptive criterion par ricochet: that of empathy has always been the only (generalized) model of imputation of responsibility, which is transmitted by the physical persons (organs or representatives) who commit the crime to the moral person, on the strength of the objective criterion referred to in art. 121-2 of criminal code (the realization of the crime pour compte of the body)[46]. The consequence of a similar approach was that of not foreseeing the

[45]Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Sapin II). For more details and analysis see: A. LECOURT, Le renforcement de la lutte contre la corruption et l'évasion fiscale, in RTD Com., 2017, 101ss. X. BOUCOBZA, Y.M. SERINET, Loi "Sapin 2" et devoir de vigilance: l'entreprise face aux nouveaux défis de la compliance, in Recuil Dalloz, 2017, pp. 1619ss. K. HAERI, V. MUNOZ-PONS, Sapin II: l'an I de la lutte anticorruption, in Dalloz avocats, 2017, 106ss.

[46]B. SAINTOURENS, P. EMY, La réforme du droit des sociétés par la loi du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique ("Sapin 2"), in Revue Sociétés, 2017, pp. 132ss.

presence of compliance program either with an exemplary value or even with an attenuating function-in any hypothesis.

The framework has changed significantly following the introduction of the aforementioned law of 2016, which has indeed brought numerous and broad-based changes, relating to transparency, the fight against corruption and the modernization of economic life, also affecting other areas of criminal law[47].

However, it is undoubted that among the main innovations of the novel fall the anti-corruption norms: chapter I of the law is dedicated to the establishment and discipline of the Agence Française Anticorruption (AFA) and for what is most interesting here particularly significant are the consequences of Loi Sapin II on the liability of institutions, having been "institutionalized" the tool of compliance programs in this matter[48]. The provision on which to focus the analysis

[47]See art. 17, lett. 1 of Loi Sapin II: I.-Les présidents, les directeurs généraux et les gérants d'une société employant au moins cinq cents salariés, ou appartenant à un groupe de sociétés dont la société mère a son siège social en France et dont l'effectif comprend au moins cinq cents salariés, et dont le chiffre d'affaires ou le chiffre d'affaires consolidé est supérieur à 100 millions d'euros sont tenus de prendre les mesures destinées à prévenir et à détecter la commission, en France ou à l'étranger, de faits de corruption ou de trafic d'influence selon les modalités prévues au II. Cette obligation s'impose également: 1° Aux présidents et directeurs généraux d'établissements publics à caractère industriel et commercial employant au moins cinq cents salariés, ou appartenant à un groupe public dont l'effectif comprend au moins cinq cents salariés, et dont le chiffre d'affaires ou le chiffre d'affaires consolidé est supérieur à 100 millions d'euros; 2° Selon les attributions qu'ils exercent, aux membres du directoire des sociétés anonymes régies par l'article L. 225-57 du code de commerce et employant au moins cinq cents salariés, ou appartenant à un groupe de sociétés dont l'effectif comprend au moins cinq cents salariés, et dont le chiffre d'affaires ou le chiffre d'affaires consolidé est supérieur à 100 millions d'euros. Lorsque la société établit des comptes consolidés, les obligations définies au présent article portent sur la société elle-même ainsi que sur l'ensemble de ses filiales, au sens de l'article L. 233-1 du code de commerce, ou des sociétés qu'elle contrôle, au sens de l'article L. 233-3 du même code. Les filiales ou sociétés contrôlées qui dépassent les seuils mentionnés au présent I sont réputées satisfaire aux obligations prévues au présent article dès lors que la société qui les contrôle, au sens du même article L. 233-3, met en œuvre les mesures et procédures prévues au II du présent article et que ces mesures et procédures s'appliquent à l'ensemble des filiales ou sociétés qu'elle contrôle (...)".

[48]See art. 17, lett. 2 della Loi Sapin II:-Les personnes mentionnées au I mettent en œuvre les mesures et procédures suivantes: 1° Un code de conduite définissant et illustrant les différents types de comportements à proscrire comme étant susceptibles

of art. 17, which introduces obligations to prevent corruption to top managers of companies that meet the size and turnover requirements set forth therein. Said obligation also extends to chairmen and managing directors of public bodies of an industrial and commercial nature, and according to the powers exercised to the members of the board of directors of public limited-liability companies under art. 225-57 of the Commercial Code, provided that the already clarified dimensional and turnover requirements are respected, even if these entities belong to groups of companies. The public subjects who present the requirements in question, like private individuals, are therefore recipients of the discipline.

The law specifies that when the company prepares consolidated accounts, the obligations defined by art. 17 also concern all its branches (pursuant to article L. 233-1 of the French Commercial Code) or subsidiaries (pursuant to article L. 233-3 of the same code); in any case, the subsidiaries that exceed the thresholds mentioned are considered compliant with the obligations if the measures and procedures provided

de caractériser des faits de corruption ou de trafic d'influence. Ce code de conduite est intégré au règlement intérieur de l'entreprise et fait l'objet, à ce titre, de la procédure de consultation des représentants du personnel prévue à l'article L. 1321-4 du code du travail; 2° Un dispositif d'alerte interne destiné à permettre le recueil des signalements émanant d'employés et relatifs à l'existence de conduites ou de situations contraires au code de conduite de la société; 3° Une cartographie des risques prenant la forme d'une documentation régulièrement actualisée et destinée à identifier, analyser et hiérarchiser les risques d'exposition de la société à des sollicitations externes aux fins de corruption, en fonction notamment des secteurs d'activités et des zones géographiques dans lesquels la société exerce son activité; 4° Des procédures d'évaluation de la situation des clients, fournisseurs de premier rang et intermédiaires au regard de la cartographie des risques; 5° Des procédures de contrôles comptables, internes ou externes, destinées à s'assurer que les livres, registres et comptes ne sont pas utilisés pour masquer des faits de corruption ou de trafic d'influence. Ces contrôles peuvent être réalisés soit par les services de contrôle comptable et financier propres à la société, soit en ayant recours un auditeur externe à l'occasion de l'accomplissement des audits de certification de comptes prévus à l'article L. 823-9 du code de commerce; 6° Un dispositif de formation destiné aux cadres et aux personnels les plus exposés aux risques de corruption et de trafic d'influence; 7° Un régime disciplinaire permettant de sanctionner les salariés de la société en cas de violation du code de conduite de la société; 8° Un dispositif de contrôle et d'évaluation interne des mesures mises en œuvre. Indépendamment de la responsabilité des personnes mentionnées au I du présent article, la société est également responsable en tant que personne morale en cas de manquement aux obligations prévues au présent II.

for in paragraph 2 are implemented by the parent company, and if they also apply to all subsidiaries[49].

The heart of the provision, however, is paragraph 278, which lists in detail the mandatory anti-corruption measures and procedures that the subjects indicated are called to prepare, and which also for a parallelism with contents of the other regulations examined so far, such as the Bribery Act 2010.

The first measure listed is the adoption of a code of conduct, integrated into the company's internal regulations, which defines and illustrates the different types of behavior to be banned, as they are likely to characterize corruption or influence influences. Secondly, it is required to set up an internal alarm mechanism (internal alert system), in order to allow the collection of employee reports relating to the existence of behaviors or situations contrary to the code of conduct. The third measure to be adopted concerns the mapping of risks (cartographie des risques), in the form of regularly updated documentation, to identify, analyze and classify the exposure risks of the institution to external solicitations, having regard to the sectors of activity and geographical areas in which it operates. Then, as a fourth measure, procedures for evaluating (procédures d'évaluation) the situation of customers, primary suppliers and intermediaries must be considered, in the light of the results of the risk mapping. No less important is the reference, at the fifth point, to accounting procedures, internal or external, to ensure that accounting is not used instrumentally in order

---

[49]See article 17, lett. 3 and 4 of Loi Sapin II: ”(...) -L’Agence française anticorruption contrôle le respect des mesures et procédures mentionnées au II du présent article. Le contrôle est réalisé selon les modalités prévues à l’article 4. Il donne lieu à l’établissement d’un rapport transmis à l’autorité qui a demandé le contrôle et aux représentants de la société contrôlée. Le rapport contient les observations de l’agence sur la qualité du dispositif de prévention et de détection de la corruption mis en place au sein de la soiété contrôlée ainsi que, le cas échéant, des recommandations en vue de l’amélioration des procédures existantes. IV. -En cas de manquement constaté, et après avoir mis la personne concernée en mesure de présenter ses observations, le magistrat qui dirige l’agence peut adresser un avertissement aux représentants de la société. Il peut saisir la commission des sanctions afin que soit enjoint à la société et à ses représentants d’adapter les procédures de conformité internes destinées à la prévention et à la détection des faits de corruption ou de trafic d’influence. Il peut également saisir la commission des sanctions afin que soit infligée une sanction pécuniaire. Dans ce cas, il notifie les griefs à la personne physique mise en cause et, s’agissant d’une personne morale, à son représentant légal (...)”.

to conceal events of corruption or trafficking in influences; it is clarified that these checks can be performed by company's accounting and financial control functions, or by using an external auditor.

The sixth mesure de prévention et de détection envisages the creation of a training system for managers and personnel most exposed to the risks of corruption and traffic of influence, while the seventh measure to be implemented concerns a disciplinary system for sanctioning employees of the company in case of violation of the code of conduct; finally, the eight and last fulfillment referred to refers to a system of internal control and assessment of the measures implemented[50]. Even the entity can therefore answer for the non-observance of the anti-corruption obligations placed primarily for the physical persons and firmly remaining the responsibility of these persons.

