# National Anti-corruption Authority

## *Deliberation n. 1208 of the 22nd November 2017*

## *Final approval of the 2017 Follow up to the National Anti-corruption Plan*

WHEREAS art. 19, c. 15, of the law decree of the 24th of June 2014, n. 90 «*Urgent measures for the administrative simplification and transparency and the efficiency in the judicial offices»,* according to which the functions entrusted to the Department of the public function of the Prime Minister's Office to prevent corruption are transferred upon the National Anti-Corruption Authority, of which article 1 of the law of the 6th of November 2012 with «*Regulation to prevent and repress corruption and illegality within the public administration»*

WHEREAS the Deliberation of the 3rd of August 2016 including the resolution of final approval of the National Anti-Corruption Plan 2016.

WHEREAS art. 1, c. 2-bis of the l. 190/2012, introduced by the leg. decree 97/2016, provides that the National Anti-Corruption Plan (Piano Nazionale Anti-corruzione, PNA) lasts three years and is yearly updated.

WHEREAS the deliberation of the Council of the Authority of the 1st of August 2017 with which the preliminary draft of the 2017 Follow up was approved with regard tot the National Anti-Corruption Plan providing for the public consultation for the period 03/08/2017 – 15/09/2017.

AFTER HAVING ASSESSED the observations and the contributions sent

THE COUNCIL OF THE AUTHORITY

In the assembly of the 22nd of November 2017 finally approves the 2017 Follow up to the National Anti-Corruption Plan and provides for the publication of the ANAC's (National Anti-Corruption Authority - Autorità Nazionale Anticorruzione) institutional website and the transmission to the Official Journal.

The President

Raffaele Cantone

Filed at the Secretariat of the Council on the 4th December 2017

The secretary
Maria Esposito

National Anti-Corruption Authority

# 2017 Follow up to the National Anti-Corruption Plan

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## GENERAL PART

### Introduction

The present 2017 Follow up to the National Anti-Corruption Plan 2016 (Piano Nazionale Anti-Corruzione, hereinafter PNA) has been adopted by the Authority in compliance with what provided by the law of the 6th of November 2012, n. 190 «*Regulations for preventing and repressing corruption and illegality within the public administration*» where it is provided that the PNA is an act to give guidelines to the administrations and the other subjects that have to comply with the regulations about prevention of corruption; it lasts three years and it is updated every year.

As is well known, according to the law 190/2012, the PNA identifies the main risks of corruption and the relative remedies, also taking into account the organizations' size and the different activity sectors.

Therefore, as already thoroughly explained in the 2016 PNA, some specific kinds of administrations or activity sectors have been chosen to be focused in order to support the administrations in drafting their PTPCs.

This year in particular, the Authority has deemed best to concentrate the PNA Follow up on some administrations that have remarkable organisational and functional peculiarities, after some requests from the administrations themselves and after having carried out its monitoring activity. These particular administrations are the port system Authorities, the extraordinary Commissioners and the Universities.

These in-depth analyses are preceded by a general part where the Authority introduces the feedback from the assessment on a sample of 577 administration PTPCs and adds some guidelines about the implementation of the prevention rules against corruption involving each subject to whom the rules are intended.

*Procedure of drafting the PNA*

As it is usual by now, for the in depth analyses the Authority has created some special technical meetings with the active participation from the directly involved administrations, the main operators in the sectors and some experts.

In particular, the in-depth analysis over the port system Authorities (AdSP) has been performed with the Ministry of Infrastructures and Transports (MIT), the Authority regulating the transports (Autorità di Regolazione dei Trasporti ART), the Port Autority in Gioia Tauro, the AdSP of the Eastern Adriatic Sea, the AdSP of Ionic Sea, the AdSP of Central Tyrrhenian Sea and the AdSP of the Northern Adriatic Sea.

The Ministry of Infrastructures and Transports (MIT), the Presidency of the Ministry Council (Presidenza del Consiglio dei Ministri, PCM) and the Ministry for the Environment and Safeguard of Territory and Sea (Ministro dell'Ambiente e la Tutela del Territorio e del Mare, MATTM) have taken part to the meeting about the extraordinary Commissioners.

The part related to the Universities have been drafted thanks to the proactive contribution from a technical meeting started on February 2017, whose members, besides the experts in the sector, come from the Ministry for Education, University and Scientific Research (Ministero dell'Istruzione, dell'Università e della Ricerca scientific MIUR), the National Agency of Assessment of the University System and Research (Agenzia Nazionale di Valutazione del Sistema Universitario e della Ricerca, ANVUR), the National University Council (Consiglio Universitario Nazionale, CUN), The National Commitee of the Research Warrantors (Comitato Nazionale dei Garanti per la Ricerca, CNGR), the National Council of the University Students (Consiglio Nazionale degli Studenti Universitari, CNSU), the Conference of the Deans of the Italian Universities (Conferenza dei Rettori delle Università Italiane, CRUI)) and the Convention of the general directors of the university Administrations (Convegno dei direttori generali delle Amministrazioni universitarie, CODAU).

The measures, even if are simply recommended and not dictated, have arisen from the analysis on the risks of corruption that recur in the administrations taken into consideration. It is about illustrative measures to prevent the risk of corruption and, therefore, in some cases, are not totally detailed. In this sense, the PNA is considered also by the legislative body as an orienting and supporting instrument for the administrations aiming to strengthen and steer the actual implementation according to focus oriented principles and not merely intended to implement the rules. Therefore, administrations are fully responsible for identifying and put into practice these and other measure in the best suitable way for the organisational context. This is to prevent the corruption risks as identified in the process of analysis and management of the risks that are necessary to draft the PTCPs.

*Procedure of approval of PNA*

The present 2016 PNA Follow up was preliminarily adopted by the Council of the Authority during the session of the 1st of August 2017. Then it was subject to an open public consultation until the following 15th of September in order to receive observations and proposals of additions.

Overall 39 contributions have been sent out, of which 9 from Public Administrations, 2 from Associations, 3 from People in charge of the corruption prevention, 25 from civil servants and private subjects.

The observations and the suggestions received have been taken into consideration in drafting the PNA's final text, which was approved by the Authority on the 22nd of November 2017.

## 1 Outcomes from the assessment on the 2017-2019 PTPCs

During 2017, the Authority, in collaboration with the University of Rome "Tor Vergata", performed an analysis of the three year Plans for the corruption prevention and transparency (PTCP) referred to the 2017-2019 three years in order to identify the main critical points highlighted by the administrations in their feedbacks and improved ANAC support towards the public administrations and the other subjects to whom the rules apply.

The monitoring was performed on the PTCPs from a sample of 577 administrations related to different divisions, among which: Ministries, Non-economic public entities, Agencies and other national entities, Autonomous Regions and Provinces, Provinces and Metropolitan Cities, small and large sized

Municipalities, local health Companies and Hospitals, Scientific Institutional Cares, Chambers of Commerce, State Universities and Professional Bodies.

The monitoring results per division show an uneven trend. The most significantly positive experience was the one of health institutions, which have gone through a growing *trend* in almost all the examined points. On the contrary the Ministries' division, compared to the data in the previous years, has shown a negative *trend* in terms of involvement from the political guidelines entity and the other stakeholders both internal and external.

The analysis has shown, very briefly/in a nutshell, the following results:

**1.1.** an increase over time of the number of administrations that adopt and publish their PTCPs: the 24.8% out of 557 administrations subject to the analysis has, in fact, adopted the first version of 2013-2015 PTCP; the 76.1% the 2014-2016 PTCP version; the 81% the 2015-2017 PTCP version; the 89.4% the 2016-2018 version;

**1.2.** an improvement in the administrations' ability to draft their own PTCPs even if some critical points remain, in particular in the phases of the risk management process, especially in some divisions;

**1.3.** a scarce coordination of the PTCP with the other planning instruments adopted by the administrations.

The principal outcomes are mentioned hereinafter more in detail.

*The process of approval*

Information regarding the process related to the plan approval continue not to be clearly collected. The percentage of administrations that did not describe it is quite high (approximately 21%) and so is the number of administrations that described it only with generic terms (31.6%). Only in 19.2% of the cases the ways of involving the political administrative guidelines organs and/or the offices direct collaboration were clearly reported; it was used the so called "double passage" according to which, especially for the territorial bodies, the approval of a first general outline of PTPC and, afterwards, a final one is hoped for. The 24.2% of the administrations approved the Plan with the involvement of the internal offices and the 10.4% upon previous public consultation.

In the process of Plan approval, therefore, the involvement with the guidelines entity, the organizational structure and the external *stakeholders* should be involved, including such involvement in the PTCP; the number of subjects involved and the procedures of involvement and participation in the process of risk management should be mentioned as well.

*The role of the Responsible for the Prevention of corruption and transparency (RPCT)*

The analysis shows a good level of implementation of the law, at least as far as the merge of role of the Responsible for the Prevention of Corruption and the Responsible for the Transparency is concerned (approximately in the 80% of the cases in exam). In the 56.4% of the Plans the powers of communication and control held by the RPCT were clarified; nevertheless, the cases of entrusting a support to gather information and an operational support to such figure were clearly specified are quite low (29.1%) or the presence of a supporting structure (only in 4.1% of the cases). The division where a

particularly positive *trend* has been recorded is related to the local entities differently from the Ministries and Regions where these profiles have turned out to be particularly critical.

Therefore, it is advisable to better explain in the PTPCs which subjects support the RPCT in the drafting and implementation of the corruption prevention strategy within the organisation, together with their relative tasks and responsibilities.

*The monitoring system*

Just slightly more than half of the administrations analysed did not mention the existence of a monitoring system (approximately 22%) and approximately 33% mentioned it in just generic terms. The remaining part properly identified times and verifiers (approximately 33%) or at least one of the two elements.

Considering that the monitoring system impacts on the PTCPs' whole efficacy, the importance of mentioning the relative implementation procedures in the Plans is paramount and so is the feedback on the outcomes from the previous monitoring activities; they are useful in re-planning the corruption prevention strategy.

*Coordinating with the planning instruments*

The analysis has highlighted a datum that is still not completely satisfactory in terms of effectiveness in coordinating the different planning instruments. Only one third of the PTCPs mentions the strategic and operational (or structural) targets with regard to corruption prevention and transparency provided by the performance Plan. Even if the percentage of the administrations that do not mention at all the performance Plan is very low, nevertheless, the majority included only a generic mention about the need of a connection between corruption prevention and performance.

*Analysis of the external context*

The number of administrations that did not perform the analysis on the external context has been decreased overall compared to the previous assessment - except for Regions – nevertheless it is evident that administrations have to improve their skills in understanding and interpreting the social-territorial dynamics with regard to the corruption risks that they might face; and they have to take them into account when drafting their Plan.

Approximately 73% of the administrations performed the analysis on the external context and this is a considerable improvement compared to the past assessments. Nevertheless, 34% used scarce or not very significant data, while 28%, even if they are provided with a decent basis of data (both relevant and significant) do not use such information to show the impact from these variables on the corruption risk. Only 10% performs the analyses highlighting the impact from the gathered data on the corruption risk for their own organisation.

*Mapping the processes*

Mapping the processes, even though it is a less critical phase then the previous one, turned out not to be rather adequate in terms of completeness.

In 92% of PTCPs there was the analysis of the processes of the so called "obligatory areas"; only in 52% there was also the analysis of the risk areas so called "general" as mentioned in the 2015 PNA (assignments and appointments, managements of revenues, expenses and assets, controls, assessments, inspections and sanctions, legal affairs and litigations). 21% of the administrations continues to consider the mapping as a mere list of the processes, failing to include a description of the phases and/or activities and the verifiers.

The best results have been recorded by hospitals, Municipalities and Ministries where a drop has been recorded in the number of administrations that considered the mapping as a mere list of processes; on the contrary, as far as Regions are concerned a less positive result has been recorded even with a slight increase in the number of cases where only the list of processes is present.

*The analysis and the assessment of the risk*

With regard to all the divisions taken into consideration, except for Regions, the administrations that did not individuate the risky events have been lower in number. Nevertheless, the number of PTCPs where those are not mentioned (29%) still remains high. The percentage of administrations that even if they have identified the risky events did not identify the relative causes is approximately 46%. Approximately 78% has performed the assessment on the exposure to the risk of processes using the methodology provided in the 2013 PNA. Only 3% resorted to an alternative methodology.

It is evident how the administrations have struggled in looking for solutions that better fit their own peculiarities and needs; therefore, they struggled in creating coherent assessment tools with the particular characteristics of the organisation that is about to perform the analysis.

*The treatment of the risk*

A considerably high number of administrations identified and planned the implementation of the measures that the 2013 PNA defined as "compulsory" (90% for the Conduct Code) even with different details. Nevertheless, the particularly positive datum is related to the specific measures that were individuated approximately by 72% of the administrations. Out of these approximately 40% linked them to the risk analysis in a very detailed way.

With regard to planning the specific measures, it has been recorded that in 22.3% of the cases a simple list of the measures is present; in 19% times, verifiers, monitoring indicators and followed values are mentioned, while in 14% of the cases only times and verifiers.

By way of summary, matching the results with those from the previous assessments a general improvement (even if small) has emerged for all the assessed divisions with regard to the presence and planning of the specific measures, except for the divisions in Regions, where a fairly negative trend has been recorded.

*The PTCP section dedicated to transparency*

In compliance with the new regulations, 95% of the administrations has merged the PTCP and the triennial Program of transparency and integrity (Programma triennale della trasparenza e dell'integrità, PTTI) into a single instrument. In 40% of the PTCPs examined in the section about transparency the obligations to publish, the times and the publication managers are mentioned; in 3.4% of cases times

are mentioned but not the publication managers; in 28.5% of the cases the managers are mentioned by not the times; in 16% of the cases the information are mentioned very generically or are not mentioned at all (9%).

As mentioned in the 2016 PNA, in order to comply with the transparency obligations, the section is required to include suitable organisational solutions to ensure the compliance of the publication obligations; the section has also to identify the managers of the transmission and publication of data and documents.

*An in-depth analysis – public Contracts*

With regard to the guidelines provided by the 2015 PNA Follow up, in the section dedicated to the public contracts, from the examined Plans a discreet level of compliance with the guidelines provided there has emerged. The percentage of administrations that include the mapping of processes per each different phase of procurement has been 41.5% with regard to the planning phase, approximately 44% with regard to the phase of planning the bid, 45% with regard to the phase of the selection of the contracting party, approximately 38% for the examination of the contract award and contract execution, approximately 41% with regard to the implementation phase, 30% for the final reporting phase. To be more specific, in matching the results with the ones from the previous assessment, a significant improvement in the level of compliance.

*An in-depth analysis - Health*

In the 2017-2019 PTPCs a good level of compliance with the guidelines provided in the special part "Health" of the 2015 PNA Follow up has emerged, even if with wide margins for improvement. In the Plans the risk areas related to professional activities and waiting lists (75% in hospitals and 72% in the health authorities), the contract relationships with private subjects accredited (29% in hospitals and 64% in health authorities) pharmaceutical, devices and other technologies: research, tests and sponsorship (71% in hospitals and 74% in health authorities), activities following the death within hospitals (45% of hospitals and 54% of health authorities). Furthermore, a moderate level of compliance has been recorded also with regard to specific measures for the processes in the above-mentioned risk areas.

## 2 Subjects that are required to adopt measures to prevent corruption

With regard to the subjects who are required to comply with the rules related to transparency and the guidelines related to corruption prevention provided by the PNA, the Authority has already issued guidelines in the 2016 PNA (§ 2 General Part)

In that part the Authority undertook to study more in depth the problems related to the implementation of the law 190/2012 to public companies and the subjects mentioned in art. 2-bis, c. 2, lett. b) and c) and c. 3 of the leg. Decree 33/2013, as amended by the leg. Decree 97/2016, taking also in consideration that the legislative decree of the 19th of August 2016, n. 175 *«Consolidated law with regard to companies with government participations»*

In this regard, ANAC adopted the resolution n. 1134 of the 8th of November 2017 approving the «*New guidelines for the implementation of the rules related to the corruption prevention and transparency from the*

*companies and private law entities controlled and participated by public administrations and economic public entities»,* to whom it is referred.

## 3 The PTPC e the other performance planning acts

The Authority has received some enquiries with regard to the relationships between the contents in the PTPC and those in the planning and monitoring documents for the performance assessments. The need to further explain these aspects has been caused also by the new laws with regard to the Independent Assessment Entities (Organismo Indipendente di Valutazione OIV) functions provided by the leg. Decree 97/2016 (see § 4.2) and by the same monitoring results; as above mentioned from the latter a lack of coordination between the different planning instruments has emerged. This aspect obviously impacts the administrations' ability to design and implement them as a whole, maintaining their peculiarities at the same time.

The need to coordinate and complete (in some aspects) the three year Plan for corruption prevention and transparency and the Plan for performance, has been highlighted in several rules by the lawmakers and also by ANAC (see 2016 PNA § 5.3).

Under the operational point of view, it has been said that some analyses that the administration is asked to perform according to the performance Plan are certainly also useful for the PTCP (see the case of the internal context analysis where an exam over the organisational structure is required or the same mapping of processes) and vice versa (the case of the individuation of the managers for the measures and their target in the PTPC has to be taken into consideration in terms of both individual performance and structure in the performance Plan).

Even after an exchange of opinion in this regard to the Department of the Public Function, the Authority deems that the need to enhance the analyses and the data possessed by the administrations cannot lead to a tout-court merging of the planning instruments, being present different objectives and different related responsibilities.

The administrations are asked to clearly highlight those differences. What is relevant for the PTPC again is on the one hand the management of the risk and the clear identification of the corruption prevention measures also in terms of definition of times and responsibilities, on the other hand, the organisation of the information fluxes for the publication and the relative verifiers for the implementation of transparency.

## 4 Internal subjects involved in the process of drafting and adopting the PTPC

### 4.1. The person in charge of the prevention of corruption and transparency

What was mentioned in the 2016 PNA is also valid for the RPCT's role and functions.

In this context the Authority deems necessary to clarify some elements related to the procedure of revocation of the RPCT and the creation of a list of Managers at the Authority.

#### 4.1.1. The annulment procedure

With regard to the annulment procedure of the RPCT, the Authority, in carrying out its monitoring activity, has found several critical points with regard to the aspects of its competence (provided by the

art. 1, c. 82, of law 190/2012, art. 15, c. 3, of the leg. Decree of the 8th of April 2013, n. 39 and the art. 1, c. 7 of the law 190/2012).

The lawmaker since the very beginning wanted to safeguard the RPCT's role and functions even with rules that prevent an early revocation from the appointment.

Initially, such form of safeguard provided by the art. 1, c. 82 of the law 190/2012 was applied only in case of an overlapping of the RPCT and Municipal Clerk roles. The rule gives the Provincial governor the task to inform the National Anti-Corruption Authority about the revocation order; the revocation is valid unless ANAC, within thirty days, declares that this is a consequence from the activities performed by the Clerk/RPCT with regard to corruption prevention (art. 1, c. 82, of the law 190/2012).

The subject is completed by the art. 15, c. 3, of the leg. Decree 39/2013, which extended ANAC's intervention in case of a revocation, not just with regard to the Municipal Clerk but, more generally, every time an administrative appointment (top management level) is revoked when the person has been entrusted with RPCT functions.

The regulation has specified the kind of intervention from ANAC; the intervention is simply a request to re-examine the revocation order, in case the Authority notices that the same is related to the activities performed by the Verifier with regard to corruption prevention. With regard to the re-examination ANAC is entitled to a time frame of thirty days after which the revocation order will be final/effective.

Thanks to the amendments applied to the law 190/2012 by the leg. Decree 97/2016 (art. 41, c. 1 lett. f) the RPCT's role has been further safeguarded.

Any possible discriminatory measures have to be reported to ANAC – therefore not only in cases of revocation – against the RPCT, when the same are in any way, both directly or indirectly, related to the performance of his functions. In this case, ANAC can ask for some information to the guidelines entity and intervene according to what provided by the art. 15, c. 3 of the leg. Decree 39/2013 (request of a re-examine within thirty days). The new regulation seems to have also filled the normative gap when the RPCT role, especially in small size structures, is not entrusted to executive subjects. The regulation is referred to the RPCT as such irrespective of the role he has within the structure.

The above mentioned regulations related to ANAC's intervention in case of a revocation of a RPCT are not really clear with regard to the monitoring activity in the following aspects: a) the Administration entity that has to inform the Authority about the revocation order; b) the time within which ANAC has to carry out the examinations; c) the possible consultation among the parties, which ANAC should guarantee in compliance with the verification ex art. 15, c. 3 of the leg. decree n. 39/2013.

To increase the guarantees in the role covered by the RPCT, the Authority has interpreted the provision (lacking a clarification from the rule) in the sense they can enforce their power, provided by the aforementioned art. 15, c. 3 of the leg. Decree 39/2013 (request for a re-examination within thirty days), also in case the revocation has been informed after the warning from the subject involved in the revocation and not only after a communication from the Administration of interest. This is also because the top managerial role is often of a fiduciary nature and as such can be exposed to "influences" or incorrect pressures.

In any case, ANAC is entitled to adopt a regulation act in order to specify the above mentioned procedural aspects and guarantee the efficacy and timing to their intervention in the procedures of revocation and warning of discriminatory measures.

Here it is worth to highlight the following:

- according to what provided in the 2016 PNA (§ 5.2.) with regard to the possibility that in small size entities the RPCT role might be entrusted to a no executive employee, it is deemed that the intervention from ANAC in case of a revocation can be extended also to these subjects taking in consideration the amendments applied by the leg. decree 97/2016;
- the entity that decides for the revocation has to inform in a timely manner ANAC or the prefect so that he can timely inform the Authority, which can proceed within the times provided by the law.

