Anti-Corruption Models and Experiences

The challenge of fighting corruption is strategic at a global and European level, and the inadequacy of the repressive and penal response alone has now been evidenced: corruption must not only be fought, but understood, and preventive administrative measures must be taken. Anti-corruption is not an issue that concerns only the judiciary branch, the legal system, and police authorities, but it is, above all, a challenge for society and institutions as a whole. And it is a challenge to be transformed, in particular, into a change in administrations and institutions, in their way of organizing and operating. This volume the result of the Project "Administrative Prevention through Targeted Anti-corruption MODels for candidate countries" – APTA-MOD, co-funded by the European Union's HERCULE III programme, which has conducted comparative law studies and high-profile research activities in the field of administrative prevention of corruption, with specific focus on Albania, Montenegro, North Macedonia and Serbia.

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FrancoAngeli
La passione per le conoscenze

Anti-Corruption Models and Experiences

The Case of the Western Balkans

Edited by
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DIRITTO E SOCIETÀ

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Introduction
The prevention of corruption between models and contexts

Enrico Carloni, Diletta Paoletti

"*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish*": a reflection on the harmful effects of corruption can begin with the preamble of the Merida Convention (2003). Not twenty years later, the issue arises yet again, with different but no less strong words, in the recent White House Memorandum (2021): "*Corruption corrodes public trust; hobbles effective governance; distorts markets and equitable access to services; undercuts development efforts; contributes to national fragility, extremism, and migration; and provides authoritarian leaders a means to undermine democracies worldwide*". Here a series of problematic issues linked to the presence of widespread corruption can be detected, which are connected to economic growth, to the protection of individual rights, to social well-being, and (last but not least) to trust in democratic institutions.

As the European Commission points out in its 2014 report, "*corruption seriously harms the economy and society as a whole*". The challenge of fighting corruption is therefore strategic both at a global and a European level: "*It impinges on good governance, sound management of public money, and competitive markets. In extreme cases, it undermines the trust of citizens in democratic institutions and processes*". The analysis by the European Union also highlights the terms of a discourse that goes from the protection of competition to the maintenance of democracy.

Furthermore, in the face of such an insidious problem, the inadequacy of the repressive and penal responses alone has now been brought to light. Corruption must not only be fought, but understood; the reasons for it must be studied, especially when it is not an "episodic" phenomenon (linked to the single individual), but "endemic" or "systemic" (hence linked to cultures, social dynamics, organizational practices). The context and conditions that favour its

development must be understood, and corruption risk prevention, contrast and management strategies must be put in place. Anti-corruption is not an issue that concerns only the judiciary branch, the legal system and police authorities, but it is, above all, a challenge for society and institutions as a whole. And it is a challenge to be transformed, in particular, into a change in the organization of administrations and institutions and the way they function.

Anti-corruption actions represent a challenge as important as it is complex, but decisive for the improvement of living conditions, economic development and the strengthening of democratic institutions.

It is therefore not a coincidence that European institutions pay particular attention to the problem of combating corruption and, in the case of countries requesting accession to the Union, that such institutions require the development of adequate anti-corruption policies. This volume deals with this issue and analyses the challenge of anti-corruption policies, both for individual countries and for Europe as a whole: a challenge that is anything but simple, as corruption is a complex and elusive phenomenon, difficult to understand and difficult to measure; it is linked to informal dynamics, not only to the application of formal rules which develop between the political-administrative environment and society, variously perceived and represented in public discourse.

It is all the more complicated, as literature on "fragile" States demonstrates, when the political and institutional framework in question is in transition… when the perception of corruption is particularly high… when, in short, the integrity and transparency of an administration appear to be more results to be achieved and built than values to be protected. It is a problem of political and administrative reformism: legislative reforms can define the coordinates for the improvement of the apparatuses and their functioning, but the implementation of the reforms requires action by those same apparatuses. All of this seems to be an apparent paradox, which can perhaps be overcome by the (fortunate) combination of external support, convinced leadership, support from public opinion, as well as by resorting to effective "technical" administrative reform solutions.

Reading the 2014 European Commission Report, the issue and the discrepancy are clear: on the one hand, anti-corruption measures present in the EU scenario remain robust ("*EU Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption*"), but on the other hand, their degree of effectiveness and efficiency is controversial and wide ranging, even among existing Member States ("*anti-corruption rules are not always vigorously enforced, systemic problems are not tackled effectively enough, and the relevant institutions do not always have sufficient capacity to enforce the rules*"). It is not sufficient, therefore, to have a system of rules in place

and apply legislative reforms under adhesion protocols and the implementation of an European anti-corruption *acquis*. It is necessary to adapt the rules to the context, and take the local circumstances into account.

This therefore requires solutions that are not only ideal, but "adequate" and "suitable": for this precise reason, studies are important, including comparative studies, aimed at investigating experiences that rarely enter the international scientific debate, and to which "standard" solutions are often addressed.

As in a matryoshka, the case of the candidate countries for accession to the Union (the four experiences of Albania, North Macedonia, Montenegro, Serbia), must be understood in the context of Eastern Europe and above all of the Western Balkans area, and therefore within European and global challenges (not only of integrity, but also of geopolitics, as the most recent events show). This is a case that is therefore of very particular interest, especially if (as it is not to be excluded) the crisis that characterizes the border area to the east of the European Union were to lead to an acceleration of the process of entry into the Union of countries to time kept on the threshold.

This volume collects writings that, with a juridical and interdisciplinary slant from different angles, investigate the phenomenon of anti-corruption in this context, moving between general issues and specific solutions. The "Apta-Mod" ("*Administrative Prevention through Targeted Anti-corruption MODels for candidates countries*"), project is the result of a European project, funded by OLAF under the HERCULE III Program, which was developed at the LEPA centre "Legality and participation" of the Department of Political Sciences of the University of Perugia.

Over the span of just over two years, the Apta-Mod Project has conducted comparative law studies and high-profile research activities in the field of administrative prevention of corruption, with a specific focus on Albania, Montenegro, North Macedonia and Serbia. The activities have been conducted by the academic team of the University of Perugia, with the precious collaboration of on-site experts (Mirjon Brahimllari, Goran Ivić, Armela Maxhelaku, Katarina Nikolić, Natašha Sardžoska, Rozeta Trajan). International round tables and final conference were held in the framework of the Project and involved institutional participants and civil society stakeholders from the interested countries, all relations the University is building upon for further future activities in the field of the administrative prevention of corruption.

1
The Rule of Law in Europe: main elements and perspectives

Federica Mannella, Diletta Paoletti, Fabio Raspadori[1]

Summary: 1. European *acquis*: the Rule of Law as a common element of an anti-corruption system – 1.1. Notion and general characteristics of the rule of law in Europe – 1.2. The role of the Venice Commission: identification and application of common European standards – 2. The Rule of Law between primary law, newly introduced tools and conditionality – 2.1. Article 7 TEU and infringement proceedings: how the primary law protects the rule of law – 2.2. The Rule of Law Framework and Mechanism as tools to protect the rule of law – 2.3. EU financial resources and the conditionality to the rule of law – 3. Enlargement process and the Rule of Law in the Eastern Europe countries – 3.1. The importance of the rule of law for the enlargement process – 3.2. The four pillars of the rule of law – 3.2.1. The justice system – 3.2.2. The anti-corruption framework – 3.2.3. Media pluralism – 3.2.4. Other institutional checks and balances – 3.3. State of compliance of the Balkan Candidate countries – 3.3.1. Albania – 3.3.2. Montenegro – 3.3.3. North Macedonia – 3.3.4. Serbia – 4. Conclusions.

1. European *acquis*: the Rule of Law as a common element of an anti-corruption system

1.1. Notion and general characteristics of the rule of law in Europe

The Rule of Law (RoL) principle, understood as a system of rules that inspire and limit the exercise of public power, represents today in Europe one of the founding values of the Union (art. 2.1. TEU), common to the Member States (art. 2.2. TEU).

In the European Union, the Rule of Law principle is developed in a plurality of action plans: in relations between the EU and the recipients of Union acts; in relations between the EU and the Member States and between the EU and the

1. Although the conception of the essay is a collective work, paragraph 1 is to be attributed to Federica Mannella, paragraph 2 to Diletta Paoletti, and paragraph 3 to Fabio Raspadori.

States requesting access to the Union; and, finally, in international relations with States outside the EU and with international organisations.

As will be seen below, to guarantee this principle, the TEU has provided, among other things, that any violation involves the initiation of control and sanctioning procedures (Article 7 of the TEU); any such procedure is one of those principles that must guide the Union's external actions (Article 21 TEU); and, finally, that compliance with this principle is a prerequisite for States requesting access to the Union (art. 49 TEU).

The Charter of Fundamental Rights of the European Union[2] also refers to this principle in the preamble "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the Rule of Law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

In order to analyse the effectiveness of this principle in its application, it is therefore appropriate to recall the general characteristics and contents of the rule of law.

The evolution of the principle has had a long historical journey and has been the subject of a wide variety of interpretations and definitions, as evidenced by the vast doctrinal debate on the subject that can only be briefly mentioned here.

Born in the Anglo-Saxon context in the second half of the nineteenth century (Dicey, 1885), the concept of the rule of law is identified with: the absolute supremacy of the law over arbitrary power; equality before the law; compliance with the principles of law developed by the common law courts. As it was originally conceived, therefore, numerous principles found space (legality, equality, prohibition of retroactivity of the law, reasonableness, guarantee of freedom of individuals, regularity, publicity and generality of the authoritative decisions) and their interaction made the Rule of Law a "majestic guardian against tyranny". (Gowder, 2016)

This formal definition was then developed and expanded over time; more recently new elements have been introduced such as respect for international obligations and the protection of fundamental rights, in order to give prominence to the democratic connotation of the system. (Bingham, 2010)

The English interpretation of the Rule of Law principle, developed in a common law context, then found its own particular declination in other continental European countries as well, strongly influenced by the existence of a State, source of the law.

2. Charter of Fundamental Rights of the European Union, 2012/C 326/02, Preamble.

In particular, the law is the expression of a representative assembly and is in a position of supremacy over the administration and the authoritative power of the State; the rights of citizens are subordinated to the law or, rather, are protected by the law and are an expression of it; the judiciary branch is an independent body with the task of applying the law not only with regard to citizens, but also with regard to the public administration. The democratic connotation of the system therefore has an important position.

However, the comparison of the two settings of the Rule of Law, one typical of the common law and the other typical of continental European States (in which it assumes more specific definitions such as *État de droit*, *Stato di diritto*, *Estado de derecho*, *Rechtsstaat*), show a different logic that inspires them. (Salerno, 2020)

Specifically, the Rule of Law is not limited to providing that the State holds the monopoly of the production of law, but must also deal with the individual and collective freedoms that must be guaranteed through the principle of good governance in the judiciary system. When we speak of the Rule of Law, we are referring to a set of regulations that subject public and private power to various constraints to protect the community, made effective by an impartial judicial power that applies respect for the principle of justice.

In the European Union, the ultimate purpose of the Rule of Law is to ensure the creation and maintenance of the Union. To this end, the concept of Rule of Law in the European context ends up confronting the founding values of the Member States: "The Rule of Law is one of the founding values of the European Union and reflects our common identity and our common institutional traditions"[3].

Therefore it is not enough to recall the democratic nature of the form of government and the principles of separation of powers and autonomy of jurisdiction to define the concept of Rule of law in Europe in an exhaustive way: "The European constitutional heritage is made up not only by the European treaties and conventions in the field of the human rights and Rule of Law, but also by those principles which have been at the basis of the historical process of gradual growth of the legal orders of the European States. Therefore, the concept covers at the same time the legal provisions which have been in force in those legal orders and the scientific elaboration of them which has supported their implementation and their development. This definition implies that the terms of reference of the concept are, on one side, the normative experience of the European countries and, on the other side, the doctrines and the theories which have prepared and supported this experience". (Bartole, 2015)

3. Communication from the European Commission 2019, *Strengthening the Rule of Law in the Union. The current context and possible new initiatives*.

Europe today is aware that the constitutions of the Member States are increasingly lacking in the face of the serious constitutional problems that are emerging and that threaten the founding values of the Union, such as democracy, Rule of Law and human rights. (Pech, Scheppele, 2017; Palombella, 2018)

It follows that the concept of the Rule of Law "constitutes a common constitutional standard to guide and limit the exercise of democratic power"[4].

However, considering the generic nature of the definition, a notable differentiation has also emerged among the Member States in the choice of content and definition of the fundamental principles of the rule of law.

It was therefore necessary to rework the rule of law into more specific parameters, transforming it into a set of concrete, understandable and directly applicable principles in all Member States.

In Europe, a fundamental role in this regard is played by the Venice Commission, a consultative body of the Council of Europe on constitutional matters, which provides assistance to Member States in adapting national legal systems to the principle of the rule of law.

1.2. The role of the Venice Commission: identification and application of common European standards

The role of the Venice Commission is part of the action conducted by the Council of Europe to ensure compliance with the rule of law.

The Rule of Law principle is identified, together with democracy and human rights, as one of the three fundamental values of the Council of Europe[5].

In its *Report on the Rule of Law*, the Venice Commission highlights how, unlike the other two pillars, the Rule of Law has been dealt in a marginal and generic way[6].

In recent years there has been an attack on the constitutional principles that make up the Rule of Law in Europe and several States have shown a tendency towards authoritarian and illiberal methods. (Cartabia, 2018)

As a result, the Council of Europe has resumed thinking about the Rule of Law concept in order to provide adequate support to Member States in line with constitutional standards; the Venice Commission was set up for this purpose.

4. Venice Commission, *Report on the Rule of Law*, CDL-AD (2011) 003rev, par. 69.

5. Statute of the Council of Europe, Art. 3 "Every member of the Council of Europe must accept the principles of the Rule of Law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms […]".

6. Venice Commission, Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011, par. 67).

The Venice Commission has a particularly important, concrete and directly operating role in the legal systems of individual States: this institution, with the usual cooperative spirit and with the authority that derives from the technical expertise of its members, has produced valuable documents and guidelines for the verification of the Rule of Law in the systems affiliated to it in support of the actions of all the institutions, national and European entities, involved. (Cartabia, 2019)

The Commission starts from the need to find a common declination of the principle, according to shared constitutional standards, which provides the Member States with the tools useful for its effective practical application at the regulatory and jurisprudential levels.

In 2011 the Venice Commission elaborated and adopted the *Report on the Rule of Law*, for the first time systematically dealing with the defining issue of the principle, with the aim of finding a shared definition. This document is an operational tool for legislators and judges, national and supranational, to adapt the legal systems of the Member States to the principles of the rule of law.

For this purpose, the Commission does not consider it useful to investigate the subject from a strictly theoretical point of view in order to develop a common definition, even if in the introduction of the document it refers to includes the well-known definition according to which "all the persons and authorities of the State, whether public or private, should be bound and authorized by public laws, which have effect for the future and are publicly administered in the courts". (Bingham, 2010)

Rather, the Commission prefers to develop the identification of a series of common characteristics and fundamental elements of the rule of law, "in order to ensure their practical realization". (De Vissier, 2015)

This work of analysis and study will lead to the drafting of a Rule of Law Checklist, made up of six benchmarks: legality, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, respect for human rights, and non-discrimination and equality before the law. (Qerimi, 2020)

This tool is designed to assess the degree of compliance with the Rule of Law principle of the legal system of a Member State and is intended not only for experts from the Venice Commission, but for all interested parties, including State authorities, organisations international organisations, non-governmental organisations, as well as citizens of M ember States.

Before the approval of this document, the work of the European Council to guarantee the rule of law was born, mainly, following appeals to the European Court of Human Rights by citizens of Member States. This method was certainly limited and fragmented, since it stopped the analysis of single internal elements,

without allowing a global assessment of compliance with the rule of law in internal legal systems.

Without claiming to be exhaustive, as stated in its introduction, the Checklist aims to identify the essential elements of the Rule of Law, the parameters that must be met in order to ensure compliance of national laws with this organisational model.

Several years after its adoption, the Checklist has been used in the evaluation of the legal systems of numerous Member States, becoming a fundamental tool in the process of adapting national legislation to the standards of the European Rule of Law.

2. The Rule of Law between primary law, newly introduced tools and conditionality

2.1. Article 7 TEU and infringement proceedings: how the primary law protects the rule of law

In the framework of the discussion on the Rule of Law applied to the EU context, it is particularly interesting to analyse how the concept can compromise the membership of a country participating in the Union. The primary law expressly targets the issue, in article 7 of the Treaty of the European Union. Disrespect for the Rule of Law can undermine membership with the Union, weakening some rights of the State responsible for the violation. This could not have been otherwise, considering that the Rule of Law is listed among the founding values of the Union[7]. Article 7 describes the situation consequent to a risk of violation or an effective violation of one of the founding values of the EU. With a gradual approach – that, as will be seen hereinafter, was not always the case – the first paragraph refers to the risk of a serious violation of the founding principles: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such

7. "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail", Treaty on the European Union, Art. 2.

a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure"[8].

There are several aspects which make this a gradual approach: guarantees for the potential violator arise from the fact that the proposal which starts the process has to be well-reasoned, satisfactorily explaining the reasons for the need to initiate this process. Next, the proposal is to be put forward by one third of the Member States. This means that – in the current EU of 27 nations – the proposal is valid if presented by nine States. This requirement is intended to break possible hidden geopolitical coalitions to hinder another State. Furthermore, if the proposal is initiated by the Council – the institution which, in the EU architecture, represents the States – it has to act by a majority of four fifths of its Members and needs to obtain the consent of the European hemicycle. The proposal can also originate from the European Parliament or the European Commission. Having fulfilled the above-mentioned requirements, the formal determination follows. The paragraph foresees that, preceding the formal determination, the "possible" violator State could be heard and targeted by recommendations. Once the determination is made (the potential risk is declared), the Council has the responsibility to verify that, over time, the grounds on which such a determination was made continue to exist. The second paragraph goes a step further: what must be determined now is not the risk, but the existence of the violation. If the first section can be described as a preventive mechanism, this second section describes what brings to the sanctioning mechanism. "The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations". The European Council takes control of the process, acting unanimously, and its action is based on the proposal of the Member States (almost one third) or by the Commission itself. The consent of the European Parliament is necessary. The third paragraph refers to the consequences of the determination of the existence of a serious and persistent breach of the values referred to in Article 2. It can cause the loss, for the Member State in question, of rights produced by its EU membership: "The Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible

8. Article 7 of the Treaty of the European Union, GU C 202, 7.6.2016.

consequences of such a suspension on the rights and obligations of natural and legal persons". In this last phase of the sanctions mechanism, the Parliament's consent is not necessary. If certain rights can be suspended, the obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State. This part of the Article, even with the uncertainty deriving from the expression "certain of the rights", produces one indisputable consequence: the suspension of a Member State cannot arise from the violation of the founding EU values. "Hence, Article 7(3) TEU excludes the possibility of suspension of membership or the ceasing of membership"[9]. Under the definition "certain of the rights" – in addition to the suspension of voting rights of the representative of the government of that Member State in the Council, expressly referred to by the article – can be found, for example, the suspension of secondary law or of European funding: these are all rights deriving from the application of the Treaties. The only limit is the idea of proportionality suggested by the expression "consequences of such a suspension on the rights and obligations of natural and legal persons"[10]. The fourth paragraph introduces the necessary flexibility in order to evaluate a possible change of the situation which caused the determination and its consequences: the Council, always acting by a qualified majority, may decide to modify or revoke measures taken under paragraph 3. The fifth paragraph refers to the voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article, as set forth in Article 354 of the Treaty on the Functioning of the European Union. It would be appropriate, at this point, to have an in-depth look at the origins of Article 7. It entered EU Law for the first time with the Amsterdam Treaty, which was signed in 1997 and came into force in 1999. The reason for such an introduction was the ever-increasing possibility of EU enlargement by extending membership to the eastern countries[11] after the fall of the Berlin Wall and the implosion of the USSR. At the time, Article F1[12]

9. Besselink L. (2016). *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, Amsterdam Centre for European Law and Governance, Working Paper Series 2016-01, 6.

10.*Ibidem*.

11. The "eastern"/ex USSR enlargement took place, with the following countries entering the Union: Finland (1995), Poland, Hungary, Chech Republic, Slovakia, Slovenia, Latvia, Lithuania, Estonia (2004).

12. Article Fl: 1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(l), after inviting the government of the Member State in question to submit its observations. 2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to

presented some differences (for example, there was no preventive mechanism, but just the possibility to determine – through the Council – the existence of a serious breach of the founding values).

With the Treaty of Nice (2003), the preventive mechanism and consequent talks were introduced. A contrast can be seen between the potential impact of the activation of Article 7 and the realistic probability that it will actually be activated. "The procedure is sometimes called the EU's 'nuclear option' as it provides for the most serious political sanction the bloc can impose on a member country – the suspension of the right to vote on EU decisions"[13], according to an analysis published by Politico EU. Indeed, the sanctioning mechanism, – which, as we have seen, "allows the Council to suspend certain rights deriving from the application of the treaties to the EU country in question" – can include suspension of the voting rights of that country in the Council[14]. The usability of Article 7 is considered unlikely, first of all because of the majorities needed in the Council (four fifths or unanimity). It is also described as unusable and counter-productive, "since it is likely to increase internal support for the government in question and increase levels of Euroscepticism in the

suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State. 3. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their being imposed. 4. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 148(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 2. 5. For the purposes of this Article, the European Parliament shall act by a two thirds majority of the votes cast, representing a majority of its members.

13. *www.politico.eu/article/graphic-what-is-article-7-the-eus-nuclear-option/*. The expression comes from the State of the Union speech to the European Parliament, President Barroso, who in September 2012 said: "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU". In the following year's speech, he said that "experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework […]. The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe". See: *europa.eu/rapid/press-release_SPEECH-12-596_en.htm*; *europa.eu/rapid/press- release_SPEECH-13-684_en.htm*.

14. See *Promoting and safeguarding the EUs values*, *eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l33500, 10.06.2016*.

population. This is because Article 7 measures are understood by citizens as sanctions against them more than against their government"[15]. Article 7 has in fact been activated only twice so far. The first time, in December 2017, the European Commission triggered the process against Poland, over concerns about government influence on the judiciary system[16]. In September 2018, the European Parliament voted on taking the same action against Viktor Orbán's Hungarian government, regarding concerns about freedom of expression, academic freedom, the rights of minorities and refugees, and other related issues[17]. Along with the difficult usability, there is the potential ineffectiveness of Article 7. The effectiveness of the Article 7 procedure is also questioned not only for its unlikely activation, as evidenced by events, but also because it is less suited for the purpose. As highlighted by many observers, what seems most effective is the use of the infringement proceedings pursuant to Article 258. This establishes that "if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations". And continues: "if the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union". In the past, the Commission was confronted on several occasions with crisis events in some EU countries, which revealed specific Rule of Law problems. The Commission addressed these events by exerting political pressure, as well as by launching infringement proceedings in case of violations of EU law. Infringement proceedings would take place in the case of non-compliance with EU law, while the Article 7 mechanisms also apply outside the EU realm, but only when violations are serious enough and persistent[18]. Article 7 and Article

15. Poptcheva E.-M., *Member States and the rule of law*, EPRS (European Parliamentary Research Service), Briefing, March 2015. *www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf*.

16. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law Brussels, 20.12.2017 COM(2017) 835 final 2017/0360 (NLE). It is followed by the European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP).

17. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

18. "Infringement actions are much better suited to addressing systemic violations of EU law than preliminary rulings. The former may end with a finding that certain laws or practices are not compatible with EU law, while the latter procedure usually leaves the final assessment to national authorities, which may not be in a position to adequately weigh the gravity of systemic rule of law problems". (Bárd, Śledzińska-Simon, 2019)

258 can coexist: "They are separate procedures, set out in different provisions of the Treaties, based on a different scheme and serve a different purpose". (Bárd, Śledzińska-Simon, 2019) The infringement procedure can be partial, because it only considers some aspects of a wider problem while some other issues can fall outside the sphere of competence of EU Law. This is clearly pointed out by the Commission itself: "Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain Rule of Law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law"[19]. Two conditions – not just one – need to be fulfilled: the Rule of Law being put at risk and the fact that this refers to that which is stated by EU law. In other terms: "There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the Rule of Law"[20]. In other words, infringement proceedings typically target specific violations of EU law and cannot grasp the systemic nature of many small reforms adding up to significant democratic backsliding. (Scheppele, 2016)

2.2. The Rule of Law Framework and Mechanism as tools to protect the rule of law

Having referred to what is enshrined by article 7 of the TEU and having explained the differences and complementarities with the infringement procedure, to complete the picture it seems necessary to describe two more instruments which aim to protect the Rule of Law within the Union. These are the Rule of Law Framework and the Rule of Law Mechanism, through which an action by the Commission to safeguard the Rule of Law is possible. The Rule of Law Framework is an early-warning tool which was adopted by the Commission in March 2014[21], allowing it to enter into dialogue with a Member State to address systemic threats to the Rule of Law and prevent escalation. The Communication setting up the Framework starts from the recognition of a difficulty in responding to violations of the Rule of Law: "The Commission and the EU had to find *ad hoc* solutions since current EU mechanisms and

19. Communication from the Commission to the European Parliament and the Council *"A new EU Framework to strengthen the Rule of Law"* COM/2014/0158 final.

20. *Ibidem*.

21. *Ibidem*.

procedures have not always been appropriate in ensuring an effective and timely response to threats to the Rule of Law"[22]. As expressed in the cited statement from former EC President Barroso, the need to fill a gap was clear, *i.e.* the requirement to find an effective procedure – resolving future threats to the Rule of Law in Member States – before the conditions for activating the mechanisms foreseen in Article 7 TEU are met. This does not hamper the Commission's powers to address specific situations which fall within the scope of EU law by the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU), as seen before. But – as noted – this is a partial measure, which can operate only when the violation (real or potential) of the Rule of Law has an impact on specific aspects of the EU Law implementation. For other situations there is Article 7, but "the thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort. Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the Rule of Law in a Member State"[23]. In other words, in the situations of concern which fall outside the scope of EU law but pose a systemic threat to the Rule of Law, the preventive and sanctioning mechanisms provided for in Article 7 TEU may apply. Consequently, with the Framework, the Commission sets out a new procedure to ensure an effective and coherent protection of the Rule of Law in all Member States. "It is a framework to address and resolve a situation where there is a systemic threat to the Rule of Law"[24]. What is the Framework's perimeter of action? It is intended to be activated in the presence of a threat to the Rule of Law which is of a systemic nature and regards those principles which define the core meaning of the Rule of Law[25]. It means that the "political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress". With a form of subsidiarity, the Framework will be activated when national "Rule of Law safeguards" do not seem capable of effectively addressing those

22. *Ibidem*.

23. *Ibidem*.

24. *Ibidem*.

25. "Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law" (ivi, section 2).

threats. Operationally, the procedure needs to meet some transversal principles and it is organised in three stages. Regarding the former, these are: dialogic approach (with the Member State involved in the process), objectivity and thoroughness in the assessment (*i.e.* in the evaluation on the existence of a systemic threat to the Rule of Law), impartiality (in the treatment of the States when involved), swiftness and concreteness in the action. The first phase is the assessment which, in turn, consists of two steps. The first step of this first phase sees the Commission collecting information from trustworthy sources[26] about the possible systemic threat. If this is confirmed, a dialogue opens between the European executive and the State under examination. The label for this dialogue is a "Rule of Law opinion". The Member State involved is expected to respond to the Commission and not to obstruct the process, and not act as though the process itself does not exist (with reference to the duty of sincere cooperation set out in Article 4(3) TEU). The only aspect of this phase that is public is the fact that it is taking place (the launch of the assessment and the sending of the opinion), while the specific contents of the dialogue are not made public, in order to reach a timely solution. With the second stage – named the "Commission recommendation" – if the first stage does not reach a satisfactory conclusion, Bruxelles sends a "Rule of Law recommendation" addressed to the Member State concerned, which confirms the existence of a systemic threat that the authorities of that Member State are not taking appropriate action to redress. Before a deadline, the state is recommended to act. The final stage is the follow-up to the recommendation, monitoring the action taken by the Member State concerned. If the serious threat continues to exist, Article 7 TEU can be activated.

"The Rule of law framework was designed in 2014 for Hungary, initiated against Poland and now will probably be tested on Romania. It was used in January 2016 for the first time as a result of constitutional crisis in Poland, in which the main point dealt with the unconstitutional amendments affecting the Constitutional Tribunal", writes Barbara Grabowska-Moroz[27]. "The main idea of the Framework is based on a "constructive dialogue" between the Commission and a Member State. Such a "dialogical" approach to Rule of Law is already visible in the letter, which uses very diplomatic expressions to state the aim "to help the Romanian authorities to find solutions to the Rule of Law issues" and "to resume progress under the Cooperation and Verification Mechanism".

26. The concept isn't further explained in the Communication, which include, as examples, the bodies of the Council of Europe and the European Union Agency for Fundamental Rights.

27. Barbara Grabowska-Moroz, *Rule of law framework – is it time for Romania?*, June 5, 2019, in *reconnect-europe.eu/blog/grabowska-moroz-rule-of-law-romania-timmermans/*.

The Polish chapter of the "Rule of law framework" showed, however, how ineffective such dialogue can be when one side (a Member State undermining Rule of Law) does not want to discuss it"[28].

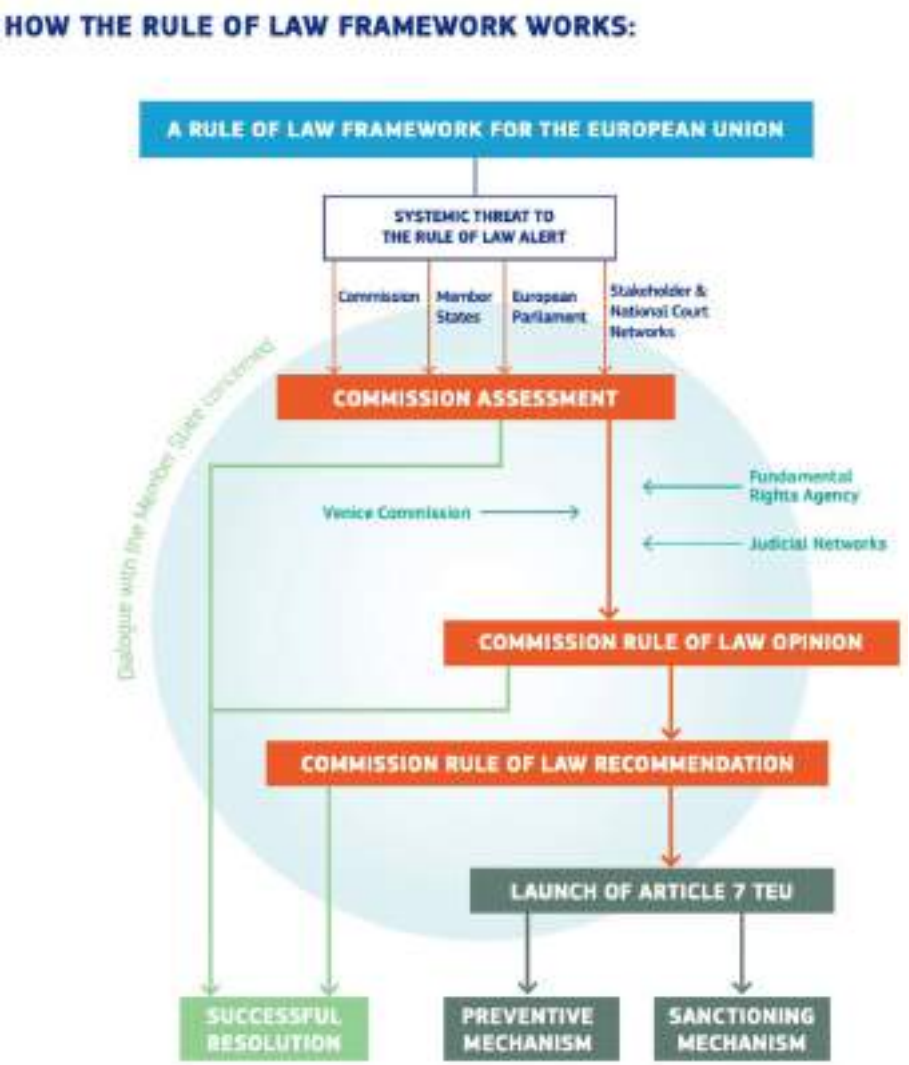

Figure 1. *Source: EC, Methodology for the preparation of the Annual Rule of Law Report*

28. *Ibidem*.

The Framework described so far is a reactive measure targeted to threats to the Rule of Law. But the EU felt the need for more comprehensive action, unrelated to possible violations but rather aimed at the prevention and the promotion of a real environment for the correct implementation of the principle of the Rule of Law. "The Political Guidelines of President von der Leyen set out the intention to establish an additional and comprehensive Rule of Law mechanism as a key building block in the common commitment of the EU and the Member States to reinforce the Rule of Law"[29]. In July 2019, the Commission adopted its Communication on Strengthening the Rule of Law within the Union – a blueprint for action, setting out some of the features of such a mechanism. It is preceded by the Communication from the Commission, "[f]urther strengthening the Rule of Law within the Union"[30]. The Rule of Law Mechanism is a yearly monitoring cycle with an annual Rule of Law report at its centre, promoting the Rule of Law in all Member States and preventing challenges from emerging or escalating. It provides a process for an annual dialogue between the Commission, the Council and the European Parliament, together with Member States as well as national parliaments, civil society and other stakeholders, on the Rule of Law. "A core objective of the European Rule of Law Mechanism is to stimulate inter-institutional cooperation and encourage all EU institutions to contribute in accordance with their respective institutional roles. This aim reflects a long-standing interest from both the European Parliament and the Council. The Commission also invites national parliaments and national authorities to discuss the report, and encourages other stakeholders at the national and EU level to be involved"[31]. The first report is dated 2020 and it has its own methodology[32]. First of all, four pillars are identified: justice systems, an anti-corruption framework, media pluralism, and other institutional issues related to checks and balances. The anti-corruption framework represents a specific interest with regard to the topics covered by the Apta-mod Project.

The assessment in the European Rule of Law Mechanism is carried out by the Commission against EU law requirements and well-established European standards, including: relevant obligations under EU law and European Court of Justice case law, European Court of Human Rights case law; Council of Europe standards. A list of relevant standards is also contained in the standards section

29. Rule of Law Report. The rule of law situation in the European Union, Brussels, 30.9.2020 COM(2020) 580 final, which refers to *ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission en.pdf*.

30. Brussels, 3 April 2019, COM(2019) 163 final.

31. *Rule of Law Report – questions and answers*, European Commission, Brussels, 30 September 2020.

32. *ec.europa.eu/info/sites/default/files/2020_rule_of_law_report_methodology_en.pdf*.

of the Venice Commission Rule of Law Checklist. The Checklist can help to identify specific risks and weaknesses. In its assessment the Annual Report makes reference to the specific standards relevant for the situation assessed. Member states (as institutional representatives) are involved in the process (through a dialogue with national contact points and country visits), as well as qualified stakeholders.

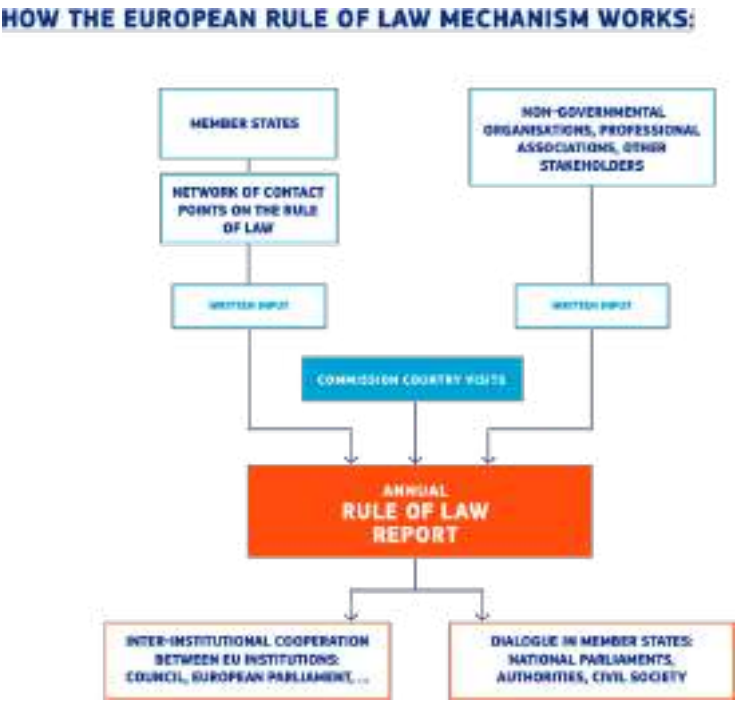

Figure 2. *Source: EC, Methodology for the preparation of the Annual Rule of Law Report*

2.3. EU financial resources and the conditionality to the rule of law

In this framework, the issue of the conditionality to the rule of law of a Member State's use of EU financial resources merits consideration. On 16 December 2020, the EU adopted a new policy instrument, aimed at protecting the financial interests of the EU against breaches of the Rule of Law. What is known as the "budget conditionality regulation" aims to protect EU funds from being misused by national governments that do not respect the Rule of Law.

It came into force on 1 January 2021. The subject matter of the Regulation is that it "establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the Rule of Law in the Member States", as enshrined by Article 1[33]. For the purposes of this Regulation, the following may be indicative of breaches of the principles of the Rule of Law: when the independence of the judiciary system is endangered; when prevention, correction or sanctioning of arbitrary or unlawful decisions by public authorities do not take place, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning, or failing to ensure the absence of conflicts of interest; when limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law. When these breaches take place in a Member State and affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way, measures can be taken. This occurs when the breaches concern, for example, the authorities implementing the Union budget or controlling the expenses or the existence of frauds. The consequences can range from suspension of payments for the EU funds directly managed by the Union, to the suspension of the approval of one or more programmes for the shared management funds. Regarding the procedure, it starts with a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it has based its findings. In this phase, the Commission shall inform the European Parliament and the Council without delay of such notification and its contents[34].

There is an on-going debate, given that on 11 March 2021, Poland and Hungary challenged the regulation in the EU Court of Justice and on 2 December 2021, the Advocate-General issued an opinion stating that actions by Hungary and Poland against the rules on conditionality, which protect the European Union budget, should be dismissed by the Court[35].

The EU funds conditionality regime also applies to the external action of

33. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget *GU L 433I del 22.12.2020, 1-10*.

34. See *www.europeanpapers.eu/en/europeanforum/rule-law-conditionality-long-awaited-step-towards-solution-rule-law-crisis*.

35. At the time of writing, a plenary debate at the European Parliament has been planned on this topic, with the participation of the European Commission Ursula von der Leyen (*www.europarl.europa.eu/news/en/agenda/briefing/2022-02-14/1/rule-of-law-conditionality-meps-to-debate-eu-court-ruling-with-von-der-leyen*).

the EU, and therefore to the candidate countries. The "Financial Regulation" (Regulation 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union) addresses the topic of the budget support to a third country, specifying that the corresponding financing agreements concluded with the third country shall contain: "(b) a right for the Commission to suspend the financing agreement if the third country breaches an obligation relating to respect for human rights, democratic principles and the Rule of Law and in serious cases of corruption".

For example, Regulation 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession Assistance (IPA III) – the means by which the EU has been supporting reforms in the enlargement region with financial and technical assistance – points out that "Horizontal financial rules adopted by the European Parliament and the Council on the basis of Article 322 TFEU apply to this Regulation. Those rules are laid down in the Financial Regulation and determine in particular the procedure for establishing and implementing the budget through grants, prizes, procurement and indirect management, and provide for checks on the responsibility of financial actors. Rules adopted on the basis of Article 322 TFEU also include a general regime of conditionality for the protection of the Union budget". Therefore, "[a]s the respect for democracy, human rights and the Rule of Law is essential for sound financial management and effective Union funding as referred to in the Financial Regulation, assistance could be suspended in the event of the degradation of democracy, human rights or the Rule of Law by a beneficiary listed in Annex I"[36].

It is possible to find the same principles in the Regulation of the European Parliament and of the Council 2021/947 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe.

3. Enlargement process and the Rule of Law in the Eastern Europe countries

3.1. The importance of the rule of law for the enlargement process

The very importance of the rule of law principle for the European Union is an element of clear evidence. It is enshrined in the article 2 of the Treaty on the

36. The countries listed in ANNEX I are: The Republic of Albania, Bosnia and Herzegovina, Iceland, Kosovo, Montenegro, The Republic of North Macedonia, The Republic of Serbia, The Republic of Turkey.

European Union (TEU) together with other fundamental values of the Union. The strong engagement on the rule of law has recently been confirmed in the speech for the State of the Union 2020 in which the president of the European Commission, Ursula von der Leyen, affirms that "The Rule of Law helps protect people from the rule of the powerful. It is the guarantor of our most basic of every day rights and freedoms. It allows us to give our opinion and be informed by a free press".

Looking specifically at the accession process, Article 49 of the TEU sets out that a candidate State must respect "the values referred to in Article 2 and is committed to promoting them" and among which, the rule of law (RoL) principle carries out a pivotal role.

Alongside these aspects, respect for the RoL is also at the core of the foundation of a common area of freedom, security and justice and it is also co-essential to the functioning of the European internal market.

Without a sound basis that assures the fundamental liberties, it is easy to foresee the insurgence of distrust among the Member States and their citizens, as well as the emergence of a difficult economic context, where the "friends of the powerful" can easily obtain benefits and profits to the detriment of ordinary people and economic operators, especially those who have a different nationality.

In this sense, full and effective respect for the RoL principle appears to be a real essence of the juridical and political founding pact of the Union, and the pillar of European civilization.

For these reasons, conformity to the RoL is also a precondition for every action and policy that the European Institutions realise outside its borders. In this perspective, the EU is engaged to pursue a coherent approach between its internal policies on the RoL and how this principle is respected outside its borders, especially with regard to the accession process and the relationship with neighbouring countries, but also in respect to all the other international partners at bilateral, regional and multilateral levels.

Notwithstanding the above, in recent years we have seen a general backsliding from this unrenamable pillar of European civilization, that is more evident in some EU countries of relatively recent accession. But, the strong reactions of the European Institutions against these drifts, evident primarily in the suspension procedures triggered toward Hungary and Poland, prove that the RoL remains a vital element for the consolidation and the evolution of the integration process.

Therefore, considering the centrality of this element, multiple instruments have been created within the European legal order to monitor and control the compliance with the RoL.

Among these, there is the RoL Report issued by the European Commission

for the first time in 2020 with the aim of setting forth key elements to assess the level of conformity present in Member States and to evaluate the general attitude of the public powers toward a solid and sincere respect for the RoL principle.

A relevant contribution which we can glean from the RoL Report which is useful for the objective of this presentation, is the definition of the four pillars by means of which the EU assesses the state of conformity to the RoL principle. Each pillar corresponds to thematic fields where some specific conditions must be assured and they are: the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances.

3.2. The four pillars of the rule of law

Now we will try to isolate the basic elements that characterise the four pillars of the RoL, as they conceived by the European Commission. The aim is to evaluate the current situation in each of the Balkan candidate countries to the accession that we have chosen to analyse: Albania, Montenegro, North Macedonia and Serbia.

3.2.1. The justice system

With regard to the justice system, the very existence of an effective judicial review to ensure compliance with the law could be considered the essence of the Rule of Law. As we already said, an effective justice system is also the basis for mutual trust, which is the bedrock of the common area of freedom, justice and security, and it guarantees reliable investments, long-term growth and the protection of EU financial interests.

To measure the presence of an independent and effective juridical system, capable of managing justice and assuring its main attributes (processes performed in reasonable time, fair treatment of the contenders, general access to justice, etc.), the first indicator to be considered is the general public perception.

Going into the mechanisms of the juridical system, another element to consider is the influence that the executive or the legislative branch has over the activities of the judges. These aspects should be determined by taking a close look at: the setting up or strengthening of an independent national Council, the method followed for the appointment of judges, the disciplinary procedures prescribed for judges, and the legal and constitutional safeguards formally guaranteed within the system.

In particular, a key element for the maintenance of judicial independence is

the autonomy of the prosecution with regard to the executive branch, as well as the capacity of Councils for the judiciary branch to exercise their functions, including those of the Constitutional Courts or Supreme Courts.

Finally, to invest in justice is more necessary than ever in order to address efficiency challenges, meaning the assurance of adequate human and financial resources and, as has been evidenced by the Covid-19 pandemic, fostering the digitalization of the justice system. All of these aspects can longer be deferred.

3.2.2. The anti-corruption framework

The second pillar of the RoL to be considered is the presence of an effective legal anti-corruption framework. Also in this case, the first element to be considered is the public perception on the fairness of the juridical and administrative public systems created to fight corruption. This highlights the necessity for the existence of a coherent legislative and administrative setting that appears to be regularly applied.

Attention must next be focused on the real capacity of the criminal justice system to fight corruption through the development of anti-corruption plans and strategies and the effective implementation and monitoring of the progress made over time.

Likewise, the effective ability to conduct criminal investigations of corruption cases and the enforcement of adequate sanctions should be convincing. Other factors to take into consideration: international anti-corruption standards; presence of prosecution and law enforcement bodies equipped with adequate funding, human resources, technical capacity and specialised expertise; treatment of high-level corruption cases.

Before enacting any repressive measures, a higher priority would be to assure a system able to develop ethical rules and a widespread awareness of the harmful effects of corruption. This objective could be reached through credible rules on: asset disclosures, incompatibilities and conflicts of interest; internal control mechanisms; lobbying; revolving doors; transparency and access to public information; protection of whistle-blowers. But probably the most important element is the existence of an overall culture of integrity in public life, especially rooted within the public servants.

3.2.3. Media pluralism

In addition to the public institutional system, an indispensable tool for real application of the RoL is the presence and the active attitude of an independent media framework system.

The several conditions necessary in order to guarantee a fair media context, including: the availability of independent resources, a reliable system of board appointment, transparency of media ownership. Another central aspect is the distribution of State advertising that must be delivered without favouritism towards media close to public power. Furthermore, the form and the entity of the political pressure on the media should be reduced to the lowest possible level.

Journalists' activities should be protected against different forms of threats and attacks, such as: artificial deployment of lawsuits; threats to physical safety and actual physical attacks; online harassment (especially of female journalists); smear campaigns; intimidation and politically oriented threats.

3.2.4. Other institutional checks and balances

The last element with which to evaluate compliance with the RoL is the existence of institutional checks and balances able to assure a fair relationship amongst public powers and between such public powers and the citizens.

In this regard, the active role of a Supreme or Constitutional Court (endowed with *ex-ante* and *ex-post* control over the compliance of laws to the constitutional system) and the presence of effective procedures to strengthen institutional checks and balances are essential, with particular attention towards the mechanisms of constitutional review also open to citizens.

An aspect to be observed with special attention is the excessive use of the accelerated and emergency legislation that could jeopardise the role of the legislative branch in favour of the executive branch.

Looking at the forms and guarantees on behalf of private citizens participating in political spheres, the pro visions for meaningful consultations – especially of the legislative branch with stakeholders and experts – are seen as a positive sign, as well as the delivering of dialogues with the political opposition.

Also very important are debates on the RoL, as well as the capability to improve the inclusiveness and quality of the legislative process involving stakeholders, and ensure that structural reforms are the product of broad discussions.

Finally, a point of great importance is the presence of an Ombudsperson or a National Human Rights Institution, both of which can play a very relevant role for assuring control over public bureaucracy and to raise overall public awareness.

3.3. State of compliance of the Balkan Candidate countries

To test the level of conformity to the four pillars of the RoL principle, we examine each of the Balkan country through two instruments of analysis: the position held in the scoreboard of two of the major watch-dog non governmental organisations involved in attesting respect for fundamental liberties in the world (Freedom House and Transparency International), and the main elements emerging from the annual Report issued by the European Commission regarding the countries of accession.

3.3.1. Albania

We start with Albania. Regarding the opinion of the NGOs [Non-Government Organizations], the country is evaluated a little below the worst EU Member States. In the ranking published in Freedom House's 2021 Report, Albania obtained 66 points, only three less than Hungary (the last-ranked among the EU Member States). For Transparency International (2020 Report) Albania totals 36 points, eight less than Hungary, Romania and Bulgaria.

Looking at the last Accession Report, the European Commission deems Albania moderately prepared in implementing EU *acquis* and European standards on respecting the RoL principle. The Commission appreciated the progress accomplished in the field of the judicial system, while it asks for more efforts in the fight against corruption.

Some recommendations have been forwarded to the country: further progress regarding the process of re-evaluating judges and prosecutors; consolidation of the capacity of the judicial system and the governance institutions, in particular in trying to strengthen the legal education system and finalising the new judicial map; decisive steps towards a roll-out of a new integrated case management system, ensuring its inter-operability across the entire justice system.

3.3.2. Montenegro

Moving on to Montenegro, the score obtained in the Freedom House scoreboard is only 63 points, that is three less than Albania. In the Transparency International Report for 2020, this country presents a better performance with 45 points, that is one more than the EU Member State in the last position.

Regarding the 2021 Report of the European Commission on the progress accomplished in the accession process, the European executive expresses moderate satisfaction. In particular, the progress made in the area of RoL and the respect for human rights seems limited, with stagnating implementation of

key judicial reforms; in many areas of the country, corruption still remains an issue of concern.

For this reason, the Commission has confirmed the recommendations issued in the 2020 report which remain largely valid. Montenegro in particular is asked to: ensure the effective independence and professionalism of the judiciary system; implement the relevant constitutional and legal framework, in line with the Venice Commission and Council of the Europe Group of States against Corruption (GRECO) recommendations; review the disciplinary and ethical framework for judges and prosecutors; adopt a new strategy for rationalisation of the judicial network, laying down the next concrete steps leading to closure of unviable small courts.

3.3.3. North Macedonia

North Macedonia, like Albania, totalled 66 points in the 2021 Freedom House ranking, but the score assigned in the 2020 Report for International Transparency on corruption was only 35.

The European Commission, however, did acknowledge that some progress has been made in the field of RoL, in particular emphasising strengthened judicial independence and the efforts made to address the problem of police impunity. Notwithstanding the institution of the State Commission for the Prevention of Corruption, corruption is prevalent in many areas and remains an issue of concern.

Considering the requests for the following year, the Commission is keen to see progress in the following fields: improvement in implementation of the judicial reform strategy and an updated action plan, including a new law on civil procedure; new recruitments in the judiciary and public prosecution network inspired by principles of transparency; improvement of the automated court case management information system (ACCMIS) to ensure that it is fully functional and reliable.

3.3.4. Serbia

Finally, Serbia presents an outline similar to those of the other countries examined, in fact it has a score of 64 in the Freedom House Report (2021), and 38 points for the evaluation of International Transparency (2020 Report).

The Commission expresses some elements of concern in its 2021 Report. In particular, in spite of the fact that constitutional reform was relaunched in late 2020, the current legal framework does not provide sufficient guarantees against potential political influence over the judiciary system. Also regarding

corruption, the situation is not positive; in the opinion of the Commission, the country's legal system maintains an ambiguous attitude towards the prevention and repression of corruption.

Taking into account these considerations, the Commission asks that the country: strengthens the independence of the judiciary system and the autonomy of the prosecution, also at a constitutional level; introduce new and fair procedures for the appointment, career management and disciplinary proceedings of judges and prosecutors; amend the laws for the High Judicial Council and the State Prosecutorial Council in order to defend judicial independence and prosecutorial autonomy; strengthen the human resources strategy for the entire justice sector together with establishing a uniform and centralised case management system, necessary for a measurable improvement in efficiency and effectiveness of the justice system.

4. Conclusions

In general terms, our final considerations can be summarised in two statements. The first is that respect for the principle of RoL still remains a pillar of the European Union's identity, notwithstanding the turbulence that jeopardises it from different directions, above all from within the European Union itself.

The second is that the four Balkan countries on which we have focused our attention must dedicate more efforts to reach the necessary levels of conformity, but these necessary levels do not appear distant.

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2
Measuring corruption: general challenges, supranational and national specificities

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Summary: 1. The complexity of corruption and its measurement – 2. The state of the art in corruption measurement – 3. Corruption risk assessment and the "red flag" logic – 4. An outline of public procurement databases in European countries – 4.1. Tenders Electronic Daily (TED) – 4.2. Opentender platform – 5. The Italian National Database of Public Procurement: a model for corruption risk management – 6. Public procurement data in countries involved in the APTA-mod project.

1. The complexity of corruption and its measurement

Corruption exists in every society, in every sector, and at all levels, from local to transnational, imposing significant costs on governments, citizens, and businesses. Containing it by preventing fraud, malfeasance and misconduct, is acknowledged worldwide as a key goal for governments who need to allocate resources across competing priorities. Yet, despite the widespread agreement that corruption is a key target for policy makers, there is still a rather weak consensus on how to best measure it.

The non-trivial circumstance that corruption is, in itself, very difficult to measure is at the core of such a feeble consensus. Indeed, corruption is a latent phenomenon by nature: it cannot be directly observed and analysed, as people involved in corruptive activities with the aim of illicit gains have every interest to hide such activities. What is more, corruption is inherently complex as it encompasses several activities at different levels of gravity, from the trivial to the much more severe activities (*i.e.*, a bribe to avoid prosecution for a traffic violation; a falsification of public decisions for illicit private interests). Moreover, many different types of corruption exist, varying according to the sectors where they happen (public or private, political or administrative); the parties involved (public officials, private citizens, politicians), as well as the degree to which they are formalised (systemic or occasional). (Andersson, Heywood, 2009)

Further, the weak consensus on how corruption can be measured best is linked to a number of drawbacks of current measures against corruption. Indeed, in absolute terms, there simply is no best way to measure corruption as each measurement instrument not only has its positive aspects, but shows peculiar downsides that, while more suitable than others in certain circumstances, are not workable in others. As it will be better clarified in the next paragraph, the most commonly used method to measure corruption – the so-called perception-based and non-perceptual measures or corruption – are all affected by conceptual, methodological or political problems (Heywood, Rose, 2014; Carloni 2017a; 2017b) that limit their relative utility as a guide for developing effective anti-corruption policies. Perception-based measures based on subjective perceptions of corruption expressed by experts, for instance, may not mirror actual experiences of corruption. On the other side, so-called objective measures relying on statistical and market proxies and judicial measures pose other constraints. One of such limitations is, for instance, the limited usability of judicial measures in international studies (*i.e.*, as judicial systems are very different and largely incomparable among different countries) and their limited utility for preventing corruption (*i.e.*, a conviction for a corruption crime may occur many years after the corruptive event took place).

2. The state of the art in corruption measurement

Corruption is mainly measured through perception-based indicators. Perception-based measures are founded on the subjective perception of corruption provided by experts and are generally expressed at a country-level. One of such measures is the Transparency International's Corruption Perceptions Index (CPI; Transparency International 2020). The CPI is a composite index of corruption perception expressed by experts and managers of the private sector, employing 13 external databases produced by the World Bank, the World Economic Forum, private companies, and Think Tanks. Despite widespread use in comparative studies, corruption measures based on perceptions are questioned. Critics point out that perception-based measures are prone to bias and serve as imperfect proxies for actual levels of corruption, because perceptions may not be related to actual experiences of corruption (Rose, Peiffer, 2012), and can be driven by the general sentiment reflecting prior economic growth or media coverage of important cases of corruption. (Golden, Picci, 2005; Mancini *et al.*, 2017)

Surveys or questionnaires that include questions assessing the direct involvement of individuals and firms in corrupt practices in well-defined

instances (*i.e.*, when obtaining a water supply contract or an electricity connection) are further measures against corruption. The World Bank Enterprise Surveys (WBES) is an example of such latest measures, collecting the most widely used firm-level survey data on corruption. Even if these measures partly overcome the drawbacks of perception-based measures, providing information on the direct involvement in corrupt practices, they show drawbacks as well. A major challenge is the extent to which a respondent may purposefully misreport corruption events. Fear or shame of exposure can lead respondents to under-report corruption, while a strategic concern with influencing action on a particular corrupt practice can lead to over-report instances of corruption. (Gnaldi *et al.*, 2021)

Judiciary measures can be also used to gauge corruption through judicial deeds, such as judgments, sentences and convictions for corrupt crimes. Despite showing fewer statistical criticalities compared to the previous measures, judiciary measures show a number of drawbacks linked primarily to their *i.* limited usability in international studies because different countries adopt different judicial systems; and *ii.* partial utility for preventing corruption, as a conviction for corruption crimes may occur many years after the corrupt event took place.

Corruption is also assessed through statistical inference and market measures. These measures estimate corruption through *proxies*, that is, variables considered expressions of behaviours or situations close to corruption, and then approximating corruption. Some of these measures rely on a comparison between real data and a theoretical statistical (or economic/econometric) model hypothesising the non-corrupted behaviour. Purposely, they estimate the incidence of corruption in specific contexts or sectors, by verifying to what extent the real observed data deviate from the hypothesis of absence of corruption (*i.e.*, what should be observed in the absence of corruption, under a specific theoretical model). Proxy measures are useful in allowing users to estimate the incidence of corrupt practices in specific contexts or sectors, to understand the micro-dynamics of corruption, and to study the economic impact of corruption. On the other hand, as they are indirect measures against corruption, their main limitation lies in where they might not express corruption itself but other forms of inefficiency. (Sequeira, 2012)

Further contiguous measures use "red flag" indicators, as proxy measurements of corruption. These indicators signal risk of corruption rather than actual corruption, and they are expected to be correlated to corrupt practices rather than perfectly matching them. (OECD, 2019) They originate from the grounds which acknowledge that corruption control has a more preventative dimension than a repressive dimension. (Gnaldi, Del Sarto, 2019; Gnaldi *et al.*, 2021) Corruption

prevention seeks to identify potential weaknesses in a public organisation in order to provide warnings and to reveal any potential vulnerabilities and opportunities for malpractice, and to advise recommendations for their reduction and minimisation. (Carloni, 2017a; Gallego *et al.*, 2021) The key target of such measures is, therefore, no longer quantifying *ex-post* the "amount of corruption", but rather identifying, in advance, situations at risk of corruption. Indeed, corruption prevention can be addressed by implementing a wide range of instruments, from national administrative anti-corruption programmes and their subsequent assessment through surveys, to corruption risk assessment. (Gnaldi *et al.*, 2021)

National administrative anti-corruption programmes aim at developing and implementing deterrence systems of *ex ante* controls of public officials from the commission of corruption crimes. (Li, 2014; Carloni, 2017b) In the Italian context, the national legislation adopted a preventive perspective to tackle corruption with law n. 190 of 2012, which introduced two main tools to reduce the risk of corruption in public administrations: *i.* a three-year plan for corruption prevention (PTPC), by which each administration is required to assess its own exposure levels to the risk of corruption and indicate the organisational changes to reduce such a risk; *ii.* the introduction of a new figure, the supervisor for corruption prevention (RPC) who, among other duties, takes part in a national survey by filling in a report on the degree of accomplishment of national anti-corruption measures by the public administration they represent.

Indicators of the administrative fight against corruption are obtained from the latest of such surveys. They provide information on the capability of administrative offices to effectively oppose the spread of deviant behaviours and corrupt practices in the administration offices they represent, by adopting and executing the preventative measures entrusted by the national legislation (*i.e.*, in terms of staff turnover, transparency requirements, etc.).

Despite the potential, indicators of the administrative fight against corruption do show certain weaknesses. First, as they are summary indicators based on auto-declarations by officials, they provide information on the capability of the administrative system to effectively adopt preventative measures, rather than on the actual effectiveness of preventative measures themselves. Therefore, they are valid indicators of the degree of compliance and adoption of preventative measures, rather than of the actual effectiveness of anti-corruption measures themselves. Further, a fundamental limitation common to all measures based on official government-led corruption audits, is that once officials understand the workings of a system that attempts to consistently detect and measure corruption through systematic audits, they may adapt their behaviour and find ways to elude it. (Gnaldi *et al.*, 2021)

Risk assessment can be qualitative, quantitative or both, and no exclusive methodology exists for assessing corruption risks. Qualitative approaches can provide critical insights, but the volume and complexity of the information stored in databases often requires specialised skills in analysing data. Setting up and maintaining a quantitative risk assessment process to measure corruption risk requires fewer specific quantitative skills. Details on this process are provided in the next paragraph.

3. Corruption risk assessment and the "red flag" logic

Perhaps the greatest and most direct potential for use and development for the purposes of constructing "red flag indicators" of corruption within a risk assessment procedure is provided by the procurement process, by which public authorities purchase work, goods or services from private companies. Indeed, in the public procurement process, a number of practical occurrences can signal potentially risky circumstances to monitor, from a delay or failure to award a contract, to excessive use of emergency procedures, contract extensions, recurrence of small assignments with the same object, etc.

Over recent years, experts' efforts have concentrated mainly on the first strategic phases of the risk assessment process, devoted, on one side, to create, extract, and organise the relevant administrative datasets (*i.e.*, from public procurement sources) and, on the other, to select the relevant single indicators of corruption risk (*i.e.*, "red flags").

Indeed, a big push towards the growing availability of interlinked data sources has been played by both data availability in a machine-readable format and the development of new technologies based on the collection and cross-processing of public procurement data with other data sources of public administrations. The potentials of new technologies in the fight against corruption is demonstrated by the 2018 Pannonia Declaration adopted by the European Partners against Corruption (EPAC), by which involved bodies decided to provide a structure for the mutual comparison on the use and implementation of big data analytics and artificial intelligence in European and national anti-corruption policies.

Over the last two decades, the literature has proposed many red flag indicators of corruption risk in public procurement. Any corrupt contract allocation requires at least four components to be in place (OECD, 2019): *a*) corrupt transactions allowing for rent generation (contract), *b*) corrupt relations underpinning collective action of corrupt groups (particularistic tie); *c*) organisations enabling rent allocation (contracting body); and *d*) organisations extracting corrupt rents (supplier).

Overall, the proposed indicators can be classified into four blocks (Fazekas *et al.*, 2017):

- Tendering Risk Indicators (TRI), reporting risks of corrupt manipulation in the process of publication of a tender for the purpose of generating profits by distributing them among related companies.
- Political Connections Indicators (PCI), providing an indication of the direct/indirect political connections between the contracting authority and the private companies, which can influence the public procurement process through corrupt agreements.
- Supplier Risk Indicators (SRI), signalling the instrumental use of tender winning companies, as means to ensure the illegal distribution of profits and advantages necessary to reward all the actors involved in the illegal agreement.
- Contracting Body Risk Indicators (CBRI), measuring the weaknesses of the formal contracting bodies, that is, those public structures conceived to defend and preserve companies from undue pressures aimed at favouring particular bidders.

Current international literature tends to converge towards the selection of a set of the most relevant single red flags of corruption risk in public procurement. Some of them are (Fazekas, 2016): single bidding (*i.e.*, only one bid received); call for tender not published in official journals; relative length of eligibility criteria; relative price of tender documentation; exclusion of all bidders but one; the importance of non-price evaluation criteria (*i.e.*, proportion of non-price related evaluation criteria included with the criteria as a whole); annulled procedure re-launched; length of decision period (*i.e.*, number of working days between submission deadline and announcing contract award); contract modification during delivery; contract lengthening and extensions; contract economic value increase.

Many red flag indicators suffer from overestimating corruption risks, as there can be numerous non-corrupt circumstances where a red flag indicator signals a non-existent risk (*i.e.*, false positives) (OECD, 2019). For example, while there are certainly cases where extremely high turnover growth observed in public procurement data is due to government favouritism, it cannot be excluded that this is due to new innovative companies entering the market. The distorting effect of false positives can be attenuated by (OECD, 2019) *i.* carefully selecting the elementary risk indicators that are the most closely associated with other corruption signals; *ii.* basing any risk assessment of an array of red flags, rather than a single red flag (or few of them), each pointing to high risk; *iii.*

pulling several red flag indicators into a composite indicator of corruption risk, which tend to be more robust to unobserved variation in specific corruption techniques and single indicators (*i.e.*, observable through a specific red flag, but not through a different one).

Currently, both at the academic and policy levels, little energy has been devoted to developing a robust synthetic/composite indicator of corruption risk in public procurement as an aggregate measurement of single red flags. Among these, the proposal of Fazekas and colleagues (Fazekas *et al.*, 2016) stands out. In this work, the authors developed a composite score of tendering red flags, the Corruption Risk Index (CRI), as a proxy measure of high-level corruption in public procurement, derived from public procurement data from 28 European countries between 2009 and 2014. A similar study is carried out by Troìa (Troìa, 2020) with data and red flag indicators developed from the Italian National Dataset of Public Contracts (*Banca Dati Nazionale dei Contratti Pubblici*). Further, in the Single Market scoreboard Initiative[1], the single indicators (*i.e.*, red flags) are aggregated by summing them to show how different EU countries are performing on key aspects of public procurement.

Generally, composite indicators of corruption risk can be useful communication tools for conveying summary information in a relatively simple way. In fact, aggregate measures are used widely across different sectors in public services as policy analysis and public communication tools. In the context of corruption measurement, aggregate measures of corruption risk would allow: *i.* reliable comparisons of corruption risk at the territorial level (regions, nations, contracting bodies, etc.) and according to each category (*i.e.*, contracting stations); *ii.* consistent appraisals of trends over time, providing insights on the ways past, present and emerging corruption risk schemes relate to current risk drivers.

The composite indicators of corruption risk developed within the previous works are computed by relying on a rather simple methodological base. In fact, they are obtained as a simple arithmetic (hence, unweighted) means of individual risk indicators. Furthermore, none carries out a validation procedure of the proposed composite, reporting a sensitivity analysis of the composite indicator with the aim of verifying its robustness. From a statistical point of view, however, summarising information available from a set of single indicators (*i.e.*, red flags) into a single metric, such as a composite indicator of corruption risk, is a major challenge in the measurement of corruption and corruption risks. Indeed, in the construction of composite indicators, many methodological issues need to be

1. *ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm*.

addressed carefully if the results are not to be misinterpreted and manipulated. It is known (OECD, 2008) that composite indicator development involves stages where a number of subjective judgements have to be made, from the selection of individual indicators (*i.e.*, red flags) to the choice of normalisation methods, weighting schemes, and aggregation models. All such factors are not merely methodological aspects, as they reflect substantial choices. A higher attention to such aspects and further efforts are needed to strengthen the robustness of composite indicators of corruption risks, with the aim of validating a replicable and robust statistical procedure within a corruption risk assessment procedure.

Functional to the full exploitation of the potentials of data availability in a machine-readable format and of new technologies based on big data to the field of corruption measurement is the development of a shared ontological standard for public data. A common ontology is needed in order both to build a common data description language recognised by any public organisation, and to guarantee the semantic interoperability between different data collections, both nationally and internationally. (Gnaldi *et al.*, 2021) Public administrations nationally and across the globe must reduce their chronic fragmentation and be able to process information from different sources with shared common standards. The exchange of data, the integration of data from different sources and data standardisation – at the core of a common ontology – represent a crucial precondition for any measurement effort with comparability objectives in the field of corruption assessment.

4. An outline of public procurement databases in European countries

Public procurement includes activities particularly vulnerable to corruption. In fact, corruption risks are exacerbated by some characteristics of public procurement, such as, among others, process complexity, close interaction between public officials and businesses, multitude of stakeholders, volume of transactions and financial interests at stake. In this regard, OECD observes that integrity risks might occur throughout the whole public procurement process, as in each step that characterises the three main phases of the process (pre-tendering, tendering and post-award) different risk typologies may be highlighted. This very complex issue may be carefully approached by envisaging integrity measures (*i.e.*, red flag indicators) in all the steps of the procurement process and, at the same time, by addressing all the several types of risk. (OECD, 2016) Consequently, it is essential to have data about the public procurement process in order to organise a robust red flag indicator system, identifying which indicators to integrate in it.

Moreover, the concept of open data is gaining momentum in public procurement and, overall, in the public contracting process (thus, not only in procurement, but also in concessions, permits, licenses, grants, etc.). In fact, the term "open contracting" refers to the possibility of making contract details (such as project description, bidders, awarded company, expected and actual project price, terms of contracts, etc.) freely and publicly accessible. However, in Europe we have observed a lack of databases to be used as monitoring tools – by governments, but by the public as well – of corruption risks and inefficiencies in public procurement. What is more, even if all EU countries have a significant amount of micro-level information on tenders, these databases are often fragmented and present some limitations in terms of data quality. Computer science instruments are available for gathering details on individual contracts, although shortcomings still exist, especially related to the approaches on how to systematically analyse huge datasets of tenders with the aim of assessing the presence of corruption, collusion, inefficiency, and so on. (Czibik, 2015)

In any case, this "opening" is based on a consistent regulatory framework, both at national (e.g., the national Freedom of Information laws) and supranational level (e.g., international agreements, such as United Nations Convention Against Corruption and EU Public Procurement Directives). Moreover, open data policies in public procurement are encouraged by new and reliable computer science tools and standards, such as the Open Contracting Data Standard developed by the Open Contracting Partnership (OCP), the world-leading organisation for open data in public procurement. (Opendatasoft, 2020) First examples of open data in public procurement date back to the early 2000s, but it has definitely caught on since 2010 with the Open Government Partnership, the Infrastructure Transparency Initiative, the Open Contracting Partnership and the OECD Recommendation for Public Procurement. (OECD, 2015)

Some studies have attempted to evaluate the impact of open contracting. Among them, Kovalchuk *et al.* (2019) highlight a positive effect on competition, prices and processing times, even if the authors outline the difficulty of disentangling the open data effect from the public procurement reform. Furthermore, using the World Bank's Enterprise Surveys, Knack *et al.* (2019) find that countries with more transparent procurement systems report higher firm participation in public procurement markets and lower kickbacks paid by firms to obtain contracts. Moreover, other research highlights the higher probability of awarding contracts using open procedures after open data initiatives. (Duguay *et al.*, 2020) On the other hand, focusing on the case studies of Mexico, Paraguay, and Slovakia, Adam *et al.* (2020) identify no policy-relevant short-term effect of open contracting reforms.

In the following of this section, we examine some of the available open datasets on public procurement in Europe.

4.1. Tenders Electronic Daily (TED)

As an online version of the EU "Supplement to the Official Journal", TED is dedicated to European public procurement and every year publishes approximately 700,000 procurement award notices (of which, 235,000 are calls for tenders).

TED data are presented online available in comma separated value (csv) format and includes public procurement for the European Area, Switzerland, the Republic of North Macedonia and EU institutions for the period 2006-2019. As outlined in the TED data information guide (EU, 2020), data come from public procurement standard forms, created by the European Commission according to the different EU legal bases for publishing public procurement. In order to publish on TED, each EU public contracting body can send their procurement data (notices in electronic files using the official TED XML format) using specific applications (e.g., EU eNotices, or any eSender[2]).

TED data content has an almost direct correspondence with the fields in the standard forms. However, data may be input incorrectly or missing, thus causing a potential limit concerning their data quality. Furthermore, the EU is keen to point out that "older data has lower quality and sometimes lower coverage, because the data collection structure was less developed". (EU, 2020) In fact, common procurement vocabulary – the unique classification system in public procurement for standardising the subject of procurement contracts – changed in 2008 and important modifications in data format took place in 2016 and 2017.

Specifically, data in TED include information on all the tenders with a value above specific threshold[3] and refer to the most important fields about the calls for competition and contract award notice, as well as some voluntary ex-ante transparency notices.

TED data are analysed in several publications: using the Google Scholar search, with key words "TED" and "public procurement", about 1,860 results are obtained, focusing only on the period 2018-2021.

2. *simap.ted.europa.eu/web/simap/list-of-ted-esenders*.

3. 5.35 million euros for public works, 139,000 euros for service and supply contracts, 428,000 euros for all other supplies and services in the sectors of water, energy and transport. For details see *ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en*.

4.2. Opentender platform

In line with the above, the Opentender platform home page title is "Making Public Tenders More Transparent". In fact, this instrument allows us to search, analyse, and download public procurement data related to the 28 EU member states, Norway, the EU Institutions, Iceland, Switzerland and Georgia.