The monitoring of compliance with anti-corruption measures introduced by Loi Sapin II is delegated, pursuant to art. 17, lett. 3 and 479, to the French Anti-Corruption Agency[51]. The proceeding is

[50]V. MONGILLO, The Bribery Act 2010, Corporate criminal liability for bribery offences, in A. FIORELLA (a cura di), Corporate criminal liability and compliance programs, op. cit.,

[51]According to art. 17, lett. 5-8 of Loi Sapin II: "(...) V.-La commission des sanctions peut enjoindre à la société et à ses représentants d'adapter les procédures de conformité internes à la société destinées à la prévention et à la détection des faits de corruption ou de trafic d'influence, selon les recommandations qu'elle leur adresse à cette fin, dans un délai qu'elle fixe et qui ne peut excéder trois ans. La commission des sanctions peut prononcer une sanction pécuniaire dont le montant ne peut excéder 200 000 € pour les personnes physiques et un million d'euros pour les personnes morales. Le montant de la sanction pécuniaire prononcée est proportionné à la gravité des manquements constatés et à la situation financière de la personne physique ou morale sanctionnée. La commission des sanctions peut ordonner la publication, la diffusion ou l'affichage de la décision d'injonction ou de sanction pécuniaire ou d'un extrait de celle-ci, selon les modalités qu'elle précise. Les frais sont supportés par la personne physique ou morale sanctionnée. La commission des sanctions statue par décision motivée. Aucune sanction ni injonction ne peut être prononcée sans que la personne concernée ou son représentant ait été entendu ou, à défaut, dûment convoqué. Les sanctions pécuniaires sont versées au Trésor public et recouvrées comme créances de l'Etat étrangères à l'impôt et au domaine. Un décret en Conseil d'Etat précise les conditions de fonctionnement de la commission, notamment les conditions de récusation de ses membres. VI.-L'action de l'Agence française anticorruption se prescrit par trois années révolues à compter du jour où le manquement a été constaté si, dans ce délai, il n'a été fait aucun acte tendant à la

initiated with the drafting of a report sent to the authority requesting the control and to the representatives of the subsidiary, which contains agency's observations on the quality of the system of prevention and detection of corruption implemented within of the company and, where appropriate, recommendations for the improvement of existing procedures. If violations are found, after allowing the interested parties to submit their observations, the magistrate who directs the agency may direct a reference to the representatives of the company.

He can ask the "Committee for Sanctions" (commission des sanctions) from the Anti-Corruption Authority to impose on the company and its representatives i) the adaptation of the procédures de conformité internes aimed at preventing and detecting corruption and influencing traffic and, ii) a pecuniary sanction.

With regard to the content of the penalties in question, it is envisaged that the commission may order the company and its representatives to adapt internal anti-corruption compliance procedures within a period set by it, which may not exceed three years. The amount of the pecuniary sanction cannot exceed 200,000 euros for natural persons and one million euros for legal entities, and must be proportionate to the seriousness of the ascertained violations and to the financial situation of the recipient. Furthermore, it is envisaged that the penalties committee will order the publication of the measures by setting the relative costs against the sanctioned natural or legal person.

On the procedural level, the committee, in the adversarial with the interested parties[52], decides with a motivated and re-credible

---

sanction de ce manquement. VII.-Les recours formés contre les décisions de la commission des sanctions sont des recours de pleine juridiction. VIII.-Le présent article entre en vigueur le premier jour du sixième mois suivant la promulgation de la présente loi (...)".

[52]According to artt. 131-39-2 of Code pénal, introduced in art. 18 of Loi Sapin II: "(...) - I.Lorsque la loi le prévoit à l'encontre d'une personne morale, un délit peut être sanctionné par l'obligation de se soumettre, sous le contrôle de l'Agence française anticorruption, pour une durée maximale de cinq ans, à un programme de mise en conformité destiné à s'assurer de l'existence et de la mise en œuvre en son sein des mesures et procédures définies au II. II.-La peine prévue au I comporte l'obligation de mettre en œuvre les mesures et procédures suivantes: 1° Un code de conduite définissant et illustrant les différents types de comportements à proscrire comme étant susceptibles de caractériser des faits de corruption ou de trafic d'influence; 2° Un dispositif d'alerte interne destiné à permettre le recueil des signalements émanant d'employés et relatifs à l'existence de conduites ou de situations contraires au code

decision; the amount of the pecuniary sanctions is paid into the public funds. The action of the French Anti-Corruption Agency shall be time-barred within three years from the date on which the violation was established. The structure thus outlined relates to the administrative prevention of corruption, but the Loi Sapin II has introduced considerable innovations also in terms of the criminal responsibility of companies. The normative reference is contained in art. 131-39-2 of criminal code, which provides for the possibility that the criminal court imposes and enforces the adoption of the anti-corruption compliance program that is to say, the set of all the measures and procedures provided for by the aforementioned provision as a real penalty, under the monitoring of the anti-corruption Agency, in the event of conviction for crimes of active corruption and trafficking in influence.

The rule specifies that the expenses incurred by the Agence française anticorruption for experts, persons or authorities qualified to assist them in the legal, financial, tax and accounting analysis shall be borne by the convicted legal entity, without the amount of those costs

de conduite de la personne morale; 3° Une cartographie des risques prenant la forme d'une documentation régulièrement actualisée et destinée à identifier, analyser et hiérarchiser les risques d'exposition de la personne morale à des sollicitations externes aux fins de corruption, en fonction notamment des secteurs d'activités et des zones géographiques dans lesquels la personne morale exerce son activité; 4° Des procédures d'évaluation de la situation des clients, fournisseurs de premier rang et intermédiaires au regard de la cartographie des risques; 5° Des procédures de contrôles comptables, internes ou externes, destinées à s'assurer que les livres, registres et comptes ne sont pas utilisés pour masquer des faits de corruption ou de trafic d'influence. Ces contrôles peuvent être réalisés soit par les services de contrôle comptable et financier propres à la personne morale, soit en ayant recours à un auditeur externe à l'occasion de l'accomplissement des audits de certification de comptes prévus à l'article L. 823-9 du code de commerce; 6° Un dispositif de formation destiné aux cadres et aux personnels les plus exposés aux risques de corruption et de trafic d'influence (...)". Art. 17 of Loi Sapin II. 7° Un régime disciplinaire permettant de sanctionner les salariés de la personne morale en cas de violation du code de conduite de la personne morale. – Lorsque le tribunal prononce la peine prévue au I du présent article, les frais occasionnés par le recours par l'Agence française anticorruption à des experts ou à des personnes ou autorités qualifiées pour l'assister dans la réalisation d'analyses juridiques, financières, fiscales et comptables sont supportés par la personne morale condamnée, sans que le montant de ces frais ne puisse excéder le montant de l'amende encourue pour le délit au titre duquel cette peine est prononcée. Un décret en Conseil d'Etat précise les règles déontologiques applicables à ces experts et à ces personnes ou autorités qualifiées (...)".

exceeding amount of the penalty incurred for the offenses that gave rise to the "compliance program".

To protect the anti-corruption obligations imposed by Loi Sapin II, the new hypothesis of abstention ou d'obstacle à l'exécution de la peine de mise en conformité, ex art. 434-43-1 of criminal code, which punishes the organs or legal representatives of the institution sentenced to the penalty de mise en conformité which abstain from taking the necessary measures or hinder the correct execution of the obligations, with the penalty of two years of imprisonment and 50,000 euros fine.

It can be observed that there is no coincidence between the subjective scope outlined by art. 17 of the Loi Sapin II-the subjects obligatorily obliged to the adoption of mesures destinées à prévenir et à détecter les actes de corruption ou de trafic d'influence-and subjects to whom the penalty de mise en conformité can be applied: the latter is applicable, in light of the general criteria of the criminal liability of entities in the French legal system, also to non-recipients of the provisions of art. 17 (for example, because they do not fall within the size limits and turnover referred to therein) that are condemned for corruption. This means that even subjects not exposed to the application of the Loi Sapin II with regard to anti-corruption measures could have an interest in adopting a compliance system, implementing the measures mentioned above. In this sense, the imposition of the program de mise en conformitè is a very important novelty: the threat of penal sanction will contribute to 'harmonizing' anti-corruption obligations between subjects of different sizes and operational areas-since, as seen, the planned measures they are the same, on the public and private side.
The French anti-corruption discipline responds to the needs of contrasting the phenomenon according to a model that might appear, at first glance, unbalanced in terms of obligations rather than incentives: an "imposition" emerges from above, of considerable importance, which concern aspects procedural and internal organization, sanctioned in administrative way and through the instrument of the peine de mise en conformité-also criminal. Institutions are required to adopt anti-corruption measures provided for by the law and, where they do not comply, they arrive at forced taxation through the criminal trial, under the supervision of the Anti-Corruption Agency to take care of its implementation.
In truth, to complete the picture it is still necessary to examine an instrument introduced with the 2016 reform: the reference is to the new

pre-trial agreements, which seem to follow the deferred prosecution agreement Anglo-Saxon. Even the French system is therefore attentive to the premium side, and offers institutions that are willing to collaborate with the authorities a possibility of exit from the "bottlenecks" of criminal proceedings.

7. Procedural Diversion For The Moral Person: The New Instrument Of The Judiciaire D'intérêt Public Convention

One of the reasons for the anti-corruption reform implemented with the Loi Sapin II lay in the need to offer French companies rules that would protect them from responsibilities in foreign jurisdictions, particularly the North American one. An input in this direction is indeed derived from the affair of the French multinational Alcom, which concluded with the US authorities in 2012, an agreement for the payment of over 700 million euros for violations of the American discipline on the subject, the Foreign Corrupt Practices Act (FCPA)[53].

So, to align with the choices of other systems, the French system also opted for the introduction of the convention judiciaire d'intérêt public, provided for in art. 22 of the Loi Sapin II, which inserted the new art. 41-1-285[54]. The instrument consists of a settlement agreement between public prosecutors and companies, for the early termination of criminal proceedings concerning corruption, traffic of influence or money laundering.