### 4.1.2. The list of RPCTs held by ANAC

All the administrative measures related to the appointments, revocations and substitutions of the RPTCs are under direct responsibility of the relative administrations. Furthermore, the name of the RPCT has to be included in the three year Plan of corruption prevention and transparency (art. 43, c. 1, leg. decree 33/2013) and is to be published on the Administration's website - "Transparent Administration section" - "Other contents / prevention of corruption".

According to the guidelines provided by the Department of the public function in its information newsletter n. 1 of the 25th January 2013[1], ANAC has created a list of the RPCTs, only for informative purposes, which is published on its institutional website.

On the 18th February 2015, via a public Notice from the President, some guidelines were given to the administrations about the procedure of transmission of the RPCT details to ANAC.

It has to be highlighted that the Notice is to be intended as directed to the Responsible for the Prevention of Corruption and Transparency since, after the amendments introduced by the leg. decree 97/2016, the appointment of RPC and RT has been merged upon one single subject (RPCT); any exception has to be duly justified.

It is highlighted that since the provision to create a list of RPCTs is included in a newsletter, the Authority simply maintain the list to monitor the Public Administrations' behaviours in compliance with the regulations and to be provided with the details that are useful to ease the contacts between ANAC and the RPCTs, also taking into consideration the powers of control provided on the ones Responsible for the transparency (art. 45, c. 2, leg. decree 33/2013).

## 4.2. Independent Assessment Entities

As already mentioned in the 2016 PNA, the OIVs play a key role within the management system of performance and transparency, according to art 14 of the legislative decree of the 27th of October 2009, n. 150 and the Decree of the President of Republic of the 9th of May 2016, n. 105 art. 6. The

[1] This magazine, in particular § 2, provided that «*the appointment of the responsible ones for the prevention must be reported to CIVIT (ANAC); the entity has created a dedicated section on the website to gather the relative data*».

reform on the assessment of the performance applied on the leg. decree of the 25th of May 2017, n. 74, specified the OIVs' tasks.

The need to coordinate the performance targets and the transparency measures has clearly emerged both from the leg. decree 33/2013, art. 44, and the law 19/2012, art. 1, c. 8-bis, introduced by the leg. decree 97/2016; in this it is mentioned that the OIV has to assess the coherence between the targets provided in the PTPC and those mentioned in the strategic-management planning documents and that the assessment over the performance takes into account the targets related to the anti-corruption and transparency.

More recently, the regulations about the OIVs have kept unaltered their tasks to promote and assess the achievement of the targets related to transparency (art. 14, c.4, lett. g), according to the leg. drecree 150/2009.

Therefore, it is worth to notice that the OIVs certification activity with regard to the published data continue to play a key role for ANAC. The Authority, within the range of its controlling and monitoring powers on the compliance with the prevention and transparency measures, yearly defines the procedure for the drafting of the certification. In order to enhance the efficient performance from the OIV's activities, ANAC is going to ask for the certifications within the 30th April of every year, which is the same deadline also for the OIVs to file the documents about the performance. In this regard it is worth to mention that both the PTPC's publication and the existence of organisational measure to ensure the regular functioning of the information fluxes (to be published in the "*transparent Administration*" section) will be subject to certification. With regard to the composition of the OIV, the administration political-administrative policy entity identifies the members among the subjects mentioned in a special list, kept by the Department of public function. The Department guarantees the proper appointment and composition of the OIV (d.P.R. n. 105/2016, art. 6, leg. decree 150/2009, art. 14 and 14-bis).

In case the administration does not have to be provided with the OIV – as for example, Regions, local entities and the national health service entities (in compliance with the principles provided by the legislative decree 150/2009) within the limits and with the procedure provided by the art. 16 of the same decree – the relative functions can be appointed to other bodies, such as the assessment bodies.

In this case, the Authority deems worthwhile to highlight that, especially in the territorial entities, the Secretary is often also member of the assessment entity. Since the Secretary is "as a rule" also RPCT, the consequence is that the same RPCT can be member of an entity who is entitled, for some aspects (for example the transparency certifications) to control the RPCT's activity. Even if complying with the current laws which could cause some conflicts of interest as above mentioned, ANAC wishes for the administrations to find some solutions that are compatible with the need to keep separated the RPCT role from the member of the entity that performs the OIV functions.

Further indications about the OIV's activities with regard to corruption prevention and transparency can be the matter of the Authority's deliberations or public statements.

## 5 Actions and measures for prevention

Without prejudice to what already mentioned in the 2016 PNA, the Authority has wanted here to make some clarifications about the rotation of personnel

### 5.1. Rotation

As widely reported in the paragraph 7.2 of the 2016 PNA, rotation is one of the measures expressly provided by the lawmaker in the law 190/2012 (art. 1, c. 4, letter e), c. 5, letter b), c. 10, letter b). It is about a measure that shows some critic aspects in its implementation but, nevertheless, the Authority encourages the administrations to take this into account together with other measures.

With regard to the ordinary rotation, the Authority, in performing its monitoring activity, is noticing that, even if it is provided in the PTPCs of the administrations under examination, this is not really implemented. It is reminded that that the law 190/2012 in art. 1, c. 14 provides for precise responsibilities in case of violations of the prevention measures mentioned in the Plan. The Authority intends to monitor these violations. Similarly, the Authority is noticing that implementation of the so called "extraordinary" rotation measure is also scarce; this rotation is to be enforced after some corruption phenomenon has taken place, according to the leg. decree n. 165 of the 30th March 2001, art. 16, c. 1, let. l-*quater*, according to which «*Directors of directorate general units monitor the activities where the risk of corruption is higher within the unit to which they are appointed; they see to the rotation of personnel, with a justified provision, whenever some criminal or disciplinary procedures have started due to some corruption behaviours*».

Therefore, administrations and other entities are recommended to pay particular attention in monitoring the cases with the conditions to implement such form of rotation.

In order to guarantee a higher control on the implementation of this measure, the Authority together with the public function Department, is going to start a collaboration with the Inspectorate for the public function taking in consideration the tasks entrusted to the same by art. 60, c. 6, of the leg. decree 165/2001, as redefined by art. 71 of the leg. decree 150/2009 among which there is the one to monitor the enforcement of disciplinary powers.

## 6 Controls on the declarations about the groundlessness of the causes for the impossibility of appointment

The Authority has several times issued decisions in this regard adopting the n. 833 resolution of the 3rd of August 2016 including *«Guidelines with regard to the verification of the inability to appoint the role and the incompatibilities of the administrative officer roles for the person responsible for the corruption prevention. Activities of supervision and powers of assessment of A.N.A.C. in case of roles that cannot be entrusted or are incompatible».* In the assessment procedure (see that part) among others the RPCT role and functions are clarified with regard to the procedure of checking the inability of being appointed and the incompatibilities.

## SPECIAL PART- IN DEPTH ANALYSES

## I – PORT SYSTEM AUTHORITY

### Introduction

The legislative decree of the 4th August 2016, n. 169 *«Reorganization, rationalisation and simplification of the rules related to the port Authorities mentioned in the law of the 28th January 1994, n. 84»,* which was drafted in compliance to the act of delegation with regard to the reorganization of the State administration included in the art. 8 of the law of the 7th August 2015, n. 124, amended the rules about the port Authorities. Currently, while the present PNA Follow up is being passed, the government is about to pass a new decree to amend the previous one. Following the structure of a legislative decree with supplementary and corrective provisions to the legislative decree of the 4th August 2016, n. 169 (*Reorganization, rationalisation and simplification of the rules related to the port Authorities mentioned in the law of the 28th January 1994, n. 84),* the opinion from the Council of State in the Gathering of the special Commission of the 4th October 2017 (number of affair 001668/2017) was given force. In the present in-depth analysis the most relevant elements of the decree are mentioned.

The new 15 port system Authorities (hereinafter AdSP) have taken over all the 54 Italian ports substituting the 24 port Authorities created with the aforementioned law 84/1994.

The AdSP office is located at the central port's office (so called core), identified in the EU Regulation n. 1315/2013 related to the new Trans-European Transports Network (Rete Transeuropea dei Trasporti, TEN-T) (art. 6, c. 3, law 84/1994). The reorganizational reform (art. 6-bis, c. 1, 84/1994) provides for the creation of territorial offices and decentralised administrative offices, with regard to the ports that do not included the AdSPs. The first are created in the ports that already include a port Authority's office and are managed directly by the general Secretary of the AdSP, who is entrusted with the functions appointed by the management Committee (art. 6-bis, co. 1, 84/1994). The second ones are, on the contrary, created at a common principal town of the province, which does not host already a port Authority's office (art. 6-bis, co. 2, 84/1994); to them the general Secretary the general Secretary (or his representative from the directorate level) is appointed. In every case, both the territorial offices and the decentralised are entrusted with functions appointed by the management Committee.

The assessment over the main functions of promoting, planning, managing and controlling in the so-called *core ports* aims to enhance a single strategy in order to relaunch the national port logistic sector, which is a key "tile" for the development of the Italian economic system. Each AdSP now includes

several ports, managing the smaller ones (for example the management of Vibo Valentia and Reggio Calabria's ports are now entrusted to the Gioia Tauro's AdSP).

With the same logic the new *governance* model provided by the reform for the newly created AdSPs is to be seen. It is leaner and more centralised than the one provided by the law 84/1994. In this sense the innovations are: the elimination of the port Committee, substituted by a smaller and ultimate management Committee; the creation of the national Conference of AdSP coordination at the Ministry for the infrastructures and transports (art. 11-ter, 84/1994) and the new powers bestowed to the President.

The *governance* system so drafted provides that the ports of national and international relevance are coordinated by the 15 AdSPs to whom a strategic role of directing, planning, coordinating the port system in their own area. Regions, whose ports have not been involved in the reform, can propose some amendments to the composition of the AdSPs, asking to include further ports of regional relevance within the supervision of a AdSP (art. 6, co. 2-bis, 84/1994).

The port planning activity remains the sore point in the reform; it provides for complex procedures and, moreover, depends on the fulfilment of complicated agreements among the entities (Municipalities and Regions) with regard to the choices related to the development of the ports present in their territory.

### 1. The AdSP's legal nature and the enforcement of the anti-corruption and transparency provisions.

The AdSP is legally defined by the new art. 6 of the leg. decree 169/2016 as *"non-economic public entity of national relevance with a special organisation";* the entity is provided with administrative, organisational, regulatory, financial and of balance sheet autonomy. According to what provided by art. 1, c. 2 of the legislative decree of the 30th March 2001, n. 165, the non-economic public entities are considered as public administrations.

With regard to the enforceability of the anti-corruption and transparency regulations to the AdSP, the amendments provided by the recent legislative decree of the 25th March 2016, n. 97 introducing the art. 2-bis, co. 1, into the legislative decree of the 14th March 2013, n. 33. This norm expressly includes the AdSPs among the entities that have to comply with the transparency obligations. Then the law n. 190 of the 6th November 2012 (art. 1, c. 2 -bis) includes all the public administrations of art. 1, c. 2 of leg. decree 165/2001, among the subjects that has to adopt the PTPCs (for which the PNA is a policy act) and all the subjects of art. 2-bis of leg. decree n. 33/2013, among which the AdSPs are part.

The lawmaker has therefore finally clarified and removed the doubts arisen in the previous legal framework, with regard to the total subjection of AdSPs to the law 190/2012 and the leg. decree 33/2013. The AdSPs are therefore asked to comply with all the corruption prevention and transparency measures provided by the above-mentioned provisions.

The peculiarities in the port sector compared to the other environments of public administration together with the news provided by the above-mentioned reform explain the need to provide the 2017 PNA Follow up with a special in-depth analysis.

To this end, ANAC has created a technical Work Group to which the representatives from the Ministry of the infrastructures and transports (MIT), the Authority of the regulation of transports

(A.R.T.), the AdSPs of the Central Tyrrhenian Sea, Ionian Sea and Northern Adriatic Sea took part aiming to outline and identify the areas that are mostly exposed to risk in the sector; the aim was also to provide the specific guidelines to draft and manage the related measures of prevention. The guidelines provided in the present in-depth analysis have been agreed on by the technical Work Group and represent its outcome.

It has been noted that centralisation of all the main function of promotion, planning, management and control that characterise the new SPAs' new mission caused a global revision of the entire organisational and structural system of the same. This system, nevertheless, considering the important targets that the reform seems to entrust to the same, appears still fragile and exposed to risks of corruption.

It is worth to highlight since now the effort made by the recent reform to make the government entities and SPA governance system more open and simpler; similarly, the Authority of the transports has tried to set a regulating framework. Nevertheless, considering all these efforts, the difficulties from the long approval procedures of the port regulatory plans and the delays in approving the regulations of the relative concessions still remain. This has led to an excessive micro-regulation, which can trigger some phenomena of maladministration and real corruption. In this regard, it is to be noted that ANAC has received and still continues to receive warnings from the port sector regarding micro and macro corruption situations and that the port managements are often involved in legal proceedings.

The implementation of the corruption prevention measures that are mentioned in the present in-depth analysis should correspond to a suitable and compliant planning in the organisation of both the territorial offices (AdSP's offices) and the decentralised administrative offices. This is to enhance the efficiency in the structures, strengthen the risk management and prevent any possible phenomena of corruption; furthermore, promoting transparency and reducing situations of conflicts of interests are also addressed.

Considering the above, in order to guide the AdSPs' activity, the following matters are studied in depth.

- Individuating the RPCT, adopting the PTPC and corruption prevention measures.
- Individuating some specific areas of risk that characterise the AdSPs' activity (concessions and authorisations, monitoring activity and critical aspects related to internal organisational aspects) and individuating the relative amendment measure.
- Creating the Independent Assessment Entity (OIV) in the AdSPs.

## 2. Governance authorities in the AdSPs, identification of the RPCT and adoption of the PTPC

### 2.1. AdSP governance authorities

According to art. 7, c. 1 of the 84/1994, as amended by the leg. decree 169/2016, the AdSP authorities are the President, the management Committee (which has substituted the former port Committee) and the Board of auditors.

The President (ex art. 8 of 84/1994) is chosen by the Ministry of the infrastructures and transports in agreement with the President of the Region; he represents the entity, appoints and chairs the

management Committee and proposes the appointment of the general Secretary. The AdSP President, according to what provided by the c. 3 of the above mentioned art. 8, submits the three year operational plan to the management Committee, for the approval, and the port system regulatory plan, for the adoption; he submits the deliberation schemes related to the provisional budget and the relative amendments, the costing and the remuneration to the general Secretary; after having consulted with the management Committee about the state concessions, he takes the relative decisions; he is entrusted with coordinating powers with regard to the other public parties that operate in the port; moreover he can promote the undertaking of agreements between AdSPs and the other administrations operating in the port to speed up the port operations and simplify procedures; he can promote some infrastructural investments plans that provide for state grants or grants from other national or EU public entities; he can take part to the sessions of the inter-ministerial Committee for the Economic Plan (Comitato interministeriale per la programmazione economica, CIPE) when some strategic decisions with regard to the port of reference are to be taken.

The management Committee ex art. 9 of the 84/1994 is chaired by the President, who sees also to the appointment of its members. The Committee is composed of a limited number of subjects, i.e. the representatives from the involved institutions and the local organisations (Regions, metropolitan Cities, Municipalities and maritime Authorities). The tasks entrusted to the Committee are listed in the c. 5 of art. 9, among which there are: the adoption of a port system regulatory plan; the approval of the three year operational plan, reporting the development strategies related to the port and logistic activities; the approval of the budget, the amendments notes and the costing; the drafting of the AdSP management and accountancy regulation, to be approved with a decree from the Minister of the infrastructures and transports in agreement with the Minister of the economy and finance; the approval of the yearly report on the AdSP's activity to be sent to the Minister of the infrastructures and transports; the appointment of the general Secretary upon the proposal from the AdSP president.

The functions entrusted to the management Committee secretary are performed by the general Secretary according to art. 9, co 4 of the law 84/1994.

### 2.2. Identification and appointment of the RPCT

According to their organisational structure, it is deemed that the in the AdSP the one entrusted with the power to appoint the RPCT is the President, as the political-administrative guidance authority. From the in-depth analyses it has emerged that currently in the AdSPs the RPCT functions are commonly entrusted to the general Secretary who is also entrusted with some significant managerial roles.

The general Secretary, appointed by the management Committee, upon the proposal from the AdSP President, is chosen among subject of proved managerial experience or professional skills in the port sector and in the accountancy-administrative matters. The person carries out important tasks within the AdSPs; the tasks are mentioned in the c. 4 of the art. 10 of the law 84/1994. Among these tasks there are the implementations that are necessary to the AdSP's functioning, the supervision and coordination of the port territorial offices' activities, the drafting and the inquiry of all the due acts from the President and the management Committee.

Taking into consideration, therefore, the amount and the particularities of such functions upon this unique subject, it is deemed that in the AdSPs the RPCT is to be chosen among the permanent in service top managers, except for some particular circumstances. It is provided that they are entrusted

with powers and functions that allow the duly performance of the appointment autonomously and effectively even if with the implementations of some amendments (see 2016 PNA adopted with ANAC deliberation n. 831/2016, § 5.2).

In this sense, it is highly desirable that the governance entity in the AdSP (President and management committee) ensures that the subject individuated as RPCT has legitimacy and authority also through a series of strategic actions and indications, such as the adoption of formal provisions that properly integrate him within the organisation. They give him a proper collocation, describing his functions and tasks. Similarly, the entire organisation has to collaborate providing him with the information, the data and the activities that are necessary to achieve the targets; this obligation has to be expressly included in the codes of conduct.

In the residual hypothesis when the general Secretary is appointed as the RPCT in the AdSP, it is desirable to provide some forms of responsibilities related to the RPCT role through the introduction of specific provisions within the code of ethical conduct; the code is intended to the members of the policy guiding entity in the AdSPs and also to the general Secretary himself (see § 4.3.).

In every case, both the management Committee and the President are recommended to properly participate and exchange opinions with the RPCT in drafting the PTPC; in particular with regard to the individuation of the areas of risk, the choice of the preventive measures against the phenomena of corruption and the enforcement of the powers of monitoring and control.

### 2.3. Identification of the entity adopting the PTPC

According to art. 1, c. 8 of the l. 190/2012, the individuation of the policy guiding entity is relevant also with regard to the approval of PTPC. According to the provisions provided by the law 84/1994 it seems clear that policy guiding entity who takes decisions within the AdSP is individuated by the law maker in the management Committee. To the committee are entrusted the specific capacity to adopt and approve the "plans".

Nevertheless, the President seems to represent the monocratic executive policy guiding entity; as such, he could also be indicated as the competent subject for the approval of the PTPC. Therefore, it is believed that the final adoption of the PTPC within the AdSPs can usually go through two passages: the approval from the management Committee of a document of a general character about the content of the PTPC; while the executive entity, represented by the President, could keep his own competence with regard to the final adoption of the Plan.

It is understood that the responsibility, in the hypothesis of "*omitted adoption*" according to art. 19, c. 5, lett. b) of the leg. decree of the 24th June 2014, n. 90, remains upon the competent entity for the final adoption of the "plan", i.e. the AdSP President.

An exam carried out by the Authority about the 2017-2019 PTPCs published on the AdSP institutional websites has shown the existence of a deep heterogeneity in the procedure related to the individuation of the policy guiding entity that adopts that PTPC[2]. On the contrary it is desirable that the AdSPs follow a uniform procedure coordinating themselves also together with the decentralised

[2] Among the different procedures to be followed within the AdSP, it is worth to mention, for example, the ones adopted by the AdSPs in the Ionic Sea; the western Sicily Sea; the eastern Adriatic Sea, in which the PTPCT was drafted by the RPCT (the general Secretary) and afterwards approved by the President. On the contrary, in the AdSP of the central Tyrrhenian Sea the RPCT autonomously drafted the plan and afterwards approved it.

administrative offices. In order to enhance the synergy and collaboration between these latter and the AdSP territorial central offices it could be advisable to appoint one representative by RPCT in the various decentralised offices.

## 3. Specific areas of risk characterising the AdSP's activities

### 3.1. Concessions and authorisations

Among the functions that the lawmaker appoints to the AdSPs particularly relevant is the exclusive administration of the areas and the properties belonging to the public maritime domain, which are present in the relative district. These properties can be leased to private subjects according to art. 8 of the law n. 18, of the 84/1994 (lease of areas or quays) and the art. 36 of the waterways code (lease of state properties). The leasing procedure according to art. 36 of the waterways code has been adapted to the port provisions substituting the maritime Authority's competences with the AdSP entities' competences.

With regard to short term leases (less than four years) the competent entity is the AdSP President together with the management committee as advisory body (art. 8, 84/1994), while for long term leases (more than four years) the competent entity is the management Committee itself upon the proposal from the President. The waterways code (art. 37) regulates the case of several leasing applications; according to this, preference is given to the applicant that is provided with the best guarantees for a profitable use of the concession and that undertakes to use the property also in the best public interest, upon the administration's judgement. In case these preferential grounds are not present, a restricted adjudication is to be applied.

Art. 18, c. 1, 84/1994, on the contrary, provides that the concessions are granted on the basis of suitable forms of disclosure, established by the Minister of transports and navigation, in agreement with the Minister of finance, with a special decree; relative fees, which are fixed also taking into consideration the amount of port traffics. Included in the same decree are the following:

a) the length of the concession, the monitoring and control powers in the granting Authorities, the procedure of the concession renewal or the leasing of the plants to a new concessionaire;

b) the minimal limits in the leases that the concessionaires have to pay.

Among other, the law provides that the competent Minister, with the aforementioned decree, adapts the national regulation related to the licensing of areas and quays to the EU regulations.