Opentender came about thanks to Digiwhist, an EU Horizon 2020 funded project, as a result of a collaboration between the Department of Sociology of the University of Cambridge, the Open Knowledge Foundation Germany, the Government Transparency Institute, the Hertie School of Governance, Datlab and the Joint Research Centre on Transnational Crime of the Università Cattolica del Sacro Cuore of Milan and the University of Trento. By systematically collecting, structuring, analysing and disseminating information on public procurement and on mechanisms that increase accountability of public officials in the EU and neighbouring countries, the main purpose of this project is to allow society to fight public sector corruption.

Opentender was built through a robust data collection and processing software, retrieving procurement data from 25 public procurement data sources (such as, among others, TED and national web portals/open data sources). As reported in one of the project deliverables (Hrubý *et al.*, 2018), the following data processing steps were implemented:

1. data download (collection of data files in several formats, such as HTML, CSV, XML, etc.);
2. structuring of downloaded data using a uniform structured data template;
3. formatting, by converting textual data to standard data types and cleaning meaningless values or ballast information;
4. linking information about each specific tender gathered from various sources;
5. merging information from all linked data records with the aim of creating one final, overall record (with up to 250 variables) for each tender, related to its whole life cycle.

The final data are approximately 46 million tenders over the period 2009-2020: the most "represented" countries are Romania (around 20 million tenders), Italy (14 million), Poland and France (around 3 million).

Beyond the massive data collection process just described, the main potentiality of this platform is its dashboard, which allows us to browse country-by-country and to visualise data, also through maps. There are several ways to for interact with the data: going beyond the overview, data download and search tools, the dashboard allows for the computation of various indicators for the

analysis of public procurement performance (both overall and at country level), organised in the following three pillars:

1. administrative capacity (Fazekas, 2017);
2. transparency (Bauhr *et al.*, 2017);
3. integrity (Fazekas, 2016).

5. The Italian National Database of Public Procurement: a model for corruption risk management

Among the EU countries, Italy deserves particular attention as it has a very complete and structured database which collects every single tender processed in the country, both below and above the European threshold. The Italian National Database of Public Procurement (BDNCP, *Banca Dati Nazionale dei Contratti Pubblici*) is managed by the Italian Anticorruption Authority (ANAC, *Autorità Nazionale Anticorruzione*) and, medically speaking, allows for a sort of "follow-up" of every single procurement procedure throughout its entire life cycle (*i.e.*, from the publication of the call for tender until the final inspection of the completed project).

Thanks to the BDNCP, in 2018 ANAC won first prize of the European Commission's award for better governance through public procurement digitalisation[4], a competition with the aim of raising awareness about the benefits of digitisation and transparency in public procurement. Among the strong points, the Commission highlighted the scope of the database (no value thresholds for being included) and the interoperability with other systems.

The BDCNP contains 53 million procedures over the period of 2009-2021, 2.4 trillion euros as contract total value, around 38,000 contracting authorities, and 240,000 private companies. Data are freely accessible and downloadable (in CSV, JSON and XML format) through the ANAC open data portal[5], which includes all the data, managed by ANAC and dealing with anti-corruption, transparency and public procurement.

BDNCP data are provided directly from the contracting authorities using a digitised system built to ease the public administration interoperability. Thanks to this system, each tender receives a unique identifier – the CIG (*Codice Identificativo di Gara*) – by which every step of the tender life cycle

4. *ec.europa.eu/growth/content/european-commission-award-better-governance-through-procurement-digitalisation_en*.

5. *dati.anticorruzione.it/*.

can be traced, from beginning to end, and this, in turn, allows for a prompt and effective monitoring of the financial flows involved in public procurement. However, for tenders below 40,000 euros, a more simplified procedure is requested for obtaining the identifier. Consequently, information on this contract category is definitely narrower and basically relates to data contained in the call for tender.

As regards the so-called "ordinary" tenders (*i.e.*, above 40,000 euros), data flowing into BDNCP are organised into different tables, each one related to a different stage of the procurement process. The extraction of the complete information of a single tender is therefore possible, thanks to its CIG, the tender unique identifier introduced above. Data contained in these tables include the following:

1. publication of the call for tenders (e.g., publication date, procedure type, submission deadline, contract value, identification of the contracting authority, tender subject);
2. contract award (e.g., winner company, award criterion, participants, award value);
3. implementation (e.g., starting date, expected completion date, sums paid, possible modifications);
4. completion and final approval (e.g., final value, real completion date, final approval).

An accurate and solid procurement data tracking system, such as the one implemented in the BDNCP, is a key tool for making the procurement process as transparent as possible, without compromising its effectiveness and efficiency, in order to minimise the risk of corruption. As outlined by the ANAC President during the first meeting of the G20 Anti-Corruption Working Group of 2021 (ANAC, 2021), efficiency and transparency in the public procurement management are fostered by the BDNCP through four key points: *i.* digitised and simplified process of purchase; *ii.* public contract market with a unique reference data source; *iii.* standardised data collection; *iv.* open data.

6. Public procurement data in countries involved in the APTA-mod project

This section contains a brief outline about the public procurement data tools related to the four countries involved in the APTA-mod project: Albania, Montenegro, North Macedonia and Serbia.

Albania has an electronic procurement system (EPS)[6] managed by the Public Procurement Agency (PPA), the institution responsible for the operation of the public procurement system, concessions/public private partnership and public auctions. EPS is used for electronically processing procedures related to public procurement and concessions, such as publication of contract notices, downloading and uploading of tender documentation and tender submissions, and e-archiving (OECD, 2021a). Contracting bodies must use EPS for all transactions above 100,000 ALL (approximately 823 euros), which is the minimum contract value covered by the public procurement provisions. Moreover, as regards very low-value procedures, procurement law requires publication in the portal of related information.

Another important tool concerned with Albanian public procurement data is the "open procurement Albania" project[7], which collects open data on tender procedures in 61 Municipalities of the country starting from July 2015. In particular, a structured database is available, which collects data coming from several sources, such as the PPA official website, public notice's newsletters, the official website of the Public Procurement Commission, publications in the official website of the Ministry of Finance on treasury transactions, and the National Business Centre's database. Finally, well-structured information can be converted and exported in JSON and spreadsheet format.

Since January 2021, Montenegro has a brand-new e-procurement system, which includes several important features such as publication of procurement plans, tender documents, the public opening of tenders and tender submission, including information on simplified tenders (*i.e.*, those below the lowest threshold according to the Montenegrin public procurement law). Despite the overall satisfaction of contracting authorities and economic operators with this new system, improvements should be undertaken in order to increase its efficiency. (OECD, 2021b)

North Macedonia public procurement data flow into TED as regards the above-threshold procedures (e.g., we have 19,331 records in 2019). Furthermore, an advanced Electronic System for Public Procurement (ESPP)[8] is implemented in the country, in which contracting bodies must publish notices and tender documents (also for low-value contracts), as well as public procurement annual plans, copies of awarded contracts, notices about the contract modifications and other data about the contract fulfilment. (OECD, 2021c) In addition, ESPP contents are publicly available without registration.

Finally, since July 2020, Serbia holds a new advanced electronic public

6. *www.app.gov.al/home/*.
7. *openprocurement.al/en/albaniandf/project*.
8. *e-nabavki.gov.mk/PublicAccess/Home.aspx#/home*.

procurement portal[9], which allows for the e-submission of tenders and access to monitoring and data collection on award procedures. E-valuation is also possible. The portal is managed by the Public Procurement Office and is employed for the announcement of all notices, as well as for the communication between contracting bodies and economics operators. Moreover, information contained in the portal is freely available to the public and can be downloaded in spreadsheet format. However, data on contract management and execution are not included in the system. (OECD, 2021d)

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3
Media and corruption in Western Balkan countries

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Summary: 1. Introduction: free press and corruption – 2. The political and party system of the Balkan countries – 3. Media systems and media market in Western Balkan countries – 3.1. Media market – 3.2. Press freedom – 3.3. Political parallelism – 3.4. Journalistic professionalisation – 3.5. Role of the State – 3.6. Ownership concentration – 4. Interplay among the media system, levels and perceptions of corruption.

1. Introduction: free press and corruption

When discussing tools to fight corruption, the news media are always brought into the spotlight, as they are considered to be efficient instruments for uncovering malfeasance and condemning illegal behaviour. (Lindstedt, Naurin, 2010; Camaj, 2013; Worthy, McClean, 2014) This assumption is well summarised by a famous essay on the subject, entitled *A free press is bad news for corruption*. (Brunetti, Weder, 2003) These studies, mainly from the economic field, demonstrate that there is a statistically significant negative correlation between indexes of corruption and indexes related to freedom of speech and of the press, assuming that when corruption-related news are free to circulate among public opinion, the social control toward misuse is facilitated and the corrupt find a less favourable ground to perpetrate their illicit affairs.

However, a number of studies from different fields, such as political science (Fieschi, Heywood, 2004) and media studies (Mancini *et al.*, 2017), has recently questioned this approach, as it might be at risk of being too deterministic. This does not mean that the media have no role to play. It means, however, that it is not enough to have laws protecting the freedom of the press in order to provide an efficient deterrent against corruption. As we will see, this is particularly true for the countries that will be considered in this section, namely Albania, Northern Macedonia, Serbia, and Montenegro, countries that have recently

experienced a democratic transition (Dobek-Ostrowska, Głowacki, 2015) and where some legacies of the non-democratic past are still present. (Andresen *et al.*, 2017) All the countries included in this study at have laws protecting the free do of the press, yet their anti-corruption performance does not always meet satisfactory standards. (Bak, 2019) This is for a number of reasons: first of all, it is very difficult to give an exhaustive overview of the concept of freedom of the press. (Nordenstreng, 2013; Richter, 2016) Such a concept is in fact very much linked to Western liberalism (Siebert *et al.*, 1956), whereas the countries referred to experienced long years of communist regime, with a particular "legal culture" different from its Western counterpart. (Grødeland, 2013) In other words, freedom of expression cannot be reduced to a mere regulatory issue, but must be considered within a more varied social context of explicit and implicit rules, routines, and influences.

Secondly, one of the reasons why there is a risk of determinism when it comes to the media and corruption is that journalism tends to be seen as something detached from the social context. (Dobek-Ostrowska, Głowacki, 2015) Yet many scholars have argued that journalism is a social field with a high level of heteronomy, *i.e.* it is subject to various types of influence from other social fields, above all the political or economic fields. (Bourdieu, 1995; Hesmondhalgh, 2006; Marchetti, 2009) The Balkans, like many post-socialist countries, are young and emerging democracies with fragile and unstable institutions, polarised civil society, and transnational economic pressures; as a result, their media systems are particularly vulnerable to influences from political and corporate interests. (Zielonka, 2015) According to Andresen, Hoxha and Godole (2017), the media in these countries are dealing with "troubled pasts", presenting several critical issues linked, on the one hand, to the historical peculiarities of their political and media systems, and on the other hand, to their evolution in more recent years. As a country ruled by a communist regime, the State had a monopoly on the media until only a few years ago. Although political control over the media was not as strong as in other communist countries, the media in the Balkans have nevertheless been marked by the same characteristics as State-controlled communist media. (Aumente *et al.*, 1999) With the opening up of the market economy, however, there was a shift from the absolute monopoly of the state media under communism to an oligopoly of private tycoons with interests in various activities outside the media sector. This opens the field to phenomena widely documented in literature, such as "political parallelism" (Hallin, Mancini, 2004), "media capture" (Mungiu Pippidi, 2008), "partisan polyvalence" (McCargo, 2011) and "media colonisation" (Bajomi-Lázár, 2015a), to describe situations in which the absence of journalistic autonomy results in the instrumentalisation

of news for editorial interests. The fragility of journalistic professionalism, revealed in the inability to exercise independent control of the news production process or in the reliance of news contents on "external" sources of legitimacy (political or commercial), may result in a partisan coverage of corruption that does not contribute to its reduction, but may even increase it. (Mancini *et al.*, 2017) Moreover, corrupted media can conceal or manipulate certain cases of corruption that harm the interests of their publishers. (Tsetsura, 2005; Ristow, 2010; Yang, 2012) Finally, corruption may be the subject of instrumental coverage that aims to destroy the reputations of business and political actors, as many other studies have shown. (Ledeneva, 2006; Kol'cova, 2009; Gerli *et al.*, 2018)

For this reason, in this chapter we will propose an analysis focused on the media system in the selected countries and its relationship with the political system in order to highlight the criticalities that may weaken the role of the media in combating corruption. After introducing the main features of the four countries' political and party systems (focusing in particular on the quality of the political class), our aim is to place the mass media systems of the analysed countries within a model found in the literature, which will be presented below. Given that the Balkan context often tends to be associated with the "polarised pluralist" model (Peruško *et al.*, 2021) according to the classification of Hallin and Mancini (2004), we assess the specific dimensions of the media system following the Hallin and Mancini models: press market, political parallelism, journalistic professionalisation, role of the State, press freedom, ownership concentration.

2. The political and party system of the Balkan countries

The Balkan countries (excluding Albania) share a recent past of wars, based on the ethnic claims spread soon after the Yugoslav State's dissolution, and a common undemocratic past. As for the latter point, it is indeed necessary to bear in mind the influence that the Communist legacy has exerted on the structure and the political system of these countries for ages. This legacy, together with other factors, such as the intervention of international protagonists, the different domestic social and economic conditions, etc., has had a different impact on each of the Balkan countries, which have therefore followed different paths towards democratisation. Nowadays, according to the data of the annual report *Freedom in the World*, Serbia can be considered as fully democratic or "free", whereas Montenegro, Albania, and Macedonia are classified as "partially free". (Passarelli, 2019)

With regard to the form of the State, all four countries are highly centralised. Macedonia, however, is the least centralised of the four. Since 2001, indeed, it has enhanced the level of decentralisation and delegation of power, especially for the benefit of non-Macedonian ethnic groups, such as Albanians. (Passarelli, 2019) Serbia, Montenegro, and Macedonia are semi-presidential republics, whereas Albania is a parliamentary republic.

However, as highlighted by Kmezić and Bieber (2017), the Parliaments in these countries remain weak. The polarisation and antagonism between the main political parties have hampered the recognition of the relevant role played by the opposition and, therefore, its ability to control the executive branch. It is no coincidence that Parliament has been frequently boycotted in recent years.

In Serbia, the democratisation process started soon after the defeat of the Milošević regime in 2000, putting an end to the country's long-lasting international isolation and fostering a process of European integration. Unlike the other countries, democratisation preceded European integration in Montenegro, which shared its international isolation with Serbia. In Albania, Berisha's leadership and the support of the EU and the United States helped the country to move toward democracy and to give up a paternalistic management of public affairs. In Macedonia, the transition to democracy was encouraged by the presence of a strong leader, who, however, was not able to remove the ethnic tensions between Macedonians and Albanians; these tensions contributed to the emergence of a proportional electoral system after an extended period of a majoritarian system.

Many factors, such as the communist past, the different paths to democracy, and the leadership's features, have affected the development of the political parties in the democratic era. Generally speaking, the party systems of the Balkan countries show four characteristics:

- Prevalence of one party/coalition over an alternation of power;
- Few and weak links between parties and society;
- Low levels of trust and popularity enjoyed by the political parties;
- Low levels of institutionalisation.

Most of the current Balkan political parties were formed before the transition to democracy; they are therefore usually characterised by the predominance of strong leadership over the party's organisation – a typical trait of their communist and authoritarian past.

The most relevant Serbian political parties were established by groups of politicians who were connected with civil society. These parties developed mainly through territorial penetration (from the centre to peripheral areas);

accordingly, they created strong homogeneous organisations, often run by charismatic leaders. According to Małgorzata Podolak (2017), the Serbian party system is strongly ideologized. The 2020 national elections produced many changes in the political arena. The SNS confirmed itself for the third time as the party most voted for and won the election in the coalition called "For Our Children" (63,02% of the votes). Some of the aforementioned parties, such as the DSS and the SRS, practically disappeared, and others that were old parties, such as the conservative and right-wing populist Serbian Patriotic Alliance and the national-conservative United Serbia, emerged.

In Montenegro, the "new" communist party continues to play a relevant role even today, and the other parties take its organisational structure as their reference model. Here, the "structure of the party systems and the characteristics of the dominant party have increased the tendency towards unaccountable party leaders once in government". (Passarelli, 2019, p. 19) The main families of political parties are represented by: social democratic, Croatian, Serbian and Albanian minority parties, parties supporting Montenegro's union with Serbia, conservative, liberal, national and other ones.

The 2020 national elections registered the record turnout – for Montenegro – of 76,5% and totally changed the country's political background. The Democratic Party of Socialists of Montenegro (DPS), which has ruled the country since 1991 and is led by Milo Đukanovi, former prime minister of four legislatures and president of the Republic, lost the election in a coalition with the Liberal Party of Montenegro, receiving 35,06% of the votes (30 seats). The heterogeneous, ethno-nationalist, clerical, conservative and populist opposition coalition For the Future of Montenegro, formed by the Democratic Front alliance, the Popular Movement alliance and the Socialist People's Party, together with the populist coalition Peace in our Nation and with the coalition In Black and White, obtained the majority, with 50,62% of the votes and 41 seats. Zdravko Krivokapić, an academic professor and leader of the new coalition For the Future of Montenegro, became prime minister.

The Albanian political parties are very similar to each other in many ways: ideological, programmatic, organisational. They are highly centralised and hierarchical and show long-lasting leadership. In 2008, a new Constitution was promulgated in the Republic of Albania. It confirmed the number of the unicameral legislature's MP at 140 and replaced the majority-proportional electoral system with a purely proportional one. Even if sometimes it has been said that the lists of candidates are chosen through internal election, in reality they are a prerogative of the political parties' chairmen. From 1991, the year of the first multi-party elections, to nowadays, the electoral system and thresholds, the formulas for calculating the number of seats, and even the size of Parliament,

have been changed many times, testifying to the substantial weakness of the political system.

The Macedonian political parties exhibit greater differences, being formed both by penetration and by diffusion (peripheral organisations that promote a centre as a coalition of local elites). Some of these parties have recently adopted primary elections for selecting their leaders. The party system is characterised by a small number of parties, and shows features of bipolarity. On the one hand, we have the right coalition, led by the Democratic Party for Macedonian National Unity, while on the other hand, there is the left coalition, the main party of which is the Social Democratic Union of Macedonia. Another party that can rely on a large amount of support is the moderate Albanian party Democratic Union for Integration, close to the positions of the social democrats. In the last period, nationalist parties, such as those of Albanian, Turks, Bosniaks, Serbs, and Romans, have acquired an increasing popularity.

The risks of electoral malpractice, fraud, and even political violence, very common in the past, have been mitigated by the control exerted by international authorities during the elections, and, moreover, by linking the possible accession to EU to the improvement of the electoral regulation and processes – the latter should also weaken the ethnic tensions always present in these multi-national societies. For instance, in 2012, the Albanian Parliament, under the pressure of the EU and USA, amended the Electoral Code because of the violent political clashes that broke out during the 2009 elections. However, according to Kmezić and Bieber (2017, p. 18), the "ability of governments to deliver reforms in this field clashes with their desire to stay in power. Thus, attempts to assure a level playing field in the elections are usually limited to minimal concessions by incumbent political parties".

The two aforementioned authors have also highlighted that the Western Balkan countries do not meet acceptable standards regarding a credible and electronically accessible electoral register, which includes many "phantom voters", that is dead or emigrated voters. A paradigmatic example is that of the Serbian town of Priboj: in the 2016 parliamentary elections, the number of registered voters exceeded that of the citizens of 1,125 units. Similar cases can also be found in Montenegro and Macedonia. Furthermore, many reports and research have denounced how often the Balkan ruling elites try to remain in power through cronyism and the buying and selling of votes. In particular, it seems that in all the four countries taken into consideration, during the 2012-2016 parliamentary and presidential elections, the political parties in power tried to secure votes by granting social welfare benefits. (Kmezić, Bieber, 2017)

3. Media systems and media market in Western Balkan countries

The collapse of communism in 1989 not only profoundly changed the map of the Balkans, but the transformations of the media itself following the fall of socialism also entailed changes in institutions, rules, and values, as well as in the media and audience practices. (Peruško, 2016) From the first decade of post-socialist transformations onward, the media systems of CEE countries were analysed in comparative terms to show how they differed from those in the West. Starting from media system models proposed by Hallin and Mancini (2004), several studies initially assumed that the new democracies of the CEE would all fit into the Polarised-Pluralist model as they are the most politically polarised and with the lowest levels of professionalisation in journalism. This assumption, however, was only partially confirmed. Indeed, the significant differences in these countries' political and media systems have frequently been overlooked. (Peruško *et al.*, 2021) Among the CEE countries, there are 11 members of the European Union (Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Slovenia and Croatia), six Balkan State s (Serbia, Montenegro, Bosnia-Herzegovina, Kosovo, North Macedonia and Albania), two post-Soviet republics (Moldova and Ukraine), which are still in a long political transition, and two former Soviet Union republics (Russia and Belarus), which have been authoritarian. They are therefore countries with profound differences, and it would be wrong to consider them as a whole.

Although the political, economic, and social processes in the CEE are still very dynamic and it is sometimes difficult to predict their direction, intensity, and effects, we believe it is useful to begin with Dobek-Ostrowska studies (2015a; 2019) in order to analyse the media system and media market of the Balkan countries. Four models of media and politics in the CEE countries are distinguished, namely: Hybrid Liberal, Politicised Media, Media in Transition and Authoritarian. (*Figure 1*)

The Hybrid Liberal model is characterised by the best economic situation and the highest democratic standards in the region. The six CEE State s that are members of the European Union fall within this model. In these countries, the mass media system is affected by foreign media companies, motivated by economic reasons and notable commercialisation and tabloidisation of media content.

In the Politicised Media Model, we find Bulgaria, Croatia, Hungary, Romania, Poland, and Serbia. These countries are characterised by deep politicisation, poor media freedom especially in the case of public broadcasting, poor journalistic culture (Dobek-Ostrowska, 2015b), and a high degree of party media colonisation. (Bajomi-Lázár, 2015b; Urbán *et al.*, 2017) Furthermore,

there is a lack of clear separation between parties and politicians, on the one hand, and economic and media groups, on the other. A typical feature of this model is political parallelism, particularly in the public media, which has become a tool of the ruling elites. (Dobek-Ostrowska, 2019)

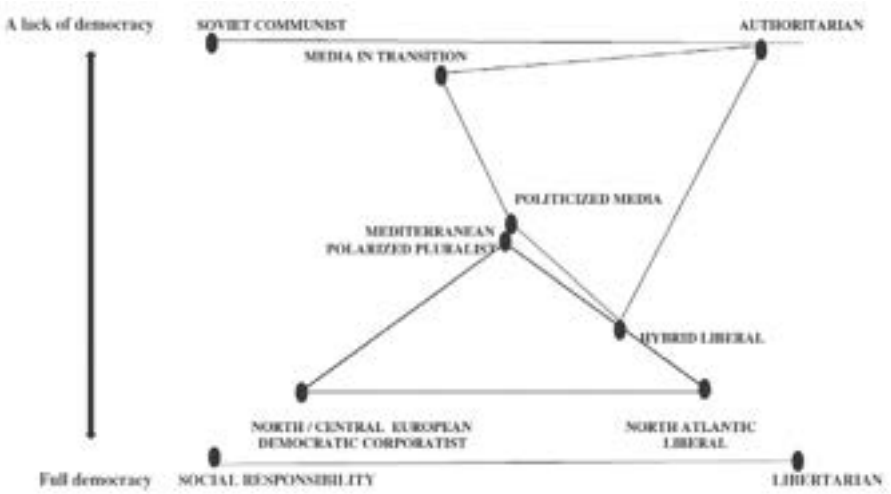

Figure 1. *The CEE media models on the map of media systems.*
Source: Dobek-Ostrowska 2019.

The remaining five countries in the Balkan region (Albania, Bosnia and Herzegovina, Kosovo, Macedonia, and Montenegro), plus Ukraine and Moldova, fall within the Transitional Media Model. They are among the poorest countries in Europe, characterised by low democratic standards, which are reflected in very low levels of journalistic professionalism. Difficult political, economic, and social conditions undermine the smooth functioning of democracy in these countries and sometimes lead to internal and external conflicts. Political and media systems are still in a long and unpredictable transition: they can no longer be classified as falling under the authoritarian model, but they have neither developed the characteristics of the politicised media model.

The latest model, the Authoritarian one, relates to Russia and Belarus. In these cases, the State has a monopoly on broadcasting. Although private media are also present in both countries, they are strictly controlled by the political regime. Political criticism is formally possible, but in fact, censorship is pervasive in its every day reality.

These four CEE media models can help us to understand how the media works and to explain the connections between the media and political systems

in the Balkan countries under analysis. Media systems have undergone profound changes in recent decades, not only in Europe but around the world, and have a dynamic structure. In this analysis, we are interested in the following dimensions: press market, political parallelism, journalistic professionalisation, the role of the State, press freedom, ownership concentration.

3.1. Media market

After the collapse of communism, a dual media model began to develop in this region: public vs. commercial. Alongside the public or State media, commercial media began to appear. Since 2005, the intense development of communication technology has changed the structure of media systems, spurred by easier access to internet and the advent of social media. As a result, news coverage can take three different paths: public broadcasting service (PBS), commercial media, and social media.

Starting with the only country included in the Politicised Media Model, the Serbian media market is small and oversaturated, with over 2,000 media registered with the Business Registers Agency (APR), but due to the poorly regulated registration system, the precise number of registered media is still not known. Serbia has two public broadcasters, one with a national frequency and the other with a regional reach.

Moving to countries included in the Transitional Media model, in North Macedonia there are 49 television stations and 72 radio stations. There is no precise data about the exact number of printed newspapers, but all the newspapers are in the Macedonian language, except for the single case of a newspaper in the Albanian language. It is worth highlighting that in this country the first newspaper appeared only recently, in 1944. (Peruško, 2016) The number of media outlets in Albania is relatively high compared to the country's population. The number of newspapers and magazines published all over the country is more than 200, but there is no official list of the country's printed media. The country has one public broadcaster (RTSH) with three local branches, mainly financed by broadcasting fees. Cable stations are found in almost every city or small town. They do not produce their own content but offer a mix of Albanian and foreign programmes. As for the audio broadcasting media, Albania has one national radio station with several regional branches, 51 local radio stations, and four commercial radio stations. Montenegro has a large number of media outlets, both private and public. The public service consists of the television and radio channel RTCG, to which several private televisions and a variety of radio channels are added. Among the newspapers, there is one daily

newspaper majority owned by the State, four dailies, one weekly newspaper, and a large number of electronic media registered on the website of the Agency for Electronic Media. There are also several portals that are not officially registered. The majority of newspapers and magazines in this country are in the Montenegrin language, but there are also some in Albanian and English.

The circulation of newspapers in all four analysed countries is very low. Furthermore, due to global and local crises and the establishment of digital media, printed media, like in most countries, are facing a difficult economic situation. Printing and distribution costs have increased, resulting in major issues, especially for local newspapers, due to their small print-runs and limited range. Therefore, several media have been forced to close their print editions for economic reasons. The number of online media and blogs has propagated widely in recent years, even if in these countries the use of internet has been slow, with significant improvements over the last few years, but quite below the European average. The development of online journalism in Serbia, North Macedonia, Albania, and Montenegro tries to keep up with the rest of Europe. While this offers a number of opportunities both for outlets and individual media protagonists, it has opened up the media landscape to a decrease in advertising revenue and sustainable funding models, predatory competition from social media platforms, as well as an increase in the sharing of disinformation.

3.2. Press freedom

When talking about freedom of information in countries that can be defined as "democracies in transition", it is worth making a distinction between the formal and the substantive level. From a formal point of view, all State s recognize rights relating to freedom of expression and information in their constitutional charters, and all State s have laws protecting freedom of expression or information. This is, for example, the case in Albania, where the right to information is guaranteed by Article 23 of the 98th Constitution. Furthermore, on September 18th 2014, Albania adopted the new Freedom of Information Law (*Law n. 119/2014 "On the Right to Information"*) that regulates the possibility of accessing information being produced or held by public sector bodies. The rules contained in this law are designed to ensure the public's access to information in the framework of assuming the rights and freedoms of the individual in practice, as well as establishing views on the state and social situation.

In a sense, the right to information is guaranteed in the constitution even in North Macedonia. The Constitution of the Republic of Macedonia, as one of the basic rights of the citizens of the corpus "Civil and political freedoms

and rights", guarantees free access to information and freedom to receive and transmit information. This guaranteed fundamental right was put into practice with the adoption of the Law on Free Access to Public Information in 2006, which provides publicity and transparency in the work of information holders and enables individuals and legal entities to exercise the right to free access to public information. The adoption of the Law on Free Access to Public Information brings the Macedonian legal system closer to European and world standards in the field of free access to information. With the adoption of this law, the State has taken a step towards the democratisation of society, its opening up to its citizens, increasing public control over the work of State bodies and all holders of public authority, which should ultimately lead to strengthening the trust of citizens in public office holders and public administration. In 2018, the legislator intervened further in the matter, in order to facilitate the exercise of the right of individuals and legal entities to free access to public information, drafting a new law that regulates this area.

The Republic of Serbia's Constitution addresses media freedom as well, and it includes in great detail the right of the people to be informed. The Constitution also guarantees the right to thought and expression. Following the Constitution as the supreme legal act, the next level of providing guarantees for freedom of the media are laws, in particular, the most general media law among them – the Law on Public Information and Media (LPIM). The LPIM, from its very beginning, through its principles and its very aim, stipulates that public information is free and not subject to censorship, and that the public has the right and the interest to be informed on issues of public interest, that monopoly in the media is not allowed, and that information on the media is public. Serbia also has the Law on Free Access to Information for the Public that sets the framework for access to information of public importance held by public authorities.

The Constitution of Montenegro guarantees the right to freedom of expression, and there is a Law on Free Access to Information. There is also an agency that acts in accordance with this law in cases of receiving requests of this kind. Although, as said from a formal point of view, these countries have sufficient legal guarantees regarding freedom of expression, there are some critical issues from a substantive point of view. These laws are often substantially impeded, and freedom of information, expression, and access to documents is not always guaranteed according to Western standards. An EU-funded project conducted by the Centre for Media Pluralism and Media Freedom (CMPF) at the European University Institute (Centre for Media Pluralism and Media Freedom 2017; 2018; 2020), documents a medium risk situation, between the years 2017 and 2019, in Albania, Serbia, and Macedonia regarding the "freedom

of expression". This medium risk situation is due to an overall assessment of several variables. Countries that are assessed as being at medium risk usually have a satisfactory or solid regulatory framework in place, which is in line with international standards, but they demonstrate poor implementation, which, in practice, leads to systematic violations of freedom of expression.

Montenegro, on the other hand, has a fairly high score in terms of freedom of expression (or a low level of risk). However, other reports show contradictory data (Camovic Velickovic, Konatar, 2019): in many cases, the right to freedom of expression is restricted in practice in various ways, or citizens and journalists are discouraged from using it. (Dobek-Ostrowska, 2015a; 2015c; 2015b; Bajomi-Lázár, 2015b; 2017) Journalists and media experts point out that this right is often only formal and is often violated in practice at several levels – in newsrooms, where it has been violated by managers and editors, as well as by the State when a certain form of pressure and repression is carried out.

3.3. Political parallelism

The politicisation of the media is one of the most visible and painful problems in the CEE countries, specifically in the Balkans. The process of media change in this region is more dynamic than in Western Europe, as emerges from quantitative and qualitative academic research and indices. (Bajomi-Lázár, 2014; 2017; Dobek-Ostrowska, 2015a; 2015c; 2015b; Zielonka, 2015; Castro Herrero *et al.*, 2017) As can be seen in *Figure 2*, in terms of politicisation, we can highlight good amount of variety in this part of Europe. The four countries included in this analysis also show different levels of politicisation. In the cases of Albania and Serbia, the politicisation of the media has an average level, with scores between 26 and 30. On the other hand, in the case of the other two countries analysed, Montenegro and Macedonia, this link between media and politics is stronger, with scores that reach up to 40 points.

Figure 2. *Politicisation of media systems in CEE countries.*
Source: Dobek-Ostrowska 2019.

Political parallelism is a typical feature of countries included in the Politicised Media model, such as Serbia. A lack of media autonomy and growing political interference are visible in this country. (Kleut, Spasojević, 2015) The leading media in Serbia are polarised and are considered to be divided into pro-government and anti-government. The pro-government media were characterised as spokespersons for the ruling party, while the independent media had a critical attitude towards the government. There are legal obligations in Serbia to ensure the independence of the media from politics, but these provisions are formulated only as general principles. In practice, the editorial policies of the service in Serbia are not independent of political influences. The apparent practice of political pressure has developed into a culture of self-censorship: journalists mostly do not cover topics that would not be to the liking of certain political figures. (Trpevska, Micevski, 2018) However Party colonisation of the media is also visible in Albania, Macedonia, and Montenegro, three countries classified under the Transitional Media Model which, as indicated by the name of the model, as countries in transition, could move towards the Politicised Media model or towards the Authoritarian Model. (Dobek-Ostrowska, 2019) The media in these State s are still in transition from communist/socialist regimes, and it is difficult to predict the final results of this process due to the high political instability illustrated in the previous section. Although the few academic publications in which the authors have analysed the relationship between the media and political figures, the manipulation of the media is present. (Taradai, 2014; Ryabinska, 2017) In the case of Montenegro, for example, polarised coverage is not only a historical consequence of the necessity to glorify the ruler, or his opponents, but also bipolarity based on the division into pro-Western Montenegrins and, on the other hand, traditionally pro-Eastern Serbs. After the independence of Montenegro, the previously established dichotomy between sovereigntists and unionists has been replaced by the opposition between pro and anti-government. This dichotomy is also found in the media (newspapers, radio, television, online portals). In Montenegro, therefore, there is a complete media polarisation that is characterised by a division on political grounds: media that are critically committed to the government and others that support the current political majority. The internal pluralism of the media reflects the political diversity of society. (Camovic Velickovic, Konatar, 2019) Although formally editorial independence is guaranteed in Montenegro, at least within the public service, in practice independence has not been ensured and pressure on public broadcasting employees is common. An almost similar situation is also occurring in Macedonia. Although formally a regulation of political parallelism of the public service is provided, in practice journalists and editors of the public broadcasting depend heavily on political power. Over the years, pressures have

been reported on journalists working in Macedonian broadcasting in the form of job relegation, pay cuts, professional marginalisation, and direct political threats. (Trpevska, Micevski, 2018)

The political parallelism of the media influences public television and radio above all. Relationships between politicians and party leaders, on one hand, and media owners on the other, are not always clear. (Bajomi-Lázár, 2014) For example, government funds in the media are frequently used to obtain positive coverage. (Bajomi-Lázár, 2015c) Because many media outlets are not financially sustainable, polarisation has increased, which has a negative impact on the quality of reporting and professionalism. The regulatory environment and the role and approach of public service broadcasters are characterised by the strong presence of polarisation. The analysis of these Balkan countries' media systems reveals the need to dismantle the entrenched polarisation that frames public service broadcasters' editorial and political positions, to augment the media's trust in the State's ability to respond to crimes against journalists, and the allocation of support funds and resources. (Centre for Media Pluralism and Media Freedom, 2020) The extent of the politicisation of the media system, media organisations, newsrooms, media reporting, and public service media, in summary, is at medium risk in Serbia and Albania and at high risk in Macedonia and Montenegro. The main problem is political capture over the media, which prevents more independence and media freedom. In many new democracies, in fact, State support for the media is undermined by the widespread presence of media capture, a legacy of previous authoritarian rule. Moreover, in these countries, the liberalisation and privatisation of the media occurred parallel with democratic transition (Wyka, 2010), which makes the media markets particularly sensitive to global technological disruption of media business models. Therefore, the lack of fair regulation and transparency, and the fact that the State still acts as one of the leading sources of financing, represent risks of political influence on the media.

3.4. Journalistic professionalisation

The level of journalistic professionalisation, as described by Hallin and Mancini (2004), allows us to categorise journalistic practices into "good" or "bad". The authors assume that professional journalism is possible if journalists adhere to specific (shared) values. The problem is that such shared values often constitute an alibi for particular media practices that inevitably lead to unprofessional journalism, as in the case of the countries analysed here. (Hrvatin, Petkovic, 2014) As previously stated, the lowest levels of professionalisation in

journalism, combined with strong political parallelism and polarisation, have caused CEE countries to revert to the Polarised-Pluralist Model proposed by Hallin and Mancini (2004). As with the other dimensions analysed so far, however, it is not correct to evaluate all CEE countries in the same way, just as it is not correct for the Balkan countries. The significantly different economic, political, and social conditions of these countries are also reflected in the quality of the media and journalistic professionalism. Returning to the models introduced at the beginning of this chapter, the countries included in the Politicised Media Model, such as Serbia, are characterised by weak freedom of the media and, especially in the case of public broadcasting, low journalistic culture, which is typical of countries such as Spain, Italy, Portugal, and Greece. On the other hand, the lack of democratic standards typical of the countries included in the Media in Transition Model (Albania, North Macedonia, and Montenegro) is reflected in a culture of very low journalistic professionalism. (Dobek-Ostrowska, 2019) In some cases, the strong push towards commercialisation and tabloidization resulting from the intervention of foreign media companies (as we will see better in the next paragraph) has resulted, in most State s, in a decrease in journalistic professionalism. As noted, the lack of a clear separation between the worlds of politics, business and media underlies the deep dependence of journalists on many economic and political groups, which means that journalists do not have any professional identity and are frequently related to political parties or politicians. (Radojkovič *et al.*, 2014)

The overall socio-economic conditions in the countries in question are also reflected in journalism; in fact, there are problems such as low wages, irregular payments and unpaid overtime, irregular work and lack of social security. Added to this is the fact that trade union actions are poor and insufficient to fight exploitation by private owners and pressure from politicians. Official statistics on the number of journalists who have signed employment contracts or the amount of money they make are not available. Journalists and media unions, where they exist, are still weak and cannot significantly influence the improvement of labour rights and the economic position of journalists. This weak regularisation of the journalistic profession certainly does not improve the levels of professionalisation in the Balkan countries. (Trpevska, Micevski, 2018) In this region, we notice a persistent patronage practice among journalists, publishers, media owners, and politicians. Very few media outlets have adopted some internal regulations to separate their editorial offices, on the one hand, and their managerial and proprietary structures, on the other. Influential media owners in the region are known to use the media for their commercial, political, and other interests. From the evidence provided by other studies, as well as polls and interviews conducted by journalist associations, it is clearly demonstrated

that almost all media owners exercise control over editorial content. Of the four countries under review, only Montenegro, on a proposal from the Montenegro Media Union (TUMM) and on the recommendation of the Council of Europe, lobbied to include legal protections for journalists in the media law and to set limits to the influence of the owners on the contents of the media. (Camovic Velickovic, Konatar, 2019) When it comes to adopting and complying with codes of ethics for public service broadcasters, all four countries are lacking. In cases such as Serbia, ethical codes were not adopted, while in the other three countries, PBS editors made efforts to include these documents. However, regardless of whether or not there are ethical codes, editorial independence is not ensured in all cases. This means that even in cases where these codes are adopted, this was done only to satisfy some formal criteria, rather than to make a real difference. In Albania, for example, there is media self-regulation and, in 2020, 19 media outlets signed an agreement to create the country's first self-regulatory platform for ethical media. (Trpevska, Micevski, 2018)

Self-censorship is still a major problem for most Balkan journalists, mainly due to their inadequate socioeconomic position and fear of losing their jobs. The high level of job insecurity and precarious working conditions make journalists particularly vulnerable to political and economic pressures, which in turn lead to self-censorship. However, the freedom of journalists within newsrooms depends on each country's specific political environment, on the general level of confidence in working in journalism, and on the specific media in which they work. In some countries, such as Serbia, for example, journalists are exposed to constant pressure at all levels, while in others, such as North Macedonia, the overall political environment has become more favourable for the work of journalists over the past year. The same institutions set up by the media industry to regulate their own power, therefore, demonstrate the inability of the media to serve the public interest and develop independently (not under the pressure of the State) and to comply with the professional standards that have the purpose of safeguarding the public interest. The idea of self-regulation has become stuck in the tangle of corrupt and clientelistic relations between the media and politics. (Hrvatin, Petkovic, 2014)

3.5. Role of the State

According to various media studies (Hallin and Mancini 2004), the State can play three roles relating to the media market: owner, funder, and regulator. With regard to the latter, we have already addressed the role of the State as a regulator in the previous paragraphs, highlighting how all the countries analysed have,

from a formal point of view, strong legislation to guarantee freedom of the press and freedom of expression. For this reason, in this section, we will deal with the role of the State by looking at the other two variables, *i.e.* the State as funder and as owner.

Regarding Montenegro, the State owns the national public service RTCG – Montenegro Radio and Television, which has been a full member of the European Broadcasting Union since the country's independence in 2006. RTCG is regulated by the Law on Public Radio-Diffusion Services, which requires it to serve the interests of all Montenegro citizens, regardless of their political, religious, cultural, racial or gender affiliation. RTCG is managed by a Council of nine members, who are experts proposed by civil society organisations and appointed by the Parliament with a simple majority. The RTCG Council appoints the Director General of the RTCG and advocates in the public interest. RTCG is widely seen as dependent on the Government, particularly after allegedly politically motivated dismissals of journalists in 2011. RTCG does not pay a broadcasting licence fee and is financed directly from the State budget (1,2% of the budget) as well as from advertising revenues (for a limited amount of airtime) and sales revenues.

Regarding funds, State investments may be distributed, in accordance with the Law on the Media, for the production of educational, cultural, or minority media. The government-appointed Commission for the Control of State Aid found no irregularities in the distribution of such subsidies in 2012. However, another form of funding is that derived from public advertising, and a number of critical issues have been highlighted in this area. State advertising is distributed without clear criteria, and this raises concerns. In 2012, 89% of the funds for press advertisements by Ministries went to the daily newspaper *Pobjeda*, majority owned by the State. The public procurement law is not properly applied to advertisement services, and data are not available on the official web-portal.

In North Macedonia, the Government has introduced a program for support for the printing and distribution of printed media. In other words, the Government each year covers part of the expenses of the printed media.

Serbia has two public broadcasters – RTS with a national frequency, and RTV with a regional reach. Both broadcasters get most of their funding from the State budget, which influences their editorial policy, independence, and objectivity. Aside from State funding, RTS and RTV also compete with other media houses for a part of the advertising market. Moreover, a small part of their income comes from subscription fees, which amount to 220 dinars (2.10 euros) per household. Media companies operate under great economic pressure. The average annual market value of advertising in the last couple of years was some 175 million euros, with the market growing in 2018 along with

its value of 197 million euros[1], which is insufficient to provide economic survival for all currently active media. Due to the weak economy and constant liquidity problems, the State still has a significant role and influence in the media market. It continues to control the media through direct media ownership, but even more so through various models of State funding (public tenders for media projects, public procurement of media services and advertising contracts).

3.6. Ownership concentration

The effectiveness of the media in deterring corruption depends greatly on several structural features of the media system, including the independence of journalism from political and economic spheres. In this respect, such countries' media landscape presents several critical issues, linked on the one hand to the historical peculiarities of their media systems and, on the other hand, to their evolution in more recent years. As in countries ruled by communist regimes, the State had monopolistic control on the media until a few years ago. With the opening up to a market economy, however, there was a shift from the absolute monopoly of the State to an oligopoly of private tycoons with interests in various activities outside the media sector. One of the most critical issues in some of these countries is the transparency of properties, which would allow for accurate knowledge of the corporate structures of the media companies. The transparency of media ownership refers to the public availability of accurate, comprehensive, and up-to-date information about media ownership structures. A legal regime guaranteeing transparency of media ownership makes it possible for the public as well as for media authorities to find out who effectively owns, controls, and influences the media as well as media influence on political parties or State bodies. A lack of transparency in the entrepreneurs who control media companies leaves the door open to a system of interests and influences that is difficult to assess and control, encouraging phenomena such as patronage and media capture. (Mungiu Pippidi, 2008)

This is, for example, the case of Albania. Rather than developing in a well-planned and oriented way, Albania's media system has developed in a spontaneous and sporadic manner, effectively preventing accurate knowledge of the corporate structures of the media companies. In 2016, the Constitutional Court of Albania decided to abrogate anti-monopoly and anti-concentration provisions in the broadcast law. This paved the way for narrower pluralism in the Albanian media and openly violated European standards. Regarding Montenegro, the

1. Source: IPSOS, Nielsen AM, marketing agencies.

transparency of media ownership is also insufficient and poorly regulated. This is one of the major reasons for the creation of media clusters that polarise the media system in a country where media ownership structures are widely believed to conceal the true identities of people and interests involved in the media scene.

In general terms, media laws contain only indirect regulations of ownership transparency, which are only referred to in the printed media sector. The issue of transparency of media ownership is not therefore addressed in any media-specific or separate law. Printed media are recorded in a register kept by the Ministry of Culture; however, such a register, which also contains data on ownership structure, is not public and only partial data are available through the Central Registry of Commercial Entities of the Tax Administration. Furthermore, the public and media experts question the accuracy of publicly available information, stating that it does not refer to the actual owners and does not provide a complete picture of ownership structures.

4. Interplay among the media system, levels and perceptions of corruption

In the last decade, corruption has become a dominant issue in the political debate in Central-Eastern Europe (CEE) and, for the Balkan countries, it has become even more so from the moment they started talking about their adhesion to the European Union. Politicians, intergovernmental and non-governmental organisations are increasingly leading to corruption in many of the economic and social problems faced by these countries. The four countries discussed are trying to overcome the legacy of the past, including corruption, and the incentive to join the EU has stimulated improvements in the fight against corruption. While the press almost never covered this issue in the early 1990s, the main news outlets in the region have recently published numerous stories about corrupt practices, corruption scandals, or government statements on the fight against corruption. (Grigorescu, 2006; Sotiropoulos, 2017) Corruption is seen as one of the greatest threats to the survival of new democracies around the world. In some countries, democratically elected leaders have lost power (and consensus) due to corruption scandals, while in other countries, such events have actually led to a return to authoritarianism. The most dangerous effect of corruption, however, is not the change in individual politicians, but the growing scepticism of democratic changes brought about by such high-level scandals. In new democracies with high levels of corruption, for example, the popular distrust of public institutions and the democratic system is growing. The risk, especially for those countries still in transition, is that politicians may use corruption as a weapon to criticise democratic governments and demand

greater State intervention. A very important factor is that the degree of citizens' trust in a particular politician or government is a result of the perceived degree of corruption. Furthermore, perceived corruption can also have effects in the economic field, for example, foreign companies may decide not to invest in a country because they perceive that there is a high level of corruption. The distinction between corruption and perception of corruption would not be relevant if the two data were strongly correlated. But recent research has shown that they may not be. In a study on Italy (Mazzoni *et al.*, 2017), it was found that even though about 90 percent of the interviewed people were not personally affected by corruption in the last twelve months, practically all the respondents considered corruption to be highly prevalent in their country. Likewise, a study on petty corruption in four Eastern European countries (Grigorescu, 2006) found that citizens have far fewer real-world experiences with corruption than others believe. Both of these studies reflect that corruption is perceived to be greater than it actually is.

A situation comparable to that revealed in the two studies listed above also exists in the Balkans. The Western Balkan countries today are widely regarded as very corrupt. Compared to other European democracies, including those of Eastern Europe, they are perceived as more corrupt than other European democracies. These assessments, however, are mainly based on the perceived level of corruption, which is formed by the direct experience or experience of one's acquaintances with corruption and, above all, by the information received from the mass media, especially if they consider the media as relatively independent. The coverage of corruption, however, is affected by the level of press freedom, political parallelism, instrumentalisation of the media, and market segmentation. Even within the same country, for example, each newspaper could offer a slightly different image of the phenomenon depending on the audience it addresses. Different and even contrasting coverage of corruption can spread a high level of uncertainty. This can mainly occur in transitional democracies and highly polarised democracies, where the idea of the "common good" appears to be weaker and where the instrumentalisation of the media is a frequent practice. (Voltmer, 2007; Zielonka, 2015; Mancini *et al.*, 2017) In these situations, as anticipated, the risk is an increase in distrust of the government and political institutions.

The growing distrust of government and political institutions in the Western Balkans is also due to the fact that opponents of ruling elites have been involved in corruption cases, and anti-corruption agencies have turned against them rather than against members of ruling elites. The fight against corruption, managed through State agencies, was used by governments to attack the opposition. This is the result of a targeted strategy by government elites to use corruption and the

fight against corruption not only to enrich themselves but also, if not primarily, to prolong their stay in power. In other words, the specificity of corruption in the selected countries is, firstly, the involvement of the ruling elite in corruption and, secondly, the systematic use of corruption as a weapon by the government and competing political elites against the opposition. (Sotiropoulos, 2017) The pattern observed to combine personal economic advantages with political advantages, as demonstrated by Sotiropoulos (2017), is the following: first, the ruling elites forge ties with certain businessmen who they favour, excluding their commercial competitors from public procurement; then, members of the ruling elites actively participate in the affairs themselves. This creates a clear conflict of interest, as elected officials only defend the public interest as a formality, but in practice use their position for their own benefit. The desired benefit is not necessarily economic, as in typical cases of corruption, but it is also political, in the strict sense of extending their stay in power by all possible means, including corruption. In other words, political corruption is not so much a means of personal enrichment as a vehicle for clinging to power. Using corruption as a means of extending their tenure in power can be done in more ways than one. As mentioned, public procurements are not managed transparently and government officials award contracts for public works to domestic and foreign contractors very selectively. If these entrepreneurs are active in the media sector, in exchange for such favours, these businessmen not only finance the parties of the ruling coalition but also spread government propaganda. In this sense, the government intervenes in the economy to build a pro-government business elite. In some countries, the active role of the ruling coalition in creating a government-business nexus even goes towards the systematic marginalisation of those businessmen who are reluctant to collaborate with the government or openly oppose it. To summarise, we could say that it is the government that captures businesses rather than the other way around, unless, of course, we include in this equation the influence of large foreign companies that have invested in these countries. (Grigorescu, 2006; Sotiropoulos, 2017) The most useful part that the pro-government business elites have to play is their control over private mass media, such as newspapers and television. Such pro-government private media, which in appearance are run independently and separately from the government-controlled State media, can serve both the task of spreading the government's line on controversial issues to the electorate and discrediting the opposition through hostile reporting or even smear campaigns against government opponents (parties or civil society).

Within the context just described, corruption coverage is guided by an instrumentalisation logic rather than a watchdog logic. A logic of instrumentalisation means that journalism responds to particular and partisan interests. Corruption is covered because it allows the media to pursue specific

objectives that often favour private interests over the general interest and that polarise opinion. Each newspaper establishes its own hierarchy of importance and promotes its own point of view, preventing the formation and strengthening of a widely shared sense of outrage through which corruptive behaviour can be discovered, controlled, and condemned. (Voltmer, 2007; 2013; Mancini *et al.*, 2017) Furthermore, the fight against corruption has become a tool to legitimise the government and delegitimise the opposition, as well as to deal with disloyal party exponents, uncooperative businessmen, and the mass media. (Sotiropoulos, 2017; Dobek-Ostrowska, 2019) There is no doubt that the media can curb corruption through tangible or intangible means (Stapenhurst, 2000), just as there is no doubt that the level of freedom of the press is an important aspect of the media's ability to exert a restraining influence, especially when other sources of social control are lacking or weak. However, from this work, it emerges that other dimensions, such as the structure of the media market and political parallelism, which are closely linked to the relationship with politics, must also be considered.

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4
Prevention of corruption: governance, policies, and tools

Enrico Carloni

Summary: 1. From repression to prevention: trends and influences – 2. The complexity of anti-corruption reforms, between general standards and the need for a targeted approach – 3. The governance of corruption prevention and the role of anti-corruption authorities – 3.1. Models and limits of the anti-corruption authorities – 3.2. The anti-corruption authorities in the Balkan area – 3.3. Solutions and problems among the candidate countries – 4. Policies, strategies (National Anti-corruption Strategy – NAS) and programs – 4.1. Trends and models: general profiles – 4.2. Experiences in the Balkan area – 5. Tools: a summary of main administrative corruption prevention measures – 5.1. "Internal" (or integrity) measures – 5.2. "External" (or transparency) measures.

1. From repression to prevention: trends and influences

In the International and European framework, the increasing awareness of the risks and dangers arising from the presence of widespread forms of corruption has led to the development of a preventive approach to the phenomenon, along with the more traditional repressive-criminal response (Klitgaard, 1988; Rose-Ackerman, 1999; OECD, 1999; Huther, Shah, 2000; Graycar, Prenzler, 2013; Cerrillo Martinez, Ponce, 2017; Cantone, Carloni, 2018; Carloni, 2019; Carloni, Cantone, 2021).

This is a fact that has characterized the Italian experience since 2012 (Cantone, Carloni, 2018), but it is also a fact strongly present in the comparative scenario, and in particular in the Balkan and Eastern European area, where important policies have been developed aimed at building a system that does not limits itself to repress the phenomena of corruption, but tries to prevent it

Traditionally, corruption has been dealt with by criminal law as a means of repression; corruption is seen by criminal laws first and foremost as a specific offense: its core, consisting of punishing the action of a person who, receiving an unfair advantage, gives a public official an undue benefit for carrying out his

functions, is then extended to include further contiguous behaviours. (Davigo, Mannozzi, 2007; Mendelsohn, 2015) The conduct of corruption, in its nature, has been sanctioned in different legal systems since antiquity. (Noonan, 2017; Buchan, Hill, 2014)

Certainly, attention continues to be given to better discipline for crimes committed and to the strengthening of the capacity to ascertain such crimes. (Thus, for example, in North Macedonia, there is the figure of a "special prosecutor's office" [Office of the Public Prosecutor for Prosecuting Organized Crime and Corruption] or similarly in Albania.) At the international level, great attention is also being paid to the repression of corruption ("police patrol" approach: Rose-Ackerman, Soreide, 2001), but we are beginning to recognize the need for an integrated approach, capable of combining repression and prevention. In fact, with significant evidence over the last two decades, the criminalisation strategy alone is perceived, as insufficient to contain corruption.

There are several reasons for this inadequacy. (Carloni, Cantone, 2021) One such reason is related to the cost and "burden" of the penal solution; another for "usury from inflation" (the more it is used, the less the perception of the seriousness of the phenomenon decreases) (Davigo, Mannozzi, 2007); politicisation of public discourse on scandals (Mazzoni, Marchetti, Mincigrucci, 2021); for investigative reasons, related to the difficulty of ascertaining the facts of corruption. But above all, because the corruption that comes to light is only a minor part of the corruption present in the entire political and administrative system. There is, essentially, a part of the "iceberg" that although it does not emerge, it is nonetheless noticeable, also thanks to the use of other detection tools, and requires to be managed and resized with different solutions and tools than those applicable to "emerged" cases.

The progressive establishment of corruption prevention strategies capable of intervening not so much on the facts of corruption, but on the factors that favour the development of episodes of corruption, is experiencing a formidable acceleration in the comparative scenario, due to the impetus of the Merida Convention promoted by the United Nations, to which the stimulus and solicitation action of numerous other international organisations is linked.

As a result of this process, the development of a system of preventive solutions is a feature of recent developments in institutional systems, not least in the European context. (Hough, 2013; Auby, Breen, Perroud, 2014; European Commission, 2014; Betancor, 2017; Mungiu-Pippidi, 2015; Carloni, Gnaldi, 2021)

Various factors lead to this result, often of an institutional political nature, but also geopolitical ones.; in legal terms, the framework within which this approach is developed is constituted, above all, by some important international

conventions (at global and regional level). Such conventions have contributed significantly not only to the spread of a greater awareness of the issue and to a broadening of the ways of containing the phenomenon, but above all to a standardisation of response measures and to the definition of mechanisms for monitoring and stimulating anti-corruption policies in different countries. (Cantone, 2020; Carloni, Cantone, 2021)

Looking at the European context, it is, in particular, with the two 1999 Conventions of the Council of Europe that a broader and more comprehensive strategy to fight the criminal phenomenon of corruption begins to be developed[1]. The most important legacy of these two conventions (under article 24 and article 14, respectively) is the establishment of a special body, GRECO (an acronym for Group d'Etats contre la corruption), which is responsible for ensuring that the parties "implement the Convention". GRECO has been very active over the years and its reports have been a formidable stimulus for Member States to implement the necessary reforms. This is also because the GRECO, as well as the European Commission, has taken on the task of accompanying the states in the implementation of an overall set of standards deriving not only from the conventions of the Council of Europe

This does not mean that GRECO's recommendations are always and promptly respected: adaptation to international stimuli depends very much on the political framework and on the various political phases, and in particular, in the candidate countries, on the political "push" that is given to the process of convergence towards European standards. With situations, therefore, variable and sometimes with light and shade. Thus, with reference to Serbia: in effect, in its 2020 report, in its 2020 report GRECO complained of a very partial response to its recommendations. For this reason, GRECO considered the Serbian situation as "globally unsatisfactory" and decided to launch its "non-compliance procedure", including a request to Serbia to report on the progress made. (European Commission 2021, Serbia, p. 29)

In any case, the most significant document for the definition of anti-corruption strategies is most certainly The United Nations Convention Against Corruption – UNCAC[2]. This Convention takes action from "the gravity of the problems posed by corruption" and the "threat it poses to the stability and security of societies, undermining democratic institutions and values, ethical values and justice and compromising sustainable development and the rule of law"; the 71 articles of the UN Convention covers a wide range of topics: the

1. Criminal Law Convention on Corruption of 27th January; Civil Law Convention on Corruption of 4th November.

2. Supported by the UN and launched on 31st October 2003 in Merida, Mexico.

offences that must be provided for at state level, and measures to enable the seizure and recovery of assets.

For the first time in an international act, there is a reference not only to repressive measures, but also to "preventive measures", to which an entire and very intense chapter is devoted.

The "preventive section" opens with a provision (Article 5) which, while not explicitly defining what prevention is, clearly suggests what it should consist of (*i.e.* avoiding the occurrence of corruption acts or rendering them much more difficult). Furthermore, while not indicating a binding model but leaving it up to the individual states to determine the practical arrangements, it outlines certain aspects of the preventive strategy. In particular, the objectives to be pursued ("rule of law", "integrity", "accountability") and certain means to be used (starting with "transparency" and "participation of society").

The articles from 6 to 14 set out specific actions to be taken, which together form an essential core for corruption prevention policies. This aspect deserves to be emphasised. Although the individual experiences and therefore the individual corruption prevention systems are different, there is a common core of measures defined by the United Nations Convention. And this "common heart" is proposed, at the European level, as part of a "European (anti-corruption) *acquis*" relating to the rule of law.

Also in this case, the United Nations Office on Drugs and Crime (UNODC) is entrusted with an envisaged monitoring mechanism (based on peer review criteria). The Convention has been ratified by many nations: as of February 2021, 187 (out of 193 UN members), including all European countries and the European Union itself. In the case of the European Union, the European institutions have operated with a dual understanding of the European Union's role: on one hand, as a direct subscriber and addressee of the Convention; on the other, as a promoter of the implementation of the Convention by its Member States. At present, this European role is particularly evident also in the relationship with the candidate countries for accession to the Union.

2. The complexity of anti-corruption reforms, between general standards and the need for a targeted approach

Looking at realities such as those of the candidate countries, but also considering the experience of member countries of the European Union that have developed organic policies for the prevention of corruption (such as Italy, Slovenia, Croatia, and France), one immediately grasps the complexity and breadth of the issues that are inevitably called into question.

In fact, intervening on corruption means reforming the administrative system and the political system itself. This is all the more complex when corruption is widespread in the political and institutional system.

Just think of the close connection between the dynamics of corruption at the institutional and administrative levels and the functioning of the political system (with specific crucial issues such as financing of political parties), or the close relationship between anti-corruption policies and more extensive administrative reform strategies.

For candidate countries, the European requests in the framework of the programs of approximation of legislation and adaptation to the European Union *acquis* show these challenges well, and numerous European documents that accompany these strategies well represent the state of progress and the problems that characterise the different experiences. Indeed, anti-corruption strategies are closely linked to broader reform interventions targeting both the political and administrative systems.

For example, in this sense reference can be made to the case of North Macedonia, where the "public financial management" (PFM) reform program is being implemented (albeit with some delays related to the Covid-19 crisis), and where an overall "public administration reform strategy" (2018-2022), as well as a "strategy on judicial reform (2017-2022)", are underway. The same can be said for the other candidate countries, where the very need to adapt the institutional system to the European *acquis* determines the urge for numerous reform interventions.

On the other hand, as previously analysed herein[3], the same procedures for joining the European Union fully grasp the strategic perspective of preventing and repressing corruption As stated in "Chapter 23", it should be noted that the "EU's founding values include the rule of law and respect for human rights. An effective (independent, quality and efficient) judicial system and an effective fight against corruption are of paramount importance, as is respect of fundamental rights in law and in practice".

Anti-corruption reforms therefore oscillate between the search for a standard model and the need for targeted solutions, between general challenges and specific problems, between model and context.

The model is given, as mentioned, above all by international conventions; it is within this framework that the "common core" of a corruption prevention strategy is outlined, stemming in particular from the indications provided by the UNCAC.

Specifically, on the basis of Chapter II of the Convention, an essential structure of a preventive approach to corruption can be developed. Taken together,

3. See Chapter 1 in this volume.

these elements embody the fundamental "building blocks" in the strategy of rebuilding the "ethics infrastructure" (the set of institutions, mechanisms and systems to promote integrity and prevent corruption in public administrations), the importance of which has long been recognized both in the international and comparative scenario.

Although the "model" proposed by the UNCAC Convention has common general features, its implementation in the various legal systems knows and has known great differences. The same can be said for the experiences of the candidate countries, where the homogeneity of solutions is even greater, and is favoured by action in the area of international organisations, "donors", and above all by the converging stimuli of GRECO and the European Commission. Even in the presence of a system with broadly common general features, in which on the whole it can be affirmed that "the track record on prevention of corruption is slowly improving", the single experiences show evident differences, linked both to the different administrative tradition (as in the case of Albania), and to the different political "thrust", which is a factor not to be underestimated not only as regards the adoption of reforms, but also as regards their implementation.

3. The governance of corruption prevention and the role of anti-corruption authorities

3.1. Models and limits of the anti-corruption authorities

An important element that characterises anti-corruption reforms, is given by the identification, in each legal system, of a public structure entrusted with the mandate of fighting and/or preventing corruption. The growing international awareness of this issue, already in the decade before the Merida Convention and then with a clear acceleration after it (De Jaegere, 2012), has led to the diffusion in many countries of "Anti-Corruption Authorities".

In fact, according to Article 6 of the UNCAC Convention, each country has to organise, in particular, anti-corruption structures with preventive functions, on the basis of a provision that complements the provision regarding repression contained in Article 36, which requires the "existence of a body or bodies or persons specialised in combating corruption through law enforcement". Included in various conventions (both global and regional), the establishment of national anti-corruption authorities has been called for and promoted by various international organisations, international financial institutions, donor agencies and non-governmental organisations. (De Sousa, 2009)

Also on the basis of these solicitations, three main models of anti-corruption authorities can be distinguished in the comparative scenario: (1) authorities that concentrate both preventive and investigative powers ("multipurpose agencies"), (2) specialised authorities with investigative and repressive powers ("law enforcement agencies") and, finally, (3) authorities in charge of prevention, with a role in knowledge of the phenomenon and in the definition of anti-corruption policies. (OECD, 2013) In either case, however, the UNCAC Convention does not require a single agency to have overall responsibility for corruption prevention policies (UNODC, 2009), and there is no single model in the development of an anti-corruption system, but there seems to be a prevailing trend towards a single anti-corruption authority at central level.

It should be noted, however, that these models are very different from one another, especially with regards to the powers entrusted to the various agencies and, in particular, their independence (in fact, they are often departments and not separate authorities or agencies). In general terms, despite the expectations attached to the introduction of anti-corruption authorities, it must be said right now that criticism is nevertheless widespread (Schütte, 2017), especially in relation to the perception of their limited impact (bordering on irrelevance, in the most problematic cases: De Sousa, 2009).

The changing forms of corruption, in increasingly sophisticated and complex ways (Della Porta, Vannucci, 2021), and the aforementioned perception of the extended and systemic nature of corruption justify, however, the identification of organisational solutions for its control and contrast (Carloni, Cantone, 2021) solutions that are different from, and add to, the traditional ones implemented by widespread judicial and police control over the corruption crime (Recanatini, 2011; Sekkat, 2018). It is the response to these dynamics that we are witnessing a "proliferation" of ACAs, as part of the overall anti-corruption-oriented reform policies that are spreading in the first decades of the new millennium. (UNDP, 2011; AFA, 2020)

Albeit with varying solutions and powers, ACAs are often identified as authorities responsible for the development and implementation of anti-corruption policies at national level, their enforcement, and overall verification of the compliance of the actions of public institutions with the law.

3.2. The anti-corruption authorities in the Balkan area

In many countries of the Balkan region and in particular in the former Yugoslavia (Bosnia Herzegovina, Serbia, Montenegro, Kosovo, Slovenia, North Macedonia), the establishment of anti-corruption authorities is not

only frequent, but is also a well-known practice, since it is often the result of reforms stemming from the beginning of the millennium. (Carloni, 2019) We can find significant cases of the Commission for the Prevention of Corruption in Slovenia, the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption in Bosnia Herzegovina; the case of Kosovo, where an Anti-corruption Agency (ACA) operates, also deserves a reference.

In giving attention to the candidate countries, the North Macedonian case of the "State Commission for the Prevention of Corruption" (SCPC) deserves a brief examination: the Commission operates in particular with investigations of conflict of interest cases, and in recent years has continued to be pro-active in preventing corruption and has opened several new cases. (European Commission 2021, p. 6) The Serbian experience of the Anti-Corruption Agency is now consolidated, although the overall strategy of the Balkan country presents some critical issues. A similar body is present in Montenegro, where the Anti-Corruption Agency (ACA) "under new management demonstrated a more proactive approach" (European Commission 2021, Montenegro), especially in stepping up its communication and outreach activities towards the general public, media and civil society and in addressing the caseload pending from previous years. This certainly does not mean that all the problems are solved: as the European Commission points out, "despite this positive trend, challenges related to Agency's independence, priority-setting, selective approach and the quality of its decisions remain and require sustained efforts in this respect".

A particular case, in the scenario of the candidate countries, is the Albanian one. While on the repressive side Albania has a specific authority (Special Anti-Corruption and Organized Crime Structure – SPAK), there is no single (or prevalent) anti-corruption authority dedicated to the prevention of corruption. Rather, there is a "network", with a more evident political responsibility: […] the regulatory framework of the network of Anti-corruption coordinators in 17 institutions established to prevent and tackle corruption in state administration remains weak. Effective coordination should be ensured between the new structures at the Ministry of Justice (where the role of the Office of the National Coordinator against Corruption – NCAC is central), the Unit for Transparency and Anti-Corruption at the Prime Minister's office, the Special Unit for Anti-Corruption and Anti-Evasion established also at the Prime Minister's office, as well as the Integrated Policy Management Group for PAR and Good Governance.

In general terms, the presence of specialised institutions is particularly widespread in Eastern Europe and Central Europe. Bulgaria has the Commission for Anti-Corruption and Illegal Assets Forfeiture of the Republic of Bulgaria,

which was established in 2018. In the Republic of Moldova operates the National Anticorruption Centre; in Latvia, the functions of the Corruption Prevention and Combating Bureau (KNAB) range from prevention to investigation. In Ukraine, before the crisis, the development of an interesting anti-corruption approach was underway, involving both preventive (the National Agency on Corruption Prevention) and repressive specialised bodies (the National Anti-Corruption Bureau).

International influence is not only vertical but also horizontal: the importance of the circulation of models is clear, especially in specific geographic areas. This happens with imitation and circulation of model-types (favoured, in some contexts, by specialised umbrella organisations, as in the case of the Regional Anticorruption Initiative – RAI – which operates in the Balkan area).

The different influence processes add up in the case of the candidate countries.

In this context, the European conditioning (primarily that of the Commission, especially through the definition of the conditions of entry in the Union for the countries that joined most recently or those that have applied to join) and the influence of supranational organisations, both within the framework of the aforementioned international conventions and within the framework of specific intervention projects (in particular, but not only, of the OECD and the World Bank), appears clearly relevant.

3.3. Solutions and problems among the candidate countries

In addition to the Authority responsible for implementing anti-corruption policies, there are various other bodies with functions of preventing corruption. Thus in the Serbian case, the Anti-Corruption council, whose role is however weak and often little considered by the Serbian institutions themselves, is noted with consultative, information and stimulus functions. In Montenegro there are "several ad-hoc advisory bodies, including the National Council for the fight against high-level corruption, the Council for control of the voter registry and the Council for privatisation and capital projects". Also in Montenegro, the "State Audit Institution monitor political party financing" deserves a reference, which is one of the many examples of "specialised" institutions whose functions cross the issues of conflicts of interest and the prevention of corruption.

In the complex Albanian framework, the experience of the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest is also interesting (HIDAACI): its role of detecting conflicts of interest and

checking asset declarations was reinforced through the adoption of the Law on whistle-blowing and whistleblower protection, as well as the implementation of the "vetting process". (European Commission 2021, Albania, p. 26) The "vetting process" alone deserves specific attention: although it is addressed to the judiciary branch, with the aim of removing the less capable and more corrupt magistrates and judges, it is a mechanism that presents evident critical issues (starting from the problem of the separation of powers and therefore from the guarantees of independence of the judiciary branch). (Bardha, Cucchi, 2017) The activation of a mechanism of this type clearly shows how the theme of anti-corruption reforms (in Albania, but the discourse can be extended) is also linked to a question of regime change and transitional justice. (de Grieff, Mayer-Reiff, 2007)

Returning to the topic of anti-corruption authorities, recurring problems for these authorities are independence, which must always be ensured but is often "weak", and the availability of adequate functions and resources. Thus, in the case of North Macedonia, the European Commission itself recommends that "the efforts to improve its functioning should continue, especially by allocating extra funding for the recruitment of expert staff". (European Commission 2021, North Macedonia, p. 6) This need is particularly felt with respect to the Serbian case: thus, as regards the prevention of corruption, GRECO concluded that its recommendation on the Agency for the Prevention of Corruption was fulfilled in a satisfactory manner. This recommendation concerned, in particular, the need for an adequate degree of independence and financial and personnel resources as well as extension of the Agency's competence. (See European Commission 2021, Serbia, p. 6)

The problem of effectiveness is widespread, including the ability to affect corruption in a general sense, and the ability to effectively impose one's own decisions. Thus in Montenegro, where, looking at the action of the Anti-corruption Agency, "sanctions imposed in general still remain below the statutory minimum and do not have a preventive or deterrent effect". (European Commission 2021, Montenegro, p. 27) This problematic node is also well perceived by looking at the Albanian case, where it is possible to grasp the distance between an adequate regulatory framework and a weak "practice": "The regulatory framework is in place to prevent corruption and to ensure the integrity of public officials and civil servants, but the institutional capacity for verifying assets and assessing conflict of interest declarations should be reinforced". (European Commission 2021, Albania, p. 17)

The action of the corruption prevention entities (even where their independence, functions and resources were ensured), however, does not exhaust the needs to support anti-corruption policies, which (precisely due

to the relationship between anti-corruption and more general reform policies) inevitably remain linked to the effective will of the Government and Parliament to proceed in this direction. In summary, although "independent", the anti-corruption authorities cannot be "isolated" from the political framework. This is confirmed, for example, in the Serbian case, where the Commission itself warns "there is a need for strong political will to effectively implement the full mandate of the Agency and ensure increased trust of citizens in the institutions preventing corruption". (European Commission 2021, Serbia, p. 29) But also in the case of Montenegro, where "the decisive political commitment needed to unblock important segments of those reforms is still outstanding", while "despite a more proactive approach of the Anti-Corruption Agency, corruption remains prevalent in many areas and an issue of concern". (European Commission 2021, Montenegro, p. 6)

4. Policies, strategies (National Anti-corruption Strategy – NAS) and programs

4.1. Trends and models: general profiles

Under art. 5, UNCAC, each State is under obligation to develop specific "corruption prevention policies and practices", implementing "effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability". In the meantime, each State is obliged to "establish and promote effective practices aimed at the prevention of corruption" and, periodically, to "evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption".