The procedure is, albeit with some adjustments linked to the specificities of the French discipline, for many similar profiles to that in relation to the British DPAs[55], since a judicial screening phase is also

[53]A. MIGNON-COLOMBET, La convention judiciaire d'intérêt public: vers une justice de coopération?, in la Semaine Juridique, 51, 2017, pp. 68 ss. C. GHRÉNASSIA, K. EL GOHARY, La convention judiciaire d'intérêt public: en attendant la transaction pénale, in Revue Lamy Droit des Affaires, 125, 2017, 40ss.

[54]C. GHRÉNASSIA, K. EL GOHARY, La convention judiciaire d'intérêt public: en attendant la transaction pénale, op. cit.

[55]According lett. 1 of art. 41-1-2 code of criminal procedure:"(...) I.-Tant que l'action publique n'a pas été mise en mouvement, le procureur de la République peut proposer à une personne morale mise en cause pour un ou plusieurs délits prévus aux articles 433-1, 433-2, 435-3, 435-4, 435-9, 435-10, 445-1, 445-1-1, 445-2 et 445-2-1, à l'avant-dernier alinéa de l'article 434-9 et au deuxième alinéa de l'article 434-9-1 du code pénal, pour le blanchiment des infractions prévues aux articles 1741 et 1743 du

envisaged for the implementation of a convention judiciaire d'intérêt public.

The public prosecutor to propose to a legal person involved in investigations for the crimes in question to be able to access this type of agreement, before the prosecution. Through the convention it is possible to impose the following obligations on the institution: the payment of a fine (amende d'intérêt public) to the public coffers, the amount of which will be set in proportion to the benefits deriving from the deficiencies detected, within the limit of 30% of the average annual turnover, calculated on the last three annual figures known at the date on which the violations were contested; the adoption of a "compliance program", for a maximum of three years, including one or more measures to prevent and detect corruption, to be carried out under the control of the French anti-corruption agency, and supporting the related costs (costs of the procedure and related to legal, financial, accounting

code général des impôts, ainsi que pour des infractions connexes, à l'exclusion de celles prévues aux mêmes articles 1741 et 1743, de conclure une convention judiciaire d'intérêt public imposant une ou plusieurs des obligations suivantes : 1° Verser une amende d'intérêt public au Trésor public. Le montant de cette amende est fixé de manière proportionnée aux avantages tirés des manquements constatés, dans la limite de 30 % du chiffre d'affaires moyen annuel calculé sur les trois derniers chiffres d'affaires annuels connus à la date du constat de ces manquements. Son versement peut être échelonné, selon un échéancier fixé par le procureur de la République, sur une période qui ne peut être supérieure à un an et qui est précisée par la convention; 2° Se soumettre, pour une durée maximale de trois ans et sous le contrôle de l'Agence française anticorruption, à un programme de mise en conformité destiné à s'assurer de l'existence et de la mise en œuvre en son sein des mesures et procédures énumérées au II de l'article 131-39-2 du code pénal. Les frais occasionnés par le recours par l'Agence française anticorruption à des experts ou à des personnes ou autorités qualifiées, pour l'assister dans la réalisation d'analyses juridiques, financières, fiscales et comptables nécessaires à sa mission de contrôle sont supportés par la personne morale mise en cause, dans la limite d'un plafond fixé par la convention; Lorsque la victime est identifiée, et sauf si la personne morale mise en cause justifie de la réparation de son préjudice, la convention prévoit également le montant et les modalités de la réparation des dommages causés par l'infraction dans un délai qui ne peut être supérieur à un an. La victime est informée de la décision du procureur de la République de proposer la conclusion d'une convention judiciaire d'intérêt public à la personne morale mise en cause. Elle transmet au procureur de la République tout élément permettant d'établir la réalité et l'étendue de son préjudice. Les représentants légaux de la personne morale mise en cause demeurent responsables en tant que personnes physiques. Ils sont informés, dès la proposition du procureur de la République, qu'ils peuvent se faire assister d'un avocat avant de donner leur accord à la proposition de convention (...)".

and tax advisors), within the limit of a ceiling established in the agreement; compensation for the damage to the identified victims, who can transmit any element to the public prosecutor to assess the injury suffered. The victims must indeed be informed in advance of the decision of the public prosecutor to propose a convention, so as to be able to adduce elements to support their position[56].

The proposed convention must contain a precise statement of the facts, as well as the related legal classification. If the agreement is reached, the public prosecutor is required to submit the convention to the president of the instance for validation Tribunal. Substantial judicial control over the agreement between the parties is envisaged, similar to the provisions of the deferred British prosecution agreement, and can be observed unlike the US DPAs, where the terms of the agreement are rarely reached disregarded by the courts.

The validation by the judge takes place in a special public hearing, in which both the legal entity and the possible victims are heard. If the President of the Court validates the convention, the legal

[56]Lett. 2 of art. 41-1-2 code of criminal procedure: "(...) II.-Lorsque la personne morale mise en cause donne son accord à la proposition de convention, le procureur de la République saisit par requête le président du tribunal de grande instance aux fins de validation. La proposition de convention est jointe à la requête. La requête contient un exposé précis des faits ainsi que la qualification juridique susceptible de leur être appliquée. Le procureur de la République informe de cette saisine la personne morale mise en cause et, le cas échéant, la victime. Le président du tribunal procède à l'audition, en audience publique, de la personne morale mise en cause et de la victime assistées, le cas échéant, de leur avocat. A l'issue de cette audition, le président du tribunal prend la décision de valider ou non la proposition de convention, en vérifiant le bien-fondé du recours à cette procédure, la régularité de son déroulement, la conformité du montant de l'amende aux limites prévues au 1° du I du présent article et la proportionnalité des mesures prévues aux avantages tirés des manquements. La décision du président du tribunal, qui est notifiée à la personne morale mise en cause et, le cas échéant, à la victime, n'est pas susceptible de recours. Si le président du tribunal rend une ordonnance de validation, la personne morale mise en cause dispose, à compter du jour de la validation, d'un délai de dix jours pour exercer son droit de rétractation. La rétractation est notifiée au procureur de la République par lettre recommandée avec demande d'avis de réception. Si la personne morale mise en cause n'exerce pas ce droit de rétractation, les obligations que la convention comporte sont mises à exécution. Dans le cas contraire, la proposition devient caduque. L'ordonnance de validation n'emporte pas déclaration de culpabilité et n'a ni la nature ni les effets d'un jugement de condamnation (...)".

entity must, within ten days, decide whether or not to exercise his droit de rétractation[57]. In case of failure to validate the agreement by the judge or entity's rétractation, the prosecutor, exercising the criminal prosecution, will not be able to use in the process the declarations made and the documents presented by the institution during the negotiation of the convention judiciaire d'intérêt public. The agreement definitively concluded and validated by the judge does not entail a déclaration de culpabilité by the juridical person and is not equivalent to a judgment of condemnation: an attempt was thus made to incentivize the institution to sign the agreement, shielding it from constitutional reputational damages to an admission of guilt.

During the execution of the agreement the prescription of the prosecution remains suspended: if the juridical person does not respect the terms of the convention, the public prosecutor will exercise the

[57]"(...) la convention judiciaire d'intérêt public n'est pas inscrite au bulletin n° 1 du casier judiciaire. Elle fait l'objet d'un communiqué de presse du procureur de la République. L'ordonnance de validation, le montant de l'amende d'intérêt public et la convention sont publiés sur le site internet de l'Agence française anticorruption. La victime peut, au vu de l'ordonnance de validation, demander le recouvrement des dommages et intérêts que la personne morale s'est engagée à lui verser suivant la procédure d'injonction de payer, conformément aux règles prévues par le code de procédure civile (...)". See also lett. 3 of art. 41-1-2 code of criminal procedure: "III.- Si le président du tribunal ne valide pas la proposition de convention, si la personne morale mise en cause décide d'exercer son droit de rétractation ou si, dans le délai prévu par la convention, la personne morale mise en cause ne justifie pas de l'exécution intégrale des obligations prévues, le procureur de la République met en mouvement l'action publique, sauf élément nouveau. Si la convention a été conclue dans le cadre d'une information judiciaire, le dernier alinéa de l'article 180-2 est applicable. En cas de poursuites et de condamnation, il est tenu compte, s'il y a lieu, de l'exécution partielle des obligations prévues par la convention. Si le président du tribunal ne valide pas la proposition de convention ou si la personne morale exerce son droit de rétractation, le procureur de la République ne peut faire état devant la juridiction d'instruction ou de jugement des déclarations faites ou des documents remis par la personne morale au cours de la procédure prévue au présent article. A peine de nullité, le procureur de la République notifie à la personne morale mise en cause l'interruption de l'exécution de la convention lorsque cette personne ne justifie pas de l'exécution intégrale des obligations prévues. Cette décision prend effet immédiatement. Le cas échéant, elle entraîne de plein droit la restitution de l'amende d'intérêt public versée au Trésor public prévue au 1° du I. Elle n'entraîne cependant pas la restitution des éventuels frais supportés par la personne morale et occasionnés par le recours par l'Agence française anticorruption à des experts ou à des personnes ou autorités qualifiées pour l'assister dans la réalisation d'analyses juridiques, financières, fiscales et comptables nécessaires à sa mission de contrôle (...)".

penal action; on the contrary, the compliant execution by the collective subject will extinguish the action[58]. The instrument in question concerns only legal persons and cannot be considered in relation to natural persons. Any suspensive effects do not extend, therefore, to individual authors: pursuant to sub-par. 1 of the provision, "les représentants légaux de la personne morale en en demeurent responsables en tant que personnes physiques"[59].

In the literature it was found that "(...) the legal framework of the new settlement instrument appears to be deficient in terms of its determinability, providing no indication of the circumstances that may lead the public prosecutor to propose the convention. Any decision in this regard is therefore left to the discretion of the ministère public (...)"[60].