The Council of State decided on the aforementioned «*Scheme of a decree related to the regulation of the leasing procedure for areas and quays, included in the port environment, ex art. 18, c. 1, law of the 28th January 1994, n. 84*» with the opinion expressed by the Advisory Section of Regulatory Acts, assembly of the 7th April 2016 (Affair number: 552/2016). The decree, after more than two decades since the issuing of the law, has not been approved yet; therefore, the relative market has remained under a regulatory gap, which might worsen the corruption risks that are dormant in this sector.

Lacking a national regulation, the AdSPs apply the bare provisions included in the laws. Several AdSPs have adopted their own internal regulations about the public maritime domain, also with the aim

to regulate all the relevant procedural phases. This is an admirable and necessary attempt in self-regulation.

It is desirable that this situation of lacking regulation is closed as soon as possible by the competent Ministries, in compliance with the provisions included in this PNA. Art. 16 of the law 84/1994, on the contrary, provides that the performance of the operations (uploading, downloading, transhipment, the storage and the moving in general of goods and any other material) and the port services (special, complementary and accessory performances with regard to the cycle of port operations) is to be prior to a concession from the AdSP. In compliance with what provided by the art. 16, c. 4, the former Minister of transports and navigation approved the ministerial decree of 31st May 1995, n. 585, regulating the granting, suspension and revocation of the authorisations for the port activities. According to a possible interpretation of the two art. 16 and 18 of the law 84/1994, the prior possession of the authorisation could be a requirement to take part to the licensing procedure.

The regulation related to the granting of the authorisations and, in particular, the concessions from the AdSPs is exposed to corruption risks that are typical in the market of public contracts, even more there are further risks since it is a market characterised by consistent corporate pressures, a high concentration level, especially in some segments, and an incomplete regulatory framework. Taking into consideration the peculiarities of this market under this in-depth analysis, the phases of the planning, the choice of the concessionaire, the enforcement and the renewal of the concessions will be analysed under the point of view of the corruption risks.

In this regard, taking into consideration the several similar aspects, the fundamental principles in the section of the 2015 PNA Follow up have to be reminded here. The Follow up was approved with deliberation n. 12 of the 28th October 2015, about the "*public contracts*" risk area, in view of the adaptation of said section to the new Code of public contracts, adopted with the legislative decree of the 18th April 2016, n. 50 as subsequently amended and supplemented.

It is highlighted that the opinions expressed and the proposed measures can be applied also to the regional relevance ports, taking into account the similarity in the issues with regard to the granting of authorisations and concessions.

### 3.2. Planning

The reform in the Italian port law with the leg. decree 169/2016 has introduced a new planning tool in the AdSPs: the port system regulatory Plan ("Piano regolatore di sistema portuale, hereinafter PRSP). According to art. 5 of the 84/1994, as renewed by the aforementioned leg. decree 169/2016, the PRSP defines the range and the whole structure of the ports that represent the system, including the areas destined to the industrial production, building sites and road and railway infrastructures. Furthermore, the PRSP identifies the characteristics and the functional destination of the relevant areas.

Art. 5, c. 3, of the 84/1994 identifies the PRSP procedure, providing that this (including the environmental report) is adopted by the management Committee, prior agreement with the municipality or the municipalities involved. This plan is, therefore, sent to the superior Council for the public works and, afterwards, is approved by the interested Region within thirty days since the completion of the procedure of the Strategic Environmental Assessment (Valutazione Ambientale Strategica, hereinafter VAS), prior agreement with the Minister of the infrastructures and transports. If

this agreement is not reached, the procedure ex art. 14-quarter of the law of the 7th August 1990, n. 241.

It is helpful to remind, furthermore, what provided by the art. 11-bis of the 84/1994, which at each AdSP provides for the creation of the "Organism of partnership of the sea resource"; this organism promotes the dialogue among the partnership members both top-down and vice versa and provides advice in the economic social partnership field, with regard to several issues, among them there is the PRSPs.

This organism is composed of the AdSP President, who chairs it, the port captain or the captain of several ports, (which have already hosted the port authority, belonging to the AdSP port system) together with a representative of the shipowners, a representative of the industrialists; a representative of the operators mentioned in the art. 16 and 18; a representative of the shipping agents; a representative of the intermodal logistics operators present in the port; a representative of the railway operators present in the port; a representative of the maritime agents and shipping agents; a representative of the road haulage operators that are active in the port-logistics field; three representatives of the workforce of companies that operate in the port; a representative of the tourist and trading operators present in the port.

Pending the enforcement of the new port planning system, it is possible to approve the "old" port regulatory plans (piani regolatori portuali, hereinafter PRPs) in case the requirement provided by the art. 22, c.6, of the leg. decree n. 169/2016 is fulfilled: «*In the ports mentioned in article 6, c. 1, of the law n. 84 of the 1994, in which the AdSP is present, the port regulatory plans, which have already been adopted by the port committee before the effective date of the present decree, are approved in compliance to the current law when they are adopted*».

The complexity in the aforementioned procedures of drafting and approval of the Plans implies that there can be a considerable span of time between the adoption of the Plan from the management Committee and the approval of the same from the Region; any possible reconsiderations from the involved territorial entities can happen. Consequently, the implementation times for the port development planning guidelines often turn out to be absolutely incompatible with the changes in the maritime traffic and the urgent demands from the international operators.

In particular, also within the new regulatory framework, the times for approval of PRSPs depend on the agreement reached with the municipalities ex art. 5 of the 84/1994. Reaching this *"agreement"* might be very arduous especially when several municipality administrations are involved. Another critical aspect is the need to coordinate the PRSPs with the urban planning instruments.

The problems in exam are further complicated by the lack of homogeneousness in the respective regional provisions: in some Regions the Plan is superordinate compared to local urban instruments and, consequently, in case of disagreement among the planning instruments, the amendments included in the Plan are automatically included in the municipality urban instrument; in other Regions, the Plans are considered as implementation plans of the municipality regulatory plans and, therefore, the amendments to the PRP are subject to the approval of the municipality regulatory plans. This implies that each amendment to the PRP has to be subject to the "amendment agreement" approved by the involved Municipality. Finally, there are further complications for the ports that belong to the Sites of National Interest – Siti di interesse nazionale, S.I.N.

The complexity in the approval procedure of the PRSPs and PRPs (which cannot be mitigated without an intervention from the lawmaker on the related regulatory structure) has led to the presence of some port regulatory plans that are quite old and therefore unable to comply with the new needs for a development in the trading traffics. The situation is similar with regard to the procedures of fixing the concession fees, since, again, the aforementioned ministerial regulation has not been approved yet; this regulation should indicate *«the minimum limits for the fees that the concessionaires have to pay»*.

In this regard, it is noted that during the works to draft the present in-depth analysis the Authority for the regulation of transports has highlighted the need to adopt some homogeneous criteria for the eligibility of the costs related to the fixing of the concession fees (among which the ones for the investments) and the related length of the single concessions together with the other fees for the services provided in the ports[3]. It is relevant in this regard the ART[4] economic regulation activity.

According to what has been announced, the ART is going to draft some measures related to the fair and no discriminatory access to port infrastructures and, among others, the obligations to a separate accountancy, a regulatory accountancy and transparency of costs upon which fees and tariffs[5] are fixed.

The absence of updated regulatory plans, therefore, enhances the micro-regulatory relevance in each single concession with the consequent exposure to risks in the relative decisions.

*Possible risky events*

- Risk of particularism pressures from holders of private interests; they might act to protect their profitable consolidated positions due to the lack of approval of updated port regulatory plans. In particular this happens when the current plan does not define the destination of use of docks and quays to be assigned as a concession to the economic operators; in this way the entity has a high discretionary power when comparing the different possible uses of areas and quays.

- Risk of corruption pressures in the phase of determining the object of the concession, lacking the presence of guarantees for participation, transparency and control, which are common in acts of general regulation. Moreover, the fact that the characteristics of the activities and the traffics that can be performed in the port environments are not specified does not provide the administration with an objective criterium of selection and choice of the concessionaire; this negatively impacts on the level of information transmitted to the economic operators: they are informed about the content and the characteristics of the concession only when the notice is published.

[3] And this in compliance with the criteria set by ART according to the articles 37, co 2 of the leg. decree n. 201 of the 6th of December 2011 and 8, c. 3 lett. n.) of the law 1. n. 84/1994, in the light of the recent EU Regulation n. 2017/352 of the European Parliament and the Council of the 15th of February 2017; the regulation provides for a provisional framework for the providing of port services, common provisions with regard to financial transparency of ports and amendments to the general norms of exemption from the regulation about the State supports approved by the EU Commission on the 17th of May 2017 and currently being published.

[4] Starting from the procedure began with deliberation n. 40/2017, which will be carried out according to the common method of *notice and comment.*

[5] Since the enforcement of the European Regulation n. 2017/352, and similarly to what already happens in other environments (railways and airports), these fees and tariffs will be fixed prior consultation with the operators/users (art. 15).

- Risks deriving from the deprivation of a competitive environment with regard to concessions including the creation of some powerful positions held by the economic operators towards their competitors and the AdSPs themselves.
- Risks of corruption pressures from the operators that are already active in the port so that the AdSPs use their power to limit the number of economic operators authorised to operate in the port; in so doing their profitable position is reinforced and guaranteed.

*Possible measures*

The measures for containing the corruption risks connected with the systems of concessions and authorisations can, therefore, include some local offices aimed to increase the efficiency and transparency of the managements.

- Recovery of moments of advisory and public participation in the phase of drafting the concession notice, especially if it is of relevant value and duration. AdSPs could also issues some notices of pre-information in order to enhance a wider circulation of information.
- Provision of an intercurrent time, properly modulated, between the publication of a public notice and the final date for filing the relative applications; in so doing the economic operators, especially the ones that are not operating in the port, may fill their applications for a concession.
- Limitation of the procedure of granting and renewal so called *ad opponendum*, in which the procedure starts with the publication of the application for the concession or extension filed by an economic operator. Leaving the decision of the starting of the procedure to the application from the private subjects could cause some unbalances in competition; as a consequence, the administration might be exposed to evident corruption risks.
- Prevision of a concession duration that is proportionate to the value and complexity of the same and, in any case, no longer than the period of time that is necessary for recovering the investments from the concessionaire. It is reminded in this regard that in the aforementioned opinion given in the advisory phase, the Council of State expressively mentioned the possibility to include some safeguard clauses in the concession such as social clauses for the takeover of staff or redemption allowance to be borne by the successor operator.
- Adoption of homogeneous criteria for the relevance and eligibility of the costs to be borne for fixing the fees.
- Adoption of homogeneous criteria for determining the duration of the concessions and the concessionaire's duties, according to the commitments undertaken in the business plans.
- Adoption of criteria for determining the maximum number of authorisations granted in compliance to the art. 16, c. 7, of the law 84/1994, following the principle of the fair and non discriminatory access to the port infrastructures and in order to guarantee the coherence with the Triennial Operational Plan (Piano Operativo Triennale, P.O.T.)

### 3.3. Selecting the concessionaire

As aforementioned, the procedures for granting the concessions from the AdSPs are included in the articles 37 and following of the maritime code and the art. 18 of the law 84/1994 and, when present, in the regulations adopted by each AdSP.

These provisions, which certainly are not able to prevent several corruption risks typical in the selection procedures of public contracting parties, has to be integrated (it is a constant orientation in the administrative jurisprudence and this Authority) with the principles deriving from the national primary and EU legislation: principles of economy, effectiveness, impartiality, equal treatment, transparency, proportionality, publicity, safeguard of environment and energy efficiency.

The Authority has to remind what affirmed (also recently) by the Council of State: «*The indifference shown by the EU order towards the definition of the present case and, therefore, to its internal reclassification either in public or private environments ensures that the relevance of the principles of evidence are sufficiently satisfied with the circumstance that with the concession of a maritime domain area an chance for profits is entrusted to subjects operating in the market; therefore a competition procedure compliant to the aforementioned principles of transparency and non-discrimination».* (Council of State Section VI; 06/11/2015, n. 5062). The code of public contracts especially in the part related to concession, is certainly a benchmark to whom the AdSPs have to comply, in particular if the value of the concession increases.

In any case, it is highlighted that only in case it is provided the execution from the concessionaire of works for the building of properties destined to be permanently owned by the government or, in any case, part of the AdSPs' assets (with a proper concession of works), the code of contracts has to be fully complied with (see in this regard the recital 15 of the EU directive 23/2014). Moreover, the Authority wishes that in drafting the ministerial regulation ex art. 18, c. 1, law 84/1994 these concerns are duly taken into consideration.

*Possible risk events*

- Risk of favouritisms in granting the concessions and establishing relationships only with some economic operators.
- Risk of actions aimed to illegitimately reduce the number of participants to the tender.
- Risk of a distorted enforcement of the award criteria in the tender to manipulate the result.

*Possible measures*

As above mentioned, the measures related to the choice of the concessionaire are mainly the ones provided by the code of public contracts for the selection procedures of the contracting party. As an example, the following aspects are mentioned:

- Adequate forms of national and international advertising and preference given to procedures that are started by the government entities in compliance with some planning instruments and not simply ex parte.
- Defining the subjective requirements to take part to the entrusting procedure, which are at least similar to those mentioned by art. 80 of the leg. decree 50/2016.

- Defining the requirements of economic-financial suitability and technical professional skills that are proportionate to the value of concession.
- Preference given to open and restricted procedures.
- Mentioning the award criteria in the contract notice, which are transparent and objective; the awarding commission has to be composed of subjects (even not from SPA) that are provided with a proved experience in the sector. With a particular reference to the selection criteria, then, it is worthwhile to remind that the art. 18 of the law 84/1994 refers to the ministerial decree for the "minimum" fees; therefore, this implies that the amount to be paid for the fees (as the duration of the concession) can be included among the criteria for the offers selection. The AdSP obviously has to take these criteria into consideration in the way it is deemed most suitable to safeguard the public interest entrusted to them.
- In case there is a number of applications for the granting of the authorisations, according to the art. 16 of the law 84/1994, which exceeds the availability, the AdSP periodically performs a procedure of competition to guarantee the chances of access also to new economic operators.
- A clear and accurate mentioning in the bid documentation of the assessment parameters of the performances provided by the concessionaire, the duties upon the same, and the penalties/sanctions enforceable in case of failure or incorrect compliance to the due performances.
- When entrusting the concessions, mentioning that (with the provided requirements) the authorisation ex art. 16 of the law 84/1994 can be granted to the selected concessionaire who has not been provided with it yet, also, possibly, when there is an excessive number compared to the limit introduced.

It is reminded, then, that the Authority has already had the chance to clarify that the public concession is subject both to the obligations to inform the Observatory and pay the Authority and the obligations of traceability of the financial flows, within the limits mentioned in the opinion on the regulation of the 15th of February 2013.

### 3.4. Enforcement

As already mentioned several times, the concessions that are granted in the port market tend to have a long duration. The proper management of the order during its existence is therefore extremely relevant.

Particularly relevant are the controls that the AdSPs have to perform on the selected economic operators keeping the necessary requirements and on the compliance to the investments program and the other obligations undertaken when the concession was granted. Particularly relevant is also the proper compliance to the obligation to pay the fee upon the economic operator and the possible following forced recovery of the unpaid sums. From the in-depth analyses performed it has emerged the critical situation related to the phenomenon of the *variation of the concession*, especially with regard to the content of the same.

The order of variation adopted by the AdSPs according to the art. 24 of the Regulation for the enforcement of the code for waterways may have a relevant impact (either positive or negative) not

only toward the recipient but also toward the other operators that are active in the ports and seems, therefore, able to cause corruption risks.

Excepted the cases of objective and incidental situations (admitted by the jurisprudence), also in this case the Authority has to enforce the compliance with the consolidated EU principles; according to these principles the substantial change in the conditions provided by the contract notice requires for the restart of the public evidence phase.

*Possible risk events*

- Failure or insufficient control on the correct performance of the concession, also in relation to the control parameters of the performances provided by the concessionaire and the obligations upon the same mentioned in the contract, in order to avoid the enforcement of penalties/sanctions, dissolution or revocation of the concession or the forced collection of the relative fees.
- Improper amendments to the contract in order to favour the concessionaire.

*Possible measures*

- Creation of procedures and planning the control measures on the concessionaires to be transmitted also to the RPCT and the internal monitoring entities. To this aim, the undertakings upon the concessionaire and the parameters to evaluate his performance have been drafted in the contract, so that, in case of a breach or incorrect implementation of the due performances the relevant offices ask the management Committee to start the procedures to impose penalties/sanctions or to revoke the concession or to forcibly collect the fees.
- Since the publication of the notice, including some examples of cases and procedures with which it is possible to proceed to amend the contract. The procedure ex art. 24 of the regulation of maritime navigation should provide sufficient guarantees of publicity and transparency, allowing also the participation of other subjects with contrasting interests. It is deemed that what mentioned in the Code of public contracts, in particular at art. 175, can also in this case represent a suitable parameter of reference.

### 3.5. Expiration and renewal of the concession

One of the critical aspects that have particularly emerged is the one related to the possible extension or renewal of the concession, which apparently is a quite common phenomenon in this market. According to the information gathered in drafting the present in-depth analysis, moreover, it appears that several current concessions have been recently extended.

In this regard, the Authority has to resort to the very consolidated jurisprudence in this matter; the jurisprudence, always taking into consideration the EU principles, forbids any kind of extension or renewal that is not based on a new granting procedure. Also, in this case, as per the granting of the concession, the ex officio procedures should be preferred and not the ones that start *ex parte*, so that the leaving concessionaire has not an excessive competitive advantage.

Moreover, a possible source of corruption risks can arise from the test procedures and procedures of transfer to the government the works made by the concessionaire, who might try to obtain higher amounts than the actual value of the assigned works.

*Possible risk events*

- Risk that the leaving concessionaire might press AdSPs to be granted extensions or renewals of concession; this would imply a lack of competition in the market, which could be due to the extension.

*Possible measures*

- With a duly timely notice before the natural expiration starting the procedures for the granting of the concession.
- Providing measures that ensure a constant and accurate flow of data between the concessionaire and the AdSPs during the concession and, especially, when the expiration date approaches; in so doing, the AdSPs may have all the necessary information to draft the contract notice.
- Appointing the test commission with procedures that are similar to the ones for the tender commission in order to guarantee the necessary requirements of independence and impartiality.

### 3.6. Supervision and oversight activities in the port premises

Art. 6, c. 4, lett. a), of the l. 84/94 provides the AdSPs with, among other, the control function on the port operations and services and the other trading and industrial activities. According to art. 24, c. 2-bis, of the same law, the port Authorities are entrusted also with the supervision and control on the compliance with the provision related with work safety and hygiene with the related power of administrative police.

To the aforementioned tasks the control activities are added provided by the art. 4 and 38 of the leg. decree n. 272 of the 27th July 1999 with regard to workers' health and safety in their performance of the port operations and services; the operations of maintenance, repair and transformation of the ships within the ports; and further oversight activities with regard to the state properties (unlawful seizure, damaging of state properties and misuse of state properties), port works (interferences between the terminal operator and the port company used; procedures of employing workers and contractor companies, working hours), road networks (detection of irregular parking, presence of loads with unattended dangerous goods), and security (controls of access credentials).

The surveillance activity is, in general, susceptible of external influences and pressures since it is discretionary.

*Possible risk events*

- Failure or incomplete performance of the surveillance activity.
- Failure to report what detected to the competent entities.

*Possible measures*

- Including specific mentions to the inspectors' duties of conduct in the AdSP employees' code of conduct; these mentions highlights the need for an effective coordination between the different subjects that performs the surveillance activities in the ports: ASL operators, port masters' operators, etc.

- Performance of the surveillance activity in multiple management for assessments, at least in the most complex cases.
- Planning the personnel rotation measures in the sector.
- Designing training for staff in their specific technical sector and with regard to corruption prevention, legitimacy and codes of conducts.

## 4. Internal organisational aspects in the AdSPs

### 4.1. Staff recruitment

The lawmaker amended art. 6, c. 5 of the law n. 84/1994 with the leg. decree n. 169/2016; the article provides that to the newly created port system Authorities «*the principles of title I of the legislative decree of the 30th March 2001, n. 165 are applied. The AdSPs adapt their sets of rules to the aforementioned principles and adopt criteria and procedures with their own provisions for the top management and ordinary recruitment in compliance with the article 35, comma 3, of the same legislative decree. The same provisions rule the procedures of appointing top managers and other staff, according to transparency and impartiality criteria. The measures adopted according to the present comma are subject to the approval from the Minister of the infrastructures and transports».* The AdSP staff's employment relationship, provided by art. 10, c. 6, of 84/1994, on the contrary, is subject to private law and ruled by the national collective bargaining agreements[6].

Therefore, on the one hand, the employment relationship in AdSPs remains under private law, on the other hand, the principles of public provisions are reminded with regard to the personnel recruitment procedures, both at managerial level and below.

With regard to what aforementioned, the provisional system ruling the personnel recruitment procedures appears to be completely atypical and special, increasing the corruption risk that is already present tout-court in this organisation aspect (see art. 1, c. 16 lett. d) law n. 1. 190/2012). In the part, the administrative court has repeatedly intervened in this matter[7].

The AdSPs, in compliance with what provided by the c. 5 of the art. 6 of the law 84/1994, has to be provided with a special "*Provision*" to regulate the personnel recruitment procedure according to the

[6] Art. 10, c. 6, law 84/1994 provides that «The employment relationship of the personnel under the port system authority is ruled by private law and by the Civil Code provisions, book V – title I – chapters II and III, title II – chapter I, and by the laws on the employment relationship within companies. The aforementioned relationship is ruled by the national collective bargaining agreements, upon the general criteria provided with a decree from the Minister (of the infrastructures and transports); they will have to take into account also the compatibilities with the economic , financial and budgetary resources; these agreements are signed by the representative association (of the port system authorities) on the employer's side and by the national trade unions that mostly represent the personnel of the port system authorities on the employees' side».