The UN Convention essentially requires that specific policies to prevent and combat corruption are defined, implemented and monitored by assessing their effectiveness at a national level in an approach aimed at encouraging the involvement of citizens and society as a whole.

The "Practical Guide" for the development and implementation of this provision (UNODC, 2015), suggest that a "national anti-corruption strategy" should be expressed starting with a careful assessment of the context, the detailed analysis, also with special studies, of the specific features of the phenomenon in each country, the comparative observation, the analysis of experiences of anticorruption already in the field, the collection of available information, and the scrutiny of the "vulnerability" of the system.

Such an approach must not ignore the "forces" at work, both in terms of those who might support an anti-corruption policy and in terms of others (social forces, political actors, economic operators, etc.) who might oppose it.

There are different levels of "strategy". At a higher level there is the choice of defining an overall system for the prevention of corruption, and therefore at this level the reform policy takes the form of specific legislative and institutional reforms. This can be defined as an "architectural" level: when we talk about "strategies", however, it usually refers to a different level – documents that define, for a certain period of time, the actions to be undertaken in a State, the political and institutional priorities, the methods of action for the prevention of corruption.

As the UN guidelines suggest, the "strategy" must therefore be adapted to the context, with the recommendation to "be ambitious but realistic": concrete and specific measures must be identified, the main objectives of each part of the reform must be established, costs and benefits must be identified, and priorities and sequences must be planned.

UN operational guidelines provide that the function of coordinating the anti-corruption strategy should be entrusted to "a single, high-level entity", called on to operate in strong liaison with the structures responsible for the application, implementation and monitoring of these policies. All participants involved in coordination and implementation should be adequately empowered.

The same UN guidelines suggest that great attention should be paid to the stages of monitoring and evaluating the effectiveness of the policies in place, breaking down the overall reform into successive steps, selecting progress indicators, setting realistic targets for each indicator, and cautiously using internal evaluations by the administrations involved. Monitoring and evaluation must be functional to a progressive improvement: "utilise evaluations to adjust implementation targets and strategy goals". The warning (rather than the indication) that concludes the operational instructions on this point is important: the process requires time and adequate resources ("allocate sufficient time and adequate resources for evaluation").

From this common ground, differentiated solutions are developed which depend on internal factors, first and foremost of an organisational nature (ultimately linked to the characteristics of administrative systems, more or less centralised, and to the form of government). (Hussman, 2007; Transparency Int., 2013; UNDP, 2014; United Kingdom, 2015)

Comparative experience suggests a variety of national strategies, adopted with strong emphasis and often on the basis of solicitation and support from supranational bodies, as well as being an attempt to respond to a critical

situation on the corruption front (especially as "perceived" by the Transparency International's corruption index).

In the European scenario, the translation of policies to contain and fight corruption into a specific "policy" document is not always immediate, also due to the strong variability of the "corruption problem" as perceived at institutional and public opinion level. Without generalising, it can reasonably be argued that planning for a specific and formalised "national strategy" tends to depend on the centrality of the matter in terms of political issues and the "need" to provide a response (to the public opinion and stakeholders, including international ones) that is recognizable, at least in terms of intentions, in view of the gravity of the phenomenon.

4.2. Experiences in the Balkan area

In the framework of EU joining processes, the definition of a specific anti-corruption strategy, linked both to the phase of repression of criminal conduct and to the definition of prevention plans and strategies, is required by the joining protocols.

In North Macedonia, the "National Strategy for the Prevention of Corruption and Conflict of Interest" (2021-2025) and the related Action Plan is the main reference document. The strategy was drafted in an inclusive process, involving relevant stakeholders and experts. It was adopted by Parliament in April 2021. This "National Strategy", "consolidating the country's commitment to prevent corruption and sanction corrupt behaviour". (European Commission 2021, p. 6) According to the EU report (European Commission 2021, Serbia, p. 6), "Serbia has yet to adopt a new anti-corruption strategy accompanied by an action plan and to establish an effective coordination mechanism to operationalize prevention or repression policy goals and effectively address corruption" (the previous national strategy for the fight against corruption for period 2013-2018 and its accompanying action plan expired); meanwhile, "Serbia should increase its efforts in addressing these shortcomings and step up the prevention and repression of corruption".

Among the most modern and interesting approaches that characterise some of the leading experiences in administrative corruption prevention is the development of plans and procedures for corruption risk management in public administrations.

This approach, tailored to individual organizations, is to be distinguished from the aforementioned "strategies" (which reflect an overall view of the phenomenon and also define the reforms to be introduced to prevent and fight

corruption in the various States), although in some experiences the boundary is not so clear-cut. One such example is Italy, which is also the most interesting model-type in the European scenario in terms of risk management plans in the public sector, where the "national anti-corruption plan" (PNA) is a general guideline for individual administrations to draw up their own risk management plan (three-year corruption prevention plan). This document, adopted by the National Anti-Corruption Authority, in the absence of a strategy defined at the governmental level, ends up being regarded as the general tool for defining corruption prevention policy. However, it is an act of guidance that lacks the overall vision of a national strategy and, above all, it cannot outline systemic reforms, but only direct individual administrations to draft their own risk management plans.

This viewpoint is rooted in the corruption risk management measures developed within the framework of ISO standardisation rules, and in particular ISO 370001. From this "risk" approach and related standards, an anti-corruption path can be inferred that develops within organisations: this is done by analysing activities and functions, identifying the corruption risks affecting them, determining the tolerable risk level (taking into account the probability of the corruption event and/or its impact), comparing the tolerable corruption threshold with the existing one, deciding on "risk mitigation" where necessary, and selecting the most suitable measures in the light of a "cost-benefit" assessment.

A case of decentralised plans is also present in the Serbian contest: "Out of the 106 (2019: 102) local self-governments that adopted anti-corruption plans, 22 (2019: 28) established a body to monitor their implementation, mostly in line with the Agency's model. Overall, there were no tangible improvements in relation to anti-corruption efforts at the local level, and the impact of the local anti-corruption plans is yet to be seen" (European Commission 2021, Serbia, p. 30) "Integrity plans" are also envisaged in Montenegro: on the basis of 2020 data, 679 reports on the implementation of the integrity plans for 2019 were submitted, and the European Commission report states that "currently 98% of public authorities have integrity plans in place". (European Commission 2021, Montenegro, p. 29)

The Albanian experience is more fragmented where, according to the data collected by the European Commission, "five municipalities have adopted and piloted integrity plans with measures to combat corruption at local level" (European Commission 2021, Albania, p. 13) and where integrity plans are also foreseen at the ministerial level.

5. Tools: a summary of main administrative corruption prevention measures

5.1. "Internal" (or integrity) measures

In line with the guidelines of the UN Convention, and often prompted by GRECO reports as well as supranational stimuli, there is a strengthening of a number of mechanisms that constitute "pillars" of a corruption prevention system. In fact, the list could be very broad, but for descriptive purposes an attempt can be made to try to simplify and outline it.

A first set of anti-corruption measures are organisational, internal, and aim at strengthening the integrity of public officials. (Pioggia, Pacilli, Mannella, 2021)[4]

In this case, we note the reforms that are affecting various countries of the Balkan area – particularly candidate countries – aimed first of all at strengthening the so-called "Merit system" in the recruitment phase of public personnel and as a guarantee of stability and merit in the exercise of administrative functions. The issue lies at the crossroads between legislative reforms and administrative cultures and requires specific and continuous attention. Thus, for example, while on the one hand, North Macedonia "is currently reviewing the legislative framework on human resources management through the revision of the Law on Administrative Servants and the Law on Public Service Employees, and is introducing a new Law on Top Management Service", on the other, "The State Commission for the Prevention of Corruption (SCPC) continued to address cases of alleged nepotism, cronyism and political influence in the process of recruitment of public sector employees and in the process of appointment of members of supervisory and management boards". (European Commission 2021, NM, p. 4) The same need is felt regarding Serbia: "Serbia still needs to ensure (i) merit-based recruitment and a reduction in the excessive number of acting senior manager positions" (European Commission 2021, Serbia, p. 5): "the integrity of the civil service remains undermined by the aforementioned excessive number of acting senior manager posts".

A very particular case of reform aimed at strengthening the quality of the institutions is the already-mentioned Albanian "vetting process": the process (a process of revaluation of judges and prosecutors) which concerns in particular members of the Judicial System. This was evaluated positively by the European Commission (Hasanaj, 2020), which supports and accompanies it through specific initiatives, also in terms of effectiveness, although it is obviously a particularly delicate process. The vetting of members of the judiciary system

4. Chapters 5 and 6 in this volume are dealt with in greater depth of these measures.

continues to have a positive impact on the fight against corruption. To date, 62% of the vetting dossiers processed have resulted in dismissals and resignations. Among the high-ranking magistrates, 10 former high-level judges of the High Court and the Constitutional Court have been dismissed through vetting or have resigned. (European Commission 2021, Albania, p. 25) In more general terms, the challenge facing the Albanian administrative system, in terms of necessary reforms, is to strengthen the independence of officials: the Commission recommends "encouraging the merit-based implementation of the civil service law at all levels, especially at the local level where de-politicization of civil service [is] needed" (European Commission 2021, Albania, p. 15): "progress so far in merit-based recruitment, promotion and dismissal needs to be consolidated, in particular by addressing the fragmentation of the legislative framework, and applying uniform standards across the entire public administration". (ivi, p. 17)

Measures to strengthen the integrity of public officials reflect an approach that focuses in particular on the regulation of codes of conduct and the prevention of conflicts of interest. In operational terms, this matter is linked in more general terms to issues such as the definition of clear rules on incompatibility with the pursuit of other activities, the possibility of switching between public and private positions (issues that call into question limitations on the so-called "revolving doors" and "pantouflage"), and the duties of declaration and abstention aimed at avoiding situations of conflict of interest. Nevertheless, it is worth also recalling how the Mérida Convention already contains a number of aspects relating to the challenge to integrity: both when it provides for "adequate procedures for the selection and training of individuals for public positions considered especially vulnerable" (Art. 7(1)(b)), and when (Art. 8) it calls for the adoption of "codes or standards of conduct for the correct, honourable and proper performance of public functions" and the introduction of "systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result".

The attention to these aspects is particularly strong in various candidate countries.

A new Code of Ethics for members of the government and public office holders appointed by the government was adopted in North Macedonia in 2020 and amended in 2021. Efforts continue to improve the transparency of public institutions. The new National Strategy for the Prevention of Corruption and Conflict of Interest systematises measures in public procurement and employment in the public as well as other sectors.

Of particular interest is the recent Serbian discipline of the conduct of Members of Parliament, aimed at regulating and containing the risk of conflicts

of interest: a code of conduct for Members of Parliament aimed at the avoidance and resolution of conflicts of interest. Aside from adoption of the code, GRECO also recommended that it should be effectively implemented in practice, and accompanied by proper guidance, training and counselling. In September 2021, Parliament adopted a revised version of the code of conduct with the aim to follow-up on the GRECO recommendations. (European Commission 2021, Serbia, p. 29)

5.2. "External" (or transparency) measures

A second type of measure is that of "external" measures, aimed at strengthening citizen involvement and widespread control, in particular through transparency rules. (Ponti, Cerrillo, Di Mascio, 2021) The theme is deepened in this volume[5], so we can limit ourselves to a general framework of some issues.

Here we find, in particular, measures aimed at regulating transparency and the right to knowledge as a condition of citizens' control over the work of public authorities and therefore, at the same time, an instrument of accountability and responsibility, according to the maxim that "sunlight is the best disinfectant". A mong the instruments capable of ensuring transparency, the importance of "freedom of information" legislation is evident, but so is the growing relevance of proactive transparency mechanisms (especially by making information available through public portals or open data solutions). It is worth recalling that the UN Convention provides, in this respect, for the adoption of "the measures necessary to increase the transparency of its public administration, including, where appropriate, its organisation, functioning and decision-making processes" (Article 10, which refers foremost to making information open to the public). However, as stated in Article 13, it is also a matter of "increasing the transparency of decision-making processes", "ensuring effective public access to information", and "respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption". These issues are dealt with in chapter V.

A recurring problem, beyond the specific quality of the regulations, is that of the effectiveness of the right to know. Thus in Serbia, citizens' right to access public information is regulated in the law on access to information of public importance, amended in 2021 As remarked upon by the European Commission (Serbia, 2021, p. 16) "administrative silence, whereby public authorities fail to properly act on the citizens' information requests, remains a major issue".

5. See Chapter 7.

As a corollary of the "transparency pillar", an important institution such as the protection of whistle-blowers can also be considered (whistleblowing creates a mechanism for "internal" transparency) by offering guarantees and protection to whistle-blowers who report wrongdoings discovered during their work. Article 13 of the UNCAC Convention itself, which does not expressly regulate the figure of the "whistleblower", provides that "facts liable to be considered as constituting an offence established in accordance with this Convention may be reported to them, even anonymously". However, it is primarily Article 33, in the part relating to the "suppression of corruption", which claims for "appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention". The growth of adequate whistleblower protection legislation was most recently brought about by European Directive n. 1937 of 2019, which provided for the introduction by all EU Member States of "common minimum standards providing for a high level of protection of persons reporting breaches of Union law". (Article 1)

In addition to these main areas of preventive measure actions, there are other more specific ones, whose presence in the various legal systems is less recurrent and whose discipline cannot be traced directly to the aforementioned international conventions.

The attention to the issue is significant in the Balkans area, also thanks to specific awareness projects. In any case, even in the presence of widespread whistleblower protection regulations, there is a need to ensure the effectiveness and strengthening of the institution. Thus for Serbia, cited as needing "to step up its protection of whistle-blowers and investigate allegations in high corruption cases, in order to strengthen trust in the institutions". (European Commission 2021, Serbia, p. 29)

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5
The quality of civil servants

Guido Sirianni, Alessandra Pioggia, Matteo Falcone[1]

Summary: 1. Introduction – 2. The quality of civil servants as a tool in the fight against corruption – 3. Appointing senior management positions – 3.1. National experiences in Western Balkans – 3.2. It takes time to consolidate reform – 4. Merit and evaluation of public employees – 4.1. A season of reforms that has yet to profoundly transform the recruitment system – 4.2. Performance evaluation: a system yet to be consolidated – 4.3. Perspectives for an improvement of evaluation systems to increase public ethics – 5. Training of civil servants – 5.1. The establishment of public schools for the training of civil servants – 5.2. The legal significance, planning and scope of training for civil servants – 5.3. The knowledge and skills provided by training for civil servants – 5.4. Improvements needed for adequate training.

1. Introduction

One of the major issues included in the institutional reform policies pursued, with a variety of accents, by the Republics of the Western Balkans, in the still very short and tormented historical parable, is that of public administration. The aspirations for reform in this field seem to pursue two main objectives.

The first is the realization of an administrative decentralization in favour of local communities, capable of overturning traditional, secular, centralized and hierarchical structures, the essential features of which passed unscathed under different political structures – the Ottoman order, the Kingdom of Yugoslavia, the Socialist Federal Republic…

The second objective is to change the perception of public administration. Instead of a *longa manus* of governmental power, and therefore as an internal organization totally entrusted to the will and availability of the government

1. The work is the result of a common reflection, but paragraphs 1, 2, 5, 5.1, 5.2, 5.3, 5.4 are attributed to Matteo Falcone; paragraphs 3, 3.1, 3.2 to Guido Sirianni; paragraphs 4, 4.1, 4.2, 4.3 to Alessandra Pioggia.

– again, according to the postulates of all the political structures that have succeeded each other over time, the concept of public administration is to be built up as a politically neutral, stable body, established on to meritocratic principles. While always responsible towards the government public administration would therefore be capable of imparting greater efficiency and legality to public action.

These two aspirations are clearly present – especially the first – in the texts of the Constitutional Charters which four countries (Albania, Northern Macedonia, Montenegro, Serbia) have endowed themselves with. Autonomist decentralization takes on forms of varying intensity, but in any case implicitly brings with it the need to reorganize the residual state apparatus and to provide local authorities with adequate professional administrations with respect to the increased functions, which do not risk being enslaved by a very restrictive policy. In the Charters there are also important statements which deserve reflection, concerning the aspiration to a neutral, meritocratic, guaranteed administration, supervised by the government, but at the service of the citizen.

The clearest and most explicit statements in this area are undoubtedly those contained in the Constitutions of Albania (adopted in 1998) and Northern Macedonia (adopted in 1991). The Albanian Constitution states in art. 107, in point 1, that "Public employees apply the law and are at the service of the people", in point 2, that "Employees in the public administration are selected by competition, except when the law provides otherwise", and in point 3 that "Guarantees of term and legal treatment of public employees are regulated by the law". Even more explicit, in terms of neutrality and guarantees, is the Macedonian Constitution, for which (art. 95) "Political organization and activities within bodies of state administration are prohibited. The organization of work of bodies of state administration are regulated by a law to be approved by a two thirds majority vote of all Representatives", and, further (art. 96) "The bodies of state administration perform the duties within their sphere of competence autonomously and on the basis and within the framework of Constitution and laws, being accountable for the work to Government". The 2007 Montenegrin Constitution, on the other hand, is practically silent, according to which (Article 111) "The duties of civil service shall be discharged by the ministers and other administrative authorities"; the Serbian Constitution (2006), on the other hand, clearly recalls the need to reconcile the principles of the independence of the administration and its responsibility towards the Government (art. 136, 1 al. "The Public Administration shall be independent, bound by the Constitution and Law and it shall account for its work to the Government") but focuses on the division of regulatory powers in matters of administrative order between Parliament and Government.

The new republics originating from the dramatic crisis of the Yugoslav socialist state have, therefore, appreciably thematized at the highest level of their respective systems, the crux of the role to be reserved for public administration in a democratic and pluralist context, which has begun to realize the need to implement their intentions not necessarily from a clean slate, but from an economic, political, social, cultural, very bumpy and rubble-strewn terrain. Conversely, professional bureaucracies, in countries where they actually exist, are after all the result of a long, historical sedimentation which were cemented between the nineteenth and twentieth centuries; the mortar was a national state establishment which, in our globalized world, has now become anachronistic.

The reforms of the civil service initiated by the four Republics over the last twenty years, with the enactment of laws amended several times and a large series of regulatory acts by the Governments, constitute the stages of a difficult process of implementation of the constitutional programs that has further intersected with the intention of responding to the requests made by the bodies of the European Community for the purpose of accepting the requests for membership. The crucial aspects of the administrative reforms on which our review is based are five: the methods of selection and appointment of the bureaucratic elite, with a view to overcoming the deteriorating practices of the spoil system; the regularization and planning of access to the roles of public administrations through merit, systematic and neutral competition procedures; the introduction of procedures and objective rules for evaluating the performance of public employees, in the context of the management of positions and careers; the preparation of a permanent staff training system within the public sector. As is evident, these aspects are interconnected, circular, and refer to each other.

2. The quality of civil servants as a tool in the fight against corruption

It is clear from reading international documents that the integrity of administrations and the impartiality of administrative action to a great extent depend on the quality of public officials and, therefore, on the rules of access to public management, the human resources management system and the provision of training programmes for those who actually perform administrative functions, particularly on issues relating to public ethics and the prevention of corruption.

The Organisation for Economic Cooperation and Development (OECD) has paid particular attention to the human resources management system, in particular to the mechanisms for evaluating staff – which essentially concern

access and subsequent performance evaluation – and to their training. For example, in the document the *Principles of Public Administration* drafted in 2017 by the SIGMA/OECD Programme, it is required that the recruitment and selection process be clearly based on merit, equal opportunities and open competition, and that public employee laws stipulate that any form of recruitment and selection not based on merit is considered legally void. Great importance was also placed on selection committees, whose members should have a sound knowledge of the tasks to be performed and operate with impartiality and be independent from political influences.

Moreover, the 2017 OECD Council *Recommendation on Public Integrity*[2], clarifies in many of its provisions the importance of merit-based personnel selection and ethical training of public servants, particularly managers, in order "to raise awareness and develop essential skills for the analysis of ethical dilemmas and make public integrity standards applicable and meaningful in their personal contexts"[3]. The Recommendation considers knowledge and the capacity to resolve ethical problems to be the fundamental instruments for the emergence of the so-called ethical leadership within the public organisations, and invites the Administrations to favour the career progression of those who possess this type of knowledge and competence, thus stimulating the overall sensitivity of the administrative structure to the ethical themes.

The European Union has also considered these aspects to be important in guaranteeing the quality of public officials and their work. The 2014 *Union Report on the Fight against Corruption* (COM(2014) 38) – focusing its analysis on the state of repression and prevention of corruption in Member States' legal systems, in particular in the area of public procurement – identified the development of a human resource management system as one of the three key pillars of the Enlargement Strategy for the Western Balkan countries.

In the same 2014 document, the Commission also emphasizes the need for states to focus more efforts not only on the ethical training of civil servants, but also on their overall training, including in technical and scientific fields.

These recommendations are reiterated in the *Toolbox 2017 edition – Quality of Public administration*, which not only includes a section on ethics, transparency and anti-corruption, but more generally refers to the importance of setting up an adequate personnel management system, along with adequate training for civil servants to ensure the quality of public action and public policies. as a means of curbing politicisation and nepotism in the civil service, both of which have consequences in lowering levels of integrity in government.

2. See also related documents such as OECD, *Public Integrity Handbook*, 2020.
3. See recommendation 8 under b).

Finally, the *United Nations Convention against Corruption* (UNCAC) explicitly highlights this in several provisions[4], recommending to the signatory States to pay particular attention to merit and transparency in the recruitment process of civil servants and to provide specific training programmes for civil servants not only on integrity and corruption prevention, in order to strengthen their public ethics, but more generally in all fields of knowledge useful for the proper performance of administrative functions.

3. Appointing senior management positions

In the context of the reform process, the provisions reserved for the top management of the administrative bodies are of particular importance, in order to provide the bureaucratic elite with a status of duties and particular, distinct or supplementary guarantees from those affecting the generality of public employees. There are several reasons for this particular remark. In the first place, fundamental roles in the management of merit-based selection, the progression of the careers of public officials, the organisation of offices, the supervision of the integrity of public employees, and the protection of the same employees from political or economic conditioning generally reserved for high bureaucracy. The neutralisation and professionalisation of public administrations are objectives which, by their nature, presuppose that the top management of the same public administrations are fully involved and are, in turn, covered by adequate guarantees of neutrality and capacity. Secondly, the high bureaucracy must necessarily interact constantly with the political bodies of direction and control, maintaining a relationship of professional trust (very different from political trust) which must run along a thin track, without derailing in the sense of the spoils system or in the inverse one of self-referencing. The necessary dialogue between politics and high bureaucracy requires mutual awareness and respect. If the neutralisation of the high levels of public administration continues to be, even in the most stabilised administrative and political contexts, an elusive goal which can never be said to be achieved once and for all, the difficulties are, intuitively, all the greater in a context in which both the political and administrative systems are in a magmatic state.

4. The reference is clear in Articles 6 and 36 dedicated to the corruption prevention bodies; in Article 7, paragraph 1 letter d), concerning integrity in the public sector; in Article 9 dedicated to the management of public procurement and public finances; in Article 60 concerning the specific training of officials on the fight against and the prevention of corruption.

3.1. National experiences in Western Balkans

The statute of this top staff, who plays an essential role in the social elite, and is called to operate in the grey area between administration and politics, is traditionally, even in the Balkan area, particularly fluid. The administrative reform guidelines, taken as a whole, aim precisely at reducing this degree of fluidity.

Perhaps the Albanian system is the one in which the aspiration to create a strong administrative elite finds a more coherent development. Law no. 152/2013 also includes senior level managers in the civil service subject to its discipline, while it excludes cabinet officials (Article 2). Senior level managers are divided into four classes (general secretary; department director; general management director; positions equivalent to the latter) (Article 19). Senior level managers constitute the bodies of senior level civil servants (TMC) with an organic role established by the budget law, equal to the number of positions to be filled increased by a reserve share of 15% (Article 27).

Access to the state body (which in turn is further fragmented into multiple bodies, corresponding to the different branches of the administration) is governed by law in a clear merit-based and transparent perspective. In an annual plan, the positions to be announced during the year are predetermined; the selection procedure is that of a course-competition managed by the School of Administration (ASPA) (Article 28). Only middle level managers and senior levels of independent administrations can be admitted to the course-competition; the selection for access is entrusted to a special national selection committee (TMC), made up almost entirely of independent experts and representatives of the School of Administration. Those who pass the course are assigned to fill positions, or to play the role of coordinators. However, it is the law itself that operates some temperaments : it admits that foreigners in possession of specific requirements may also be admitted to the course-competition (Article 28); it allows the possibility of access through a competition reserved for middle civil servants, without the necessity of attending a course; it provides that senior positions in public bodies and local government units are assigned with a reserved competition, again without the necessity of attending a course. Of the intent to discourage attempts to circumvent the procedures of the course-competition, or in any case of the competition itself, the rules (articles 30 and 32) confirm the illegitimacy of any appointment attributed by derogating from the rules on the coverage of holidays, to which confers mandatory value. In order to depoliticise the administration, the Albanian law on public employment provides, in the end, heavier burdens for the TMC than for the generality of public employees: TMCs are prohibited from registering with political parties; in the event that

they become members of a political party or take up positions in political party organs, they lose their position (Article 65). working hours.

The Serbian civil service reform law defines (art. 33-34) a particular status for the "appointed positions" divided into five groups in the state and other administrations, distinguishing them from the "executorial positions". The main distinguishing feature is represented by the recruitment methods (art. 66): the holidays of the appointed positions must be covered through a competition, which can be both reserved and open. However, the coverage of positions falling within the competence of the government must take place exclusively with reserved competition, except in the event that the internal selection fails. The procedure is announced by the Human Resources Management Service, which also appoints the jury, made up of its own members and external experts. The commission identifies the triad of suitable candidates among whom the government may (but is not obligated to) identify the person to whom the appointment is to be conferred.

The Montenegrin law on civil servants and state employees also dedicates specific rules to senior management (Article 18, 20, 21), identifying the corresponding offices, which are conferred by the Government and have a five-year duration. Holidays (contrary to what has been seen in the case of Serbia) must always be covered through a public competition (thus excluding internal announcements and public announcements) (Article 38). The public procedure is carried out by the Human Resources Management Authority which compiles the list of competitors and appoints the Examining Commission, made up of its representatives and experts; the exam must necessarily include structured interviews. A short list of candidates, with the indication of the best classified, is proposed to the head of the administration of the vacant position to be filled, who can however propose to the Government, for the purpose of the appointment, also a different name included in the short list, explaining the reasons.

In the legislation of Northern Macedonia (specifically, the Law on administrative servants, enacted in 2014 and subsequently amended), there are no rules intended to confer a differentiated status on the heads of the civil service. *Ad hoc* rules, however, are reserved for top figures, placed between politics and administration, who in Italy would be referred to as "direct collaborators", that is, the general secretaries (in state or local administrations), who have recently been appropriately included among the administrative servants, and to the components of the lavatories. Those who, among the administrative servants, hold the position of chiefs, are subject to the general provisions concerning the coverage of holidays, according to which the matter must be the subject of an annual planning, and the procedures (competition,

promotion or mobility) must be in any case transparent, competitive, loyal. There are no reserved competitions, but it is expected that certain positions can be attributed only to subjects who have gained important work experience in terms of quality and duration in public administrations.

3.2. It takes time to consolidate reform

The set of regulations highlights a common approach in affirming the competition – a competition managed by officials and experts, formally removed from direct political influences and mainly reserved for those who already work in the bureaucratic ranks – the only way to access positions at the top. An important indirect support of transparency and meritocracy certainly comes from the forecasts that bind the overall management of holidays to annual planning procedures, which combine the functionality needs of the services and budget constraints, thereby limiting the room to manipulate client lists and corporate interests, especially in the case of state administration.

In assessing these legislative trends, it must be taken into account that the effective performance of the rules on the status of senior management (which certainly do not end with those concerning the coverage of holidays, but extend to the stability of the offices, both formal and effective; interference that political leaders can practice, in law or in fact, on the nominal competences of administration heads; the right to intervene autonomously in the organisation of services and procedures; on the seriousness and objective of the modalities with which the service is evaluated) depends both from the detailed regulations, which are often decisive, as well as from the general, political, social and cultural context conditions. Observers focused on public employment in the Western Balkans[5] show that in the case of senior servants there is the greatest resistance and the tendency to keep widespread practices of spoils systems alive, e.g. through recourse to continuously renewed temporary positions (so-called "acting heads"), through collusive practices or other circumvention (top management who "voluntarily" resign before the expiry of the office, coinciding with the expiry of the mandate of the relevant politician, or in any case when the latter requests it; selections made on the basis of superficial and arbitrary

5. Albania GRECO Eval5 Rep (2019) 5; Commission Staff Working Document Albania 2020 Report (COM(2020)660 final); SIGMA OECD Report Serbia 2019; Government of Montenegro, Public Administration Reform Strategy in Montenegro 2016-2020; SIGMA OECD Report North Macedonia 2021; V. Stancetic, Spoils system is not dead: the development and effectiveness of merit system in the Western Balkans (2020); ReSPA – University of Nottingham, Merit recruitment in Western Balkans. An evaluation of change between 2015 and 2019. (2019).

CV comparisons, without written and traceable examinations). proximity between politics and bureaucracy and the intertwining of political, family and economic clienteles. These difficulties can only be overcome over time and gradually, through a continuous refinement of primary and secondary legislation (evidenced, in the case of our countries, by the excessive overlapping of reform measures) which must however settle down and become the social heritage of each Country, as their own Constitutions postulate with the affirmations that we recalled in the introduction to these notes. However, difficulties and reticence cannot surprise, even more so if we remember that the evasive practices and the flooding of the spoils system continue to be very present even in countries where there are ancient and noble professional bureaucracies, now in a brazen way, now disguising themselves through privatisations or spin-offs of institutional activities.

4. Merit and evaluation of public employees

To promote the trustworthiness and professionalism of public employees as tools in the fight against corruption, it is important that the selection and evaluation of public employees be regulated to ensure that these issues are addressed. Moreover, the reliability of these mechanisms plays a fundamental role, not only in the fight against corruption but also in good governance. The internationally accepted standard of human resource management in public administration is the merit principle, which can be broadly defined as the establishment of a special value system of public administration, based on professionalism, competence, and integrity to pursue the public interest (Ingraham, 2006; Rabrenović, 2018).

As already considered above, most of the constitutions of the Western Balkans countries have a part dedicated to the Public Administration, in which principles such as that of legality and responsibility of public employees are affirmed. In some cases, it is possible to find more specific rules on access to employment, as in the case of Albania, whose Constitution, in article 107, establishes that "Public administration employees are selected by competition unless the law provides otherwise".

In the last years, Western Balkan's national governments invested a great deal of energy in the reform of the civil service and the establishment of the new legislative framework, also with the perspective to promote merit practices in the civil service. All countries have adopted laws on access to public employment and some rules on evaluation of the Performance of Civil Servants have been adopted in Serbia (2019), provided in the last Public Administration

Reform Strategy in Montenegro, and regulated in the Albanian law on civil servants (2013).

The presence of specific laws does not always indicate the effectiveness of enforcement. Regarding the countries of this area, some authors (Meyer-Sahling *et al.*, 2015) point to two types of problems in the implementation of reforms: when the implementation of new legal frameworks is delayed, suspended, or simply ignored (due to incomplete regulatory issues, incomplete implementation, lack of expertise, or low examination standards) and when laws are not breached, but informal behaviour contradicts the purpose of the law. One cannot disagree with the statement that: "Merit recruitment is a complex process consisting of multiple interdependent components. The effectiveness of merit recruitment can thus be undermined if any one of the components of the process is deficient"[6]. The same order of considerations can be made concerning the performance evaluation of public personnel.

In this perspective, it is necessary to take into account several elements that can weaken a recruitment system and a reliable performance evaluation system to the point that they lose their effectiveness in guaranteeing the independence and professionalism of employees. Some of the aspects to which attention should be paid are "tailor-made" job positions for politically affiliated people, non-merit based criteria for promotion and recruitment, a high number of temporary contracts, transformation of temporary contracts to permanent positions without any objective criteria, lack of data related to the number of public servants, and so on.

4.1. A season of reforms that has yet to profoundly transform the recruitment system

The most recent wave of reforms led to the amendment of civil service laws or the adoption of new laws in several Western Balkans countries. Concerning civil service admissions in the State administration, Albania has implemented a centralised system whereby recruitment procedures are managed by the Department of Public Administration (DoPA). The system includes pooled recruitment – primarily driven by efforts to limit political influence on the process. Article 20 of Law n. 152/2013, "On the Civil Servant", states that "Recruitment in the civil service shall be based on the principles of equal opportunity, merit, professional ability, and non-discrimination and shall be

6. J.H. Meyer-Sahling *et al.* (2020), *Making Merit Recruitment Work: Lessons from and for the Western Balkans*, ReSPA Publications.

carried out through a transparent and fair selection process". Recruitment is done through public announcements of vacancies posted throughout the nation. Procedures are designed not to give internal candidates an unfair advantage by imposing unreasonable burdens on external candidates. In addition, there is transparency in the public decisions of the selection committees and these can be made available to the candidate.

Also in Montenegro, the regulation of the recruitment system in the public sector is part of the Public Administration Reform Strategy 2016-2020. The strategy places particular emphasis on the need to improve the recruitment and professional development system. In 2018, Montenegro adopted the Law on Civil Servants and Public Employees, which in its Article 10, provides rules on "equal access to employment positions", stating that: "The civil servant and state employee shall enter service based on a public announcement", "[t]he job positions of civil servants and state employees shall be accessible to all applicants on equal terms", and "[t]he selection of applicants shall be based on their professional training, knowledge, skills, previous work experience, job performance, and test results". In July 2018, the Government of Montenegro adopted the Public Administration Optimization Plan 2018-2020, which also covers recruitment. On this occasion, the possibility of fixed-term hiring was also restricted, which, as considered above, may conflict with the need for independence of civil servants.

In Serbia, civil service legislation was amended in December 2018 providing for merit-based recruitment and dismissal procedures. As of 2021, the excessive number of interim positions was also reduced.

However, legislative changes have not always brought good results. In the case of North Macedonia, for example, the continuous changes in the regulatory framework have created a situation of uncertainty that has not favoured the consolidation of virtuous behaviour. Since 2008, Macedonian civil service legislation has undergone numerous and continuous changes. In 2014, the law on civil servants (LPSE) and the law on administrative employees (LAS) (Official Gazette n. 27) were approved. Both new laws were amended twice in 2015, and twice more in 2016, and once in early 2018. Over the past twelve years, civil service law has been subject to 26 changes, undermining the stability of the legal context. The State Commission for the prevention of corruption continued to address cases of nepotism, patronage, and political influence in the process of hiring civil servants.

Overall, legislative reforms in recent years have not eliminated all weaknesses.

Uniform standards for merit-based hiring, promotion, and dismissal are still lacking across the civil service, often due to a fragmented legislative framework. In Montenegro, for instance, it is estimated that about half of State regulators, agencies, and funds do not implement the Civil Service Law but follow only

Labour Code standards and procedures. (Meyer-Sahling *et al.*, 2020) In several countries, there is no noticeable reduction in the excessive number of interim management positions. In Serbia, for instance, candidates for the positions of Secretary of the Ministry, Assistant Minister, and Director of non-ministerial entities can be appointed as interim managers for three to six months at the discretion of the (political) head of the institution. Then, although interim appointments may not be officially renewable, they are often renewed in practice.

All of this is likely due to the fact that many of the reforms have not yet transformed existing hiring procedures and practices, focusing instead on improving them. Indeed, despite these reform efforts, several monitoring reports (such as the ReSPA studies and regular SIGMA monitoring reports) indicate that the politicisation of civil service recruitment remains widespread throughout the region.

As can be read in a ReSPA study (Meyer-Sahling *et al.*, 2020), nearly 60% of human resources managers considered political leadership support as either important or very important in the selection of senior civil service positions. Even at the level of non-management civil servants, more than 50% of HR managers attributed an important or very important role to political leadership in the recruitment and selection process. Albania's situation seems better than this picture[7]. Civil servants show a predominantly positive perception of the meritocratic nature of the recruitment process. However, there is a perception gap between civil servants and the average Albanian citizen. While 64% of civil servants surveyed think that civil servants are hired based on qualifications and skills, only 35% of Albanian citizens hold the same opinion. 51% or more than half of the public does not believe in meritocracy in civil service recruitment.

Along with the weaknesses, however, there are some noteworthy experiences.

An interesting mode of selection that, because of the way it is carried out, ensures good transparency and traceability, is one that uses tests administered by electronic means. In Montenegro, for example, with the last reform, an electronic test system was introduced for the professional entrance exam to work in public administration, including at the local level. Even more significant is the experience the Albanian administration had during the Covid-19 pandemic period, when the recruitment procedures for those institutions of the State administration that are centrally managed by the DoPA were conducted entirely online. The procedure consisted of two phases: an online written test and an online structured oral interview. For technical reasons and to ensure quality, the entire structured oral interview process, including the interviews of

7. National PAR Monitor Albania 2017-2018, Institute for Democracy and Mediation, Tirana, November 2018.

all of the candidates, was recorded. As we can read in the dedicated SIGMA report[8]: "now that DoPA has begun implementation of full online recruitment procedures, DoPA staff are confident that these online procedures can continue and be developed further. They could be used as an alternative way to conduct recruitment procedures, especially for lateral transfers and promotions". A major advantage of this type of selection method is the transparency of the process: the fully electronic test provides written test results to candidates in real-time, further increasing the transparency and quality of the hiring process. Another advantage is the increased integrity of the process due to the standardisation of the procedure, which is less permeable to corruption, and also the increased participation of candidates.

4.2. Performance evaluation: a system yet to be consolidated

The relationship between the fight against corruption and the performance evaluation system passes first of all through the importance of ensuring the efficiency of the administration. Inefficiency is a favourable condition for the penetration of corruption in public administration.

Inefficiency can generate corruption as people try to overcome delays and other inefficiencies. The payment of bribes can be seen as an antidote to uncertainty. The low quality of public sector management opens up spaces where corruption can flourish. Lack of accountability between government and citizens increases attempts to bribe public employees.

Since dysfunctional public administration is considered a major cause of corruption, a well-functioning public sector that provides quality public services is strategic to combating corruption.

Performance-based accountability has the potential to improve the performance of government services and to ensure the integrity of public action.

The fight against corruption, in turn, is also a fight against maladministration (inefficiency, slowness, hyper bureaucracy): improving administration to fight corruption.

Western Balkan countries have adopted several reforms in recent years to improve governmental performance capacity, including performance appraisal of individual employees, especially in the central government. Over the past decade, almost all of these countries have established an institutional framework for the introduction of performance appraisal. However, actual practice and

8. Online Recruitment to the Civil Service in Albania as a Response to the Covid-19 Crisis, May 2020.

implementation tend to lag behind. Often this is because individual staff performance appraisal systems are formally in place but are not linked to the overall managerial environment and professional development activities and, in some cases, are conducted only as a formality.

A key issue is a link between performance appraisal and salary increases. For this to work, however, the wage system needs to be defined organically. In Albania, for example, the wage system is based on a job classification system, which requires further reform. The fairness and consistency of the system is undermined by the continued lack of a wage policy that establishes clear criteria for wage supplements and salary increases.

Another important issue concerns the uniformity of salary supplements across administrations. The fragmentary nature of the laws affecting public employees in the various administrations that we pointed out above also affects the variety of salaries. In North Macedonia, for example, the salary system has not been unified, while *ad hoc* payment allowances have continued to be given to civil servants without any transparent justification[9].

Another element that needs to be considered is the size of salaries, which, if too low, discourages productivity. In Montenegro, for example, salaries in the public sector remain modest and the pay system is not attractive to civil servants and government employees, and does not appear to be based on clear, fair, and transparent criteria.

Another key aspect of the personnel evaluation system is the linkage between performance evaluation and decisions about promotion, demotion, or training needs. In many countries, this aspect has proven to be meaningless and formal, often leading to almost all employees being evaluated as top performers[10]. This can also be due to too little time given to the employee to achieve the required results. Interesting is the choice of Serbia, which in the last reform provided a longer period to achieve performance results.

4.3. Perspectives for an improvement of evaluation systems to increase public ethics

The importance of an adequate personnel evaluation system, both for access to employment and to reward productivity and incentivize good behaviour, suggests that work should continue on its improvement. In the countries of the

9. European Commission, Commission Staff Working Document, North Macedonia 2020 Report.

10. SIGMA, *Baseline Measurement Reports*, OECD Publishing, 2015.

Western Balkans, reforms of public administration, also in view of EU entry, have affected these sectors to varying degrees. However, there remain many aspects that still need to be worked on.

The ReSPA study (Meyer-Sahling *et al.*, 2020) makes three sets of recommendations: improve the knowledge base of selection committees; improve regulatory frameworks (especially in areas such as temporary employment in public service positions); and, finally, look to the future. Specifically, concerning the latter, they suggest revising entrance examinations, raising the bar on the level of candidate preparation, improving monitoring and transparency, and developing mechanisms for information sharing and learning.

In addition to this, some other useful suggestions for the future can be made. Concerning the procedures for access to employment, it is necessary to diminish the relationship between committee and candidates, avoiding local committees, centralising the tests, and also allowing the winners to choose the location. Regarding the latter, there is the Albanian example of the pool examination, which must be watched carefully precisely because it allows the choice of location. Still, about access, it would seem useful to provide that trade unionists and politicians cannot be part of competition commissions, imagining commissions formed mainly or exclusively by persons outside the administration. It could also be useful to foresee that a minimum number of women be present on commissions, taking into account the relationship, albeit controversial, between gender and corruption. (Stensöta, Wängnerud, 2018)

Even for the performance evaluation system, however, it is important to provide an explicit link between desirable behaviour and integrity, to encourage fair and impartial, as well as efficient, behaviour. Another key element concerns the impartiality of the decision-maker. With this in mind, an independent commission must be provided to oversee the evaluation and compliance with the rules governing it.

In conclusion, however, alongside the precise indications of possible improvement, it is necessary to consider the effectiveness of the reform policies. The feeling is that the imposition of reforms on the selection of civil servants was seen as an external factor and resulted in a mere formal implementation of legislative reforms. What is missing is a combination of multiple protagonists supporting change. In other words, external pressure did not activate both political and public will, both necessary for a change. Brinkerhoff (2000, pp. 242-243) includes the source of the initiative in his five indicators of political will for the fight against corruption. When it is external, it indicates a less genuine intent to pursue reform. Multiple authors also highlight the need for a "critical mass" to demand and support change. This includes active engagement of civil society, but the external source of the need for change made it complicated.

5. Training of civil servants

The quality of civil servants in public administrations and the integrity of administrative structures depend on the provision of mechanisms and instruments capable of ensuring comprehensive training for civil servants. Although European and international bodies have not always set themselves specific parameters for assessing the adequacy of the training provided to civil servants, it is useful to consider the presence and declination of three elements: the presence of public schools for the training of civil servants; the legal significance of training activities and the instruments that enable them to be effective; and the knowledge and skills provided by the training of public personnel.

5.1. The establishment of public schools for the training of civil servants

The establishment of national schools of public administration or, at any rate, of training schools for civil servants is a decisive element in ensuring quality and continuity in the training of civil servants, particularly those who actually exercise administrative power, such as the top figures in public administrations.

Public schools for the training of personnel, in theory, are not only structures designed to ensure, on the one hand, the appropriate knowledge for the performance of public functions (traditional, technical-scientific and ethical knowledge) and, on the other, the managerial skills and concrete management of that knowledge for daily administrative action and for the resolution of ethical dilemmas. On closer inspection, they are places with a greater, systemic value, within which a shared administrative culture is stratified and in which a body of officials emerges, in particular of top officials, who have their own common cognitive and ethical baggage, at the service of the effective guarantee of citizens' rights and the concrete care of the public interest, not only functional to the achievement of an objective or of certain results in the performance of the function.

The European Union and international bodies have attached particular importance to the establishment of schools of public administration in countries seeking to join the Union. In the Western Balkans, for example, the Regional School of Public Administration (ReSPA) has been established since 2010 as a joint initiative financed by the European Commission and the governments of the area (Albania, Bosnia and Herzegovina, Republic of North Macedonia, Montenegro and Serbia) with the aim of addressing and resolving weaknesses in their administrative structures.

However, the presence of the ReSPA has not prevented the establishment of administrative training schools at the national level: in 2017 Serbia, established the National Academy of Public Administration[11], while Albania established the Albanian School of Public Administration (ASPA) in 2013[12].

The establishment of a regional school of public administration certainly had the advantage of filling an important gap in the Western Balkans, but the difficult coordination between different governments on training programmes and the voluntary participation of individual administrations in its activities did not guarantee constant training of civil servants.

5.2. The legal significance, planning and scope of training for civil servants

The legal relevance of training, the scheduling of training activities, and the number of civil servants covered by training are a set of determinants for understanding the adequacy of the legal training regime for civil servants.

Moreover, the fact that training is compulsory and that it is planned consistently are two parameters that are taken into account by international bodies when assessing the effectiveness of training. These documents emphasise that training for civil servants must be provided for by law and must be regarded both as a right and as a duty of the civil servant. Moreover, strategic training needs must be periodically identified, adequately funded and annual or biannual training plans must be continuously developed through transparent, inclusive, coordinated or supported processes. Finally, the plans, in order to make them more and more suitable to the training needs of the administration, must be monitored and evaluated periodically and intended for all civil servants, *i.e.* all those (public or private employees) who perform a public function, in particular (but not exclusively) for top management[13].

In the Western Balkans, training is always included in the rules governing public employment, both as a right and as a duty of the employee, but very often it is only addressed to the top management of the administrative offices and not to the officials present in the office, and it is left to the assessment of the public manager's decision.

11. The National Academy of Public Administration was established under the Law on the National Academy of Public Administration ("Official Gazette of the RS", n. 94/2017 of 19 October 2017) and started functioning in January 2018.

12. Established by Act No. 152/2013 On the Civil Servants.

13. Elements present in Principle 6 of the section dedicated to Human resource management within the 2017 SIGMA-OECD Principles of Public Administration for EU candidate countries and potential candidates.

The legal regime of training is very fragmented and is richer in countries where there is a public training school. In these countries (Serbia and Albania), training is compulsory following the first recruitment for specific roles or categories and, in certain cases, it is necessary for career progression (Albania).

5.3. The knowledge and skills provided by training for civil servants

In addition to the establishment of public training schools and the legal regime of training activities, the third and final element influencing the effectiveness of training in terms of the quality of civil servants is the type of knowledge and skills it guarantees.

As we have seen, European and international documents have often touched on this aspect. Although they never fully go into the type of knowledge and skills needed to guarantee the quality and impartiality of public intervention, from reading them it is possible to deduce at least three strands of knowledge and skills needed to guarantee the quality of the official and therefore of his or her integrity.

Officials undoubtedly need traditional knowledge and skills, such as those transmitted by the social sciences; technical-scientific knowledge and skills, especially in certain sectors of administrative activity exposed to corruption risks such as public procurement; and finally, ethical knowledge and skills, linked to the management and resolution of ethical dilemmas that may arise daily during administrative action.

In the Western Balkans, training activities focus on more traditional skills, *i.e.* legal and economic skills, and traditional managerial skills. More technical knowledge and skills (engineering, architecture, IT, etc.), on the other hand, seem to be neglected, despite the fact that they are very useful in guaranteeing the integrity of public offices when the administration deals with private individuals, especially in sectors exposed to the risk of corruption, such as public contracts. This may be a consequence of the absence in the rules governing public employment of specific provisions dedicated to particular technical roles in public administration.

Moreover, the training activities of the Regional School of Public Administration (ReSPA) and the Serbian National Academy of Public Administration seem to devote more space to ethical knowledge and the management of ethical dilemmas which may, in the medium to long term, lead to an overall increase in the integrity of civil servants.

5.4. Improvements needed for adequate training

In conclusion, the training of civil servants in the Western Balkans still needs to be better defined in its main elements. Although progress has undoubtedly been made in recent years, there are still weaknesses in effectively guaranteeing the quality of civil servants through adequate training programmes.

Two fundamental issues need to be addressed: firstly, coordination between training schools and administrations, in particular as regards to the knowledge and skills that training programmes must offer civil servants; secondly, the prescriptiveness of training obligations and the guarantee of widespread training in all administrations and for all types of administrative activity. Two problematic issues whose resolution would greatly improve the quality of civil servants in the Western Balkans.

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6
The integrity of public officials: public ethics, conflicts of interest and rules of conduct

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Summary: 1. Premise: strengthen integrity to reduce corruption – 2. Social norms and ethical conducts – 3. Promoting integrity: from the workplace as a laboratory of integrity to gender mainstreaming – 3.1. Workplace as a laboratory of integrity – 3.2. Integrity and gender mainstreaming – 4. The instruments of integrity and guidance of the conduct of public officials – 4.1. The duties of the public official as instruments of integrity – 4.1.1. Conflict of Interest – 4.1.2. Codes of conduct – 4.2. Governance in matters of integrity to oversee the duties of conduct: from the international to the national dimension – 5. A normative standard (European and international) of duties of conduct as an instrument of integrity of public officials – 5.1. The prescriptive nature of the duties of conduct – 5.2. An extended scope: the number of officials and administrative activities involved in the duties – 5.3. The duties of conduct related to the prevention of corruption and its administrative activities – 5.4. The effectiveness of the duties of conduct: administrative codes of conduct, disciplinary sanctions and control bodies – 5.4.1. The right disciplinary responsibility: adequate offices and effective sanctions – 5.4.2. The codes of conduct of the individual administrations – 5.4.3. Governance of integrity to oversee the effectiveness of the duties of conduct.

1. Premise: strengthen integrity to reduce corruption

The challenge of corruption is very closely linked to the integrity of officials and political staff, to their ethics. It is clear, already reflecting on the concept of being "intact" (meaning, "not corrupt"), that the fact of being able to rely on public personnel with their own ability to resist attempts at corruption and to display the "virtue" that makes them inclined to look after the public's interest is an extraordinary resource for any institutional system. In his essay on bureaucracy, Luhmann dwelt on the "ethics of the German bureaucracy", and in

1. The work is the result of a common study, but in any case they are to be attributed: to M.G. Pacilli paragraphs 2 and 3, to M. Falcone paragraph 5, to F. Merenda paragraph 4, to E. Carloni paragraph 1.

more general terms the theme is still present even in the critical reflections with respect to the "standard" models of new public management: it is a question of persistent topicality, according to lines of reflection fed by the Weberian idea of bureaucracy itself. The issue arises no less with regard to political personnel, with sometimes dangerous intertwining in systems in which the separation between politics and administration (such as career paths and, in particular, as a guarantee of the bureaucratic merit system) is less marked.

Precisely in the countries where the risk of corruption is most strongly felt, the issue therefore arises strongly, in terms which, however, cannot only be descriptive (of the state of affairs), but prescriptive, as intended to strengthen the integrity of officials (bureaucratic and elective) and sometimes to attempt to re-establish largely deficient public ethics by way of regulation.

The ethics of a public official and his or her integrity is therefore a question that is closely linked, on the one hand, to the access paths to public offices, on the other to the investigation of the reasons for unethical behaviours and therefore of the strategies for their reduction: this last issue particularly calls into question the instrument of ethical codes, understood as a set of rules of conduct capable of defining "good officials", defining their values positively and negatively evidencing prohibited conduct.

Codes (variously defined: codes of ethics, codes of conduct, codes of conduct) tend to be used in different contexts, both to codify the existing norms (defining and strengthening an average "standard" already present), as well as to establish new ones. It is often used when the gap between real rules and behaviour grows, and this often when it is the rules that are intended to raise the level of the conduct of officials who instead continue to follow practices and conduct that are perceived as inadequate. Therefore, in practice, ethical codes are often present as an "accompanying" tool for reforms aimed at improving the functioning of institutions, particularly public administrations. Therefore, there is a tendency, through these, to facilitate compliance with the laws and to integrate (and sometimes reform) insufficient customary rules.

With this tool, it is possible to try to combat the spread, or the persistence, of deviant behaviour, using tools other than the criminal instrument: this is another aspect that deserves attention. In the system set up to now for the prevention of corruption (in its various manifestations which are strongly affected by historical-political and cultural coordinates, albeit within a model with increasingly common features), the prevalent part of the mechanisms precedes individual conduct, in the sense that this develops into an organisational or procedural dimension (think of transparency mechanisms, or of risk management systems through specific programs). In the case of codes of conduct, and more generally of interventions relating to the integrity of officials, a preventive approach (of

a priori guidance of conduct) and a repressive approach (of sanctioning improper behaviour) are combined with a variable balance that depends on the sanctions related to the violation of the duties contained in the codes of conduct. Precisely through the rules of conduct, however, it is possible to perceive the existence of a phenomenon of "corruption" which has its own autonomy with respect to the criminal notion, in the sense that the behaviour prohibited by the codes of conduct certainly cannot be limited to those already provided for by criminal law.

In general terms, these tools can be traced back to the "Madisonian" idea of "auxiliary precautions" with respect to the degeneration of the conduct of persons in charge of public functions. These "auxiliary precautions" represent a regulatory model with particular characteristics, definitely anchored in content to a vision of public ethics, as a guide for employees and as different from private ethics. Against the persistence of widespread malpractice within the administrative, bureaucratic and (with less frequency and attention) political dimensions, the growing need, in a political-social context in which shared rules are increasingly being lost, such as rules of "good behaviour", and on the other hand, the need to "break" "toxic" schemes of conduct traditionally present in organisations, imposes the need for new interventions aimed at the construction and reconstruction of the ethos of the official.

As is clear, the connection with the problem of corruption does not, however, exhaust the proper role of ethical codes: the role that these instruments play in directing the conduct of employees with respect to the objectives and values assigned to the administration, which, in other words, is equivalent to saying that through these tools one contributes to functionalizing the behaviour of employees for the purposes of the institution as such.

What are these "codes"? First of all, the "decalogues", legally relevant, which contain a series of regulations, a violation of which can result in legal consequences of a disciplinary or, at times, a criminal nature. Also included are "Perfect and imperfect" rules, that is to say with sanctions or not, containing "positive" precepts, as a guide in conduct, as well as prohibitions covered by specific sanctions (disciplinary, but not only), united by an ethical tension, so that the legal sanction, where present, is always accompanied by the evaluation in terms of "disapproval" by the legal system and by the people directly and indirectly involved in the conduct of the official.

Why, then, is there often talk of "ethical codes"? Not because their effectiveness unfolds only in the field of morality of the group to which they are addressed, but because the norms contained in it aim at the construction (and reconstruction) of ethical values, and because the code aims to trigger the personal absorption of values and creation of virtuous mechanisms in the conduct of public officials.

It is particularly useful in providing an "orientation" in the conduct of officials, as long as it is consistently applied and enforced by the leadership in the various organisations, following the literature on the subject, to regulate in particularly "grey" area of administrative conduct: an area in which the ethical dimension of individual choices and behaviour is very strong, and in which the connection between the public function to be pursued and the official's private interests is particularly delicate.

This, whether the rules of conduct are formulated as a support to the decision (and to the internal and external evaluation of the conduct, even if only potential), that is to say in positive terms, or whether they are formulated (as is more frequent in contexts with higher levels of corruption) by prohibitions and obligations. On closer inspection, in any case, the rules of conduct contain both elements: guides to virtuous conduct together with specific prohibitions.

An interesting point is the fact that the rules of conduct, and in particular the ethical codes, therefore transcend the sole dimension of the employee's service (understood as "work performance", albeit with all its peculiarities) and become an instrument through which the same exercise of functions and, therefore, the same administrative activity are regulated, with the provision of specific duties and conduct required of the employee, thus affecting citizens' rights. This emerges both in the Italian experience and, in a marked way, at the level of the European Union: at the European level, in the code of conduct for officials and members of the European Commission, we find provisions aimed at regulating the relations between the administration and citizens, even before the in-service behaviour of employees.

On closer inspection, however, this is true in general terms: the integrity of the official is not just an internal issue of the relationship between the employee and the organisation, but directly concerns the rights of citizens, who only when faced with an intact administration see their rights and legitimate interests truly guaranteed.

2. Social norms and ethical conducts

Ethical conducts are frequently viewed as the result of an individual's inherent and dispositional convictions, with little regard for the normative influences of the groups in which individuals live, from the workplace to the broader society (Ellemers, Van Der Toorn, 2015). Formal norms, *i.e.* laws that recognized authorities adopt in order to govern are crucial in order to guide and constrain individual behaviour. Apart from this type of norm, another critical regulatory tool for influencing individual ethical conduct is represented by social norms.

(Cialdini, Trost, 1998) Social norms emerge from group interactions, define what is legitimate and acceptable in a society or groups and, as such, serve as a behavioural guide for the group as a whole, eventually becoming significant moral anchors when individuals internalise them. (Ellemers, 2017) Adherence to social norms ensures membership in an organisation, boosts members' self-esteem, and serves as a means of expressing loyalty and commitment. (Cialdini, Trost, 1998)

Morality is necessary for groups to function, and members adhere to group moral standards in exchange for respect within the group itself. The individual's proclivity to conform to the majority's social norms is particularly relevant when discussing ethical organisational behaviour. Indeed, if conformity to group norms is regarded as a sign of group loyalty, deviance and dissent are frequently regarded as indicators of disloyalty and disengagement. (Jetten, Hornsey, 2014) Deviance can be detrimental to a group's ability to function normally, or even to its very existence and as a result, the group elicits behaviour from its members aimed at reducing or eliminating it. Additionally, continued exposure to behavioural norms at odds with those of the larger society may condition individuals into modifying their understanding of what is ethical, rendering broader moral norms irrelevant. (Moore, Gino, 2013)

3. Promoting integrity: from the workplace as a laboratory of integrity to gender mainstreaming

For all those involved in governance, integrity is critical to acting in an ethical manner. (Huberts, 2018) It is motivated by more than immediate and personal reasons; it also reflects adherence to broader societal norms (including gender role norms), and it is key to consider how these norms may influence individuals' behaviour and attitudes in work and organisational settings.

3.1. Workplace as a laboratory of integrity

The workplace represents a laboratory of integrity wherein the individuals can engage in a continuous process of ethical learning. (Smith, Kouchaki, 2021) People indeed spend a significant portion of their daily lives at work, and frequently find themselves in morally challenging situations. As such, organisations constitute an ideal setting for ethical learning and moral character development. In order to make the workplace an integrity laboratory, people's moral character need to be considered not as stable and immutable, but as the result of a complex interaction of psychological, social, and contextual factors. This implies that integrity

development is a lifelong endeavour and that ethical learning requires significant effort and intensive work. Accepting that our capacity for ethical behaviour is limited is a critical mental shift, and paradoxically, precisely because we place an excessive amount of faith in our moral capacities, we are constantly at risk of ethical transgressions. To avoid falling into this error, it is crucial to cultivate moral humility with an acceptance of our ethical fallibility, as this enables us to strengthen ourselves and improve our ability to deal with ethically complex situations.

3.2. Integrity and gender mainstreaming

The relationship between (female) gender and integrity violations and corruption has received increasing interest since 2001, when the first two studies on the topic by Dollar and colleagues (Dollar, Fisman, Gatti, 2001) and Swamy and colleagues (Swamy, Knack, Lee, Azfar, 2001) were published. These studies, conducted in a variety of countries, showed that a higher number of women in parliament was associated with lower levels of corruption in the country itself, even when other relevant variables, such as the general level of social and economic development or average years of education, were factored in. This relationship has also been found in subsequent studies (Sundström, Wängnerud, 2016) and today there is widespread agreement that gender equality is a key factor in promoting integrity and combating corruption. In clientelistic systems, opportunities for corruption often have a gendered connotation: for example, recruitment often takes place on the basis of male gender homogeneity, seen as predictable and secure, as opposed to gender diversity, seen as potentially uncontrollable. In order to proliferate, corruption often needs informal networks built on trust, secrecy and mutual protection. Men, historically occupying positions of power more often than women, are the people who benefit most from these networks and therefore have an interest in preserving them. (Bjarnegård, 2018) Inequalities in a broad sense, especially when legitimised, accepted and not opposed, create fertile conditions for perceiving corruption as inevitable. Patriarchy, by defining itself as a social system in which men are legitimized in an imbalance of power in relation to women, can become a fertile ground for corruption, as it provides a foundation for other forms of unequal and partial treatment. (Alexander 2016)

The issue of the relationship between gender inequality and corruption is a complex one and it is important to avoid an essentialist rhetorical drift on the basis of which women are by nature less corrupt or corruptible. Pacilli and colleagues (Pacilli, Giovannelli, Spaccatini, Lopez Ortiz, 2021) examined whether, rather than individuals' gender per se, their gender ideology may be

relevant in explaining the level of perceived acceptability of corruption. In a cross-cultural study involving 911 participants from Italy and Ecuador, two countries ranked 92nd and 52nd (out of 180) in Transparency International's 2020 rankings (Transparency Int., 2020) for perceived corruption, it was found that, even after controlling for participants' gender, adherence to a traditional view of gender roles was associated with increased acceptability of corruption, as measured by how acceptable it was in different situations for a public official to accept a bribe in exchange for a service.

As previously stated, there is widespread agreement that gender equality is critical in the fight against corruption and as such, gender mainstreaming constitutes an essential tool for promoting integrity. By sharpening our focus on and understanding gender power relations and inequalities, we can strengthen governance and anticorruption interventions. As Ortrun Merkle (Merkle, 2018) has illustrated, gender mainstreaming is critical throughout the anti-corruption program's cycle, including 1) assessment and analysis, 2) planning and design, 3) implementation, and 4) monitoring and evaluation. Gender assessment and analysis typically begin with the collection of gender sensitive data (sex-disaggregated data such as statistics and interview results) and the application of a gender lens to examine the causes and consequences of gender differences in terms of power dynamics. To ensure gender equality, the project must include women's organisations and women from diverse backgrounds. Anti-corruption programs must also consider gender issues during the planning and design phases. Among the factors to consider when developing gender-sensitive policy objectives are addressing the concerns of both men and women and committing to changing attitudes and institutions in general. Throughout implementation, it is critical to enable women's participation and capacity building, and the project team must constantly raise awareness of the differences between men and women's responses to anti-corruption interventions. Gender-sensitive indicators and milestones are intended to collect information about the impact of the intervention on men's and women's realities. As such, it is critical to ensure that all data collected is disaggregated by age, gender, and ethnicity during the monitoring and evaluation stage.

4. The instruments of integrity and guidance of the conduct of public officials

The integrity of public officials is a principle consisting of a series of legal duties, measures and administrative obligations: its fulfillment requires intense reflection and professional training.

At the international level, this principle is considered as one of the pillars of political, economic and social structures and, therefore, a determining element of the well-being of a state; it is also considered essential for the governance of public affairs, as an element of safeguarding the public interest and strengthening fundamental values such as the commitment to pluralist democracy based on the rule of law and respect for human rights. (OECD, 2017; Huberts, 2018; Erhard, Jensen, Zaffron, 2014; Graycar, 2020; Cox, 2009; Menzel, 2015; Anechiarico, Jacobs, 1996)

Integrity is one of the important principles and values of European "*good governance*", considered as the "*core principle*" whose purpose is to model behaviour in public administration. (European Commission, 2017; Transparency Int., 2014a, Szarek-Masson, 2010) Furthermore, the anti-corruption and integrity framework is considered by the European Commission as a mechanism that directly affects compliance with the rule of law. (European Commission, 2020a) A strong rule of law and a solid anti-corruption culture result in citizens' trust where integrity is the norm and compliance with the law is protected. (European Commission, 2020b) It can therefore be said that the scope of application has been broadened beyond the criteria of formal democracy to reach areas of substantive democracy, such as anti-corruption and integrity measures. (Balfour, Stratulat, 2011)

Consequently, integrity must be seen as a criterion for EU membership: the adoption of anti-corruption and integrity rules and actions have become essential for the Member States and at the stage of negotiations for States that seeking to join the European Union. (Schroth, Bostan, 2004) To demonstrate this, some states in the Western Balkans area (European Court of Auditors, 2022; European Commission, 2019; Elbasani, Šelo Šabic, 2017; Center for the study of democracy, 2018), are placing the adoption and adaptation of their systems to the required standards at the centre of their actions. (GRECO, 2020; ProTRACCO, 2020; Hoxhaj, 2020; Sotiropoulos, 2017; Mungiu-Pippidi, 2002) In fact, the implementation of integrity and anti-corruption rules are considered as one of the main conditions necessary for the EU accession process to move forward. (European Commission, 2020)

The main reference system shared by the States on the issue of integrity is that of international conventions[2]. Over the last few decades, the result is a widespread conformation of practices at a global level, useful for the adoption

2. Since the mid-1990s, the following Conventions have been approved: the United Nations Convention against Corruption of 2003; the Organisation for Economic Co-operation and Development (OECD) Convention against Corruption of 1997; the Criminal Law Convention (1997) of the Council of Europe; and the Civil Law Convention (1999).

of tools and standards aimed to increase the level of integrity in the public sector. The purpose of the Conventions avails to enhance the integrity of public officials and to strengthen administrative action. Conventions also play a key role by providing frameworks that set anti-corruption standards and address cross-border issues. (Transparency Int., 2014b)

It is necessary, in a preliminary way, to consider two aspects: the instruments of integrity are related with the measures aimed at the fight and prevention of corruption, even if they are not limited to them (Heywood, Kirby, 2020; Hardi, Heywood, Torsello, 2015; Heywood, Marquette, Peiffer, Zuniga, 2017); national rules on integrity vary widely between countries, due to the peculiar nature of the risks of integrity and legal, institutional and socio-cultural differences.

Therefore, the system that concerns the promotion of integrity is considered as a combination of solid legal rules with a set of measures useful to contain (preventing) the unethical actions of holders of public functions and a series of activities aimed at staff training.

Some of these measures serve to increase the legality, quality and efficiency of the public sector, others intervene in the eventuality that they are violated. The rules on transparency, risk analysis and management programs and codes of conduct serve to ensure accountability, compliance with the law and the pursuit of public interest; others correspond to restrictions (for example, in matters of conflicts of interest), administrative responsibilities and disciplinary sanctions.

The main elements concerning the promotion of the integrity of public officials are briefly illustrated below, through two points: 1) behavioural duties enshrined in state legislation, based on international and European guidelines, along with preventive measures; and 2) governance in matters of integrity.

4.1. The duties of the public official as instruments of integrity

Once a citizen fills a public role, there is the necessity to adhere to certain standards of conduct, which collectively represent the expression of values and principles relating to his or her status enshrined in the Constitutions.

Standards of conduct are incorporated into the legal system and organisational policies, which establish the underlying principles and clarify the boundaries of acceptable behaviour. (OECD, 2020)

In each legal system, the range of duties varies by virtue of the office and the nature of the power: political personnel and those employed by the public administration. For the former, there are legal and political responsibilities that affect non-re-election and removal, while on the preventive front there are duties that limit the right to exercise and retain office.

Much more complex and rigid is the set of duties that public officials are required to fulfill, which we will focus on in the following pages. With respect to political personnel, they clearly have no political responsibility; however, there are other forms of responsibility with very articulated preventive measures.

Leaving aside the laws on civil servants and how they are introduced in the respective Constitutions[3], which vary greatly according to the "administrative constitution" of each state, we focus on the duties present in the following disciplines: conflicts of interest and codes of conduct.

4.1.1. Conflict of Interest

One of the key principles for those who work in public administration is the subordination of personal interests to public interests. Failure to comply with this principle is the basis of most of the actions contrary to the correct exercise of the public function of any legal system. (Auby, Breen, Perroud, 2014)

When we speak about conflict of interests, we inevitably find the violation of one of the most important principles of the public sector, that is the principle of impartiality, considered as a duty par excellence, from which a multiplicity of institutions and rules derive. (OECD, 2003a)

Regarding this matter, we can say that the conflict of interest "*implies a conflict between the public duty and the private interests of a public official, in which the public official has private interests that could improperly influence the execution of their official duties and their responsibility*". (OECD, 2003b)

The United Nations Convention against Corruption of Mérida (2003) (Heimann, 2018; Chowdhury, Rose, Kubiciel, Landwehr, 2020; Rose, Kubiciel, Landwher, 2019) is the first global agreement characterised by a change of strategy and featured with various rules and provisions of a preventive nature (Parisi, 2017), as well as the only legally binding treaty against corruption[4].

The Convention addresses the issue of conflict of interest, but does not provide a detailed definition of it. Article 7 requires that: "each State shall do its best, in accordance with the fundamental principles of its internal law, in order to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest". Much more specific is paragraph 5 of art. 8, in which States are required to adopt measures that oblige public officials to

3. See, by way of example, the following articles: art. 103.3 of the Spanish Constitution and art. 97 of the Italian Constitution.

4. In the text of the Convention we find various references to the principle of integrity: in the preamble it speaks of the need to safeguard integrity; it is also one of the three main objectives expressed in art. 1: "*the promotion of integrity, responsibility and good faith in the management of public affairs and public goods*".

declare: "to the competent authorities, in particular, all their external activities, employment, investments, goods and any substantial gift or advantage from which a conflict of interest with their functions as public officials".

The implementation of articles 7 and 8 of the UNCAC Convention is one of the main factors on which States must work, an example being the Western Balkans which are working in this direction. (ACA, 2018; Lakovic-Draskovic, 2021)

The 2017 OECD Council Recommendation also urges Member States to define high standards of conduct: "establishing clear and proportionate procedures that help prevent breaches of integrity standards in the public sector and manage actual or potential conflicts of interest".

States must ensure that rules in this area can: "*guarantee that conflict of interest policy is supported by organizational strategies and practices to help identify the variety of conflict-of-interest situations*". (OECD, 2003b) The European Commission has recently specified that the rules on conflict of interest should be implemented in an overall preventive manner, as they aim to prevent, in the first place, the situation where the power of an individual is conditioned by personal interests. (European Commission, 2021) For this reason too, the candidate countries of the Western Balkans (apta-mod) are implementing, although with difficulty, the recommendations and assessments of European and international bodies. (OECD, 2021; Implementation Review Group, 2019; GRECO, 2020)

4.1.2. Codes of conduct

The code of conduct is considered the main tool for promoting integrity in the public sector[5]. The link between integrity and codes of conduct has been present since the first versions of codes drawn up by the United Nations in 1997 and by the Council of Europe in 2000.

A code of conduct defines a series of principles and norms that serve to translate ethical rules into actual legal duties. With this purpose, GRECO, which considers codes of conduct to be an essential part of ethics laws (GRECO,

5. The link between integrity and codes of conduct is clear in the *Recommendation n. R (2000) 10 of the Committee of Ministers to Member states on code of conduct for public officials*, art. 3: "*The purpose of this code is to specify the standards of integrity and conduct to be observed by public officials, to help them meet those standards and to inform the public of the conduct it is entitled to expect of public officials*". See also *International Code for Conduct for Public Officials*, art. 2: "*Public officials shall ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies. They shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner*".

2005), has often recommended the development of rules of conduct in a single text, precisely in the codes. (GRECO, 2019)

Their adoption is recommended to regulate and guide the conduct of all public officials, both at international and European level. Not surprisingly, the UNCAC Convention asks states to encourage the integrity of their public officials at the very beginning of the rule dedicated to codes[6] (GRECO, 2015).

The States find the main reference on the matter in Article 8 of the UNCAC Convention. Paragraph 2 of Article 8 requires each State party to: "*apply, within its institutional and legal systems, codes or rules of conduct for the correct, honourable and adequate exercise of public functions*". On the content of these tools, unlike the discipline of conflicts of interest, some measures are specified that the codes must include in their national versions: Article 8.4: "*measures and systems that facilitate reporting by public officials to the competent authorities, of the acts of corruption which they have become aware of in the exercise of their functions*"; the aforementioned article 8.5; Article 8.6: "*disciplinary measures or other measures against public officials who violate the codes or rules established under this article*".