However, the institute has been in force for a few months and it will be necessary to wait for the first results to be able to test its functionality, also in order to better highlight similarity profiles and differences with the homologous Anglo-Saxon derivation instruments. In any case, the publication on the Agence française anticorruption website of the first public interest court agreement signed with HSBC Private Bank (Suisse) SA[61] on money laundering, which may represent a reference point for companies called for to confront, in the near future, with the new tool.

In conclusion, the new anti-corruption structure in France is still in the initial phase of its development. In October 2017, the Agency was

[58]See lett. 4 and 5 of art. 41-1-2 code of criminal procedure: “(...) IV.-La prescription de l’action publique est suspendue durant l’exécution de la convention. L’exécution des obligations prévues par la convention éteint l’action publique. Elle ne fait cependant pas échec au droit des personnes ayant subi un préjudice du fait des manquements constatés, sauf l’Etat, de poursuivre la réparation de leur préjudice devant la juridiction civile. Le président du tribunal de grande instance peut désigner, aux fins de validation de la convention judiciaire d’intérêt public, tout juge du tribunal. V.-Les modalités d’application du présent article sont fixées par décret en Conseil d’Etat (...)”.

[59]A.M. NEIRA, La efectividad de los criminal compliance programs como objeto de prueba en el proceso penal, in Política Criminal, 11, 2016, pp. 467ss.

[60]Convention judiciaire d’intérêt public CJIP conclue par le Parquet national financier avec la société HSBC Private Bank (Suisse) SA, 30 October 2017.

[61]Décret n° 2017-329 du 14 mars 2017 relatif à l’Agence française anticorruption e Arrêté du 14 mars 2017 relatif à l’organisation de l’Agence française anticorruption.

operational a few months[62]announced that it had launched a public consultation on draft recommendations on the prevention and detection of "breaches of duty of probity" (manquements au devir de probité: corruption, trafic d 'influence, concussion, prise illégale d'intérêt, détournement de fonds publics, favoritisme). The purpose of the consultation is to allow all interested parties to bring any proposals to the attention of the Agency, so as to arrive at the drafting of definitive recommendations, adapted to the nature of the risks and the professional environment of the actors.

The first phase saw the publication on the AFA website of some draft recommendations, concerning the elaboration of a risk mapping document (l'élaboration d'une cartographie des risques), of an anti-corruption conduct code (the in place of a code de conduite anticorruption), of an internal system of signals (mise en place d'un dispositif d'alerte interne). On 16 November 2017, the Agency, opening the further phase of the consultation, published online a second group of recommendations concerning the following measures: the top-level committment in the fight against corruption (the engagement de l'instance directe dans la prévention et de détection de faits de corruption); the training system against corruption risks (le dispositif de formation aux risques de corruption); the procedures for the evaluation of third parties (les procédures d'evaluation des tiers); accounting control procedures to prevent and detect corruption (les procédures de contrôles comptables, outils de prévention et de détection de la corruption); the system of internal controls (le dispositif de contrôle et d'évaluation interne); clarifications for public actors (les précisions à l'attention des acteurs publics); clarifications for actors with limited resources (les précisions à l'attention des acteurs disposant de faibles ressources).

The public consultation is therefore under way and will close on December 16th. According to the announced timescales, all recommendations will be the subject of a notice published in the

---

[62]With regard to the sanctions regime applicable to the collective subject, they are contained in art. 33, lett. 7, criminal code. The articles 52 and 53 of the code regulate the penalty of the fine; Article. 66-bis criminal code establishes the criteria for measuring the sentences in question, as amended by the Ley Orgánica no. 1 of 2015; Article. 130, lett. 2, of criminal code states that the transformation, merger, incorporation or division of the legal person does not extinguish its criminal responsibility.

Official Journal and on the Agency's website before the end of the year.

8. Modelos De Organización Y Gestión In Spain: Footsteps Of The Italian Discipline

The examination of the legal systems taken into consideration in our survey ends with a focus on the Spanish discipline, in relation to the profiles of interest on the anti-corruption compliance program. The Spanish system of corporate liability is the most recent among those illustrated: the overcoming of the principle societas delinquere non potest took place only in 2010, with the Ley Orgánica n. 5, by means of which a form of criminal liability was introduced against the collective subjects pursuant to art. 31-bis of the Italian Civil Code, capable of involving, for the offenses expressly provided for, the application of fines and disqualification sentences[63]. The legislator then re-started the discipline structure again and significantly in 2015, with the Ley Orgánica n. 199, for which currently the characters of the responsibility of the personas juridicas are no longer enclosed in a single provision, being indeed contemplated in the articles of the Código penal from 31-bis to 31-quinquies.

Unlike the British and French experiences, the Spanish system does not have an ad hoc anti-corruption discipline, contained in a separate body of legislation; the instruments of contrast remain entrusted to the criminal arsenal and the aforementioned codic predictions. In consideration of the fact that the Spanish model of liability of the legal person has unitary character the criteria of imputation are the same for all the predicate offenses, as already in the Italian regulation of Decree 231, the contents of the compliance program have a general value. This means that also in the Spanish legal system, as in the Italian context, the collective subjects are called to adopt a single organizational model able to prevent the different predicate crises which, due to the operative characteristics of the entity, its dimensions, sector of activity, fall within the risk-crime area and may be committed by its members. In this case and as we will say better in a moment anti-corruption protocols will have to be elaborated starting from the minimum characteristics

[63] J. GIMENO BEVIÁ, La apuesta por el principio de oportunidad y los programas de compliance en el proceso penal de las personas jurídicas, in Diario La Ley, 2014, n. 8437, 2014. A.M. NEIRA, La efectividad de los criminal compliance programs como objeto de prueba en el proceso penal, op. cit., pp. 467ss.

provided for in the drafting of the model, to be also appropriately integrated in the light of international guidelines and best practices on the subject, of which we have repeatedly referred in the course of work. Corruption crimes in the private (articles 286ss.) And public sectors (articles 419ss.) of the Spanish criminal code are among the predicate offenses of the liability of legal persons.

As already noted[64], one of the main reasons for the reform[65] of 2015 concerned the fact that, in the previous structure, the model could only have the mitigating effect, if adopted after the commission of the offense. The Spanish legislator has reversed the route and today the centrality of the organizational model already emerges on the level of imputation. The responsibility of the company derives from the commission for the benefit of one of the predicate offenses committed by its agents: in this sense, the adoption and effective implementation of a model of organization and management before the commission of the offense can be effective exempt, and also the Spanish law is differently modulated for this purpose, distinguishing on the basis of the person who has committed the predicate crime.

In order for the liability of the collective subject to be configurable depending on the fact of an apex[66], it is required that the

[64]Nel Preámbulo, III, alla Ley Orgánica n. 1 del 2015, which is affirmed that: "(...) [l]a reforma lleva a cabo una mejora técnica en la regulación de la responsabilidad penal de las personas jurídicas (...), con la finalidad de delimitar adecuadamente el contenido del 'debido control', cuyo quebrantamiento permite fundamentar su responsabilidad penal. Con ello se pone fin a las dudas interpretativas que había planteado la anterior regulación, que desde algunos sectores había sido interpretada como un régimen de responsabilidad vicarial, y se asumen ciertas recomendaciones que en ese sentido habían sido realizadas por algunas organizaciones internacionales (...)". S. BACIGALPO SAGGESE, B.J. FEIJOO SÁNCHEZ, J.I. ECHANO BASALDUA, Estudios de derecho penal. Homenaje al Professor Miguel Bajo, ed. Universitaria Ramòn Areces, Madrid, 2018, pp. 52ss.

[65]on this point the interpretation of the Spanish General Attorney: Fiscalía General del Estado, Circular 1/2016, Sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código penal efectuada por Ley Orgánica 1/2015, pp. 17ss. C. CUELLO, B. JOACQUIN Y MAPELLI CALFARENA, Curso de derecho penale, ed. Tecnos, 2015.

[66]According to art. 31-bis, par. 1, lett. a): "(...) De los delitos cometidos en nombre o por cuenta de las mismas, y en su beneficio directo o indirecto, por sus representantes legales o por aquellos que actuando individualmente o como integrantes de un órgano de la persona jurídica, están autorizados para tomar decisiones en nombre de la persona jurídica u ostentan facultades de organización y control dentro de la misma

offense be committed by a legal representative or by who, individually or as a member of an institution body, is authorized to take decisions for account of this, or have powers of organization and control within it[67]. In this hypothesis the fate of the entity depends on the proof of a series of articulated requirements, exactly borrowed from those provided for by art. 6 of Decree 231. Like the Italian law, the legal entity may be exempt from liability (the person juridical quedará exenta de responsabilidad) if it has adopted, before delictum, an appropriate organizational model, and if the other conditions required by the paragraph are satisfied 2 of the art. 31-bis of criminal code.

The law states that it will also be necessary to demonstrate that the supervision of the functioning of the models has been entrusted to a body with independent powers of initiative and control, or to the institutional body that oversees the effectiveness of the internal controls of the institution; that the organizational models have been fraudulently (fraudulently) evaded by the summits; that there has not been omitted or insufficient supervision by the body to which the supervision of the models is entrusted. Therefore, these are cumulative requirements which if not fully attested can in any case be valued in a mitigating way (a los efectos de atenuación de la pena); the same value is recognized, however, also in the hypothesis of the crime committed by the subject.

The letter of Decree 231 is also reiterated with regard to the possibility that, in small institutions, the supervisory functions are assumed by the administrative body; however, with respect to the Italian legislation, the Spanish legislator takes care to define "las personas juridico de pequeñas dimensiones", identifying them with those required by law to draw up the financial statements in abbreviated form[68].

(...)". O. HARRO, Manual de derecho penal, ed. Atelier, Madrid, 2017.

[67] Art. 31-bis, par. 2 n. 1 defines i compliance program as "modelos de organización y gestión que incluyen las medidas de vigilancia y control idóneas para prevenir delitos de la misma naturaleza o para reducir de forma significativa el riesgo de su comisión".