[7] The administrative court, with regard to the personnel selection procedures performed by the port Authorities, has several times remarked that they are "non-economic public entities" and as such they are subject to what provided by the legislative decree of the 30th of March 2001, n. 165. The circumstance that the work performed by the port Authorities personnel is regulated by the private law and by the national collective bargaining agreement is not against an open competition preliminary phase with the aim to find the best skilled people (Administrative Court in Catania, decision n. 02251/2009 and Council of Administrative Justice decision n. 134 of 2011). In this regard also the Council of State, Advisory section for the Regulatory Acts, expressed their opinion n. 00435/2016 taken on the 27th April 2016 with regard to the reform legislative decree scheme of the law 84/1994.

principle of «a *public and transparent selection*» to be approved by the Minister of the infrastructures and transports. Nevertheless, so far only the AdSPs in the central Tyrrhenian Sea and northern central Tyrrhenian Sea have adopted the aforementioned Provision, reporting the fact on their institutional website.

*Possible risk events*

- The absence of a regulation that disciplines the personnel recruitment procedures leaving wide discretion to the administration with possible favouritisms in the recruitment.
- Inconsistencies in the personnel recruitment procedures between each AdSP with following possible inequalities of treatment.
- Inefficient performance of the selection procedures and lacking transparency in the same.

*Possible measures*

- Effective adoption of special acts (Provisions or Regulations) which, according to c. 5, art. 6 of the law 84/1994 regulates the following with criteria of transparency and impartiality: a) the temporary and open-end personnel recruitment procedures; b) the procedures appointing the top managerial positions either when they are for the internal personnel or external; c) the appointment of any other position including collaborations and advisories.
- Compliance with the transparency measures provided by the leg. decree 33/2013, in particular: publication of the aforementioned regulations and/or the general acts regulating the temporary and open-end personnel selection procedures on the institutional website under the "Transparent Administration" section.
- Publication of the documents related to the beginning of procedures – notice and selection criteria -and the outcomes of the same on the institutional website according to art. 19 of the leg. decree 33/2013.
- With regard to the outsourced appointments of collaboration or advisory, publication of the relative remuneration, whatever called, according to the art. 15 c. 2 of the leg. decree n. 33/2013, related to each single entrusted appointment of collaboration and advisory.
- Publication of the relative category national agreement on the website with regard to the employees (art. 21, leg. decree 33/2013) and for personnel under private law treatment. Publication of the integrated data about the present open-end and temporary personnel (art. 16 and 17, leg. decree 33/2013) mentioning the relative annual cost and the absence ratios.

### 4.2. Management of the conflicts of interests in outsourcing appointments

With regard to incompatibility and accumulation of tasks and appointments, the principles provided by the legislative decree 165/2001 are applied to the AdSPs. In this regards it has been noticed the absence of regulations and the need to intervene with duly clarifications, especially the fact that the AdSP Presidents are subject to the legislative decree of the 8th April 2013, n. 39 with regard to impossibility and incompatibilities of appointments in the public administrations.

Lacking a common regulatory framework, some possible risk events and possible prevention measures are mentioned hereinafter.

*Possible risk events*

- The lack of regulation in entrusting the outsourced appointments can foster the creation of not so transparent relationships between the AdSPs and third parties.

*Possible measures*

- Adoption of internal Regulations to discipline the authorisations with regard to outsourced appointments. It is desirable that the Minister for the infrastructures and transports monitors the actual adoption of these Regulations and possibly provides guidelines to guarantee uniform principles and procedures for all AdSPs.
- The actual adoption of the codes of conduct for the employees to regulate the different appointments entrusted to the employees themselves.
- Inclusion of suitable rules to regulate the entrust of appointments; specific provisions in the codes of conduct adopted by each AdSP according to the decree of the President of Republic 62/2013 such as, for example, the obligation to refrain whenever there are some conflicts of interest.

### 4.3. Composition of the management Committee and cases of conflicts of interests.

The management committee, ex art. 9 of the law 84 of 1994, is chaired by the President who appoints their members. They are nominated respectively by the institutions and the public entities whose territory is included, also partially, in the port system (Regions, Municipality Mayor, Metropolitan Mayor and maritime authority).

It is worth to highlight that the aforementioned scheme of legislative decree, not yet approved, with *«Supplementary and corrective provisions to the legislative decree of the 4th August 2016, n. 169»* with art. 8 amends the art. 9, second comma, of the law 84/94, which provides for composition, functioning and appointments of the management Committee.

This amendment would imply that the members of the management Committee would be subject to the provisions related to impossibility and incompatibility of appointments in the public administrations provided by the legislative decree of the 8th April 2013 n. 39, and would be prevented to be appointed as a member of an administrative political entity both at a local and a regional level. It is worth to remember, in this latter case, that the Council of State, in their opinion on the aforementioned scheme of decree (n. affair 1668/2017), clarified that for those members of the management Committee that are in this situation when the rule becomes enforceable, the lapse will be provided by law.

With regard to what aforementioned, it seems that the before mentioned amendments aims to attenuate the conflicts of interests ensuring that the entity is duly independent and autonomous.

*Possible risk events*

- According to what above mentioned, there is the risk that some conflicting interests and roles might be present in the management Committee's decisional processes. The risk seems

mitigated by the provision above mentioned, introduced by the new decree still to be approved. This circumstance is intensified by the fact that the reform provided by the leg. decree 169/2016 has centralised the functions of guidance and management are both entrusted into the hands of the political guidance entity (management Commitment and President).

*Possible measures*

- Adoption of an "ethical" code intended to the members of the political guidance entity in the AdSPs (President, management Committee and general Secretary); they can comply with it on a voluntary basis. It is preferable that this code provides special clauses of termination or lapse of the job appointment proportioned to the seriousness of the violation of the obligations of conduct there included.

- For the actual compliance to the provisions provided in the aforementioned code of conduct it is desirable the creation of an external guarantee entity, with advisory and assessment tasks to be performed totally autonomously.

### 4.4. Staff rotation

With regard to the implementation of the measure of personnel rotation, the AdSPs can comply with the provisions already provided by the ANAC in the 2016 PNA (see this plan); the lawmaker defined the rotation as an ordinary corruption prevention measure in art. 1, c. 5, lett. b) of the law 190/2012.

The in-depth analyses carried out in this matter have highlighted the problems faced in enforcing the measure, due to a scarce number of personnel and the impossibility to use some specialisations.

The AdSPs can plan suitable measures to train their personnel (especially in this phase of reorganization after the drastic reform in the sector), in order to use the different professionalisms in different working environments.

In case the preventive organisational measure of personnel rotation cannot be applied, some alternative measure can be individuated in the PTPCs, especially in the areas more exposed to a corruption risk (see for example the measures proposed by the 2016 PNA).

The application of the particular measure of *territorial rotation*, i.e. among different offices in the same AdSP (decentralised territorial offices and administrative offices) can be promoted on a voluntary basis (in the spirit of internal collaboration, in the administration) prior having duly informed the trade unions and having specified the relative planning and procedure in the PTCP. Also, in this regard see the general provisions provided to the administrations in the 2016 PNA.

## 5. Creation of the OIV in the AdSPs

The legislative decree n. 150 of the 27th October 2009 has not been deemed to be extended to the AdSPs so far. The decree regulates the performance assessment system in the public administrations. At the moment it seems that they have not created an internal organism of assessment (Organismo interno di valutazione, OIV) according to the criteria provided by the art. 2 and 14 of the leg. decree 150/2009. With regard to the assessment on the employees' administrative performances some heterogeneous and different behaviours have been, therefore, recorded.

For example, the AdSP of Venice has created an assessment unit composed of the internal personnel and two external members. On the contrary, the AdSP of Cagliari has not created any assessment unit yet but is committed to do it in the future.

Even though Department of the Public Functions is directly competent for the matter related to the performance assessment and the OIVs, it is deemed that the AdSPs have to create the OIVs, considering that they have to comply with the law 190/2012 and the legislative decree 33/2013 (see the "Introduction").

Such conclusion seems moreover supported by the recent Directive n. 245 of the 31st May 2017, issued by the Ministry of the infrastructures and transports including the *«Individuation of the targets aimed to fix the variable part in the compensation to the Presidents of the Port System Authorities for the year 2017».* In the Directive, among the operational targets that the Presidents have to achieve, the one mentioned in the n. 1) C3 expressively mentions the creations of suitable Organisms of internal assessment (OIV), according to the model provided by the leg. decree 150/2009.

With regard to the OIVs' role related to the corruption prevention and transparency see what already mentioned in the 2016 (§ 5.3).

## II – MANAGEMENT OF THE EXTRAORDINARY COMMISSIONERS APPOINTED BY THE GOVERNMENT

### Introduction

With the present in-depth analysis, the National Anti-Corruption Authority has chosen to provide guidelines about the enforcement of the regulations on the corruption prevention and transparency towards the Extraordinary Commissioners appointed by the government. These are extraordinary entities that are highly atypical and heterogeneous in terms of organisations and functions, chosen for operational coordination among the state administrations or substituting ordinary public administrations. They are often entrusted with relevant administrative powers and the management of consistent financial resources.

According also to some inquiries from different administrations and in particular by the Presidency of the Council of Ministries (PCM), it is necessary to identify some common trends in order to oversee phenomena of maladministration that have been detected in the past. Once it has been clear that these entities are also subject to the provisions in reference, drafting a special in-depth analysis in the present PNA Follow up is functional also to the surveillance from ANAC.

Upon expressed request from the Presidency of the Council of Ministries, the Authority has therefore started an in-depth analysis together with the Presidency itself and the other administrations identified according to a jointly ANAC and PCM assessment. A work group has been then created comprising not only PCM, but also the representatives from the Ministry of the infrastructures and transports, the Ministry of the environment and safeguard of the territory and the sea and also some extraordinary Commissioners (who perform activities connected to the aforementioned ministries).

The provisions about the extraordinary Commissioners' activities and functions are mainly included in several special rules, which can hardly be unified into a single system. In some cases, the detailed provisions are almost totally included in the decrees appointing the Commissioners themselves.

The extraordinary Commissioners are subjects appointed by the lawmaker to take care of deficiencies and malfunctioning within the ordinary administrative organisation or to implement specific programmes and projects. In some cases, the extraordinary Commissioner totally replaces the competent administration for the functions expressively provided by the law or identified in the appointment acts; in other cases, this subject is appointed to perform a specific task or to fulfil specific programmes and projects; in yet others, the appointment aims to enforce functions of coordination and surveillance (upon appointment from the Government) to perform some planned interventions of particular relevance by the ordinarily competent administrations; in this latter cases, the extraordinary Commissioner may enforce substitutive powers.

In light of these peculiarities only briefly mentioned, the aim of this in-depth analysis is to propose a rationalisation of some complexities (among the several ones) which characterise the commissioner management, identifying some common aspects in order to outline some guidelines for the implementation of the provisions preventing corruption provided by the law 190/2012 and the implementation decrees.

It is necessary to immediately clarify that the extraordinary Commissioners that substitute the subjects from central, regional or local administrations and public entities are not to be included in the present in-depth analysis; and so are not the commissioners appointed according to the art. 5, commas 4 and 4 bis, of the law of the 24th February 1992, n. 225 for the Civilian Protection. These Commissioners are subject to the general provisions about the subjects belonging to the administrations and public entities, the local and territorial entities and the provisions from the anti-corruption law (art. 42, c. 1-bis of the leg. decree 33/2013).

The commissioners taken into account in this in-depth analysis are the following (it is not a complete list and this is without prejudice to each special provision):

- the extraordinary Commissioners provided by the art. 11, law of the 23rd August 1998, n. 400; they are appointed with a decree from the President of the Republic (extraordinary Commissioners of the Government) *«in order to fulfil specific targets with regard to programmes or guidelines drafted by the Parliament or the Council of ministries or for temporary and particular needs of operational coordination among the state administrations» and «without prejudice to the appointments from the Ministries, provided by law»* and the extraordinary Commissioners appointed by decree from the President of the Council of Ministries to fulfil specific tasks provided by special laws;
- the extraordinary Commissioners appointed with a decree from the President of the Council of Ministries with the appointed powers ex art. 20, law-decree of the 29th November 2008, n. 185; they are appointed with regard to *«interventions that are planned within the National Strategic Framework for the national planning; these interventions are deemed to be primary for the economic development in the territory and the labour implications and connected social impacts, in compliance with the undertakings at international level»;*
- the extraordinary Commissioners appointed with a decree from the President of the Council of Ministries with the substitution powers provided by the art. 13 in the law-decree of the 25th March 1997, n. 67 signed into law n. 135/1997; they are appointed to fulfil works *«to whom the State contributes, even if indirectly, either providing capitals, totally or partially, or with co-funding activity with EU resources; they are of relevant national interest for the labour implications and the related social impacts; the works are already contracted or assigned as a concession to general contractors or, in any case, they are included into a*

*framework agreement, subject to a previous tender and their implementation (even if it could start or continue) has not been started yet or, if it has, is suspended, in any case».*

Taking into account the typologies above listed (they are simply an example) it is possible to observe that the administration that proceeds with the appointment of the extraordinary Commissioner (usually the PCM) not always is also the one entrusted with the main power of guidance and surveillance on the commissioner management. During the works, this possible dichotomy has been highlighted to differentiate the responsibilities upon the central administrations in order to comply with the provisions from the corruption prevention and transparency regulations. The administration that, either together or without the power to appoint or identify (in case of appointment via a decree of the President of the Republic) enforces their principal powers of guideline and surveillance, in a wide sense, on the commissioner managements is indicated in the present document as the "Administration of reference".

Taking into account the heterogeneity and the large number of the commissioner managements, the work group has preliminarily agreed that, possibly at the PCM and after an assessment on the initiative's feasibility and financial costs, a single Register of extraordinary Commissioners is created together with their structures of reference. Moreover, the following organizational and procedural aspects have been deemed to be studied more in depth:

- the procedures and the decrees appointing the extraordinary Commissioners paying particular attention to the enforcement of any possible transparency measures;
- the appointment of the RPCT and the drafting of the PTPC in the commissioner managements;
- the analysis on some of the areas with the highest risk of corruption, which are common to the different typologies of extraordinary Commissioners;
- the enforceability of the corruption prevention and transparency provisions to the entities that support the extraordinary Commissioners (such as the so-called implementation subjects), if any.

## 1. Appointment and possible appointment extension or revocation with regard to the extraordinary Commissioner

The appointment of the extraordinary Commissioners is performed with a decree from either the President of the Council of Ministries (d.P.C.M.) or the President of the Republic (d.P.R.); in the same decree it is included the entrustment of powers and the possible entrustment of financial and human resources to be managed. It is deemed advisable to remind the guidance entities appointing or designating (in case of a d.P.R.) the commissioners that it is necessary to comply with the impartiality and transparency principles, so to avoid the creation of new commissioners when the public administrations may ordinarily perform their tasks through an efficient management.

Without any prejudice to the high discretionary power in identifying the extraordinary Commissioner, the relevance of the public interests involved requires that in the appointment decree the reason for the choice made has to be clearly indicated. Taking into consideration how delicate the role undertaken by the extraordinary Commissioner is, it should be necessary, before the appointment, to verify the lack of conflict of interests or any hypothesis of incompatibility; moreover the art. 1, c. 42, lett. 1) of the law 190/2012 (which has introduced that measure of the so called *Pantouflage*) should

also be complied with; there are also the special provisions with regard to the single Commissioner; finally, the appointment of a Government Extraordinary Commissioner may comply with the art. 11 of the law 400/1988 and consequently the provisions in the art. 11, c. 2, and art. 2, c. 4, of the law 215/2004. It would also be necessary to mention the professional skills owned by the designated subject in the appointment decree.

The appointment decree should afterwards be published on the institutional website of the political guidance entity, which has seen to the appointment, together with the extraordinary Commissioner's curriculum vitae, in order to ensure a complete transparency.

The possibility for an extension of the appointment entrusted to the same commissioner is expressively provided by the art. 11, c. 2, of the law 400/1988 for the extraordinary Commissioners mentioned in the same. It is deemed sensible to apply this discipline also to the extraordinary Commissioners subject to art. 20 of the law n.185/2008 or other special laws.

Similarly to the appointment, it is suitable that any possible extensions of the commissioner appointment are motivated, also *per relationem* (through a third document) so that the enforcement of such power from the guidance entity is made transparent. The annulment of the commissioner appointment should be clearly motivated and linked to the achievement of the targets of public interest, which the extraordinary Commissioner has to achieve in performing his task.

The hypothesis provided by the art. 20, c. 3, law decree 185/2008 is different from the aforementioned situation; according to the article, *«in case there are circumstances that prevent the total or partial fulfilment of the investment, the appointed extraordinary Commissioner proposes to the competent Minister or the President of the Region the revocation of the resources assigned»*. It would be particularly important, for transparent reasons, to identify at least some of the intervened causes that could make impossible the fulfilment of the activities provided by the appointment, since the occurring of one of these circumstances should automatically persuade the extraordinary Commissioner to propose the revocation of the assigned financial resources to the competent Minister or the President of the Region.

In relation to what above, some risk events and possible organisational measures to prevent them are hereinafter mentioned; their inclusion in the PTPCs could be profitably assessed by the Administrations that proceed to the appointment or that propose the appointment of the Extraordinary Commissioners.

*Possible risk events*

- unjustified recourse to the commissioner appointment as a remedy to the inefficiency in the public administration in case a simpler amendment in the ordinary management may bring the same results;
- identifying an extraordinary Commissioner in situations of potential conflict of interests;
- payment of an undue compensation to the extraordinary Commissioner, whenever there are not some specific indications in the d. P.C.M.;
- concentration of more than one commissioner managements upon the same subjects over the years;

- extensions of the commissioner appointment lacking the achievement of the results requested by the political entity at the moment of the appointment due to a cause that is not ascribable to the extraordinary Commissioner;
- failure to revoke the appointment in case the commissioner management is not coherent with the planning guidelines drafted by the political entity or manifestly inefficient;
- failure to revoke the assignment of the financial resources if the commissioner management is impossible due to supervened circumstances that are not ascribable to the extraordinary Commissioner and consequent irregular use of the assigned resources.

*Possible measures*

- assessment on whether there are conflicts of interest (also in compliance with the law of the 20th July 2004, n. 215 – considering the nature of the Commissioner) and reasons for impossibility of appointment or incompatibility of the appointment and publication of the relative documents;
- provision of the following minimum contents in the appointment decree:

  a) duration; b) targets and possible time frames; c) criteria of results identification; d) human and financial resources assigned; e) identifying the political-administrative top entity of reference and, possibly, the administration in charge of the activity, even if in a wide sense, of guidance and surveillance on the extraordinary Commissioner (Administration of reference) especially if provided by law; f) mentioning the criteria for the payment of the compensation if any; g) mentioning the subject who performs the RPCT functions in the commissioner management and the guidance entity who has to adopt the PTPC (see § 2);
- including the reasons why the political entity has decided to entrust a different subject from the competent administration or unrelated to the same in the appointment order for the extraordinary Commissioner, when this is not expressively provided by law;
- mentioning the obligation to file a periodical report in the appointment order; the extraordinary Commissioner has to transmit the report to the political authority of reference to report the activity performed as a Commissioner;
- publishing the appointment order and the extraordinary Commissioner's curriculum vitae on the website of the administration where the political guidance entity is located, under the subsection of the extraordinary Commissioners.

## 2. The supervisor for the prevention of corruption and transparency

Also, for the commissioner managements it has been deemed necessary to add some clarifications about the problem of the identification of the supervisor for the corruption prevention and transparency (Responsabile della prevenzione della corruzione e della trasparenza, RPCT), who has to be nominated by the guidance entity according to the art. 1, c. 7, law 190/2012.

Due to the heterogeneity of the commissioner roles and the difficulty in defining a priori, once and for all, the identification of the subject asked to perform the RPCT tasks in the commissioner

managements, it has been deemed suitable that the RPCT in the commissioner management can be alternatively:

- the person identified as RPCT in the Administration competent for the nomination or to whom the main tasks of guidance and surveillance in the commissioner management are related (Administration of reference);
- the same extraordinary Commissioner himself.

Lacking a provisional indication, the choice between these solutions is entrusted to the autonomy and responsibility of the appointing administration or to whom is provided with the main tasks of guidance and surveillance on the commissioner managements. Upon the Authority's discretion, it is important that this choice takes into account the needs to guarantee the effectiveness of the functions performed for the corruption prevention and the peculiarity of the single commissioner management, especially assessing:

- the content of the extraordinary Commissioner's appointment, in particular in the light of the possible character of urgency and the duration of the relevant activities;
- the entity of the human and financial resources and the organisational powers entrusted;

For example, in light of limiting the burdens for the commissioner managements (which, as such, should have a short duration), the more urgent and episodic are the tasks appointed to a Commissioner the more sensible is that these functions are performed by the RPCT of the administration of reference.

In light of the aforementioned, the possible ideal models are the following:

- in case the guidance entity appointing the Commissioner or proposing the appointment (in case of nomination with d.P.R.) is the one entrusted with the main functions of guidance and surveillance on the Commissioner, he (giving reasons according to the aforementioned criteria) alternatively:
  - indicates the RPCT within his own administration as the RPCT also for the commissioner management;
  - appoints the extraordinary Commissioner as the RPCT in the commissioner management;
- in case the guidance and surveillance powers on the commissioner are entrusted to a guidance entity that is different from the one appointing the Commissioner or proposing the appointment (in case of formalisation with the d.P.R.) the entity entrusted with these powers, on the basis of the aforementioned criteria, alternatively and suitably motivating:
  - indicates the RPCT in his own administration as RPCT as also in the commissioner management;
  - appoints the extraordinary Commissioner as RPCT in the commissioner management.