However, the standards evincible in the Convention are to be considered as "*minimum standards*"[7] and therefore not exhaustive. Each code reflects fundamental values and principles common to many States[8], but the duties of integrity are much more articulated, as well as greater with the advent of state anti-corruption legislation.

4.2. Governance in matters of integrity to oversee the duties of conduct: from the international to the national dimension

The integrity system rests on three levels: OECD and UN at the international level; Council of Europe at the European level; the bodies (agencies/authorities) charged with the supervision, control and adoption of measures at national level.

6. 1. *For the purpose of combating corruption, each State Party shall in particular encourage the integrity, honesty and accountability of its public officials in accordance with the fundamental principles of its legal system.*

7. On whether international documents provide minimum guidance on standards of conduct, one example is the 2017 OECD Recommendation where it specifies that: "*go beyond minimum requirements, prioritize the public interest, adhere to public service values, and an open culture that facilitates and rewards learning and encourages good governance*".

8. For example, the rule of law, legality, political neutrality, loyalty, honesty, impartiality, accountability, efficiency and effectiveness, and transparency.

The implementation of the rules and standards of integrity is monitored by intergovernmental cooperation working groups: at the European level there is GRECO, established within the Council of Europe; within the UN there is the UNODC; the Working Group on Bribery (WGB) within the OECD.

Integrity controls are developed through three categories: 1) verification and monitoring of the compliance of public administrations with integrity rules and measures; 2) measurement and assessment of the level of integrity of public administrations; 3) application of the legal effects of the violation of the rules and integrity measures by public administrations. (D'Alterio, 2017)

The commitment of the OECD in the field of integrity and anti-corruption starts from the Conventions, but is also developed through recommendations, studies and specific reports. In fact, in 2017 the aforementioned "Recommendation on integrity in the public sector" was adopted: States were urged to adopt measures in an integrated and global perspective, in which the crucial role of society must be considered.

Recently, the OECD published a manual on public integrity, with the aim of better defining the scope and purpose of the Recommendation. The content is based on the explanation of the standards that States must adopt through procedures and mechanisms aimed at preventing violations and spreading the culture of integrity[9].

The Working group on Bribery (WGB) is a working group that performs peer-review monitoring, meets once a year and is composed of one representative per State.

Review is seen as an effective tool in creating transparency on state behaviour, mobilising pressure and stimulating learning. (Jongen, 2021) The Group works to verify that States have adapted domestic legislation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997.

Also on an international level, there is the UNODC (United Nations Office on drugs and crime), which is a United Nations agency that also deals with integrity and acts as the "guardian" of the Merida Convention. There is also the Conference of States which has acceded to the UNCAC Convention; it meets every two years and adopts decisions and resolutions, as well as supports the States in implementing the activities in relation to the reference Convention.

9. The main points are as follows: clearly defined and mandatory high standards of conduct in the legal framework that prioritize the public interest and adherence to public service values; legal and regulatory frameworks and strategies that incorporate integrity values and standards; clear and proportionate procedures and processes to prevent and manage issues that could violate public integrity standards if left unchecked; internal and external communication measures to increase awareness of public sector values and standards.

The Council of Europe (CoE) plays a crucial role in promoting human rights, democracy and the rule of law. The fight against corruption and the promotion of integrity are also essential for safeguarding the rule of law/constitutional state. The main body responsible for this is GRECO, which has the task of monitoring compliance with anti-corruption standards through a process of mutual evaluation and peer pressure. It plays a very important role because it stimulates states to adopt integrity measures and strengthen institutions that are not fully compliant with the relevant conventions and standards developed by the various working groups.

The activity is carried out through evaluation rounds, which are based on specific issues; monitoring, on the other hand, consists of an evaluation procedure that is valid for everyone and that produces recommendations aimed at the adoption of measures; finally, the conformity procedure which serves to verify whether the recommendations are met.

At the national level, there are the institutions for the prevention and fight against corruption, which have different tasks and differ in the powers and activities carried out (SELDI, 2019). According to the OECD, any new institution of this type must adapt to the specific national context, considering different cultural, legal and administrative circumstances. (OECD, 2013)

Authorities perform several tasks and play a key role in the overall system. The preparation of measures and actions in the fight against and prevention of corruption are completed with control and sanctioning activities (where permitted).

However, in addition to these skills, they have the task of communicating with the authorities of other states in order to share best practices and therefore improve their systems. Therefore, the logic of integrity and the prevention of corruption relies heavily on cooperation between states, precisely because it recognizes public integrity as a shared value on a global level and as such, it requires the synergistic contribution of all national experiences.

The promotion of integrity, therefore, consists of a governance characterised by cooperation between institutions and agencies as well as the people involved in order to create a global strategy, as much as possible in compliance with the standards and norms enshrined in the Conventions and other international and European documents.

The implementation of the instruments of integrity and the orientation of the behaviour of public officials takes place, certainly in compliance with international and European standards and documents, but the decisive process is the national one: elaboration of state legislation, preparation of public policy, activities and tasks of the authority and controls, and training of all personnel.

A solid system of public integrity is one in which states satisfactorily implement the recommendations on the subject, prepare integrity tools consistent with the needs of their public administration and go beyond the mere formalistic fulfillment of the measures. Precisely for these reasons the duties of public officials alone are not enough to carry out the overall design of the "Integrity system". To do this, it is necessary to develop a culture of integrity that starts from training and that inserts the rules of honesty into the broader framework of public management and governance.

After having outlined a general framework on the integrity rules of the public official, below we will focus on some more specific elements, also referring to the experiences of some candidate states to join the EU in the Western Balkan area.

5. A normative standard (European and international) of duties of conduct as an instrument of integrity of public officials

From the reading of the European and international documents, which we recalled in detail in the previous paragraph, and from the scientific literature, it is possible to derive a real regulatory standard (European and international) of the behavioural duties of public employees, *i.e.* a set of elements that must necessarily compose the discipline of the duties of conduct to make them truly instruments of public integrity. (Molina, 2017; Falcone, 2019; A. Pioggia *et al.*, 2021)

Many of these elements are therefore used as parameters by European and international organisations, such as GRECO (GRECO, 2000; 2019) or the European Commission (European Commission, 2014; 2017), and by some regional organisations, such as RAI (RAI, 2014) and OCSE (OCSE, 2016), to assess the effectiveness of the duties of conduct within countries, particularly, in states that are participating in the enlargement processes of the European Union, such as the Western Balkans.

The European and international regulatory standard of behavioural duties that can be derived from the reading of European and international documents, therefore, includes various aspects of their discipline, such as their legal nature, the scope of application, the tools to ensure their effective application in all administrations, up to the type of duties that must be introduced in administrations, many of which must be closely linked to the prevention of corruption and the administrative activities related to it.

5.1. The prescriptive nature of the duties of conduct

The first element of this shared normative standard that emerges from the grey and scientific literature is the legal nature of the duties of conduct. To be effective within public organisations and to differentiate themselves from simple duties of an ethical nature, the duties of conduct must have a prescriptive nature, that is, they must have a legal significance. In general, this aspect is guaranteed by their provision within regulatory sources of constitutional rank or within ordinary laws. (GRECO, 2000; RAI, 2014; OCSE, 2016; Falcone, 2019)

The presence of direct constitutional references to the duties of conduct or to indirect references, such as references to the impartiality of the administration, to its integrity or to the loyalty of public employees to the Nation, can strengthen the national integrity system and bind the legislator more to provide for specific duties of conduct in ordinary legislation.

In the Western Balkans, for example, the duties of conduct have a legal significance and are mainly present within the laws on public work, which are in line with most European experiences. The duties of conduct, furthermore, are present also within the specific rules, dedicated to sectorial administrative activities (as in public procurement) and recently also within the laws on the prevention of corruption or conflicts of interest. (SIGMA-OCSE, 2022)

At the constitutional level, however, there are few direct references to the duties of conduct or references to principles such as the impartiality of administrative action or the integrity of administrations or, again, the loyalty of public employees.

The prescriptiveness of the duties of conduct, at least from a formal point of view, seems to be guaranteed: an element that is also confirmed by the monitoring reports of international organisations (SIGMA-OCSE, 2021a; 2021b; 2021c; 2021d; GRECO 2020; 2021).

5.2. An extended scope: the number of officials and administrative activities involved in the duties

A second aspect that emerged as a fundamental element of the regulatory standard under analysis is the extension of the scope of application of the duties of conduct. The prescriptiveness and effectiveness of duties as a tool for the integrity of administrations is closely linked to the extension of their scope.

The duties of conduct must apply to all officials who carry out administrative

activities. Beyond their formal classification in the organisation, the law must provide for specific behavioural duties for all officials, from top management to simple officials, passing through professional public managers.

Furthermore, the duties of conduct must be differentiated with respect to the types of administrative activities to which they are addressed and must concern all administrative activities, not only those that require the use of administrative power, but also those that do not provide for it, but provide a performance in the context of a public service. In the latter case, specific behavioural duties must be envisaged even if the public service has been entrusted to private subjects (GRECO, 2000; 2019; OECD, 2017).

In the Western Balkans, for example, a first analysis of the rules on civil servants reveals a limited scope of application of the duties of conduct. In public labour laws, duties generally refer to those who exercise administrative power and to those who work in those offices, but the rules have a number of exceptions that leave out the application of duties of conduct many administrative activities – especially those related to certain sectors of the administration (administration of justice, army, secret services or presidency of the council for example) or certain performance activities, such as those related to some public services – or many categories of public officials[10].

5.3. The duties of conduct related to the prevention of corruption and its administrative activities

A third element that characterises the European and international regulatory standard of behavioural duties is the presence of specific behavioural duties linked to the discipline on the prevention of corruption or the discipline on conflicts of interest. (Merloni, 2019; Carloni, Paoletti, 2019)

There are three main types of duties: the prohibition to accept certain offices/jobs that are considered incompatible with the exercise of one's function; the obligation to provide certain communications relating to certain financial interests and shareholdings; the duty of abstention.

The public official has the duty to inform his superior (manager) about any direct and indirect relationships with private subjects. On this point, each internal legislation determines what the degrees of kinship are within which to

10. This first analysis, which deserves to be further investigated, was carried out through the analysis of the research material produced by the researchers of the countries involved in the APTA-MOD Project. In particular, these analyses are the result of the work and comparison activities that took place during the round tables of the research.

extend the ban and the years in which such relationships have occurred. The employee must also refrain from participating in the adoption of decisions or activities that may involve himself or his relatives, within a certain established degree, but also of his spouse or cohabitants, or of people with whom he has habitual acquaintances (GRECO, 2000; 2019).

Participation in some associations or political parties is considered, in some legal systems, as a potential form of conflict and therefore involves the duty of communication. The official therefore has the duty to refrain from any case in which there may be serious reasons of convenience.

Regarding the conflict of interest, there are prohibitions and duties that concern both some specific moments of work and subsequent to them, as in the case of the discipline of the so-called "*post-public employment*". (OECD, 2010) In both cases, the purpose is to protect the impartiality and good reputation enjoyed by the public administration.

In addition to the traditional duties of conduct of officials, specific duties of conduct are emerging which aim, on the one hand, at making effective the rules on conflicts of interest, incompatibilities, revolving doors or pantouflage or, on the other, aiming at general to make the obligations on the prevention of corruption effective, such as the adoption of anti-corruption strategies or administrative codes of conduct, but also the correct execution of the disciplinary procedure, etc. In the latter case, they are duties of conduct that fall mainly on the heads of the offices and aim to activate disciplinary responsibilities for these figures. (Pioggia *et al.*, 2021)

A type of behavioural duties is also emerging in the Western Balkans. Recent laws on the prevention of corruption and conflicts of interest have introduced some of these duties of behaviour, which were then adopted within the ethical codes of administrations (where they exist). (SIGMA-OCSE, 2022)

The duties that are most developed are those relating to conflicts of interest, that is, those that oblige the official to communicate on-going conflicts of interest to the administration and to refrain from administrative activities if there are personal interests. (SIGMA-OCSE 2021a; 2021b; 2021c; 2021d; GRECO, 2020; 2021)

Those relating to the so-called potential conflicts of interest and those relating to anti-corruption and security activities still have to be fully developed[11].

11. A fact that emerged well from the round table discussion with researchers from the Balkan countries within the APTA-MOD Project.

5.4. The effectiveness of the duties of conduct: administrative codes of conduct, disciplinary sanctions and control bodies

The last element, perhaps the most important, of the European and international regulatory standard we are talking about is represented by the tools that ensure the effective application of the duties of conduct. Three tools are identified by international and European documents and discussed in scientific literature: the provision of disciplinary sanctions for those who do not respect the duties of conduct for the "good" functioning of the disciplinary procedure; the adoption of codes of conduct for each individual administration; the establishment of control agencies or bodies on the adoption of codes of conduct or on the correct imposition of sanctions (GRECO, 2000; 2019; OECD, 2017; Molina, 2017; Falcone, 2019, Pioggia *et al*., 2021).

5.4.1. The right disciplinary responsibility: adequate offices and effective sanctions

The duties of conduct must necessarily be accompanied by true disciplinary responsibility, that is, by administrative procedures and disciplinary sanctions in order to be effectively respected. Generally, the laws governing public work provide for both specific disciplinary offices and procedures for ascertaining violations of the duties of conduct.

However, it is important that disciplinary responsibility is adequately regulated. On the one hand, the sanctions must respect the principle of proportionality and must constitute an effective deterrent not to violate the duties of conduct: for example, fines of a financial nature proportionate to the seriousness of the violation, or suspension from work or dismissal for the most serious violations. On the other hand, the disciplinary procedure must be impartial and fair, that is, it must provide for the contradiction of the proceeding office with the interested parties and provide for mechanisms that make the start of the impartial assessment: for example, regulate the procedure so that it begins automatically in the presence of certain violations or conditions, and which does not completely depend on the will of the disciplinary office. At the same time, it is important to give the office the opportunity to initiate the sanctioning proceedings *ex officio*, perhaps following external or internal reports to the administration. In this case, it is very important to develop the knowledge and ethical skills of the officials and managers of the disciplinary offices through adequate training, and to allow them, through dedicated rules, an impartial assessment action free from political or private influences or from the administrative apparatus itself. (GRECO, 2000; 2019; OECD 2017)

Even in the Western Balkans, the laws on public work provide for the presence of disciplinary offices and specific procedures to ascertain the actual violation of the duties of conduct in each individual administration. (SIGMA-OCSE, 2022) The matter of disciplinary responsibility in the Western Balkans, even if in some cases it presents important guarantees of cross-examination for those who are subject to assessment, does not pay particular attention either to the impartiality of the procedure or to the knowledge and skills of those who work in the disciplinary offices. Furthermore, the percentage of disciplinary sanctions confirmed by the courts is very low in some countries (around 30%), which implies procedural weaknesses and/or unjust or illegal disciplinary sanctions (for example in Serbia and North Macedonia). (SIGMA-OCSE 2021a; 2021b; 2021c; 2021d)

5.4.2. The codes of conduct of the individual administrations

Even the adoption of specific codes of conduct is a choice that guarantees the effectiveness of duties. Codes of conduct, especially if adopted with legislative and mandatory acts for all public employees, guarantee the prescriptiveness of the duties of conduct and allow the overcoming of purely ethical codes of a moral nature.

A best practice in this sense is the Italian experience of codes of conduct. Italy has provided for a double level of codes of conduct, one national and the other decentralised. The 2012 anti-corruption law and a subsequent 2013 government regulation adopted a national code of conduct, which contains a set of minimum duties of conduct for all public officials and for all public administrations at any level of government. The decentralised level, on the other hand, consists of the administration codes: each administration must adopt its own code of conduct which must necessarily contain the minimum duties expected at national level and identify other specific duties suitable for the context in which the administration operates and for the activities administrative offices for which it is responsible. (Merloni, 2019; Carloni, Paoletti, 2019; Falcone, 2019)

The duality of the codes of conduct is essential for the effectiveness of duties and allows you to create the conditions for the definition of an overall strategy of public integrity.

In the Western Balkans, on the other hand, many legal systems do not provide for national codes of conduct, but only individual administrative codes that contain the duties of behaviour identified in the law, while in the systems where scientific literature and international and European documents are provided, they have highlighted the serious cultural and legal

vulnerabilities that render them ineffective. (SIGMA-OCSE, 2021a; 2021b; 2021c; 2021d)[12]

5.4.3. Governance of integrity to oversee the effectiveness of the duties of conduct

The lack of effectiveness of the duties of conduct (and codes of conduct) is also linked to the presence or absence of public bodies or agencies dedicated to monitoring the implementation of integrity measures by administrations, especially on the adoption of codes of conduct.

International and European documents recommend and, in some cases, oblige the establishment of anti-corruption agencies or bodies and guarantee public integrity. (GRECO 2000; 2019; European Commission, 2014; OECD, 2017; SELDI, 2019)

The effectiveness of the duties of conduct is very much linked to the ability of bodies external to the administration, agencies or independent authorities to effectively control and monitor the implementation of anti-corruption and integrity measures, including the adoption of codes of conduct. It is necessary that these bodies have adequate powers of direction, control and sanctions on the adoption of codes of conduct in administrations.

In the Western Balkans there are organisations that deal with coordinating, directing corruption prevention measures and checking their correct implementation, but only in some cases (for example in Serbia) is there an Integrity Plan that pays particular attention to adoption and compliance with codes of conduct (SIGMA-OCSE 2021a; 2021b; 2021c; 2021d; GRECO, 2020; 2021).

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12. The ineffectiveness of the codes of conduct emerged both from the country reports composed as part of the APTA-MOD research project, and from the comparison with Balkan researchers in the round tables organised during the APTA-MOD project.

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7
Transparency, access to information legislation and accountability as anti-corruption tools in Western Balkans: a comparative perspective

Gloria Pettinari, Benedetto Ponti[1]

Summary: 1. Transparency, publicity, and access to information framework – 2. Right to know and Freedom of information background – 3. Accountability in a rule of law system as means of prevention of risks of corruption. The role of transparency to prevent it: Western Balkans on the way to access European Union – 4. Six "key elements" for the effectiveness of freedom of information legislation (FOIA) and a glance at the FOIA in Montenegro, North Macedonia, Serbia, and Albania – 5. Transparent laws and opaque practices: paths of information laws in the Western Balkans

1. Transparency, publicity, and access to information framework

Transparency is a doctrine of governance composed of more than one feature, but mainly established in order for governments to be subject to scrutiny by the public through many disclosure rules and procedures. The final objective is to realise an accounting method of government that consists of reporting "who gains, and who pays for public measures" and consent to access governance information of the "general public". (Hood, 2006, p. 5) This section will demonstrate that a "full disclosure" (Fung, 2007) system is possible by an openness policy and the freedom of information act (FOIA), such as two *erga omnes* means. Other types of transparency are *erga partes* related to exposure of administrative proceedings because of a legitimate interest that is part of the transparency policy. It differs for the legal title of the recipient and the audience and finality. Broadly, the whole system of rules defined conducting of public affairs open to public scrutiny. (Florini, 1999)

In a comparative perspective, the evolution of transparency in most countries links those two components together. Usually, the *erga partes* refer to people entitled to defend an interest in front of the authorities because

1. Gloria Pettinari wrote paragraph 1, 2, 3, 4 and par. 5 is up to Benedetto Ponti.

their involvement in a proceeding comes before anyone's right to know. Still, they coexist in legislation because, as two categories of disclosure, they answer two different necessities also to safeguard against the authority's arbitrariness. So transparency measures come from various doctrinal approaches, but the evolution culminates in also comprehending FOIA (Hood, 2006), such as the capability of widespread knowledge if we consider transparency together with freedom of information as democracy's milestone, also defined as "The governance of public power in public". (Bobbio, 1980, p. 182)

The declaration of the United Nations Human Rights Committee, General Comment no 34, 2011, defines access to Information (ATI) as a fundamental human right[2] (McDonagh, 2013; Birkinshaw, 2006) which is carried out through transparency, while it is up to the law to provide every restriction necessary to protect (other) legitimate interests.

Apart from the concept of "understanding as an ontological category – a way of being in the world", Heidegger's definition of a "fundamental way of living in the world" (Stephen, 2021; Fehér, István, 2016) – following the transparency principle, public interest information is available to the people because they are owners of sovereignty. (Birkinshaw, 2006) We will see in the next paragraph that the international and European affirmation of the right is based on the consolidated idea of civil society, which is in turn based on the right for everyone to know public information, to obtain knowledge, speech, vote, and participate. Even though one of the main issues is still about the "use" and "abuse" of data (Birkinshaw, 2010), indeed, we know that "if the people and their elected representatives have the right to find out what their government is planning and doing, we live under a democracy. If the executive branch has the privilege to determine how much the people shall know, we are following the authoritarian course of government" (Moss, 1959). It was John E. Moss to say this phrase; he was a campaigner for the people's "clear right" to know, to investigate, and to access government information in the USA. Moss soon was the leader of the Committee Government, who presented and discussed the USA Freedom of Information Act (FOIA) that became law in 1966[3].

Nevertheless, although late in accepting a "full disclosure" transparency regime (Fung, 2007; Mattarella, Savino, 2018), a rule where public information is available arose through two main tools:

2. See also the Resolution 59 (1) at 95 UN Doc. A/46 of the UN General Assembly of 14 December 1946: "Freedom of information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated", December 1946.

3. See also United States House of Representatives, *Historical Highlights, The Freedom of Information Act*, *history.house.gov/HistoricalHighlight/Detail/15032443727*.

1. affirmative disclosure by an active publicity – proactive disclosure;
2. access to information by request – data not already available – reactive disclosure. (Riekkinen, Suksi, 2015)

The latter refers to such matters as access to information upon request (model of FOIA) in order to realise a presumptive right to information held by public authorities. (Birkinshaw, 2010)

Publicity towards universality is a fundamental principle on democracy for the legitimacy of the power, the main guarantee of fairness between authorities and citizens. Today, its object interests a broader range of claims of disclosure of acts, decisions, organisation, etc., so much so that the current modern freedom of information formula (Meijer 2009) also contains a large sphere of proactive public diffusion of information, becoming part of the same right-to-know example.

Proactive disclosure and access to information on a request-driven approach are two counters part of right-to-know and so freedom of information model[4], but they are complementary. The publicity made by the authority is mainly based on a range of information established by the law for the legitimacy of the power. (Ponti, 2011) Therefore, the law already makes a balance between contrasting interest, secrecy, and confidentiality items. On the other hand, the system consists of requesting information and waiting for a response. So, what information to ask is based on a free choice. It is a freedom of information model because it regards data not already available to the public. Therefore, it contributes to expanding the area of knowledge and the volume of transparency. Still, in such a situation, it is necessary to strike a balance, evaluating case by case with counter interests, such as the right to privacy of third parties (counterpart) involved by request. In conclusion, there are two different mechanisms intended for the same right to know.

However, in general, the openness and "full disclosure" regime met some limits, regulated by the Data and privacy legislation and the protection of others' rights represent a counterbalance because the freedom of information can violate them. In that sense, the right to access is not "absolute". (EU Ombudsman, 2013)

A comparative investigation shows that a claim for a proper regime of transparency containing the freedom of information act is relatively recent. Access to information campaigns representing the fourth wave of rights and following the quest for more civil, political, and social rights, culminates in asking for freedom of information after a moment of crisis of trust between

4. See the fourth paragraph of this chapter.

citizens and governments. (Riegner, 2017) History therefore shows that it is not something that came together with the arrival of immediate or automatic democratic government, but that it has been a product of the evolution of a "mature" democracy. (Schudson, 2015) From publicity of the law to assure the legality (Fuller, 1964)[5], and accessibility of legislation as a central issue of democracy (Hood, 2006)[6], to other democratic guarantees, including instruments to know the action and the organisation of authorities affecting a fair relationship between the authorities and citizens.

In such an evolution, transparency rules prevail over time, overriding secrecy and confidentiality issues through new regulations for authorities that become "a way of being" transparent (Arena, 2006), the main rule in organisation staff and administrative acts and the performance of their duties.

In the overall scheme of things, two rights are co-existing: one for stakeholders, and another for citizens or, better, for "everyone", in which data and documents are accessible for two main situations:

1. because the proceeding affects a personal sphere of interest concerning in particular individuals or legal entities (personal data), it is the so called the "need-to-know[7]" basis (Galetta, 2014; Savino, 2010)[8];
2. because of the human right to know public information and account representatives and government acts and organisations, it is the so-called "right-to-know" case. (OECD, 2019; Galetta, 2014; Savino, 2010)

From one point of view, in their own sphere as individuals, people have a right to know about their file, to participate in defending their interests in an administrative proceeding. Basically, they are guarantees for the "fair procedures" (Walker, 1999, p. 962) as a "good administration[9]" affirmation, a principle which includes such factors as: the right to have reasonable procedure,

5. "Publication of law is a necessity of a legal system", Fuller 1964.

6. One of the ancient and classic principles of a State is that the Government should operate according to fixed and predictable rules.

7. "… to the need to protect the public interest", Savino 2010. In Italy the notion has been use by Consiglio di Stato, Adunanza Plenaria 2 April, 2020, n. 10.

8. For example, in Italy is the Law No. 241/1990 to establish the right of access, pursuant to article 22 para 1 letter a) of Law No. 241/90, the right of access as "the right of interested parties to view and to take copies of administrative documents". Article 22 para 1 letter b) of Law No. 241/90 statues the right for stakeholders: "all private parties, including stakeholders representing public or widespread interests, who have a direct, concrete, and actual interest corresponding to a legally protected situation that is linked to the document to which access is requested", Galetta 2014.

9. See the next paragraph.

including the right to be heard, in a proceeding that meets the interests of the subject and therefore the right to know acts and documents, the obligation of justification for the measures taken, the impartiality and fairness of decisions, to receive notice if an application has been rejected, and a right to compensation for damages. (Pioggia, Pacilli, Mannella, 2021, p. 137)

On the other side, there is a system providing for freedom of information, where everyone can request more information not already available, placing transparency above the secrecy rulings as a principle of public management. In this way, good administration includes transparency.

2. Right to know and Freedom of information background

The principle of transparency found its first expression in Article 15 of the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789, according to which "society has the right to ask any public official to account for his administration". While transparency is a constitutional provision, it is not always explicitly stated in the constitution of countries in which a proper freedom of information is recognized. This is not the case in some younger constitutions, such as Spain and the Balkan countries, where the right to ask and obtain information from their authorities appears clearly (ELSA, 2021)[10].

The Spanish Constitution of 1978, at art. 105. B[11], guarantees the right of

10. The prior system was censorship to means of communications and the requirement of granting of authorization for the circulation of information, ELSA 2021.

11. "Article 105 The law shall regulate: a) the hearing of citizens directly, or through the organisations and associations recognised by law, in the process of drawing up the administrative provisions which affect them; b) the access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals: c) the procedures for the taking of administrative action, guaranteeing the hearing of interested parties when appropriate". But see also article 20: "Article 20 1. The following rights are recognised and protected: a) the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication; b) the right to literary, artistic, scientific and technical production and creation; c) the right to academic freedom; d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regu12 Right to personal freedom Right to intimacy. Inviolability of the home. Freedom of residency and movement Freedom of expression late the right to invoke personal conscience and professional secrecy in the exercise of these freedoms. 2. The exercise of these rights may not be restricted by any form of prior censorship. 3. The law shall regulate the organisation and parliamentary control of the social communications media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and of the various languages of Spain. 4. These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the

access to all official records. In North Macedonia, access to public information is provided for under article 16 of its constitution, first adopted in 1991, establishes freedom of access to public data and to obtain and receive data with no legitimate obstruction from authorities[12]. In Albania, articles 22 and 23 of the Constitution of 1998 must be interpreted together; they guarantee the freedom of expression and the right to access public information regarding authorities, providing that the right to information is guaranteed and that anyone has the right, in compliance with law, to obtain information about the activity of state organs and of persons who exercise state functions (everyone is given the possibility to know meetings of elected collective organs)[13]. The Serbian constitution of 2006 enshrined freedom of expression, including the right to receive and seek information (article 46[14]) and the Right to Information (article 51[15]). Finally, in Montenegro, article 51 of the Constitution of 2007 declared everyone's right to access to information and the right of expression (article 47[16]).

protection of youth and childhood. 5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order".

12. "Article 16 The freedom of personal conviction, conscience, thought and public expression of thought is guaranteed. The freedom of speech, public address, public information, and the establishment of institutions for public information is guaranteed. Free access to information and the freedom of reception and transmission of information are guaranteed. The right of reply via the mass media is guaranteed. The right to a correction in the mass media is guaranteed. The right to protect a source of information in the mass media is guaranteed. Censorship is prohibited", Constitution of the Republic of North Macedonia no. 52/1991.

13. The Constitution of Republic of Albania "Article 22: 1. Freedom of expression is guaranteed. 2. Freedom of the press, radio and television is guaranteed. 3. Prior censorship of means of communication is prohibited. 4. The law may require authorization to be granted for the operation of radio or television stations". "Article 23: 1. The right to information is guaranteed. 2. Everyone has the right, in compliance with law, to obtain information about the activity of state organs, and of persons who exercise state functions. 3. Everyone is given the possibility to attend meetings of elected collective organs".

14. The Constitution of Republic of Serbia, Freedom of thought and expression "Article 46 The freedom of thought and expression shall be guaranteed, as well as the freedom to seek, receive and impart information and ideas through speech, writing, art or in some other manner".

15. Right to information Article 51.2: "Everyone shall have the right to access information kept by state bodies and organizations with delegated public powers, in accordance with the law".

16. The Constitution of Montenegro, "Article 51: Access to information Everyone shall have the right to access information held by the state authorities and organizations exercising public authority. The right to access to information may be limited if this is in the interest of: the protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defence of Montenegro; foreign, monetary and economic policy". The right of expression at the article 47: "Freedom of expression Everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner. The right to freedom of expression may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro".

In other cases, while countries recognised the freedom of information as a statutory right, their Constitutions only mentioned freedom of expression. These legal systems find an indirect link via other rights within the constitution, such as the freedom of expression, which includes the right to seek and receive information, the right to inform and the right to be informed. (Villanueva, 2003, p. 17)

In the cases of the UK and Italy[17], their constitutions reflect the spirit of the period in which they were written; they could interpret freedom of expression, recently expanded to include the concept of seeking information from public authorities following the newly proclaimed fundamental principles. In those contexts, over a long period of time, the rule was the secrecy of the action of power, which became inadequate with the development of their level of democracy stimulated by the international and European consciousness in favour of the right to know.

Nevertheless, having an advanced constitution that recognises the right to access public information does not necessarily mean having adequate freedom of information legislation; it can take time to have a proper regime of RTI[18]. For example, article 105.B of the Spanish constitution was explicit about recognising the right to access administrative files; it was not until 2013 when the freedom of information act was passed.

Moreover, when there is a law, it still needs to be "effective". So, paragraph 4 of this chapter will expand on how to have appropriate freedom of information legislation; the statute should assure some key elements necessary to the exercise of the right in a new culture reflecting an open framework. An example of this

17. The Italian legal doctrine had identified the freedom of information guaranteed under freedom of expression enacted in article 21 of the Constitution, and several others constitutional grounds: on which a general right of access to the public administration documents could be based. Such grounds included, the principles of democracy, protection of personal rights, and equality (articles 1, 2, and 3 of the Constitution) that provide a democratic relationship to the citizen and authority. But, more than that, by the entire Italian Constitution itself.13 This right to information is also a result of the provisions of articles 97 and 98 about according to which public bodies are organized in such a way as to ensure good administration and impartiality, Galetta 2014, 212.

18. "Nonetheless, experience in OECD and EU countries has shown that promoting openness in government and administration in practice is a very difficult task. Ensuring the "right to know" of citizens through appropriate access to information stored in public offices remains an elusive policy goal […] Despite such difficulties, many countries, including those in Central and Eastern Europe, which have recently instituted democratic political regimes and administrations, have introduced Freedom of Information Acts (FOIA) in recent years. The fact that a FOIA is passed in parliaments does not guarantee per se more openness and transparency in governments and administrations, especially when it is not followed by adequate implementation. [But] Yet, the adoption of a FOIA does constitute a first crucial step on the way to an open government…". Cit. Savino 2010, 4.

is the impact of globalisation; the rise of commercial exchanges and diplomacy means that implied transparency impacts expansions.

Looking at the international role of incentivizing the affirmation of a freedom of information regime, we should think about commercial and new diplomatic rules (after the Second World War; see Yannoukakou, Araka, 2014, pp. 332-340) about the necessity of sharing clear information. For instance, for economic investors it is essential to have a clear picture of the distribution of benefits and risks in order to calculate their business better, rationalising the market and fighting corruption that is an economic and social cost.

FOIA legislation finds affirmation, especially in the second part of the 20th century, around 1990, when a proper "global explosion" (Ackerman, Sandoval-Ballesteros, 2006) characterised the Organisation for Economic Co-operation and Development of countries (OECD).

Since 1990, FOIA has shed light around the world thanks to democratisation of many countries around the world, as well as the North American success regarding their access to information legislation, which has become the new legal standard for a democratic rule of law system.

At any rate, the first sample of an access to information act was in Sweden, in 1766, when the right of access to public records act was passed, providing for freedom of the press as well. The second country was Finland, which passed the law in 1951 (Ackerman, Sandoval-Ballesteros, 2006, p. 109)[19], then there is the North American FOIA of 1966[20], which become the most important example for further development. Then in the 1980s, the Commonwealth countries, except for the UK, followed, leading up to the global explosion during the 1990s, which continues to this day. Currently, 121 countries around the world have adopted a freedom of information act. (Banisar, 2020)

As mentioned, it is interesting to think about the countries which have only recently that recognised a FOIA[21], having found intense internal resistance to passing a FOIA, even in countries with an unquestionable democratic nature. These arrived at passing a FOIA after a "proper" evolution of transparency measures, through which they found their way to real transparency. These entities had other legal instruments to answer the quest for democratic guarantees, such as the fairness of procedure in the case of need-to-know.

19. They are considered as the forerunners of the worldwide expansion trend, such as the historic pioneer, Ackerman, Sandoval-Ballesteros, *The global explosion of Freedom of information Laws,* Administrative Law Review, 2006, 109.

20. Currently, the North American FOIA does not represent the most modern example as, due to new circumstances there have been further adjustments in the newest version which has been partially included in the American system by others means, ID.

21. Such as the sample of the UK which passed the law in 2000, Spain in 2013, Italy in 2016.

Still, measures for policy accountability and integrity of p.a. also exist. The previous means of accountability comes from the parliament to the executives (Birkinshaw, 2006)[22]; for example, the budget Committee (USA), the Public Account Committee (UK), and the diffusion of information to the "general public" which came through the accountability goal first of all in front of the members of the Parliament Code of Practice on Open Government of 1994. (Birkinshaw, 2010; Leyland, 2010; Turchini, 2008).

The global explosion of freedom of information as access to information took on new importance and became a campaign for the mobilisation of civil society (Cuiller, 2019), reflecting the quest for a different relationship between individuals and the authorities, taking into account the contemporary international legal standard raised globally. (Herrera, 2017)

In order to understand how countries addressed transparency, we set forth to find common contextual factors that stimulate demand for transparency and its mechanism. Below is a brief description of the regulations rapidly, describing the evolution of affirmed transparency rules over time.

The Universal Declaration of Human Rights adopted by the UN Assembly in 1948[23] declared transparency as a human right[24]. Article 19 of the Declaration established the right to "seek, receive and impart information and ideas through any media and regardless of any frontiers". Already the Declaration expected that the right to information would define freedom of information system filing or attacking the government's control of documents without restraint. (Birkinshaw, 2006) At the same time, other human right limits the right to know as well as recognised article 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. The regulation everyone has the right to the protection of the law against such interference or attacks". Also, International Covenant on Civil and Political Rights (UN, 1966[25]) and European Convention

22. The question is complex because, on the one hand, some of those instruments also include empowerment accountability to representatives and parliament members. On the other hand, following a "spillover effect", more power for political representatives becomes an issue for citizens to ask for individual freedom of accountability to the public administration. The tools shifted to democracy and became a participatory when the oldest representative struggled with parliament inform. See Birkinshaw 2006.

23. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217, A (III), *www.un.org/en/universal-declaration-human-rights/*.

24. In some legislation privacy and the right to pass and receive information are of equal value. See the UK example, Campbell v. MGN [2004] UKHL 22.

25. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, *www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*, Article 19.

for the Protection of Human Rights and Fundamental Freedoms (ECHR)[26] protect Freedom of Expression, also including freedom of access to public information too.

Regarding the European Union context (De Graaf, 2019), the Maastricht Treaty of 1992 recognised the necessity to open the decision-making process to the public according to a Declaration which recommends the development of the means to access of information. It was article 255 of the Treaty which addressed the principle of access: "1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles […]".

The Treaty of Amsterdam consecrates access to documents as a European citizens' right, establishing a general right of public access to documents; in 1997, the Treaty regulated what has became a community legal standard (but every States and each institution remains free to decide how to apply it[27]).

This was followed substantially by a "Code of Conduct", the adoption of a proper regulation for which was not until 2001, when Reg. 1049/2001 was adopted, addressing access to information regarding the European Parliament, Council, and Commission, also upon request.

Later, the Lisbon Treaty 2007 innovated its constitutional provision[28], as the Treaty enshrines three fundamental principles of the European Union: democratic equality, representative democracy, and participatory democracy. Furthermore, the Charter of Fundamental Rights are legally binding[29]. Therefore, under article 42, any citizen of the European Union has a:

"Right of access to documents, and any natural or legal person residing or having its registered office in a Member State has a right of access to European Parliament, Council and Commission documents".

26. European Convention of Human Rights Article 10 (1) "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises…".

27. Art. 255.3.: "Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents".

28. The Treaty establishing the European Community is renamed the "Treaty on the Functioning of the European Union" (TFEU) and the term "Community" is replaced by "Union" throughout the text: see: The Treaty of Lisbon, *Fact Sheets on the European Union European Parliament*, *www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon*.

29. Article 6(1) TEU gives the Charter the same value as the Treaties, see: The Treaty of Lisbon, *Fact Sheets on the European Union European Parliament*, *www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon*.

Furthermore, the new text of article 15.3 of Treaty on the Functioning of the European Union (TFEU) statues: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph".

This follows the FOIA formula, which set forth the transparency regime, assuring a full disclosure system supporting the right to know. Indeed, despite a culture of official secrecy that has been an absolute characteristic of the exercise of governmental power, who described the origin of numerous legislative decisions (CoE, 1950)[30], the "paradigm shift" occurred because the law specifies the area of secrecy, while the rest is available. The *favour* for transparency (right to know) beyond the administrative proceedings (need to know) impacted the case law doctrine of the Court of Justice on this subject. The interpretation of the right to expression expanded because now it comprehends the right to know in case of a particularly relevant topic for the public: information can be disclosed. The turning point was the *Magyar* case of 2016[31], when the ECHR Court concluded that refusing to disclose the information was not required in a democratic society. Even though data under question concerns privacy, because it regards information inside the public domain and whether an applicant has a social function as a "watchdog", necessary in a democratic society, data should be available. As enacted by article 10, ECHR, exercising the right to freedom of expression includes the right to receive and share information without interference with the authorities[32]. However, that does not exclude the necessity of balancing between confidentiality and transparency within the context of

30. CoE, European Convention on Human Rights, as amended by Protocols No. 11 and 14, 4 November 1950, ETS 5, available at: *www.echr.coe.int/Documents/Convention_ENG.pdf*, Article 9, 10, ratified in North Macedonia 10 April 1997.

31. Magyar Helsinki Bizottsàg c. Ungheria, 2016. The case is whether an applicant has a social function as a "watchdog", necessary in a democratic society. As enacted by article 10, European Convention on Human Rights, exercising the right to freedom of expression includes the right to receive and share information without interference with the authorities. In the *Magyar* case of 2016, the European Court of Human Rights (ECHR) concluded that refusing the request to disclose the names of their appointed public defenders and the number of the public defenders' respective appointments was not required in a democratic society, even though it was involving data concerning privacy, since it concerned public interest information. The Grand Chamber of the Court recognised that Article 10 ECHR does not clearly define a general right of access to information held by public authorities that arises in certain cases of public interest. Consequently, the refusal of the authority determined a damage in the NGO's exercise of their right to freedom of expression. (Article 10 ECHR)

32. "a. The purpose of the information requested: contribution to a public debate b. The nature of the information sought: public interest nature c. The role of the applicant: social "watchdogs"

facts. The evaluation is possible by specific techniques to evaluate private and general damage in withholding and disclosing data established by the law that we will find further in this paper. (Neamtu, Dragos, 2019)[33]

Thus, above all, access to information needs to be compared and weighed with other counter rights, for instance, with data protection legislation and interests, also part of a democratic legal standard.

At the time of this judgement, RTI was already approved by many European Countries, as well as by the Institution, so it became a legal standard, with most of the member states adopting a proper transparency regime. (Savino, 2010).

Throughout history, this right has been theorised and invoked several times. (Meijer, 2015, p. 38) However, in a relatively short period, that becomes a proper right. This corresponds to a transformation of democracy. (Schudson, 2015) The reasons are many and some go beyond the objectives of this written but can be found in the new the relationship between officers and citizens changed from "bipolar" paradigm to "collaborative". (Arena, 2006) With a new complexity of the organisation and action of the State when more interventions and services are required, the role of the State changes and public administration functions and public power to individuals are increased. (Birkinshaw, 2010) People become the centre of politics and public operations and so do their rights and services. (Benvenuti, 1992) To implement new public functions, it is necessary to have different staff organisations of public authorities conforming to new challenges. The complexity of the new public sphere which required many resources and the growth of a proper administrative state that withholds and asks information from citizens, is one of the reasons for the quest for a direct accountability tool for people; people want to know and monitor executive actions. Citizens want to discover who makes the decisions, "what they are, and who gains and who loses". (Birkinshaw, 2006) Access to public information is one of the accountability tools, and it is a necessary counterbalance in front of new government sphere of competence; the people's sovereignty is a prior condition to participate with public institutions goals. Following the principle of subsidiary capacity of private members (Arena 2008), they can contribute and participate also in public interest functions within the public interest. (Bovens, 2002) The open government initiative[34] includes transparency, participation,

and the like. d. Whether the information is ready and available to the public authorities". ECHR 8 November 2016, Magyar Helsinki Bizottsga/Hungary.

33. In the EU case, the protection of some counter interests must be evaluated with the weight of public interest in disclosure and if this exceeds the limit, the information will become available, Neamtu, Dragos 2019, 14-18.

34. See Open Government Declaration, 2011, *www.opengovpartnership.org/process/joining-ogp/open-government-declaration/*.

and collaboration (Attorney General Holder's FOIA Guidelines Creating a "New Era of Open Government", 2009), together for an encompassing scope.

It took a change in rulings, but it came up diachronically in States' history because of their evolution. In that sense, the timing of the introduction of a FOIA usually depends on the democratic development of a country.

Thus, recognising that the right to know is possible to combat asymmetries of information that defines inequality, the reason why transparency and access to information rights are for "anyone", following a universal approach of democratic equality.

Moreover, the citizens' power of monitoring turns transparency into a means to fight maladministration, as "the light (transparency) is the best disinfectant[35]" for preventing corruption. (Brandeis, 1913) In that sense, the main goal of the multidimensional concept of transparency is accountability.

There are other contextual factors that impact transparency affirmation and development: think about digital technologies and their contribution to diffusion of information that affects its performance. Digital backgrounds and data policies, such as re-usable data, disclose is another important preview to make the information freely available, hence accessible but also intelligible and knowledgeable[36]. Also to be taken into consideration is the administration's capabilities to apply the reform; addressing this, we will speak primarily about the effectiveness of the legislation in terms of guarantees to recognise a practical right.

Nowadays, transparency can potentially be "by default"[37] where public information is automatically accessible and understandable, also meeting preliminary actions (but not everywhere), and performing public functions including private bodies. However, FOIA still is based on acts taken and decisions already made by executives[38]. Thus, one of the points is about what expansion can have various types of transparency. (Coglianese, 2009, pp. 529-544)

It is interesting to note that expansion of transparency (that includes the spheres of public meetings and access to agendas and minutes of meetings)

35. "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants, electric light the most efficient policeman", and "disclosure should include a list of those participating in the underwriting so that the public may not be misled", Brandeis 1913.

36. Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 on the re-use of public sector information, at *www.eurlex.eu. Directive 2003/98/EC* (recently amended). In Italy the Directive has been implemented in 2006 by Legislative Decree No. 36/2006.

37. Open data Charter: open data available by default, *opendatacharter.net*.

38. Imagine how many subjects and matters could be subject to the law if all public interests actions were inside the rules. Still, even more administrative regulations are needed.

go towards an Open Government system, which includes a whole range of transparency means and more. (Meijer, Curtin, Hillebrandt, 2012) Open government relies on free access to information that can be freely re-used by anyone. Data available from the public must be "complete, timely, accessible, machine processable, non-discriminatory, non-proprietary, and license free[39]".

The questions are many, but after describing the essentiality of the transparency system, what it is, how it is composed, why it is required, in the following paragraphs we will discover some better notions and how it can differ based on various national contexts.

3. Accountability in a rule of law system as means of prevention of risks of corruption. The role of transparency to prevent it: Western Balkans on the way to access European Union

Transparency makes authority like a "fishbowl" (Bouder, 2014), because "makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. Openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability"[40]. As stated above, the architecture of transparency is aimed towards a "full disclosure system" etched on the relations between state and individuals, because it subdues public authorities under a general overview, assuring accountability of the executive's power. In that framework, freedom of information is a proper step towards requesting accountability.

The EU legislation boosts the diffusion of transparency, acting to pressure to recognise transparency as a good administration principle, such an element of EU common legislation: the so called European "*acquis*".

Nevertheless, international organisations such as the World Bank have also pushed for increased transparency for controlling corruption. In order to improve the investment in a developing country, governments need to open up their accounts and their transactions, but also their organisations to the outside (Ackerman, Sandoval-Ballesteros, 2006)[41].

39. Open Government Working Group, Open Government Initiative, 2007, *public.resource.org/8_principles.html*.

40. European Ombudsman, *Good administration in practice: The European Ombudsman's decisions in 2013*, *www.ombudsman.europa.eu/en/publication/en/56331*.

41. The World Bank, Political Accountability, *www.worldbank.org*.

It follows that accountability has a multidimensional scope and strategy to reach several targets, both internal and external.

In the EU framework, following article 15. 1 of the Treaty on the Functioning of the European Union (TFEU), the law identifies a fundamental connection among transparency, good governance, and right of access to public documents, providing that: "1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices, and agencies shall conduct their work as openly as possible".

In accordance with article 15(3), it established that "[a]ny citizen of the Union […] shall have a right of access to documents of the Union's institutions, bodies, offices and agencies".

The EU principle strengthens democratic monitoring credentials to their member s states, and this is also a request for new candidate countries, particularly with a transition democratic situation, where the state of secrecy was the previous legal regime. Transparency is also a means of "good governance" in the multilevel level typical of EU, enshrined in the White Paper on European Governance[42] stating the stakeholders' need for openness.

In that sense, EU candidates and potential candidates face the question of the right of access to public information for three main purposes.

"First, it enables citizens to more closely participate in public decision-making processes. Second, it strengthens citizens' control over the government, and thus helps in preventing corruption and other forms of maladministration. Third, it guarantees the administration a greater legitimacy, as long as it becomes more transparent and accountable[43]". (Savino, 2010, p. 14)

Albania, the Republic of North Macedonia, Montenegro, Serbia are candidate countries, so they started a negotiation to reach the European legislation[44] (whose standards are divided into 35 goals, to be addressed one by one). "Transitional measures" are previews for specific questions and periods to fulfil the main scope, essentially for heavy investments. Otherwise, for "horizontal" legal standards, it is possible to obtain just threshold results, such as the approval of access to legislative information[45]. The latter is a cross-sectorial feature that needs to be implemented by the date of accession. At the same time, other pieces of legislation such as good government and good

42. EC, COM (2001) 428, White Paper on Good Governance, 12. 10. 2001.

43. In Italy, the notion has been used by the *Consiglio di Stato, Adunanza Plenaria* 2 April 2020, n. 10.

44. All the countries applied for EU membership during the 2005 to 2010 period; and currently, each one of them has a different negotiation status.

45. EU Commission, Additional tools Candidate Countries and Potential Candidates, *ec.europa.eu/environment/enlarg/candidates.htm*.

governance are part of the European *acquis* to get for members. Transparency is a meta-target of both, and access to information is a measure for both. The principle of good governance has the mission of achieving the rule of law, transparency, participation, accountability, integrity, and effectiveness of the decision-making process for guaranteeing a democratic network inside and outside the country. For the EU relationship, the principle of good governance is essential and defined as a political conditional, a critical element necessary in order to work in the EU dimension, which also includes other implicit rights such as respect of human rights, equity, impartiality, and absence of corruption. The latter element results in a prevention approach, pursued by transparency, which is made by access to information and dissemination of information, up to creating a dissemination service. The duty to publish and right to access information require consenting control over the action of the government and public administration for maximising general knowledge. (Cerrillo-i-Martínez, 2017) Nevertheless, accountability also means decentralised power from the government of certain matters to the autonomous subjects, such as agencies and independent authorities to supervise transparency (ID).

The good government principle has an individual dimension that affects the relationship between citizens and the p.a., and an external one, guaranteeing a rule of law and a democratic administration of power. (Pioggia, Pacilli, Mannella, 2021)

Indeed, in terms of relations with the p.a., focus should be on the concept of good administration, meaning a proper right established by art. 41 of the Charter of Nice of 2007, strictly linked to the right of access to documents (art. 42), Ombudsman (art. 44) and the right of petition (art. 44):

Article 41 – Right to good administration
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions:
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. […]

Access to information and publication of data is a crucial element in order to combat and prevent the risk of corruption for three main reasons: people can know maladministration through the information disclosed and shared, knowing "doing and wrongdoing". Conversely, a lack of transparency can be a red flag for an audit; the risk that agencies have the possibility of observing or watching reduces opportunities for corruption. (Carloni, 2017, pp. 261-209)

In this sense, the United Nations Convention against Corruption (UNCAC) is relevant, where in article 9 it connects enshrined transparency as a prevention of corruption, stating that is necessary for "public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts". Article 10 previews that to "take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes, where appropriate: *i.* adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; *ii.* Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and *iii.* Publishing information, which may include periodic reports on the risks of corruption in its public administration".

Moreover, article 13 provides regarding access to information: to stimulate the participation of society should ensure "that the public has effective access to information" because respecting, promoting, and protecting the freedom to seek, receive, publish and disseminate information concerning the prevention of corruption.

About the risk of corruption in the Western Balkans countries, mention can be made of the Corruption Perception Index (CPI) 2021[46], which reveals that corruption in Western Balkans countries is a quite relevant question. Based on the survey trend, the risk of corruption seems to be high for a long time, with not a very significantly noticeable improvement in the recent period.

Where the 0 (zero) score represents the highest level of corruption and the 100 is the lowest[47]: of the four countries considered, Montenegro has the best

46. Ranks countries/territories based on how corrupt a country's public sector, experts and business executives perceived, see *www.transparency.org/en/news/how-cpi-scores-are-calculated*.

47. Compared to 2020, Albania's CPI lost one point score, while Serbia maintained the same level. North Macedonia, however, gained 4, and Montenegro one point rank, *www.transparency.org/en/cpi/2020*.

score: 46, and it is on 64th /180 rank. On the other hand, North Macedonia is 87th /180, obtaining a score of 39, Serbia is 96th/180 with a score of 38, and Albania 110th /180 with a score of 35 (see *Figure 1*).

Figure 1

Following CPI surveys for quite a long period, since 2012, we can see the trend score: North Macedonia lost its 8-point rank until last year and recovered 4 with 2021; Montenegro improved by 4 points; Serbia is basically at the same level; and Albania improved by 2 items.

Italy had reformed its p.a. and passed several important anti-corruption laws and established prevention tools in 2012/2013; since that time it improved its CPI, moving from 72nd/176 to 52nd/180 rank.

4. Six "key elements" for the effectiveness of freedom of information legislation (FOIA) and a glance at the FOIA in Montenegro, North Macedonia, Serbia, and Albania

The successful application of the freedom of information act also depends on the progress of democracy, the capacity of applying the law and exploitation of the opportunity by civil society. Nonetheless, a good rule, a truly good one, when passed respecting the modern standard of FOIA should anyway innovate the legal system and the constitutional provision which it impacts. So, the question now is, what is FOIA? As already said above, anyone can freely claims access to data recorded, held by the p.a. (and all the assimilated subjects) and not already published information, with a request-driven approach. The

application should require no reason. The deadline for the response to the request should be known and follow the administrative procedure time limit; in most cases, the law is about 20 days. Many other points can make a difference for the success of such a right and therefore define a good law. Following the recommendation of the OECD (Mendel, 2008) and various doctrine, we can summarise six key elements (ARTICLE 19, 1999) for an effective right to access information (Open Society Institute, 2006):

1. Maximum Disclosure: the principle establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. Both "information" and "public bodies" should be defined broadly.
2. Limited scope of Exemptions: all individual requests for information from public bodies should be met with data, unless the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can demonstrate that the information meets a strict three-part test. A balancing test is requested by means of a "harm test" and a "public interest test".
3. Procedure to Facilitate Access: requests for information should be processed rapidly and fairly. All public bodies should be required to establish an internal system designating an individual responsible for processing such requests and compliance with the law. It should also be required to assist applicants whose requests are unclear, excessively broad, or otherwise need reformulation.
4. Duty to publish: the right to access implies not only that public bodies respond to requests for information but also that they proactively publish and disseminate data of significant public interest widely – furthermore, public bodies need to identify key categories of information that must be published.
5. Promote open government: informing the public of their rights and promoting a culture of openness. Promotional activities are, therefore, an essential component of a right to information regime. Application of the open government principle, above all, on free open and re-usable data. But also (following the public interest need to know) extend the area of what can be known, using digital technology for protecting third party rights, such as privacy by rending data anonymous.
6. Appeal and enforcement: an independent review of any refusals should be available. A process for deciding requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts.

Recalcitrant civil service can undermine even the most progressive legislation. Usually, this is a kind of "automatic" answer by a p.a. to a new paradigm of transparency, but promoting a good FOIA (if sincere) represents a revolution. (Villeneuve, 2007, pp. 147-162)[48] A new right that once given to society, it cannot be taken away. Most of all, it is essential that the administrative organisation is well equipped to implement the law. Still, this means having a good provision of law, especially with regard to the independent supervision and clear responsibility for the function. (OECD, 2021)

The Tromso Convention n. 205 of 2009 of the Council of Europe (CoE)[49] is an important example of request-driven access to information[50], and ten countries, including North Macedonia, Montenegro, and Serbia, directly signed the Treaty in 2009; Albania signed it recently, in 2022. But from them, the Convention was enacted just in Montenegro on 1st December 2020, since it from the 1st December 2020. The document is a guide for many countries for new legislation, and has also been so in the past. For instance, in recent cases, Spain mentioned it in the preamble of its legislation the sample of Convention 205. The treaty confirms the top recommendation from OECD, reflecting the modern style of FOIA in its main points, although the act is more focused on request-driven transparency rather than proactive disclosure. At any rate, it established that every country shall take the necessary measures to make documents public and to promote openness as a policy. (art. 10)

Furthermore, in addition to clear and short response time limits (art. 3) and the techniques of balancing counter interests (art. 3.2.), for a right to be effective, it is also necessary to highlight the role of internal appeal (towards the same p.a.) and then the independent authority's part in ensuring the exercise of the request, such as Information Commissioner or Ombudsman. (OECD, 2019). Such is the field of a review procedure and enforcement of the law. The Treaty sets forth a review procedure in article 8, before the appeal to the Court of an independent authority, involving reconsideration or reviewing the claim, because the request has been denied. Hereafter, the requesting party must be

48. See Villeneuve J.-P. (2007), *Organizational barriers to transparency: a typology and analysis of organizational behaviour tending to prevent or restrict access to information*, in *International Review of Administrative Sciences*, 73(1), 147-162.

49. "This Convention is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities". CoE, *Details of Treaty*, n. 205, *www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205*.

50. "The Convention sets forth the minimum standards to be applied in the processing of requests for access to official documents (forms of and charges for access to official documents), review procedure and complementary measures and it has the flexibility required to allow national laws to build on this foundation and provide even greater access to official documents". CoE, *Details of Treaty*, n. 205, *www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205*.

able to appeal to the impartial body, and then to the judge. But the Treaty does not dwell on the compulsory nature of the enforcement power.

In the Joint Declaration of 2004[51], the UN, OAS and OSCE Special Rapporteurs established in general terms that "those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints" framework's perimeter of action. (Special Rapporteur on Freedom of Expression, 2009) This is what the primary Anglo-Saxon example of legislation declared in the Westminster model of FOIA; and also, one of the best practices in the UK with the role of Information Commissioner (IC) who gives guidelines for the correct application, expresses an opinion over the conduct of the single p.a. and can syndicate in case of a refusal and apply an enforcement notice. The p.a. can file an appeal with the Court.

As mentioned above, Montenegro ratified the Tromso Convention that will be in force next year (in 2023), as announced to the government reviewing the previous legislation of 2012[52]. The latter was criticised by journalists, civil organisations (Access Info, 2018) and international organisations (EC, 2021) because of not meeting minimum legal standards. Most of all, the main problem was about a broader area of limits and secrecy, the lack of power for evaluating public interest on access by the authorities, thus an extreme power of the p.a. to deny the request.

At any rate, it was equipped with a proper agency to overview and make enforcement notice over the law. However, its empowerment has been negatively assessed because of the insufficient administrative organisation's capability to manage the implementation through guidelines, etc. (EC, 2020)[53]

Macedonia was in a similar situation about the lack of standards[54], where

51. Joint Declaration on Politicians and Public Officials and Freedom of Expression Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

52. "The Montenegrin Cabinet adopted the Draft Law on Amendments to the Law on Free Access to Information with the Action Plan for effective implementation of the Law which will enable more efficient exercise of citizens' right to access information held by government bodies and more transparent work, said Minister of Public Administration, Digital Society and Media Tamara Srzentić", *www.gov.me/en/article/cabinet-adopts-draft-law-on-amendments-to-the-law-on-free-access-to-information*.

53. "However, the capacity to launch and handle grant schemes still needs to be improved and capacity varies amongst ministries", European Commission, 2020.

54. The scope of exemptions to free access to public information was too broad, and the Commission responsible for reviewing appeals did not have the capacity to monitor compliance

following the European and OECD recommendations, in January 2019, the government submitted a new Draft Law on Free Access to Public Information to the parliament, which was subsequently adopted on 24 April 2019[55]. The law is now compatible with the better legal standards, because the Draft has been submitted for review to the OECD.

It should be noted that there is still a problem on the application concerning the management of transparency, as we can see following the comment of the European Commission of 2021, who reports: "Concerns were also raised regarding the substantial number of cases of conflict of interest and asset disclosure involving top executive functions processed by the SCPC", where the latter is the State Commission for Prevention of Corruption. (Balkan Investigative Reporting Network, 2018; Pavlovska Daneva, Bitrakov, 2019)

According to the Right to Information rating, RTI-rating, the others enforced legislations of the countries taken into consideration, Albanian Law n. 119/2014, On the Right to Information. On the other hand, Serbian, n. 120/04, Law on Free Access to Information of Public Importance, is among the best access to information law globally.

These laws are written following quite well the indication of OECD for good practice. Indeed, Serbian legislation is the 3rd place, and Albanian legislation the 5th, out of 135 countries examined (the first in Afghanistan, and the second in Mexico). But looking at the comments of civil society and the European organisations, we can find some difficulties putting in practice all the mandatory previews.

In a trend that is improving, still, there are areas of critical element for the prevention of corruption where opacity persists (EC 2021 Report, OECD 2021, Communication on EU Enlargement Policy). The secrecy field is still wide and sometimes it is up to the government's decision, such as the stipulation of the agreement for confidentiality. (Milovanović, Davinić, Cucić, 2019, p. 499) The problem with the role of government can be read also in case of the limited power of the independent authorities, that even though they exist everywhere, their job is not always so effective. In particular, think about the Serbian Commissioner, when deciding on appeals in case the right has been denied, he has no power regarding the highest institutions of the state, nor does he have any enforcement power (BRIN, 2020).

Furthermore, the complainants also saw a general lack of capability and

with the proactive disclosure of information requirement, nor was it empowered to impose penalties in cases of non-compliance.

55. Law on prevention and protection against discrimination, Official Gazette of the Republic of North Macedonia n. 101/2019 of 22.05.2019.

knowledge of the administration for a proper application of the legislation. In that sense, following GRECO recommendations, we can understand that for every Western Balkan country analysed, one of the main risks is about scarce diffusion of information, also in terms of proactive publications over important public interest information that can help to prevent corruption.

In summary, FOIA usually indicates a democracy's health status. However, at times, a top-down mechanism of decision for the approval of a law can hide a true evolution. Still, there is no doubt that the introduction of the right can have a good impact on the democratic regime. There is often a "spillover" event to pass the law, and this can be one in that case. (Ackerman, Sandoval-Ballesteros, 2006)

5. Transparent laws and opaque practices: paths of information laws in the Western Balkans

In order to understand the actual implementation of freedom of access to information laws held by public authorities, it is important to frame the context in which the use of the right of access unfolds: who are the parties most involved, and what kind of interaction is activated with the public authorities. This approach makes it possible to appreciate the effectiveness of the legal institutions of the right of access, and – together – provides useful indications for evaluating how these tools fit into the dynamics of both *accountability* and the prevention of corruption.

The previous paragraphs have shown how – also, as a result of the process of accession to the European Union[56] – the countries of the Western Balkans have approved very advanced laws (on paper) in terms of recognition of the right of access. But it has also shown how the formal recognition of the right in itself can be insufficient, if not adequately accompanied by mechanisms of promotion and *enforcement*. A look at the actual dynamics that are in place between the actors involved can be useful, above all because it inserts factual elements that help to outline the interactions between the regulatory system and the actual practice.

On the regulatory front, it is possible to make a first observation, which relates to the evolution over time of the legislative framework that secures the right of access. The countries in this area that have adopted a law on the right of access in older times[57] are also those that (more recently) record a progressive *worsening* of the regulatory framework and application thereof, based on a succession of

56. See the essay by F. Raspadori, in this volume.

57. The first version of Serbia's Foia legislation dates back to 2003, while the first adopted by Montenegro dates back to 2005 (when the country was still part of a confederation with Serbia).

amendments to these laws (some approved, others only proposed, others still under discussion), aimed at introducing new exceptions, restricting the scope or granting exemption left to discretionary decision by the administrations involved (or the government itself). (SELDI, 2021, p. 33)[58] A path that initially highlights a high level of protection of the right of access to public information, but which then – as time goes by – discounts the will of the political and administrative power to escape from the external scrutiny. That regulatory dynamic indicates that under the formal level, the "culture of secrecy" has continued to constitute a characterising trait of public power in these countries, and together with the "setbacks" recorded both on the legislative level and (especially) at the level of practice[59], they represent a manifestation of this enduring culture. The pandemic phase, on the other hand, has provided further arguments and levers to hinder transparency. (BRIN, 2020, pp. 19-20)

On the institutional level, this "culture of secrecy" manifests itself in various forms. From an organisational point of view, the authorities responsible for *enforcing* the right of access are generally underfunded (as constantly highlighted in the assessment reports drawn up by the EU) (EC, 2019, p. 24), and in some cases subject to administrative practices (starting with the choice of the heads of the authorities) not in line with the independence from the government (and from the political parties, more generally) that similar tasks require[60]. On an operational level, administrations very often remain silent with respect to access requests or activate more or less explicit obstacle strategies to hinder

58. See the amendments introduced in 2017 to the law of Montenegro, which exclude the application from further objects (new text of art.1) and strengthen the exceptions based on the protection of intellectual property and trade secrets (see BRIN 2019, 31-32; MANS 2018), as well as the amendments proposed by the government in 2019, aimed at introducing further, heavy restrictions on the right of access, increasing the margins of discretion of administrations in refusing requests for access (see the analysis of the amendment proposal from Access-Info & Mans: *www.access-info.org/2019-10-31/right-of-access-to-information-at-risk-in-montenegro/*). In Serbia, a draft law published by the end of 2018 by the Government envisages solutions which aim to exclude public companies from this law, as well as the possibility granted to public authorities to file administrative lawsuits against decisions of the commissioner for information of public importance and personal data protection, whose task is to control their work (see SELDI 2021, 33).

59. See BRIN, *Freedom of Information and Journalists in the Western Balkans: one step forward, two step back,* cit., as well as Id., *Freedom of Information in the Western Balkans in 2020. Classified. Rejected. Delayed,* 2021.

60. The story reported in the *Freedom House country assessment is significant* (2020) relating to Montenegro: "According to the EU, corruption remains endemic in Montenegro, compounded by the lack of political will to tackle it. Following the publication of an EC non-paper in November that criticized the government's anticorruption efforts, the director of the Agency for Prevention of Corruption (ASK), Sreten Radonjić, announced he would resign before his mandate expired. He subsequently applied for and was elected head of the Council of the Agency for Personal Data Protection and Free Access to Information" (*freedomhouse.org/country/montenegro/nations-transit/2020*).

disclosure, which significantly contributes to the scarce effectiveness of the right of access, formally guaranteed by the law[61]. In other words, the culture of secrecy is reflected in the scarce investment in financial and budget terms, in a lack of political and administrative commitment in the implementation of the law, when not in a silent boycott. Many commentators complain about the low level of literacy of officials with respect to the relevant discipline on the subject, underscoring the shortage of focused training.

Faced with this overall attitude, on the front of the recipients of the right of access to information, there is a fair amount of activism, both in civil society (in which many NGOs interested in activating accountability), and on the part of national and regional networks media and journalists, particularly in the field of investigative journalism. Indeed, it can be said that on this front the implicit and explicit "promises" that accompanied the introduction of the right of access legislative framework (and, more generally, those regarding anticorruption) (Seldi.net, 2019) have been taken seriously, and we see a vast and heterogeneous series of social protagonists interested and committed to using the right of access as a tool for various purposes (lobbying, awareness campaigns, investigative journalism, etc.). The social protagonists have shown themselves to be very attentive to the implementation of these laws, have reacted (often in a coordinated way) to attempt to limit their scope, and have denounced any regressions by legislation and the silence and opacity of the administrations. Furthermore, they have variously contributed to the realisation of empirical studies aimed at verifying the effective application of the right of access, so as to provide evidence on the status of the right to public information in the respective countries.

A dynamic overall characterised by strong opposition and mutual distrust emerges[62]. The methods for granting (as declared by law), and obstructing (as

61. With reference to the right of access in Montenegro, see what is reported by the European Commission, *Montenegro 2019 Report* ("While there have been some improvements, administrative silence remains the major cause of citizens' complaints. The increasing trend of government to declare information classified, particularly on grounds of tax related data, without justified exemptions or by broad interpretations of the rules, is a matter of serious concern as it prevents effective citizens' oversight of the work of public administration", 14). As for Serbia, cf. European Commission, *Serbia 2020 Report* ("Administrative silence, whereby public authorities fail to properly act on the citizens' information requests, continues to be a major issue", 17). As stated by the Freedom House country assessment (Serbia 2020): "Public officials are subject to asset disclosure rules overseen by the ACA, but penalties for violations are uncommon. While a 2004 freedom of information law empowers citizens and journalists to obtain information of public importance, authorities frequently obstruct requests in practice", *freedomhouse.org/country/serbia/nations-transit/2020*.

62. As stated by the *Freedom House country assessment* (Montenegro 2020) "The relationship between government, other political actors, and the civil society sector is characterized by high

actually practised) the right of access to public information did not favour the participation and collaboration between civil society and public authorities (according to the paradigms of *open government)*; rather, it seems to have activated a particularly pronounced dynamic of *adversarial accountability*, which is part of a polarised political context and in which mutual recognition between the political parties is particularly lacking and in which civil society has developed a profound mistrust of public parties and institutions, and is also profoundly sceptical about the "actual possibility of significant improvements (with reference, for example, to the corruption rate of bureaucrats, public managers and politicians in general)[63]" (SELDI, 2021, p. 19).

We need to ask ourselves what indications we can draw from this path, if we look at the other experiences of the same political and geographical context, where laws on the right of access have been approved in a more recent period[64]. These legislations stand out because they are in step with the times, since they take into account the most recent innovations, such as the systematic attention to the tool for online dissemination of information and the pro-active programming of transparency[65]. Also in this case, the distance between the affirmation of the law and its concrete recognition is still considerable, which appears to be physiological, given the reduced space of time in which it was possible to apply these regulations. And yet, the experiences gained in Serbia and

levels of mistrust and low levels of cooperation. Montenegrin civil society, however, enjoys stronger support and higher levels of trust among Montenegrin citizens. The public's level of trust in NGOs (39.3 percent as of December 2019) is higher than its trust in political parties (25.6 percent), Parliament (33.7 percent), and government (36.2 percent), 31 The government and other political actors perceive CSOs as rivals rather than partners".

63. According to the results of a recent survey, a majority fraction of citizens of countries in the western Balkans believe that their direct involvement in an episode of corruption is "probable" or "very probable" (ranging from 52% of respondents registered in Serbia, up to 84% in North Macedonia, passing through 62% of Kosovo, 66%, 76% of Bosnia and Herzegovia and 80% of Albania). Still a majority fraction of the population of these countries believes that corruption cannot be effectively and substantially reduced, despite the efforts of the public authorities ("corruption cannot be substantially reduced" according to the 52% of the respondent in Serbia and Montenegro, 58% in Kosovo, 62% in Bosnia and Herzegovina, 69% in North Macedonia, 78% in Albania): see SELDI 2021, 19.

64. In Albania, a new transparency law was approved in 2014 (Law No. 119/2014 on the right to information).

65. Albanian law No. 119/2014 on the right to information provides for proactive publication of certain categories of information. Under Art. 4, each public sector body must prepare and implement an institutional transparency program, to be revised periodically, setting out the categories of information being made public *ex officio* and the method of making this information public. Art. 7 lists the information categories that the public sector bodies must make available to the public *ex officio*. Failure to prepare, review and implement the transparency institutional programs is fined (Art. 18).

Montenegro indicate that the law, even if in line with the highest international standards, appears to be an unsuitable instrument (in itself) to change cultures and administrative practices[66]. Indeed, it can also happen that the norm – if perceived as a foreign body[67] – can end up determining phenomena of rejection, and thus contribute (contrary to intentions) to preserve and strengthen these cultures. An element on which it is necessary to reflect.

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66. You could add the case of the Republic of North Macedonia. Here again we have a good legislative framework (the Law on Free Access to Public Information was adopted in 2006, and further improved by amendments adopted in 2010 e 2019), but an unsatisfactory implementation. In its 2020 Report, EC had conceded that "some progress was made in improving transparency, with the adoption of the 2019-2021 Transparency Strategy, the operationalisation of the open government data portal and the publication of government finances data". According to the regional ACTION SEE network, North Macedonia's municipalities remain the least open, accessible, and transparent in the Western Balkans (data from 2019 referring to 2018: Danilovska, Dance and Nada Naumovska, "Proposals for the improvement of the current state, Openness of the local self-government institutions in the region and in the Republic of North Macedonia", Metamorphosis Foundation for Internet and Society and ACTION SEE, July 2019, 4), and although two local government units – Skopje and Prilep – practised outstanding transparency, still, there are large disparities throughout the country, and seven units present no public information on their financial activities (Freedom House country assessment 2021).