[68] "(...) la regulación de la responsabilidad penal de las personas jurídicas en España quedará transformada en un Frankenstein jurídico […] [e]l Proyecto del Gobierno se ha limitado a copiar literalmente (…) varios apartados de los artículos 6 y 7 of the italian legislative decree n. 231/2001 (...)". For more details see: J. DOPICO GOMEZ-ALLER, Análisis crítico del nuevo régimen de responsabilidad penal de las personas jurídicas, según el Proyecto de Reforma de 2013, in J.R.A. BOIX, F. J. ÁLVAREZ

Also in the Iberian mechanism it is crucial, then, to identify the contents of the appropriate organizational model, as a tool to identify and detail the parameters of a virtuous preventive organization. In this regard, it is necessary to look at paragraph 5 of art. 31-bis of criminal code mentioned several times, where the organizational model is required: identify the activities in which the crimes to be prevented can be committed (mapping of risks); it foresees protocols or procedures that concretize the process of formation of the will of the juridical person, of adoption and execution of its decisions; individual methods of managing financial resources to prevent the commission of crimes to be prevented; foresees the obligation to inform about the possible risks and violations of the model the body responsible for supervising the functioning and observance of the same; establish a disciplinary system suitable to punish adequately the violation of the measures indicated in the model; provide for a periodic check of the compliance program and its possible changes where there are significant violations of the provisions contained therein, or when changes occur in the organization, in the control structure or in the activities carried out that require revision.

The Spanish legal system has even imported the condition, which proved to be very problematic in the Italian experience, of the fraudulent evasion of the model in the case of crimes of the apex; in both disciplines there is also a body with supervisory and supervision tasks. With regard to this second profile, however, it has been critically observed in doctrine that the figure of the supervisory body is often assimilated, in Spanish practice, to the different figure of the compliance officer, with an overlapping of questionable functions capable of distorting the role to it is assigned in the economy of the discipline of institutions[69].

It should also be noted that it did not provide guidelines prepared by trade associations, instruments which in the Italian experience

---

GARCÍA (a cura di), El Informe de la Sección de Derechos Humanos del Colegio de Abogados de Madrid, sobre los proyectos de reforma del Código Penal, Ley de Seguridad Privada y Ley del Poder Judicial (Jurisdicción Universal), ed, INAP, Valencia, 2014, pp. 18. In the same spirit see also: A. NIETO MARTÍN, J.A. LASCURAÍN, Urgente: dos órganos de cumplimiento en las empresas, in Almacén de derecho, 3 June 2016.

[69] A. NIETO MARTÍN, J.A. LASCURAÍN, Urgente: dos órganos de cumplimiento en las empresas, op. cit.,

should have constituted a reference point for the development of precautions[70]; moreover, in Spain there are no "special" organizational models, with scope of application limited to certain sectors. Furthermore, unlike art. 7 of Decree 231 that for the offenses committed by subordinates admits the adoption of a simplified model, a similar possibility is not mentioned in the text of Spanish law.

In terms of protocols, the introduction of new certification mechanisms appears to be of great interest, similarly to what was previously reported with respect to ISO 37001115. In May 2017 the Spanish standardization body (Asociación española de normación) actually published the technical standard UNE 19601: 2017116, which aims to define the requirements and guidelines for the creation of a criminal compliance management system in compliance with the provisions of the Código penal and international best practices, which can be certified by part of a third institution. Like the international ISO standards, they are not considered binding rules even in the Spanish legal system, limiting themselves to defining technical reference standards. The Spanish standard, formulated according to HLS (High-Level Structure) rules, also takes several aspects of the ISO 37001 standard in particular, with reference to the due diligence processes for members of the organization and business partners[71].

Without wanting to go back to the detailed profiles of ISO certifications, already under consideration, it is interesting to note here that UNE 19601 has been elaborated taking into account specifically the requirements indicated in art. 31-bis, co. 5, of criminal code on the subject of the contents of the organizational model, and is therefore tailor-made to the Spanish system. Furthermore, the standard in

[70]N. J. DE LA MATA, ¿Qué cabe esperar de la Norma UNE 19601 sobre sistemas de gestión de compliance penal? in Almacén de derecho, 13 June 2017.

[71]The Spanish doctrine did not fail to show appreciation for the integrated strategy adopted in Italy, highlighting that the 2012 law “(...) refleja de un modo especialmente claro la idea de que, a los efectos de prevenir la corrupción, la administración pude concebirse como una gran empresa y que no tiene por qué existir una gran distancia entre el cumplimiento normativo empresarial y el público (...)”. See in argument: A. NIETO MARTÍN, De la ètica pública al “public compliance”: sobre la prevención de la corrupción en las administraciones públicas, in A. NIETO MARTÍN, M. MAROTO CALATAYUD (a cura di), Public compliance. Prevención de la corrupción en administraciones públicas y partidos políticos, ed. De Castilla-la Mancha, Valencia, 2014, pp. 20ss.

question aims to build a criminal compliance system: this means that it does not target a specific category of offenses, but based on established standards and guidelines, it allows to implement wide-ranging prevention measures, as well as to strengthen-presumably the keeping of the compliance program in case of any judicial scrutiny.

For our purposes, the significance of this rule is to be found in the fact that, in a regulatory context in which a caution is not positivized in the specific anti-corruption context unlike what happens, with different intensity, in the United Kingdom and in France a more precise identification of the procedures to be adopted for the prevention of the phenomenon may constitute a step forward in the dissemination of certain standards (also the UNE 19601 standard incorporates and re-elaborates the international best practices on the subject). In the absence of clearer legislative indications on the contents of organizational models in a manner not dissimilar to what happens in Italy certifications of this type, far from being able to represent the answer to the problem, can nevertheless contribute to ensuring greater homogenization of the prevention systems of the corruption adopted within organizations.

9. Pictures Of Public Compliance In The Spanish System

The Spanish reality is characterized, as seen, by the provision of anti-corruption measures that impose on the private sector companies self-organization obligations and the preparation of considerable and burdensome internal procedures and controls-organizational models, supervisory body, periodic monitoring systems, along the lines of what is foreseen in Italy by Decree 231.

Parallelism with the Italian system stops at the cumulation programs planned in the private sphere, while there is no public regulation that comes close to the provisions of the Italian anti-corruption law, nor the presence of an independent body similar to ANAC. The doctrine, moreover, has already signaled for some time how the choice of the Spanish legislator to impose obligations on companies and not on the Public Administrations present paradoxical aspects: "(...) ¿y qué ocurre con las administraciones públicas?, ¿no sería razonable que la ley les impusiera obligaciones semejantes?, ¿qué contarán con responsables de cumplimiento, con códigos éticos, canales de denuncias, políticas en las que se detallen qué pueden y no pueden hacer los funcionarios públicos? (...)”[72].

The Spanish legislator seems to have relied more on the repressive component: the observation is not surprising, if it is true that, as already noted, the situation presented itself in the same terms also in the Italian context before the 2012 reform[73]; and moreover, even the British set-up[74] leverage mainly the criminal response, since it does not have either an apparatus of administrative measures similar to the one adopted in Italy, nor an authority that emphasizes the anti-corruption powers.

However, if in the English legal system the phenomenon has no systemic dimension and the United Kingdom appears to have a good ranking in the last annual ranking of international transparency, different is the speech related to Spain. Since 2012, the country has lost several positions in the aforementioned classification, and there are numerous public corruption events that have come to the fore in recent years[75]; Spain has also received repeated recommendations to implement its anti-corruption structure (as well as by non-governmental organizations that deal with the issue also) from the main supranational bodies in the monitoring.

At present, and only to illustrate, the Spanish system does not have legislation on the protection of whistle blowers, and for a long time it was one of the few European countries not to have a dedicated regulation on transparency. The latter lacuna has remedied the adoption, in 2013, of the Ley de Transparencia[76], which introduced, among other

[72] A. NIETO MARTÍN, La privatización de la lucha contra la corrupción, in A. NIETO MARTÍN, L. ARROYO ZAPATERO (a cura di), El derecho penal economico en la era compliance, ed. Tirant, Valencia, 2013, pp. 209ss

[73] TRANSPARENCY INTERNATIONAL, Spain Needs Urgently to Deal With Systemic Corruption, 18 May 2017

[74] GRECO, Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report: Spain, 2013, pp. 44ss). And the next Report of 2016: GRECO concludes that none of the eleven recommendations contained in the Fourth Round Evaluation Report has been implemented satisfactorily or dealt with in a satisfactory manner by Spain”.

[75] Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno.

[76] A. NIETO MARTÍN, L. ARROYO ZAPATERO (a cura di), El derecho penal economico en la era compliance, op. cit.

things, rules on the publication of information and access, promoting the development of web portals to allow an approach between institutions and citizens.

In this context, it can not be said that the Spanish legal system does not present forecasts of interest from the point of view of preventing crimes in organizations, even on the public side. These are not "systematic" provisions, ie integrated into a broader strategy like those introduced by ANAC, to remain in the Italian example and yet, from the perspective of defining a public compliance[77], they seem very significant. The reference is, respectively, to the criminal responsibility of political parties and trade unions and to the recent implementation of European directives on public procurement.

The aspect to be emphasized regards the circumstance that, at the time of the introduction of the responsibility of the entities in 2010, political parties and trade unions appeared on the list of subjects excluded from the scope of application of the discipline. A 2012 law, on the other hand, has extended liability to these categories[78] and this is the current situation even today, following the 2015 reform as better clarified by the aforementioned Circular no.1 of the Fiscalía General del Estado of 2016[79].