It is reminded that these criteria are solely indicative and with no prejudice to the full responsibility upon the Administration of reference to choose the solution that is most suitable for the need to

guarantee (it is worth to highlight it again) the efficacy in the enforcement of the corruption prevention transparency regulations. Under a logic of full responsibility, the Administrations of reference may decide to include the commissioner management activities in their own PTPC, having the extraordinary Commissioner himself or a person indicated by him as the RPCT representative.

The law 190/2012 (art. 1, c.8) provides that it is the guidance entity to define the strategic targets with regard to corruption prevention and transparency. These targets have to be the necessary content in the three-year Plan for the corruption prevention and transparency.

As it is known, the guidance entity adopts the PTPC upon the proposal from the Supervisor for the corruption prevention and transparency.

With regard to what is provided by the art. 11, law 400/1988, the guidance entity that is naturally entrusted to the adoption of the PTPC should be the President of the Council of Ministers; he has to report (also through an appointed Minister) the extraordinary Commissioner's activities to the Parliament. This seems confirmed by the comma 1 of the art. 11, law 400/1988. The norm provides that the appointment of the extraordinary Commissioner is implemented *«in order to fulfil specific targets determined in relation to programmes or guidelines decided by either the Parliament of the Council of Ministries or for particular and temporary needs of operational coordination among public administrations»*. This is inferred also from the provision ex art. 5, c. 3, lett. b), law 400/1988, where it is clarified that the President of the Council of Ministries, either directly or appointing a competent minister, *«supervises the Government commissioners' activity»*. Furthermore, with regard to the Commissioners appointed ex c. 7, of the art. 20 of the leg. decree 185/2008 it provides that *«The President of the Council of Ministries for the coordination and surveillance on the commissioners designates the competent Minister, who carries out the designated activities through the current ministerial structures, without any new or greater burdens in the State balance sheet. With regard to the interventions of regional competence, the President of the Regional Governing Council identifies the competent regional structure. The structures in the present comma inform the Audit Authority about any delay detected in the fulfilment of the investment, so that the responsibility action ex article 1 of the law of the 14th January 1994, n. 20 can possibly be enforced »*.

Nevertheless, in case a Minister is identified to be appointed to perform the main functions of surveillance and guidance, it would be suitable that the adoption of the PTCP is made by the competent Minister (taking also into account the power to report to the Audit Authority provided by the aforementioned provisions, which are closely connected to the fulfilment of the investment).

### 3. Guidelines about transparency

The publication of the data ex leg. decree 33/2013 related to each commissioner management would be desirable if performed in a special subsection in the "transparent Administration" section in the institutional website of the Administration of reference.

The special subsection would, therefore, be a single access source to data; the social control on the activities and results of the commissioner management would be eased and so would the performance of the surveillance function from the ANAC on the compliance with the transparency obligations. Moreover, the collection of data in a special subsection (managed by the Administration appointed with the surveillance and guidance functions) would ensure the compliance with the art. 8, c. 3, of the leg. decree 33/2013, according to which the data are to be published for 5 years, a considerably longer amount of time than that required for a commissioner management.

With regard to art. 8 of the leg. decree 33/2013, it is reminded that also the data subject to obligatory publication related to the commissioner managements are accessible, ex art. 5 of the leg. decree 33/2013, after the 5 years publication on the institutional website.

With regard to the identification of the subjects appointed to manage the subsection, it is reminded what provided by the art. 10, c. 1, of the leg. decree 33/2013 about the supervisors of the data processing and publication; they have to be mentioned in a special section in the PTPC. Therefore, in the special section of their own PTPC, the Administration of reference should mention the supervisors of the transmission and publication of the data related to the commissioner management. These subjects ensure the regular and timely flow of data to be published and are responsible for any possible failure or partial compliance with the transparency obligation ex art. 43 c. 4 and 5, of the leg. decree 33/2013.

In the subsection of the "transparent Administration" section (dedicated to the commissioner managements), it is desirable to include the information necessary for a correct filing of the applications requesting access to the procedures and the civic accesses, simple and generalised, with regard to the Commissioners' activities.

In order to comply with the new principle of transparency introduced by the leg. decree 97/2016 (so to have homogeneous behaviours from the commissioner managements), the Administration of reference should integrate the provisions about the internal procedural aspects and the organisational adaptations related to the uploading and management of the requests (related to the three kinds of access to data, documents and information about the commissioner managements – see the ANAC guidelines in the deliberation n. 1309/2016 and the circular letter from the DFP n. 2/2017). Moreover, it is advisable that the access register, at the Administration of reference, includes the data related to the inquiries about data, documents and information related to the commissioner managements.

## 4. Guidelines about the primary contents in the PTPC

As with regard to the other administration, the planning activity for the corruption prevention measures has to take into account the context, both external and internal, about the commissioner structure, the mapping of processes and the identification and treatment of the corruption risk in the different areas exposed to risk.

The activities and operational contexts appointed to the Commissioners are characterised by significant heterogeneities and complexities; sometimes they require the performance of promoting, coordination and control activities over an amount of public and private subjects and the management of remarkable financial resources. This implies the relevance of specific risk areas to be taken into account.

Hereinafter some most relevant assessment activities are mentioned (with the mere aim to provide some operational guidelines). These activities are useful to identify the risk areas, the risk events and the relative organisational prevention measures:

- with regard to the analysis on the external context it could be advisable to identify the potential corrupting pressure that might be looming over the extraordinary Commissioner's activity. This pressure can arise, in particular, from the value produced by the commissioner management in terms of social and economic

benefits for both the citizens and the stakeholders and from the other public and private organisations, which are present in the territory of reference; the extraordinary Commissioner might have to dialogue with these entities during his commissioner management;

- with regard to the internal context, it should be taken into account:

  - the functions and competences entrusted to the extraordinary Commissioner;

  - the financial resources entrusted to the extraordinary Commissioner;

  - the human resources provided to the extraordinary Commissioner;

  - the possible pre-existing organisational structure where the extraordinary Commissioner locates himself;

  - the mapping of processes characterising the commissioner management. In this regard two paramount environments are mentioned:

    a) the activities and the procedures that the extraordinary Commissioner directly carries out to enforce his tasks and competences;

    b) as a subset of the first ones, the activities of coordination and surveillance carried out by the extraordinary Commissioner (including the performance of the substitutive powers) with regard to the intervention or programme to be implemented also with reference to the possible implementing subject.

### 4.1. Examples of specific risk areas for the extraordinary Commissioners' activities

Taking into consideration the extraordinary Commissioners' heterogeneity and the atypical nature of their tasks, it is not possible to thoroughly identify the risk areas connected to the commissioner managements. In the light of a clarification and containment of the administrative burdens upon the organs that are requested to perform their activities in brief times and/or in emergency conditions, it has been deemed advisable to concentrate the mapping of processes focusing the attention only on some of them. These processes are deemed essential since they are related to the risk areas that commonly arise in every commissioner management.

Each commissioner structure (i.e. the Administration of reference) can identify (starting from the assessment on the external and internal contexts) which are the further activities that, in the specific case, can be influenced by potential phenomena of corruption and that should be examined in view of the adoption of the corruption prevention measures.

As a common measure, it is reminded in particular the "whistle-blowing" measure, to be implemented in the Administration of reference (see the special law passed on the 15th November 2017[8] and the Authority's Guidelines about this issue[9].

[8] To this day the follow-up to the law is being passed and has not been published in the Official Journal yet.

[9] See ANAC Decision n. 6 of the 28th April 2015 - «Guidelines with regard to the safeguard of the public employee reporting some crimes (so called whistle-blower)» published in the Official Journal, general series n. 110 of the 14th May 2015.

The principal risk areas taken into consideration are the following:

- Appointing contracts

The procedures of appointing public contracts represent one of the activities with the highest corruption risk, in particular with regard to the selection phase of the contractor, as already provided by the law 190/2012 (art. 1, c. 16) and the 2015 PNA follow-up.

For further information please see the in-depth analysis on the issue included in the special part of the 2015 PNA follow-up[10], without any prejudice to the additional cautions that should be put in place considering the particularities in the commissioner management and the possible exceptional powers appointed to the same.

- Management of income, expenses and properties

The management of the financial resources (often enormous) entrusted to the extraordinary Commissioners is an area to be taken in account for the corruption prevention.

- Controls and inspections

The system of controls implemented by the commissioner structure (so that the activities entrusted can be correct, efficient and effective) must not be subject to distortions in order to favour particular interests.

- Staff selection and management

The institutional mission in a commissioner structure (in the light of the public interest pursued and the extraordinary conditions in which operates) requires personnel with a suitable professionalism together with technical and managerial skills. The corruption prevention measures towards the personnel have to be necessarily contextualised, bearing in mind the specific organisational aspects in the commissioner management; as a common measure it is reminded, anyway, to comply with the codes of conducts drafted by the PCM or the Administration of reference and the *pantouflage*[11] one.

- Enforcement of substitutive powers

A peculiar aspect that characterises the appointment of an extraordinary Commissioner is the entrusting of powers that substitute the ones held by the ordinary competent entities. It is inevitable that if, on the one hand, this is necessary to achieve the commissioner management's targets, on the other, it is advisable to identify specific measures in order to prevent an incorrect use of the aforementioned substitutive powers.

- Concession of subsidies, contributions and other public concessional terms

In some cases, the extraordinary Commissioners provide financing and, in general, revenue foregone. In such hypotheses, it is necessary to provide adequate measures for corruption prevention to ensure the correct and efficient use of the resources entrusted and ensure transparency according to art. 26 and 27 of the leg. decree 33/2013.

[10] ANAC – Decision n. 2 of the 28th October 2015.

[11] See § B.10 « *The performance of the activities after the work relationship has been terminated (pantouflage – revolving doors)» - National Anti-corruption Plan* 2013 - Enclosure 1 *«Subjects, actions and measures for the corruption prevention»*, page 51.

## 5. Entities supporting the government extraordinary Commissioners: compliance with the anti-corruption and transparency provisions

In examining the outcomes from the Technical Work group, it appears that the cases when the extraordinary Commissioner resorts to an external subject from the commissioner structure are quite common; these subjects are entrusted with different kinds of tasks but, mainly, they are of a contracting character.

Lacking a specific regulation, the relationship between the extraordinary Commissioner and the support entity will have, therefore, to comply with the general principles and the Code of the public contracts besides the special regulatory framework appointing the commissioner management.

From the provisions and the appointment orders examined during the works to draft the present in-depth analysis, it has been possible to identify some recurring cases:

- appointment of an extraordinary Commissioner and identification *ex lege* of an "implementing subject";
- appointment of an extraordinary Commissioner authorised to make use of the monitored entities by the sectoral Minister, together with specialised totally publicly participated companies;
- appointment of an extraordinary Commissioner who coordinates participated companies and other entities possibly involved in the emergency interventions and initiatives;
- appointment of an extraordinary Commissioner who makes use of a pre-existing *general contractor* structure.

In the first hypothesis, the implementing Subject (in some cases identified by the norm itself) is appointed with a following decree from the President of the Council of Ministries in compliance with the European principles of transparency and competition. Usually the legal form is the one of an *in-house* entity.

He is appointed, generally speaking, to process and implement the extraordinary program with the available resources for the public party. The same subject, furthermore, is a "client party" in contracting the activities and implementing the infrastructural works.

With regard to the tasks appointed to the implementing Subject, they (as aforementioned) can be included into the ones performed by a "client party". Nevertheless, in these hypotheses the major critical aspects are evident; they are connected to the implementation time-frame abbreviated (often significantly) with regard to the activities provided by the regulations about the commissioner management; they are also connected to the possible and consequent limitation in the competition during the initiatives promoted by the implementing Subject himself. In some cases, a Protocol of collaborative surveillance has been agreed upon – among ANAC, the extraordinary Commissioner and the implementing Subject – with regard to the fulfilment of the emergency activities; it is a guarantee of high surveillance and guarantee of the fairness and transparency in the connected procedures. The initiative of the collaborative surveillance protocol is, in any case, subject to the Council of the Authority.

The companies and the entities of private law supporting the Government Extraordinary Commissioner can also be required to adopt the corruption prevention measures and ensure transparency.

In case they are included among the subjects ex art. 2-bis, c. 2 and 3, of the leg. decree 33/2013, they will be subjected respectively to the provisions of corruption prevention and transparency (art. 2 bis, c. 2) or only to those of transparency limited to public activities (art. 2 bis, c. 3) as mentioned in the specific Authority's Guidelines adopted with deliberation n. 1134/2017, *«New guidelines for the implementation of the provisions related to corruption prevention and transparency towards companies and entities of private law controlled and participated by public administration and public economic entities»* (see the text). Therefore, in their own PTPC and in the "transparent Company" or "Transparent Administration" section, the implementing subjects clearly report their activities performed for the commissioner management.

In case of a pre-existing general contractor structure, it is advisable that the extraordinary Commissioner ensures that a legality protocol[12] is adopted by the client party (either the implementing Subject or the extraordinary Commissioner); this is also to regulate the anti-corruption and transparency measures, which the general contractor has to comply with in performing his activities related to the commissioner management.

## III - UNIVERSITIES

### Introduction

Universities and research are a relevant field in the Italian administration, in particular characterised by the constitutional principles of freedom of science, research and high culture (art. 33, c. 1 and 6, Constitution). The law of 30th December 2010, n. 240 itself, *«Provisions with regard to the organisation of universities, academic personal and recruitment, and appointment to the Government to encourage the quality and efficiency in the university system», (*reorganisation of the discipline) provides that «*the universities are a paramount centre of free research and free education within their respective order and are a place to learn and, in a discriminate way, elaborate knowledge; they operate combining research and teaching in a coherent way, for the cultural, civil, and economic progress of the Republic» (art. 1).*

The system is characterised with a significant constitutional acknowledgement of their autonomy (art. 33, Constitution, last comma: *«the institutions of high culture, universities and academies are entitled to provide themselves with autonomous orders, within the limits established by the State laws*»).

The autonomy (which includes self-governance and regulatory autonomy to regulate the performance of the fundamental functions - research and teaching - and organisational autonomy) is functional and a consequence and guarantee of individual freedom, freedom to teach and research, freedom of professors and academic researchers. The scientific communities that gather in the universities have, therefore, rights that are constitutionally guaranteed (having autonomous orders);

[12] In this regard see the CIPE deliberation n. 58 of the 3rd August 2011 and the art. 194, c. 3, lett. d), leg. decree 50/2016.

these rights are enforced within the limits of the State laws. Hence the State can establish the organisation guidelines and has the power to create or recognise universities (public and private); this implies (at least with regard to the third level education) the power to assess the outcomes in providing this public service.

Under the institutional point of view, the system is structured in 96 universities (public and private), among which 11 online; the Minister of the Education, University and Scientific Research (Ministero dell'Istruzione, dell'Università e della Ricerca scientifica, hereinafter MIUR) has guidance and coordination powers towards this system. The most relevant MIUR's functions are: the creation and acknowledgement of each university; the ordinary financing of the state universities; the promotion of the scientific research (both national and in each university); the regulation of national scientific qualifications in order to recruit both professors and researchers (they are, then, recruited by the public and private universities trough open recruitments); the power to monitor the correct enforcement of the regulatory autonomy; and the power to steer and coordinate the universities' operation.

This sectoral *governance* uses competences from entities and institutes that differ in terms of mandate, composition and nature. Among these there are the National University Council (Consiglio Universitario Nazionale, CUN) as the elective entity that represents the university system (all of the members) which is regulated by the law of the 16th January 2006, n. 18; the National Committee of Guarantors for the Research (Comitato Nazionale dei Garanti per la Ricerca, CNGR) created with the art. 20 of the law of the 30th December 2010, n. 240; the National Council of the University Students (Consiglio Nazionale degli Studenti Universitari (CNSU), which is an advisory entity representing the students enrolled in the courses activated in the Italian universities for a degree, a master's degree and doctoral degree, provided by the law of the 15 March 1997, n. 59 and created with the decree of the President of the Republic of the 2nd December 1997, n. 491; the Assessment National Agency of the University and Research system (Agenzia Nazionale di Valutazione del Sistema Universitario e della Ricerca, ANVUR), an agency created with art. 2, law of the 24th November 2006, n. 286; the Conference of Deans of Italian Universities (Conferenza dei Rettori delle Università Italiane, CRUI) a private association of the state and no state Universities, founded in 1963; the Conference of the general directors of the university administrations (Convegno dei direttori generali delle Amministrazioni universitarie, CODAU), an association of general directors of the Italian university administrations. The present document – of which ANAC takes full responsibility also in its drafting – was made with the active contribution from a technical work group, starting from February 2017, summoned at the Authority. The group counts members from the different aforementioned environments and other experts.

The present Plan, whose nature of a guidance act (not binding) is clarified in art. 1, c. 2-bis, of the law n. 190 of 2012, is intended to subjects that take the most relevant public decisions (within the higher education system) in performing their tasks entrusted by law. It's intended then especially to universities, since they are public entities that directly perform their fundamental tasks of research and teaching. It is also intended to other subjects that adopt relevant acts or acts that impact the system's structure and functioning, MIUR included.

The present Plan, according to the proven experience already achieved in other administrative sectors, aims to show the subjects in the system how to proceed in individuating the corruption risks, bad administration or conflicts of interests and suggest some possible organisational, procedural and prevention measures; the final and effective drafting of these measures is of course entrusted to the

universities themselves and the other subjects to whom the document is intended. The PNA always recognizes the organizational autonomy of the administrations. This is particularly true due to the autonomy constitutionally acknowledged to universities.

It is worth to clarify the enforceability of the Plan to the non-state universities. They are entities legally recognised with the decree of the Minister of the Education, University and Research, upon the presence of the legal requirements. Their nature of public entity was denied by the recent jurisprudence (Council of State, section VI, decision of 11th July 2016, n. 3043). Therefore, they are not obliged to draft the three-year Plans for the corruption prevention and transparency. Nevertheless, the measures present in this document are extended also to the non-state universities when, in performing the activities of public interest, they are forced to comply with the same provisions enforced to the state universities (for example, for the recruitment of professors and researchers). With regard to the transparency measures, since it is not certain the application of the art. 2-bis, comma 3, of the leg. decree 33/2013, the Authority wishes for the non-state universities to comply with the transparency measures included in the present follow up.

The measures proposed are basically recommendations for the organisation and reorganisation of single sectors or single processes (in line with the national Plans previously approved); the aim is to reduce the conditions that favour corruption (the term is to be intended generally, as it is known, as decisions deviating from the care of the general interest due to irregular influences). It is advisable that the measures proposed are applied in a coherent integration with any other policy for an organisational improvement.

Moreover, it is worth to highlight that the national anti-corruption Plan is not the suitable occasion to look for proposals to reform the system at a law level. Its peculiarity (in case critical situations emerge that might suggest the possibility that irregular interferences have infiltrated the proceedings examined) is the possibility to signal (as a guidance act) merely organisational solutions. The national anti-corruption Plan aims to highlight some critical aspects that can be tackled through suitable no legislative acts. Nevertheless, in case the Work group has unanimously detected some systematic critical situations that exceed the competence covered by the present Plan, it has deemed opportune to report possible inspirations of systemic orientation: among these, it is highlighted, for example, the opportunity of a code of discipline about research, as with regard to similar codes, which have been similarly deemed suitable, about education and university.

Finally, it is necessary to clarify that the present section of the Plan, dedicated to universities, has not directly dealt with the complex system of research Entities, whichever form they have. To these entities, nevertheless, the present evaluations can apply, especially the ones related to the activities of scientific research, within the limits of compatibility.

## 1. Organisation for the prevention of corruption

### 1.1. The supervisor for corruption prevention and transparency

The art. 1, comma 7, of the law 190/2012, as amended by the leg. decree 97/2016, provides that *«the guidance entity identifies the supervisor for the corruption prevention and transparency, usually among the operating permanent managers (...)»*. Actually, the previous provision gave priority to the administrative managers of first level as the most suitable subjects for the task; nevertheless, the Authority expressed its opinion (2016 PNA) declaring that, whenever possible, it is highly recommended to maintain the appointment

of Supervisor for the corruption prevention and transparency (Responsabile della prevenzione della corruzione e della trasparenza, RPCT) entrusted to the managers of first level.

Therefore, in the universities the RPCT role can be appointed to the general director, who is chosen among the personnel of high professional qualification and proven long-standing experience with managerial functions; this role is entrusted with the overall management and organisation of services, resources and technical-administrative personnel in the university together with the functions (since they are compatible) provided by the art. 16 of the leg. decree 165/2001 for the managers of general managerial offices (art. 2, c. 1, lett. n) and o) of the law of the 30th December 2010, n. 240 «*Provisions with regard to the organisation of universities, academic personnel and recruitment; provisions appointment the Government to promote the quality and efficiency in the university system*».

There are universities that have a workforce where the managerial roles are considerably small or where the general director is the top role. In those environments, several ad interim roles are performed by managers in areas potentially exposed to corruption risks. In case the RPCT role is appointed to one of these managers or to the general director, it is necessary to guarantee a balance in the functions and powers to prevent the concentration of decisional powers upon one or few roles, as much as possible. If this measure is not feasible, considering the small dimensions, it is advisable to provide suitable controls or adopt the so called "segregation of functions".

As mentioned in the 2016 PNA, it is necessary to carefully assess the possibility whether the RPCT is the same subject entrusted with the disciplinary power. This suggestion, nevertheless, cannot be applied in the small dimensioned universities. Only in those cases the universities can take into consideration a merge of the two functions upon a single subject.

Either the RPCT role is covered by the general director or is covered by a manager, the independence of the function from the political-managerial sphere and its involvement in all the environments that might impact the system of controls and internal surveillance has to be guaranteed. In this sense, the RPCT has to be able to resort and coordinate with the Board of Auditors the assessment Team, the system of management control or internal audit (if present) and with any possible system of assessment such as the inspection service provided by the art. 1, c. 62 of the law of 23rd December 1996, n. 662 *«Measures for rationalising the public finance»,* or the legal services. If necessary, the RPCT can ask these subjects to be supported in order to ascertain the reported facts or the facts for which he has decided to intervene.