67. For example, it is not unusual that legislative texts, promoted by citizens, are attributable to parties who promote lobbying activities on an international level, such as in the case of the Albanian law on the right to access public information (n. 119/2014). Center for Public Information Issues (INFOCIP) was one of the partners which offered the drafting team its extended expertise on developing the new approach which found it way into this new law, and at the end of its successful process (the approval of the draft by the legislature), "INFOCIP congratulates the SOROS Foundation for its commitment to drafting and preparing this new law, in the spirit of cooperation with main actors of the civil society" (see: *www.infocip.org/en/?p=1312*).

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La passione per le conoscenze

Anti-Corruption Models and Experiences

The Case of the Western Balkans

Edited by
Enrico Carloni, Diletta Paoletti

DIRITTO E SOCIETÀ

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Indice

Introduction
The prevention of corruption between models and contexts

Enrico Carloni, Diletta Paoletti

"*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish*": a reflection on the harmful effects of corruption can begin with the preamble of the Merida Convention (2003). Not twenty years later, the issue arises yet again, with different but no less strong words, in the recent White House Memorandum (2021): "*Corruption corrodes public trust; hobbles effective governance; distorts markets and equitable access to services; undercuts development efforts; contributes to national fragility, extremism, and migration; and provides authoritarian leaders a means to undermine democracies worldwide*". Here a series of problematic issues linked to the presence of widespread corruption can be detected, which are connected to economic growth, to the protection of individual rights, to social well-being, and (last but not least) to trust in democratic institutions.

As the European Commission points out in its 2014 report, "*corruption seriously harms the economy and society as a whole*". The challenge of fighting corruption is therefore strategic both at a global and a European level: "*It impinges on good governance, sound management of public money, and competitive markets. In extreme cases, it undermines the trust of citizens in democratic institutions and processes*". The analysis by the European Union also highlights the terms of a discourse that goes from the protection of competition to the maintenance of democracy.

Furthermore, in the face of such an insidious problem, the inadequacy of the repressive and penal responses alone has now been brought to light. Corruption must not only be fought, but understood; the reasons for it must be studied, especially when it is not an "episodic" phenomenon (linked to the single individual), but "endemic" or "systemic" (hence linked to cultures, social dynamics, organizational practices). The context and conditions that favour its

development must be understood, and corruption risk prevention, contrast and management strategies must be put in place. Anti-corruption is not an issue that concerns only the judiciary branch, the legal system and police authorities, but it is, above all, a challenge for society and institutions as a whole. And it is a challenge to be transformed, in particular, into a change in the organization of administrations and institutions and the way they function.

Anti-corruption actions represent a challenge as important as it is complex, but decisive for the improvement of living conditions, economic development and the strengthening of democratic institutions.

It is therefore not a coincidence that European institutions pay particular attention to the problem of combating corruption and, in the case of countries requesting accession to the Union, that such institutions require the development of adequate anti-corruption policies. This volume deals with this issue and analyses the challenge of anti-corruption policies, both for individual countries and for Europe as a whole: a challenge that is anything but simple, as corruption is a complex and elusive phenomenon, difficult to understand and difficult to measure; it is linked to informal dynamics, not only to the application of formal rules which develop between the political-administrative environment and society, variously perceived and represented in public discourse.

It is all the more complicated, as literature on "fragile" States demonstrates, when the political and institutional framework in question is in transition… when the perception of corruption is particularly high… when, in short, the integrity and transparency of an administration appear to be more results to be achieved and built than values to be protected. It is a problem of political and administrative reformism: legislative reforms can define the coordinates for the improvement of the apparatuses and their functioning, but the implementation of the reforms requires action by those same apparatuses. All of this seems to be an apparent paradox, which can perhaps be overcome by the (fortunate) combination of external support, convinced leadership, support from public opinion, as well as by resorting to effective "technical" administrative reform solutions.

Reading the 2014 European Commission Report, the issue and the discrepancy are clear: on the one hand, anti-corruption measures present in the EU scenario remain robust ("*EU Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption*"), but on the other hand, their degree of effectiveness and efficiency is controversial and wide ranging, even among existing Member States ("*anti-corruption rules are not always vigorously enforced, systemic problems are not tackled effectively enough, and the relevant institutions do not always have sufficient capacity to enforce the rules*"). It is not sufficient, therefore, to have a system of rules in place

and apply legislative reforms under adhesion protocols and the implementation of an European anti-corruption *acquis*. It is necessary to adapt the rules to the context, and take the local circumstances into account.

This therefore requires solutions that are not only ideal, but "adequate" and "suitable": for this precise reason, studies are important, including comparative studies, aimed at investigating experiences that rarely enter the international scientific debate, and to which "standard" solutions are often addressed.

As in a matryoshka, the case of the candidate countries for accession to the Union (the four experiences of Albania, North Macedonia, Montenegro, Serbia), must be understood in the context of Eastern Europe and above all of the Western Balkans area, and therefore within European and global challenges (not only of integrity, but also of geopolitics, as the most recent events show). This is a case that is therefore of very particular interest, especially if (as it is not to be excluded) the crisis that characterizes the border area to the east of the European Union were to lead to an acceleration of the process of entry into the Union of countries to time kept on the threshold.

This volume collects writings that, with a juridical and interdisciplinary slant from different angles, investigate the phenomenon of anti-corruption in this context, moving between general issues and specific solutions. The "Apta-Mod" ("*Administrative Prevention through Targeted Anti-corruption MODels for candidates countries*"), project is the result of a European project, funded by OLAF under the HERCULE III Program, which was developed at the LEPA centre "Legality and participation" of the Department of Political Sciences of the University of Perugia.

Over the span of just over two years, the Apta-Mod Project has conducted comparative law studies and high-profile research activities in the field of administrative prevention of corruption, with a specific focus on Albania, Montenegro, North Macedonia and Serbia. The activities have been conducted by the academic team of the University of Perugia, with the precious collaboration of on-site experts (Mirjon Brahimllari, Goran Ivić, Armela Maxhelaku, Katarina Nikolić, Natašha Sardžoska, Rozeta Trajan). International round tables and final conference were held in the framework of the Project and involved institutional participants and civil society stakeholders from the interested countries, all relations the University is building upon for further future activities in the field of the administrative prevention of corruption.

1
The Rule of Law in Europe: main elements and perspectives

Federica Mannella, Diletta Paoletti, Fabio Raspadori[1]

Summary: 1. European *acquis*: the Rule of Law as a common element of an anti-corruption system – 1.1. Notion and general characteristics of the rule of law in Europe – 1.2. The role of the Venice Commission: identification and application of common European standards – 2. The Rule of Law between primary law, newly introduced tools and conditionality – 2.1. Article 7 TEU and infringement proceedings: how the primary law protects the rule of law – 2.2. The Rule of Law Framework and Mechanism as tools to protect the rule of law – 2.3. EU financial resources and the conditionality to the rule of law – 3. Enlargement process and the Rule of Law in the Eastern Europe countries – 3.1. The importance of the rule of law for the enlargement process – 3.2. The four pillars of the rule of law – 3.2.1. The justice system – 3.2.2. The anti-corruption framework – 3.2.3. Media pluralism – 3.2.4. Other institutional checks and balances – 3.3. State of compliance of the Balkan Candidate countries – 3.3.1. Albania – 3.3.2. Montenegro – 3.3.3. North Macedonia – 3.3.4. Serbia – 4. Conclusions.

1. European *acquis*: the Rule of Law as a common element of an anti-corruption system

1.1. Notion and general characteristics of the rule of law in Europe

The Rule of Law (RoL) principle, understood as a system of rules that inspire and limit the exercise of public power, represents today in Europe one of the founding values of the Union (art. 2.1. TEU), common to the Member States (art. 2.2. TEU).

In the European Union, the Rule of Law principle is developed in a plurality of action plans: in relations between the EU and the recipients of Union acts; in relations between the EU and the Member States and between the EU and the

1. Although the conception of the essay is a collective work, paragraph 1 is to be attributed to Federica Mannella, paragraph 2 to Diletta Paoletti, and paragraph 3 to Fabio Raspadori.

States requesting access to the Union; and, finally, in international relations with States outside the EU and with international organisations.

As will be seen below, to guarantee this principle, the TEU has provided, among other things, that any violation involves the initiation of control and sanctioning procedures (Article 7 of the TEU); any such procedure is one of those principles that must guide the Union's external actions (Article 21 TEU); and, finally, that compliance with this principle is a prerequisite for States requesting access to the Union (art. 49 TEU).

The Charter of Fundamental Rights of the European Union[2] also refers to this principle in the preamble "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the Rule of Law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

In order to analyse the effectiveness of this principle in its application, it is therefore appropriate to recall the general characteristics and contents of the rule of law.

The evolution of the principle has had a long historical journey and has been the subject of a wide variety of interpretations and definitions, as evidenced by the vast doctrinal debate on the subject that can only be briefly mentioned here.

Born in the Anglo-Saxon context in the second half of the nineteenth century (Dicey, 1885), the concept of the rule of law is identified with: the absolute supremacy of the law over arbitrary power; equality before the law; compliance with the principles of law developed by the common law courts. As it was originally conceived, therefore, numerous principles found space (legality, equality, prohibition of retroactivity of the law, reasonableness, guarantee of freedom of individuals, regularity, publicity and generality of the authoritative decisions) and their interaction made the Rule of Law a "majestic guardian against tyranny". (Gowder, 2016)

This formal definition was then developed and expanded over time; more recently new elements have been introduced such as respect for international obligations and the protection of fundamental rights, in order to give prominence to the democratic connotation of the system. (Bingham, 2010)

The English interpretation of the Rule of Law principle, developed in a common law context, then found its own particular declination in other continental European countries as well, strongly influenced by the existence of a State, source of the law.

2. Charter of Fundamental Rights of the European Union, 2012/C 326/02, Preamble.

In particular, the law is the expression of a representative assembly and is in a position of supremacy over the administration and the authoritative power of the State; the rights of citizens are subordinated to the law or, rather, are protected by the law and are an expression of it; the judiciary branch is an independent body with the task of applying the law not only with regard to citizens, but also with regard to the public administration. The democratic connotation of the system therefore has an important position.

However, the comparison of the two settings of the Rule of Law, one typical of the common law and the other typical of continental European States (in which it assumes more specific definitions such as *État de droit*, *Stato di diritto*, *Estado de derecho*, *Rechtsstaat*), show a different logic that inspires them. (Salerno, 2020)

Specifically, the Rule of Law is not limited to providing that the State holds the monopoly of the production of law, but must also deal with the individual and collective freedoms that must be guaranteed through the principle of good governance in the judiciary system. When we speak of the Rule of Law, we are referring to a set of regulations that subject public and private power to various constraints to protect the community, made effective by an impartial judicial power that applies respect for the principle of justice.

In the European Union, the ultimate purpose of the Rule of Law is to ensure the creation and maintenance of the Union. To this end, the concept of Rule of Law in the European context ends up confronting the founding values of the Member States: "The Rule of Law is one of the founding values of the European Union and reflects our common identity and our common institutional traditions"[3].

Therefore it is not enough to recall the democratic nature of the form of government and the principles of separation of powers and autonomy of jurisdiction to define the concept of Rule of law in Europe in an exhaustive way: "The European constitutional heritage is made up not only by the European treaties and conventions in the field of the human rights and Rule of Law, but also by those principles which have been at the basis of the historical process of gradual growth of the legal orders of the European States. Therefore, the concept covers at the same time the legal provisions which have been in force in those legal orders and the scientific elaboration of them which has supported their implementation and their development. This definition implies that the terms of reference of the concept are, on one side, the normative experience of the European countries and, on the other side, the doctrines and the theories which have prepared and supported this experience". (Bartole, 2015)

3. Communication from the European Commission 2019, *Strengthening the Rule of Law in the Union. The current context and possible new initiatives*.

Europe today is aware that the constitutions of the Member States are increasingly lacking in the face of the serious constitutional problems that are emerging and that threaten the founding values of the Union, such as democracy, Rule of Law and human rights. (Pech, Scheppele, 2017; Palombella, 2018)

It follows that the concept of the Rule of Law "constitutes a common constitutional standard to guide and limit the exercise of democratic power"[4].

However, considering the generic nature of the definition, a notable differentiation has also emerged among the Member States in the choice of content and definition of the fundamental principles of the rule of law.

It was therefore necessary to rework the rule of law into more specific parameters, transforming it into a set of concrete, understandable and directly applicable principles in all Member States.

In Europe, a fundamental role in this regard is played by the Venice Commission, a consultative body of the Council of Europe on constitutional matters, which provides assistance to Member States in adapting national legal systems to the principle of the rule of law.

1.2. The role of the Venice Commission: identification and application of common European standards

The role of the Venice Commission is part of the action conducted by the Council of Europe to ensure compliance with the rule of law.

The Rule of Law principle is identified, together with democracy and human rights, as one of the three fundamental values of the Council of Europe[5].

In its *Report on the Rule of Law*, the Venice Commission highlights how, unlike the other two pillars, the Rule of Law has been dealt in a marginal and generic way[6].

In recent years there has been an attack on the constitutional principles that make up the Rule of Law in Europe and several States have shown a tendency towards authoritarian and illiberal methods. (Cartabia, 2018)

As a result, the Council of Europe has resumed thinking about the Rule of Law concept in order to provide adequate support to Member States in line with constitutional standards; the Venice Commission was set up for this purpose.

4. Venice Commission, *Report on the Rule of Law*, CDL-AD (2011) 003rev, par. 69.

5. Statute of the Council of Europe, Art. 3 "Every member of the Council of Europe must accept the principles of the Rule of Law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms […]".

6. Venice Commission, Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011, par. 67).

The Venice Commission has a particularly important, concrete and directly operating role in the legal systems of individual States: this institution, with the usual cooperative spirit and with the authority that derives from the technical expertise of its members, has produced valuable documents and guidelines for the verification of the Rule of Law in the systems affiliated to it in support of the actions of all the institutions, national and European entities, involved. (Cartabia, 2019)

The Commission starts from the need to find a common declination of the principle, according to shared constitutional standards, which provides the Member States with the tools useful for its effective practical application at the regulatory and jurisprudential levels.

In 2011 the Venice Commission elaborated and adopted the *Report on the Rule of Law*, for the first time systematically dealing with the defining issue of the principle, with the aim of finding a shared definition. This document is an operational tool for legislators and judges, national and supranational, to adapt the legal systems of the Member States to the principles of the rule of law.

For this purpose, the Commission does not consider it useful to investigate the subject from a strictly theoretical point of view in order to develop a common definition, even if in the introduction of the document it refers to includes the well-known definition according to which "all the persons and authorities of the State, whether public or private, should be bound and authorized by public laws, which have effect for the future and are publicly administered in the courts". (Bingham, 2010)

Rather, the Commission prefers to develop the identification of a series of common characteristics and fundamental elements of the rule of law, "in order to ensure their practical realization". (De Vissier, 2015)

This work of analysis and study will lead to the drafting of a Rule of Law Checklist, made up of six benchmarks: legality, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, respect for human rights, and non-discrimination and equality before the law. (Qerimi, 2020)

This tool is designed to assess the degree of compliance with the Rule of Law principle of the legal system of a Member State and is intended not only for experts from the Venice Commission, but for all interested parties, including State authorities, organisations international organisations, non-governmental organisations, as well as citizens of M ember States.

Before the approval of this document, the work of the European Council to guarantee the rule of law was born, mainly, following appeals to the European Court of Human Rights by citizens of Member States. This method was certainly limited and fragmented, since it stopped the analysis of single internal elements,

without allowing a global assessment of compliance with the rule of law in internal legal systems.

Without claiming to be exhaustive, as stated in its introduction, the Checklist aims to identify the essential elements of the Rule of Law, the parameters that must be met in order to ensure compliance of national laws with this organisational model.

Several years after its adoption, the Checklist has been used in the evaluation of the legal systems of numerous Member States, becoming a fundamental tool in the process of adapting national legislation to the standards of the European Rule of Law.

2. The Rule of Law between primary law, newly introduced tools and conditionality

2.1. Article 7 TEU and infringement proceedings: how the primary law protects the rule of law

In the framework of the discussion on the Rule of Law applied to the EU context, it is particularly interesting to analyse how the concept can compromise the membership of a country participating in the Union. The primary law expressly targets the issue, in article 7 of the Treaty of the European Union. Disrespect for the Rule of Law can undermine membership with the Union, weakening some rights of the State responsible for the violation. This could not have been otherwise, considering that the Rule of Law is listed among the founding values of the Union[7]. Article 7 describes the situation consequent to a risk of violation or an effective violation of one of the founding values of the EU. With a gradual approach – that, as will be seen hereinafter, was not always the case – the first paragraph refers to the risk of a serious violation of the founding principles: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such

7. "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail", Treaty on the European Union, Art. 2.

a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure"[8].

There are several aspects which make this a gradual approach: guarantees for the potential violator arise from the fact that the proposal which starts the process has to be well-reasoned, satisfactorily explaining the reasons for the need to initiate this process. Next, the proposal is to be put forward by one third of the Member States. This means that – in the current EU of 27 nations – the proposal is valid if presented by nine States. This requirement is intended to break possible hidden geopolitical coalitions to hinder another State. Furthermore, if the proposal is initiated by the Council – the institution which, in the EU architecture, represents the States – it has to act by a majority of four fifths of its Members and needs to obtain the consent of the European hemicycle. The proposal can also originate from the European Parliament or the European Commission. Having fulfilled the above-mentioned requirements, the formal determination follows. The paragraph foresees that, preceding the formal determination, the "possible" violator State could be heard and targeted by recommendations. Once the determination is made (the potential risk is declared), the Council has the responsibility to verify that, over time, the grounds on which such a determination was made continue to exist. The second paragraph goes a step further: what must be determined now is not the risk, but the existence of the violation. If the first section can be described as a preventive mechanism, this second section describes what brings to the sanctioning mechanism. "The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations". The European Council takes control of the process, acting unanimously, and its action is based on the proposal of the Member States (almost one third) or by the Commission itself. The consent of the European Parliament is necessary. The third paragraph refers to the consequences of the determination of the existence of a serious and persistent breach of the values referred to in Article 2. It can cause the loss, for the Member State in question, of rights produced by its EU membership: "The Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible

8. Article 7 of the Treaty of the European Union, GU C 202, 7.6.2016.

consequences of such a suspension on the rights and obligations of natural and legal persons". In this last phase of the sanctions mechanism, the Parliament's consent is not necessary. If certain rights can be suspended, the obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State. This part of the Article, even with the uncertainty deriving from the expression "certain of the rights", produces one indisputable consequence: the suspension of a Member State cannot arise from the violation of the founding EU values. "Hence, Article 7(3) TEU excludes the possibility of suspension of membership or the ceasing of membership"[9]. Under the definition "certain of the rights" – in addition to the suspension of voting rights of the representative of the government of that Member State in the Council, expressly referred to by the article – can be found, for example, the suspension of secondary law or of European funding: these are all rights deriving from the application of the Treaties. The only limit is the idea of proportionality suggested by the expression "consequences of such a suspension on the rights and obligations of natural and legal persons"[10]. The fourth paragraph introduces the necessary flexibility in order to evaluate a possible change of the situation which caused the determination and its consequences: the Council, always acting by a qualified majority, may decide to modify or revoke measures taken under paragraph 3. The fifth paragraph refers to the voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article, as set forth in Article 354 of the Treaty on the Functioning of the European Union. It would be appropriate, at this point, to have an in-depth look at the origins of Article 7. It entered EU Law for the first time with the Amsterdam Treaty, which was signed in 1997 and came into force in 1999. The reason for such an introduction was the ever-increasing possibility of EU enlargement by extending membership to the eastern countries[11] after the fall of the Berlin Wall and the implosion of the USSR. At the time, Article F1[12]

9. Besselink L. (2016). *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, Amsterdam Centre for European Law and Governance, Working Paper Series 2016-01, 6.

10.*Ibidem*.

11. The "eastern"/ex USSR enlargement took place, with the following countries entering the Union: Finland (1995), Poland, Hungary, Chech Republic, Slovakia, Slovenia, Latvia, Lithuania, Estonia (2004).

12. Article Fl: 1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(l), after inviting the government of the Member State in question to submit its observations. 2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to

presented some differences (for example, there was no preventive mechanism, but just the possibility to determine – through the Council – the existence of a serious breach of the founding values).

With the Treaty of Nice (2003), the preventive mechanism and consequent talks were introduced. A contrast can be seen between the potential impact of the activation of Article 7 and the realistic probability that it will actually be activated. "The procedure is sometimes called the EU's 'nuclear option' as it provides for the most serious political sanction the bloc can impose on a member country – the suspension of the right to vote on EU decisions"[13], according to an analysis published by Politico EU. Indeed, the sanctioning mechanism, – which, as we have seen, "allows the Council to suspend certain rights deriving from the application of the treaties to the EU country in question" – can include suspension of the voting rights of that country in the Council[14]. The usability of Article 7 is considered unlikely, first of all because of the majorities needed in the Council (four fifths or unanimity). It is also described as unusable and counter-productive, "since it is likely to increase internal support for the government in question and increase levels of Euroscepticism in the

suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State. 3. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their being imposed. 4. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 148(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 2. 5. For the purposes of this Article, the European Parliament shall act by a two thirds majority of the votes cast, representing a majority of its members.

13. *www.politico.eu/article/graphic-what-is-article-7-the-eus-nuclear-option/*. The expression comes from the State of the Union speech to the European Parliament, President Barroso, who in September 2012 said: "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU". In the following year's speech, he said that "experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework […]. The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe". See: *europa.eu/rapid/press-release_SPEECH-12-596_en.htm*; *europa.eu/rapid/press- release_SPEECH-13-684_en.htm*.

14. See *Promoting and safeguarding the EUs values*, *eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l33500, 10.06.2016*.

population. This is because Article 7 measures are understood by citizens as sanctions against them more than against their government"[15]. Article 7 has in fact been activated only twice so far. The first time, in December 2017, the European Commission triggered the process against Poland, over concerns about government influence on the judiciary system[16]. In September 2018, the European Parliament voted on taking the same action against Viktor Orbán's Hungarian government, regarding concerns about freedom of expression, academic freedom, the rights of minorities and refugees, and other related issues[17]. Along with the difficult usability, there is the potential ineffectiveness of Article 7. The effectiveness of the Article 7 procedure is also questioned not only for its unlikely activation, as evidenced by events, but also because it is less suited for the purpose. As highlighted by many observers, what seems most effective is the use of the infringement proceedings pursuant to Article 258. This establishes that "if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations". And continues: "if the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union". In the past, the Commission was confronted on several occasions with crisis events in some EU countries, which revealed specific Rule of Law problems. The Commission addressed these events by exerting political pressure, as well as by launching infringement proceedings in case of violations of EU law. Infringement proceedings would take place in the case of non-compliance with EU law, while the Article 7 mechanisms also apply outside the EU realm, but only when violations are serious enough and persistent[18]. Article 7 and Article

15. Poptcheva E.-M., *Member States and the rule of law*, EPRS (European Parliamentary Research Service), Briefing, March 2015. *www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf*.

16. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law Brussels, 20.12.2017 COM(2017) 835 final 2017/0360 (NLE). It is followed by the European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP).

17. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

18. "Infringement actions are much better suited to addressing systemic violations of EU law than preliminary rulings. The former may end with a finding that certain laws or practices are not compatible with EU law, while the latter procedure usually leaves the final assessment to national authorities, which may not be in a position to adequately weigh the gravity of systemic rule of law problems". (Bárd, Śledzińska-Simon, 2019)

258 can coexist: "They are separate procedures, set out in different provisions of the Treaties, based on a different scheme and serve a different purpose". (Bárd, Śledzińska-Simon, 2019) The infringement procedure can be partial, because it only considers some aspects of a wider problem while some other issues can fall outside the sphere of competence of EU Law. This is clearly pointed out by the Commission itself: "Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain Rule of Law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law"[19]. Two conditions – not just one – need to be fulfilled: the Rule of Law being put at risk and the fact that this refers to that which is stated by EU law. In other terms: "There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the Rule of Law"[20]. In other words, infringement proceedings typically target specific violations of EU law and cannot grasp the systemic nature of many small reforms adding up to significant democratic backsliding. (Scheppele, 2016)

2.2. The Rule of Law Framework and Mechanism as tools to protect the rule of law

Having referred to what is enshrined by article 7 of the TEU and having explained the differences and complementarities with the infringement procedure, to complete the picture it seems necessary to describe two more instruments which aim to protect the Rule of Law within the Union. These are the Rule of Law Framework and the Rule of Law Mechanism, through which an action by the Commission to safeguard the Rule of Law is possible. The Rule of Law Framework is an early-warning tool which was adopted by the Commission in March 2014[21], allowing it to enter into dialogue with a Member State to address systemic threats to the Rule of Law and prevent escalation. The Communication setting up the Framework starts from the recognition of a difficulty in responding to violations of the Rule of Law: "The Commission and the EU had to find *ad hoc* solutions since current EU mechanisms and

19. Communication from the Commission to the European Parliament and the Council *"A new EU Framework to strengthen the Rule of Law"* COM/2014/0158 final.

20. *Ibidem*.

21. *Ibidem*.

procedures have not always been appropriate in ensuring an effective and timely response to threats to the Rule of Law"[22]. As expressed in the cited statement from former EC President Barroso, the need to fill a gap was clear, *i.e.* the requirement to find an effective procedure – resolving future threats to the Rule of Law in Member States – before the conditions for activating the mechanisms foreseen in Article 7 TEU are met. This does not hamper the Commission's powers to address specific situations which fall within the scope of EU law by the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU), as seen before. But – as noted – this is a partial measure, which can operate only when the violation (real or potential) of the Rule of Law has an impact on specific aspects of the EU Law implementation. For other situations there is Article 7, but "the thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort. Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the Rule of Law in a Member State"[23]. In other words, in the situations of concern which fall outside the scope of EU law but pose a systemic threat to the Rule of Law, the preventive and sanctioning mechanisms provided for in Article 7 TEU may apply. Consequently, with the Framework, the Commission sets out a new procedure to ensure an effective and coherent protection of the Rule of Law in all Member States. "It is a framework to address and resolve a situation where there is a systemic threat to the Rule of Law"[24]. What is the Framework's perimeter of action? It is intended to be activated in the presence of a threat to the Rule of Law which is of a systemic nature and regards those principles which define the core meaning of the Rule of Law[25]. It means that the "political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress". With a form of subsidiarity, the Framework will be activated when national "Rule of Law safeguards" do not seem capable of effectively addressing those

22. *Ibidem*.

23. *Ibidem*.

24. *Ibidem*.

25. "Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law" (ivi, section 2).

threats. Operationally, the procedure needs to meet some transversal principles and it is organised in three stages. Regarding the former, these are: dialogic approach (with the Member State involved in the process), objectivity and thoroughness in the assessment (*i.e.* in the evaluation on the existence of a systemic threat to the Rule of Law), impartiality (in the treatment of the States when involved), swiftness and concreteness in the action. The first phase is the assessment which, in turn, consists of two steps. The first step of this first phase sees the Commission collecting information from trustworthy sources[26] about the possible systemic threat. If this is confirmed, a dialogue opens between the European executive and the State under examination. The label for this dialogue is a "Rule of Law opinion". The Member State involved is expected to respond to the Commission and not to obstruct the process, and not act as though the process itself does not exist (with reference to the duty of sincere cooperation set out in Article 4(3) TEU). The only aspect of this phase that is public is the fact that it is taking place (the launch of the assessment and the sending of the opinion), while the specific contents of the dialogue are not made public, in order to reach a timely solution. With the second stage – named the "Commission recommendation" – if the first stage does not reach a satisfactory conclusion, Bruxelles sends a "Rule of Law recommendation" addressed to the Member State concerned, which confirms the existence of a systemic threat that the authorities of that Member State are not taking appropriate action to redress. Before a deadline, the state is recommended to act. The final stage is the follow-up to the recommendation, monitoring the action taken by the Member State concerned. If the serious threat continues to exist, Article 7 TEU can be activated.

"The Rule of law framework was designed in 2014 for Hungary, initiated against Poland and now will probably be tested on Romania. It was used in January 2016 for the first time as a result of constitutional crisis in Poland, in which the main point dealt with the unconstitutional amendments affecting the Constitutional Tribunal", writes Barbara Grabowska-Moroz[27]. "The main idea of the Framework is based on a "constructive dialogue" between the Commission and a Member State. Such a "dialogical" approach to Rule of Law is already visible in the letter, which uses very diplomatic expressions to state the aim "to help the Romanian authorities to find solutions to the Rule of Law issues" and "to resume progress under the Cooperation and Verification Mechanism".

26. The concept isn't further explained in the Communication, which include, as examples, the bodies of the Council of Europe and the European Union Agency for Fundamental Rights.

27. Barbara Grabowska-Moroz, *Rule of law framework – is it time for Romania?*, June 5, 2019, in *reconnect-europe.eu/blog/grabowska-moroz-rule-of-law-romania-timmermans/*.

The Polish chapter of the "Rule of law framework" showed, however, how ineffective such dialogue can be when one side (a Member State undermining Rule of Law) does not want to discuss it"[28].

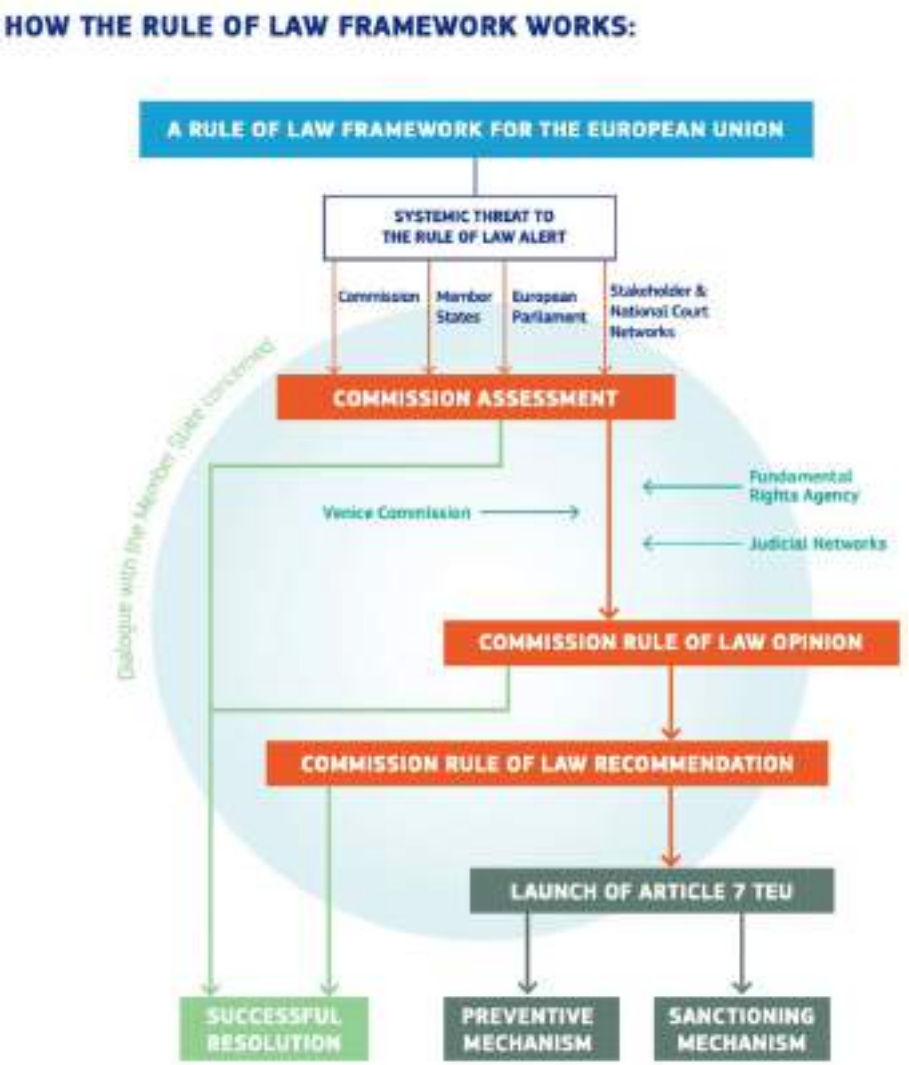

Figure 1. *Source: EC, Methodology for the preparation of the Annual Rule of Law Report*

28. *Ibidem*.

The Framework described so far is a reactive measure targeted to threats to the Rule of Law. But the EU felt the need for more comprehensive action, unrelated to possible violations but rather aimed at the prevention and the promotion of a real environment for the correct implementation of the principle of the Rule of Law. "The Political Guidelines of President von der Leyen set out the intention to establish an additional and comprehensive Rule of Law mechanism as a key building block in the common commitment of the EU and the Member States to reinforce the Rule of Law"[29]. In July 2019, the Commission adopted its Communication on Strengthening the Rule of Law within the Union – a blueprint for action, setting out some of the features of such a mechanism. It is preceded by the Communication from the Commission, "[f]urther strengthening the Rule of Law within the Union"[30]. The Rule of Law Mechanism is a yearly monitoring cycle with an annual Rule of Law report at its centre, promoting the Rule of Law in all Member States and preventing challenges from emerging or escalating. It provides a process for an annual dialogue between the Commission, the Council and the European Parliament, together with Member States as well as national parliaments, civil society and other stakeholders, on the Rule of Law. "A core objective of the European Rule of Law Mechanism is to stimulate inter-institutional cooperation and encourage all EU institutions to contribute in accordance with their respective institutional roles. This aim reflects a long-standing interest from both the European Parliament and the Council. The Commission also invites national parliaments and national authorities to discuss the report, and encourages other stakeholders at the national and EU level to be involved"[31]. The first report is dated 2020 and it has its own methodology[32]. First of all, four pillars are identified: justice systems, an anti-corruption framework, media pluralism, and other institutional issues related to checks and balances. The anti-corruption framework represents a specific interest with regard to the topics covered by the Apta-mod Project.

The assessment in the European Rule of Law Mechanism is carried out by the Commission against EU law requirements and well-established European standards, including: relevant obligations under EU law and European Court of Justice case law, European Court of Human Rights case law; Council of Europe standards. A list of relevant standards is also contained in the standards section

29. Rule of Law Report. The rule of law situation in the European Union, Brussels, 30.9.2020 COM(2020) 580 final, which refers to *ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission en.pdf*.

30. Brussels, 3 April 2019, COM(2019) 163 final.

31. *Rule of Law Report – questions and answers*, European Commission, Brussels, 30 September 2020.

32. *ec.europa.eu/info/sites/default/files/2020_rule_of_law_report_methodology_en.pdf*.

of the Venice Commission Rule of Law Checklist. The Checklist can help to identify specific risks and weaknesses. In its assessment the Annual Report makes reference to the specific standards relevant for the situation assessed. Member states (as institutional representatives) are involved in the process (through a dialogue with national contact points and country visits), as well as qualified stakeholders.

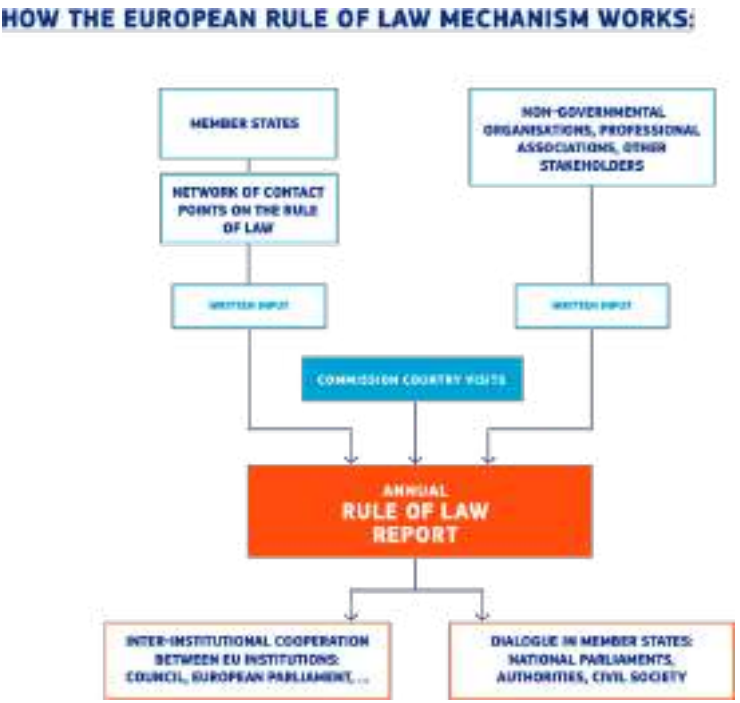

Figure 2. *Source: EC, Methodology for the preparation of the Annual Rule of Law Report*

2.3. EU financial resources and the conditionality to the rule of law

In this framework, the issue of the conditionality to the rule of law of a Member State's use of EU financial resources merits consideration. On 16 December 2020, the EU adopted a new policy instrument, aimed at protecting the financial interests of the EU against breaches of the Rule of Law. What is known as the "budget conditionality regulation" aims to protect EU funds from being misused by national governments that do not respect the Rule of Law.

It came into force on 1 January 2021. The subject matter of the Regulation is that it "establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the Rule of Law in the Member States", as enshrined by Article 1[33]. For the purposes of this Regulation, the following may be indicative of breaches of the principles of the Rule of Law: when the independence of the judiciary system is endangered; when prevention, correction or sanctioning of arbitrary or unlawful decisions by public authorities do not take place, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning, or failing to ensure the absence of conflicts of interest; when limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law. When these breaches take place in a Member State and affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way, measures can be taken. This occurs when the breaches concern, for example, the authorities implementing the Union budget or controlling the expenses or the existence of frauds. The consequences can range from suspension of payments for the EU funds directly managed by the Union, to the suspension of the approval of one or more programmes for the shared management funds. Regarding the procedure, it starts with a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it has based its findings. In this phase, the Commission shall inform the European Parliament and the Council without delay of such notification and its contents[34].

There is an on-going debate, given that on 11 March 2021, Poland and Hungary challenged the regulation in the EU Court of Justice and on 2 December 2021, the Advocate-General issued an opinion stating that actions by Hungary and Poland against the rules on conditionality, which protect the European Union budget, should be dismissed by the Court[35].

The EU funds conditionality regime also applies to the external action of

33. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget *GU L 433I del 22.12.2020, 1-10*.

34. See *www.europeanpapers.eu/en/europeanforum/rule-law-conditionality-long-awaited-step-towards-solution-rule-law-crisis*.

35. At the time of writing, a plenary debate at the European Parliament has been planned on this topic, with the participation of the European Commission Ursula von der Leyen (*www.europarl.europa.eu/news/en/agenda/briefing/2022-02-14/1/rule-of-law-conditionality-meps-to-debate-eu-court-ruling-with-von-der-leyen*).

the EU, and therefore to the candidate countries. The "Financial Regulation" (Regulation 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union) addresses the topic of the budget support to a third country, specifying that the corresponding financing agreements concluded with the third country shall contain: "(b) a right for the Commission to suspend the financing agreement if the third country breaches an obligation relating to respect for human rights, democratic principles and the Rule of Law and in serious cases of corruption".

For example, Regulation 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession Assistance (IPA III) – the means by which the EU has been supporting reforms in the enlargement region with financial and technical assistance – points out that "Horizontal financial rules adopted by the European Parliament and the Council on the basis of Article 322 TFEU apply to this Regulation. Those rules are laid down in the Financial Regulation and determine in particular the procedure for establishing and implementing the budget through grants, prizes, procurement and indirect management, and provide for checks on the responsibility of financial actors. Rules adopted on the basis of Article 322 TFEU also include a general regime of conditionality for the protection of the Union budget". Therefore, "[a]s the respect for democracy, human rights and the Rule of Law is essential for sound financial management and effective Union funding as referred to in the Financial Regulation, assistance could be suspended in the event of the degradation of democracy, human rights or the Rule of Law by a beneficiary listed in Annex I"[36].

It is possible to find the same principles in the Regulation of the European Parliament and of the Council 2021/947 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe.

3. Enlargement process and the Rule of Law in the Eastern Europe countries

3.1. The importance of the rule of law for the enlargement process

The very importance of the rule of law principle for the European Union is an element of clear evidence. It is enshrined in the article 2 of the Treaty on the

36. The countries listed in ANNEX I are: The Republic of Albania, Bosnia and Herzegovina, Iceland, Kosovo, Montenegro, The Republic of North Macedonia, The Republic of Serbia, The Republic of Turkey.

European Union (TEU) together with other fundamental values of the Union. The strong engagement on the rule of law has recently been confirmed in the speech for the State of the Union 2020 in which the president of the European Commission, Ursula von der Leyen, affirms that "The Rule of Law helps protect people from the rule of the powerful. It is the guarantor of our most basic of every day rights and freedoms. It allows us to give our opinion and be informed by a free press".

Looking specifically at the accession process, Article 49 of the TEU sets out that a candidate State must respect "the values referred to in Article 2 and is committed to promoting them" and among which, the rule of law (RoL) principle carries out a pivotal role.

Alongside these aspects, respect for the RoL is also at the core of the foundation of a common area of freedom, security and justice and it is also co-essential to the functioning of the European internal market.

Without a sound basis that assures the fundamental liberties, it is easy to foresee the insurgence of distrust among the Member States and their citizens, as well as the emergence of a difficult economic context, where the "friends of the powerful" can easily obtain benefits and profits to the detriment of ordinary people and economic operators, especially those who have a different nationality.

In this sense, full and effective respect for the RoL principle appears to be a real essence of the juridical and political founding pact of the Union, and the pillar of European civilization.

For these reasons, conformity to the RoL is also a precondition for every action and policy that the European Institutions realise outside its borders. In this perspective, the EU is engaged to pursue a coherent approach between its internal policies on the RoL and how this principle is respected outside its borders, especially with regard to the accession process and the relationship with neighbouring countries, but also in respect to all the other international partners at bilateral, regional and multilateral levels.

Notwithstanding the above, in recent years we have seen a general backsliding from this unrenamable pillar of European civilization, that is more evident in some EU countries of relatively recent accession. But, the strong reactions of the European Institutions against these drifts, evident primarily in the suspension procedures triggered toward Hungary and Poland, prove that the RoL remains a vital element for the consolidation and the evolution of the integration process.

Therefore, considering the centrality of this element, multiple instruments have been created within the European legal order to monitor and control the compliance with the RoL.

Among these, there is the RoL Report issued by the European Commission

for the first time in 2020 with the aim of setting forth key elements to assess the level of conformity present in Member States and to evaluate the general attitude of the public powers toward a solid and sincere respect for the RoL principle.

A relevant contribution which we can glean from the RoL Report which is useful for the objective of this presentation, is the definition of the four pillars by means of which the EU assesses the state of conformity to the RoL principle. Each pillar corresponds to thematic fields where some specific conditions must be assured and they are: the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances.

3.2. The four pillars of the rule of law

Now we will try to isolate the basic elements that characterise the four pillars of the RoL, as they conceived by the European Commission. The aim is to evaluate the current situation in each of the Balkan candidate countries to the accession that we have chosen to analyse: Albania, Montenegro, North Macedonia and Serbia.

3.2.1. The justice system

With regard to the justice system, the very existence of an effective judicial review to ensure compliance with the law could be considered the essence of the Rule of Law. As we already said, an effective justice system is also the basis for mutual trust, which is the bedrock of the common area of freedom, justice and security, and it guarantees reliable investments, long-term growth and the protection of EU financial interests.

To measure the presence of an independent and effective juridical system, capable of managing justice and assuring its main attributes (processes performed in reasonable time, fair treatment of the contenders, general access to justice, etc.), the first indicator to be considered is the general public perception.

Going into the mechanisms of the juridical system, another element to consider is the influence that the executive or the legislative branch has over the activities of the judges. These aspects should be determined by taking a close look at: the setting up or strengthening of an independent national Council, the method followed for the appointment of judges, the disciplinary procedures prescribed for judges, and the legal and constitutional safeguards formally guaranteed within the system.

In particular, a key element for the maintenance of judicial independence is

the autonomy of the prosecution with regard to the executive branch, as well as the capacity of Councils for the judiciary branch to exercise their functions, including those of the Constitutional Courts or Supreme Courts.

Finally, to invest in justice is more necessary than ever in order to address efficiency challenges, meaning the assurance of adequate human and financial resources and, as has been evidenced by the Covid-19 pandemic, fostering the digitalization of the justice system. All of these aspects can longer be deferred.

3.2.2. The anti-corruption framework

The second pillar of the RoL to be considered is the presence of an effective legal anti-corruption framework. Also in this case, the first element to be considered is the public perception on the fairness of the juridical and administrative public systems created to fight corruption. This highlights the necessity for the existence of a coherent legislative and administrative setting that appears to be regularly applied.

Attention must next be focused on the real capacity of the criminal justice system to fight corruption through the development of anti-corruption plans and strategies and the effective implementation and monitoring of the progress made over time.

Likewise, the effective ability to conduct criminal investigations of corruption cases and the enforcement of adequate sanctions should be convincing. Other factors to take into consideration: international anti-corruption standards; presence of prosecution and law enforcement bodies equipped with adequate funding, human resources, technical capacity and specialised expertise; treatment of high-level corruption cases.

Before enacting any repressive measures, a higher priority would be to assure a system able to develop ethical rules and a widespread awareness of the harmful effects of corruption. This objective could be reached through credible rules on: asset disclosures, incompatibilities and conflicts of interest; internal control mechanisms; lobbying; revolving doors; transparency and access to public information; protection of whistle-blowers. But probably the most important element is the existence of an overall culture of integrity in public life, especially rooted within the public servants.

3.2.3. Media pluralism

In addition to the public institutional system, an indispensable tool for real application of the RoL is the presence and the active attitude of an independent media framework system.

The several conditions necessary in order to guarantee a fair media context, including: the availability of independent resources, a reliable system of board appointment, transparency of media ownership. Another central aspect is the distribution of State advertising that must be delivered without favouritism towards media close to public power. Furthermore, the form and the entity of the political pressure on the media should be reduced to the lowest possible level.

Journalists' activities should be protected against different forms of threats and attacks, such as: artificial deployment of lawsuits; threats to physical safety and actual physical attacks; online harassment (especially of female journalists); smear campaigns; intimidation and politically oriented threats.

3.2.4. Other institutional checks and balances

The last element with which to evaluate compliance with the RoL is the existence of institutional checks and balances able to assure a fair relationship amongst public powers and between such public powers and the citizens.

In this regard, the active role of a Supreme or Constitutional Court (endowed with *ex-ante* and *ex-post* control over the compliance of laws to the constitutional system) and the presence of effective procedures to strengthen institutional checks and balances are essential, with particular attention towards the mechanisms of constitutional review also open to citizens.

An aspect to be observed with special attention is the excessive use of the accelerated and emergency legislation that could jeopardise the role of the legislative branch in favour of the executive branch.

Looking at the forms and guarantees on behalf of private citizens participating in political spheres, the pro visions for meaningful consultations – especially of the legislative branch with stakeholders and experts – are seen as a positive sign, as well as the delivering of dialogues with the political opposition.

Also very important are debates on the RoL, as well as the capability to improve the inclusiveness and quality of the legislative process involving stakeholders, and ensure that structural reforms are the product of broad discussions.

Finally, a point of great importance is the presence of an Ombudsperson or a National Human Rights Institution, both of which can play a very relevant role for assuring control over public bureaucracy and to raise overall public awareness.

3.3. State of compliance of the Balkan Candidate countries

To test the level of conformity to the four pillars of the RoL principle, we examine each of the Balkan country through two instruments of analysis: the position held in the scoreboard of two of the major watch-dog non governmental organisations involved in attesting respect for fundamental liberties in the world (Freedom House and Transparency International), and the main elements emerging from the annual Report issued by the European Commission regarding the countries of accession.

3.3.1. Albania

We start with Albania. Regarding the opinion of the NGOs [Non-Government Organizations], the country is evaluated a little below the worst EU Member States. In the ranking published in Freedom House's 2021 Report, Albania obtained 66 points, only three less than Hungary (the last-ranked among the EU Member States). For Transparency International (2020 Report) Albania totals 36 points, eight less than Hungary, Romania and Bulgaria.

Looking at the last Accession Report, the European Commission deems Albania moderately prepared in implementing EU *acquis* and European standards on respecting the RoL principle. The Commission appreciated the progress accomplished in the field of the judicial system, while it asks for more efforts in the fight against corruption.

Some recommendations have been forwarded to the country: further progress regarding the process of re-evaluating judges and prosecutors; consolidation of the capacity of the judicial system and the governance institutions, in particular in trying to strengthen the legal education system and finalising the new judicial map; decisive steps towards a roll-out of a new integrated case management system, ensuring its inter-operability across the entire justice system.

3.3.2. Montenegro

Moving on to Montenegro, the score obtained in the Freedom House scoreboard is only 63 points, that is three less than Albania. In the Transparency International Report for 2020, this country presents a better performance with 45 points, that is one more than the EU Member State in the last position.

Regarding the 2021 Report of the European Commission on the progress accomplished in the accession process, the European executive expresses moderate satisfaction. In particular, the progress made in the area of RoL and the respect for human rights seems limited, with stagnating implementation of

key judicial reforms; in many areas of the country, corruption still remains an issue of concern.

For this reason, the Commission has confirmed the recommendations issued in the 2020 report which remain largely valid. Montenegro in particular is asked to: ensure the effective independence and professionalism of the judiciary system; implement the relevant constitutional and legal framework, in line with the Venice Commission and Council of the Europe Group of States against Corruption (GRECO) recommendations; review the disciplinary and ethical framework for judges and prosecutors; adopt a new strategy for rationalisation of the judicial network, laying down the next concrete steps leading to closure of unviable small courts.

3.3.3. North Macedonia

North Macedonia, like Albania, totalled 66 points in the 2021 Freedom House ranking, but the score assigned in the 2020 Report for International Transparency on corruption was only 35.

The European Commission, however, did acknowledge that some progress has been made in the field of RoL, in particular emphasising strengthened judicial independence and the efforts made to address the problem of police impunity. Notwithstanding the institution of the State Commission for the Prevention of Corruption, corruption is prevalent in many areas and remains an issue of concern.

Considering the requests for the following year, the Commission is keen to see progress in the following fields: improvement in implementation of the judicial reform strategy and an updated action plan, including a new law on civil procedure; new recruitments in the judiciary and public prosecution network inspired by principles of transparency; improvement of the automated court case management information system (ACCMIS) to ensure that it is fully functional and reliable.

3.3.4. Serbia

Finally, Serbia presents an outline similar to those of the other countries examined, in fact it has a score of 64 in the Freedom House Report (2021), and 38 points for the evaluation of International Transparency (2020 Report).

The Commission expresses some elements of concern in its 2021 Report. In particular, in spite of the fact that constitutional reform was relaunched in late 2020, the current legal framework does not provide sufficient guarantees against potential political influence over the judiciary system. Also regarding

corruption, the situation is not positive; in the opinion of the Commission, the country's legal system maintains an ambiguous attitude towards the prevention and repression of corruption.

Taking into account these considerations, the Commission asks that the country: strengthens the independence of the judiciary system and the autonomy of the prosecution, also at a constitutional level; introduce new and fair procedures for the appointment, career management and disciplinary proceedings of judges and prosecutors; amend the laws for the High Judicial Council and the State Prosecutorial Council in order to defend judicial independence and prosecutorial autonomy; strengthen the human resources strategy for the entire justice sector together with establishing a uniform and centralised case management system, necessary for a measurable improvement in efficiency and effectiveness of the justice system.

4. Conclusions

In general terms, our final considerations can be summarised in two statements. The first is that respect for the principle of RoL still remains a pillar of the European Union's identity, notwithstanding the turbulence that jeopardises it from different directions, above all from within the European Union itself.

The second is that the four Balkan countries on which we have focused our attention must dedicate more efforts to reach the necessary levels of conformity, but these necessary levels do not appear distant.

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2
Measuring corruption: general challenges, supranational and national specificities

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Summary: 1. The complexity of corruption and its measurement – 2. The state of the art in corruption measurement – 3. Corruption risk assessment and the "red flag" logic – 4. An outline of public procurement databases in European countries – 4.1. Tenders Electronic Daily (TED) – 4.2. Opentender platform – 5. The Italian National Database of Public Procurement: a model for corruption risk management – 6. Public procurement data in countries involved in the APTA-mod project.

1. The complexity of corruption and its measurement

Corruption exists in every society, in every sector, and at all levels, from local to transnational, imposing significant costs on governments, citizens, and businesses. Containing it by preventing fraud, malfeasance and misconduct, is acknowledged worldwide as a key goal for governments who need to allocate resources across competing priorities. Yet, despite the widespread agreement that corruption is a key target for policy makers, there is still a rather weak consensus on how to best measure it.

The non-trivial circumstance that corruption is, in itself, very difficult to measure is at the core of such a feeble consensus. Indeed, corruption is a latent phenomenon by nature: it cannot be directly observed and analysed, as people involved in corruptive activities with the aim of illicit gains have every interest to hide such activities. What is more, corruption is inherently complex as it encompasses several activities at different levels of gravity, from the trivial to the much more severe activities (*i.e.*, a bribe to avoid prosecution for a traffic violation; a falsification of public decisions for illicit private interests). Moreover, many different types of corruption exist, varying according to the sectors where they happen (public or private, political or administrative); the parties involved (public officials, private citizens, politicians), as well as the degree to which they are formalised (systemic or occasional). (Andersson, Heywood, 2009)

Further, the weak consensus on how corruption can be measured best is linked to a number of drawbacks of current measures against corruption. Indeed, in absolute terms, there simply is no best way to measure corruption as each measurement instrument not only has its positive aspects, but shows peculiar downsides that, while more suitable than others in certain circumstances, are not workable in others. As it will be better clarified in the next paragraph, the most commonly used method to measure corruption – the so-called perception-based and non-perceptual measures or corruption – are all affected by conceptual, methodological or political problems (Heywood, Rose, 2014; Carloni 2017a; 2017b) that limit their relative utility as a guide for developing effective anti-corruption policies. Perception-based measures based on subjective perceptions of corruption expressed by experts, for instance, may not mirror actual experiences of corruption. On the other side, so-called objective measures relying on statistical and market proxies and judicial measures pose other constraints. One of such limitations is, for instance, the limited usability of judicial measures in international studies (*i.e.*, as judicial systems are very different and largely incomparable among different countries) and their limited utility for preventing corruption (*i.e.*, a conviction for a corruption crime may occur many years after the corruptive event took place).

2. The state of the art in corruption measurement

Corruption is mainly measured through perception-based indicators. Perception-based measures are founded on the subjective perception of corruption provided by experts and are generally expressed at a country-level. One of such measures is the Transparency International's Corruption Perceptions Index (CPI; Transparency International 2020). The CPI is a composite index of corruption perception expressed by experts and managers of the private sector, employing 13 external databases produced by the World Bank, the World Economic Forum, private companies, and Think Tanks. Despite widespread use in comparative studies, corruption measures based on perceptions are questioned. Critics point out that perception-based measures are prone to bias and serve as imperfect proxies for actual levels of corruption, because perceptions may not be related to actual experiences of corruption (Rose, Peiffer, 2012), and can be driven by the general sentiment reflecting prior economic growth or media coverage of important cases of corruption. (Golden, Picci, 2005; Mancini *et al.*, 2017)

Surveys or questionnaires that include questions assessing the direct involvement of individuals and firms in corrupt practices in well-defined

instances (*i.e.*, when obtaining a water supply contract or an electricity connection) are further measures against corruption. The World Bank Enterprise Surveys (WBES) is an example of such latest measures, collecting the most widely used firm-level survey data on corruption. Even if these measures partly overcome the drawbacks of perception-based measures, providing information on the direct involvement in corrupt practices, they show drawbacks as well. A major challenge is the extent to which a respondent may purposefully misreport corruption events. Fear or shame of exposure can lead respondents to under-report corruption, while a strategic concern with influencing action on a particular corrupt practice can lead to over-report instances of corruption. (Gnaldi *et al.*, 2021)

Judiciary measures can be also used to gauge corruption through judicial deeds, such as judgments, sentences and convictions for corrupt crimes. Despite showing fewer statistical criticalities compared to the previous measures, judiciary measures show a number of drawbacks linked primarily to their *i.* limited usability in international studies because different countries adopt different judicial systems; and *ii.* partial utility for preventing corruption, as a conviction for corruption crimes may occur many years after the corrupt event took place.

Corruption is also assessed through statistical inference and market measures. These measures estimate corruption through *proxies*, that is, variables considered expressions of behaviours or situations close to corruption, and then approximating corruption. Some of these measures rely on a comparison between real data and a theoretical statistical (or economic/econometric) model hypothesising the non-corrupted behaviour. Purposely, they estimate the incidence of corruption in specific contexts or sectors, by verifying to what extent the real observed data deviate from the hypothesis of absence of corruption (*i.e.*, what should be observed in the absence of corruption, under a specific theoretical model). Proxy measures are useful in allowing users to estimate the incidence of corrupt practices in specific contexts or sectors, to understand the micro-dynamics of corruption, and to study the economic impact of corruption. On the other hand, as they are indirect measures against corruption, their main limitation lies in where they might not express corruption itself but other forms of inefficiency. (Sequeira, 2012)

Further contiguous measures use "red flag" indicators, as proxy measurements of corruption. These indicators signal risk of corruption rather than actual corruption, and they are expected to be correlated to corrupt practices rather than perfectly matching them. (OECD, 2019) They originate from the grounds which acknowledge that corruption control has a more preventative dimension than a repressive dimension. (Gnaldi, Del Sarto, 2019; Gnaldi *et al.*, 2021) Corruption

prevention seeks to identify potential weaknesses in a public organisation in order to provide warnings and to reveal any potential vulnerabilities and opportunities for malpractice, and to advise recommendations for their reduction and minimisation. (Carloni, 2017a; Gallego *et al.*, 2021) The key target of such measures is, therefore, no longer quantifying *ex-post* the "amount of corruption", but rather identifying, in advance, situations at risk of corruption. Indeed, corruption prevention can be addressed by implementing a wide range of instruments, from national administrative anti-corruption programmes and their subsequent assessment through surveys, to corruption risk assessment. (Gnaldi *et al.*, 2021)

National administrative anti-corruption programmes aim at developing and implementing deterrence systems of *ex ante* controls of public officials from the commission of corruption crimes. (Li, 2014; Carloni, 2017b) In the Italian context, the national legislation adopted a preventive perspective to tackle corruption with law n. 190 of 2012, which introduced two main tools to reduce the risk of corruption in public administrations: *i.* a three-year plan for corruption prevention (PTPC), by which each administration is required to assess its own exposure levels to the risk of corruption and indicate the organisational changes to reduce such a risk; *ii.* the introduction of a new figure, the supervisor for corruption prevention (RPC) who, among other duties, takes part in a national survey by filling in a report on the degree of accomplishment of national anti-corruption measures by the public administration they represent.

Indicators of the administrative fight against corruption are obtained from the latest of such surveys. They provide information on the capability of administrative offices to effectively oppose the spread of deviant behaviours and corrupt practices in the administration offices they represent, by adopting and executing the preventative measures entrusted by the national legislation (*i.e.*, in terms of staff turnover, transparency requirements, etc.).

Despite the potential, indicators of the administrative fight against corruption do show certain weaknesses. First, as they are summary indicators based on auto-declarations by officials, they provide information on the capability of the administrative system to effectively adopt preventative measures, rather than on the actual effectiveness of preventative measures themselves. Therefore, they are valid indicators of the degree of compliance and adoption of preventative measures, rather than of the actual effectiveness of anti-corruption measures themselves. Further, a fundamental limitation common to all measures based on official government-led corruption audits, is that once officials understand the workings of a system that attempts to consistently detect and measure corruption through systematic audits, they may adapt their behaviour and find ways to elude it. (Gnaldi *et al.*, 2021)

Risk assessment can be qualitative, quantitative or both, and no exclusive methodology exists for assessing corruption risks. Qualitative approaches can provide critical insights, but the volume and complexity of the information stored in databases often requires specialised skills in analysing data. Setting up and maintaining a quantitative risk assessment process to measure corruption risk requires fewer specific quantitative skills. Details on this process are provided in the next paragraph.

3. Corruption risk assessment and the "red flag" logic

Perhaps the greatest and most direct potential for use and development for the purposes of constructing "red flag indicators" of corruption within a risk assessment procedure is provided by the procurement process, by which public authorities purchase work, goods or services from private companies. Indeed, in the public procurement process, a number of practical occurrences can signal potentially risky circumstances to monitor, from a delay or failure to award a contract, to excessive use of emergency procedures, contract extensions, recurrence of small assignments with the same object, etc.

Over recent years, experts' efforts have concentrated mainly on the first strategic phases of the risk assessment process, devoted, on one side, to create, extract, and organise the relevant administrative datasets (*i.e.*, from public procurement sources) and, on the other, to select the relevant single indicators of corruption risk (*i.e.*, "red flags").

Indeed, a big push towards the growing availability of interlinked data sources has been played by both data availability in a machine-readable format and the development of new technologies based on the collection and cross-processing of public procurement data with other data sources of public administrations. The potentials of new technologies in the fight against corruption is demonstrated by the 2018 Pannonia Declaration adopted by the European Partners against Corruption (EPAC), by which involved bodies decided to provide a structure for the mutual comparison on the use and implementation of big data analytics and artificial intelligence in European and national anti-corruption policies.

Over the last two decades, the literature has proposed many red flag indicators of corruption risk in public procurement. Any corrupt contract allocation requires at least four components to be in place (OECD, 2019): *a*) corrupt transactions allowing for rent generation (contract), *b*) corrupt relations underpinning collective action of corrupt groups (particularistic tie); *c*) organisations enabling rent allocation (contracting body); and *d*) organisations extracting corrupt rents (supplier).

Overall, the proposed indicators can be classified into four blocks (Fazekas *et al.*, 2017):

- Tendering Risk Indicators (TRI), reporting risks of corrupt manipulation in the process of publication of a tender for the purpose of generating profits by distributing them among related companies.
- Political Connections Indicators (PCI), providing an indication of the direct/indirect political connections between the contracting authority and the private companies, which can influence the public procurement process through corrupt agreements.
- Supplier Risk Indicators (SRI), signalling the instrumental use of tender winning companies, as means to ensure the illegal distribution of profits and advantages necessary to reward all the actors involved in the illegal agreement.
- Contracting Body Risk Indicators (CBRI), measuring the weaknesses of the formal contracting bodies, that is, those public structures conceived to defend and preserve companies from undue pressures aimed at favouring particular bidders.

Current international literature tends to converge towards the selection of a set of the most relevant single red flags of corruption risk in public procurement. Some of them are (Fazekas, 2016): single bidding (*i.e.*, only one bid received); call for tender not published in official journals; relative length of eligibility criteria; relative price of tender documentation; exclusion of all bidders but one; the importance of non-price evaluation criteria (*i.e.*, proportion of non-price related evaluation criteria included with the criteria as a whole); annulled procedure re-launched; length of decision period (*i.e.*, number of working days between submission deadline and announcing contract award); contract modification during delivery; contract lengthening and extensions; contract economic value increase.

Many red flag indicators suffer from overestimating corruption risks, as there can be numerous non-corrupt circumstances where a red flag indicator signals a non-existent risk (*i.e.*, false positives) (OECD, 2019). For example, while there are certainly cases where extremely high turnover growth observed in public procurement data is due to government favouritism, it cannot be excluded that this is due to new innovative companies entering the market. The distorting effect of false positives can be attenuated by (OECD, 2019) *i.* carefully selecting the elementary risk indicators that are the most closely associated with other corruption signals; *ii.* basing any risk assessment of an array of red flags, rather than a single red flag (or few of them), each pointing to high risk; *iii.*

pulling several red flag indicators into a composite indicator of corruption risk, which tend to be more robust to unobserved variation in specific corruption techniques and single indicators (*i.e.*, observable through a specific red flag, but not through a different one).

Currently, both at the academic and policy levels, little energy has been devoted to developing a robust synthetic/composite indicator of corruption risk in public procurement as an aggregate measurement of single red flags. Among these, the proposal of Fazekas and colleagues (Fazekas *et al.*, 2016) stands out. In this work, the authors developed a composite score of tendering red flags, the Corruption Risk Index (CRI), as a proxy measure of high-level corruption in public procurement, derived from public procurement data from 28 European countries between 2009 and 2014. A similar study is carried out by Troìa (Troìa, 2020) with data and red flag indicators developed from the Italian National Dataset of Public Contracts (*Banca Dati Nazionale dei Contratti Pubblici*). Further, in the Single Market scoreboard Initiative[1], the single indicators (*i.e.*, red flags) are aggregated by summing them to show how different EU countries are performing on key aspects of public procurement.

Generally, composite indicators of corruption risk can be useful communication tools for conveying summary information in a relatively simple way. In fact, aggregate measures are used widely across different sectors in public services as policy analysis and public communication tools. In the context of corruption measurement, aggregate measures of corruption risk would allow: *i.* reliable comparisons of corruption risk at the territorial level (regions, nations, contracting bodies, etc.) and according to each category (*i.e.*, contracting stations); *ii.* consistent appraisals of trends over time, providing insights on the ways past, present and emerging corruption risk schemes relate to current risk drivers.

The composite indicators of corruption risk developed within the previous works are computed by relying on a rather simple methodological base. In fact, they are obtained as a simple arithmetic (hence, unweighted) means of individual risk indicators. Furthermore, none carries out a validation procedure of the proposed composite, reporting a sensitivity analysis of the composite indicator with the aim of verifying its robustness. From a statistical point of view, however, summarising information available from a set of single indicators (*i.e.*, red flags) into a single metric, such as a composite indicator of corruption risk, is a major challenge in the measurement of corruption and corruption risks. Indeed, in the construction of composite indicators, many methodological issues need to be

1. *ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm*.

addressed carefully if the results are not to be misinterpreted and manipulated. It is known (OECD, 2008) that composite indicator development involves stages where a number of subjective judgements have to be made, from the selection of individual indicators (*i.e.*, red flags) to the choice of normalisation methods, weighting schemes, and aggregation models. All such factors are not merely methodological aspects, as they reflect substantial choices. A higher attention to such aspects and further efforts are needed to strengthen the robustness of composite indicators of corruption risks, with the aim of validating a replicable and robust statistical procedure within a corruption risk assessment procedure.

Functional to the full exploitation of the potentials of data availability in a machine-readable format and of new technologies based on big data to the field of corruption measurement is the development of a shared ontological standard for public data. A common ontology is needed in order both to build a common data description language recognised by any public organisation, and to guarantee the semantic interoperability between different data collections, both nationally and internationally. (Gnaldi *et al.*, 2021) Public administrations nationally and across the globe must reduce their chronic fragmentation and be able to process information from different sources with shared common standards. The exchange of data, the integration of data from different sources and data standardisation – at the core of a common ontology – represent a crucial precondition for any measurement effort with comparability objectives in the field of corruption assessment.

4. An outline of public procurement databases in European countries

Public procurement includes activities particularly vulnerable to corruption. In fact, corruption risks are exacerbated by some characteristics of public procurement, such as, among others, process complexity, close interaction between public officials and businesses, multitude of stakeholders, volume of transactions and financial interests at stake. In this regard, OECD observes that integrity risks might occur throughout the whole public procurement process, as in each step that characterises the three main phases of the process (pre-tendering, tendering and post-award) different risk typologies may be highlighted. This very complex issue may be carefully approached by envisaging integrity measures (*i.e.*, red flag indicators) in all the steps of the procurement process and, at the same time, by addressing all the several types of risk. (OECD, 2016) Consequently, it is essential to have data about the public procurement process in order to organise a robust red flag indicator system, identifying which indicators to integrate in it.

Moreover, the concept of open data is gaining momentum in public procurement and, overall, in the public contracting process (thus, not only in procurement, but also in concessions, permits, licenses, grants, etc.). In fact, the term "open contracting" refers to the possibility of making contract details (such as project description, bidders, awarded company, expected and actual project price, terms of contracts, etc.) freely and publicly accessible. However, in Europe we have observed a lack of databases to be used as monitoring tools – by governments, but by the public as well – of corruption risks and inefficiencies in public procurement. What is more, even if all EU countries have a significant amount of micro-level information on tenders, these databases are often fragmented and present some limitations in terms of data quality. Computer science instruments are available for gathering details on individual contracts, although shortcomings still exist, especially related to the approaches on how to systematically analyse huge datasets of tenders with the aim of assessing the presence of corruption, collusion, inefficiency, and so on. (Czibik, 2015)

In any case, this "opening" is based on a consistent regulatory framework, both at national (e.g., the national Freedom of Information laws) and supranational level (e.g., international agreements, such as United Nations Convention Against Corruption and EU Public Procurement Directives). Moreover, open data policies in public procurement are encouraged by new and reliable computer science tools and standards, such as the Open Contracting Data Standard developed by the Open Contracting Partnership (OCP), the world-leading organisation for open data in public procurement. (Opendatasoft, 2020) First examples of open data in public procurement date back to the early 2000s, but it has definitely caught on since 2010 with the Open Government Partnership, the Infrastructure Transparency Initiative, the Open Contracting Partnership and the OECD Recommendation for Public Procurement. (OECD, 2015)

Some studies have attempted to evaluate the impact of open contracting. Among them, Kovalchuk *et al.* (2019) highlight a positive effect on competition, prices and processing times, even if the authors outline the difficulty of disentangling the open data effect from the public procurement reform. Furthermore, using the World Bank's Enterprise Surveys, Knack *et al.* (2019) find that countries with more transparent procurement systems report higher firm participation in public procurement markets and lower kickbacks paid by firms to obtain contracts. Moreover, other research highlights the higher probability of awarding contracts using open procedures after open data initiatives. (Duguay *et al.*, 2020) On the other hand, focusing on the case studies of Mexico, Paraguay, and Slovakia, Adam *et al.* (2020) identify no policy-relevant short-term effect of open contracting reforms.

In the following of this section, we examine some of the available open datasets on public procurement in Europe.

4.1. Tenders Electronic Daily (TED)

As an online version of the EU "Supplement to the Official Journal", TED is dedicated to European public procurement and every year publishes approximately 700,000 procurement award notices (of which, 235,000 are calls for tenders).

TED data are presented online available in comma separated value (csv) format and includes public procurement for the European Area, Switzerland, the Republic of North Macedonia and EU institutions for the period 2006-2019. As outlined in the TED data information guide (EU, 2020), data come from public procurement standard forms, created by the European Commission according to the different EU legal bases for publishing public procurement. In order to publish on TED, each EU public contracting body can send their procurement data (notices in electronic files using the official TED XML format) using specific applications (e.g., EU eNotices, or any eSender[2]).

TED data content has an almost direct correspondence with the fields in the standard forms. However, data may be input incorrectly or missing, thus causing a potential limit concerning their data quality. Furthermore, the EU is keen to point out that "older data has lower quality and sometimes lower coverage, because the data collection structure was less developed". (EU, 2020) In fact, common procurement vocabulary – the unique classification system in public procurement for standardising the subject of procurement contracts – changed in 2008 and important modifications in data format took place in 2016 and 2017.

Specifically, data in TED include information on all the tenders with a value above specific threshold[3] and refer to the most important fields about the calls for competition and contract award notice, as well as some voluntary ex-ante transparency notices.

TED data are analysed in several publications: using the Google Scholar search, with key words "TED" and "public procurement", about 1,860 results are obtained, focusing only on the period 2018-2021.

2. *simap.ted.europa.eu/web/simap/list-of-ted-esenders*.

3. 5.35 million euros for public works, 139,000 euros for service and supply contracts, 428,000 euros for all other supplies and services in the sectors of water, energy and transport. For details see *ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en*.

4.2. Opentender platform

In line with the above, the Opentender platform home page title is "Making Public Tenders More Transparent". In fact, this instrument allows us to search, analyse, and download public procurement data related to the 28 EU member states, Norway, the EU Institutions, Iceland, Switzerland and Georgia.

Opentender came about thanks to Digiwhist, an EU Horizon 2020 funded project, as a result of a collaboration between the Department of Sociology of the University of Cambridge, the Open Knowledge Foundation Germany, the Government Transparency Institute, the Hertie School of Governance, Datlab and the Joint Research Centre on Transnational Crime of the Università Cattolica del Sacro Cuore of Milan and the University of Trento. By systematically collecting, structuring, analysing and disseminating information on public procurement and on mechanisms that increase accountability of public officials in the EU and neighbouring countries, the main purpose of this project is to allow society to fight public sector corruption.