Therefore, even if subject to the same criminal liability regime applicable to any other society, political parties and trade unions[80] adopt organizational and management models that take into account their special characteristics, inspired by the principles of transparency, citizen participation and internal democracy. In this regard, the Ley Orgánica n. 6 of 2002 concerning "Partidos Políticos" has been modified[81] with the addition of art. 9-bis, which expressly obliges the

---

[77]Ley Orgánica 7/2012, de 27 de diciembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal en materia de transparencia y lucha contra el fraude fiscal y en la Seguridad Social.

[78]Circular 1/2016, Sobre la responsabilidad penal de las personas jurídicas, cit., 30ss.

[79]J.M. ZUGALDÍA ESPINAR, La responsabilidad criminal de los partidos políticos y los sindicatos, in Revista Derecho Penal y Criminología, 12, 2014, pp. 365ss.

[80]According to the modification of Ley Orgánica 3/2015, de 30 de marzo, de control de la actividad económico-financiera de los Partidos Políticos, porla que se modifican la Ley Orgánica 8/2007, de 4 de julio, sobre financiación de los Partidos Políticos, la Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos y la Ley Orgánica 2/1982, de 12 de mayo, del Tribunal de Cuentas.

[81]See art. 9-bis (Prevención y supervisión) of the law on political parties: “Los partidos

parties to adopt in their internal regulations a system of prevention of illicit behavior and vigilance, for the purposes set forth in art. 31-bis of the criminal code. More clearly, political parties are required to adopt a compliance program to prevent, literally, 'conducted in contrast with the legal system'[82]. In the risk assessment activities of these subjects, certainly a prominent role is reserved for the phenomenon of illicit financing, in accordance with the provisions of law no. 8 of 2007[83].

The second theme to be mentioned concerns the recent adoption of Ley n. 9 of 2017 concerning the "Contratos del Sector Público", through which the directives of the European Parliament and of the Council 2014/23/EU[84] and 2014/24/EU of 26 February 2014[85]. For

políticos deberán adoptar en sus normas internas un sistema de prevención de conductas contrarias al ordenamiento jurídico y de supervisión, a los efectos previstos en el artículo 31 bis del Código Penal".

[82]Ley Orgánica 8/2007, de 4 de julio, sobre financiación de los partidos políticos.

[83]Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014, entry in force from 9 March 2018.

[84]Directive 2014/23/EU of the European Parliament and of the Council of 2 February 2014 on the award of concession contracts Text with EEA relevance, OJ L 94, 28.3.2014, p. 1–64.

[85]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 Text with EEA relevance, OJ L 94, 28.3.2014, p. 65–242.

See art. 71 of law n. 9/2017, relating to the offencesfor which they take le Prohibiciones de contratar: "(...) 1. No podrán contratar con las entidades previstas en el artículo 3 de la presente Ley con los efectos establecidos en el artículo 73, las personas en quienes concurra alguna de las siguientes circunstancias: Haber sido condenadas mediante sentencia firme por delitos de terrorismo, constitución o integración de una organización o grupo criminal, asociación ilícita, financiación ilegal de los partidos políticos, trata de seres humanos, corrupción en los negocios, tráfico de influencias, cohecho, fraudes, delitos contra la Hacienda Pública y la Seguridad Social, delitos contra los derechos de los trabajadores, prevaricación, malversación, negociaciones prohibidas a los funcionarios, blanqueo de capitales, delitos relativos a la ordenación del territorio y el urbanismo, la protección del patrimonio histórico y el medio ambiente, o a la pena de inhabilitación especial para el ejercicio de profesión, oficio, industria o comercio. La prohibición de contratar alcanzará a las personas jurídicas que sean declaradas penalmente responsables, y a aquellas cuyos administradores o representantes, lo sean de hecho o de derecho, vigente su cargo o representación y hasta su cese, se encontraran en la situación mencionada en este apartado (...)".

what concerns us, art. 71[86] of the law in question states that is forbidden to contract with public subjects as defined by art. 3 of the same law to (physical and) legal persons who have been definitively convicted for a large catalog of crimes, including corruption. The ban is triggered not only in the event of conviction for the specified offenses, but also for serious administrative offenses; moreover, it also extends to organizations whose administrators have been definitively convicted.

The aspect of greatest interest concerns the possibility, provided for by art. 72, revoking the ban on contracting when the company pays the sanction and adopts appropriate technical, organizational and personal measures to avoid the commission of future infringements: in short, the implementation of appropriate organizational protocols may also have the crucial effect of allowing the private entity to propose itself again as interlocutor of public bodies, relaunching with them the commercial relationships interrupted as a result of criminal convictions or serious administrative violations.

The examples shown underline how the chapter of criminal compliance plays an increasingly important role in the Spanish context, insofar as it, alongside private subjects, also involves public subjects. The characters of such an evolution appear to be in the definition phase, as they are recent provisions, and can therefore be object of an appropriate evaluation only in the near future; but the road has clearly been traced.

---

[86]See art. 72, par. 5 of Ley 9/2017 de Contratos del Sector Público: "(...) no procederá, sin embargo, declarar la prohibición de contratar cuando, en sede del trámite de audiencia del procedimiento correspondiente, la persona incursa en la causa de prohibición acredite el pago o compromiso de pago de las multas e indemnizaciones fijadas por sentencia o resolución administrativa de las que derive la causa de prohibición de contratar, siempre y cuando las citadas personas hayan sido declaradas responsables del pago de la misma en la citada sentencia o resolución, y la adopción de medidas técnicas, organizativas y de personal apropiadas para evitar la comisión de futuras infracciones administrativas, entre las que quedará incluido el acogerse al programa de clemencia en materia de falseamiento de la competencia. Este párrafo no resultará de aplicación cuando resulte aplicable la causa de prohibición de contratar a que se refiere el artículo 71.1, letra a). La prohibición de contratar, así declarada, podrá ser revisada en cualquier momento de su vigencia, cuando la persona que haya sido declarada en situación de prohibición de contratar acredite el cumplimiento de los extremos a que se refiere el párrafo anterior. El órgano competente para conocer de la citada revisión será el mismo que dictó la resolución de declaración de prohibición de contratar (...)".

Concluding Remarks

The analysis conducted so far offers a precise response to the working hypothesis from which the steps were taken: a trend aimed at enhancing "subjectivist" criteria in the assignment of responsibility to the institution is evident on a European scale, and, in particular, to attribute relevance to the "disorganized" action of the collective subject, sub-species of non-predisposition of protocols and precautions aimed at preventing the commission of crimes and, therefore, of organizational defect.

This is confirmed by the legislative evolution that characterized the different legal experiences taken into consideration, particularly in the field of combating corruption. The reflection unfolded along three lines: the recognition of the criteria of subjective imputation of the corporate criminal liability in civil law (France and Spain) and common law (England); the analysis of the discipline looking at the links between the guilt of the institution and organizational models, compared to the three-year anti-corruption plans in the public sector; the examination of the anti-corruption regulations adopted in the foreign systems mentioned, with reference to the role of the compliance programs and to the functionality of process diversion institutes.

In the English system, where the corporate criminal liability is of long tradition, a (partial) transition is taking place, from vicarious forms of responsibility or based on the identification principle-criteria valid for the generality of the case-towards a type of reproach other, in the context of corporate disciplines based on corporate offense, that is crimes specific to corporations. The example of greater significance is the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007): in the hypotheses of "corporate homicide" the institution is liable for a management failure, a lack of organization that bases and justifies the punishment of the legal person. It is certainly not coincidental that the new ascriptive criterion has been coined in the field of health and safety at work, where the intrinsic limits of the identification theory have been laid bare.

The Bribery Act 2010 (BA 2010) also relies on a corporate offense, outlined by Section 7 (failure to prevent bribery), but with an option that is in part different from that adopted by CMCHA 2007. In response to the difficulties identified in the identification point of the senior management in that discipline, the BA 2010 extends the audience of the subjects able to commit the responsibility of the entity to the subordinates and, even in the face of a liability that remains of an objective type-the doctrine leads to the provision of Section 7 to the list of hybrid offense-introduces compliance program innovation, which can be invoked as a defense.

The "adequate procedures" referred to in this provision do not play a role in the guilty nature of the commercial organization, but they assume importance as a cause for the exclusion of liability; the serious violation of a duty of due diligence due to an organizational gap determines the responsibility of the entity, and only if the latter is able to demonstrate that adequate measures have been implemented can avoid the imposition of responsibility. The new failure to prevent model is today the subject of reflection on the part of the doctrine and the legislator itself, if it is true that it has recently been extended to other crimes (in the matter of tax evasion) and that there is discussion about the possibility of its general application to crimes of an economic nature, by introducing a hypothesis of corporate failure to prevent economic crimes.

A partly similar path emerges from the examination of the French system. Even the model beyond the Alps is based on objective criteria of imputation (it speaks indeed of responsibility "rebound") in relation to the moral person. Already on the level of jurisprudential interpretation, the rigidity of this approach had been tempered by some readings aimed at seeking subjective coefficients of ascription in any case not required by the legislation so that the entity could be held criminally responsible. The courts have sometimes identified the criterion of the "pour compte" with the organizational defect (in the wrong hypotheses, with the corporate policy), even without regard to the identification of the offender, considered indispensable in the French scheme for identification. To this it is added that in the context of this mechanism based on ricochet the legislator has introduced a form of exclusive responsibility of the entity, in the case of faute simple in cases of indirect causality: here it is done without the cumulus and to result only the legal person is responsible.

In a framework, therefore, much more articulated than it could in the first instance appear, the turning point implemented with the Loi Sapin II was finally engaged. The general imputation criteria have not changed, but for the first time, the adoption of a compliance program on anti-corruption matters, charged to public and private bodies, which have the dimensional and turnover required by law. The novelty has great systematic value, since it introduces the theme of the organizational model-never taken into consideration by the French legislator in an informed context of a derivative responsibility. It will not be overlooked that even in this case, as in the Bribery Act 2010, organizational models have made space on the ground for combating corruption. In the French experience, indeed, the model "changes skin" and can take on the appearance of a sanction (program de mise en conformité) of an injunction, so that, in the case of convictions for corruption and trafficking in influences, the "good organization" can be imposed by the judge.