Also, with regard to the inquiry activity on reported facts or, in any case, facts that he comes to be aware of, the RPCT has to be able to access the internal information sources, such as the databases available. For example, in case of verifications on the causes of impossibility of appointment and incompatibility of top managerial roles and managerial roles in controlled companies and entities, these are activities for which it could be necessary to be provided with suitable information elements in order to assess the existence of any possible obstacles to the appointment or continuation of the role.

The risk management and all the prevention activities, even though they involve the entire administration, should be coordinated by the RPCT (see 2016 PNA § 5.2). To this end, it is advisable that the RPCT is provided with a supporting suitable technical structure to design and perform the activities for analysing processes, monitoring, managing the reports, executing the assessment activities. Universities can assess the opportunity to include also professors and researchers among the RPCT representatives.

The RPCT is appointed by the university guidance entity, i.e. the Board of directors.

### 1.2. The three-year Plan for corruption prevention and transparency

Universities have to adopt the PTPC since they are public administrations included in the list mentioned in the art. 1, c. 2, of the leg. decree 165/2001, even with their peculiarities. All the personnel, including professors and researchers, is subject to the Plan.

In this regard, as already mentioned also in the 2016, the PTPCs are closely coordinated with the performance Plans and with the other planning instruments adopted by universities. This is so that the targets of corruption risk prevention are sustainable and coherent with those fixed in the strategic-management planning documents and are included in the indicators of individual and organisational performance. The assessment Team in the universities is entrusted with the OIV functions, including the declaration of implementation of the transparency obligations. The team has to verify the coherence between the targets included in the PTPC and the ones included in the performance Plan; the team has to verify the sufficiency of the related indicators (art. 44, leg. decree 33/2013). The amendments that the leg. decree 97/2016 applied to the law 190/2012 strengthen the functions already entrusted to the OIV with regard to the corruption prevention and transparency ex leg. decree 33/2013. In order not to weaken the role and the efficacy of the actions performed by the assessment Teams it is important to avoid any overlapping areas with the activities carried out by the University Offices of Quality; it has to be kept in mind that the Teams have a surveillance function on the Offices in compliance with the guidelines included in the ANVUR.

When assessing the need for a coordinated development in planning the university activities with regard to performance and anti-corruption (also in the light of the economic-financial planning) it is worth to notice, nevertheless, that it is important that the PTPC maintains its own autonomy from the other planning instruments. In this regard (in light of the evolution in regulating the PTPC) it is highlighted the need to overcome the tendency to draft a single plan (defined as "integrated Plan") . This suggestion is coherent with what mentioned in the General Part in the present Follow up with regard to the relationships between PTPC and the performance plans for the public administrations in general (§ 3), without prejudice to the specific sectoral regulations.

It is worth to notice that the activities of identification and implementations of the corruption prevention measures have to be seen not as a mere compliance but as a constant and synergic process; this process aims to look for a greater functionality (also in terms of performance) and – consequently – the prevention of the phenomena of bad administration.

In order to fulfil the necessary coordination between the different planning instruments it is paramount that the RPCT, when asked to draft the PTPC, can constantly interact with strategic decisional top when planning the targets and the activities related to the corruption prevention and transparency.

The PTPC gives force to the strategic objectives with regard to corruption prevention and transparency defined by the guidance entity, which in universities is identified in the Board of directors. This entity adopts the PTPC upon proposal from the RPCT within the 31st January of every year.

## 2 Research

In order to better identify the area of university research, the activities of scientific research can be subject to different conditions and therefore different regulations, depending on the nature of the financing and the activity's intrinsic characteristics: the international, national and regional research and the internal research in the universities; the research with public funds and the research with private funds; the basic research and the applied research; the research directly performed by the university and the research performed through a spin off; the financed research performed by a single university and the research performed by aggregations of public and private subjects. The related legal discipline is, consequently, fragmented: the uncertainty and the parcelling in the regulation contribute to increase the perception of an area with obscure elements and, therefore, exposed to corruption risk. The provisions' partial inconsistency and a-systematic character is an obstacle for the equal conditions in the full accessibility to the financing funds, when the financing subjects' details and the framework of the existent public financing are uncertain; in any case, the clarifying commitment from the MIUR is significant (see DD.MM. n. 593 and 594 of the 2016 which codified the MIUR's practice to publish contract notices and documents that help to clarify the assessment criteria and procedure and the applications' format).

With regard to research, there is, first of all, a significant amount of funds: in fact, the various funds for research were unified into the Fund for the investments in the scientific and technological research (Fondo per gli investimenti nella ricerca scientifica e tecnologica, FIRST), ex art. 1, c. 870, of the law of the 27th December 2006, n. 296; with regard to MIUR, the instruments to ask for resources via a direct transfer are basically the Fund of universities ordinary financing (Fondo di finanziamento ordinario delle università, FFO) and the Ordinary Fund for research entities and institutions (Fondo ordinario enti e istituzioni di ricerca, FOE) in which only a small fraction is used for internal contract notices; the research special integrative Fund (Fondo integrativo speciale per la ricerca, FISR) with the transfer of money directly to the monitored universities and research public entities (in the fund a very small fraction is used for the university contract notices); the competition contract notices, such as the research Projects of national interest (Progetti di ricerca di interesse nazionale, PRIN) and the Funds for the investments in basic research (Fondi per gli investimenti della ricerca di base, FIRB), intended to universities and research entities with ever decreasing funds and the national structural Funds (Fondi strutturali nazionali, PON) and the Clusters intended to partnerships among universities and public research entities in collaboration with the industrial research. In the assessment, the funds from European contract notices or calls have been omitted, such as Horizon 2020 or ERC or other platform such as IMI and LIFE. The amount of funds corresponds to an amount of governance subjects so that it does not seem guaranteed the full and transparent knowledge of the existing financing, the procedures adopted by the provider subjects, the adopted criteria for the assessment, the beneficiary subjects of the financing and the subjects entitled to the assessment. This fragmentation makes the financing framework difficult to be known.

The need for a general planning in the entire research budget has been noticed ant is widely agreed on. This is to highlight and clearly distinguish the large strategic choices from the ones of regulation-organisation in the research assessment and financing. In this regard there is a shared need for a clearer planning of the funds to be destined both at a national level and in a single university. This seems to be more necessary since it is a period of scarce economic resources. In this regard it is clearly about governance choices that, as such, go beyond the present Plan.

Considering how fragmented is the financing and special regulations' framework, ANAC has noticed that, since the laws have not been amended, there is the need to strengthen the measures and the coordination instruments already provided by the present provisions (in particular by the legislative decree of the 5th June 1998, n. 204).

In the present in-depth analysis, the procedure of research is analysed, from the planning to the publication of the outcomes, highlighting the situations deemed more critical since they are particularly obscure or potentially more exposed to situations of conflicts of interest. A particular attention is then paid to the risk area in assessing the research products, where there are macro processes that involve the governance institutional subjects in the system and oversee more directly the allocation of the funds to universities.

The relevant public decisions on the research activity and management are divided into four distinct phases: planning, assessment of the projects and their financing; performance of research; publication of the outcomes. In order to reduce the bureaucratic burdens in performing the research activities, during the technical Work group's meetings a necessity has emerged to wish for the law maker to extend also to universities possible simplifications that have already been introduced for the research entities (see for example, art. 10 of the leg. decree of the 25th November 2016, n. 218).

The research assessment and financing is the most sensitive phase to some irregular interferences

### 2.1. Planning the research

In relation to the phases in the research planning within universities (either for the contract notices for financing funds to the university itself or for drafting international or national projects) one of the risks that might take place is about the information inconsistencies about the financing opportunities; some environments or specific subjects might be preferred to others, also simply omitting some information. This particular necessity is felt both at a central level and in each single university and is articulated in two profiles: on the one hand, it is related to the knowledge of sources; on the other hand, it is related to the equal access conditions to financing.

At a central level, it is deemed sensible that standard procedures of disclosing the contracts notices are to be defined and published, through general acts (recommendations or guidance acts from MIUR); in these acts the procedures for filing the applications and assessing the projects are to be clearly specified.

At a decentralised level, in this phase of the process, it is advisable that universities:

- adopt measures that enhance the best circulation of information about the contract notices and the university facilities towards all the internal researchers that are interested or might be interested:
- predetermine the rules through which all the researchers have the same possibilities to access the contract notices, draft their projects and have their project assessed;
- provide suitable resources so that their own researchers have the possibility to draft the research projects to rightfully compete for the international financing (both European and national). This is to provide all the researchers with the possibility to access the funds at equal conditions;

- concentrate the university resources on research projects (clearly distinguishing these from the research activities through appointments from external subjects) and provide the same especially with the university spin off (see hereinafter, §7.2).

### 2.2. Evaluating and financing the projects

Due to the parcelling of financing resources and the financing subjects, in the phase of assessing the projects, there is not homogeneity in the access procedure, in the procedures of drafting and filing the projects, in the selection criteria, in the parameters and procedures of assessing ex ante the projects themselves. These differences are, partly, justified by the different nature of the interventions. Nevertheless, in several cases, it is to be highlighted that the lack of knowledge of the procedure and, ex post, even the amount of beneficiary subjects is a sign of the scarce transparency in the system and the possible risks of discriminatory choices.

Specific risks are present in the reviewers' selection procedures. For example, it has been noticed that to the composition of the database accessed by the MIUR reviewers (called Reprise, i.e. Register of Expert Peer Reviewers for Italian Scientific Evaluation) it has been so far applied a criterium of self-adhesion. Such modus operandi favours the possibility that only the interested subjects might apply as reviewers or, on the contrary, the subjects that are particularly active, scientifically speaking, are not encouraged to apply, especially when the control is on secondary fields that might fail. Therefore, it is deemed important that the accessibility to the reviewers' data and the relative general list has to be improved also through a link between the Reprise database and the MIUR website.

Considering these anomalies, the measures proposed aim to reconstruct a framework in which the maximum circulation of information and the best homogeneity in the procedures are guaranteed; other measures insists mainly on organisational solutions to enhance criteria of transparency in selecting the reviewers; among these criteria there is the rotation of appointments and the avoidance of possible conflicts of interests.

This measure identifies MIUR as the competent subject to define a benchmark on the procedural requirements for a uniform granting of funds, at a central level and with guidance acts.

Another measure is related to the creation or organisation of databases of research projects so that the financing to research can be known in a better way. On the MIUR institutional website (www.miur.gov.it) and on the www.researchitaly.it portal (linked to the first one) there is broad information about the polices and the intervention in the research field. It is to be reminded that the creation of a database or a register that reports all the public and private financing, including the publication of procedures, criteria, etc. in the same place, is a common solution also at international level. In Italy, the current Reprise database could be matched to the National Register of Professors, Researchers and scientific Products (Anagrafe Nazionale dei Professori, Ricercatori e Prodotti scientifici, ANPR and PS), provided by the law of 9th January 2009, n. 1, «*Ratification, with amendments, of the decree law of 10th November 2008, n. 180, including urgent provisions for the right to study, the enhancement of the credits and the quality of the university system and research*». This implementation is currently suspended. It is undeniable how strategically important this measure is in terms of transparency and impartiality in the assessments: the creation of the ANPREPS Register and the coordination of the two databanks would be an improvement towards the transparency in the assessment in the whole university and research. The urgency is to be highlighted, therefore, for MIUR, CNGR and ANVUR, together with the

Guarantee for the Privacy to overcome the critical aspects highlighted in order to implement the ANPREPS database.

Moreover, the MIUR could create a central collection of the data about the financing activities that have already taken place, so to avoid a repetition of financing from different sources and allow a more aware alignment of strategies in the research field.

Among the measures to be applied when choosing the reviewers, MIUR could take into consideration, with regard to researchers themselves, the registration in the list of national projects reviewers as a mandatory requirement for the future participation to the contract notices themselves. Similarly, a mandatory registration with pre-defined curricular characteristics could be taken into account; or, the mandatory registration with regard to universities could be the requirement to take part to local commissions for recruiting professors or researchers; or else it could be a measure to promote the participations from single individuals and structures to whom the individuals belong (universities and departments).

Secondly, strengthening the criterium of self-adhesion to the Reprise list is desirable, through some promotion instruments to identify the members in the selection committees among scientists with high level curricula in their sector of reference; in so doing the current scarce number of reviewers and qualified reviewers might be solved and, moreover, the necessary alternation between professors from different universities might be implemented together with the rotation principle.

ANAC acknowledges the fact that CNGR, in agreement with MIUR, is currently revising the selection procedure for reviewers in the Reprise database; this is in order to promote a better simplification to the accessibility and a selection of reviewers according to their credits. It is desirable that this revision might be fulfilled shortly.

With regard to research financing provided within the single university, the major problem is, as aforementioned, the publicity of the contract notices and the criteria for distributing the funds, which should follow a proportionality criterium based on the people's scientific credits and the relevance of the research projects; moreover, relevance should be given to the areas that contribute to the granting of the FFO award shares from the university (according to indicators and parameters shared with ANVUR) besides other possible strategic shares fixed in a transparent way for the weakest areas on which the university wishes to invest.

Moreover (again to safeguard transparency) the publication ex post of the whole list of the reviewers' names should be mandatory, including the revisions performed and the indication of the relative scientific areas (without mentioning the single judgments expressed) so that, at least ex post, there might be a general idea of the work performed by the reviewers.

Pre-defining the assessment criteria is equally important for the accessibility to knowledge and transparency. The same measure could be implemented with a disclosure ex post of the criteria followed for the selection.

The ethical codes/codes of behaviour in universities should include special provisions in this regard, mentioning specific sanctioning consequences with regard to the breaching of principles of transparency, fairness, impartiality, abstention in case of conflict of interest and incompatibility related to the assessment. MIUR and ANVUR should draft Codes of behaviours for the reviewers, according their respective competences.

### 2.3. Performing the research

The performance of research seems particularly delicate since the rights and freedom belonging to the research groups must be guaranteed.

In this phase, the maladministration phenomena can be related to the identification of the research coordinator and the group members, the management of the relationships within the research group and how to use the research results. Distorted behaviours can cause conflicts of interest in terms of transparency and access to information. In this regard, it is to be noticed that it is a complex problem, in which trespassing might be in contrast with freedom of research, especially in technical-scientific environments; the balance between transparency and privacy in performing a research might become complicated.

Moreover, also in performing research activities it is necessary to ascertain that there are not any forms of conflicts of interest with regard to the kind of activity performed, both under the subjective profile and the objective profile. For example, in creating the so-called university spin off, it is necessary to verify the absence of conflicts of interest between their partners and the education, research and advisory activity performed by the members of the relative university department.

One of the measures for tackling these phenomena is to include the relative cases in the sections of the university ethical codes/codes of behaviours (see hereinafter for the specific problems).

### 2.4. Outcomes and circulation of results

In the conclusive phase it is important to be able to verify the actual performance of the research and the results achieved, so that it is possible to ascertain if the granted financing has led to the success of the experiment, at least on the procedural and document level. This activity should be regardless of the scientific results, which will have to be verified by the sectoral specialists.

It is worth to notice that only recently some assessment systems *ex post* have been activated; nevertheless they seem to deserve an in depth study.

Possible measures to adopt in this phase are related to:

- the implementation of the Open Access system for all the results produced by researches financed with public resources (this system is already mandatory in Europe) together with the creation of a project website, which remains as a documentation of what performed. This system might be a verification instrument and would make the achieved financed research results accessible.

- the verification from the "client party" (when not provided) about the actual performance of the research within the established timeline as a necessary requirement for filing other applications for future projects and financing.

## 3. Assessment on the research quality of universities (and Public Research Entities)

The introduction of an assessment model within the Italian university system can be traced to art. 5 of the law of the 24th December 1993, n. 537, which amended the university public financing system, substituting the previous numerous expenditure chapters allocated mostly centrally, with the institution of a single fund (Fund for the Ordinary Financing) related to the expenditure share for the university

functioning and institutional activities, including the expenses for the personnel, the ordinary maintenance of the university structures and the scientific research.

This model characterises the Italian assessment system as a so-called performance based system, in which the financing is granted on the basis of the scientific results achieved (art. 60 of the law decree of the 21st June 2013, n. 69, ratified with amendments by the law of the 9th August 2013, n. 98). This phase represents the main source of information for the central structures to grant the shares. It is understandable, therefore, why the research assessment is an area of risk, which requires a separate treatment and arises different kinds of problems to be treated differently.

First of all, it is necessary to highlight that the abstract concentration of competences into few subjects can produce deviations in the entire system: ANAC, in recording the relative auspices, on the one hand, for a strengthening of the MIUR's strategic role and, on the other hand, to a better definition of the roles between who creates the rules, who has to apply them appointing the members in the assessment entities, who has to carry out the suitable controls, in the present document merely indicates some exemplifying measures for the anomalies prevention.

In this regard, the technical phase of the assessment is performed by ANVUR in special sessions called Assessments on the Research Quality (Valutazione della Qualità della Ricerca, VQR); the activity is divided for research areas, in each of them a Group of Assessment experts (Gruppo di esperti della Valutazione, GEV) is identified with their relative president; on the other hand, MIUR is appointed with the strategic guidance. Furthermore, it is advisable to monitor the activities performed in this phase so that they take place according to set criteria, parameters and procedures; in this way the room for less objective or poisoned by conflicts of interest judgements is reduced. A potential risk area lies in the procedure of appointing the GEV members and the committees operating within ANVUR; they should be selected through public notices, i.e. a practice that ANVUR could start systematically only recently for the GEV for the 2011-2014 VQR.

In this regard, it has to be reminded that the appointment of the members performing the 2011-2014 VQR was preceded by a greater transparency than the previous activity. For the composition of the aforementioned GEV, more transparent procedures have been adopted through the publication of a public selection notice, inviting to file applications. ANAC wishes for the consolidation of this public call procedure, together with the predetermination of the choice criteria for the selection of the members, in order to offer more guarantees for transparency and accessibility.

The fact that those who have performed relevant tasks for authorities, entities, ministries, etc. operating in the university and research field may then be immediately appointed to perform tasks at public entities (universities and other entities operating the education and research fields) which only few days before where their decisions' objects (a sort of internal *pantouflage*) is another profile of risk.

In these cases, to tackle the phenomenon of overlapping in several decisional processes and conflicts of interest, it is recommended to:

- provide suitable "cooling periods" in the relative statutes;
- introduce stricter incompatibility hypotheses or prohibition hypotheses to accumulate roles and appointments between the roles performed at MIUR, ANVUR, CUN and other entities operating in the central office with regard to university and research and the ones performed within their own university or between several roles accumulated within the university or at universities different from their own;

- ask the reviewer (as it is already taking place in Italy and in the international practice) to make a statement of absence of interests (also scientific) with regard to the product to assess. In this way, the content of these declarations should provide wider hypotheses than the ones defined by the conflict of interest; hypotheses of extra-curricular professional connection, without prejudice to the legitimate hypotheses of academic connection;
- introduce major cautions than the ones ordinarily provided in the GEV composition, as per the single reviewers' position, in order to exclude situations of conflicts of interest;
- consolidate the already applied rotation principle (in recruiting GEVs) according to which the members are renewed, from one appointment duration and the other, for at least 80%; in this way, impartiality is guaranteed and the preservation of an element of continuation and stability in the procedures (with the transmission of the experience) is reduced to the minimum necessary.

## 4. Organisation of education

The critical profiles that have been noticed in the organisation and assessment of the education are related both to possible incorrect influences in the accreditation procedures for courses and centres (involving both universities and ANVUR) and some distorting behaviours from professors, which might negatively impact on the quality of the education offered and the students' education.

### 4.1. Procedure of accreditation of centres and study courses

The law 240/2010 and the following implementation provisions (legislative decree 19/2012, ministerial decree 987/2016 and ministerial decree 60/2017) have introduced the initial and periodical accreditation of the centres and university courses for the state e non state legitimately acknowledged universities (including the online universities); they, therefore, provide two distinctive moments of assessment: an initial authorisation phase, initial accreditation based on minimum standards related to the resources available and the documentation for the implementation of a system to ensure quality internally; this is followed by a periodical assessment phase, a periodical accreditation. The assessment system is managed by ANVUR. For the initial and periodical accreditation both of the courses and the centres, the Ministry, with its own decree, is the one to grant or deny the accreditation, but this takes place upon assent from ANVUR. Also, in this case, it has been noticed that it is desirable that the MIUR's strategic guidance is strengthened.

With regard to the courses, the procedure for the initial accreditation provides (with regard to universities) the filling of an information form, which includes the relevant information of each new course to be activated. ANVUR, according to the final report drafted by an Assessment Commission of Experts (Commissione di esperti della valutazione, CEV) appointed by the Agency itself to assess and gather all the available documentation and decide for the accreditation of the new course. The new courses are created also after a positive opinion expressed by CUN on the didactic regulations (art. 4, c. 1, ministerial decree 987/2016). The CEVs for the periodical accreditation procedure are composed of assessment experts of different profiles (system, education, students, online), which are selected (according to the education composition of the courses and departments to be assessed) among the subjects registered in public registers, gathered with public notices and then formed by the Agency itself depending on the assessment procedure.

The centres and the relative courses are afterwards subjected to periodical accreditation, which provides a wider assessment activity on the centres and courses complying with the requirements for the initial accreditation and the quality requirements. The assessment is entrusted to the CEVs which proceed in three phases: examining from remote, visiting the premises and drafting their report with a synthetic assessment; this is to be finally approved by CEV after any possible counter-arguments from the university and for ANVUR represents the basis (together with all the documentation available) to draft a short public report with which expressing the final assessment on the periodical accreditation of the centre and the courses visited.