Opentender was built through a robust data collection and processing software, retrieving procurement data from 25 public procurement data sources (such as, among others, TED and national web portals/open data sources). As reported in one of the project deliverables (Hrubý *et al.*, 2018), the following data processing steps were implemented:

1. data download (collection of data files in several formats, such as HTML, CSV, XML, etc.);
2. structuring of downloaded data using a uniform structured data template;
3. formatting, by converting textual data to standard data types and cleaning meaningless values or ballast information;
4. linking information about each specific tender gathered from various sources;
5. merging information from all linked data records with the aim of creating one final, overall record (with up to 250 variables) for each tender, related to its whole life cycle.

The final data are approximately 46 million tenders over the period 2009-2020: the most "represented" countries are Romania (around 20 million tenders), Italy (14 million), Poland and France (around 3 million).

Beyond the massive data collection process just described, the main potentiality of this platform is its dashboard, which allows us to browse country-by-country and to visualise data, also through maps. There are several ways to for interact with the data: going beyond the overview, data download and search tools, the dashboard allows for the computation of various indicators for the

analysis of public procurement performance (both overall and at country level), organised in the following three pillars:

1. administrative capacity (Fazekas, 2017);
2. transparency (Bauhr *et al.*, 2017);
3. integrity (Fazekas, 2016).

5. The Italian National Database of Public Procurement: a model for corruption risk management

Among the EU countries, Italy deserves particular attention as it has a very complete and structured database which collects every single tender processed in the country, both below and above the European threshold. The Italian National Database of Public Procurement (BDNCP, *Banca Dati Nazionale dei Contratti Pubblici*) is managed by the Italian Anticorruption Authority (ANAC, *Autorità Nazionale Anticorruzione*) and, medically speaking, allows for a sort of "follow-up" of every single procurement procedure throughout its entire life cycle (*i.e.*, from the publication of the call for tender until the final inspection of the completed project).

Thanks to the BDNCP, in 2018 ANAC won first prize of the European Commission's award for better governance through public procurement digitalisation[4], a competition with the aim of raising awareness about the benefits of digitisation and transparency in public procurement. Among the strong points, the Commission highlighted the scope of the database (no value thresholds for being included) and the interoperability with other systems.

The BDCNP contains 53 million procedures over the period of 2009-2021, 2.4 trillion euros as contract total value, around 38,000 contracting authorities, and 240,000 private companies. Data are freely accessible and downloadable (in CSV, JSON and XML format) through the ANAC open data portal[5], which includes all the data, managed by ANAC and dealing with anti-corruption, transparency and public procurement.

BDNCP data are provided directly from the contracting authorities using a digitised system built to ease the public administration interoperability. Thanks to this system, each tender receives a unique identifier – the CIG (*Codice Identificativo di Gara*) – by which every step of the tender life cycle

4. *ec.europa.eu/growth/content/european-commission-award-better-governance-through-procurement-digitalisation_en*.

5. *dati.anticorruzione.it/*.

can be traced, from beginning to end, and this, in turn, allows for a prompt and effective monitoring of the financial flows involved in public procurement. However, for tenders below 40,000 euros, a more simplified procedure is requested for obtaining the identifier. Consequently, information on this contract category is definitely narrower and basically relates to data contained in the call for tender.

As regards the so-called "ordinary" tenders (*i.e.*, above 40,000 euros), data flowing into BDNCP are organised into different tables, each one related to a different stage of the procurement process. The extraction of the complete information of a single tender is therefore possible, thanks to its CIG, the tender unique identifier introduced above. Data contained in these tables include the following:

1. publication of the call for tenders (e.g., publication date, procedure type, submission deadline, contract value, identification of the contracting authority, tender subject);
2. contract award (e.g., winner company, award criterion, participants, award value);
3. implementation (e.g., starting date, expected completion date, sums paid, possible modifications);
4. completion and final approval (e.g., final value, real completion date, final approval).

An accurate and solid procurement data tracking system, such as the one implemented in the BDNCP, is a key tool for making the procurement process as transparent as possible, without compromising its effectiveness and efficiency, in order to minimise the risk of corruption. As outlined by the ANAC President during the first meeting of the G20 Anti-Corruption Working Group of 2021 (ANAC, 2021), efficiency and transparency in the public procurement management are fostered by the BDNCP through four key points: *i.* digitised and simplified process of purchase; *ii.* public contract market with a unique reference data source; *iii.* standardised data collection; *iv.* open data.

6. Public procurement data in countries involved in the APTA-mod project

This section contains a brief outline about the public procurement data tools related to the four countries involved in the APTA-mod project: Albania, Montenegro, North Macedonia and Serbia.

Albania has an electronic procurement system (EPS)[6] managed by the Public Procurement Agency (PPA), the institution responsible for the operation of the public procurement system, concessions/public private partnership and public auctions. EPS is used for electronically processing procedures related to public procurement and concessions, such as publication of contract notices, downloading and uploading of tender documentation and tender submissions, and e-archiving (OECD, 2021a). Contracting bodies must use EPS for all transactions above 100,000 ALL (approximately 823 euros), which is the minimum contract value covered by the public procurement provisions. Moreover, as regards very low-value procedures, procurement law requires publication in the portal of related information.

Another important tool concerned with Albanian public procurement data is the "open procurement Albania" project[7], which collects open data on tender procedures in 61 Municipalities of the country starting from July 2015. In particular, a structured database is available, which collects data coming from several sources, such as the PPA official website, public notice's newsletters, the official website of the Public Procurement Commission, publications in the official website of the Ministry of Finance on treasury transactions, and the National Business Centre's database. Finally, well-structured information can be converted and exported in JSON and spreadsheet format.

Since January 2021, Montenegro has a brand-new e-procurement system, which includes several important features such as publication of procurement plans, tender documents, the public opening of tenders and tender submission, including information on simplified tenders (*i.e.*, those below the lowest threshold according to the Montenegrin public procurement law). Despite the overall satisfaction of contracting authorities and economic operators with this new system, improvements should be undertaken in order to increase its efficiency. (OECD, 2021b)

North Macedonia public procurement data flow into TED as regards the above-threshold procedures (e.g., we have 19,331 records in 2019). Furthermore, an advanced Electronic System for Public Procurement (ESPP)[8] is implemented in the country, in which contracting bodies must publish notices and tender documents (also for low-value contracts), as well as public procurement annual plans, copies of awarded contracts, notices about the contract modifications and other data about the contract fulfilment. (OECD, 2021c) In addition, ESPP contents are publicly available without registration.

Finally, since July 2020, Serbia holds a new advanced electronic public

6. *www.app.gov.al/home/*.
7. *openprocurement.al/en/albaniandf/project*.
8. *e-nabavki.gov.mk/PublicAccess/Home.aspx#/home*.

procurement portal[9], which allows for the e-submission of tenders and access to monitoring and data collection on award procedures. E-valuation is also possible. The portal is managed by the Public Procurement Office and is employed for the announcement of all notices, as well as for the communication between contracting bodies and economics operators. Moreover, information contained in the portal is freely available to the public and can be downloaded in spreadsheet format. However, data on contract management and execution are not included in the system. (OECD, 2021d)

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3
Media and corruption in Western Balkan countries

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Summary: 1. Introduction: free press and corruption – 2. The political and party system of the Balkan countries – 3. Media systems and media market in Western Balkan countries – 3.1. Media market – 3.2. Press freedom – 3.3. Political parallelism – 3.4. Journalistic professionalisation – 3.5. Role of the State – 3.6. Ownership concentration – 4. Interplay among the media system, levels and perceptions of corruption.

1. Introduction: free press and corruption

When discussing tools to fight corruption, the news media are always brought into the spotlight, as they are considered to be efficient instruments for uncovering malfeasance and condemning illegal behaviour. (Lindstedt, Naurin, 2010; Camaj, 2013; Worthy, McClean, 2014) This assumption is well summarised by a famous essay on the subject, entitled *A free press is bad news for corruption*. (Brunetti, Weder, 2003) These studies, mainly from the economic field, demonstrate that there is a statistically significant negative correlation between indexes of corruption and indexes related to freedom of speech and of the press, assuming that when corruption-related news are free to circulate among public opinion, the social control toward misuse is facilitated and the corrupt find a less favourable ground to perpetrate their illicit affairs.

However, a number of studies from different fields, such as political science (Fieschi, Heywood, 2004) and media studies (Mancini *et al.*, 2017), has recently questioned this approach, as it might be at risk of being too deterministic. This does not mean that the media have no role to play. It means, however, that it is not enough to have laws protecting the freedom of the press in order to provide an efficient deterrent against corruption. As we will see, this is particularly true for the countries that will be considered in this section, namely Albania, Northern Macedonia, Serbia, and Montenegro, countries that have recently

experienced a democratic transition (Dobek-Ostrowska, Głowacki, 2015) and where some legacies of the non-democratic past are still present. (Andresen *et al.*, 2017) All the countries included in this study at have laws protecting the free do of the press, yet their anti-corruption performance does not always meet satisfactory standards. (Bak, 2019) This is for a number of reasons: first of all, it is very difficult to give an exhaustive overview of the concept of freedom of the press. (Nordenstreng, 2013; Richter, 2016) Such a concept is in fact very much linked to Western liberalism (Siebert *et al.*, 1956), whereas the countries referred to experienced long years of communist regime, with a particular "legal culture" different from its Western counterpart. (Grødeland, 2013) In other words, freedom of expression cannot be reduced to a mere regulatory issue, but must be considered within a more varied social context of explicit and implicit rules, routines, and influences.

Secondly, one of the reasons why there is a risk of determinism when it comes to the media and corruption is that journalism tends to be seen as something detached from the social context. (Dobek-Ostrowska, Głowacki, 2015) Yet many scholars have argued that journalism is a social field with a high level of heteronomy, *i.e.* it is subject to various types of influence from other social fields, above all the political or economic fields. (Bourdieu, 1995; Hesmondhalgh, 2006; Marchetti, 2009) The Balkans, like many post-socialist countries, are young and emerging democracies with fragile and unstable institutions, polarised civil society, and transnational economic pressures; as a result, their media systems are particularly vulnerable to influences from political and corporate interests. (Zielonka, 2015) According to Andresen, Hoxha and Godole (2017), the media in these countries are dealing with "troubled pasts", presenting several critical issues linked, on the one hand, to the historical peculiarities of their political and media systems, and on the other hand, to their evolution in more recent years. As a country ruled by a communist regime, the State had a monopoly on the media until only a few years ago. Although political control over the media was not as strong as in other communist countries, the media in the Balkans have nevertheless been marked by the same characteristics as State-controlled communist media. (Aumente *et al.*, 1999) With the opening up of the market economy, however, there was a shift from the absolute monopoly of the state media under communism to an oligopoly of private tycoons with interests in various activities outside the media sector. This opens the field to phenomena widely documented in literature, such as "political parallelism" (Hallin, Mancini, 2004), "media capture" (Mungiu Pippidi, 2008), "partisan polyvalence" (McCargo, 2011) and "media colonisation" (Bajomi-Lázár, 2015a), to describe situations in which the absence of journalistic autonomy results in the instrumentalisation

of news for editorial interests. The fragility of journalistic professionalism, revealed in the inability to exercise independent control of the news production process or in the reliance of news contents on "external" sources of legitimacy (political or commercial), may result in a partisan coverage of corruption that does not contribute to its reduction, but may even increase it. (Mancini *et al.*, 2017) Moreover, corrupted media can conceal or manipulate certain cases of corruption that harm the interests of their publishers. (Tsetsura, 2005; Ristow, 2010; Yang, 2012) Finally, corruption may be the subject of instrumental coverage that aims to destroy the reputations of business and political actors, as many other studies have shown. (Ledeneva, 2006; Kol'cova, 2009; Gerli *et al.*, 2018)

For this reason, in this chapter we will propose an analysis focused on the media system in the selected countries and its relationship with the political system in order to highlight the criticalities that may weaken the role of the media in combating corruption. After introducing the main features of the four countries' political and party systems (focusing in particular on the quality of the political class), our aim is to place the mass media systems of the analysed countries within a model found in the literature, which will be presented below. Given that the Balkan context often tends to be associated with the "polarised pluralist" model (Peruško *et al.*, 2021) according to the classification of Hallin and Mancini (2004), we assess the specific dimensions of the media system following the Hallin and Mancini models: press market, political parallelism, journalistic professionalisation, role of the State, press freedom, ownership concentration.

2. The political and party system of the Balkan countries

The Balkan countries (excluding Albania) share a recent past of wars, based on the ethnic claims spread soon after the Yugoslav State's dissolution, and a common undemocratic past. As for the latter point, it is indeed necessary to bear in mind the influence that the Communist legacy has exerted on the structure and the political system of these countries for ages. This legacy, together with other factors, such as the intervention of international protagonists, the different domestic social and economic conditions, etc., has had a different impact on each of the Balkan countries, which have therefore followed different paths towards democratisation. Nowadays, according to the data of the annual report *Freedom in the World*, Serbia can be considered as fully democratic or "free", whereas Montenegro, Albania, and Macedonia are classified as "partially free". (Passarelli, 2019)

With regard to the form of the State, all four countries are highly centralised. Macedonia, however, is the least centralised of the four. Since 2001, indeed, it has enhanced the level of decentralisation and delegation of power, especially for the benefit of non-Macedonian ethnic groups, such as Albanians. (Passarelli, 2019) Serbia, Montenegro, and Macedonia are semi-presidential republics, whereas Albania is a parliamentary republic.

However, as highlighted by Kmezić and Bieber (2017), the Parliaments in these countries remain weak. The polarisation and antagonism between the main political parties have hampered the recognition of the relevant role played by the opposition and, therefore, its ability to control the executive branch. It is no coincidence that Parliament has been frequently boycotted in recent years.

In Serbia, the democratisation process started soon after the defeat of the Milošević regime in 2000, putting an end to the country's long-lasting international isolation and fostering a process of European integration. Unlike the other countries, democratisation preceded European integration in Montenegro, which shared its international isolation with Serbia. In Albania, Berisha's leadership and the support of the EU and the United States helped the country to move toward democracy and to give up a paternalistic management of public affairs. In Macedonia, the transition to democracy was encouraged by the presence of a strong leader, who, however, was not able to remove the ethnic tensions between Macedonians and Albanians; these tensions contributed to the emergence of a proportional electoral system after an extended period of a majoritarian system.

Many factors, such as the communist past, the different paths to democracy, and the leadership's features, have affected the development of the political parties in the democratic era. Generally speaking, the party systems of the Balkan countries show four characteristics:

- Prevalence of one party/coalition over an alternation of power;
- Few and weak links between parties and society;
- Low levels of trust and popularity enjoyed by the political parties;
- Low levels of institutionalisation.

Most of the current Balkan political parties were formed before the transition to democracy; they are therefore usually characterised by the predominance of strong leadership over the party's organisation – a typical trait of their communist and authoritarian past.

The most relevant Serbian political parties were established by groups of politicians who were connected with civil society. These parties developed mainly through territorial penetration (from the centre to peripheral areas);

accordingly, they created strong homogeneous organisations, often run by charismatic leaders. According to Małgorzata Podolak (2017), the Serbian party system is strongly ideologized. The 2020 national elections produced many changes in the political arena. The SNS confirmed itself for the third time as the party most voted for and won the election in the coalition called "For Our Children" (63,02% of the votes). Some of the aforementioned parties, such as the DSS and the SRS, practically disappeared, and others that were old parties, such as the conservative and right-wing populist Serbian Patriotic Alliance and the national-conservative United Serbia, emerged.

In Montenegro, the "new" communist party continues to play a relevant role even today, and the other parties take its organisational structure as their reference model. Here, the "structure of the party systems and the characteristics of the dominant party have increased the tendency towards unaccountable party leaders once in government". (Passarelli, 2019, p. 19) The main families of political parties are represented by: social democratic, Croatian, Serbian and Albanian minority parties, parties supporting Montenegro's union with Serbia, conservative, liberal, national and other ones.

The 2020 national elections registered the record turnout – for Montenegro – of 76,5% and totally changed the country's political background. The Democratic Party of Socialists of Montenegro (DPS), which has ruled the country since 1991 and is led by Milo Đukanovi, former prime minister of four legislatures and president of the Republic, lost the election in a coalition with the Liberal Party of Montenegro, receiving 35,06% of the votes (30 seats). The heterogeneous, ethno-nationalist, clerical, conservative and populist opposition coalition For the Future of Montenegro, formed by the Democratic Front alliance, the Popular Movement alliance and the Socialist People's Party, together with the populist coalition Peace in our Nation and with the coalition In Black and White, obtained the majority, with 50,62% of the votes and 41 seats. Zdravko Krivokapić, an academic professor and leader of the new coalition For the Future of Montenegro, became prime minister.

The Albanian political parties are very similar to each other in many ways: ideological, programmatic, organisational. They are highly centralised and hierarchical and show long-lasting leadership. In 2008, a new Constitution was promulgated in the Republic of Albania. It confirmed the number of the unicameral legislature's MP at 140 and replaced the majority-proportional electoral system with a purely proportional one. Even if sometimes it has been said that the lists of candidates are chosen through internal election, in reality they are a prerogative of the political parties' chairmen. From 1991, the year of the first multi-party elections, to nowadays, the electoral system and thresholds, the formulas for calculating the number of seats, and even the size of Parliament,

have been changed many times, testifying to the substantial weakness of the political system.

The Macedonian political parties exhibit greater differences, being formed both by penetration and by diffusion (peripheral organisations that promote a centre as a coalition of local elites). Some of these parties have recently adopted primary elections for selecting their leaders. The party system is characterised by a small number of parties, and shows features of bipolarity. On the one hand, we have the right coalition, led by the Democratic Party for Macedonian National Unity, while on the other hand, there is the left coalition, the main party of which is the Social Democratic Union of Macedonia. Another party that can rely on a large amount of support is the moderate Albanian party Democratic Union for Integration, close to the positions of the social democrats. In the last period, nationalist parties, such as those of Albanian, Turks, Bosniaks, Serbs, and Romans, have acquired an increasing popularity.

The risks of electoral malpractice, fraud, and even political violence, very common in the past, have been mitigated by the control exerted by international authorities during the elections, and, moreover, by linking the possible accession to EU to the improvement of the electoral regulation and processes – the latter should also weaken the ethnic tensions always present in these multi-national societies. For instance, in 2012, the Albanian Parliament, under the pressure of the EU and USA, amended the Electoral Code because of the violent political clashes that broke out during the 2009 elections. However, according to Kmezić and Bieber (2017, p. 18), the "ability of governments to deliver reforms in this field clashes with their desire to stay in power. Thus, attempts to assure a level playing field in the elections are usually limited to minimal concessions by incumbent political parties".

The two aforementioned authors have also highlighted that the Western Balkan countries do not meet acceptable standards regarding a credible and electronically accessible electoral register, which includes many "phantom voters", that is dead or emigrated voters. A paradigmatic example is that of the Serbian town of Priboj: in the 2016 parliamentary elections, the number of registered voters exceeded that of the citizens of 1,125 units. Similar cases can also be found in Montenegro and Macedonia. Furthermore, many reports and research have denounced how often the Balkan ruling elites try to remain in power through cronyism and the buying and selling of votes. In particular, it seems that in all the four countries taken into consideration, during the 2012-2016 parliamentary and presidential elections, the political parties in power tried to secure votes by granting social welfare benefits. (Kmezić, Bieber, 2017)

3. Media systems and media market in Western Balkan countries

The collapse of communism in 1989 not only profoundly changed the map of the Balkans, but the transformations of the media itself following the fall of socialism also entailed changes in institutions, rules, and values, as well as in the media and audience practices. (Peruško, 2016) From the first decade of post-socialist transformations onward, the media systems of CEE countries were analysed in comparative terms to show how they differed from those in the West. Starting from media system models proposed by Hallin and Mancini (2004), several studies initially assumed that the new democracies of the CEE would all fit into the Polarised-Pluralist model as they are the most politically polarised and with the lowest levels of professionalisation in journalism. This assumption, however, was only partially confirmed. Indeed, the significant differences in these countries' political and media systems have frequently been overlooked. (Peruško *et al.*, 2021) Among the CEE countries, there are 11 members of the European Union (Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Slovenia and Croatia), six Balkan State s (Serbia, Montenegro, Bosnia-Herzegovina, Kosovo, North Macedonia and Albania), two post-Soviet republics (Moldova and Ukraine), which are still in a long political transition, and two former Soviet Union republics (Russia and Belarus), which have been authoritarian. They are therefore countries with profound differences, and it would be wrong to consider them as a whole.

Although the political, economic, and social processes in the CEE are still very dynamic and it is sometimes difficult to predict their direction, intensity, and effects, we believe it is useful to begin with Dobek-Ostrowska studies (2015a; 2019) in order to analyse the media system and media market of the Balkan countries. Four models of media and politics in the CEE countries are distinguished, namely: Hybrid Liberal, Politicised Media, Media in Transition and Authoritarian. (*Figure 1*)

The Hybrid Liberal model is characterised by the best economic situation and the highest democratic standards in the region. The six CEE State s that are members of the European Union fall within this model. In these countries, the mass media system is affected by foreign media companies, motivated by economic reasons and notable commercialisation and tabloidisation of media content.

In the Politicised Media Model, we find Bulgaria, Croatia, Hungary, Romania, Poland, and Serbia. These countries are characterised by deep politicisation, poor media freedom especially in the case of public broadcasting, poor journalistic culture (Dobek-Ostrowska, 2015b), and a high degree of party media colonisation. (Bajomi-Lázár, 2015b; Urbán *et al.*, 2017) Furthermore,

there is a lack of clear separation between parties and politicians, on the one hand, and economic and media groups, on the other. A typical feature of this model is political parallelism, particularly in the public media, which has become a tool of the ruling elites. (Dobek-Ostrowska, 2019)

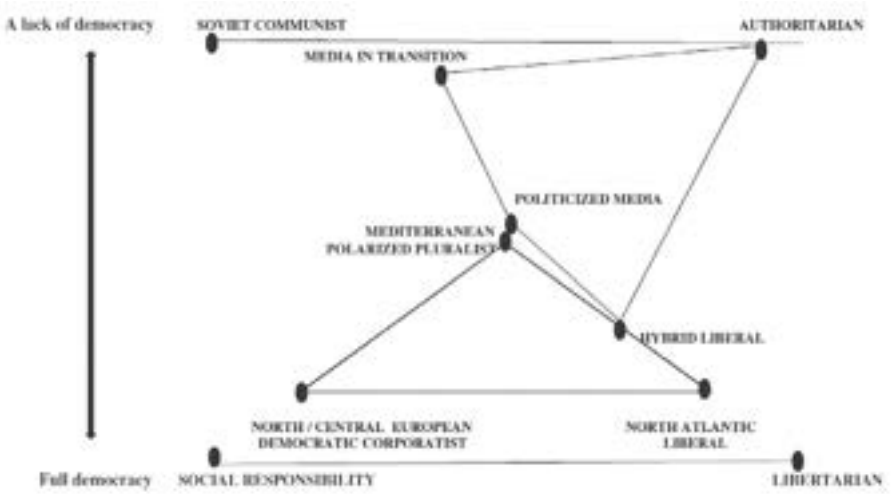

Figure 1. *The CEE media models on the map of media systems.*
Source: Dobek-Ostrowska 2019.

The remaining five countries in the Balkan region (Albania, Bosnia and Herzegovina, Kosovo, Macedonia, and Montenegro), plus Ukraine and Moldova, fall within the Transitional Media Model. They are among the poorest countries in Europe, characterised by low democratic standards, which are reflected in very low levels of journalistic professionalism. Difficult political, economic, and social conditions undermine the smooth functioning of democracy in these countries and sometimes lead to internal and external conflicts. Political and media systems are still in a long and unpredictable transition: they can no longer be classified as falling under the authoritarian model, but they have neither developed the characteristics of the politicised media model.

The latest model, the Authoritarian one, relates to Russia and Belarus. In these cases, the State has a monopoly on broadcasting. Although private media are also present in both countries, they are strictly controlled by the political regime. Political criticism is formally possible, but in fact, censorship is pervasive in its every day reality.

These four CEE media models can help us to understand how the media works and to explain the connections between the media and political systems

in the Balkan countries under analysis. Media systems have undergone profound changes in recent decades, not only in Europe but around the world, and have a dynamic structure. In this analysis, we are interested in the following dimensions: press market, political parallelism, journalistic professionalisation, the role of the State, press freedom, ownership concentration.

3.1. Media market

After the collapse of communism, a dual media model began to develop in this region: public vs. commercial. Alongside the public or State media, commercial media began to appear. Since 2005, the intense development of communication technology has changed the structure of media systems, spurred by easier access to internet and the advent of social media. As a result, news coverage can take three different paths: public broadcasting service (PBS), commercial media, and social media.

Starting with the only country included in the Politicised Media Model, the Serbian media market is small and oversaturated, with over 2,000 media registered with the Business Registers Agency (APR), but due to the poorly regulated registration system, the precise number of registered media is still not known. Serbia has two public broadcasters, one with a national frequency and the other with a regional reach.

Moving to countries included in the Transitional Media model, in North Macedonia there are 49 television stations and 72 radio stations. There is no precise data about the exact number of printed newspapers, but all the newspapers are in the Macedonian language, except for the single case of a newspaper in the Albanian language. It is worth highlighting that in this country the first newspaper appeared only recently, in 1944. (Peruško, 2016) The number of media outlets in Albania is relatively high compared to the country's population. The number of newspapers and magazines published all over the country is more than 200, but there is no official list of the country's printed media. The country has one public broadcaster (RTSH) with three local branches, mainly financed by broadcasting fees. Cable stations are found in almost every city or small town. They do not produce their own content but offer a mix of Albanian and foreign programmes. As for the audio broadcasting media, Albania has one national radio station with several regional branches, 51 local radio stations, and four commercial radio stations. Montenegro has a large number of media outlets, both private and public. The public service consists of the television and radio channel RTCG, to which several private televisions and a variety of radio channels are added. Among the newspapers, there is one daily

newspaper majority owned by the State, four dailies, one weekly newspaper, and a large number of electronic media registered on the website of the Agency for Electronic Media. There are also several portals that are not officially registered. The majority of newspapers and magazines in this country are in the Montenegrin language, but there are also some in Albanian and English.

The circulation of newspapers in all four analysed countries is very low. Furthermore, due to global and local crises and the establishment of digital media, printed media, like in most countries, are facing a difficult economic situation. Printing and distribution costs have increased, resulting in major issues, especially for local newspapers, due to their small print-runs and limited range. Therefore, several media have been forced to close their print editions for economic reasons. The number of online media and blogs has propagated widely in recent years, even if in these countries the use of internet has been slow, with significant improvements over the last few years, but quite below the European average. The development of online journalism in Serbia, North Macedonia, Albania, and Montenegro tries to keep up with the rest of Europe. While this offers a number of opportunities both for outlets and individual media protagonists, it has opened up the media landscape to a decrease in advertising revenue and sustainable funding models, predatory competition from social media platforms, as well as an increase in the sharing of disinformation.

3.2. Press freedom

When talking about freedom of information in countries that can be defined as "democracies in transition", it is worth making a distinction between the formal and the substantive level. From a formal point of view, all State s recognize rights relating to freedom of expression and information in their constitutional charters, and all State s have laws protecting freedom of expression or information. This is, for example, the case in Albania, where the right to information is guaranteed by Article 23 of the 98th Constitution. Furthermore, on September 18th 2014, Albania adopted the new Freedom of Information Law (*Law n. 119/2014 "On the Right to Information"*) that regulates the possibility of accessing information being produced or held by public sector bodies. The rules contained in this law are designed to ensure the public's access to information in the framework of assuming the rights and freedoms of the individual in practice, as well as establishing views on the state and social situation.

In a sense, the right to information is guaranteed in the constitution even in North Macedonia. The Constitution of the Republic of Macedonia, as one of the basic rights of the citizens of the corpus "Civil and political freedoms

and rights", guarantees free access to information and freedom to receive and transmit information. This guaranteed fundamental right was put into practice with the adoption of the Law on Free Access to Public Information in 2006, which provides publicity and transparency in the work of information holders and enables individuals and legal entities to exercise the right to free access to public information. The adoption of the Law on Free Access to Public Information brings the Macedonian legal system closer to European and world standards in the field of free access to information. With the adoption of this law, the State has taken a step towards the democratisation of society, its opening up to its citizens, increasing public control over the work of State bodies and all holders of public authority, which should ultimately lead to strengthening the trust of citizens in public office holders and public administration. In 2018, the legislator intervened further in the matter, in order to facilitate the exercise of the right of individuals and legal entities to free access to public information, drafting a new law that regulates this area.

The Republic of Serbia's Constitution addresses media freedom as well, and it includes in great detail the right of the people to be informed. The Constitution also guarantees the right to thought and expression. Following the Constitution as the supreme legal act, the next level of providing guarantees for freedom of the media are laws, in particular, the most general media law among them – the Law on Public Information and Media (LPIM). The LPIM, from its very beginning, through its principles and its very aim, stipulates that public information is free and not subject to censorship, and that the public has the right and the interest to be informed on issues of public interest, that monopoly in the media is not allowed, and that information on the media is public. Serbia also has the Law on Free Access to Information for the Public that sets the framework for access to information of public importance held by public authorities.

The Constitution of Montenegro guarantees the right to freedom of expression, and there is a Law on Free Access to Information. There is also an agency that acts in accordance with this law in cases of receiving requests of this kind. Although, as said from a formal point of view, these countries have sufficient legal guarantees regarding freedom of expression, there are some critical issues from a substantive point of view. These laws are often substantially impeded, and freedom of information, expression, and access to documents is not always guaranteed according to Western standards. An EU-funded project conducted by the Centre for Media Pluralism and Media Freedom (CMPF) at the European University Institute (Centre for Media Pluralism and Media Freedom 2017; 2018; 2020), documents a medium risk situation, between the years 2017 and 2019, in Albania, Serbia, and Macedonia regarding the "freedom

of expression". This medium risk situation is due to an overall assessment of several variables. Countries that are assessed as being at medium risk usually have a satisfactory or solid regulatory framework in place, which is in line with international standards, but they demonstrate poor implementation, which, in practice, leads to systematic violations of freedom of expression.

Montenegro, on the other hand, has a fairly high score in terms of freedom of expression (or a low level of risk). However, other reports show contradictory data (Camovic Velickovic, Konatar, 2019): in many cases, the right to freedom of expression is restricted in practice in various ways, or citizens and journalists are discouraged from using it. (Dobek-Ostrowska, 2015a; 2015c; 2015b; Bajomi-Lázár, 2015b; 2017) Journalists and media experts point out that this right is often only formal and is often violated in practice at several levels – in newsrooms, where it has been violated by managers and editors, as well as by the State when a certain form of pressure and repression is carried out.

3.3. Political parallelism

The politicisation of the media is one of the most visible and painful problems in the CEE countries, specifically in the Balkans. The process of media change in this region is more dynamic than in Western Europe, as emerges from quantitative and qualitative academic research and indices. (Bajomi-Lázár, 2014; 2017; Dobek-Ostrowska, 2015a; 2015c; 2015b; Zielonka, 2015; Castro Herrero *et al.*, 2017) As can be seen in *Figure 2*, in terms of politicisation, we can highlight good amount of variety in this part of Europe. The four countries included in this analysis also show different levels of politicisation. In the cases of Albania and Serbia, the politicisation of the media has an average level, with scores between 26 and 30. On the other hand, in the case of the other two countries analysed, Montenegro and Macedonia, this link between media and politics is stronger, with scores that reach up to 40 points.

Figure 2. *Politicisation of media systems in CEE countries.*
Source: Dobek-Ostrowska 2019.

Political parallelism is a typical feature of countries included in the Politicised Media model, such as Serbia. A lack of media autonomy and growing political interference are visible in this country. (Kleut, Spasojević, 2015) The leading media in Serbia are polarised and are considered to be divided into pro-government and anti-government. The pro-government media were characterised as spokespersons for the ruling party, while the independent media had a critical attitude towards the government. There are legal obligations in Serbia to ensure the independence of the media from politics, but these provisions are formulated only as general principles. In practice, the editorial policies of the service in Serbia are not independent of political influences. The apparent practice of political pressure has developed into a culture of self-censorship: journalists mostly do not cover topics that would not be to the liking of certain political figures. (Trpevska, Micevski, 2018) However Party colonisation of the media is also visible in Albania, Macedonia, and Montenegro, three countries classified under the Transitional Media Model which, as indicated by the name of the model, as countries in transition, could move towards the Politicised Media model or towards the Authoritarian Model. (Dobek-Ostrowska, 2019) The media in these State s are still in transition from communist/socialist regimes, and it is difficult to predict the final results of this process due to the high political instability illustrated in the previous section. Although the few academic publications in which the authors have analysed the relationship between the media and political figures, the manipulation of the media is present. (Taradai, 2014; Ryabinska, 2017) In the case of Montenegro, for example, polarised coverage is not only a historical consequence of the necessity to glorify the ruler, or his opponents, but also bipolarity based on the division into pro-Western Montenegrins and, on the other hand, traditionally pro-Eastern Serbs. After the independence of Montenegro, the previously established dichotomy between sovereigntists and unionists has been replaced by the opposition between pro and anti-government. This dichotomy is also found in the media (newspapers, radio, television, online portals). In Montenegro, therefore, there is a complete media polarisation that is characterised by a division on political grounds: media that are critically committed to the government and others that support the current political majority. The internal pluralism of the media reflects the political diversity of society. (Camovic Velickovic, Konatar, 2019) Although formally editorial independence is guaranteed in Montenegro, at least within the public service, in practice independence has not been ensured and pressure on public broadcasting employees is common. An almost similar situation is also occurring in Macedonia. Although formally a regulation of political parallelism of the public service is provided, in practice journalists and editors of the public broadcasting depend heavily on political power. Over the years, pressures have

been reported on journalists working in Macedonian broadcasting in the form of job relegation, pay cuts, professional marginalisation, and direct political threats. (Trpevska, Micevski, 2018)

The political parallelism of the media influences public television and radio above all. Relationships between politicians and party leaders, on one hand, and media owners on the other, are not always clear. (Bajomi-Lázár, 2014) For example, government funds in the media are frequently used to obtain positive coverage. (Bajomi-Lázár, 2015c) Because many media outlets are not financially sustainable, polarisation has increased, which has a negative impact on the quality of reporting and professionalism. The regulatory environment and the role and approach of public service broadcasters are characterised by the strong presence of polarisation. The analysis of these Balkan countries' media systems reveals the need to dismantle the entrenched polarisation that frames public service broadcasters' editorial and political positions, to augment the media's trust in the State's ability to respond to crimes against journalists, and the allocation of support funds and resources. (Centre for Media Pluralism and Media Freedom, 2020) The extent of the politicisation of the media system, media organisations, newsrooms, media reporting, and public service media, in summary, is at medium risk in Serbia and Albania and at high risk in Macedonia and Montenegro. The main problem is political capture over the media, which prevents more independence and media freedom. In many new democracies, in fact, State support for the media is undermined by the widespread presence of media capture, a legacy of previous authoritarian rule. Moreover, in these countries, the liberalisation and privatisation of the media occurred parallel with democratic transition (Wyka, 2010), which makes the media markets particularly sensitive to global technological disruption of media business models. Therefore, the lack of fair regulation and transparency, and the fact that the State still acts as one of the leading sources of financing, represent risks of political influence on the media.

3.4. Journalistic professionalisation

The level of journalistic professionalisation, as described by Hallin and Mancini (2004), allows us to categorise journalistic practices into "good" or "bad". The authors assume that professional journalism is possible if journalists adhere to specific (shared) values. The problem is that such shared values often constitute an alibi for particular media practices that inevitably lead to unprofessional journalism, as in the case of the countries analysed here. (Hrvatin, Petkovic, 2014) As previously stated, the lowest levels of professionalisation in

journalism, combined with strong political parallelism and polarisation, have caused CEE countries to revert to the Polarised-Pluralist Model proposed by Hallin and Mancini (2004). As with the other dimensions analysed so far, however, it is not correct to evaluate all CEE countries in the same way, just as it is not correct for the Balkan countries. The significantly different economic, political, and social conditions of these countries are also reflected in the quality of the media and journalistic professionalism. Returning to the models introduced at the beginning of this chapter, the countries included in the Politicised Media Model, such as Serbia, are characterised by weak freedom of the media and, especially in the case of public broadcasting, low journalistic culture, which is typical of countries such as Spain, Italy, Portugal, and Greece. On the other hand, the lack of democratic standards typical of the countries included in the Media in Transition Model (Albania, North Macedonia, and Montenegro) is reflected in a culture of very low journalistic professionalism. (Dobek-Ostrowska, 2019) In some cases, the strong push towards commercialisation and tabloidization resulting from the intervention of foreign media companies (as we will see better in the next paragraph) has resulted, in most State s, in a decrease in journalistic professionalism. As noted, the lack of a clear separation between the worlds of politics, business and media underlies the deep dependence of journalists on many economic and political groups, which means that journalists do not have any professional identity and are frequently related to political parties or politicians. (Radojkovič *et al.*, 2014)

The overall socio-economic conditions in the countries in question are also reflected in journalism; in fact, there are problems such as low wages, irregular payments and unpaid overtime, irregular work and lack of social security. Added to this is the fact that trade union actions are poor and insufficient to fight exploitation by private owners and pressure from politicians. Official statistics on the number of journalists who have signed employment contracts or the amount of money they make are not available. Journalists and media unions, where they exist, are still weak and cannot significantly influence the improvement of labour rights and the economic position of journalists. This weak regularisation of the journalistic profession certainly does not improve the levels of professionalisation in the Balkan countries. (Trpevska, Micevski, 2018) In this region, we notice a persistent patronage practice among journalists, publishers, media owners, and politicians. Very few media outlets have adopted some internal regulations to separate their editorial offices, on the one hand, and their managerial and proprietary structures, on the other. Influential media owners in the region are known to use the media for their commercial, political, and other interests. From the evidence provided by other studies, as well as polls and interviews conducted by journalist associations, it is clearly demonstrated

that almost all media owners exercise control over editorial content. Of the four countries under review, only Montenegro, on a proposal from the Montenegro Media Union (TUMM) and on the recommendation of the Council of Europe, lobbied to include legal protections for journalists in the media law and to set limits to the influence of the owners on the contents of the media. (Camovic Velickovic, Konatar, 2019) When it comes to adopting and complying with codes of ethics for public service broadcasters, all four countries are lacking. In cases such as Serbia, ethical codes were not adopted, while in the other three countries, PBS editors made efforts to include these documents. However, regardless of whether or not there are ethical codes, editorial independence is not ensured in all cases. This means that even in cases where these codes are adopted, this was done only to satisfy some formal criteria, rather than to make a real difference. In Albania, for example, there is media self-regulation and, in 2020, 19 media outlets signed an agreement to create the country's first self-regulatory platform for ethical media. (Trpevska, Micevski, 2018)

Self-censorship is still a major problem for most Balkan journalists, mainly due to their inadequate socioeconomic position and fear of losing their jobs. The high level of job insecurity and precarious working conditions make journalists particularly vulnerable to political and economic pressures, which in turn lead to self-censorship. However, the freedom of journalists within newsrooms depends on each country's specific political environment, on the general level of confidence in working in journalism, and on the specific media in which they work. In some countries, such as Serbia, for example, journalists are exposed to constant pressure at all levels, while in others, such as North Macedonia, the overall political environment has become more favourable for the work of journalists over the past year. The same institutions set up by the media industry to regulate their own power, therefore, demonstrate the inability of the media to serve the public interest and develop independently (not under the pressure of the State) and to comply with the professional standards that have the purpose of safeguarding the public interest. The idea of self-regulation has become stuck in the tangle of corrupt and clientelistic relations between the media and politics. (Hrvatin, Petkovic, 2014)

3.5. Role of the State

According to various media studies (Hallin and Mancini 2004), the State can play three roles relating to the media market: owner, funder, and regulator. With regard to the latter, we have already addressed the role of the State as a regulator in the previous paragraphs, highlighting how all the countries analysed have,

from a formal point of view, strong legislation to guarantee freedom of the press and freedom of expression. For this reason, in this section, we will deal with the role of the State by looking at the other two variables, *i.e.* the State as funder and as owner.

Regarding Montenegro, the State owns the national public service RTCG – Montenegro Radio and Television, which has been a full member of the European Broadcasting Union since the country's independence in 2006. RTCG is regulated by the Law on Public Radio-Diffusion Services, which requires it to serve the interests of all Montenegro citizens, regardless of their political, religious, cultural, racial or gender affiliation. RTCG is managed by a Council of nine members, who are experts proposed by civil society organisations and appointed by the Parliament with a simple majority. The RTCG Council appoints the Director General of the RTCG and advocates in the public interest. RTCG is widely seen as dependent on the Government, particularly after allegedly politically motivated dismissals of journalists in 2011. RTCG does not pay a broadcasting licence fee and is financed directly from the State budget (1,2% of the budget) as well as from advertising revenues (for a limited amount of airtime) and sales revenues.

Regarding funds, State investments may be distributed, in accordance with the Law on the Media, for the production of educational, cultural, or minority media. The government-appointed Commission for the Control of State Aid found no irregularities in the distribution of such subsidies in 2012. However, another form of funding is that derived from public advertising, and a number of critical issues have been highlighted in this area. State advertising is distributed without clear criteria, and this raises concerns. In 2012, 89% of the funds for press advertisements by Ministries went to the daily newspaper *Pobjeda*, majority owned by the State. The public procurement law is not properly applied to advertisement services, and data are not available on the official web-portal.

In North Macedonia, the Government has introduced a program for support for the printing and distribution of printed media. In other words, the Government each year covers part of the expenses of the printed media.

Serbia has two public broadcasters – RTS with a national frequency, and RTV with a regional reach. Both broadcasters get most of their funding from the State budget, which influences their editorial policy, independence, and objectivity. Aside from State funding, RTS and RTV also compete with other media houses for a part of the advertising market. Moreover, a small part of their income comes from subscription fees, which amount to 220 dinars (2.10 euros) per household. Media companies operate under great economic pressure. The average annual market value of advertising in the last couple of years was some 175 million euros, with the market growing in 2018 along with

its value of 197 million euros[1], which is insufficient to provide economic survival for all currently active media. Due to the weak economy and constant liquidity problems, the State still has a significant role and influence in the media market. It continues to control the media through direct media ownership, but even more so through various models of State funding (public tenders for media projects, public procurement of media services and advertising contracts).

3.6. Ownership concentration

The effectiveness of the media in deterring corruption depends greatly on several structural features of the media system, including the independence of journalism from political and economic spheres. In this respect, such countries' media landscape presents several critical issues, linked on the one hand to the historical peculiarities of their media systems and, on the other hand, to their evolution in more recent years. As in countries ruled by communist regimes, the State had monopolistic control on the media until a few years ago. With the opening up to a market economy, however, there was a shift from the absolute monopoly of the State to an oligopoly of private tycoons with interests in various activities outside the media sector. One of the most critical issues in some of these countries is the transparency of properties, which would allow for accurate knowledge of the corporate structures of the media companies. The transparency of media ownership refers to the public availability of accurate, comprehensive, and up-to-date information about media ownership structures. A legal regime guaranteeing transparency of media ownership makes it possible for the public as well as for media authorities to find out who effectively owns, controls, and influences the media as well as media influence on political parties or State bodies. A lack of transparency in the entrepreneurs who control media companies leaves the door open to a system of interests and influences that is difficult to assess and control, encouraging phenomena such as patronage and media capture. (Mungiu Pippidi, 2008)

This is, for example, the case of Albania. Rather than developing in a well-planned and oriented way, Albania's media system has developed in a spontaneous and sporadic manner, effectively preventing accurate knowledge of the corporate structures of the media companies. In 2016, the Constitutional Court of Albania decided to abrogate anti-monopoly and anti-concentration provisions in the broadcast law. This paved the way for narrower pluralism in the Albanian media and openly violated European standards. Regarding Montenegro, the

1. Source: IPSOS, Nielsen AM, marketing agencies.

transparency of media ownership is also insufficient and poorly regulated. This is one of the major reasons for the creation of media clusters that polarise the media system in a country where media ownership structures are widely believed to conceal the true identities of people and interests involved in the media scene.

In general terms, media laws contain only indirect regulations of ownership transparency, which are only referred to in the printed media sector. The issue of transparency of media ownership is not therefore addressed in any media-specific or separate law. Printed media are recorded in a register kept by the Ministry of Culture; however, such a register, which also contains data on ownership structure, is not public and only partial data are available through the Central Registry of Commercial Entities of the Tax Administration. Furthermore, the public and media experts question the accuracy of publicly available information, stating that it does not refer to the actual owners and does not provide a complete picture of ownership structures.

4. Interplay among the media system, levels and perceptions of corruption

In the last decade, corruption has become a dominant issue in the political debate in Central-Eastern Europe (CEE) and, for the Balkan countries, it has become even more so from the moment they started talking about their adhesion to the European Union. Politicians, intergovernmental and non-governmental organisations are increasingly leading to corruption in many of the economic and social problems faced by these countries. The four countries discussed are trying to overcome the legacy of the past, including corruption, and the incentive to join the EU has stimulated improvements in the fight against corruption. While the press almost never covered this issue in the early 1990s, the main news outlets in the region have recently published numerous stories about corrupt practices, corruption scandals, or government statements on the fight against corruption. (Grigorescu, 2006; Sotiropoulos, 2017) Corruption is seen as one of the greatest threats to the survival of new democracies around the world. In some countries, democratically elected leaders have lost power (and consensus) due to corruption scandals, while in other countries, such events have actually led to a return to authoritarianism. The most dangerous effect of corruption, however, is not the change in individual politicians, but the growing scepticism of democratic changes brought about by such high-level scandals. In new democracies with high levels of corruption, for example, the popular distrust of public institutions and the democratic system is growing. The risk, especially for those countries still in transition, is that politicians may use corruption as a weapon to criticise democratic governments and demand

greater State intervention. A very important factor is that the degree of citizens' trust in a particular politician or government is a result of the perceived degree of corruption. Furthermore, perceived corruption can also have effects in the economic field, for example, foreign companies may decide not to invest in a country because they perceive that there is a high level of corruption. The distinction between corruption and perception of corruption would not be relevant if the two data were strongly correlated. But recent research has shown that they may not be. In a study on Italy (Mazzoni *et al.*, 2017), it was found that even though about 90 percent of the interviewed people were not personally affected by corruption in the last twelve months, practically all the respondents considered corruption to be highly prevalent in their country. Likewise, a study on petty corruption in four Eastern European countries (Grigorescu, 2006) found that citizens have far fewer real-world experiences with corruption than others believe. Both of these studies reflect that corruption is perceived to be greater than it actually is.

A situation comparable to that revealed in the two studies listed above also exists in the Balkans. The Western Balkan countries today are widely regarded as very corrupt. Compared to other European democracies, including those of Eastern Europe, they are perceived as more corrupt than other European democracies. These assessments, however, are mainly based on the perceived level of corruption, which is formed by the direct experience or experience of one's acquaintances with corruption and, above all, by the information received from the mass media, especially if they consider the media as relatively independent. The coverage of corruption, however, is affected by the level of press freedom, political parallelism, instrumentalisation of the media, and market segmentation. Even within the same country, for example, each newspaper could offer a slightly different image of the phenomenon depending on the audience it addresses. Different and even contrasting coverage of corruption can spread a high level of uncertainty. This can mainly occur in transitional democracies and highly polarised democracies, where the idea of the "common good" appears to be weaker and where the instrumentalisation of the media is a frequent practice. (Voltmer, 2007; Zielonka, 2015; Mancini *et al.*, 2017) In these situations, as anticipated, the risk is an increase in distrust of the government and political institutions.

The growing distrust of government and political institutions in the Western Balkans is also due to the fact that opponents of ruling elites have been involved in corruption cases, and anti-corruption agencies have turned against them rather than against members of ruling elites. The fight against corruption, managed through State agencies, was used by governments to attack the opposition. This is the result of a targeted strategy by government elites to use corruption and the

fight against corruption not only to enrich themselves but also, if not primarily, to prolong their stay in power. In other words, the specificity of corruption in the selected countries is, firstly, the involvement of the ruling elite in corruption and, secondly, the systematic use of corruption as a weapon by the government and competing political elites against the opposition. (Sotiropoulos, 2017) The pattern observed to combine personal economic advantages with political advantages, as demonstrated by Sotiropoulos (2017), is the following: first, the ruling elites forge ties with certain businessmen who they favour, excluding their commercial competitors from public procurement; then, members of the ruling elites actively participate in the affairs themselves. This creates a clear conflict of interest, as elected officials only defend the public interest as a formality, but in practice use their position for their own benefit. The desired benefit is not necessarily economic, as in typical cases of corruption, but it is also political, in the strict sense of extending their stay in power by all possible means, including corruption. In other words, political corruption is not so much a means of personal enrichment as a vehicle for clinging to power. Using corruption as a means of extending their tenure in power can be done in more ways than one. As mentioned, public procurements are not managed transparently and government officials award contracts for public works to domestic and foreign contractors very selectively. If these entrepreneurs are active in the media sector, in exchange for such favours, these businessmen not only finance the parties of the ruling coalition but also spread government propaganda. In this sense, the government intervenes in the economy to build a pro-government business elite. In some countries, the active role of the ruling coalition in creating a government-business nexus even goes towards the systematic marginalisation of those businessmen who are reluctant to collaborate with the government or openly oppose it. To summarise, we could say that it is the government that captures businesses rather than the other way around, unless, of course, we include in this equation the influence of large foreign companies that have invested in these countries. (Grigorescu, 2006; Sotiropoulos, 2017) The most useful part that the pro-government business elites have to play is their control over private mass media, such as newspapers and television. Such pro-government private media, which in appearance are run independently and separately from the government-controlled State media, can serve both the task of spreading the government's line on controversial issues to the electorate and discrediting the opposition through hostile reporting or even smear campaigns against government opponents (parties or civil society).

Within the context just described, corruption coverage is guided by an instrumentalisation logic rather than a watchdog logic. A logic of instrumentalisation means that journalism responds to particular and partisan interests. Corruption is covered because it allows the media to pursue specific

objectives that often favour private interests over the general interest and that polarise opinion. Each newspaper establishes its own hierarchy of importance and promotes its own point of view, preventing the formation and strengthening of a widely shared sense of outrage through which corruptive behaviour can be discovered, controlled, and condemned. (Voltmer, 2007; 2013; Mancini *et al.*, 2017) Furthermore, the fight against corruption has become a tool to legitimise the government and delegitimise the opposition, as well as to deal with disloyal party exponents, uncooperative businessmen, and the mass media. (Sotiropoulos, 2017; Dobek-Ostrowska, 2019) There is no doubt that the media can curb corruption through tangible or intangible means (Stapenhurst, 2000), just as there is no doubt that the level of freedom of the press is an important aspect of the media's ability to exert a restraining influence, especially when other sources of social control are lacking or weak. However, from this work, it emerges that other dimensions, such as the structure of the media market and political parallelism, which are closely linked to the relationship with politics, must also be considered.

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4
Prevention of corruption: governance, policies, and tools

Enrico Carloni

Summary: 1. From repression to prevention: trends and influences – 2. The complexity of anti-corruption reforms, between general standards and the need for a targeted approach – 3. The governance of corruption prevention and the role of anti-corruption authorities – 3.1. Models and limits of the anti-corruption authorities – 3.2. The anti-corruption authorities in the Balkan area – 3.3. Solutions and problems among the candidate countries – 4. Policies, strategies (National Anti-corruption Strategy – NAS) and programs – 4.1. Trends and models: general profiles – 4.2. Experiences in the Balkan area – 5. Tools: a summary of main administrative corruption prevention measures – 5.1. "Internal" (or integrity) measures – 5.2. "External" (or transparency) measures.

1. From repression to prevention: trends and influences

In the International and European framework, the increasing awareness of the risks and dangers arising from the presence of widespread forms of corruption has led to the development of a preventive approach to the phenomenon, along with the more traditional repressive-criminal response (Klitgaard, 1988; Rose-Ackerman, 1999; OECD, 1999; Huther, Shah, 2000; Graycar, Prenzler, 2013; Cerrillo Martinez, Ponce, 2017; Cantone, Carloni, 2018; Carloni, 2019; Carloni, Cantone, 2021).

This is a fact that has characterized the Italian experience since 2012 (Cantone, Carloni, 2018), but it is also a fact strongly present in the comparative scenario, and in particular in the Balkan and Eastern European area, where important policies have been developed aimed at building a system that does not limits itself to repress the phenomena of corruption, but tries to prevent it

Traditionally, corruption has been dealt with by criminal law as a means of repression; corruption is seen by criminal laws first and foremost as a specific offense: its core, consisting of punishing the action of a person who, receiving an unfair advantage, gives a public official an undue benefit for carrying out his

functions, is then extended to include further contiguous behaviours. (Davigo, Mannozzi, 2007; Mendelsohn, 2015) The conduct of corruption, in its nature, has been sanctioned in different legal systems since antiquity. (Noonan, 2017; Buchan, Hill, 2014)

Certainly, attention continues to be given to better discipline for crimes committed and to the strengthening of the capacity to ascertain such crimes. (Thus, for example, in North Macedonia, there is the figure of a "special prosecutor's office" [Office of the Public Prosecutor for Prosecuting Organized Crime and Corruption] or similarly in Albania.) At the international level, great attention is also being paid to the repression of corruption ("police patrol" approach: Rose-Ackerman, Soreide, 2001), but we are beginning to recognize the need for an integrated approach, capable of combining repression and prevention. In fact, with significant evidence over the last two decades, the criminalisation strategy alone is perceived, as insufficient to contain corruption.

There are several reasons for this inadequacy. (Carloni, Cantone, 2021) One such reason is related to the cost and "burden" of the penal solution; another for "usury from inflation" (the more it is used, the less the perception of the seriousness of the phenomenon decreases) (Davigo, Mannozzi, 2007); politicisation of public discourse on scandals (Mazzoni, Marchetti, Mincigrucci, 2021); for investigative reasons, related to the difficulty of ascertaining the facts of corruption. But above all, because the corruption that comes to light is only a minor part of the corruption present in the entire political and administrative system. There is, essentially, a part of the "iceberg" that although it does not emerge, it is nonetheless noticeable, also thanks to the use of other detection tools, and requires to be managed and resized with different solutions and tools than those applicable to "emerged" cases.

The progressive establishment of corruption prevention strategies capable of intervening not so much on the facts of corruption, but on the factors that favour the development of episodes of corruption, is experiencing a formidable acceleration in the comparative scenario, due to the impetus of the Merida Convention promoted by the United Nations, to which the stimulus and solicitation action of numerous other international organisations is linked.

As a result of this process, the development of a system of preventive solutions is a feature of recent developments in institutional systems, not least in the European context. (Hough, 2013; Auby, Breen, Perroud, 2014; European Commission, 2014; Betancor, 2017; Mungiu-Pippidi, 2015; Carloni, Gnaldi, 2021)

Various factors lead to this result, often of an institutional political nature, but also geopolitical ones.; in legal terms, the framework within which this approach is developed is constituted, above all, by some important international

conventions (at global and regional level). Such conventions have contributed significantly not only to the spread of a greater awareness of the issue and to a broadening of the ways of containing the phenomenon, but above all to a standardisation of response measures and to the definition of mechanisms for monitoring and stimulating anti-corruption policies in different countries. (Cantone, 2020; Carloni, Cantone, 2021)

Looking at the European context, it is, in particular, with the two 1999 Conventions of the Council of Europe that a broader and more comprehensive strategy to fight the criminal phenomenon of corruption begins to be developed[1]. The most important legacy of these two conventions (under article 24 and article 14, respectively) is the establishment of a special body, GRECO (an acronym for Group d'Etats contre la corruption), which is responsible for ensuring that the parties "implement the Convention". GRECO has been very active over the years and its reports have been a formidable stimulus for Member States to implement the necessary reforms. This is also because the GRECO, as well as the European Commission, has taken on the task of accompanying the states in the implementation of an overall set of standards deriving not only from the conventions of the Council of Europe

This does not mean that GRECO's recommendations are always and promptly respected: adaptation to international stimuli depends very much on the political framework and on the various political phases, and in particular, in the candidate countries, on the political "push" that is given to the process of convergence towards European standards. With situations, therefore, variable and sometimes with light and shade. Thus, with reference to Serbia: in effect, in its 2020 report, in its 2020 report GRECO complained of a very partial response to its recommendations. For this reason, GRECO considered the Serbian situation as "globally unsatisfactory" and decided to launch its "non-compliance procedure", including a request to Serbia to report on the progress made. (European Commission 2021, Serbia, p. 29)

In any case, the most significant document for the definition of anti-corruption strategies is most certainly The United Nations Convention Against Corruption – UNCAC[2]. This Convention takes action from "the gravity of the problems posed by corruption" and the "threat it poses to the stability and security of societies, undermining democratic institutions and values, ethical values and justice and compromising sustainable development and the rule of law"; the 71 articles of the UN Convention covers a wide range of topics: the

1. Criminal Law Convention on Corruption of 27th January; Civil Law Convention on Corruption of 4th November.

2. Supported by the UN and launched on 31st October 2003 in Merida, Mexico.

offences that must be provided for at state level, and measures to enable the seizure and recovery of assets.

For the first time in an international act, there is a reference not only to repressive measures, but also to "preventive measures", to which an entire and very intense chapter is devoted.

The "preventive section" opens with a provision (Article 5) which, while not explicitly defining what prevention is, clearly suggests what it should consist of (*i.e.* avoiding the occurrence of corruption acts or rendering them much more difficult). Furthermore, while not indicating a binding model but leaving it up to the individual states to determine the practical arrangements, it outlines certain aspects of the preventive strategy. In particular, the objectives to be pursued ("rule of law", "integrity", "accountability") and certain means to be used (starting with "transparency" and "participation of society").

The articles from 6 to 14 set out specific actions to be taken, which together form an essential core for corruption prevention policies. This aspect deserves to be emphasised. Although the individual experiences and therefore the individual corruption prevention systems are different, there is a common core of measures defined by the United Nations Convention. And this "common heart" is proposed, at the European level, as part of a "European (anti-corruption) *acquis*" relating to the rule of law.

Also in this case, the United Nations Office on Drugs and Crime (UNODC) is entrusted with an envisaged monitoring mechanism (based on peer review criteria). The Convention has been ratified by many nations: as of February 2021, 187 (out of 193 UN members), including all European countries and the European Union itself. In the case of the European Union, the European institutions have operated with a dual understanding of the European Union's role: on one hand, as a direct subscriber and addressee of the Convention; on the other, as a promoter of the implementation of the Convention by its Member States. At present, this European role is particularly evident also in the relationship with the candidate countries for accession to the Union.

2. The complexity of anti-corruption reforms, between general standards and the need for a targeted approach

Looking at realities such as those of the candidate countries, but also considering the experience of member countries of the European Union that have developed organic policies for the prevention of corruption (such as Italy, Slovenia, Croatia, and France), one immediately grasps the complexity and breadth of the issues that are inevitably called into question.

In fact, intervening on corruption means reforming the administrative system and the political system itself. This is all the more complex when corruption is widespread in the political and institutional system.

Just think of the close connection between the dynamics of corruption at the institutional and administrative levels and the functioning of the political system (with specific crucial issues such as financing of political parties), or the close relationship between anti-corruption policies and more extensive administrative reform strategies.

For candidate countries, the European requests in the framework of the programs of approximation of legislation and adaptation to the European Union *acquis* show these challenges well, and numerous European documents that accompany these strategies well represent the state of progress and the problems that characterise the different experiences. Indeed, anti-corruption strategies are closely linked to broader reform interventions targeting both the political and administrative systems.

For example, in this sense reference can be made to the case of North Macedonia, where the "public financial management" (PFM) reform program is being implemented (albeit with some delays related to the Covid-19 crisis), and where an overall "public administration reform strategy" (2018-2022), as well as a "strategy on judicial reform (2017-2022)", are underway. The same can be said for the other candidate countries, where the very need to adapt the institutional system to the European *acquis* determines the urge for numerous reform interventions.

On the other hand, as previously analysed herein[3], the same procedures for joining the European Union fully grasp the strategic perspective of preventing and repressing corruption As stated in "Chapter 23", it should be noted that the "EU's founding values include the rule of law and respect for human rights. An effective (independent, quality and efficient) judicial system and an effective fight against corruption are of paramount importance, as is respect of fundamental rights in law and in practice".

Anti-corruption reforms therefore oscillate between the search for a standard model and the need for targeted solutions, between general challenges and specific problems, between model and context.

The model is given, as mentioned, above all by international conventions; it is within this framework that the "common core" of a corruption prevention strategy is outlined, stemming in particular from the indications provided by the UNCAC.

Specifically, on the basis of Chapter II of the Convention, an essential structure of a preventive approach to corruption can be developed. Taken together,

3. See Chapter 1 in this volume.

these elements embody the fundamental "building blocks" in the strategy of rebuilding the "ethics infrastructure" (the set of institutions, mechanisms and systems to promote integrity and prevent corruption in public administrations), the importance of which has long been recognized both in the international and comparative scenario.

Although the "model" proposed by the UNCAC Convention has common general features, its implementation in the various legal systems knows and has known great differences. The same can be said for the experiences of the candidate countries, where the homogeneity of solutions is even greater, and is favoured by action in the area of international organisations, "donors", and above all by the converging stimuli of GRECO and the European Commission. Even in the presence of a system with broadly common general features, in which on the whole it can be affirmed that "the track record on prevention of corruption is slowly improving", the single experiences show evident differences, linked both to the different administrative tradition (as in the case of Albania), and to the different political "thrust", which is a factor not to be underestimated not only as regards the adoption of reforms, but also as regards their implementation.

3. The governance of corruption prevention and the role of anti-corruption authorities

3.1. Models and limits of the anti-corruption authorities

An important element that characterises anti-corruption reforms, is given by the identification, in each legal system, of a public structure entrusted with the mandate of fighting and/or preventing corruption. The growing international awareness of this issue, already in the decade before the Merida Convention and then with a clear acceleration after it (De Jaegere, 2012), has led to the diffusion in many countries of "Anti-Corruption Authorities".

In fact, according to Article 6 of the UNCAC Convention, each country has to organise, in particular, anti-corruption structures with preventive functions, on the basis of a provision that complements the provision regarding repression contained in Article 36, which requires the "existence of a body or bodies or persons specialised in combating corruption through law enforcement". Included in various conventions (both global and regional), the establishment of national anti-corruption authorities has been called for and promoted by various international organisations, international financial institutions, donor agencies and non-governmental organisations. (De Sousa, 2009)

Also on the basis of these solicitations, three main models of anti-corruption authorities can be distinguished in the comparative scenario: (1) authorities that concentrate both preventive and investigative powers ("multipurpose agencies"), (2) specialised authorities with investigative and repressive powers ("law enforcement agencies") and, finally, (3) authorities in charge of prevention, with a role in knowledge of the phenomenon and in the definition of anti-corruption policies. (OECD, 2013) In either case, however, the UNCAC Convention does not require a single agency to have overall responsibility for corruption prevention policies (UNODC, 2009), and there is no single model in the development of an anti-corruption system, but there seems to be a prevailing trend towards a single anti-corruption authority at central level.

It should be noted, however, that these models are very different from one another, especially with regards to the powers entrusted to the various agencies and, in particular, their independence (in fact, they are often departments and not separate authorities or agencies). In general terms, despite the expectations attached to the introduction of anti-corruption authorities, it must be said right now that criticism is nevertheless widespread (Schütte, 2017), especially in relation to the perception of their limited impact (bordering on irrelevance, in the most problematic cases: De Sousa, 2009).

The changing forms of corruption, in increasingly sophisticated and complex ways (Della Porta, Vannucci, 2021), and the aforementioned perception of the extended and systemic nature of corruption justify, however, the identification of organisational solutions for its control and contrast (Carloni, Cantone, 2021) solutions that are different from, and add to, the traditional ones implemented by widespread judicial and police control over the corruption crime (Recanatini, 2011; Sekkat, 2018). It is the response to these dynamics that we are witnessing a "proliferation" of ACAs, as part of the overall anti-corruption-oriented reform policies that are spreading in the first decades of the new millennium. (UNDP, 2011; AFA, 2020)

Albeit with varying solutions and powers, ACAs are often identified as authorities responsible for the development and implementation of anti-corruption policies at national level, their enforcement, and overall verification of the compliance of the actions of public institutions with the law.

3.2. The anti-corruption authorities in the Balkan area

In many countries of the Balkan region and in particular in the former Yugoslavia (Bosnia Herzegovina, Serbia, Montenegro, Kosovo, Slovenia, North Macedonia), the establishment of anti-corruption authorities is not

only frequent, but is also a well-known practice, since it is often the result of reforms stemming from the beginning of the millennium. (Carloni, 2019) We can find significant cases of the Commission for the Prevention of Corruption in Slovenia, the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption in Bosnia Herzegovina; the case of Kosovo, where an Anti-corruption Agency (ACA) operates, also deserves a reference.

In giving attention to the candidate countries, the North Macedonian case of the "State Commission for the Prevention of Corruption" (SCPC) deserves a brief examination: the Commission operates in particular with investigations of conflict of interest cases, and in recent years has continued to be pro-active in preventing corruption and has opened several new cases. (European Commission 2021, p. 6) The Serbian experience of the Anti-Corruption Agency is now consolidated, although the overall strategy of the Balkan country presents some critical issues. A similar body is present in Montenegro, where the Anti-Corruption Agency (ACA) "under new management demonstrated a more proactive approach" (European Commission 2021, Montenegro), especially in stepping up its communication and outreach activities towards the general public, media and civil society and in addressing the caseload pending from previous years. This certainly does not mean that all the problems are solved: as the European Commission points out, "despite this positive trend, challenges related to Agency's independence, priority-setting, selective approach and the quality of its decisions remain and require sustained efforts in this respect".

A particular case, in the scenario of the candidate countries, is the Albanian one. While on the repressive side Albania has a specific authority (Special Anti-Corruption and Organized Crime Structure – SPAK), there is no single (or prevalent) anti-corruption authority dedicated to the prevention of corruption. Rather, there is a "network", with a more evident political responsibility: […] the regulatory framework of the network of Anti-corruption coordinators in 17 institutions established to prevent and tackle corruption in state administration remains weak. Effective coordination should be ensured between the new structures at the Ministry of Justice (where the role of the Office of the National Coordinator against Corruption – NCAC is central), the Unit for Transparency and Anti-Corruption at the Prime Minister's office, the Special Unit for Anti-Corruption and Anti-Evasion established also at the Prime Minister's office, as well as the Integrated Policy Management Group for PAR and Good Governance.

In general terms, the presence of specialised institutions is particularly widespread in Eastern Europe and Central Europe. Bulgaria has the Commission for Anti-Corruption and Illegal Assets Forfeiture of the Republic of Bulgaria,

which was established in 2018. In the Republic of Moldova operates the National Anticorruption Centre; in Latvia, the functions of the Corruption Prevention and Combating Bureau (KNAB) range from prevention to investigation. In Ukraine, before the crisis, the development of an interesting anti-corruption approach was underway, involving both preventive (the National Agency on Corruption Prevention) and repressive specialised bodies (the National Anti-Corruption Bureau).

International influence is not only vertical but also horizontal: the importance of the circulation of models is clear, especially in specific geographic areas. This happens with imitation and circulation of model-types (favoured, in some contexts, by specialised umbrella organisations, as in the case of the Regional Anticorruption Initiative – RAI – which operates in the Balkan area).

The different influence processes add up in the case of the candidate countries.

In this context, the European conditioning (primarily that of the Commission, especially through the definition of the conditions of entry in the Union for the countries that joined most recently or those that have applied to join) and the influence of supranational organisations, both within the framework of the aforementioned international conventions and within the framework of specific intervention projects (in particular, but not only, of the OECD and the World Bank), appears clearly relevant.

3.3. Solutions and problems among the candidate countries

In addition to the Authority responsible for implementing anti-corruption policies, there are various other bodies with functions of preventing corruption. Thus in the Serbian case, the Anti-Corruption council, whose role is however weak and often little considered by the Serbian institutions themselves, is noted with consultative, information and stimulus functions. In Montenegro there are "several ad-hoc advisory bodies, including the National Council for the fight against high-level corruption, the Council for control of the voter registry and the Council for privatisation and capital projects". Also in Montenegro, the "State Audit Institution monitor political party financing" deserves a reference, which is one of the many examples of "specialised" institutions whose functions cross the issues of conflicts of interest and the prevention of corruption.

In the complex Albanian framework, the experience of the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest is also interesting (HIDAACI): its role of detecting conflicts of interest and

checking asset declarations was reinforced through the adoption of the Law on whistle-blowing and whistleblower protection, as well as the implementation of the "vetting process". (European Commission 2021, Albania, p. 26) The "vetting process" alone deserves specific attention: although it is addressed to the judiciary branch, with the aim of removing the less capable and more corrupt magistrates and judges, it is a mechanism that presents evident critical issues (starting from the problem of the separation of powers and therefore from the guarantees of independence of the judiciary branch). (Bardha, Cucchi, 2017) The activation of a mechanism of this type clearly shows how the theme of anti-corruption reforms (in Albania, but the discourse can be extended) is also linked to a question of regime change and transitional justice. (de Grieff, Mayer-Reiff, 2007)

Returning to the topic of anti-corruption authorities, recurring problems for these authorities are independence, which must always be ensured but is often "weak", and the availability of adequate functions and resources. Thus, in the case of North Macedonia, the European Commission itself recommends that "the efforts to improve its functioning should continue, especially by allocating extra funding for the recruitment of expert staff". (European Commission 2021, North Macedonia, p. 6) This need is particularly felt with respect to the Serbian case: thus, as regards the prevention of corruption, GRECO concluded that its recommendation on the Agency for the Prevention of Corruption was fulfilled in a satisfactory manner. This recommendation concerned, in particular, the need for an adequate degree of independence and financial and personnel resources as well as extension of the Agency's competence. (See European Commission 2021, Serbia, p. 6)

The problem of effectiveness is widespread, including the ability to affect corruption in a general sense, and the ability to effectively impose one's own decisions. Thus in Montenegro, where, looking at the action of the Anti-corruption Agency, "sanctions imposed in general still remain below the statutory minimum and do not have a preventive or deterrent effect". (European Commission 2021, Montenegro, p. 27) This problematic node is also well perceived by looking at the Albanian case, where it is possible to grasp the distance between an adequate regulatory framework and a weak "practice": "The regulatory framework is in place to prevent corruption and to ensure the integrity of public officials and civil servants, but the institutional capacity for verifying assets and assessing conflict of interest declarations should be reinforced". (European Commission 2021, Albania, p. 17)

The action of the corruption prevention entities (even where their independence, functions and resources were ensured), however, does not exhaust the needs to support anti-corruption policies, which (precisely due

to the relationship between anti-corruption and more general reform policies) inevitably remain linked to the effective will of the Government and Parliament to proceed in this direction. In summary, although "independent", the anti-corruption authorities cannot be "isolated" from the political framework. This is confirmed, for example, in the Serbian case, where the Commission itself warns "there is a need for strong political will to effectively implement the full mandate of the Agency and ensure increased trust of citizens in the institutions preventing corruption". (European Commission 2021, Serbia, p. 29) But also in the case of Montenegro, where "the decisive political commitment needed to unblock important segments of those reforms is still outstanding", while "despite a more proactive approach of the Anti-Corruption Agency, corruption remains prevalent in many areas and an issue of concern". (European Commission 2021, Montenegro, p. 6)

4. Policies, strategies (National Anti-corruption Strategy – NAS) and programs

4.1. Trends and models: general profiles

Under art. 5, UNCAC, each State is under obligation to develop specific "corruption prevention policies and practices", implementing "effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability". In the meantime, each State is obliged to "establish and promote effective practices aimed at the prevention of corruption" and, periodically, to "evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption".