Also of interest is the establishment of an anti-corruption Agency (Agence française anticorruption-AFA) with significant regulatory powers and sanctions, which in many respects recalls the ANAC established in Italy in 2012. We are sure in the presence of a "newborn" anti-corruption apparatus, to assess which we must await the first developments in practice, but it seems to us that we are dealing perhaps more than all the other experiences of a clear example of the ongoing ferment.

The Spanish legal system, on the other hand, has beaten a path that is more similar to the Italian one, although the responsibility of the institutions has been introduced at a later date with respect to the issuing of Decree 231, and is expressly classified as criminal. It has been repeatedly noted that the Spanish discipline (as a whole and, as far as we are concerned) in terms of imputation has essentially borrowed the contents in which it is therefore largely overlapping. In the first phase of life of art. 31-bis of criminal code the law had been interpreted as a vicarious ascritical mechanism; the criticisms raised in doctrine have then led to the 2015 reform, and the subjective side of the imputation is currently also valued. Similarly to the provisions of the "231 models", the modelos de organización y gestión can also influence, depending on the case, the/or the quantum of liability.

Parallelism with Italian discipline is also valid in relation to the fact that responsibility is based on the principle of specialty: it is only provided for certain predicate crimes and the models have, in the system, a generalized value, in the sense of being been introduced by a provision of criminal code not by sector legislation and must therefore contain protocols able to avoid the commission of all the predicate crimes which, on the basis of the characteristics and activities of the single entity, fall within the risk-crime, so as to be able to act as an exempt in relation to the culpabilidad de empresa.

The recognition of the ascending criteria reveals the relevance of the organizational gap as a criterion of imputation of responsibility to the institution. In the United Kingdom and France it gains ground compared to other models, if not recessive, certainly downsized, or forced to a "forced coexistence" with it; in Spain and Italy it is from the origins, and continues to be, the criterion "prince" of imputation. Parallel to the emergence of the organizational deficit, we then highlighted that the function of the compliance program becomes central, as an instrument that the institution has to 'attest' to having adequately equipped to prevent the commission of crimes by its members.

On this ground the second line of investigation develops: moving from the provisions of the Decree reserved to the subjective imputation, the function of the guilt of organization-understanding has been emphasized as the necessity of a direct coefficient "referable" to the entity, on the subjective plan, of the unlawful committed by the physical person- in the overall ascription mechanism. The existence of an organizational fault is certainly to be considered a constitutive element in the de facto hypothesis of the subordinate, ex art. 7 of the Decree; It is decidedly more difficult to reach the same conclusion in the event of a crime committed by the apical. However, both the original intentions of the legislator, emerging from the Report to the Decree; is the necessary application of penalties, which require to harmonize the discipline of art. 6 with the principle of guilt; and finally, the clear indications of the jurisprudence, which excludes the existence of an inversion of the burden of proof against the institution, must also lead us to reread the prediction in question in subjectivist terms. It is undeniable that the scheme has a "mixed" character, and that therefore also rests on the principle of identification between apical and membership entities; otherwise, it would not have been necessary to foresee the (problematic) requirement of fraudulent avoidance. The reading that today the most enlightened jurisprudence gives to the criteria of ascribing responsibility to the top requires that the regulatory system be remedied, in the sense at least to leave immediately behind the cumbersome mechanism outlined by art. 6, lett. 2 of the Decree, which has played a part in undermining the confidence of companies in the real fruitfulness of the logic of "collaboration in prevention" that should be the real backbone of the regulatory system.

To this is added the much debated theme of the poverty of the contents of the model as prefigured by the legislator who, for its part, has contributed to make a judera the judicial recognition of models suitability. The solution, we seem to have widely highlighted, cannot be sought in prior certification; in the meantime, it seems to have some chance of practicability only in regulatory areas characterized by a capillary positive discipline. At the root, however, remains the fact that does not convince the idea of "privatizing" and "crystallizing" in advance the assessment of suitability. To be denied would be the same ratio of the Decree: that is, that of a constant monitoring of the processes and areas of risk by the same recipient of the precept, also called to 'self-regulate' the precautions and put in place the appropriate corrective, in the direction of conducting its business in compliance with the rules, in a context of legality, placing itself as the first actor of this 'virtuous circle'. And all this without even returning, here, on the perplexity about the logic of harnessing the discretion of the judge to the point of concrete assessment of the fault.

It is therefore necessary to look elsewhere, and in this perspective the corruption sector once again reveals itself as a privileged observatory and a fertile ground for the design of new solutions. The contrast to corruption represents an interesting crossroads of supranational norms and soft law tools-guidelines, best practices, ISO standards that are prodigal of indications in order to elaborate the compliance programs.

Expected the presence of a public anti-corruption implementation strategy that, in synergy with the provisions of the private sector by Decree 231, has created a structured instrument (from anti-corruption plans, to the role of the ANAC, to transparency measures, whistleblowing, incandidability and inconferibility, etc.). The comparison between anti-corruption plans and organizational models has signaled areas of overlapping between the two disciplines in particular, for public companies alongside very different areas of responsibility; the Italian system represents on this side, without wishing to hide perplexities existing on individual aspects, an advanced prototype, to which other legislation emblematic of the recent French experience ended up.

In a process of revisiting the discipline in terms of responsibility of the institution, it fully occupies a space in the chapter of probation, an aspect still unknown in Italy but known to the English experience and now also French in respect of crimes in economic matters. And, also from this point of view, it is interesting to note that the agreements concluded and published in the United Kingdom concern all facts of corruption. Compared to the French experience, it is soon to be announced (November 2017!) The news of the first convention judiciaire d'intérêt public on the subject of recycling. Whatever the opinion regarding the usefulness and possible possibility of importing this type of agreement, it can not be denied that the question of "putting to the test of the entity" marks a significant break between these systems-and do not forget that the agreements they are also widely used in the United States and the Italian one, and represent one of the tools that could contribute to the achievement of two objectives: to encourage the emergence, by judicial means, of "suitable contents" of the model, and to contribute to a strategy (also) reward for the institution; perspective, the latter, which undoubtedly has played the role of real "cinderella" so far.
Let's try then to condense in a few points the indications that we seem to be able to draw from our journey through the analysis of the "corruption-bodies" in the systems that are more or less close to us.

We must take note of the insufficiency of the ascending criteria of a merely objective type whether they are of a vicarial nature or informed to the paradigm of identification which, even in the context of institution's responsibility, as already on the physical person's terrain, are to be considered inadequate to found guilt. And this is true above all on the dogmatic and principled level, because, as repeatedly mentioned, the more it moves in the direction of criminal or punitive responsibility, the guarantees that must be recognized to those involved become the most inescapable; and the question can not be made to depend decisively on the individual or collective nature of the recipient, as if the body, only because it does not have a body to be tortured and a soul to humiliate, has less dignity from this perspective. With this it is not intended to deny that it will be necessary to reflect on a more effective adjustment of the discipline of liability from crime to the characteristics of the collective subject, taking into due consideration the differences that, ontologically, mark it with respect to the natural person; but we reaffirm the conviction (and the hope) that in the search for new solutions-to be undertaken, or to recover promptly, and of which even the doctrine will be called to take charge-the compass must be represented by respect for criminal standards.

The mere objective connection between the illicit and the institution has intrinsic limits also in terms of deterrence: if the collective subject is never put in a position to avoid the imposition of the sanction, even if there is no connection of 'belonging' to the crime committed by one of its members, it will have no motivation to put in place those preventive measures that, on a global level, today constitute the first embankment in the strategy to combat business crime. If we therefore agree that as it seems right that this form of criminality can not and must not be countered only by resorting to the threat of sanction, having to favor the affirmation of genuinely rewarding logics, then it is necessary to take with conviction this second way, starting from the possibility for the institution to be able to dissociate from the physical person who is the author of predicate crime.

If the models of indirect responsibility "creak" even where they were born and have long represented the only channel of imputation of responsibility to firms, it is because we are witnessing the emergence of other paradigms: the lack of organization is a candidate to become the true foundation of the responsibility of the institution and this tendency, in light of what has been said so far, is to be welcomed.

The diffusion of the organizational gap criterion seems to facilitate the approximation of laws that are very different from each other, in the sense of identifying a basic "element" to be taken into account in risk assessment and risk management activities, with the effect of building protocols aimed at to make the internal organization as efficient as possible in order to prevent crimes. In a globalized reality in which companies are increasingly operating even outside the national borders, a good criminal compliance must also aim to make the entity responsible for liability in other jurisdictions even in the face of the often extraterritorial vocation of the disciplines of corporate liability, assuming, in fact, an active role in enforcing the related regulations on an international scale.

The second indication concerns the content of the models and the need for the "minimalist" perspective to be abandoned by the legislator of Decree 231.

The positivization of the contents of the protocols becomes an unavoidable passage so that the reproach to the body is authentically personal: if the model is the instrument that, on the basis of its structure and its constituent elements, induces the presence of an organizational gap-and therefore, the belonging of the crime to the entity-the legislator is called to define before and upstream what are the organizational shortcomings from which a punitive responsibility can derive. In this scenario, the ground of anti-corruption is the demonstration of the fact that the combination of hard law-regulatory provisions with a certain degree of detail (think of the Loi Sapin II) and soft law-principles developed by supra-national bodies, authority and certifying bodies can provide clear, shared and even internationally homogeneous elements, in relation to the measures and procedures to be foreseen and implemented in the construction of the models.