In the aforementioned accreditation process, the importance of CEV role leads to take into consideration all the possible remedies to strengthen the procedures for the composition of the Commissions from ANVUR in order to avoid any situations of conflicts of interest with their members and any possible irregular influences on the same to favour/contrast either centres or courses.

*Possible measures*

- enlarge the number of reviewer experts (for the rotation) ensuring, at the same time, their quality profile;
- provide some transparency measures with regard to the procedures for creating the Commissions (for example, clarifying the choice criteria);
- assess from time to time the compatibility between the CEV expert role with the one from other appointments related to assessment functions on universities (including their presence in the assessment Teams);
- ensure that universities duly verify the existence of situations of conflict of interests with regard to the CEV members (as promoted by ANVUR) when communicating the relative appointments; in case a situation is detected ask the Agency for the substitution of the member.

### 4.2. Performance of education

With regard to the teaching staff's behaviour it has been proposed the hypothesis of widening the content in the ethical codes with regard to the professors' duties including provisions to avoid, on the one hand, professors' misbehaviours (such as, for example, the professors' personal interests interfering with the performance of their institutional duties of education and research, situations of conflict of interest in performing the exams or other educational functions also as a member of commissions); on the other hand, to make the department directors more responsible in monitoring the professors' behaviours also through special regulations.

These and other hypotheses are examined in the Guidelines on the possible codes of conduct at § 6.1.

## 5. Recruitment of professors

Among the corruption risk area to whom all public administrations are exposed (the so called "risk general areas"), the law 190/2012, in the art. 1, c. 16, includes the open recruitments and the selection tests for hiring personnel and career developments. With regard to professors, the recruitment process, after the approval of the law 240/2010, covers both the national level in which the candidates are assessed for the national scientific qualification and at the local level in which each university manages the applications filed by the professors qualified for the job vacancies at university.

### 5.1. The procedure of national scientific qualification

With regard to the procedure of national scientific qualification (abilitazione scientifica nazionale, ASN) the current system of the national commission's composition for qualification by drawing (with recent amending provisions) has been designed by the lawmaker to best guarantee impartiality being the most neutral, with regard to the impartiality of judgements and the increased quality average of the staff qualified (according to the ANVUR survey). In any case, the commissions could be exposed to pressures from external interests or local interests.

The present Plan does not intend to propose any possible amendments to the ASN's current system but has focused the attention on some aspects of its current functioning, in particular on the classification of the scientific journals (especially those included in class A), considering the relevance that the classification has on the ASN national commissions' activities and choices. To this end some critical situations have been highlighted with regard to the instruments and the assessment methods currently used in classifying the scientific researches.

According to the provisions ex numbers 4 and 5 of the enclosure D to the MIUR ministry decree of the 7th June 2016, n. 120, for the open recruiting sectors in which the non-bibliometric indicators of scientific activity, ANVUR drafts and constantly updates (publishing on its institutional website: a) the list of all the scientific journals provided with ISSN b) the sub-group of the scientific journals defined as «of class A», or provided with ISSN, acknowledged as excellent at international level for their strictness in the assessment procedures and their circulation, distinction and impact on the sectoral scholars communities (the presence of these journals in the most important national and international databases).

At number 5 it has been clarified that, for the classification of journals in class A, with regard to the journals the revision among peers, ANVUR verifies the presence of at least one of the following criteria (with regard to the characteristics in the open recruiting sector): a) the quality of the scientific products achieved in the VQR by the contents published in the journal b) the significant impact from the scientific production, when suitable.

Considering that the journals' assessment process is potentially exposed to situations of conflicts of interests, ANVUR should always select the journal work groups through public calls, clearly predefining the choice criteria and including clauses to avoid that subjects with potential conflicts of interest become members of the group. It is also paramount to ensure the application of objective and predetermined criteria for assessing the journals provided by the regulations; the work groups could be exempted from these criteria only in exceptional situations and with adequate motivations.

### 5.2. Recruitment procedures at a local level

Within the limits of the three-year planning for the needs of personnel and according to the resources granted, universities may proceed to cover the professor role vacancies of first and second level with calling after a selection procedure ex art. 18 of the law 240/2010, or open recruitments to all the scholars with ASN or through assessment procedure ex art. 24, c. 6 of the aforementioned law, which is a selection for the open end contract professors and associate or ordinary professors, already working for the same university, who already have ASN and who can be classified as associate or ordinary professors. This latter system of recruitment was introduced on a transitional basis and then extended several times, last time with the law decree 244/2016, ratified (with amendments) by the law 19/2017 (art. 4, c. 3-bis). The Authority has noticed that the system, nevertheless, is subject to unfair pressures and so recommends to resort to it only in rare cases.

Besides the aforementioned recruitment forms there is also the direct call or for "clear fame" provided by the law 230/2005 (and following amendments, which should be included into a legal framework to clarify requirements and procedures in order to avoid the implementation interpretations that lead to different treatments or, in any case, incoherent with the ratio in the provisions) and the assessment procedure ex art. 24, c. 5 of the law 240/2010 (so called tenure track).

Generally speaking, it is necessary to notice that the main risk in the local recruiting phase is given by the pressures from the local candidates (and professors) backed by the balance sheet bounds/conditions towards choices that favour the internal subjects. The localism in the recruitment, besides seriously compromising the impartiality in the system, prevents the access not only to worthy subjects from other universities but also from foreign universities; in so doing the mobility among different universities is significantly reduced, which is a point of strength to ensure freedom and research quality. This is to the detriment of the attractive quality in the Italian research centres within a research and higher education system that is ever more internationalised.

As aforementioned, the legal framework with regard to the procedural aspect is considerably bare; in fact, the lawmaker has appointed the matter to the universities' regulatory power. Therefore, the recommendations mentioned in the following paragraphs are intended especially to universities so that they make the measures to contrast unfair behaviours and prevent episodes of corruption, partiality and conflict of interest part of their regulations and PTPCs.

Hereinafter the most relevant factors of corruption risk are mentioned; they have been detected with regard to the professors' recruitment at each single university and, in particular, in the procedures ex art. 24, c. 6, of the law 240/2010. Moreover, possible measures to prevent those risks are suggested.

### 5.2.1 Recruitment of professors according to art. 24, c. 6, l. 240/2010

In order to reduce to the minimum the illicit pressures and limit the use of the assessment recruitment procedure provided by art. 24, c. 6, of the law 240/2010, universities, also through specific regulatory provisions, can:

- autonomously establish the exceptional character of the procedure;
- provide an increased motivation, every time the university resorts to the same;

- in case there are different candidates with the necessary requirements by law to access the call procedure, provide suitable assessing comparative procedures towards the scholars[13];
- define the procedures to file the applications;
- consolidate the regulatory provision creating special assessment commissions.

Finally, in order to balance the procedures ex art. 24, c. 6 resorted by universities and the use of recruiting procedures open to external scholars, it is desirable, on the one hand, that the universities themselves increase the financial resources, as much as possible, beyond the share provided by law, to hire the external professors and, on the other hand, that the already existent system of financial incentives is improved through a suitable national intervention.

### 5.2.2. Suitable planning for the recruitment of professors

Whenever a suitable recruitment planning, both at university and department level, is lacking or missing, there could be a risk factor that might expose universities to incorrect pressures and decisions that are not properly pondered and suitable.

*Possible measures*

With regard to the professors' recruitment planning (for example, the three-year Plans for the personnel recruitment planning, to be adopted every year by the university board of directors according to the leg. decree of the 29th March 2012, n. 49) universities should:

- guarantee the presence of all the university elements to define the planning acts, without prejudice to the related provisional restraints;
- be oriented by objected criteria and general principles for all the universities that take into consideration, for example, the number of professors per subject already present in the departments;
- unify the needs of educational and research nature within the department with the needs of merits in each possible candidate to the upgrade;
- adopt a system that is more open to recruitment procedures from outside;
- make the decisional processes and the motivations for the choices transparent, also explaining the reasons for the missed activations of some teachings;
- ensure the maximum possibility to be informed about all the planning acts.

### 5.2.3. Conflicts of interests for the participants to the recruitment procedures

The possible existence of situations of conflicts of interest between who takes part to the selection procedures and the present personnel (with different roles) in the university is another risk factor; it is about situations of nepotism and partiality in the decisions to hire.

*Possible measures*

[13] In this regard see TAR Lazio, sec. III Bis, decision of the 20th March 2017, n. 3720, and the jurisprudence there mentioned. The regulatory intervention hypothesised within the document is necessary *a fortiori*, provided that the aforementioned jurisprudence orientation deems that (lacking provisions to regulate the case of presence of different candidates) the Decree of the President of the Republic n. 117/2000 has to be applied: it regulates, in any case, a university personnel recruitment system that precedes the reform provided by the law n. 240/2010.

It is to be highlighted that the lawmaker, already with the law n. 240/2010, provided a specific hypothesis of a real impossibility to apply to the selection procedure. It is about art. 18, c. 1, lett. b), last sentence, and lett. c), of the law n. 240/2010, according to which to the call procedures for professors and university researchers and for the granting of the research funds (and to any contract provided by the university) *«those who are related by blood or marriage, up to the fourth grade, to a professor belonging to the department or to the structure that performs the call or to the dean, the general director or a member of the university board of directors»* cannot take part.

Considering the aforementioned provision, universities are recommended to guarantee its strict application. It is desirable, therefore, that:

- universities adopt regulations that are coherent with the ratio in the provision, ensuring the maximum application and avoiding elusive interpretative and application practices, bearing also in mind the interpretations expressed by jurisprudence with regard to the provision[14];
- the assessment commissions in the verification phase of applications eligibility proceed with a precise control whether there are reasons for no eligibility.

It is reminded that the provision has been interpreted by jurisprudence including also the marital relationship[15] among the situations that raise the incompatibility. In this regard it has been agreed with the interpretation that extends the incompatibility clause also to the cohabitation *more uxorio* equating the relationship to the marital relationship.

With regard to the objective scope of the provision the jurisprudence has extended the hypothesis of impossibility to be a candidate also to the recruitment procedure ex art. 24, c. 6, of the law n. 240/2010, considering that if *«the incompatibility ratio is enforced for the open recruitments, even more so it may be enforced for the direct calls»*[16]. Therefore, the same reasoning leads to believe that the provision in reference can be extended also to the recruitment procedure ex art. 24, c. 5, of the law n. 240/2010.

Stll on the objective scope, the jurisprudence orientations have deemed to apply the impossibility to be a candidate clause in each phase of the recruitment procedure, not only if the same takes place in the final moment (in case of researchers is the same as the "contract proposal")[17].

### 5.2.4 Composition of the assessment commissions and conflicts of interests of the members

The irregular composition of the commissions or the presence of subjects that have conflicts of interests with the candidates might jeopardise the impartiality in the selection. The legal provisions do

[14] Council of State, sec. VI, decision of the 15th November 2016, n. 4704.
[15] See Council of State, sec. VI, decision of the 4th March 2013, n. 1270.
[16] So Council of State, sec. VI, decision of the 15th November 2016, n. 4704. aforementioned.
[17] With regard to the recruitment of researchers, see the Council of administrative justice for the Sicily Region, decision of the 21st November 2016, n. 417. The decision is about the researchers' recruitment procedures, claiming that for the professors' recruitment procedures there is no risk of partiality in the decisions during the phases before the final one. This is due, in particular, to the different provisions included in the law n. 240/2010 for the professors' recruitment; the law provides the "up hill" participation also of the Ministry of education, university and research announcing the opening of the national scientific qualification. Actually, this argumentation seems to be only partially reasonable, because the legal provisions for the "local" phase in the professors' (art. 18) and researchers' recruitment procedures (art. 24) is basically similar, therefore the conclusions drawn by the Council of administrative justice for the Sicily Region with regard to the recruitment of researchers could also be applied to the professors.

not regulate neither the creation of the commissions nor the performance of their activities, deferring the matter to the university regulations.

*Possible measures*

With regard to the composition of the commissions, it is advisable that universities in their own regulations provide that:

- to identify the members, the choice is performed by drawing from lists of subjects that have the same requirements provided for taking part to the commissions of national scientific accreditation. This procedure might be amended when the number of subject is slim;
- the members belong to the same open recruitment sector;
- whenever possible, the principle of equal opportunities between men and women is complied with in creating the assessment commissions;
- the highest transparency is guaranteed to the procedures, providing that the researchers and associated professors recruitment commissions are composed of at least three members (the majority external) and, for the recruitment of the ordinary professors, of at least five members (of which only one external). In this way a system of "growing guarantees" would be achieved with regard to the growing relevance in the academic positions;
- the appointment of commissioner in a local open recruitment is limited to only two procedures per year, possibly extended to a maximum of three for the sectors with a scarce number of subjects.

With regard to the hypotheses of conflicts of interests related to the members of the assessment commissions, the law 240/2010 does not include specific provisions.

- It is reminded that the issue of conflict of interests in these cases has been already dealt with by the Authority in its deliberation of the 1st March 2017, n. 209, both with regard to the legal provisions and the jurisprudence orientations related to the university open recruitments and the assessment procedures on the existence of grounds for exclusion upon the members.

With regard to the first aspect, according to a consolidated administrative jurisprudence orientation, the hypotheses of mandatory exclusion ex art. 51 c.p.c. (code of civil procedure[18]) are applied to the university open recruitments since they are closely connected to the transparent and correct enforcement of public functions. *«Therefore, in case a member in the open recruitment commission is in an incompatibility situation provided by the aforementioned art. 51 c.p.c., he has to abstain from performing acts related to the procedure itself; at the same time, the administration involved, having assessed the presence of the aforementioned preconditions, has to see for the substitution of the member to avoid that the acts in the procedure are biased and defected (Circular n. 3/2005 Public Function Dep.»).*

The principle included in the art. 5, c. 2, of the leg. decree of the 7th May 1948, n. 1172 (still in force) can also be applied to the university's open recruitments; the principle considers relevant also the affinal kinships (and not only the consanguineal kinships) up to the fourth grade between

[18] The jurisprudence of the Council of State has recently clarified that the art. 1 and 6-bis of the law n. 241/1990 left untouched the consolidated principles with regard to the open recruitment commissions, based on the application of the mandatory grounds of incompatibility ex art. 51 c.p.c.; this is also in consideration of the higher level of the special provisions with regard to the incompatibilities system applied to the more general administrative procedure system, even if it is chronologically subsequent (see CdS, sec. III, decision of the 28th April 2016, n. 1628).

commissioners, in addition to between candidates and commissioners [19], as a ground for incompatibility/obligatory abstention of commissioners.

The aforementioned ANAC deliberation, therefore, clarified that «to ascertain a conflict of interests between a member of an open recruitment commission and a candidate, a professional collaboration or a lifelong union is to be considered a ground of incompatibility ex art. 51 c.p.c. if it is characterised by a communion of economic or life interests that is particularly intense; such situation can be deemed existent only if said collaboration is systematic, stable and continuous so to generate a real professional partnership»[20].

It is necessary, moreover, to remind the jurisprudence orientation according to which the existence of an involvement of economic nature is not the only hypothesis for an obligation to abstain upon the single commissioner, even if it is one of the most characteristic and recurrent in practice; the orientation highlights also the fact that the assessment operations have to strictly comply with the general principles of impartiality, objectivity and transparency so the most intense and prolonged forms of collaboration, especially if characterised with forms of substantial exclusivity, have to be examined very carefully. According to the Council of State, in these hypotheses there is an abstention obligation whenever real evidence emerges of a personal relationship of such intensity to raise the suspect that the judgement might not be compliant with the principle of impartiality, such as – for example - «the circumstance that one of the commissioners is the co-author of almost the entire number of publications belonging to the candidates»[21]. With regard to the assessment procedures on the non-existence of the grounds for abstention, the Authority, with the deliberation n. 209/2017, reminded the art. 11, co. 1, of the decree of the President of the Republic 487/1994 («*Regulation including provisions about the access to the roles in public administrations and the procedures of open recruitments, single recruitments and other forms of hiring in the public roles*») according to which «*The [commission] members, having controlled the list of candidates, formally declare there are not grounds for incompatibility among the candidates and themselves, according to the articles 51 and 52 of the code of civil procedure*».

*Possible measures*

It is advisable that universities:

- ensure that in the declarations made by the commissioners the typology of possible relationships of any kind (past and present) between the members of the commission and the candidates is expressed so that universities are eased in the assessment operations on the declarations made;
- mention procedures to assess that the commissioners appointed are not facing one of the grounds of abstention from the assessment provided by the regulations, as interpreted by the jurisprudence and taking into account the peculiarities in the different scientific sectors;

[19] The provision provides that: "members of the Commission that share an affinal or consanguineal kinship up to the fourth grade or a member of the Commission with a candidate, cannot be part of the same". The provision refers to the commissions for the role of ordinary assistant ex art. 4 of the leg. decree n. 1172/1948.

[20] So the aforementioned ANAC deliberation. See also the jurisprudence of the Council of State mentioned there.

[21] See Council of State, sec. VI, decision of the 24th September 2015, n. 4473, and the jurisprudence mentioned there. In that case the President of the open recruitment Commission had been the first co-author of more than ninety percent of the publications annexed by the candidate to take part in the selection procedure (thirtyseven publications out of forty).

- that, in line with some solutions recently adopted by some universities, in case of an incompatibility solved with an inter-departmental mobility, within three years after the transfer universities create the open recruitment commissions for the assessment procedures related to the levels and the scientific educational sectors related to the interested professors/researchers with all the external commissioners.

### 5.2.5 Inadequate transparency of the assessment criteria and procedures

The lack of knowledge of pre-defined criteria and procedures of assessment to be followed is important for the possibility to take decisions to favour some candidates.

*Possible measures*

In regulating the recruitment processes it is advisable that:

- the university regulations provide that the candidates are aware of the assessment criteria set by the commission;
- the performance of the assessment activities together with the judgments expressed on the candidates take into account the logic practice that led to the final assessment on the candidacies;
- in particular, with regard to the procedure ex art. 18 of the law n. 240/2010, since the jurisprudence has defined this procedure as a real open recruitment, it is advisable that universities agree on the common principles and procedural rules, to reduce the distances between each university regulations, in particular with regard to the criteria that commissions have to follow (for example, the fact that the commission has to perform a real comparative assessment);
- for some recruitment procedures (when compatible with the provisions) a subjective assessment is provided, for example, the presence of at least a written test with guarantee of anonymity to sign a research temporary contract;

## 6. Districts for the impartiality of professors and university personnel

The university sector – as aforementioned in the introduction – is characterised by an often inconsistent legislative stratification whose effects impacts also the aspects related to organisation and personnel. This inconsistency seems, moreover, exacerbated by the peculiarities that derive from the plurality of the universities' autonomous statutes; they certainly comply with the guarantees that are constitutionally recognised, but they favour a context where the different interpretations of the same provisions create regulatory implementations that differ from university to university with regard to the behaviour provisions. In these environments conflicts of interest are possible and so are different interpretations on the incompatibility provisions or authorisations; moreover, maladministration phenomena in relation to pressures of interests of local character, internal or external, can take place in universities.

With regard to what aforementioned, three risk areas have been identified: the first is related to the relationship between ethical codes and codes of behaviours; the second is related to the implementation of the grounds of incompatibility in each single university; the third is related to the disciplinary procedures. It is about aspects where there are phenomena of detachment from the corruption prevention and the need to safeguard the efficacy and efficiency of the provisions

themselves. For example, there are uncertainties at regulatory level with regard to the implementation of the codes of conducts, considering the relationship between these and the ethical codes; similarly, there is the definition of general clauses related to incompatibility grounds provided by law; there are also situations with conflicts of interest (present or potential) that are regulated both by the amalgamated law-decree on the public employment and by the general law for reforming universities.

Therefore, it is not about choosing in advance some precise interpretation options, but about identifying criteria that allow a uniform implementation on the national territory. In the light of this (without prejudice to the acknowledged constitutional principle of the universities organisational autonomy) it is necessary to provide not only coherence but also and especially internal cohesion to the system. The coexistence of several provisional sources having the same object (or, in any case, similar) demands an effort of rationalisation that transcends the problems of coordinating the provisions; sometimes some simple lexical and semantic guidelines are necessary.

### 6.1. Code of behaviour/ethical code

Universities are provided with different provisions with regard to personnel's behaviour. The law about the university organisation provides that universities adopt an ethical code for the community composed of university professors and researchers, technical-administrative personnel and students (art. 2, c. 4, law 240/2010); this code has to identify the fundamental values of the university community, promoting the acknowledgement and respect of the individual rights and the undertaking of duties and responsibilities towards the relative institutions; the codes provide also the rules of conduct within the community and the sanctions to be inflicted in case of infringement of the code itself. On the other hand, the law 190/2012 provides the adoption of a code of conduct for the public employees so that a national code is approved (subsequently adopted with the decree of the President of Republic of the 16th April 2013, n. 62) and a code that is peculiar for each public administration, integrating and specifying the national code of conduct (art. 54, co. 5, of the leg. decree 165/2001). Not least, it has to be highlighted that there seem to be some irrelevant disciplinary measures, as it results from the reference to art. 87-89 of Royal Decree 1592/1933 by art. 10, c. 2, of the law 240/2010.