The UN Convention essentially requires that specific policies to prevent and combat corruption are defined, implemented and monitored by assessing their effectiveness at a national level in an approach aimed at encouraging the involvement of citizens and society as a whole.

The "Practical Guide" for the development and implementation of this provision (UNODC, 2015), suggest that a "national anti-corruption strategy" should be expressed starting with a careful assessment of the context, the detailed analysis, also with special studies, of the specific features of the phenomenon in each country, the comparative observation, the analysis of experiences of anticorruption already in the field, the collection of available information, and the scrutiny of the "vulnerability" of the system.

Such an approach must not ignore the "forces" at work, both in terms of those who might support an anti-corruption policy and in terms of others (social forces, political actors, economic operators, etc.) who might oppose it.

There are different levels of "strategy". At a higher level there is the choice of defining an overall system for the prevention of corruption, and therefore at this level the reform policy takes the form of specific legislative and institutional reforms. This can be defined as an "architectural" level: when we talk about "strategies", however, it usually refers to a different level – documents that define, for a certain period of time, the actions to be undertaken in a State, the political and institutional priorities, the methods of action for the prevention of corruption.

As the UN guidelines suggest, the "strategy" must therefore be adapted to the context, with the recommendation to "be ambitious but realistic": concrete and specific measures must be identified, the main objectives of each part of the reform must be established, costs and benefits must be identified, and priorities and sequences must be planned.

UN operational guidelines provide that the function of coordinating the anti-corruption strategy should be entrusted to "a single, high-level entity", called on to operate in strong liaison with the structures responsible for the application, implementation and monitoring of these policies. All participants involved in coordination and implementation should be adequately empowered.

The same UN guidelines suggest that great attention should be paid to the stages of monitoring and evaluating the effectiveness of the policies in place, breaking down the overall reform into successive steps, selecting progress indicators, setting realistic targets for each indicator, and cautiously using internal evaluations by the administrations involved. Monitoring and evaluation must be functional to a progressive improvement: "utilise evaluations to adjust implementation targets and strategy goals". The warning (rather than the indication) that concludes the operational instructions on this point is important: the process requires time and adequate resources ("allocate sufficient time and adequate resources for evaluation").

From this common ground, differentiated solutions are developed which depend on internal factors, first and foremost of an organisational nature (ultimately linked to the characteristics of administrative systems, more or less centralised, and to the form of government). (Hussman, 2007; Transparency Int., 2013; UNDP, 2014; United Kingdom, 2015)

Comparative experience suggests a variety of national strategies, adopted with strong emphasis and often on the basis of solicitation and support from supranational bodies, as well as being an attempt to respond to a critical

situation on the corruption front (especially as "perceived" by the Transparency International's corruption index).

In the European scenario, the translation of policies to contain and fight corruption into a specific "policy" document is not always immediate, also due to the strong variability of the "corruption problem" as perceived at institutional and public opinion level. Without generalising, it can reasonably be argued that planning for a specific and formalised "national strategy" tends to depend on the centrality of the matter in terms of political issues and the "need" to provide a response (to the public opinion and stakeholders, including international ones) that is recognizable, at least in terms of intentions, in view of the gravity of the phenomenon.

4.2. Experiences in the Balkan area

In the framework of EU joining processes, the definition of a specific anti-corruption strategy, linked both to the phase of repression of criminal conduct and to the definition of prevention plans and strategies, is required by the joining protocols.

In North Macedonia, the "National Strategy for the Prevention of Corruption and Conflict of Interest" (2021-2025) and the related Action Plan is the main reference document. The strategy was drafted in an inclusive process, involving relevant stakeholders and experts. It was adopted by Parliament in April 2021. This "National Strategy", "consolidating the country's commitment to prevent corruption and sanction corrupt behaviour". (European Commission 2021, p. 6) According to the EU report (European Commission 2021, Serbia, p. 6), "Serbia has yet to adopt a new anti-corruption strategy accompanied by an action plan and to establish an effective coordination mechanism to operationalize prevention or repression policy goals and effectively address corruption" (the previous national strategy for the fight against corruption for period 2013-2018 and its accompanying action plan expired); meanwhile, "Serbia should increase its efforts in addressing these shortcomings and step up the prevention and repression of corruption".

Among the most modern and interesting approaches that characterise some of the leading experiences in administrative corruption prevention is the development of plans and procedures for corruption risk management in public administrations.

This approach, tailored to individual organizations, is to be distinguished from the aforementioned "strategies" (which reflect an overall view of the phenomenon and also define the reforms to be introduced to prevent and fight

corruption in the various States), although in some experiences the boundary is not so clear-cut. One such example is Italy, which is also the most interesting model-type in the European scenario in terms of risk management plans in the public sector, where the "national anti-corruption plan" (PNA) is a general guideline for individual administrations to draw up their own risk management plan (three-year corruption prevention plan). This document, adopted by the National Anti-Corruption Authority, in the absence of a strategy defined at the governmental level, ends up being regarded as the general tool for defining corruption prevention policy. However, it is an act of guidance that lacks the overall vision of a national strategy and, above all, it cannot outline systemic reforms, but only direct individual administrations to draft their own risk management plans.

This viewpoint is rooted in the corruption risk management measures developed within the framework of ISO standardisation rules, and in particular ISO 370001. From this "risk" approach and related standards, an anti-corruption path can be inferred that develops within organisations: this is done by analysing activities and functions, identifying the corruption risks affecting them, determining the tolerable risk level (taking into account the probability of the corruption event and/or its impact), comparing the tolerable corruption threshold with the existing one, deciding on "risk mitigation" where necessary, and selecting the most suitable measures in the light of a "cost-benefit" assessment.

A case of decentralised plans is also present in the Serbian contest: "Out of the 106 (2019: 102) local self-governments that adopted anti-corruption plans, 22 (2019: 28) established a body to monitor their implementation, mostly in line with the Agency's model. Overall, there were no tangible improvements in relation to anti-corruption efforts at the local level, and the impact of the local anti-corruption plans is yet to be seen" (European Commission 2021, Serbia, p. 30) "Integrity plans" are also envisaged in Montenegro: on the basis of 2020 data, 679 reports on the implementation of the integrity plans for 2019 were submitted, and the European Commission report states that "currently 98% of public authorities have integrity plans in place". (European Commission 2021, Montenegro, p. 29)

The Albanian experience is more fragmented where, according to the data collected by the European Commission, "five municipalities have adopted and piloted integrity plans with measures to combat corruption at local level" (European Commission 2021, Albania, p. 13) and where integrity plans are also foreseen at the ministerial level.

5. Tools: a summary of main administrative corruption prevention measures

5.1. "Internal" (or integrity) measures

In line with the guidelines of the UN Convention, and often prompted by GRECO reports as well as supranational stimuli, there is a strengthening of a number of mechanisms that constitute "pillars" of a corruption prevention system. In fact, the list could be very broad, but for descriptive purposes an attempt can be made to try to simplify and outline it.

A first set of anti-corruption measures are organisational, internal, and aim at strengthening the integrity of public officials. (Pioggia, Pacilli, Mannella, 2021)[4]

In this case, we note the reforms that are affecting various countries of the Balkan area – particularly candidate countries – aimed first of all at strengthening the so-called "Merit system" in the recruitment phase of public personnel and as a guarantee of stability and merit in the exercise of administrative functions. The issue lies at the crossroads between legislative reforms and administrative cultures and requires specific and continuous attention. Thus, for example, while on the one hand, North Macedonia "is currently reviewing the legislative framework on human resources management through the revision of the Law on Administrative Servants and the Law on Public Service Employees, and is introducing a new Law on Top Management Service", on the other, "The State Commission for the Prevention of Corruption (SCPC) continued to address cases of alleged nepotism, cronyism and political influence in the process of recruitment of public sector employees and in the process of appointment of members of supervisory and management boards". (European Commission 2021, NM, p. 4) The same need is felt regarding Serbia: "Serbia still needs to ensure (i) merit-based recruitment and a reduction in the excessive number of acting senior manager positions" (European Commission 2021, Serbia, p. 5): "the integrity of the civil service remains undermined by the aforementioned excessive number of acting senior manager posts".

A very particular case of reform aimed at strengthening the quality of the institutions is the already-mentioned Albanian "vetting process": the process (a process of revaluation of judges and prosecutors) which concerns in particular members of the Judicial System. This was evaluated positively by the European Commission (Hasanaj, 2020), which supports and accompanies it through specific initiatives, also in terms of effectiveness, although it is obviously a particularly delicate process. The vetting of members of the judiciary system

4. Chapters 5 and 6 in this volume are dealt with in greater depth of these measures.

continues to have a positive impact on the fight against corruption. To date, 62% of the vetting dossiers processed have resulted in dismissals and resignations. Among the high-ranking magistrates, 10 former high-level judges of the High Court and the Constitutional Court have been dismissed through vetting or have resigned. (European Commission 2021, Albania, p. 25) In more general terms, the challenge facing the Albanian administrative system, in terms of necessary reforms, is to strengthen the independence of officials: the Commission recommends "encouraging the merit-based implementation of the civil service law at all levels, especially at the local level where de-politicization of civil service [is] needed" (European Commission 2021, Albania, p. 15): "progress so far in merit-based recruitment, promotion and dismissal needs to be consolidated, in particular by addressing the fragmentation of the legislative framework, and applying uniform standards across the entire public administration". (ivi, p. 17)

Measures to strengthen the integrity of public officials reflect an approach that focuses in particular on the regulation of codes of conduct and the prevention of conflicts of interest. In operational terms, this matter is linked in more general terms to issues such as the definition of clear rules on incompatibility with the pursuit of other activities, the possibility of switching between public and private positions (issues that call into question limitations on the so-called "revolving doors" and "pantouflage"), and the duties of declaration and abstention aimed at avoiding situations of conflict of interest. Nevertheless, it is worth also recalling how the Mérida Convention already contains a number of aspects relating to the challenge to integrity: both when it provides for "adequate procedures for the selection and training of individuals for public positions considered especially vulnerable" (Art. 7(1)(b)), and when (Art. 8) it calls for the adoption of "codes or standards of conduct for the correct, honourable and proper performance of public functions" and the introduction of "systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result".

The attention to these aspects is particularly strong in various candidate countries.

A new Code of Ethics for members of the government and public office holders appointed by the government was adopted in North Macedonia in 2020 and amended in 2021. Efforts continue to improve the transparency of public institutions. The new National Strategy for the Prevention of Corruption and Conflict of Interest systematises measures in public procurement and employment in the public as well as other sectors.

Of particular interest is the recent Serbian discipline of the conduct of Members of Parliament, aimed at regulating and containing the risk of conflicts

of interest: a code of conduct for Members of Parliament aimed at the avoidance and resolution of conflicts of interest. Aside from adoption of the code, GRECO also recommended that it should be effectively implemented in practice, and accompanied by proper guidance, training and counselling. In September 2021, Parliament adopted a revised version of the code of conduct with the aim to follow-up on the GRECO recommendations. (European Commission 2021, Serbia, p. 29)

5.2. "External" (or transparency) measures

A second type of measure is that of "external" measures, aimed at strengthening citizen involvement and widespread control, in particular through transparency rules. (Ponti, Cerrillo, Di Mascio, 2021) The theme is deepened in this volume[5], so we can limit ourselves to a general framework of some issues.

Here we find, in particular, measures aimed at regulating transparency and the right to knowledge as a condition of citizens' control over the work of public authorities and therefore, at the same time, an instrument of accountability and responsibility, according to the maxim that "sunlight is the best disinfectant". A mong the instruments capable of ensuring transparency, the importance of "freedom of information" legislation is evident, but so is the growing relevance of proactive transparency mechanisms (especially by making information available through public portals or open data solutions). It is worth recalling that the UN Convention provides, in this respect, for the adoption of "the measures necessary to increase the transparency of its public administration, including, where appropriate, its organisation, functioning and decision-making processes" (Article 10, which refers foremost to making information open to the public). However, as stated in Article 13, it is also a matter of "increasing the transparency of decision-making processes", "ensuring effective public access to information", and "respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption". These issues are dealt with in chapter V.

A recurring problem, beyond the specific quality of the regulations, is that of the effectiveness of the right to know. Thus in Serbia, citizens' right to access public information is regulated in the law on access to information of public importance, amended in 2021 As remarked upon by the European Commission (Serbia, 2021, p. 16) "administrative silence, whereby public authorities fail to properly act on the citizens' information requests, remains a major issue".

5. See Chapter 7.

As a corollary of the "transparency pillar", an important institution such as the protection of whistle-blowers can also be considered (whistleblowing creates a mechanism for "internal" transparency) by offering guarantees and protection to whistle-blowers who report wrongdoings discovered during their work. Article 13 of the UNCAC Convention itself, which does not expressly regulate the figure of the "whistleblower", provides that "facts liable to be considered as constituting an offence established in accordance with this Convention may be reported to them, even anonymously". However, it is primarily Article 33, in the part relating to the "suppression of corruption", which claims for "appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention". The growth of adequate whistleblower protection legislation was most recently brought about by European Directive n. 1937 of 2019, which provided for the introduction by all EU Member States of "common minimum standards providing for a high level of protection of persons reporting breaches of Union law". (Article 1)

In addition to these main areas of preventive measure actions, there are other more specific ones, whose presence in the various legal systems is less recurrent and whose discipline cannot be traced directly to the aforementioned international conventions.

The attention to the issue is significant in the Balkans area, also thanks to specific awareness projects. In any case, even in the presence of widespread whistleblower protection regulations, there is a need to ensure the effectiveness and strengthening of the institution. Thus for Serbia, cited as needing "to step up its protection of whistle-blowers and investigate allegations in high corruption cases, in order to strengthen trust in the institutions". (European Commission 2021, Serbia, p. 29)

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5
The quality of civil servants

Guido Sirianni, Alessandra Pioggia, Matteo Falcone[1]

Summary: 1. Introduction – 2. The quality of civil servants as a tool in the fight against corruption – 3. Appointing senior management positions – 3.1. National experiences in Western Balkans – 3.2. It takes time to consolidate reform – 4. Merit and evaluation of public employees – 4.1. A season of reforms that has yet to profoundly transform the recruitment system – 4.2. Performance evaluation: a system yet to be consolidated – 4.3. Perspectives for an improvement of evaluation systems to increase public ethics – 5. Training of civil servants – 5.1. The establishment of public schools for the training of civil servants – 5.2. The legal significance, planning and scope of training for civil servants – 5.3. The knowledge and skills provided by training for civil servants – 5.4. Improvements needed for adequate training.

1. Introduction

One of the major issues included in the institutional reform policies pursued, with a variety of accents, by the Republics of the Western Balkans, in the still very short and tormented historical parable, is that of public administration. The aspirations for reform in this field seem to pursue two main objectives.

The first is the realization of an administrative decentralization in favour of local communities, capable of overturning traditional, secular, centralized and hierarchical structures, the essential features of which passed unscathed under different political structures – the Ottoman order, the Kingdom of Yugoslavia, the Socialist Federal Republic…

The second objective is to change the perception of public administration. Instead of a *longa manus* of governmental power, and therefore as an internal organization totally entrusted to the will and availability of the government

1. The work is the result of a common reflection, but paragraphs 1, 2, 5, 5.1, 5.2, 5.3, 5.4 are attributed to Matteo Falcone; paragraphs 3, 3.1, 3.2 to Guido Sirianni; paragraphs 4, 4.1, 4.2, 4.3 to Alessandra Pioggia.

– again, according to the postulates of all the political structures that have succeeded each other over time, the concept of public administration is to be built up as a politically neutral, stable body, established on to meritocratic principles. While always responsible towards the government public administration would therefore be capable of imparting greater efficiency and legality to public action.

These two aspirations are clearly present – especially the first – in the texts of the Constitutional Charters which four countries (Albania, Northern Macedonia, Montenegro, Serbia) have endowed themselves with. Autonomist decentralization takes on forms of varying intensity, but in any case implicitly brings with it the need to reorganize the residual state apparatus and to provide local authorities with adequate professional administrations with respect to the increased functions, which do not risk being enslaved by a very restrictive policy. In the Charters there are also important statements which deserve reflection, concerning the aspiration to a neutral, meritocratic, guaranteed administration, supervised by the government, but at the service of the citizen.

The clearest and most explicit statements in this area are undoubtedly those contained in the Constitutions of Albania (adopted in 1998) and Northern Macedonia (adopted in 1991). The Albanian Constitution states in art. 107, in point 1, that "Public employees apply the law and are at the service of the people", in point 2, that "Employees in the public administration are selected by competition, except when the law provides otherwise", and in point 3 that "Guarantees of term and legal treatment of public employees are regulated by the law". Even more explicit, in terms of neutrality and guarantees, is the Macedonian Constitution, for which (art. 95) "Political organization and activities within bodies of state administration are prohibited. The organization of work of bodies of state administration are regulated by a law to be approved by a two thirds majority vote of all Representatives", and, further (art. 96) "The bodies of state administration perform the duties within their sphere of competence autonomously and on the basis and within the framework of Constitution and laws, being accountable for the work to Government". The 2007 Montenegrin Constitution, on the other hand, is practically silent, according to which (Article 111) "The duties of civil service shall be discharged by the ministers and other administrative authorities"; the Serbian Constitution (2006), on the other hand, clearly recalls the need to reconcile the principles of the independence of the administration and its responsibility towards the Government (art. 136, 1 al. "The Public Administration shall be independent, bound by the Constitution and Law and it shall account for its work to the Government") but focuses on the division of regulatory powers in matters of administrative order between Parliament and Government.

The new republics originating from the dramatic crisis of the Yugoslav socialist state have, therefore, appreciably thematized at the highest level of their respective systems, the crux of the role to be reserved for public administration in a democratic and pluralist context, which has begun to realize the need to implement their intentions not necessarily from a clean slate, but from an economic, political, social, cultural, very bumpy and rubble-strewn terrain. Conversely, professional bureaucracies, in countries where they actually exist, are after all the result of a long, historical sedimentation which were cemented between the nineteenth and twentieth centuries; the mortar was a national state establishment which, in our globalized world, has now become anachronistic.

The reforms of the civil service initiated by the four Republics over the last twenty years, with the enactment of laws amended several times and a large series of regulatory acts by the Governments, constitute the stages of a difficult process of implementation of the constitutional programs that has further intersected with the intention of responding to the requests made by the bodies of the European Community for the purpose of accepting the requests for membership. The crucial aspects of the administrative reforms on which our review is based are five: the methods of selection and appointment of the bureaucratic elite, with a view to overcoming the deteriorating practices of the spoil system; the regularization and planning of access to the roles of public administrations through merit, systematic and neutral competition procedures; the introduction of procedures and objective rules for evaluating the performance of public employees, in the context of the management of positions and careers; the preparation of a permanent staff training system within the public sector. As is evident, these aspects are interconnected, circular, and refer to each other.

2. The quality of civil servants as a tool in the fight against corruption

It is clear from reading international documents that the integrity of administrations and the impartiality of administrative action to a great extent depend on the quality of public officials and, therefore, on the rules of access to public management, the human resources management system and the provision of training programmes for those who actually perform administrative functions, particularly on issues relating to public ethics and the prevention of corruption.

The Organisation for Economic Cooperation and Development (OECD) has paid particular attention to the human resources management system, in particular to the mechanisms for evaluating staff – which essentially concern

access and subsequent performance evaluation – and to their training. For example, in the document the *Principles of Public Administration* drafted in 2017 by the SIGMA/OECD Programme, it is required that the recruitment and selection process be clearly based on merit, equal opportunities and open competition, and that public employee laws stipulate that any form of recruitment and selection not based on merit is considered legally void. Great importance was also placed on selection committees, whose members should have a sound knowledge of the tasks to be performed and operate with impartiality and be independent from political influences.

Moreover, the 2017 OECD Council *Recommendation on Public Integrity*[2], clarifies in many of its provisions the importance of merit-based personnel selection and ethical training of public servants, particularly managers, in order "to raise awareness and develop essential skills for the analysis of ethical dilemmas and make public integrity standards applicable and meaningful in their personal contexts"[3]. The Recommendation considers knowledge and the capacity to resolve ethical problems to be the fundamental instruments for the emergence of the so-called ethical leadership within the public organisations, and invites the Administrations to favour the career progression of those who possess this type of knowledge and competence, thus stimulating the overall sensitivity of the administrative structure to the ethical themes.

The European Union has also considered these aspects to be important in guaranteeing the quality of public officials and their work. The 2014 *Union Report on the Fight against Corruption* (COM(2014) 38) – focusing its analysis on the state of repression and prevention of corruption in Member States' legal systems, in particular in the area of public procurement – identified the development of a human resource management system as one of the three key pillars of the Enlargement Strategy for the Western Balkan countries.

In the same 2014 document, the Commission also emphasizes the need for states to focus more efforts not only on the ethical training of civil servants, but also on their overall training, including in technical and scientific fields.

These recommendations are reiterated in the *Toolbox 2017 edition – Quality of Public administration*, which not only includes a section on ethics, transparency and anti-corruption, but more generally refers to the importance of setting up an adequate personnel management system, along with adequate training for civil servants to ensure the quality of public action and public policies. as a means of curbing politicisation and nepotism in the civil service, both of which have consequences in lowering levels of integrity in government.

2. See also related documents such as OECD, *Public Integrity Handbook*, 2020.
3. See recommendation 8 under b).

Finally, the *United Nations Convention against Corruption* (UNCAC) explicitly highlights this in several provisions[4], recommending to the signatory States to pay particular attention to merit and transparency in the recruitment process of civil servants and to provide specific training programmes for civil servants not only on integrity and corruption prevention, in order to strengthen their public ethics, but more generally in all fields of knowledge useful for the proper performance of administrative functions.

3. Appointing senior management positions

In the context of the reform process, the provisions reserved for the top management of the administrative bodies are of particular importance, in order to provide the bureaucratic elite with a status of duties and particular, distinct or supplementary guarantees from those affecting the generality of public employees. There are several reasons for this particular remark. In the first place, fundamental roles in the management of merit-based selection, the progression of the careers of public officials, the organisation of offices, the supervision of the integrity of public employees, and the protection of the same employees from political or economic conditioning generally reserved for high bureaucracy. The neutralisation and professionalisation of public administrations are objectives which, by their nature, presuppose that the top management of the same public administrations are fully involved and are, in turn, covered by adequate guarantees of neutrality and capacity. Secondly, the high bureaucracy must necessarily interact constantly with the political bodies of direction and control, maintaining a relationship of professional trust (very different from political trust) which must run along a thin track, without derailing in the sense of the spoils system or in the inverse one of self-referencing. The necessary dialogue between politics and high bureaucracy requires mutual awareness and respect. If the neutralisation of the high levels of public administration continues to be, even in the most stabilised administrative and political contexts, an elusive goal which can never be said to be achieved once and for all, the difficulties are, intuitively, all the greater in a context in which both the political and administrative systems are in a magmatic state.

4. The reference is clear in Articles 6 and 36 dedicated to the corruption prevention bodies; in Article 7, paragraph 1 letter d), concerning integrity in the public sector; in Article 9 dedicated to the management of public procurement and public finances; in Article 60 concerning the specific training of officials on the fight against and the prevention of corruption.

3.1. National experiences in Western Balkans

The statute of this top staff, who plays an essential role in the social elite, and is called to operate in the grey area between administration and politics, is traditionally, even in the Balkan area, particularly fluid. The administrative reform guidelines, taken as a whole, aim precisely at reducing this degree of fluidity.

Perhaps the Albanian system is the one in which the aspiration to create a strong administrative elite finds a more coherent development. Law no. 152/2013 also includes senior level managers in the civil service subject to its discipline, while it excludes cabinet officials (Article 2). Senior level managers are divided into four classes (general secretary; department director; general management director; positions equivalent to the latter) (Article 19). Senior level managers constitute the bodies of senior level civil servants (TMC) with an organic role established by the budget law, equal to the number of positions to be filled increased by a reserve share of 15% (Article 27).

Access to the state body (which in turn is further fragmented into multiple bodies, corresponding to the different branches of the administration) is governed by law in a clear merit-based and transparent perspective. In an annual plan, the positions to be announced during the year are predetermined; the selection procedure is that of a course-competition managed by the School of Administration (ASPA) (Article 28). Only middle level managers and senior levels of independent administrations can be admitted to the course-competition; the selection for access is entrusted to a special national selection committee (TMC), made up almost entirely of independent experts and representatives of the School of Administration. Those who pass the course are assigned to fill positions, or to play the role of coordinators. However, it is the law itself that operates some temperaments : it admits that foreigners in possession of specific requirements may also be admitted to the course-competition (Article 28); it allows the possibility of access through a competition reserved for middle civil servants, without the necessity of attending a course; it provides that senior positions in public bodies and local government units are assigned with a reserved competition, again without the necessity of attending a course. Of the intent to discourage attempts to circumvent the procedures of the course-competition, or in any case of the competition itself, the rules (articles 30 and 32) confirm the illegitimacy of any appointment attributed by derogating from the rules on the coverage of holidays, to which confers mandatory value. In order to depoliticise the administration, the Albanian law on public employment provides, in the end, heavier burdens for the TMC than for the generality of public employees: TMCs are prohibited from registering with political parties; in the event that

they become members of a political party or take up positions in political party organs, they lose their position (Article 65). working hours.

The Serbian civil service reform law defines (art. 33-34) a particular status for the "appointed positions" divided into five groups in the state and other administrations, distinguishing them from the "executorial positions". The main distinguishing feature is represented by the recruitment methods (art. 66): the holidays of the appointed positions must be covered through a competition, which can be both reserved and open. However, the coverage of positions falling within the competence of the government must take place exclusively with reserved competition, except in the event that the internal selection fails. The procedure is announced by the Human Resources Management Service, which also appoints the jury, made up of its own members and external experts. The commission identifies the triad of suitable candidates among whom the government may (but is not obligated to) identify the person to whom the appointment is to be conferred.

The Montenegrin law on civil servants and state employees also dedicates specific rules to senior management (Article 18, 20, 21), identifying the corresponding offices, which are conferred by the Government and have a five-year duration. Holidays (contrary to what has been seen in the case of Serbia) must always be covered through a public competition (thus excluding internal announcements and public announcements) (Article 38). The public procedure is carried out by the Human Resources Management Authority which compiles the list of competitors and appoints the Examining Commission, made up of its representatives and experts; the exam must necessarily include structured interviews. A short list of candidates, with the indication of the best classified, is proposed to the head of the administration of the vacant position to be filled, who can however propose to the Government, for the purpose of the appointment, also a different name included in the short list, explaining the reasons.

In the legislation of Northern Macedonia (specifically, the Law on administrative servants, enacted in 2014 and subsequently amended), there are no rules intended to confer a differentiated status on the heads of the civil service. *Ad hoc* rules, however, are reserved for top figures, placed between politics and administration, who in Italy would be referred to as "direct collaborators", that is, the general secretaries (in state or local administrations), who have recently been appropriately included among the administrative servants, and to the components of the lavatories. Those who, among the administrative servants, hold the position of chiefs, are subject to the general provisions concerning the coverage of holidays, according to which the matter must be the subject of an annual planning, and the procedures (competition,

promotion or mobility) must be in any case transparent, competitive, loyal. There are no reserved competitions, but it is expected that certain positions can be attributed only to subjects who have gained important work experience in terms of quality and duration in public administrations.

3.2. It takes time to consolidate reform

The set of regulations highlights a common approach in affirming the competition – a competition managed by officials and experts, formally removed from direct political influences and mainly reserved for those who already work in the bureaucratic ranks – the only way to access positions at the top. An important indirect support of transparency and meritocracy certainly comes from the forecasts that bind the overall management of holidays to annual planning procedures, which combine the functionality needs of the services and budget constraints, thereby limiting the room to manipulate client lists and corporate interests, especially in the case of state administration.

In assessing these legislative trends, it must be taken into account that the effective performance of the rules on the status of senior management (which certainly do not end with those concerning the coverage of holidays, but extend to the stability of the offices, both formal and effective; interference that political leaders can practice, in law or in fact, on the nominal competences of administration heads; the right to intervene autonomously in the organisation of services and procedures; on the seriousness and objective of the modalities with which the service is evaluated) depends both from the detailed regulations, which are often decisive, as well as from the general, political, social and cultural context conditions. Observers focused on public employment in the Western Balkans[5] show that in the case of senior servants there is the greatest resistance and the tendency to keep widespread practices of spoils systems alive, e.g. through recourse to continuously renewed temporary positions (so-called "acting heads"), through collusive practices or other circumvention (top management who "voluntarily" resign before the expiry of the office, coinciding with the expiry of the mandate of the relevant politician, or in any case when the latter requests it; selections made on the basis of superficial and arbitrary

5. Albania GRECO Eval5 Rep (2019) 5; Commission Staff Working Document Albania 2020 Report (COM(2020)660 final); SIGMA OECD Report Serbia 2019; Government of Montenegro, Public Administration Reform Strategy in Montenegro 2016-2020; SIGMA OECD Report North Macedonia 2021; V. Stancetic, Spoils system is not dead: the development and effectiveness of merit system in the Western Balkans (2020); ReSPA – University of Nottingham, Merit recruitment in Western Balkans. An evaluation of change between 2015 and 2019. (2019).

CV comparisons, without written and traceable examinations). proximity between politics and bureaucracy and the intertwining of political, family and economic clienteles. These difficulties can only be overcome over time and gradually, through a continuous refinement of primary and secondary legislation (evidenced, in the case of our countries, by the excessive overlapping of reform measures) which must however settle down and become the social heritage of each Country, as their own Constitutions postulate with the affirmations that we recalled in the introduction to these notes. However, difficulties and reticence cannot surprise, even more so if we remember that the evasive practices and the flooding of the spoils system continue to be very present even in countries where there are ancient and noble professional bureaucracies, now in a brazen way, now disguising themselves through privatisations or spin-offs of institutional activities.

4. Merit and evaluation of public employees

To promote the trustworthiness and professionalism of public employees as tools in the fight against corruption, it is important that the selection and evaluation of public employees be regulated to ensure that these issues are addressed. Moreover, the reliability of these mechanisms plays a fundamental role, not only in the fight against corruption but also in good governance. The internationally accepted standard of human resource management in public administration is the merit principle, which can be broadly defined as the establishment of a special value system of public administration, based on professionalism, competence, and integrity to pursue the public interest (Ingraham, 2006; Rabrenović, 2018).

As already considered above, most of the constitutions of the Western Balkans countries have a part dedicated to the Public Administration, in which principles such as that of legality and responsibility of public employees are affirmed. In some cases, it is possible to find more specific rules on access to employment, as in the case of Albania, whose Constitution, in article 107, establishes that "Public administration employees are selected by competition unless the law provides otherwise".

In the last years, Western Balkan's national governments invested a great deal of energy in the reform of the civil service and the establishment of the new legislative framework, also with the perspective to promote merit practices in the civil service. All countries have adopted laws on access to public employment and some rules on evaluation of the Performance of Civil Servants have been adopted in Serbia (2019), provided in the last Public Administration

Reform Strategy in Montenegro, and regulated in the Albanian law on civil servants (2013).

The presence of specific laws does not always indicate the effectiveness of enforcement. Regarding the countries of this area, some authors (Meyer-Sahling *et al.*, 2015) point to two types of problems in the implementation of reforms: when the implementation of new legal frameworks is delayed, suspended, or simply ignored (due to incomplete regulatory issues, incomplete implementation, lack of expertise, or low examination standards) and when laws are not breached, but informal behaviour contradicts the purpose of the law. One cannot disagree with the statement that: "Merit recruitment is a complex process consisting of multiple interdependent components. The effectiveness of merit recruitment can thus be undermined if any one of the components of the process is deficient"[6]. The same order of considerations can be made concerning the performance evaluation of public personnel.

In this perspective, it is necessary to take into account several elements that can weaken a recruitment system and a reliable performance evaluation system to the point that they lose their effectiveness in guaranteeing the independence and professionalism of employees. Some of the aspects to which attention should be paid are "tailor-made" job positions for politically affiliated people, non-merit based criteria for promotion and recruitment, a high number of temporary contracts, transformation of temporary contracts to permanent positions without any objective criteria, lack of data related to the number of public servants, and so on.

4.1. A season of reforms that has yet to profoundly transform the recruitment system

The most recent wave of reforms led to the amendment of civil service laws or the adoption of new laws in several Western Balkans countries. Concerning civil service admissions in the State administration, Albania has implemented a centralised system whereby recruitment procedures are managed by the Department of Public Administration (DoPA). The system includes pooled recruitment – primarily driven by efforts to limit political influence on the process. Article 20 of Law n. 152/2013, "On the Civil Servant", states that "Recruitment in the civil service shall be based on the principles of equal opportunity, merit, professional ability, and non-discrimination and shall be

6. J.H. Meyer-Sahling *et al.* (2020), *Making Merit Recruitment Work: Lessons from and for the Western Balkans*, ReSPA Publications.

carried out through a transparent and fair selection process". Recruitment is done through public announcements of vacancies posted throughout the nation. Procedures are designed not to give internal candidates an unfair advantage by imposing unreasonable burdens on external candidates. In addition, there is transparency in the public decisions of the selection committees and these can be made available to the candidate.

Also in Montenegro, the regulation of the recruitment system in the public sector is part of the Public Administration Reform Strategy 2016-2020. The strategy places particular emphasis on the need to improve the recruitment and professional development system. In 2018, Montenegro adopted the Law on Civil Servants and Public Employees, which in its Article 10, provides rules on "equal access to employment positions", stating that: "The civil servant and state employee shall enter service based on a public announcement", "[t]he job positions of civil servants and state employees shall be accessible to all applicants on equal terms", and "[t]he selection of applicants shall be based on their professional training, knowledge, skills, previous work experience, job performance, and test results". In July 2018, the Government of Montenegro adopted the Public Administration Optimization Plan 2018-2020, which also covers recruitment. On this occasion, the possibility of fixed-term hiring was also restricted, which, as considered above, may conflict with the need for independence of civil servants.

In Serbia, civil service legislation was amended in December 2018 providing for merit-based recruitment and dismissal procedures. As of 2021, the excessive number of interim positions was also reduced.

However, legislative changes have not always brought good results. In the case of North Macedonia, for example, the continuous changes in the regulatory framework have created a situation of uncertainty that has not favoured the consolidation of virtuous behaviour. Since 2008, Macedonian civil service legislation has undergone numerous and continuous changes. In 2014, the law on civil servants (LPSE) and the law on administrative employees (LAS) (Official Gazette n. 27) were approved. Both new laws were amended twice in 2015, and twice more in 2016, and once in early 2018. Over the past twelve years, civil service law has been subject to 26 changes, undermining the stability of the legal context. The State Commission for the prevention of corruption continued to address cases of nepotism, patronage, and political influence in the process of hiring civil servants.

Overall, legislative reforms in recent years have not eliminated all weaknesses.

Uniform standards for merit-based hiring, promotion, and dismissal are still lacking across the civil service, often due to a fragmented legislative framework. In Montenegro, for instance, it is estimated that about half of State regulators, agencies, and funds do not implement the Civil Service Law but follow only

Labour Code standards and procedures. (Meyer-Sahling *et al.*, 2020) In several countries, there is no noticeable reduction in the excessive number of interim management positions. In Serbia, for instance, candidates for the positions of Secretary of the Ministry, Assistant Minister, and Director of non-ministerial entities can be appointed as interim managers for three to six months at the discretion of the (political) head of the institution. Then, although interim appointments may not be officially renewable, they are often renewed in practice.

All of this is likely due to the fact that many of the reforms have not yet transformed existing hiring procedures and practices, focusing instead on improving them. Indeed, despite these reform efforts, several monitoring reports (such as the ReSPA studies and regular SIGMA monitoring reports) indicate that the politicisation of civil service recruitment remains widespread throughout the region.

As can be read in a ReSPA study (Meyer-Sahling *et al.*, 2020), nearly 60% of human resources managers considered political leadership support as either important or very important in the selection of senior civil service positions. Even at the level of non-management civil servants, more than 50% of HR managers attributed an important or very important role to political leadership in the recruitment and selection process. Albania's situation seems better than this picture[7]. Civil servants show a predominantly positive perception of the meritocratic nature of the recruitment process. However, there is a perception gap between civil servants and the average Albanian citizen. While 64% of civil servants surveyed think that civil servants are hired based on qualifications and skills, only 35% of Albanian citizens hold the same opinion. 51% or more than half of the public does not believe in meritocracy in civil service recruitment.

Along with the weaknesses, however, there are some noteworthy experiences.

An interesting mode of selection that, because of the way it is carried out, ensures good transparency and traceability, is one that uses tests administered by electronic means. In Montenegro, for example, with the last reform, an electronic test system was introduced for the professional entrance exam to work in public administration, including at the local level. Even more significant is the experience the Albanian administration had during the Covid-19 pandemic period, when the recruitment procedures for those institutions of the State administration that are centrally managed by the DoPA were conducted entirely online. The procedure consisted of two phases: an online written test and an online structured oral interview. For technical reasons and to ensure quality, the entire structured oral interview process, including the interviews of

7. National PAR Monitor Albania 2017-2018, Institute for Democracy and Mediation, Tirana, November 2018.

all of the candidates, was recorded. As we can read in the dedicated SIGMA report[8]: "now that DoPA has begun implementation of full online recruitment procedures, DoPA staff are confident that these online procedures can continue and be developed further. They could be used as an alternative way to conduct recruitment procedures, especially for lateral transfers and promotions". A major advantage of this type of selection method is the transparency of the process: the fully electronic test provides written test results to candidates in real-time, further increasing the transparency and quality of the hiring process. Another advantage is the increased integrity of the process due to the standardisation of the procedure, which is less permeable to corruption, and also the increased participation of candidates.

4.2. Performance evaluation: a system yet to be consolidated

The relationship between the fight against corruption and the performance evaluation system passes first of all through the importance of ensuring the efficiency of the administration. Inefficiency is a favourable condition for the penetration of corruption in public administration.

Inefficiency can generate corruption as people try to overcome delays and other inefficiencies. The payment of bribes can be seen as an antidote to uncertainty. The low quality of public sector management opens up spaces where corruption can flourish. Lack of accountability between government and citizens increases attempts to bribe public employees.

Since dysfunctional public administration is considered a major cause of corruption, a well-functioning public sector that provides quality public services is strategic to combating corruption.

Performance-based accountability has the potential to improve the performance of government services and to ensure the integrity of public action.

The fight against corruption, in turn, is also a fight against maladministration (inefficiency, slowness, hyper bureaucracy): improving administration to fight corruption.

Western Balkan countries have adopted several reforms in recent years to improve governmental performance capacity, including performance appraisal of individual employees, especially in the central government. Over the past decade, almost all of these countries have established an institutional framework for the introduction of performance appraisal. However, actual practice and

8. Online Recruitment to the Civil Service in Albania as a Response to the Covid-19 Crisis, May 2020.

implementation tend to lag behind. Often this is because individual staff performance appraisal systems are formally in place but are not linked to the overall managerial environment and professional development activities and, in some cases, are conducted only as a formality.

A key issue is a link between performance appraisal and salary increases. For this to work, however, the wage system needs to be defined organically. In Albania, for example, the wage system is based on a job classification system, which requires further reform. The fairness and consistency of the system is undermined by the continued lack of a wage policy that establishes clear criteria for wage supplements and salary increases.

Another important issue concerns the uniformity of salary supplements across administrations. The fragmentary nature of the laws affecting public employees in the various administrations that we pointed out above also affects the variety of salaries. In North Macedonia, for example, the salary system has not been unified, while *ad hoc* payment allowances have continued to be given to civil servants without any transparent justification[9].

Another element that needs to be considered is the size of salaries, which, if too low, discourages productivity. In Montenegro, for example, salaries in the public sector remain modest and the pay system is not attractive to civil servants and government employees, and does not appear to be based on clear, fair, and transparent criteria.

Another key aspect of the personnel evaluation system is the linkage between performance evaluation and decisions about promotion, demotion, or training needs. In many countries, this aspect has proven to be meaningless and formal, often leading to almost all employees being evaluated as top performers[10]. This can also be due to too little time given to the employee to achieve the required results. Interesting is the choice of Serbia, which in the last reform provided a longer period to achieve performance results.

4.3. Perspectives for an improvement of evaluation systems to increase public ethics

The importance of an adequate personnel evaluation system, both for access to employment and to reward productivity and incentivize good behaviour, suggests that work should continue on its improvement. In the countries of the

9. European Commission, Commission Staff Working Document, North Macedonia 2020 Report.

10. SIGMA, *Baseline Measurement Reports*, OECD Publishing, 2015.

Western Balkans, reforms of public administration, also in view of EU entry, have affected these sectors to varying degrees. However, there remain many aspects that still need to be worked on.

The ReSPA study (Meyer-Sahling *et al.*, 2020) makes three sets of recommendations: improve the knowledge base of selection committees; improve regulatory frameworks (especially in areas such as temporary employment in public service positions); and, finally, look to the future. Specifically, concerning the latter, they suggest revising entrance examinations, raising the bar on the level of candidate preparation, improving monitoring and transparency, and developing mechanisms for information sharing and learning.

In addition to this, some other useful suggestions for the future can be made. Concerning the procedures for access to employment, it is necessary to diminish the relationship between committee and candidates, avoiding local committees, centralising the tests, and also allowing the winners to choose the location. Regarding the latter, there is the Albanian example of the pool examination, which must be watched carefully precisely because it allows the choice of location. Still, about access, it would seem useful to provide that trade unionists and politicians cannot be part of competition commissions, imagining commissions formed mainly or exclusively by persons outside the administration. It could also be useful to foresee that a minimum number of women be present on commissions, taking into account the relationship, albeit controversial, between gender and corruption. (Stensöta, Wängnerud, 2018)

Even for the performance evaluation system, however, it is important to provide an explicit link between desirable behaviour and integrity, to encourage fair and impartial, as well as efficient, behaviour. Another key element concerns the impartiality of the decision-maker. With this in mind, an independent commission must be provided to oversee the evaluation and compliance with the rules governing it.

In conclusion, however, alongside the precise indications of possible improvement, it is necessary to consider the effectiveness of the reform policies. The feeling is that the imposition of reforms on the selection of civil servants was seen as an external factor and resulted in a mere formal implementation of legislative reforms. What is missing is a combination of multiple protagonists supporting change. In other words, external pressure did not activate both political and public will, both necessary for a change. Brinkerhoff (2000, pp. 242-243) includes the source of the initiative in his five indicators of political will for the fight against corruption. When it is external, it indicates a less genuine intent to pursue reform. Multiple authors also highlight the need for a "critical mass" to demand and support change. This includes active engagement of civil society, but the external source of the need for change made it complicated.

5. Training of civil servants

The quality of civil servants in public administrations and the integrity of administrative structures depend on the provision of mechanisms and instruments capable of ensuring comprehensive training for civil servants. Although European and international bodies have not always set themselves specific parameters for assessing the adequacy of the training provided to civil servants, it is useful to consider the presence and declination of three elements: the presence of public schools for the training of civil servants; the legal significance of training activities and the instruments that enable them to be effective; and the knowledge and skills provided by the training of public personnel.

5.1. The establishment of public schools for the training of civil servants

The establishment of national schools of public administration or, at any rate, of training schools for civil servants is a decisive element in ensuring quality and continuity in the training of civil servants, particularly those who actually exercise administrative power, such as the top figures in public administrations.

Public schools for the training of personnel, in theory, are not only structures designed to ensure, on the one hand, the appropriate knowledge for the performance of public functions (traditional, technical-scientific and ethical knowledge) and, on the other, the managerial skills and concrete management of that knowledge for daily administrative action and for the resolution of ethical dilemmas. On closer inspection, they are places with a greater, systemic value, within which a shared administrative culture is stratified and in which a body of officials emerges, in particular of top officials, who have their own common cognitive and ethical baggage, at the service of the effective guarantee of citizens' rights and the concrete care of the public interest, not only functional to the achievement of an objective or of certain results in the performance of the function.

The European Union and international bodies have attached particular importance to the establishment of schools of public administration in countries seeking to join the Union. In the Western Balkans, for example, the Regional School of Public Administration (ReSPA) has been established since 2010 as a joint initiative financed by the European Commission and the governments of the area (Albania, Bosnia and Herzegovina, Republic of North Macedonia, Montenegro and Serbia) with the aim of addressing and resolving weaknesses in their administrative structures.

However, the presence of the ReSPA has not prevented the establishment of administrative training schools at the national level: in 2017 Serbia, established the National Academy of Public Administration[11], while Albania established the Albanian School of Public Administration (ASPA) in 2013[12].

The establishment of a regional school of public administration certainly had the advantage of filling an important gap in the Western Balkans, but the difficult coordination between different governments on training programmes and the voluntary participation of individual administrations in its activities did not guarantee constant training of civil servants.

5.2. The legal significance, planning and scope of training for civil servants

The legal relevance of training, the scheduling of training activities, and the number of civil servants covered by training are a set of determinants for understanding the adequacy of the legal training regime for civil servants.

Moreover, the fact that training is compulsory and that it is planned consistently are two parameters that are taken into account by international bodies when assessing the effectiveness of training. These documents emphasise that training for civil servants must be provided for by law and must be regarded both as a right and as a duty of the civil servant. Moreover, strategic training needs must be periodically identified, adequately funded and annual or biannual training plans must be continuously developed through transparent, inclusive, coordinated or supported processes. Finally, the plans, in order to make them more and more suitable to the training needs of the administration, must be monitored and evaluated periodically and intended for all civil servants, *i.e.* all those (public or private employees) who perform a public function, in particular (but not exclusively) for top management[13].

In the Western Balkans, training is always included in the rules governing public employment, both as a right and as a duty of the employee, but very often it is only addressed to the top management of the administrative offices and not to the officials present in the office, and it is left to the assessment of the public manager's decision.

11. The National Academy of Public Administration was established under the Law on the National Academy of Public Administration ("Official Gazette of the RS", n. 94/2017 of 19 October 2017) and started functioning in January 2018.

12. Established by Act No. 152/2013 On the Civil Servants.

13. Elements present in Principle 6 of the section dedicated to Human resource management within the 2017 SIGMA-OECD Principles of Public Administration for EU candidate countries and potential candidates.

The legal regime of training is very fragmented and is richer in countries where there is a public training school. In these countries (Serbia and Albania), training is compulsory following the first recruitment for specific roles or categories and, in certain cases, it is necessary for career progression (Albania).

5.3. The knowledge and skills provided by training for civil servants

In addition to the establishment of public training schools and the legal regime of training activities, the third and final element influencing the effectiveness of training in terms of the quality of civil servants is the type of knowledge and skills it guarantees.

As we have seen, European and international documents have often touched on this aspect. Although they never fully go into the type of knowledge and skills needed to guarantee the quality and impartiality of public intervention, from reading them it is possible to deduce at least three strands of knowledge and skills needed to guarantee the quality of the official and therefore of his or her integrity.

Officials undoubtedly need traditional knowledge and skills, such as those transmitted by the social sciences; technical-scientific knowledge and skills, especially in certain sectors of administrative activity exposed to corruption risks such as public procurement; and finally, ethical knowledge and skills, linked to the management and resolution of ethical dilemmas that may arise daily during administrative action.

In the Western Balkans, training activities focus on more traditional skills, *i.e.* legal and economic skills, and traditional managerial skills. More technical knowledge and skills (engineering, architecture, IT, etc.), on the other hand, seem to be neglected, despite the fact that they are very useful in guaranteeing the integrity of public offices when the administration deals with private individuals, especially in sectors exposed to the risk of corruption, such as public contracts. This may be a consequence of the absence in the rules governing public employment of specific provisions dedicated to particular technical roles in public administration.

Moreover, the training activities of the Regional School of Public Administration (ReSPA) and the Serbian National Academy of Public Administration seem to devote more space to ethical knowledge and the management of ethical dilemmas which may, in the medium to long term, lead to an overall increase in the integrity of civil servants.

5.4. Improvements needed for adequate training

In conclusion, the training of civil servants in the Western Balkans still needs to be better defined in its main elements. Although progress has undoubtedly been made in recent years, there are still weaknesses in effectively guaranteeing the quality of civil servants through adequate training programmes.

Two fundamental issues need to be addressed: firstly, coordination between training schools and administrations, in particular as regards to the knowledge and skills that training programmes must offer civil servants; secondly, the prescriptiveness of training obligations and the guarantee of widespread training in all administrations and for all types of administrative activity. Two problematic issues whose resolution would greatly improve the quality of civil servants in the Western Balkans.

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6
The integrity of public officials: public ethics, conflicts of interest and rules of conduct

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Summary: 1. Premise: strengthen integrity to reduce corruption – 2. Social norms and ethical conducts – 3. Promoting integrity: from the workplace as a laboratory of integrity to gender mainstreaming – 3.1. Workplace as a laboratory of integrity – 3.2. Integrity and gender mainstreaming – 4. The instruments of integrity and guidance of the conduct of public officials – 4.1. The duties of the public official as instruments of integrity – 4.1.1. Conflict of Interest – 4.1.2. Codes of conduct – 4.2. Governance in matters of integrity to oversee the duties of conduct: from the international to the national dimension – 5. A normative standard (European and international) of duties of conduct as an instrument of integrity of public officials – 5.1. The prescriptive nature of the duties of conduct – 5.2. An extended scope: the number of officials and administrative activities involved in the duties – 5.3. The duties of conduct related to the prevention of corruption and its administrative activities – 5.4. The effectiveness of the duties of conduct: administrative codes of conduct, disciplinary sanctions and control bodies – 5.4.1. The right disciplinary responsibility: adequate offices and effective sanctions – 5.4.2. The codes of conduct of the individual administrations – 5.4.3. Governance of integrity to oversee the effectiveness of the duties of conduct.

1. Premise: strengthen integrity to reduce corruption

The challenge of corruption is very closely linked to the integrity of officials and political staff, to their ethics. It is clear, already reflecting on the concept of being "intact" (meaning, "not corrupt"), that the fact of being able to rely on public personnel with their own ability to resist attempts at corruption and to display the "virtue" that makes them inclined to look after the public's interest is an extraordinary resource for any institutional system. In his essay on bureaucracy, Luhmann dwelt on the "ethics of the German bureaucracy", and in

1. The work is the result of a common study, but in any case they are to be attributed: to M.G. Pacilli paragraphs 2 and 3, to M. Falcone paragraph 5, to F. Merenda paragraph 4, to E. Carloni paragraph 1.

more general terms the theme is still present even in the critical reflections with respect to the "standard" models of new public management: it is a question of persistent topicality, according to lines of reflection fed by the Weberian idea of bureaucracy itself. The issue arises no less with regard to political personnel, with sometimes dangerous intertwining in systems in which the separation between politics and administration (such as career paths and, in particular, as a guarantee of the bureaucratic merit system) is less marked.

Precisely in the countries where the risk of corruption is most strongly felt, the issue therefore arises strongly, in terms which, however, cannot only be descriptive (of the state of affairs), but prescriptive, as intended to strengthen the integrity of officials (bureaucratic and elective) and sometimes to attempt to re-establish largely deficient public ethics by way of regulation.

The ethics of a public official and his or her integrity is therefore a question that is closely linked, on the one hand, to the access paths to public offices, on the other to the investigation of the reasons for unethical behaviours and therefore of the strategies for their reduction: this last issue particularly calls into question the instrument of ethical codes, understood as a set of rules of conduct capable of defining "good officials", defining their values positively and negatively evidencing prohibited conduct.

Codes (variously defined: codes of ethics, codes of conduct, codes of conduct) tend to be used in different contexts, both to codify the existing norms (defining and strengthening an average "standard" already present), as well as to establish new ones. It is often used when the gap between real rules and behaviour grows, and this often when it is the rules that are intended to raise the level of the conduct of officials who instead continue to follow practices and conduct that are perceived as inadequate. Therefore, in practice, ethical codes are often present as an "accompanying" tool for reforms aimed at improving the functioning of institutions, particularly public administrations. Therefore, there is a tendency, through these, to facilitate compliance with the laws and to integrate (and sometimes reform) insufficient customary rules.

With this tool, it is possible to try to combat the spread, or the persistence, of deviant behaviour, using tools other than the criminal instrument: this is another aspect that deserves attention. In the system set up to now for the prevention of corruption (in its various manifestations which are strongly affected by historical-political and cultural coordinates, albeit within a model with increasingly common features), the prevalent part of the mechanisms precedes individual conduct, in the sense that this develops into an organisational or procedural dimension (think of transparency mechanisms, or of risk management systems through specific programs). In the case of codes of conduct, and more generally of interventions relating to the integrity of officials, a preventive approach (of

a priori guidance of conduct) and a repressive approach (of sanctioning improper behaviour) are combined with a variable balance that depends on the sanctions related to the violation of the duties contained in the codes of conduct. Precisely through the rules of conduct, however, it is possible to perceive the existence of a phenomenon of "corruption" which has its own autonomy with respect to the criminal notion, in the sense that the behaviour prohibited by the codes of conduct certainly cannot be limited to those already provided for by criminal law.

In general terms, these tools can be traced back to the "Madisonian" idea of "auxiliary precautions" with respect to the degeneration of the conduct of persons in charge of public functions. These "auxiliary precautions" represent a regulatory model with particular characteristics, definitely anchored in content to a vision of public ethics, as a guide for employees and as different from private ethics. Against the persistence of widespread malpractice within the administrative, bureaucratic and (with less frequency and attention) political dimensions, the growing need, in a political-social context in which shared rules are increasingly being lost, such as rules of "good behaviour", and on the other hand, the need to "break" "toxic" schemes of conduct traditionally present in organisations, imposes the need for new interventions aimed at the construction and reconstruction of the ethos of the official.

As is clear, the connection with the problem of corruption does not, however, exhaust the proper role of ethical codes: the role that these instruments play in directing the conduct of employees with respect to the objectives and values assigned to the administration, which, in other words, is equivalent to saying that through these tools one contributes to functionalizing the behaviour of employees for the purposes of the institution as such.

What are these "codes"? First of all, the "decalogues", legally relevant, which contain a series of regulations, a violation of which can result in legal consequences of a disciplinary or, at times, a criminal nature. Also included are "Perfect and imperfect" rules, that is to say with sanctions or not, containing "positive" precepts, as a guide in conduct, as well as prohibitions covered by specific sanctions (disciplinary, but not only), united by an ethical tension, so that the legal sanction, where present, is always accompanied by the evaluation in terms of "disapproval" by the legal system and by the people directly and indirectly involved in the conduct of the official.

Why, then, is there often talk of "ethical codes"? Not because their effectiveness unfolds only in the field of morality of the group to which they are addressed, but because the norms contained in it aim at the construction (and reconstruction) of ethical values, and because the code aims to trigger the personal absorption of values and creation of virtuous mechanisms in the conduct of public officials.

It is particularly useful in providing an "orientation" in the conduct of officials, as long as it is consistently applied and enforced by the leadership in the various organisations, following the literature on the subject, to regulate in particularly "grey" area of administrative conduct: an area in which the ethical dimension of individual choices and behaviour is very strong, and in which the connection between the public function to be pursued and the official's private interests is particularly delicate.

This, whether the rules of conduct are formulated as a support to the decision (and to the internal and external evaluation of the conduct, even if only potential), that is to say in positive terms, or whether they are formulated (as is more frequent in contexts with higher levels of corruption) by prohibitions and obligations. On closer inspection, in any case, the rules of conduct contain both elements: guides to virtuous conduct together with specific prohibitions.

An interesting point is the fact that the rules of conduct, and in particular the ethical codes, therefore transcend the sole dimension of the employee's service (understood as "work performance", albeit with all its peculiarities) and become an instrument through which the same exercise of functions and, therefore, the same administrative activity are regulated, with the provision of specific duties and conduct required of the employee, thus affecting citizens' rights. This emerges both in the Italian experience and, in a marked way, at the level of the European Union: at the European level, in the code of conduct for officials and members of the European Commission, we find provisions aimed at regulating the relations between the administration and citizens, even before the in-service behaviour of employees.

On closer inspection, however, this is true in general terms: the integrity of the official is not just an internal issue of the relationship between the employee and the organisation, but directly concerns the rights of citizens, who only when faced with an intact administration see their rights and legitimate interests truly guaranteed.

2. Social norms and ethical conducts

Ethical conducts are frequently viewed as the result of an individual's inherent and dispositional convictions, with little regard for the normative influences of the groups in which individuals live, from the workplace to the broader society (Ellemers, Van Der Toorn, 2015). Formal norms, *i.e.* laws that recognized authorities adopt in order to govern are crucial in order to guide and constrain individual behaviour. Apart from this type of norm, another critical regulatory tool for influencing individual ethical conduct is represented by social norms.

(Cialdini, Trost, 1998) Social norms emerge from group interactions, define what is legitimate and acceptable in a society or groups and, as such, serve as a behavioural guide for the group as a whole, eventually becoming significant moral anchors when individuals internalise them. (Ellemers, 2017) Adherence to social norms ensures membership in an organisation, boosts members' self-esteem, and serves as a means of expressing loyalty and commitment. (Cialdini, Trost, 1998)

Morality is necessary for groups to function, and members adhere to group moral standards in exchange for respect within the group itself. The individual's proclivity to conform to the majority's social norms is particularly relevant when discussing ethical organisational behaviour. Indeed, if conformity to group norms is regarded as a sign of group loyalty, deviance and dissent are frequently regarded as indicators of disloyalty and disengagement. (Jetten, Hornsey, 2014) Deviance can be detrimental to a group's ability to function normally, or even to its very existence and as a result, the group elicits behaviour from its members aimed at reducing or eliminating it. Additionally, continued exposure to behavioural norms at odds with those of the larger society may condition individuals into modifying their understanding of what is ethical, rendering broader moral norms irrelevant. (Moore, Gino, 2013)

3. Promoting integrity: from the workplace as a laboratory of integrity to gender mainstreaming

For all those involved in governance, integrity is critical to acting in an ethical manner. (Huberts, 2018) It is motivated by more than immediate and personal reasons; it also reflects adherence to broader societal norms (including gender role norms), and it is key to consider how these norms may influence individuals' behaviour and attitudes in work and organisational settings.

3.1. Workplace as a laboratory of integrity

The workplace represents a laboratory of integrity wherein the individuals can engage in a continuous process of ethical learning. (Smith, Kouchaki, 2021) People indeed spend a significant portion of their daily lives at work, and frequently find themselves in morally challenging situations. As such, organisations constitute an ideal setting for ethical learning and moral character development. In order to make the workplace an integrity laboratory, people's moral character need to be considered not as stable and immutable, but as the result of a complex interaction of psychological, social, and contextual factors. This implies that integrity

development is a lifelong endeavour and that ethical learning requires significant effort and intensive work. Accepting that our capacity for ethical behaviour is limited is a critical mental shift, and paradoxically, precisely because we place an excessive amount of faith in our moral capacities, we are constantly at risk of ethical transgressions. To avoid falling into this error, it is crucial to cultivate moral humility with an acceptance of our ethical fallibility, as this enables us to strengthen ourselves and improve our ability to deal with ethically complex situations.

3.2. Integrity and gender mainstreaming

The relationship between (female) gender and integrity violations and corruption has received increasing interest since 2001, when the first two studies on the topic by Dollar and colleagues (Dollar, Fisman, Gatti, 2001) and Swamy and colleagues (Swamy, Knack, Lee, Azfar, 2001) were published. These studies, conducted in a variety of countries, showed that a higher number of women in parliament was associated with lower levels of corruption in the country itself, even when other relevant variables, such as the general level of social and economic development or average years of education, were factored in. This relationship has also been found in subsequent studies (Sundström, Wängnerud, 2016) and today there is widespread agreement that gender equality is a key factor in promoting integrity and combating corruption. In clientelistic systems, opportunities for corruption often have a gendered connotation: for example, recruitment often takes place on the basis of male gender homogeneity, seen as predictable and secure, as opposed to gender diversity, seen as potentially uncontrollable. In order to proliferate, corruption often needs informal networks built on trust, secrecy and mutual protection. Men, historically occupying positions of power more often than women, are the people who benefit most from these networks and therefore have an interest in preserving them. (Bjarnegård, 2018) Inequalities in a broad sense, especially when legitimised, accepted and not opposed, create fertile conditions for perceiving corruption as inevitable. Patriarchy, by defining itself as a social system in which men are legitimized in an imbalance of power in relation to women, can become a fertile ground for corruption, as it provides a foundation for other forms of unequal and partial treatment. (Alexander 2016)

The issue of the relationship between gender inequality and corruption is a complex one and it is important to avoid an essentialist rhetorical drift on the basis of which women are by nature less corrupt or corruptible. Pacilli and colleagues (Pacilli, Giovannelli, Spaccatini, Lopez Ortiz, 2021) examined whether, rather than individuals' gender per se, their gender ideology may be

relevant in explaining the level of perceived acceptability of corruption. In a cross-cultural study involving 911 participants from Italy and Ecuador, two countries ranked 92nd and 52nd (out of 180) in Transparency International's 2020 rankings (Transparency Int., 2020) for perceived corruption, it was found that, even after controlling for participants' gender, adherence to a traditional view of gender roles was associated with increased acceptability of corruption, as measured by how acceptable it was in different situations for a public official to accept a bribe in exchange for a service.

As previously stated, there is widespread agreement that gender equality is critical in the fight against corruption and as such, gender mainstreaming constitutes an essential tool for promoting integrity. By sharpening our focus on and understanding gender power relations and inequalities, we can strengthen governance and anticorruption interventions. As Ortrun Merkle (Merkle, 2018) has illustrated, gender mainstreaming is critical throughout the anti-corruption program's cycle, including 1) assessment and analysis, 2) planning and design, 3) implementation, and 4) monitoring and evaluation. Gender assessment and analysis typically begin with the collection of gender sensitive data (sex-disaggregated data such as statistics and interview results) and the application of a gender lens to examine the causes and consequences of gender differences in terms of power dynamics. To ensure gender equality, the project must include women's organisations and women from diverse backgrounds. Anti-corruption programs must also consider gender issues during the planning and design phases. Among the factors to consider when developing gender-sensitive policy objectives are addressing the concerns of both men and women and committing to changing attitudes and institutions in general. Throughout implementation, it is critical to enable women's participation and capacity building, and the project team must constantly raise awareness of the differences between men and women's responses to anti-corruption interventions. Gender-sensitive indicators and milestones are intended to collect information about the impact of the intervention on men's and women's realities. As such, it is critical to ensure that all data collected is disaggregated by age, gender, and ethnicity during the monitoring and evaluation stage.

4. The instruments of integrity and guidance of the conduct of public officials

The integrity of public officials is a principle consisting of a series of legal duties, measures and administrative obligations: its fulfillment requires intense reflection and professional training.

At the international level, this principle is considered as one of the pillars of political, economic and social structures and, therefore, a determining element of the well-being of a state; it is also considered essential for the governance of public affairs, as an element of safeguarding the public interest and strengthening fundamental values such as the commitment to pluralist democracy based on the rule of law and respect for human rights. (OECD, 2017; Huberts, 2018; Erhard, Jensen, Zaffron, 2014; Graycar, 2020; Cox, 2009; Menzel, 2015; Anechiarico, Jacobs, 1996)

Integrity is one of the important principles and values of European "*good governance*", considered as the "*core principle*" whose purpose is to model behaviour in public administration. (European Commission, 2017; Transparency Int., 2014a, Szarek-Masson, 2010) Furthermore, the anti-corruption and integrity framework is considered by the European Commission as a mechanism that directly affects compliance with the rule of law. (European Commission, 2020a) A strong rule of law and a solid anti-corruption culture result in citizens' trust where integrity is the norm and compliance with the law is protected. (European Commission, 2020b) It can therefore be said that the scope of application has been broadened beyond the criteria of formal democracy to reach areas of substantive democracy, such as anti-corruption and integrity measures. (Balfour, Stratulat, 2011)

Consequently, integrity must be seen as a criterion for EU membership: the adoption of anti-corruption and integrity rules and actions have become essential for the Member States and at the stage of negotiations for States that seeking to join the European Union. (Schroth, Bostan, 2004) To demonstrate this, some states in the Western Balkans area (European Court of Auditors, 2022; European Commission, 2019; Elbasani, Šelo Šabic, 2017; Center for the study of democracy, 2018), are placing the adoption and adaptation of their systems to the required standards at the centre of their actions. (GRECO, 2020; ProTRACCO, 2020; Hoxhaj, 2020; Sotiropoulos, 2017; Mungiu-Pippidi, 2002) In fact, the implementation of integrity and anti-corruption rules are considered as one of the main conditions necessary for the EU accession process to move forward. (European Commission, 2020)

The main reference system shared by the States on the issue of integrity is that of international conventions[2]. Over the last few decades, the result is a widespread conformation of practices at a global level, useful for the adoption

2. Since the mid-1990s, the following Conventions have been approved: the United Nations Convention against Corruption of 2003; the Organisation for Economic Co-operation and Development (OECD) Convention against Corruption of 1997; the Criminal Law Convention (1997) of the Council of Europe; and the Civil Law Convention (1999).

of tools and standards aimed to increase the level of integrity in the public sector. The purpose of the Conventions avails to enhance the integrity of public officials and to strengthen administrative action. Conventions also play a key role by providing frameworks that set anti-corruption standards and address cross-border issues. (Transparency Int., 2014b)

It is necessary, in a preliminary way, to consider two aspects: the instruments of integrity are related with the measures aimed at the fight and prevention of corruption, even if they are not limited to them (Heywood, Kirby, 2020; Hardi, Heywood, Torsello, 2015; Heywood, Marquette, Peiffer, Zuniga, 2017); national rules on integrity vary widely between countries, due to the peculiar nature of the risks of integrity and legal, institutional and socio-cultural differences.

Therefore, the system that concerns the promotion of integrity is considered as a combination of solid legal rules with a set of measures useful to contain (preventing) the unethical actions of holders of public functions and a series of activities aimed at staff training.

Some of these measures serve to increase the legality, quality and efficiency of the public sector, others intervene in the eventuality that they are violated. The rules on transparency, risk analysis and management programs and codes of conduct serve to ensure accountability, compliance with the law and the pursuit of public interest; others correspond to restrictions (for example, in matters of conflicts of interest), administrative responsibilities and disciplinary sanctions.

The main elements concerning the promotion of the integrity of public officials are briefly illustrated below, through two points: 1) behavioural duties enshrined in state legislation, based on international and European guidelines, along with preventive measures; and 2) governance in matters of integrity.

4.1. The duties of the public official as instruments of integrity

Once a citizen fills a public role, there is the necessity to adhere to certain standards of conduct, which collectively represent the expression of values and principles relating to his or her status enshrined in the Constitutions.

Standards of conduct are incorporated into the legal system and organisational policies, which establish the underlying principles and clarify the boundaries of acceptable behaviour. (OECD, 2020)

In each legal system, the range of duties varies by virtue of the office and the nature of the power: political personnel and those employed by the public administration. For the former, there are legal and political responsibilities that affect non-re-election and removal, while on the preventive front there are duties that limit the right to exercise and retain office.

Much more complex and rigid is the set of duties that public officials are required to fulfill, which we will focus on in the following pages. With respect to political personnel, they clearly have no political responsibility; however, there are other forms of responsibility with very articulated preventive measures.

Leaving aside the laws on civil servants and how they are introduced in the respective Constitutions[3], which vary greatly according to the "administrative constitution" of each state, we focus on the duties present in the following disciplines: conflicts of interest and codes of conduct.

4.1.1. Conflict of Interest

One of the key principles for those who work in public administration is the subordination of personal interests to public interests. Failure to comply with this principle is the basis of most of the actions contrary to the correct exercise of the public function of any legal system. (Auby, Breen, Perroud, 2014)

When we speak about conflict of interests, we inevitably find the violation of one of the most important principles of the public sector, that is the principle of impartiality, considered as a duty par excellence, from which a multiplicity of institutions and rules derive. (OECD, 2003a)

Regarding this matter, we can say that the conflict of interest "*implies a conflict between the public duty and the private interests of a public official, in which the public official has private interests that could improperly influence the execution of their official duties and their responsibility*". (OECD, 2003b)

The United Nations Convention against Corruption of Mérida (2003) (Heimann, 2018; Chowdhury, Rose, Kubiciel, Landwehr, 2020; Rose, Kubiciel, Landwher, 2019) is the first global agreement characterised by a change of strategy and featured with various rules and provisions of a preventive nature (Parisi, 2017), as well as the only legally binding treaty against corruption[4].

The Convention addresses the issue of conflict of interest, but does not provide a detailed definition of it. Article 7 requires that: "each State shall do its best, in accordance with the fundamental principles of its internal law, in order to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest". Much more specific is paragraph 5 of art. 8, in which States are required to adopt measures that oblige public officials to

3. See, by way of example, the following articles: art. 103.3 of the Spanish Constitution and art. 97 of the Italian Constitution.

4. In the text of the Convention we find various references to the principle of integrity: in the preamble it speaks of the need to safeguard integrity; it is also one of the three main objectives expressed in art. 1: "*the promotion of integrity, responsibility and good faith in the management of public affairs and public goods*".

declare: "to the competent authorities, in particular, all their external activities, employment, investments, goods and any substantial gift or advantage from which a conflict of interest with their functions as public officials".

The implementation of articles 7 and 8 of the UNCAC Convention is one of the main factors on which States must work, an example being the Western Balkans which are working in this direction. (ACA, 2018; Lakovic-Draskovic, 2021)

The 2017 OECD Council Recommendation also urges Member States to define high standards of conduct: "establishing clear and proportionate procedures that help prevent breaches of integrity standards in the public sector and manage actual or potential conflicts of interest".

States must ensure that rules in this area can: "*guarantee that conflict of interest policy is supported by organizational strategies and practices to help identify the variety of conflict-of-interest situations*". (OECD, 2003b) The European Commission has recently specified that the rules on conflict of interest should be implemented in an overall preventive manner, as they aim to prevent, in the first place, the situation where the power of an individual is conditioned by personal interests. (European Commission, 2021) For this reason too, the candidate countries of the Western Balkans (apta-mod) are implementing, although with difficulty, the recommendations and assessments of European and international bodies. (OECD, 2021; Implementation Review Group, 2019; GRECO, 2020)

4.1.2. Codes of conduct

The code of conduct is considered the main tool for promoting integrity in the public sector[5]. The link between integrity and codes of conduct has been present since the first versions of codes drawn up by the United Nations in 1997 and by the Council of Europe in 2000.

A code of conduct defines a series of principles and norms that serve to translate ethical rules into actual legal duties. With this purpose, GRECO, which considers codes of conduct to be an essential part of ethics laws (GRECO,

5. The link between integrity and codes of conduct is clear in the *Recommendation n. R (2000) 10 of the Committee of Ministers to Member states on code of conduct for public officials*, art. 3: "*The purpose of this code is to specify the standards of integrity and conduct to be observed by public officials, to help them meet those standards and to inform the public of the conduct it is entitled to expect of public officials*". See also *International Code for Conduct for Public Officials*, art. 2: "*Public officials shall ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies. They shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner*".

2005), has often recommended the development of rules of conduct in a single text, precisely in the codes. (GRECO, 2019)

Their adoption is recommended to regulate and guide the conduct of all public officials, both at international and European level. Not surprisingly, the UNCAC Convention asks states to encourage the integrity of their public officials at the very beginning of the rule dedicated to codes[6] (GRECO, 2015).

The States find the main reference on the matter in Article 8 of the UNCAC Convention. Paragraph 2 of Article 8 requires each State party to: "*apply, within its institutional and legal systems, codes or rules of conduct for the correct, honourable and adequate exercise of public functions*". On the content of these tools, unlike the discipline of conflicts of interest, some measures are specified that the codes must include in their national versions: Article 8.4: "*measures and systems that facilitate reporting by public officials to the competent authorities, of the acts of corruption which they have become aware of in the exercise of their functions*"; the aforementioned article 8.5; Article 8.6: "*disciplinary measures or other measures against public officials who violate the codes or rules established under this article*".

However, the standards evincible in the Convention are to be considered as "*minimum standards*"[7] and therefore not exhaustive. Each code reflects fundamental values and principles common to many States[8], but the duties of integrity are much more articulated, as well as greater with the advent of state anti-corruption legislation.