The result is there for all to see: the proliferation of anti-corruption obligations inside and outside the national borders has given life, in the short span of a short time, to a capillary set of standards and minimum rules which public and private subjects must comply with, and which if on the one hand it constitutes a weight and a cost, on the other hand it offers the institution the opportunity to access a series of benefits. "Good anti-corruption models" facilitate private sector bargaining and are often required for participation in public tenders; on the side of the award forecasts ex lege, the compliance program gives the legal person the right to avoid criminal sanctions (United Kingdom, France) and falls within the basic conditions for accessing diversion mechanisms that allow "exit" from the criminal process (deferred prosecution agreement and convention judiciaire d'intérêt public).

Elsewhere the carrot-stick approach is pursued with conviction and fully realized: the acknowledgment of the need to support the repression also the award for cooperation long since now acquired in literature and in criminal studies on the subject has given life to the dissemination of institutions that allow, to a certain extent, the negotiation between an institution and public prosecution in order to avoid the stigma deriving from the institution, above all from a reputational point of view, from the submission itself to a criminal trial. We certainly do not intend to deny that there is another side of the coin: it refers to the US experience, where there is an excess of discretion of the prosecutors who, in fact, ends up transforming in some cases these tools into 'picks' to induce corporations to self-deny and take responsibility that is not always clear, in order to avoid criminal prosecution. In our opinion, instead, the European examples propose balanced solutions with respect to the mechanisms under discussion, reviewed in the light of the outcomes mentioned above. The British DPA and the French convention are oriented to the model that provides for the necessary control of the judge on the negotiation between body and public part, proposing itself as a reference that, with a view to reforming the Italian system, cannot be considered. It seems to us that the experience gained or that it is maturing deserves to be borrowed, naturally due to the European legislator being able to show the adaptations that will be necessary for it to work in the European system.

The analysis carried out should not, of course, overshadow those that, in our opinion, are the strengths of the Italian discipline, from which we must move for future interventions.

We refer first of all to the prediction, among the subjects that can commit the responsibility of the body, of subjects in top positions and subordinates-choice then replicated by the Bribery Act 2010 and also by the Spanish discipline; in the presence of disqualifying sanctions, substantially absent elsewhere, which assure the judge a wide range of sanctions alternatives (or measures that can be activated during the precautionary phase); and, even with the indicated limits and the need for revision, including the forecasting of organizational models, as a pivot of the system.
Before the Decree 231 the models of organization and management did not find space in the European experience (the Bribery Act is in 2010 as well as the Spanish law, the French one is even more recent); and in any case, even today they do not constitute, elsewhere, a general and "broad spectrum" mechanism (see the extensive catalog of predicate offenses of the "231 discipline", "imitated" by the Spanish legislator, while in the United Kingdom and France the compliance programs have sectoral positioning and a more limited role).

To this must be added the new integrated public-private strategy to combat corruption-which today sees an interesting development in France, to the extent that our legislator has for some time now translated the idea of crime prevention into reality by organizing, in terms of fighting corruption represents, in this perspective, a patrimony certainly to be exploited.

References

Asterley Jones, P., Card, R., Cross, R., (2014). *Card, Cross and Jones criminal law*, Oxford University Press, Oxford, pp. 294ss.

Bacigalpo Saggese, S., Feijoo Sànchez, N.J., Echano Basaldua, J.I., (2018). *Estudios de derecho penal. Homenaje al Professor Miguel Bajo,* ed. Universitaria Ramòn Areces, Madrid, pp. 52ss.

Bean, B.W., Macguidwin, E.H., (2013). Unscrewing the Inscrutable: the UK Bribery Act 2010, in *Indiana International & Comparative Law Review,* 23, pp. 64ss.

Betz, K., (2017). *Proving bribery, fraud and money laundering in international arbitration*, Cambridge University Press, Cambridge.

Boles, J.R., (2014). The two faces of bribery: International corruption pathways meet conflicting legislative regimes, in *Michigan Journal of International Law,* 35, pp. 679ss.

Boucobza, X., Serinet, Y.M., (2017). Loi "Sapin 2" et devoir de vigilance: l'entreprise face aux nouveaux défis de la compliance, in *Recuil Dalloz*, pp. 1619ss.

Card, R., Molloy, J., (2016). *Card, Cross & Jones criminal law,* Oxford University Press, Oxford, pp. 282ss.

Cuello, C., Joacquin y Mapelli Calfarena , B., (2015). *Curso de derecho penale*, ed. Tecnos.

De La Mata, N.J., (2017). ¿Qué cabe esperar de la Norma UNE 19601 sobre sistemas de gestión de compliance penal? in *Almacén de derecho,* 13 June 2017.

Dopico Gomez-Aller, J., (2014). "Análisis crítico del nuevo régimen de responsabilidad penal de las personas jurídicas, según el Proyecto de Reforma de 2013", in J.R.A. Boix, F. J. Álvarez Garcìa (a cura di), *El Informe de la Sección de Derechos Humanos del Colegio de Abogados de Madrid, sobre los proyectos de reforma del Código Penal, Ley de Seguridad Privada y Ley del Poder Judicial (Jurisdicción Universal),* ed, INAP, Valencia, pp. 18.

Ghrènassia, C., El Gohary, K., (2017). La convention judiciaire d'intérêt public: en attendant la transaction pénale, in *Revue Lamy Droit des Affaires*, 125, 40ss.

Gimeno Bevià, J., (2014). La apuesta por el principio de oportunidad y los programas de compliance en el proceso penal de las personas jurídicas, in *Diario La Ley,* n. 8437, 2014.

Haeri, K., Munoz-Pons, V., (2017). Sapin II: l'an I de la lutte anticorruption, in *Dalloz avocats,* 106ss.

Harro, O., (2017). *Manual de derecho penal,* ed. Atelier, Madrid.

Heimann, F., Pieth, M., (2018). *Confronting corruption. Past concerns, present challenges and future strategies,* Oxford University Press, Oxford.

Jensen, N.M., Malesky, E.J., (2018). Non state actors and compliance with international agreements: An empirical analysis of the OECD anti-bribery Convention, in *International Organization*, 72 (1), pp. 37ss.

Kraay, A., Murrell, P., (2013). Misunderstanding corruption, in *Review of Economics and Statistics*, 98 (3), pp. 456ss.

Lecourt, A., (2017). Le renforcement de la lutte contre la corruption et l'évasion fiscale, in *RTD Com.,* pp. 101ss.

Manacorda, S., Centonze, F., Forti, G., (2014). (a cura di), *Preventing corporate corruption. The anti bribery compliance model*, ed. Springer, Berlin, pp. 505ss.

Mignon-Colombet, A., (2017). La convention judiciaire d'intérêt public: vers une justice de coopération?, in L*a Semaine Juridique*, 51, pp. 68ss.

Mongillo, V., (2013). The Bribery Act 2010. Corporate criminal liability for bribery offences, in A. Fiorella (a cura di), *Corporate criminal liability and compliance programs,* vol. I, ed. Jovene, Napoli, pp. 304ss.

Neira, A.M., (2016). La efectividad de los criminal compliance programs como objeto de prueba en el proceso penal, in *Política Criminal,* 11, pp. 467ss.

Nieto Martìn, A., (2014). De la ètica pública al "public compliance": sobre la prevención de la corrupción en las administraciones públicas, in A. Nieto Martìn, M. Maroto Calatayud (a cura di), *Public compliance. Prevención de la corrupción en administraciones públicas y partidos políticos,* ed. De Castilla-la Mancha, Valencia, pp. 20ss.

Nieto Martìn, A., (2013). La privatización de la lucha contra la corrupción, in A. Nieto Martìn, L. Arroyo Zapatero (a cura di), *El derecho penal economico en la era compliance*, ed. Tirant, Valencia, pp. 209ss

Nieto Martìn, A., Lascuraìn, J.A., (2016). Urgente: dos órganos de cumplimiento en las empresas, in *Almacén de derecho,* 3 June 2016.

O'Keefe, R., (2015). *International criminal law,* Oxford University Press, Oxford, pp. 298ss.

O'Shea, E., (2011). *The Bribery Act 2010. A practical guide*, Jordans Publishing, Bristol.

Parsons, S., (2018). The corporate manslaughter and corporate homicide act 2007 ten years on: Fit for purpose, in *The Journal of Criminal Law,* 82 (4), pp. 307ss.

Pieth, M., Low, L.A., Bonucci, N., (2014). *The OECD Convention on Bribery: A Commentary,* Cambridge University Press, London-New York.

Raphael, M., (2010). *Blackstone's guide to the Bribery Act 2010,* Oxford University Press, Oxford.

Rose, C., (2012). The UK bribery act 2010 and accompanying guidance. Belated implementation of the OECD anti-bribery Convention, in *International & Comparative Law Quarterly,* 61 (2), pp. 488ss.

Saintourens, B., Emy, P., (2017). La réforme du droit des sociétés par la loi du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique ("Sapin 2"), in *Revue Sociétés,* pp. 132ss.

Simester, A.P., Spencer, J.R., Stark, F., (2016) *Simester and Sullivan's* *criminal law theory and doctrine,* Hart Publishing, Oxford & Oregon, Portland.

Sullivan, G.R., (2011). The Bribery Act 2010: (1) An overview, in *Criminal Law Review*, pp. 87ss.

Wells, C.K., (2017) Corporate Failure to Prevent Economic Crime. A proposal, in *Criminal Law Review,* pp. 426ss.

Wells, C.K., (2015). "Corporate responsibility and compliance programs in the United Kingdom", in P. Hardi, P. Heywood, D. Torsello, *Debates of corruption and integrity. Perspectives from Europe and the US,* Palgrave Macmillan, London, pp. 60ss

Wells, C.K., (2012). Who's afraid of the Bribery Act 2010?, in *Journal of Business Law,* 5, pp. 420ss.

Zugaldìa Espinar, J.M., (2014). La responsabilidad criminal de los partidos políticos y los sindicatos, in *Revista Derecho Penal y Criminología,* 12, pp. 365ss.