A problem of coordination between ethical code and code of conduct is often present. The Authority, when implementing the code of conduct for the first time, already declared that «*for the administrations that, also according to special previsions, have adopted ethical codes, manuals of conduct or similar documents, it is desirable that the present guidelines are implemented in order to re-design and complement these texts, which possibly have to be an essential part of the new code. This would allow the administrations not only to follow a method to draft and implement the codes that is as uniform and rigorous as possible, but in particular to take into account needs that underlie the new provisions of the codes of conduct and are linked to the aims of corruption prevention. In each case it should be highlighted that (regardless of the classification given by each single administration to their own code) the new system is enforced, a system of effects and responsibilities arisen from the breach of behavioural provisions, ex art. 3, art. 54, of the leg. decree n. 165 of 2001, as amended by art. 1, comma 44, of the law n. 190 of 2012 (*Deliberation n. 75/2013 with *«Guidelines with regard to codes of conduct in the public administrations»).*

The aforementioned ANAC guidelines have not received any significant feedbacks in the university sector. On the one hand, some universities have deemed that their own ethical codes comply with the provisions ex law 190/2012 and, therefore, they have not updated them; on the other hand, other universities have approved another distinct code, called code of conduct, in which a duplication of

provisions has been noticed having a similar content, on the basis that the code of conduct is intended only to the non-teaching personnel.

It has been deemed, therefore, essential and urgent that universities identify some forms of coordination between their ethical code and code of conduct. Furthermore, from some codes examined a significant levelling off has emerged with regard to the provisions included in the national code of conduct and/or the lack of a referential scheme; so that the codes of conducts are a mere duplicate of dispositions already provided by the ethical codes (conflicts of interest, safeguard of the university image, use of equipment, nepotism, gifts, misuse of role).

Therefore, universities are invited to:

- adopt a single document that combines the ethical code's objectives with the code of conduct's objectives;
- identify two distinct levels of relevance in the unified codes, with regard to the behavioural duties: 1) duties that implies disciplinary penalties; 2) duties that implies non disciplinary penalties, when breaching some ethical and deontological norms;
- describe the provisions in the unified codes so that the duties can be distinguished according to who is subject to the same. It is preferred to identify and distinguish (in some special sections) the duties upon the technical-administrative personnel and the specific duties upon professors and researchers;
- include some cases already emerged in the present in-depth analysis into the unified codes: for example, to give force of rule to the duties upon the teaching personnel with regard to education and research or to the duties upon students. There could be special measures for misuse of role, plagiarism, conflicts of interest in scientific research, personal favouritisms and the introduction of the concept of nepotism;
- identify further areas where it is reasonable to foresee some phenomena of maladministration, which may be ruled by the code of conduct with the adoption of specific measures; for a more detailed analysis, please see the chapter dedicated to didactics.

ANAC in a close collaboration with MIUR (and the other subjects present in the technical work group), undertakes to draft special Guidelines as soon as possible to guide and promote a new cycle of codes of conducts/ethical codes in universities. This does not mean that university still have to wait to draft their codes. On the contrary, the existence of possible best practices might make drafting guidelines easier.

### 6.2. Incompatibility and conflicts of interests

In the university sector, the regulatory area about conflicts of interests and situations of incompatibility (especially with regard to professors and researchers) seems characterised by uncertainties of interpretations and a high level of diversity in implementing the rules.

The risk of conflict of interest, which is generically ruled for all the public employees by art. 53, leg. decree 165/2001, impacts the university area in a very peculiar way; differently from the other

administrations, the fact that personnel carries out some collateral activities (implementing their personal skills such as advisory, professional tasks, editorial activities and, in any case, extra-institutional activities) can lawfully and even virtuously be combined with the research autonomy.

For these reasons, the role of professor and researcher is subject to a special regulation that provides a specific incompatibility system and a peculiar system of free activities, possibly subjects to some authorisations, aimed to verify the situation of conflict of interest in each single case. Art. 6, c. 9, 10, 11 and 12, of the law 240/2010 innovated the statute of teaching personnel (either full time and/or with a temporary contract) overlapping the incompatibility system previously regulated by the decree of the President of Republic 382/1980, of which it still declares the partial enforceability.

Three different measures systems can be roughly summarised to prevent conflicts of interests, differently applied depending on if the subjects are full-time professors and researchers or temporary ones:

- absolutely incompatible activities, which require the mandatory request of a leave, as provided in the list ex art. 13 of the decree of the President of Republic 382/1980;

- free activities, without prejudice to the institutional obligations, such as the activities (also paid) «*of assessment and referee, lessons and seminars, scientific collaboration and advisory, scientific and cultural communication and circulation, and publicist and editorial activities*» provided by art. 6, c. 10, of the law 240/2010;

- activities that require the authorisations from the dean and are related to the didactic and research activities, institutional and managerial tasks, which can be performed unless some situations of conflicts of interest arise with the home university and upon the condition that the activity is not to the detriment of the didactic, scientific and managerial activities entrusted by the home university (art. 6, c. 10, law 240/2010). These activities are currently regulated by the university regulations in compliance with the sectoral provisions and the general principles on public employment. In particular it is to be highlighted that the amendments introduced by art. 53 of the leg. decree 165/2001 of the law n. 190/2012 are asking the administrations (in regulating the authorisations to be granted) for a major attention in evaluating the compatibility between the external appointments and the performance of the activity at the home administration, with regard to conflicts of interests.

There is, then, the category of the liberal profession activities and the self-employment activity (also on a continuation level) carried out by professors and researchers with a temporary contract, whose incompatibilities are regulated by the universities statutes (art. 6, c. 12, law 240/2010).

For all the aforementioned typologies of activity there are significant problematic issues about their interpretation; these issues impact all the aforementioned categories creating several critical situations both in terms of interpretation of the incompatibility cases provided by law and in terms of drafting the university autonomous provisions (statutes and regulations). A large number of vague legal subject matters has been noticed, such as, for example, the "*the performance of trading and industry*", where there is the definition of the different ways of taking part in the business practice in the form of a company (e.g. the participation to boards of directors). Identically vague is the subject matter of the "*scientific collaboration*" or the subject matter related to a professor or a researcher having a VAT number, which may not be per se a demonstrative evidence of the professional activity performed in a continuous way; there are also the cases of "*advisory*" activity and the communication and divulgation activity. Those

activities can be paid and may include any other kinds of activity. For the advisory activity, in particular, there is the problem to identify any possible limits in performing an activity even if it is called "free" by law, as, for example, the performance of an intellectual work, strictly personal and with a non professional character, totally autonomously from the client and provided as an expert in the matter.

Nevertheless, the uncertainty in the definitions is not the only critical aspect, there is also the way of interpreting the provisions: each university has enforced their own regulatory power with regard to the incompatibility system for their own professors; as a consequence, they identify cases that are compatible and cases that are incompatible, which are radically different from each other. It is deemed that letting universities be autonomous in evaluating the incompatibilities determined by law is not only inconsistent but also inadvisable; this creates – in applying the same subject matters – significant treatment discrepancies between one university and the other, to the detriment of a uniform enforcement of such relevant provisions for the corruption prevention and conflicts of interest.

It is, therefore, desirable an intervention for a homogeneous and compliant interpretation of these general clauses in order to align the implementation of the current provisions in each university, in particular, with regard to those subject matters that generate more doubts and interpretational difficulties.

Therefore, it is proposed:

- the adoption of a guidance act from MIUR in order to render the abstract subject matters homogeneous and unambiguous. ANAC has declared to be willing to give their support to define such a relevant preventive measure;
- with specific regard to the activities subject to authorisations, it is therefore confirmed the university competence to regulate the procedures and the limits of the authorisation systems, both in terms of possible subdivisions of activities that can be authorised per university and in terms of cumulation of activities per single professor/researcher; in so doing the production is not jeopardised and so are not the overall limits to remuneration ex art. 23-ter of leg. decree 201/2011.

### 6.3. Disciplinary procedures

Art. 10 of the law 240/2010 intervenes on the competence with regard to disciplinary matters and the related procedure; nevertheless, it omits to provide substantive laws with regard to unlawful acts and penalties. This article transfers all the disciplinary competences to internal subjects in the single university (Dean, Disciplinary Panel, Board of Directors). These competences were before appointed to the Dean and the CUN. In this sense, the aforementioned article identifies a disciplinary panel appointed to perform the preliminary phase in the disciplinary procedures and express a relative final opinion, in compliance with the principles of cross examination and peer judgement.

In so doing, a decentralisation of the disciplinary competence at each university has been achieved, with the abolition of each CUN competence in this regard; consequently there is a centralisation upon the Dean of the power not only to begin the procedure but also to propose the relative penalty; moreover the disciplinary Panel, appointed according to the university statute, is entrusted with the preliminary phase of the procedure (of course in case of more serious penalties than censorship) and the advisory phase about the outcome of the same; the panel has to express a binding final opinion; the

Board of Directors is appointed with the power to inflict the penalty or to shelve the procedure "*in concordance with the binding opinion expressed by the disciplinary Panel*".

With regard to the current provisions, taking into account that the law omits to provide the procedures of designating the members of the disciplinary Panel, it is recommended to universities (according to their powers of self-government)to take care of the composition and the provisions of the disciplinary Panel (through their regulations and statutes) so that the highest grade of impartiality is ensured and the third party status in the preliminary phase is guaranteed also through the preponderance of external commissioners.

With regard to the activation of the proceeding, it is deemed that the procedure provided by art. 10 of law 240/2010 raises the problem of the independence of the disciplinary entities in relation to the identification of the members of the disciplinary Panel. It is suggested to resort to external subjects from university in order to ensure a greater independence of judgement, since art. 10 does not seem to exclude a predominant external composition. It would be advisable that the lawmaker provides an electoral procedure for the composition of at least one part of the disciplinary Panel; the right to vote should be given to ordinary and associate professors and permanent researchers operating at the university (according to the principle of peer representation) while the right to stand for election should be given to the same professors, the ones that work full time and with a permanent contract or that at least a part of the disciplinary panel is external from university.

With regard to the disciplinary proceeding, there is the problem of the appointment of the disciplinary power in case of breach of the code itself by the Dean: in this regard the law 240/2010 – drafted according to the principle of peer judgement – seems to be incomplete. During the works in the technical work group the possibility has emerged to recommend universities to provide in their statutes that the disciplinary power is entrusted to the Dean, still wishing for the mainly external composition of the disciplinary panel. As an alternative, another solution has been also taken into account in order to guarantee the third-party character in the proceeding, detaching the proceeding from any possible irregular influences internal to the university by entrusting the Minister with such power.

**7. Participated entities and outsourced activities outside universities**

Within the public universities the creation of private law entities is frequent.

The Authority, being unable to have official data, has performed a spot control on the websites belonging to ten universities located in the metropolitan Cities; from this spot control the existence of a large number of entities participated by university has emerged; they can be distinguished in the following typologies:

- companies with shared capital controlled or simply participated by the university;
- associations;
- foundations;
- consortia (also inter-university);
- spin-offs, the can be set up as companies.

The proliferation of private law entities is a very wide phenomenon, which is common to several public administrations.

In the university system, the use of external private entities created by the universities themselves or to whom universities participate seems to aim to outsource variegated series of activities:

a) first of all, these entities are appointed with tasks and functions that should pertain to universities, such as services provided to students (library, secretaries, accommodation) or the projects to participate to national and European open competitions;

b) secondly, these entities supply services to the university itself (for example, maintenance, computer support, external university promotion);

c) thirdly, there are the activities called spin-off or start-up, which consist in the performance of research activities or other technical activities (measurements, checks...) or in the industrial use of the research outcomes.

### 7.1. Private law entities created to perform the institutional activities or to provide goods and services to universities

The university laws have regulated the constitution of spin-offs (also referring to secondary state rules and rules adopted by the universities themselves) while minor attention is dedicated to the first two typologies of activities mentioned at letter a) and b) in the previous paragraph.

With regard to the entities at point a), what already included in the 2016 PNA (see § 3.3) is reminded; in the text it was highlighted that very often these private law entities are not suitable to achieve the institutional goals and, sometimes, perform activities of public interest that are analogous to those performed by the public administrations. For these reasons the lawmaker has decided to intervene aiming to avoid the proliferation of these entities and considerably reduce the public participation in these entities. This target is achieved by abolishing the entities themselves and through processes of "re-internalisation" of the activities of public interest.

The creation of companies with share capital from universities will have therefore be coherent with the provisions introduced by the leg. decree 175/2016, as amended by the leg. decree of the 16th June 2017, n. 100 «*Amalgamated law with regard to companies with public participation*». It is deemed that the principles included in the leg. decree 175/2016 applied to companies can be extended (if compatible) also to other private law entities created by universities.

With regard to the entities at point b), it is reminded that the creation of private law entities, especially if in the in-house form, to the aim to directly sign with them contracts for the provision of goods and services, is allowed by the code of contracts but is still a limitation in the competitive market.

On the basis of these considerations, studying in-depth the specific critical points related to the creation of the entities participated by universities seems particularly profitable with regard to the present Plan.

The proliferation of participated companies, associations, consortia and foundations is due to the need for different universities to appoint external subjects with the tasks to perform specific activities of public interest, also taking into consideration the limits implemented to the participation in projects financed with regional and EU funds.

Nevertheless, this practice performed by universities can expose the management of public resources to phenomena of corruption and maladministration; therefore, it is advisable that their preliminary phase is monitored or the opportunity to create new entities with public participations or to acquire shares of participations (also indirect) is previously assessed.

*Possible risk events*

- creation of participated or controlled entities with the aim to perform activities that are not included in the ones of public interest;
- unjustified externalisation of activities of general interest when the appointed functions can be ordinarily performed by the university;
- the use of university staff (professors, researchers, technicians and administrative employees) from these subjects, also after the service is ended (*pantouflage*). The phenomenon of appointing operating or retired professors within these entities is particularly risky.
- conflicts of interest, in terms of conflict between controller party and controlled party, in performing the university guidance and surveillance powers on the private law entity created by the university itself or, in any case, controlled or participated;
- recruitment of personnel and appointment of roles according to private law rules infringing the rules applied to the university, in particular with regard to the open recruitment.

*Possible measures*

- a real confirmation that the criteria ex art. 5, c. 1 of leg. decree 175/2016 have been adopted in evaluating the analytic motivation drafted by the university;
- publish the motivation for the choice to create new private law entities or to acquire participation shares, also indirect ones;
- a detailed motivation when creating an in-house company to be directly entrusted with the supply activity of goods and services to the university;
- regulating the use of university personnel in these entities, applying specific incompatibilities or rules about the authorisation to perform external tasks, taking into account not only the guarantee of the work performance for the university but also the need to avoid any conflict of interest, even if only potential;
- suitable transparency measures in order to allow a wide control (especially within the university community) about the real and proper functioning of the participated entities and their effective relevance (taking into account the alternative to bring back these functions under the university ordinary entities);
- prior approval from the university on the regulations of the participated entities about the staff recruitment, the appointment of tasks and the obligation to subject each deliberation related to the staff recruitment or the appointment of tasks to the university top entity;

- obligation to publish the personnel regulations and the appointments, including the data related to the employments;
- checks from the university on the compliance with the anti-corruption and transparency provisions from the private law entities according to the leg. decree 33/2013 and law 190/2012.

**7.2. Spin-offs**

The creation of spin-offs complies with the need to perform activities of research, technical activities, activities using the outcomes from research, through business relationship with other subjects, either public or private, within a competitive market.

Spin-offs create specific problems: on the one hand the ones related to the creation, functioning and performance of activities that are to be considered as university institutional; on the other hand, the problems related to the use of university personnel in the spin-offs.

With regard to the first kind of problems, regulations require an attentive assessment on the opportunity to set up the company defining relative contents and limits. A spin-off is set up especially in those cases when the activities to perform and the enhancement of the research results would not suitably develope if performed by ordinary companies (failure of the market). Besides the assessment on the actual condition of the market of reference, the university has to attentively assess whether the activities performed by the spin-off are related to the university institutional tasks.

With regard to the second kind of problems, the provisions about the phenomenon seem to be quite attentive, even if some further clarification seems necessary.

By way of derogation from the expressed prohibition to perform trading and industrial activities, professors and university operating researchers, in compliance with the art. 6, c. 9, of the law 240/2010, can set up or take part in the corporate structure of a spin-off or a start-up, according to what provided by art. 2 and 3 of the leg. decree of the 27th July 1999 n. 297, undertaking formal responsibilities also in that environment as provided by the Ministerial Decree of MIUR of the 10th August 2011, n. 168.

The provisions related to spin-offs identify professors and university researchers as the subject entitled to propose the setup of a company with share capital in which the university takes part as partner to achieve their institutional targets. The procedure for the creation of a spin-off, ex art. 3, c.2, of the ministerial decree 168/2011, provides that in the entrepreneurial project, to be filed together with the proposal, also the role covered by professors and researchers within the spin-off is mentioned. This information allows the university board of directors to ascertain the compatibility of what provided within the entrepreneurial plan with regard to the external to university activities performed by professor with the rules especially defined by the university according to art. 6, c. 9. law 240/2010.

The ministerial decree refers to the university regulations about the provisions for other situations of incompatibilities than those directly identified by the decree itself (the members of the board of directors, of senate and of university commissions, the dean and the department directors cannot be entrusted with managerial and administrative roles in these companies), in order to ensure the autonomy in performing the function or the regular performance of the normal didactic functions. Despite the attention brought by the aforementioned ministerial decree to the incompatibility profiles related to the full performance of the activities, the attention on a different profile of conflict of

interest (also potential) between the ordinary performance of the university activities (guidance and planning, actual performance of research and teaching) and the performance of the activities in the spin-off seems to be still insufficient. This is especially true when these subjects manage consistent amounts of money and business contracts and collaborations. For example, some conflicts of interest may create unfair pressures to modify the ordinary allocation of resources among the university structures in order to guarantee the interests of those operating in the spin-offs.

Art. 5, c. 2 of Ministerial Decree 168/2011, expressively mentioning the activities performed by the university professors for participated entities, provides that «*The full-time professors and researchers that participate in whatever capacity to the companies having characteristics of spin-off or start-up must inform the university, at the end of each financial year, about relative shares of profits, fees, remunerations and benefits obtained from the company for any reason whatsoever*».

*Possible risk events*

- irregular use of university professors in the management of spin-offs and possible conflicts of interest to achieve economic profits;
- conflicts of interest between the performance of the university ordinary activities (guidance and planning and actual performance of research and didactic) and the activities performed in the spin-offs, such as, for example, pressures to modify the ordinary allocation of resources among the university structures, in order to guarantee the interests of those who operate in the spin-offs themselves;
- lack of controls on the activity performed by the professor within the spin-offs;
- illicit payments to the professors within the spin-offs.

*Possible measures*

- identifying further grounds of incompatibility than those included in the Ministerial Decree n. 168 of 2011, taking into account the conflicts of interest besides the performance of the didactic activity;
- in case the incompatibility is not provided, highlight the duty upon the professor or the researcher to declare the same and abstain from his task when facing situations of conflicts of interest;
- include (within the university regulations) the provision requiring the publication of the information related to the role covered by the university professors and researchers within the spin-offs;
- actual compliance from university with the rules providing the obligation of publication ex art. 22, c. 2 of leg. decree 33/2013, which appears to be ignored by several universities, even if with different percentage at national level;
- publication on the university institutional portal of the data required in the aforementioned art. 5, c. 2 of the Ministry Decree 168/2011. This obligation should be autonomously established by each university in their internal regulations so to create a further form of control about what performed by professors and researchers on behalf of private law entities. Generally speaking, the transparency measures (as in the case of creation of other

subjects participated by the university) aim to allow a wide control, especially in the university community, on the effective and correct functioning of the spin-offs and their actual need (as an alternative to a possible attribution of the same to the university ordinary entities);

- universities identifying within their own regulations the referent to whom both professors and researchers operating in the spin-offs have to report regularly with regard to the performance of activities that are not included among the institutional ones. It would be desirable that this referent may be identified in the one who holds the power to start the disciplinary procedures whenever the breaches of the provisions included in the university regulation may be detected.

**8. Online universities**

The online universities authorised to grant legal formal qualifications (these universities have been created to reach a wider number of students enhancing the learning process during their entire lifespan through the e-learning instrument) are deemed to be the object of particular attention for the purpose of the corruption prevention, bearing in mind, in particular, the derogation system they benefit compared to the provisions applied to the state universities.

Also, in the light of the critical aspects mentioned in the Report drafted by the Study Commission on the problem areas typical of the online universities, (created with the decree of the Minister of the Education, University and scientific Research n. 429 of the 3rd June 2013) the following measures are recommended:

- the provisions applied to these universities are made homogeneous with the ones related to the traditional universities, abolishing the derogation provisions in their favours;
- for the professors recruitment see what mentioned with regard to the state universities (see § 5);
- whenever possible, the educational activities (from remote) provided by the online universities controlled by the state universities are aligned to the educational activities provided by the state universities;
- the qualification of the courses (currently regulated by derogation provisions with regard to the number requirements and the subjective requirements for teaching) is attentively monitored by ANVUR;
- the areas/processes related to exams and final graduation, especially for master's degrees and bachelors, and the masters procedures and achievements are attentively monitored by ANVUR with checks on the actual presence and performance of the exam, the composition of the graduation commissions and the level of the final dissertations. Having especially in mind these sectors it is necessary to ensure the highest transparency on the performance of activities and relative outcomes;
- a higher transparency and surveillance are ensured on the hypotheses of appointments of extraordinary professors with temporary contracts provided by art. 1, c. 12, of the law of the 4th November 2005, n. 230;
- the transparency is ensured on the performed activity of public interest. This is because the online universities, in performing a public service, are to be included among the entities subjects

to the leg. decree 33/2013, according to what provided by art. 2-bis, c. 3, last sentence, of the leg. decree 33/2013. In this regard the Authority adopted with decision n. 1134 «*New guidelines with regard to the implementation of the provisions about corruption prevention and transparency also to private law entities* », substituting the deliberation n. 8/2015 (see the relative text).

**IV - TRANSITIONAL PROVISIONS**

The port Authorities, the Managements by Trustee and Universities, without any prejudice to the due date of 31st January 2018 for the PTPC adoption, will have to update their PTPC within the 31st August 2018 taking into consideration the recommendations included in the present Follow up. Starting from that date, ANAC will perform their surveillance duties.

The President

Raffaele Cantone