4.2. Governance in matters of integrity to oversee the duties of conduct: from the international to the national dimension

The integrity system rests on three levels: OECD and UN at the international level; Council of Europe at the European level; the bodies (agencies/authorities) charged with the supervision, control and adoption of measures at national level.

6. 1. *For the purpose of combating corruption, each State Party shall in particular encourage the integrity, honesty and accountability of its public officials in accordance with the fundamental principles of its legal system.*

7. On whether international documents provide minimum guidance on standards of conduct, one example is the 2017 OECD Recommendation where it specifies that: "*go beyond minimum requirements, prioritize the public interest, adhere to public service values, and an open culture that facilitates and rewards learning and encourages good governance*".

8. For example, the rule of law, legality, political neutrality, loyalty, honesty, impartiality, accountability, efficiency and effectiveness, and transparency.

The implementation of the rules and standards of integrity is monitored by intergovernmental cooperation working groups: at the European level there is GRECO, established within the Council of Europe; within the UN there is the UNODC; the Working Group on Bribery (WGB) within the OECD.

Integrity controls are developed through three categories: 1) verification and monitoring of the compliance of public administrations with integrity rules and measures; 2) measurement and assessment of the level of integrity of public administrations; 3) application of the legal effects of the violation of the rules and integrity measures by public administrations. (D'Alterio, 2017)

The commitment of the OECD in the field of integrity and anti-corruption starts from the Conventions, but is also developed through recommendations, studies and specific reports. In fact, in 2017 the aforementioned "Recommendation on integrity in the public sector" was adopted: States were urged to adopt measures in an integrated and global perspective, in which the crucial role of society must be considered.

Recently, the OECD published a manual on public integrity, with the aim of better defining the scope and purpose of the Recommendation. The content is based on the explanation of the standards that States must adopt through procedures and mechanisms aimed at preventing violations and spreading the culture of integrity[9].

The Working group on Bribery (WGB) is a working group that performs peer-review monitoring, meets once a year and is composed of one representative per State.

Review is seen as an effective tool in creating transparency on state behaviour, mobilising pressure and stimulating learning. (Jongen, 2021) The Group works to verify that States have adapted domestic legislation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997.

Also on an international level, there is the UNODC (United Nations Office on drugs and crime), which is a United Nations agency that also deals with integrity and acts as the "guardian" of the Merida Convention. There is also the Conference of States which has acceded to the UNCAC Convention; it meets every two years and adopts decisions and resolutions, as well as supports the States in implementing the activities in relation to the reference Convention.

9. The main points are as follows: clearly defined and mandatory high standards of conduct in the legal framework that prioritize the public interest and adherence to public service values; legal and regulatory frameworks and strategies that incorporate integrity values and standards; clear and proportionate procedures and processes to prevent and manage issues that could violate public integrity standards if left unchecked; internal and external communication measures to increase awareness of public sector values and standards.

The Council of Europe (CoE) plays a crucial role in promoting human rights, democracy and the rule of law. The fight against corruption and the promotion of integrity are also essential for safeguarding the rule of law/constitutional state. The main body responsible for this is GRECO, which has the task of monitoring compliance with anti-corruption standards through a process of mutual evaluation and peer pressure. It plays a very important role because it stimulates states to adopt integrity measures and strengthen institutions that are not fully compliant with the relevant conventions and standards developed by the various working groups.

The activity is carried out through evaluation rounds, which are based on specific issues; monitoring, on the other hand, consists of an evaluation procedure that is valid for everyone and that produces recommendations aimed at the adoption of measures; finally, the conformity procedure which serves to verify whether the recommendations are met.

At the national level, there are the institutions for the prevention and fight against corruption, which have different tasks and differ in the powers and activities carried out (SELDI, 2019). According to the OECD, any new institution of this type must adapt to the specific national context, considering different cultural, legal and administrative circumstances. (OECD, 2013)

Authorities perform several tasks and play a key role in the overall system. The preparation of measures and actions in the fight against and prevention of corruption are completed with control and sanctioning activities (where permitted).

However, in addition to these skills, they have the task of communicating with the authorities of other states in order to share best practices and therefore improve their systems. Therefore, the logic of integrity and the prevention of corruption relies heavily on cooperation between states, precisely because it recognizes public integrity as a shared value on a global level and as such, it requires the synergistic contribution of all national experiences.

The promotion of integrity, therefore, consists of a governance characterised by cooperation between institutions and agencies as well as the people involved in order to create a global strategy, as much as possible in compliance with the standards and norms enshrined in the Conventions and other international and European documents.

The implementation of the instruments of integrity and the orientation of the behaviour of public officials takes place, certainly in compliance with international and European standards and documents, but the decisive process is the national one: elaboration of state legislation, preparation of public policy, activities and tasks of the authority and controls, and training of all personnel.

A solid system of public integrity is one in which states satisfactorily implement the recommendations on the subject, prepare integrity tools consistent with the needs of their public administration and go beyond the mere formalistic fulfillment of the measures. Precisely for these reasons the duties of public officials alone are not enough to carry out the overall design of the "Integrity system". To do this, it is necessary to develop a culture of integrity that starts from training and that inserts the rules of honesty into the broader framework of public management and governance.

After having outlined a general framework on the integrity rules of the public official, below we will focus on some more specific elements, also referring to the experiences of some candidate states to join the EU in the Western Balkan area.

5. A normative standard (European and international) of duties of conduct as an instrument of integrity of public officials

From the reading of the European and international documents, which we recalled in detail in the previous paragraph, and from the scientific literature, it is possible to derive a real regulatory standard (European and international) of the behavioural duties of public employees, *i.e.* a set of elements that must necessarily compose the discipline of the duties of conduct to make them truly instruments of public integrity. (Molina, 2017; Falcone, 2019; A. Pioggia *et al.*, 2021)

Many of these elements are therefore used as parameters by European and international organisations, such as GRECO (GRECO, 2000; 2019) or the European Commission (European Commission, 2014; 2017), and by some regional organisations, such as RAI (RAI, 2014) and OCSE (OCSE, 2016), to assess the effectiveness of the duties of conduct within countries, particularly, in states that are participating in the enlargement processes of the European Union, such as the Western Balkans.

The European and international regulatory standard of behavioural duties that can be derived from the reading of European and international documents, therefore, includes various aspects of their discipline, such as their legal nature, the scope of application, the tools to ensure their effective application in all administrations, up to the type of duties that must be introduced in administrations, many of which must be closely linked to the prevention of corruption and the administrative activities related to it.

5.1. The prescriptive nature of the duties of conduct

The first element of this shared normative standard that emerges from the grey and scientific literature is the legal nature of the duties of conduct. To be effective within public organisations and to differentiate themselves from simple duties of an ethical nature, the duties of conduct must have a prescriptive nature, that is, they must have a legal significance. In general, this aspect is guaranteed by their provision within regulatory sources of constitutional rank or within ordinary laws. (GRECO, 2000; RAI, 2014; OCSE, 2016; Falcone, 2019)

The presence of direct constitutional references to the duties of conduct or to indirect references, such as references to the impartiality of the administration, to its integrity or to the loyalty of public employees to the Nation, can strengthen the national integrity system and bind the legislator more to provide for specific duties of conduct in ordinary legislation.

In the Western Balkans, for example, the duties of conduct have a legal significance and are mainly present within the laws on public work, which are in line with most European experiences. The duties of conduct, furthermore, are present also within the specific rules, dedicated to sectorial administrative activities (as in public procurement) and recently also within the laws on the prevention of corruption or conflicts of interest. (SIGMA-OCSE, 2022)

At the constitutional level, however, there are few direct references to the duties of conduct or references to principles such as the impartiality of administrative action or the integrity of administrations or, again, the loyalty of public employees.

The prescriptiveness of the duties of conduct, at least from a formal point of view, seems to be guaranteed: an element that is also confirmed by the monitoring reports of international organisations (SIGMA-OCSE, 2021a; 2021b; 2021c; 2021d; GRECO 2020; 2021).

5.2. An extended scope: the number of officials and administrative activities involved in the duties

A second aspect that emerged as a fundamental element of the regulatory standard under analysis is the extension of the scope of application of the duties of conduct. The prescriptiveness and effectiveness of duties as a tool for the integrity of administrations is closely linked to the extension of their scope.

The duties of conduct must apply to all officials who carry out administrative

activities. Beyond their formal classification in the organisation, the law must provide for specific behavioural duties for all officials, from top management to simple officials, passing through professional public managers.

Furthermore, the duties of conduct must be differentiated with respect to the types of administrative activities to which they are addressed and must concern all administrative activities, not only those that require the use of administrative power, but also those that do not provide for it, but provide a performance in the context of a public service. In the latter case, specific behavioural duties must be envisaged even if the public service has been entrusted to private subjects (GRECO, 2000; 2019; OECD, 2017).

In the Western Balkans, for example, a first analysis of the rules on civil servants reveals a limited scope of application of the duties of conduct. In public labour laws, duties generally refer to those who exercise administrative power and to those who work in those offices, but the rules have a number of exceptions that leave out the application of duties of conduct many administrative activities – especially those related to certain sectors of the administration (administration of justice, army, secret services or presidency of the council for example) or certain performance activities, such as those related to some public services – or many categories of public officials[10].

5.3. The duties of conduct related to the prevention of corruption and its administrative activities

A third element that characterises the European and international regulatory standard of behavioural duties is the presence of specific behavioural duties linked to the discipline on the prevention of corruption or the discipline on conflicts of interest. (Merloni, 2019; Carloni, Paoletti, 2019)

There are three main types of duties: the prohibition to accept certain offices/jobs that are considered incompatible with the exercise of one's function; the obligation to provide certain communications relating to certain financial interests and shareholdings; the duty of abstention.

The public official has the duty to inform his superior (manager) about any direct and indirect relationships with private subjects. On this point, each internal legislation determines what the degrees of kinship are within which to

10. This first analysis, which deserves to be further investigated, was carried out through the analysis of the research material produced by the researchers of the countries involved in the APTA-MOD Project. In particular, these analyses are the result of the work and comparison activities that took place during the round tables of the research.

extend the ban and the years in which such relationships have occurred. The employee must also refrain from participating in the adoption of decisions or activities that may involve himself or his relatives, within a certain established degree, but also of his spouse or cohabitants, or of people with whom he has habitual acquaintances (GRECO, 2000; 2019).

Participation in some associations or political parties is considered, in some legal systems, as a potential form of conflict and therefore involves the duty of communication. The official therefore has the duty to refrain from any case in which there may be serious reasons of convenience.

Regarding the conflict of interest, there are prohibitions and duties that concern both some specific moments of work and subsequent to them, as in the case of the discipline of the so-called "*post-public employment*". (OECD, 2010) In both cases, the purpose is to protect the impartiality and good reputation enjoyed by the public administration.

In addition to the traditional duties of conduct of officials, specific duties of conduct are emerging which aim, on the one hand, at making effective the rules on conflicts of interest, incompatibilities, revolving doors or pantouflage or, on the other, aiming at general to make the obligations on the prevention of corruption effective, such as the adoption of anti-corruption strategies or administrative codes of conduct, but also the correct execution of the disciplinary procedure, etc. In the latter case, they are duties of conduct that fall mainly on the heads of the offices and aim to activate disciplinary responsibilities for these figures. (Pioggia *et al.*, 2021)

A type of behavioural duties is also emerging in the Western Balkans. Recent laws on the prevention of corruption and conflicts of interest have introduced some of these duties of behaviour, which were then adopted within the ethical codes of administrations (where they exist). (SIGMA-OCSE, 2022)

The duties that are most developed are those relating to conflicts of interest, that is, those that oblige the official to communicate on-going conflicts of interest to the administration and to refrain from administrative activities if there are personal interests. (SIGMA-OCSE 2021a; 2021b; 2021c; 2021d; GRECO, 2020; 2021)

Those relating to the so-called potential conflicts of interest and those relating to anti-corruption and security activities still have to be fully developed[11].

11. A fact that emerged well from the round table discussion with researchers from the Balkan countries within the APTA-MOD Project.

5.4. The effectiveness of the duties of conduct: administrative codes of conduct, disciplinary sanctions and control bodies

The last element, perhaps the most important, of the European and international regulatory standard we are talking about is represented by the tools that ensure the effective application of the duties of conduct. Three tools are identified by international and European documents and discussed in scientific literature: the provision of disciplinary sanctions for those who do not respect the duties of conduct for the "good" functioning of the disciplinary procedure; the adoption of codes of conduct for each individual administration; the establishment of control agencies or bodies on the adoption of codes of conduct or on the correct imposition of sanctions (GRECO, 2000; 2019; OECD, 2017; Molina, 2017; Falcone, 2019, Pioggia *et al*., 2021).

5.4.1. The right disciplinary responsibility: adequate offices and effective sanctions

The duties of conduct must necessarily be accompanied by true disciplinary responsibility, that is, by administrative procedures and disciplinary sanctions in order to be effectively respected. Generally, the laws governing public work provide for both specific disciplinary offices and procedures for ascertaining violations of the duties of conduct.

However, it is important that disciplinary responsibility is adequately regulated. On the one hand, the sanctions must respect the principle of proportionality and must constitute an effective deterrent not to violate the duties of conduct: for example, fines of a financial nature proportionate to the seriousness of the violation, or suspension from work or dismissal for the most serious violations. On the other hand, the disciplinary procedure must be impartial and fair, that is, it must provide for the contradiction of the proceeding office with the interested parties and provide for mechanisms that make the start of the impartial assessment: for example, regulate the procedure so that it begins automatically in the presence of certain violations or conditions, and which does not completely depend on the will of the disciplinary office. At the same time, it is important to give the office the opportunity to initiate the sanctioning proceedings *ex officio*, perhaps following external or internal reports to the administration. In this case, it is very important to develop the knowledge and ethical skills of the officials and managers of the disciplinary offices through adequate training, and to allow them, through dedicated rules, an impartial assessment action free from political or private influences or from the administrative apparatus itself. (GRECO, 2000; 2019; OECD 2017)

Even in the Western Balkans, the laws on public work provide for the presence of disciplinary offices and specific procedures to ascertain the actual violation of the duties of conduct in each individual administration. (SIGMA-OCSE, 2022) The matter of disciplinary responsibility in the Western Balkans, even if in some cases it presents important guarantees of cross-examination for those who are subject to assessment, does not pay particular attention either to the impartiality of the procedure or to the knowledge and skills of those who work in the disciplinary offices. Furthermore, the percentage of disciplinary sanctions confirmed by the courts is very low in some countries (around 30%), which implies procedural weaknesses and/or unjust or illegal disciplinary sanctions (for example in Serbia and North Macedonia). (SIGMA-OCSE 2021a; 2021b; 2021c; 2021d)

5.4.2. The codes of conduct of the individual administrations

Even the adoption of specific codes of conduct is a choice that guarantees the effectiveness of duties. Codes of conduct, especially if adopted with legislative and mandatory acts for all public employees, guarantee the prescriptiveness of the duties of conduct and allow the overcoming of purely ethical codes of a moral nature.

A best practice in this sense is the Italian experience of codes of conduct. Italy has provided for a double level of codes of conduct, one national and the other decentralised. The 2012 anti-corruption law and a subsequent 2013 government regulation adopted a national code of conduct, which contains a set of minimum duties of conduct for all public officials and for all public administrations at any level of government. The decentralised level, on the other hand, consists of the administration codes: each administration must adopt its own code of conduct which must necessarily contain the minimum duties expected at national level and identify other specific duties suitable for the context in which the administration operates and for the activities administrative offices for which it is responsible. (Merloni, 2019; Carloni, Paoletti, 2019; Falcone, 2019)

The duality of the codes of conduct is essential for the effectiveness of duties and allows you to create the conditions for the definition of an overall strategy of public integrity.

In the Western Balkans, on the other hand, many legal systems do not provide for national codes of conduct, but only individual administrative codes that contain the duties of behaviour identified in the law, while in the systems where scientific literature and international and European documents are provided, they have highlighted the serious cultural and legal

vulnerabilities that render them ineffective. (SIGMA-OCSE, 2021a; 2021b; 2021c; 2021d)[12]

5.4.3. Governance of integrity to oversee the effectiveness of the duties of conduct

The lack of effectiveness of the duties of conduct (and codes of conduct) is also linked to the presence or absence of public bodies or agencies dedicated to monitoring the implementation of integrity measures by administrations, especially on the adoption of codes of conduct.

International and European documents recommend and, in some cases, oblige the establishment of anti-corruption agencies or bodies and guarantee public integrity. (GRECO 2000; 2019; European Commission, 2014; OECD, 2017; SELDI, 2019)

The effectiveness of the duties of conduct is very much linked to the ability of bodies external to the administration, agencies or independent authorities to effectively control and monitor the implementation of anti-corruption and integrity measures, including the adoption of codes of conduct. It is necessary that these bodies have adequate powers of direction, control and sanctions on the adoption of codes of conduct in administrations.

In the Western Balkans there are organisations that deal with coordinating, directing corruption prevention measures and checking their correct implementation, but only in some cases (for example in Serbia) is there an Integrity Plan that pays particular attention to adoption and compliance with codes of conduct (SIGMA-OCSE 2021a; 2021b; 2021c; 2021d; GRECO, 2020; 2021).

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12. The ineffectiveness of the codes of conduct emerged both from the country reports composed as part of the APTA-MOD research project, and from the comparison with Balkan researchers in the round tables organised during the APTA-MOD project.

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7
Transparency, access to information legislation and accountability as anti-corruption tools in Western Balkans: a comparative perspective

Gloria Pettinari, Benedetto Ponti[1]

Summary: 1. Transparency, publicity, and access to information framework – 2. Right to know and Freedom of information background – 3. Accountability in a rule of law system as means of prevention of risks of corruption. The role of transparency to prevent it: Western Balkans on the way to access European Union – 4. Six "key elements" for the effectiveness of freedom of information legislation (FOIA) and a glance at the FOIA in Montenegro, North Macedonia, Serbia, and Albania – 5. Transparent laws and opaque practices: paths of information laws in the Western Balkans

1. Transparency, publicity, and access to information framework

Transparency is a doctrine of governance composed of more than one feature, but mainly established in order for governments to be subject to scrutiny by the public through many disclosure rules and procedures. The final objective is to realise an accounting method of government that consists of reporting "who gains, and who pays for public measures" and consent to access governance information of the "general public". (Hood, 2006, p. 5) This section will demonstrate that a "full disclosure" (Fung, 2007) system is possible by an openness policy and the freedom of information act (FOIA), such as two *erga omnes* means. Other types of transparency are *erga partes* related to exposure of administrative proceedings because of a legitimate interest that is part of the transparency policy. It differs for the legal title of the recipient and the audience and finality. Broadly, the whole system of rules defined conducting of public affairs open to public scrutiny. (Florini, 1999)

In a comparative perspective, the evolution of transparency in most countries links those two components together. Usually, the *erga partes* refer to people entitled to defend an interest in front of the authorities because

1. Gloria Pettinari wrote paragraph 1, 2, 3, 4 and par. 5 is up to Benedetto Ponti.

their involvement in a proceeding comes before anyone's right to know. Still, they coexist in legislation because, as two categories of disclosure, they answer two different necessities also to safeguard against the authority's arbitrariness. So transparency measures come from various doctrinal approaches, but the evolution culminates in also comprehending FOIA (Hood, 2006), such as the capability of widespread knowledge if we consider transparency together with freedom of information as democracy's milestone, also defined as "The governance of public power in public". (Bobbio, 1980, p. 182)

The declaration of the United Nations Human Rights Committee, General Comment no 34, 2011, defines access to Information (ATI) as a fundamental human right[2] (McDonagh, 2013; Birkinshaw, 2006) which is carried out through transparency, while it is up to the law to provide every restriction necessary to protect (other) legitimate interests.

Apart from the concept of "understanding as an ontological category – a way of being in the world", Heidegger's definition of a "fundamental way of living in the world" (Stephen, 2021; Fehér, István, 2016) – following the transparency principle, public interest information is available to the people because they are owners of sovereignty. (Birkinshaw, 2006) We will see in the next paragraph that the international and European affirmation of the right is based on the consolidated idea of civil society, which is in turn based on the right for everyone to know public information, to obtain knowledge, speech, vote, and participate. Even though one of the main issues is still about the "use" and "abuse" of data (Birkinshaw, 2010), indeed, we know that "if the people and their elected representatives have the right to find out what their government is planning and doing, we live under a democracy. If the executive branch has the privilege to determine how much the people shall know, we are following the authoritarian course of government" (Moss, 1959). It was John E. Moss to say this phrase; he was a campaigner for the people's "clear right" to know, to investigate, and to access government information in the USA. Moss soon was the leader of the Committee Government, who presented and discussed the USA Freedom of Information Act (FOIA) that became law in 1966[3].

Nevertheless, although late in accepting a "full disclosure" transparency regime (Fung, 2007; Mattarella, Savino, 2018), a rule where public information is available arose through two main tools:

2. See also the Resolution 59 (1) at 95 UN Doc. A/46 of the UN General Assembly of 14 December 1946: "Freedom of information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated", December 1946.

3. See also United States House of Representatives, *Historical Highlights, The Freedom of Information Act*, *history.house.gov/HistoricalHighlight/Detail/15032443727*.

1. affirmative disclosure by an active publicity – proactive disclosure;
2. access to information by request – data not already available – reactive disclosure. (Riekkinen, Suksi, 2015)

The latter refers to such matters as access to information upon request (model of FOIA) in order to realise a presumptive right to information held by public authorities. (Birkinshaw, 2010)

Publicity towards universality is a fundamental principle on democracy for the legitimacy of the power, the main guarantee of fairness between authorities and citizens. Today, its object interests a broader range of claims of disclosure of acts, decisions, organisation, etc., so much so that the current modern freedom of information formula (Meijer 2009) also contains a large sphere of proactive public diffusion of information, becoming part of the same right-to-know example.

Proactive disclosure and access to information on a request-driven approach are two counters part of right-to-know and so freedom of information model[4], but they are complementary. The publicity made by the authority is mainly based on a range of information established by the law for the legitimacy of the power. (Ponti, 2011) Therefore, the law already makes a balance between contrasting interest, secrecy, and confidentiality items. On the other hand, the system consists of requesting information and waiting for a response. So, what information to ask is based on a free choice. It is a freedom of information model because it regards data not already available to the public. Therefore, it contributes to expanding the area of knowledge and the volume of transparency. Still, in such a situation, it is necessary to strike a balance, evaluating case by case with counter interests, such as the right to privacy of third parties (counterpart) involved by request. In conclusion, there are two different mechanisms intended for the same right to know.

However, in general, the openness and "full disclosure" regime met some limits, regulated by the Data and privacy legislation and the protection of others' rights represent a counterbalance because the freedom of information can violate them. In that sense, the right to access is not "absolute". (EU Ombudsman, 2013)

A comparative investigation shows that a claim for a proper regime of transparency containing the freedom of information act is relatively recent. Access to information campaigns representing the fourth wave of rights and following the quest for more civil, political, and social rights, culminates in asking for freedom of information after a moment of crisis of trust between

4. See the fourth paragraph of this chapter.

citizens and governments. (Riegner, 2017) History therefore shows that it is not something that came together with the arrival of immediate or automatic democratic government, but that it has been a product of the evolution of a "mature" democracy. (Schudson, 2015) From publicity of the law to assure the legality (Fuller, 1964)[5], and accessibility of legislation as a central issue of democracy (Hood, 2006)[6], to other democratic guarantees, including instruments to know the action and the organisation of authorities affecting a fair relationship between the authorities and citizens.

In such an evolution, transparency rules prevail over time, overriding secrecy and confidentiality issues through new regulations for authorities that become "a way of being" transparent (Arena, 2006), the main rule in organisation staff and administrative acts and the performance of their duties.

In the overall scheme of things, two rights are co-existing: one for stakeholders, and another for citizens or, better, for "everyone", in which data and documents are accessible for two main situations:

1. because the proceeding affects a personal sphere of interest concerning in particular individuals or legal entities (personal data), it is the so called the "need-to-know[7]" basis (Galetta, 2014; Savino, 2010)[8];
2. because of the human right to know public information and account representatives and government acts and organisations, it is the so-called "right-to-know" case. (OECD, 2019; Galetta, 2014; Savino, 2010)

From one point of view, in their own sphere as individuals, people have a right to know about their file, to participate in defending their interests in an administrative proceeding. Basically, they are guarantees for the "fair procedures" (Walker, 1999, p. 962) as a "good administration[9]" affirmation, a principle which includes such factors as: the right to have reasonable procedure,

5. "Publication of law is a necessity of a legal system", Fuller 1964.

6. One of the ancient and classic principles of a State is that the Government should operate according to fixed and predictable rules.

7. "… to the need to protect the public interest", Savino 2010. In Italy the notion has been use by Consiglio di Stato, Adunanza Plenaria 2 April, 2020, n. 10.

8. For example, in Italy is the Law No. 241/1990 to establish the right of access, pursuant to article 22 para 1 letter a) of Law No. 241/90, the right of access as "the right of interested parties to view and to take copies of administrative documents". Article 22 para 1 letter b) of Law No. 241/90 statues the right for stakeholders: "all private parties, including stakeholders representing public or widespread interests, who have a direct, concrete, and actual interest corresponding to a legally protected situation that is linked to the document to which access is requested", Galetta 2014.

9. See the next paragraph.

including the right to be heard, in a proceeding that meets the interests of the subject and therefore the right to know acts and documents, the obligation of justification for the measures taken, the impartiality and fairness of decisions, to receive notice if an application has been rejected, and a right to compensation for damages. (Pioggia, Pacilli, Mannella, 2021, p. 137)

On the other side, there is a system providing for freedom of information, where everyone can request more information not already available, placing transparency above the secrecy rulings as a principle of public management. In this way, good administration includes transparency.

2. Right to know and Freedom of information background

The principle of transparency found its first expression in Article 15 of the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789, according to which "society has the right to ask any public official to account for his administration". While transparency is a constitutional provision, it is not always explicitly stated in the constitution of countries in which a proper freedom of information is recognized. This is not the case in some younger constitutions, such as Spain and the Balkan countries, where the right to ask and obtain information from their authorities appears clearly (ELSA, 2021)[10].

The Spanish Constitution of 1978, at art. 105. B[11], guarantees the right of

10. The prior system was censorship to means of communications and the requirement of granting of authorization for the circulation of information, ELSA 2021.

11. "Article 105 The law shall regulate: a) the hearing of citizens directly, or through the organisations and associations recognised by law, in the process of drawing up the administrative provisions which affect them; b) the access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals: c) the procedures for the taking of administrative action, guaranteeing the hearing of interested parties when appropriate". But see also article 20: "Article 20 1. The following rights are recognised and protected: a) the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication; b) the right to literary, artistic, scientific and technical production and creation; c) the right to academic freedom; d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regu12 Right to personal freedom Right to intimacy. Inviolability of the home. Freedom of residency and movement Freedom of expression late the right to invoke personal conscience and professional secrecy in the exercise of these freedoms. 2. The exercise of these rights may not be restricted by any form of prior censorship. 3. The law shall regulate the organisation and parliamentary control of the social communications media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and of the various languages of Spain. 4. These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the

access to all official records. In North Macedonia, access to public information is provided for under article 16 of its constitution, first adopted in 1991, establishes freedom of access to public data and to obtain and receive data with no legitimate obstruction from authorities[12]. In Albania, articles 22 and 23 of the Constitution of 1998 must be interpreted together; they guarantee the freedom of expression and the right to access public information regarding authorities, providing that the right to information is guaranteed and that anyone has the right, in compliance with law, to obtain information about the activity of state organs and of persons who exercise state functions (everyone is given the possibility to know meetings of elected collective organs)[13]. The Serbian constitution of 2006 enshrined freedom of expression, including the right to receive and seek information (article 46[14]) and the Right to Information (article 51[15]). Finally, in Montenegro, article 51 of the Constitution of 2007 declared everyone's right to access to information and the right of expression (article 47[16]).

protection of youth and childhood. 5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order".

12. "Article 16 The freedom of personal conviction, conscience, thought and public expression of thought is guaranteed. The freedom of speech, public address, public information, and the establishment of institutions for public information is guaranteed. Free access to information and the freedom of reception and transmission of information are guaranteed. The right of reply via the mass media is guaranteed. The right to a correction in the mass media is guaranteed. The right to protect a source of information in the mass media is guaranteed. Censorship is prohibited", Constitution of the Republic of North Macedonia no. 52/1991.

13. The Constitution of Republic of Albania "Article 22: 1. Freedom of expression is guaranteed. 2. Freedom of the press, radio and television is guaranteed. 3. Prior censorship of means of communication is prohibited. 4. The law may require authorization to be granted for the operation of radio or television stations". "Article 23: 1. The right to information is guaranteed. 2. Everyone has the right, in compliance with law, to obtain information about the activity of state organs, and of persons who exercise state functions. 3. Everyone is given the possibility to attend meetings of elected collective organs".

14. The Constitution of Republic of Serbia, Freedom of thought and expression "Article 46 The freedom of thought and expression shall be guaranteed, as well as the freedom to seek, receive and impart information and ideas through speech, writing, art or in some other manner".

15. Right to information Article 51.2: "Everyone shall have the right to access information kept by state bodies and organizations with delegated public powers, in accordance with the law".

16. The Constitution of Montenegro, "Article 51: Access to information Everyone shall have the right to access information held by the state authorities and organizations exercising public authority. The right to access to information may be limited if this is in the interest of: the protection of life; public health; morality and privacy; carrying of criminal proceedings; security and defence of Montenegro; foreign, monetary and economic policy". The right of expression at the article 47: "Freedom of expression Everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner. The right to freedom of expression may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro".

In other cases, while countries recognised the freedom of information as a statutory right, their Constitutions only mentioned freedom of expression. These legal systems find an indirect link via other rights within the constitution, such as the freedom of expression, which includes the right to seek and receive information, the right to inform and the right to be informed. (Villanueva, 2003, p. 17)

In the cases of the UK and Italy[17], their constitutions reflect the spirit of the period in which they were written; they could interpret freedom of expression, recently expanded to include the concept of seeking information from public authorities following the newly proclaimed fundamental principles. In those contexts, over a long period of time, the rule was the secrecy of the action of power, which became inadequate with the development of their level of democracy stimulated by the international and European consciousness in favour of the right to know.

Nevertheless, having an advanced constitution that recognises the right to access public information does not necessarily mean having adequate freedom of information legislation; it can take time to have a proper regime of RTI[18]. For example, article 105.B of the Spanish constitution was explicit about recognising the right to access administrative files; it was not until 2013 when the freedom of information act was passed.

Moreover, when there is a law, it still needs to be "effective". So, paragraph 4 of this chapter will expand on how to have appropriate freedom of information legislation; the statute should assure some key elements necessary to the exercise of the right in a new culture reflecting an open framework. An example of this

17. The Italian legal doctrine had identified the freedom of information guaranteed under freedom of expression enacted in article 21 of the Constitution, and several others constitutional grounds: on which a general right of access to the public administration documents could be based. Such grounds included, the principles of democracy, protection of personal rights, and equality (articles 1, 2, and 3 of the Constitution) that provide a democratic relationship to the citizen and authority. But, more than that, by the entire Italian Constitution itself.13 This right to information is also a result of the provisions of articles 97 and 98 about according to which public bodies are organized in such a way as to ensure good administration and impartiality, Galetta 2014, 212.

18. "Nonetheless, experience in OECD and EU countries has shown that promoting openness in government and administration in practice is a very difficult task. Ensuring the "right to know" of citizens through appropriate access to information stored in public offices remains an elusive policy goal […] Despite such difficulties, many countries, including those in Central and Eastern Europe, which have recently instituted democratic political regimes and administrations, have introduced Freedom of Information Acts (FOIA) in recent years. The fact that a FOIA is passed in parliaments does not guarantee per se more openness and transparency in governments and administrations, especially when it is not followed by adequate implementation. [But] Yet, the adoption of a FOIA does constitute a first crucial step on the way to an open government…". Cit. Savino 2010, 4.

is the impact of globalisation; the rise of commercial exchanges and diplomacy means that implied transparency impacts expansions.

Looking at the international role of incentivizing the affirmation of a freedom of information regime, we should think about commercial and new diplomatic rules (after the Second World War; see Yannoukakou, Araka, 2014, pp. 332-340) about the necessity of sharing clear information. For instance, for economic investors it is essential to have a clear picture of the distribution of benefits and risks in order to calculate their business better, rationalising the market and fighting corruption that is an economic and social cost.

FOIA legislation finds affirmation, especially in the second part of the 20th century, around 1990, when a proper "global explosion" (Ackerman, Sandoval-Ballesteros, 2006) characterised the Organisation for Economic Co-operation and Development of countries (OECD).

Since 1990, FOIA has shed light around the world thanks to democratisation of many countries around the world, as well as the North American success regarding their access to information legislation, which has become the new legal standard for a democratic rule of law system.

At any rate, the first sample of an access to information act was in Sweden, in 1766, when the right of access to public records act was passed, providing for freedom of the press as well. The second country was Finland, which passed the law in 1951 (Ackerman, Sandoval-Ballesteros, 2006, p. 109)[19], then there is the North American FOIA of 1966[20], which become the most important example for further development. Then in the 1980s, the Commonwealth countries, except for the UK, followed, leading up to the global explosion during the 1990s, which continues to this day. Currently, 121 countries around the world have adopted a freedom of information act. (Banisar, 2020)

As mentioned, it is interesting to think about the countries which have only recently that recognised a FOIA[21], having found intense internal resistance to passing a FOIA, even in countries with an unquestionable democratic nature. These arrived at passing a FOIA after a "proper" evolution of transparency measures, through which they found their way to real transparency. These entities had other legal instruments to answer the quest for democratic guarantees, such as the fairness of procedure in the case of need-to-know.

19. They are considered as the forerunners of the worldwide expansion trend, such as the historic pioneer, Ackerman, Sandoval-Ballesteros, *The global explosion of Freedom of information Laws,* Administrative Law Review, 2006, 109.

20. Currently, the North American FOIA does not represent the most modern example as, due to new circumstances there have been further adjustments in the newest version which has been partially included in the American system by others means, ID.

21. Such as the sample of the UK which passed the law in 2000, Spain in 2013, Italy in 2016.

Still, measures for policy accountability and integrity of p.a. also exist. The previous means of accountability comes from the parliament to the executives (Birkinshaw, 2006)[22]; for example, the budget Committee (USA), the Public Account Committee (UK), and the diffusion of information to the "general public" which came through the accountability goal first of all in front of the members of the Parliament Code of Practice on Open Government of 1994. (Birkinshaw, 2010; Leyland, 2010; Turchini, 2008).

The global explosion of freedom of information as access to information took on new importance and became a campaign for the mobilisation of civil society (Cuiller, 2019), reflecting the quest for a different relationship between individuals and the authorities, taking into account the contemporary international legal standard raised globally. (Herrera, 2017)

In order to understand how countries addressed transparency, we set forth to find common contextual factors that stimulate demand for transparency and its mechanism. Below is a brief description of the regulations rapidly, describing the evolution of affirmed transparency rules over time.

The Universal Declaration of Human Rights adopted by the UN Assembly in 1948[23] declared transparency as a human right[24]. Article 19 of the Declaration established the right to "seek, receive and impart information and ideas through any media and regardless of any frontiers". Already the Declaration expected that the right to information would define freedom of information system filing or attacking the government's control of documents without restraint. (Birkinshaw, 2006) At the same time, other human right limits the right to know as well as recognised article 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. The regulation everyone has the right to the protection of the law against such interference or attacks". Also, International Covenant on Civil and Political Rights (UN, 1966[25]) and European Convention

22. The question is complex because, on the one hand, some of those instruments also include empowerment accountability to representatives and parliament members. On the other hand, following a "spillover effect", more power for political representatives becomes an issue for citizens to ask for individual freedom of accountability to the public administration. The tools shifted to democracy and became a participatory when the oldest representative struggled with parliament inform. See Birkinshaw 2006.

23. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217, A (III), *www.un.org/en/universal-declaration-human-rights/*.

24. In some legislation privacy and the right to pass and receive information are of equal value. See the UK example, Campbell v. MGN [2004] UKHL 22.

25. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, *www.ohchr.org/en/professionalinterest/pages/ccpr.aspx*, Article 19.

for the Protection of Human Rights and Fundamental Freedoms (ECHR)[26] protect Freedom of Expression, also including freedom of access to public information too.

Regarding the European Union context (De Graaf, 2019), the Maastricht Treaty of 1992 recognised the necessity to open the decision-making process to the public according to a Declaration which recommends the development of the means to access of information. It was article 255 of the Treaty which addressed the principle of access: "1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles […]".

The Treaty of Amsterdam consecrates access to documents as a European citizens' right, establishing a general right of public access to documents; in 1997, the Treaty regulated what has became a community legal standard (but every States and each institution remains free to decide how to apply it[27]).

This was followed substantially by a "Code of Conduct", the adoption of a proper regulation for which was not until 2001, when Reg. 1049/2001 was adopted, addressing access to information regarding the European Parliament, Council, and Commission, also upon request.

Later, the Lisbon Treaty 2007 innovated its constitutional provision[28], as the Treaty enshrines three fundamental principles of the European Union: democratic equality, representative democracy, and participatory democracy. Furthermore, the Charter of Fundamental Rights are legally binding[29]. Therefore, under article 42, any citizen of the European Union has a:

"Right of access to documents, and any natural or legal person residing or having its registered office in a Member State has a right of access to European Parliament, Council and Commission documents".

26. European Convention of Human Rights Article 10 (1) "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises…".

27. Art. 255.3.: "Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents".

28. The Treaty establishing the European Community is renamed the "Treaty on the Functioning of the European Union" (TFEU) and the term "Community" is replaced by "Union" throughout the text: see: The Treaty of Lisbon, *Fact Sheets on the European Union European Parliament*, *www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon*.

29. Article 6(1) TEU gives the Charter the same value as the Treaties, see: The Treaty of Lisbon, *Fact Sheets on the European Union European Parliament*, *www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon*.

Furthermore, the new text of article 15.3 of Treaty on the Functioning of the European Union (TFEU) statues: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph".

This follows the FOIA formula, which set forth the transparency regime, assuring a full disclosure system supporting the right to know. Indeed, despite a culture of official secrecy that has been an absolute characteristic of the exercise of governmental power, who described the origin of numerous legislative decisions (CoE, 1950)[30], the "paradigm shift" occurred because the law specifies the area of secrecy, while the rest is available. The *favour* for transparency (right to know) beyond the administrative proceedings (need to know) impacted the case law doctrine of the Court of Justice on this subject. The interpretation of the right to expression expanded because now it comprehends the right to know in case of a particularly relevant topic for the public: information can be disclosed. The turning point was the *Magyar* case of 2016[31], when the ECHR Court concluded that refusing to disclose the information was not required in a democratic society. Even though data under question concerns privacy, because it regards information inside the public domain and whether an applicant has a social function as a "watchdog", necessary in a democratic society, data should be available. As enacted by article 10, ECHR, exercising the right to freedom of expression includes the right to receive and share information without interference with the authorities[32]. However, that does not exclude the necessity of balancing between confidentiality and transparency within the context of

30. CoE, European Convention on Human Rights, as amended by Protocols No. 11 and 14, 4 November 1950, ETS 5, available at: *www.echr.coe.int/Documents/Convention_ENG.pdf*, Article 9, 10, ratified in North Macedonia 10 April 1997.

31. Magyar Helsinki Bizottsàg c. Ungheria, 2016. The case is whether an applicant has a social function as a "watchdog", necessary in a democratic society. As enacted by article 10, European Convention on Human Rights, exercising the right to freedom of expression includes the right to receive and share information without interference with the authorities. In the *Magyar* case of 2016, the European Court of Human Rights (ECHR) concluded that refusing the request to disclose the names of their appointed public defenders and the number of the public defenders' respective appointments was not required in a democratic society, even though it was involving data concerning privacy, since it concerned public interest information. The Grand Chamber of the Court recognised that Article 10 ECHR does not clearly define a general right of access to information held by public authorities that arises in certain cases of public interest. Consequently, the refusal of the authority determined a damage in the NGO's exercise of their right to freedom of expression. (Article 10 ECHR)

32. "a. The purpose of the information requested: contribution to a public debate b. The nature of the information sought: public interest nature c. The role of the applicant: social "watchdogs"

facts. The evaluation is possible by specific techniques to evaluate private and general damage in withholding and disclosing data established by the law that we will find further in this paper. (Neamtu, Dragos, 2019)[33]

Thus, above all, access to information needs to be compared and weighed with other counter rights, for instance, with data protection legislation and interests, also part of a democratic legal standard.

At the time of this judgement, RTI was already approved by many European Countries, as well as by the Institution, so it became a legal standard, with most of the member states adopting a proper transparency regime. (Savino, 2010).

Throughout history, this right has been theorised and invoked several times. (Meijer, 2015, p. 38) However, in a relatively short period, that becomes a proper right. This corresponds to a transformation of democracy. (Schudson, 2015) The reasons are many and some go beyond the objectives of this written but can be found in the new the relationship between officers and citizens changed from "bipolar" paradigm to "collaborative". (Arena, 2006) With a new complexity of the organisation and action of the State when more interventions and services are required, the role of the State changes and public administration functions and public power to individuals are increased. (Birkinshaw, 2010) People become the centre of politics and public operations and so do their rights and services. (Benvenuti, 1992) To implement new public functions, it is necessary to have different staff organisations of public authorities conforming to new challenges. The complexity of the new public sphere which required many resources and the growth of a proper administrative state that withholds and asks information from citizens, is one of the reasons for the quest for a direct accountability tool for people; people want to know and monitor executive actions. Citizens want to discover who makes the decisions, "what they are, and who gains and who loses". (Birkinshaw, 2006) Access to public information is one of the accountability tools, and it is a necessary counterbalance in front of new government sphere of competence; the people's sovereignty is a prior condition to participate with public institutions goals. Following the principle of subsidiary capacity of private members (Arena 2008), they can contribute and participate also in public interest functions within the public interest. (Bovens, 2002) The open government initiative[34] includes transparency, participation,

and the like. d. Whether the information is ready and available to the public authorities". ECHR 8 November 2016, Magyar Helsinki Bizottsga/Hungary.

33. In the EU case, the protection of some counter interests must be evaluated with the weight of public interest in disclosure and if this exceeds the limit, the information will become available, Neamtu, Dragos 2019, 14-18.

34. See Open Government Declaration, 2011, *www.opengovpartnership.org/process/joining-ogp/open-government-declaration/*.

and collaboration (Attorney General Holder's FOIA Guidelines Creating a "New Era of Open Government", 2009), together for an encompassing scope.

It took a change in rulings, but it came up diachronically in States' history because of their evolution. In that sense, the timing of the introduction of a FOIA usually depends on the democratic development of a country.

Thus, recognising that the right to know is possible to combat asymmetries of information that defines inequality, the reason why transparency and access to information rights are for "anyone", following a universal approach of democratic equality.

Moreover, the citizens' power of monitoring turns transparency into a means to fight maladministration, as "the light (transparency) is the best disinfectant[35]" for preventing corruption. (Brandeis, 1913) In that sense, the main goal of the multidimensional concept of transparency is accountability.

There are other contextual factors that impact transparency affirmation and development: think about digital technologies and their contribution to diffusion of information that affects its performance. Digital backgrounds and data policies, such as re-usable data, disclose is another important preview to make the information freely available, hence accessible but also intelligible and knowledgeable[36]. Also to be taken into consideration is the administration's capabilities to apply the reform; addressing this, we will speak primarily about the effectiveness of the legislation in terms of guarantees to recognise a practical right.

Nowadays, transparency can potentially be "by default"[37] where public information is automatically accessible and understandable, also meeting preliminary actions (but not everywhere), and performing public functions including private bodies. However, FOIA still is based on acts taken and decisions already made by executives[38]. Thus, one of the points is about what expansion can have various types of transparency. (Coglianese, 2009, pp. 529-544)

It is interesting to note that expansion of transparency (that includes the spheres of public meetings and access to agendas and minutes of meetings)

35. "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants, electric light the most efficient policeman", and "disclosure should include a list of those participating in the underwriting so that the public may not be misled", Brandeis 1913.

36. Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 on the re-use of public sector information, at *www.eurlex.eu. Directive 2003/98/EC* (recently amended). In Italy the Directive has been implemented in 2006 by Legislative Decree No. 36/2006.

37. Open data Charter: open data available by default, *opendatacharter.net*.

38. Imagine how many subjects and matters could be subject to the law if all public interests actions were inside the rules. Still, even more administrative regulations are needed.

go towards an Open Government system, which includes a whole range of transparency means and more. (Meijer, Curtin, Hillebrandt, 2012) Open government relies on free access to information that can be freely re-used by anyone. Data available from the public must be "complete, timely, accessible, machine processable, non-discriminatory, non-proprietary, and license free[39]".

The questions are many, but after describing the essentiality of the transparency system, what it is, how it is composed, why it is required, in the following paragraphs we will discover some better notions and how it can differ based on various national contexts.

3. Accountability in a rule of law system as means of prevention of risks of corruption. The role of transparency to prevent it: Western Balkans on the way to access European Union

Transparency makes authority like a "fishbowl" (Bouder, 2014), because "makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. Openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability"[40]. As stated above, the architecture of transparency is aimed towards a "full disclosure system" etched on the relations between state and individuals, because it subdues public authorities under a general overview, assuring accountability of the executive's power. In that framework, freedom of information is a proper step towards requesting accountability.

The EU legislation boosts the diffusion of transparency, acting to pressure to recognise transparency as a good administration principle, such an element of EU common legislation: the so called European "*acquis*".

Nevertheless, international organisations such as the World Bank have also pushed for increased transparency for controlling corruption. In order to improve the investment in a developing country, governments need to open up their accounts and their transactions, but also their organisations to the outside (Ackerman, Sandoval-Ballesteros, 2006)[41].

39. Open Government Working Group, Open Government Initiative, 2007, *public.resource.org/8_principles.html*.

40. European Ombudsman, *Good administration in practice: The European Ombudsman's decisions in 2013*, *www.ombudsman.europa.eu/en/publication/en/56331*.

41. The World Bank, Political Accountability, *www.worldbank.org*.

It follows that accountability has a multidimensional scope and strategy to reach several targets, both internal and external.

In the EU framework, following article 15. 1 of the Treaty on the Functioning of the European Union (TFEU), the law identifies a fundamental connection among transparency, good governance, and right of access to public documents, providing that: "1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices, and agencies shall conduct their work as openly as possible".

In accordance with article 15(3), it established that "[a]ny citizen of the Union […] shall have a right of access to documents of the Union's institutions, bodies, offices and agencies".

The EU principle strengthens democratic monitoring credentials to their member s states, and this is also a request for new candidate countries, particularly with a transition democratic situation, where the state of secrecy was the previous legal regime. Transparency is also a means of "good governance" in the multilevel level typical of EU, enshrined in the White Paper on European Governance[42] stating the stakeholders' need for openness.

In that sense, EU candidates and potential candidates face the question of the right of access to public information for three main purposes.

"First, it enables citizens to more closely participate in public decision-making processes. Second, it strengthens citizens' control over the government, and thus helps in preventing corruption and other forms of maladministration. Third, it guarantees the administration a greater legitimacy, as long as it becomes more transparent and accountable[43]". (Savino, 2010, p. 14)

Albania, the Republic of North Macedonia, Montenegro, Serbia are candidate countries, so they started a negotiation to reach the European legislation[44] (whose standards are divided into 35 goals, to be addressed one by one). "Transitional measures" are previews for specific questions and periods to fulfil the main scope, essentially for heavy investments. Otherwise, for "horizontal" legal standards, it is possible to obtain just threshold results, such as the approval of access to legislative information[45]. The latter is a cross-sectorial feature that needs to be implemented by the date of accession. At the same time, other pieces of legislation such as good government and good

42. EC, COM (2001) 428, White Paper on Good Governance, 12. 10. 2001.

43. In Italy, the notion has been used by the *Consiglio di Stato, Adunanza Plenaria* 2 April 2020, n. 10.

44. All the countries applied for EU membership during the 2005 to 2010 period; and currently, each one of them has a different negotiation status.

45. EU Commission, Additional tools Candidate Countries and Potential Candidates, *ec.europa.eu/environment/enlarg/candidates.htm*.

governance are part of the European *acquis* to get for members. Transparency is a meta-target of both, and access to information is a measure for both. The principle of good governance has the mission of achieving the rule of law, transparency, participation, accountability, integrity, and effectiveness of the decision-making process for guaranteeing a democratic network inside and outside the country. For the EU relationship, the principle of good governance is essential and defined as a political conditional, a critical element necessary in order to work in the EU dimension, which also includes other implicit rights such as respect of human rights, equity, impartiality, and absence of corruption. The latter element results in a prevention approach, pursued by transparency, which is made by access to information and dissemination of information, up to creating a dissemination service. The duty to publish and right to access information require consenting control over the action of the government and public administration for maximising general knowledge. (Cerrillo-i-Martínez, 2017) Nevertheless, accountability also means decentralised power from the government of certain matters to the autonomous subjects, such as agencies and independent authorities to supervise transparency (ID).

The good government principle has an individual dimension that affects the relationship between citizens and the p.a., and an external one, guaranteeing a rule of law and a democratic administration of power. (Pioggia, Pacilli, Mannella, 2021)

Indeed, in terms of relations with the p.a., focus should be on the concept of good administration, meaning a proper right established by art. 41 of the Charter of Nice of 2007, strictly linked to the right of access to documents (art. 42), Ombudsman (art. 44) and the right of petition (art. 44):

Article 41 – Right to good administration
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions:
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. […]

Access to information and publication of data is a crucial element in order to combat and prevent the risk of corruption for three main reasons: people can know maladministration through the information disclosed and shared, knowing "doing and wrongdoing". Conversely, a lack of transparency can be a red flag for an audit; the risk that agencies have the possibility of observing or watching reduces opportunities for corruption. (Carloni, 2017, pp. 261-209)

In this sense, the United Nations Convention against Corruption (UNCAC) is relevant, where in article 9 it connects enshrined transparency as a prevention of corruption, stating that is necessary for "public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts". Article 10 previews that to "take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes, where appropriate: *i.* adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; *ii.* Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and *iii.* Publishing information, which may include periodic reports on the risks of corruption in its public administration".

Moreover, article 13 provides regarding access to information: to stimulate the participation of society should ensure "that the public has effective access to information" because respecting, promoting, and protecting the freedom to seek, receive, publish and disseminate information concerning the prevention of corruption.

About the risk of corruption in the Western Balkans countries, mention can be made of the Corruption Perception Index (CPI) 2021[46], which reveals that corruption in Western Balkans countries is a quite relevant question. Based on the survey trend, the risk of corruption seems to be high for a long time, with not a very significantly noticeable improvement in the recent period.

Where the 0 (zero) score represents the highest level of corruption and the 100 is the lowest[47]: of the four countries considered, Montenegro has the best

46. Ranks countries/territories based on how corrupt a country's public sector, experts and business executives perceived, see *www.transparency.org/en/news/how-cpi-scores-are-calculated*.

47. Compared to 2020, Albania's CPI lost one point score, while Serbia maintained the same level. North Macedonia, however, gained 4, and Montenegro one point rank, *www.transparency.org/en/cpi/2020*.

score: 46, and it is on 64th /180 rank. On the other hand, North Macedonia is 87th /180, obtaining a score of 39, Serbia is 96th/180 with a score of 38, and Albania 110th /180 with a score of 35 (see *Figure 1*).

Figure 1

Following CPI surveys for quite a long period, since 2012, we can see the trend score: North Macedonia lost its 8-point rank until last year and recovered 4 with 2021; Montenegro improved by 4 points; Serbia is basically at the same level; and Albania improved by 2 items.

Italy had reformed its p.a. and passed several important anti-corruption laws and established prevention tools in 2012/2013; since that time it improved its CPI, moving from 72nd/176 to 52nd/180 rank.

4. Six "key elements" for the effectiveness of freedom of information legislation (FOIA) and a glance at the FOIA in Montenegro, North Macedonia, Serbia, and Albania

The successful application of the freedom of information act also depends on the progress of democracy, the capacity of applying the law and exploitation of the opportunity by civil society. Nonetheless, a good rule, a truly good one, when passed respecting the modern standard of FOIA should anyway innovate the legal system and the constitutional provision which it impacts. So, the question now is, what is FOIA? As already said above, anyone can freely claims access to data recorded, held by the p.a. (and all the assimilated subjects) and not already published information, with a request-driven approach. The

application should require no reason. The deadline for the response to the request should be known and follow the administrative procedure time limit; in most cases, the law is about 20 days. Many other points can make a difference for the success of such a right and therefore define a good law. Following the recommendation of the OECD (Mendel, 2008) and various doctrine, we can summarise six key elements (ARTICLE 19, 1999) for an effective right to access information (Open Society Institute, 2006):

1. Maximum Disclosure: the principle establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. Both "information" and "public bodies" should be defined broadly.
2. Limited scope of Exemptions: all individual requests for information from public bodies should be met with data, unless the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can demonstrate that the information meets a strict three-part test. A balancing test is requested by means of a "harm test" and a "public interest test".
3. Procedure to Facilitate Access: requests for information should be processed rapidly and fairly. All public bodies should be required to establish an internal system designating an individual responsible for processing such requests and compliance with the law. It should also be required to assist applicants whose requests are unclear, excessively broad, or otherwise need reformulation.
4. Duty to publish: the right to access implies not only that public bodies respond to requests for information but also that they proactively publish and disseminate data of significant public interest widely – furthermore, public bodies need to identify key categories of information that must be published.
5. Promote open government: informing the public of their rights and promoting a culture of openness. Promotional activities are, therefore, an essential component of a right to information regime. Application of the open government principle, above all, on free open and re-usable data. But also (following the public interest need to know) extend the area of what can be known, using digital technology for protecting third party rights, such as privacy by rending data anonymous.
6. Appeal and enforcement: an independent review of any refusals should be available. A process for deciding requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts.

Recalcitrant civil service can undermine even the most progressive legislation. Usually, this is a kind of "automatic" answer by a p.a. to a new paradigm of transparency, but promoting a good FOIA (if sincere) represents a revolution. (Villeneuve, 2007, pp. 147-162)[48] A new right that once given to society, it cannot be taken away. Most of all, it is essential that the administrative organisation is well equipped to implement the law. Still, this means having a good provision of law, especially with regard to the independent supervision and clear responsibility for the function. (OECD, 2021)

The Tromso Convention n. 205 of 2009 of the Council of Europe (CoE)[49] is an important example of request-driven access to information[50], and ten countries, including North Macedonia, Montenegro, and Serbia, directly signed the Treaty in 2009; Albania signed it recently, in 2022. But from them, the Convention was enacted just in Montenegro on 1st December 2020, since it from the 1st December 2020. The document is a guide for many countries for new legislation, and has also been so in the past. For instance, in recent cases, Spain mentioned it in the preamble of its legislation the sample of Convention 205. The treaty confirms the top recommendation from OECD, reflecting the modern style of FOIA in its main points, although the act is more focused on request-driven transparency rather than proactive disclosure. At any rate, it established that every country shall take the necessary measures to make documents public and to promote openness as a policy. (art. 10)

Furthermore, in addition to clear and short response time limits (art. 3) and the techniques of balancing counter interests (art. 3.2.), for a right to be effective, it is also necessary to highlight the role of internal appeal (towards the same p.a.) and then the independent authority's part in ensuring the exercise of the request, such as Information Commissioner or Ombudsman. (OECD, 2019). Such is the field of a review procedure and enforcement of the law. The Treaty sets forth a review procedure in article 8, before the appeal to the Court of an independent authority, involving reconsideration or reviewing the claim, because the request has been denied. Hereafter, the requesting party must be

48. See Villeneuve J.-P. (2007), *Organizational barriers to transparency: a typology and analysis of organizational behaviour tending to prevent or restrict access to information*, in *International Review of Administrative Sciences*, 73(1), 147-162.

49. "This Convention is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities". CoE, *Details of Treaty*, n. 205, *www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205*.

50. "The Convention sets forth the minimum standards to be applied in the processing of requests for access to official documents (forms of and charges for access to official documents), review procedure and complementary measures and it has the flexibility required to allow national laws to build on this foundation and provide even greater access to official documents". CoE, *Details of Treaty*, n. 205, *www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205*.

able to appeal to the impartial body, and then to the judge. But the Treaty does not dwell on the compulsory nature of the enforcement power.

In the Joint Declaration of 2004[51], the UN, OAS and OSCE Special Rapporteurs established in general terms that "those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints" framework's perimeter of action. (Special Rapporteur on Freedom of Expression, 2009) This is what the primary Anglo-Saxon example of legislation declared in the Westminster model of FOIA; and also, one of the best practices in the UK with the role of Information Commissioner (IC) who gives guidelines for the correct application, expresses an opinion over the conduct of the single p.a. and can syndicate in case of a refusal and apply an enforcement notice. The p.a. can file an appeal with the Court.

As mentioned above, Montenegro ratified the Tromso Convention that will be in force next year (in 2023), as announced to the government reviewing the previous legislation of 2012[52]. The latter was criticised by journalists, civil organisations (Access Info, 2018) and international organisations (EC, 2021) because of not meeting minimum legal standards. Most of all, the main problem was about a broader area of limits and secrecy, the lack of power for evaluating public interest on access by the authorities, thus an extreme power of the p.a. to deny the request.

At any rate, it was equipped with a proper agency to overview and make enforcement notice over the law. However, its empowerment has been negatively assessed because of the insufficient administrative organisation's capability to manage the implementation through guidelines, etc. (EC, 2020)[53]

Macedonia was in a similar situation about the lack of standards[54], where

51. Joint Declaration on Politicians and Public Officials and Freedom of Expression Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

52. "The Montenegrin Cabinet adopted the Draft Law on Amendments to the Law on Free Access to Information with the Action Plan for effective implementation of the Law which will enable more efficient exercise of citizens' right to access information held by government bodies and more transparent work, said Minister of Public Administration, Digital Society and Media Tamara Srzentić", *www.gov.me/en/article/cabinet-adopts-draft-law-on-amendments-to-the-law-on-free-access-to-information*.

53. "However, the capacity to launch and handle grant schemes still needs to be improved and capacity varies amongst ministries", European Commission, 2020.

54. The scope of exemptions to free access to public information was too broad, and the Commission responsible for reviewing appeals did not have the capacity to monitor compliance

following the European and OECD recommendations, in January 2019, the government submitted a new Draft Law on Free Access to Public Information to the parliament, which was subsequently adopted on 24 April 2019[55]. The law is now compatible with the better legal standards, because the Draft has been submitted for review to the OECD.

It should be noted that there is still a problem on the application concerning the management of transparency, as we can see following the comment of the European Commission of 2021, who reports: "Concerns were also raised regarding the substantial number of cases of conflict of interest and asset disclosure involving top executive functions processed by the SCPC", where the latter is the State Commission for Prevention of Corruption. (Balkan Investigative Reporting Network, 2018; Pavlovska Daneva, Bitrakov, 2019)

According to the Right to Information rating, RTI-rating, the others enforced legislations of the countries taken into consideration, Albanian Law n. 119/2014, On the Right to Information. On the other hand, Serbian, n. 120/04, Law on Free Access to Information of Public Importance, is among the best access to information law globally.

These laws are written following quite well the indication of OECD for good practice. Indeed, Serbian legislation is the 3rd place, and Albanian legislation the 5th, out of 135 countries examined (the first in Afghanistan, and the second in Mexico). But looking at the comments of civil society and the European organisations, we can find some difficulties putting in practice all the mandatory previews.

In a trend that is improving, still, there are areas of critical element for the prevention of corruption where opacity persists (EC 2021 Report, OECD 2021, Communication on EU Enlargement Policy). The secrecy field is still wide and sometimes it is up to the government's decision, such as the stipulation of the agreement for confidentiality. (Milovanović, Davinić, Cucić, 2019, p. 499) The problem with the role of government can be read also in case of the limited power of the independent authorities, that even though they exist everywhere, their job is not always so effective. In particular, think about the Serbian Commissioner, when deciding on appeals in case the right has been denied, he has no power regarding the highest institutions of the state, nor does he have any enforcement power (BRIN, 2020).

Furthermore, the complainants also saw a general lack of capability and

with the proactive disclosure of information requirement, nor was it empowered to impose penalties in cases of non-compliance.

55. Law on prevention and protection against discrimination, Official Gazette of the Republic of North Macedonia n. 101/2019 of 22.05.2019.

knowledge of the administration for a proper application of the legislation. In that sense, following GRECO recommendations, we can understand that for every Western Balkan country analysed, one of the main risks is about scarce diffusion of information, also in terms of proactive publications over important public interest information that can help to prevent corruption.

In summary, FOIA usually indicates a democracy's health status. However, at times, a top-down mechanism of decision for the approval of a law can hide a true evolution. Still, there is no doubt that the introduction of the right can have a good impact on the democratic regime. There is often a "spillover" event to pass the law, and this can be one in that case. (Ackerman, Sandoval-Ballesteros, 2006)

5. Transparent laws and opaque practices: paths of information laws in the Western Balkans

In order to understand the actual implementation of freedom of access to information laws held by public authorities, it is important to frame the context in which the use of the right of access unfolds: who are the parties most involved, and what kind of interaction is activated with the public authorities. This approach makes it possible to appreciate the effectiveness of the legal institutions of the right of access, and – together – provides useful indications for evaluating how these tools fit into the dynamics of both *accountability* and the prevention of corruption.

The previous paragraphs have shown how – also, as a result of the process of accession to the European Union[56] – the countries of the Western Balkans have approved very advanced laws (on paper) in terms of recognition of the right of access. But it has also shown how the formal recognition of the right in itself can be insufficient, if not adequately accompanied by mechanisms of promotion and *enforcement*. A look at the actual dynamics that are in place between the actors involved can be useful, above all because it inserts factual elements that help to outline the interactions between the regulatory system and the actual practice.

On the regulatory front, it is possible to make a first observation, which relates to the evolution over time of the legislative framework that secures the right of access. The countries in this area that have adopted a law on the right of access in older times[57] are also those that (more recently) record a progressive *worsening* of the regulatory framework and application thereof, based on a succession of

56. See the essay by F. Raspadori, in this volume.

57. The first version of Serbia's Foia legislation dates back to 2003, while the first adopted by Montenegro dates back to 2005 (when the country was still part of a confederation with Serbia).

amendments to these laws (some approved, others only proposed, others still under discussion), aimed at introducing new exceptions, restricting the scope or granting exemption left to discretionary decision by the administrations involved (or the government itself). (SELDI, 2021, p. 33)[58] A path that initially highlights a high level of protection of the right of access to public information, but which then – as time goes by – discounts the will of the political and administrative power to escape from the external scrutiny. That regulatory dynamic indicates that under the formal level, the "culture of secrecy" has continued to constitute a characterising trait of public power in these countries, and together with the "setbacks" recorded both on the legislative level and (especially) at the level of practice[59], they represent a manifestation of this enduring culture. The pandemic phase, on the other hand, has provided further arguments and levers to hinder transparency. (BRIN, 2020, pp. 19-20)

On the institutional level, this "culture of secrecy" manifests itself in various forms. From an organisational point of view, the authorities responsible for *enforcing* the right of access are generally underfunded (as constantly highlighted in the assessment reports drawn up by the EU) (EC, 2019, p. 24), and in some cases subject to administrative practices (starting with the choice of the heads of the authorities) not in line with the independence from the government (and from the political parties, more generally) that similar tasks require[60]. On an operational level, administrations very often remain silent with respect to access requests or activate more or less explicit obstacle strategies to hinder

58. See the amendments introduced in 2017 to the law of Montenegro, which exclude the application from further objects (new text of art.1) and strengthen the exceptions based on the protection of intellectual property and trade secrets (see BRIN 2019, 31-32; MANS 2018), as well as the amendments proposed by the government in 2019, aimed at introducing further, heavy restrictions on the right of access, increasing the margins of discretion of administrations in refusing requests for access (see the analysis of the amendment proposal from Access-Info & Mans: *www.access-info.org/2019-10-31/right-of-access-to-information-at-risk-in-montenegro/*). In Serbia, a draft law published by the end of 2018 by the Government envisages solutions which aim to exclude public companies from this law, as well as the possibility granted to public authorities to file administrative lawsuits against decisions of the commissioner for information of public importance and personal data protection, whose task is to control their work (see SELDI 2021, 33).

59. See BRIN, *Freedom of Information and Journalists in the Western Balkans: one step forward, two step back,* cit., as well as Id., *Freedom of Information in the Western Balkans in 2020. Classified. Rejected. Delayed,* 2021.

60. The story reported in the *Freedom House country assessment is significant* (2020) relating to Montenegro: "According to the EU, corruption remains endemic in Montenegro, compounded by the lack of political will to tackle it. Following the publication of an EC non-paper in November that criticized the government's anticorruption efforts, the director of the Agency for Prevention of Corruption (ASK), Sreten Radonjić, announced he would resign before his mandate expired. He subsequently applied for and was elected head of the Council of the Agency for Personal Data Protection and Free Access to Information" (*freedomhouse.org/country/montenegro/nations-transit/2020*).

disclosure, which significantly contributes to the scarce effectiveness of the right of access, formally guaranteed by the law[61]. In other words, the culture of secrecy is reflected in the scarce investment in financial and budget terms, in a lack of political and administrative commitment in the implementation of the law, when not in a silent boycott. Many commentators complain about the low level of literacy of officials with respect to the relevant discipline on the subject, underscoring the shortage of focused training.

Faced with this overall attitude, on the front of the recipients of the right of access to information, there is a fair amount of activism, both in civil society (in which many NGOs interested in activating accountability), and on the part of national and regional networks media and journalists, particularly in the field of investigative journalism. Indeed, it can be said that on this front the implicit and explicit "promises" that accompanied the introduction of the right of access legislative framework (and, more generally, those regarding anticorruption) (Seldi.net, 2019) have been taken seriously, and we see a vast and heterogeneous series of social protagonists interested and committed to using the right of access as a tool for various purposes (lobbying, awareness campaigns, investigative journalism, etc.). The social protagonists have shown themselves to be very attentive to the implementation of these laws, have reacted (often in a coordinated way) to attempt to limit their scope, and have denounced any regressions by legislation and the silence and opacity of the administrations. Furthermore, they have variously contributed to the realisation of empirical studies aimed at verifying the effective application of the right of access, so as to provide evidence on the status of the right to public information in the respective countries.

A dynamic overall characterised by strong opposition and mutual distrust emerges[62]. The methods for granting (as declared by law), and obstructing (as

61. With reference to the right of access in Montenegro, see what is reported by the European Commission, *Montenegro 2019 Report* ("While there have been some improvements, administrative silence remains the major cause of citizens' complaints. The increasing trend of government to declare information classified, particularly on grounds of tax related data, without justified exemptions or by broad interpretations of the rules, is a matter of serious concern as it prevents effective citizens' oversight of the work of public administration", 14). As for Serbia, cf. European Commission, *Serbia 2020 Report* ("Administrative silence, whereby public authorities fail to properly act on the citizens' information requests, continues to be a major issue", 17). As stated by the Freedom House country assessment (Serbia 2020): "Public officials are subject to asset disclosure rules overseen by the ACA, but penalties for violations are uncommon. While a 2004 freedom of information law empowers citizens and journalists to obtain information of public importance, authorities frequently obstruct requests in practice", *freedomhouse.org/country/serbia/nations-transit/2020*.

62. As stated by the *Freedom House country assessment* (Montenegro 2020) "The relationship between government, other political actors, and the civil society sector is characterized by high

actually practised) the right of access to public information did not favour the participation and collaboration between civil society and public authorities (according to the paradigms of *open government)*; rather, it seems to have activated a particularly pronounced dynamic of *adversarial accountability*, which is part of a polarised political context and in which mutual recognition between the political parties is particularly lacking and in which civil society has developed a profound mistrust of public parties and institutions, and is also profoundly sceptical about the "actual possibility of significant improvements (with reference, for example, to the corruption rate of bureaucrats, public managers and politicians in general)[63]" (SELDI, 2021, p. 19).

We need to ask ourselves what indications we can draw from this path, if we look at the other experiences of the same political and geographical context, where laws on the right of access have been approved in a more recent period[64]. These legislations stand out because they are in step with the times, since they take into account the most recent innovations, such as the systematic attention to the tool for online dissemination of information and the pro-active programming of transparency[65]. Also in this case, the distance between the affirmation of the law and its concrete recognition is still considerable, which appears to be physiological, given the reduced space of time in which it was possible to apply these regulations. And yet, the experiences gained in Serbia and

levels of mistrust and low levels of cooperation. Montenegrin civil society, however, enjoys stronger support and higher levels of trust among Montenegrin citizens. The public's level of trust in NGOs (39.3 percent as of December 2019) is higher than its trust in political parties (25.6 percent), Parliament (33.7 percent), and government (36.2 percent), 31 The government and other political actors perceive CSOs as rivals rather than partners".

63. According to the results of a recent survey, a majority fraction of citizens of countries in the western Balkans believe that their direct involvement in an episode of corruption is "probable" or "very probable" (ranging from 52% of respondents registered in Serbia, up to 84% in North Macedonia, passing through 62% of Kosovo, 66%, 76% of Bosnia and Herzegovia and 80% of Albania). Still a majority fraction of the population of these countries believes that corruption cannot be effectively and substantially reduced, despite the efforts of the public authorities ("corruption cannot be substantially reduced" according to the 52% of the respondent in Serbia and Montenegro, 58% in Kosovo, 62% in Bosnia and Herzegovina, 69% in North Macedonia, 78% in Albania): see SELDI 2021, 19.

64. In Albania, a new transparency law was approved in 2014 (Law No. 119/2014 on the right to information).

65. Albanian law No. 119/2014 on the right to information provides for proactive publication of certain categories of information. Under Art. 4, each public sector body must prepare and implement an institutional transparency program, to be revised periodically, setting out the categories of information being made public *ex officio* and the method of making this information public. Art. 7 lists the information categories that the public sector bodies must make available to the public *ex officio*. Failure to prepare, review and implement the transparency institutional programs is fined (Art. 18).

Montenegro indicate that the law, even if in line with the highest international standards, appears to be an unsuitable instrument (in itself) to change cultures and administrative practices[66]. Indeed, it can also happen that the norm – if perceived as a foreign body[67] – can end up determining phenomena of rejection, and thus contribute (contrary to intentions) to preserve and strengthen these cultures. An element on which it is necessary to reflect.

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66. You could add the case of the Republic of North Macedonia. Here again we have a good legislative framework (the Law on Free Access to Public Information was adopted in 2006, and further improved by amendments adopted in 2010 e 2019), but an unsatisfactory implementation. In its 2020 Report, EC had conceded that "some progress was made in improving transparency, with the adoption of the 2019-2021 Transparency Strategy, the operationalisation of the open government data portal and the publication of government finances data". According to the regional ACTION SEE network, North Macedonia's municipalities remain the least open, accessible, and transparent in the Western Balkans (data from 2019 referring to 2018: Danilovska, Dance and Nada Naumovska, "Proposals for the improvement of the current state, Openness of the local self-government institutions in the region and in the Republic of North Macedonia", Metamorphosis Foundation for Internet and Society and ACTION SEE, July 2019, 4), and although two local government units – Skopje and Prilep – practised outstanding transparency, still, there are large disparities throughout the country, and seven units present no public information on their financial activities (Freedom House country assessment 2021).

67. For example, it is not unusual that legislative texts, promoted by citizens, are attributable to parties who promote lobbying activities on an international level, such as in the case of the Albanian law on the right to access public information (n. 119/2014). Center for Public Information Issues (INFOCIP) was one of the partners which offered the drafting team its extended expertise on developing the new approach which found it way into this new law, and at the end of its successful process (the approval of the draft by the legislature), "INFOCIP congratulates the SOROS Foundation for its commitment to drafting and preparing this new law, in the spirit of cooperation with main actors of the civil society" (see: *www.infocip.org/en/?p=1312*).

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