HERCULE II PROGRAMME

TRAINING, SEMINARS AND CONFERENCES PROPOSAL

Avoiding Fraud in Cohesion Policy 2014 - 2020:

a comparative study on the correct observance and implementation of the public procurement EU regulations by managing and contracting authorities

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DISCLAIMER

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DETECTION AND REDUCTION OF IRREGULARITIES IN MANAGING AND IMPLEMENTING EUROPEAN FUNDS:

the correct observance of EU regulations in terms of public procurement

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SUMMARY

INTRODUCTION AND EXECUTIVE SUMMARY

This study is part of the project undertaken by the ESADE Foundation in collaboration with various experts on the subject within the scope of the *"HERCULE II Programme – Training, Seminars and Conferences"* . Each action is focused on protecting the financial interests of the European Union.

What problems exist at present?

Within the scope of the *HERCULE II Programme,* the research team found that:

> Most of the irregularities affecting the management and implementation (execution) of structural funds, particularly the ERDF, occur in the tendering process —roughly 41% of all irregularities—, which is a direct threat to the financial interests of the EU.

This is the key factor —the core problem— behind the need for a change, and demonstrates the need for this project.

What are the project's main objective and scope?

The project's main objective is:

> To detect and reduce irregularities in the management and implementation (execution) of structural funds —specifically, the ERDF— in the public procurement procedure, using data from various sources and 4 specific regions as a sample.

The following elements dictate the scope of the project:

- ✓ Impact on the EU's financial interests
- ✓ Irregularities
- ✓ Public procurement
- ✓ European funds. Specifically, the ERDF.
- ✓ 4 regions: *Catalonia, Greater Poland, Lazio and Saxony-Anhalt*
- ✓ Programming period: 2007-2013

How is the project structured?

The project consisted of three basic phases.

I. An initial **field study** phase during which objectives were defined and the relevant concepts were selected. This was followed by analysis and internal debate of the fundamental issues between researchers and the various authorities interviewed. This phase was conducted at three levels —with increasing specificity—: European, national and regional. After specific working definitions were agreed for basic terms that were the subject of some contention, some initial conclusions were drawn following a comparative analysis of the strengths and weaknesses of each region and of the European legislative and institutional framework itself.

II. The second phase consisted of holding an **Expert Workshop**[3]. The initial conclusions drawn during the first phase were addressed and debated in the Workshop, and the views of the actors directly involved in public procurement financed by European funds —particularly the ERDF— were recorded. The points covered included problems, strengths and weaknesses, solutions and best practices from a variety of perspectives: technical, legislative, management and audit-related. The Workshop was designed to go a step beyond the strictly operational, exploring the governance of European funds themselves as a best practice in public management.

III. In the third phase the initial study was compared against the proposals resulting from the Workshop, and these were included in the **Final Report** containing conclusions and recommendations.

> **HOW CAN IRREGULARITIES IN PUBLIC PROCUREMENT PROCEDURES FINANCED BY THE ERDF BE DETECTED AND REDUCED?**

Starting Point

The key sources were analysed to identify the most recurrent irregularities in public procurement financed by European funds, and to determine their causes and the reactive measures that can be adopted to combat and eliminate them.

What are the causes? What measures can be taken to counteract them? What can be done to eliminate them?

The three sources are:
I. Legislation: EU and Four Regions
II. Compulsory Actors and Actors in the Different Regions: EU and Four Regions
III. Controls. Control Mechanisms. Legal Consequences of Committing Irregularities. How Financial Corrections Are Made: EU and Four Regions

1 The project is led by Dr Joaquín Tornos Mas, Professor of Administrative Law at the University of Barcelona, and coordinated by Dr Manuel Férez, Head of the Department of Administrative Law at ESADE, and Dr Alfonso Arroyo, Lawyer and Associate Professor of Administrative Law at ESADE.
Regional studies are overseen by: Pawel Magdziarek, Legal Advisor to the Polish Ministry of Environment (Greater Poland, Poland); Mechthild von Maydell, Legal Advisor to the Ministry of Finance of Saxony-Anhalt (Saxony-Anhalt, Germany); Gianfrancesco Fidone, Lawyer and Professor of Public Law at Luiss Guido Carly University and Sapienza University of Rome (Lazio, Italy); Mar Martínez, Lawyer and Associate Professor at the Department of Administrative Law of the University of Barcelona (Catalonia, Spain). All of these individuals are researchers at ESADE.

2 *Legal Part, Grant Programme 2013. Call for Proposals 2013: to support, enhance and develop the legal and judicial protection of the EU financial interests against fraud, corruption and any other illegal activities.*

3 The Workshop was held in Barcelona on 12 December 2014. Its key content, the product of the various round tables and workshops, can be viewed online: http://www.esade.edu/research-webs/esp/igdp/debate/fraud-prevention

Analysis of these areas is essential in order to thoroughly explore the causes and reasons for identical irregularities committed on a recurring basis.

These three sources were analysed at the European level as well as in each of the four regions individually, after which they were assessed as a whole.

It was concluded that a range of external factors give rise to irregularities. These factors are not only internal; they also arise at the pan-European level. We call these factors **system failures.**

General failures of the European system:

- The legal system that governs procurement financed with European funds is utterly **variable, complex and incoherent.** The same problem exists, to varying degrees, in the regulations governing the organisation, competences and duties of the actors involved and of controls, corrective measures and the consequences of infringement. Variability, lack of coherence and complexity gives rise to **confusion** in regard to specific **key concepts.** We have also been beset by large legislative **gaps** such as those in the regulations governing modification of contracts. All of this creates legal uncertainty.

- The variability and incoherence of the law and of guidance material leads to **confusion** in regard to key **concepts** such as fraud, irregularity, the infringement of provisions of Community law, the economic operator and the beneficiary. These concepts are categorised differently in the various laws that deal with them. In the Committee's own annual reports, they are often used interchangeably.

- Guidelines on the rates of correction to be used and the Decision currently in force leave room for subjective interpretation by the auditor, leading to differences in opinion depending on who is performing the audit.

- The institutional organisation is made up of a complicated web of administrative levels: national, regional and local, led by the services of the European Commission. A large number of problems were detected in this sphere. Duplication of administrative and control functions was seen; this is inefficient and generates and increases irregularities.

- European authorities have different interpretations of what can be considered a procurement irregularity and/or error. They also take different views of the rates of correction to be applied. Such differences are seen, for instance, between the Commission and the ECA.

General system failures at the regional level:

- Public procurement Directives are not appropriately transposed into national public procurement law in Member States.

- The applicable legislation is incoherent, unstable and complicated.

- Specific bodies dedicated to public procurement and judicial bodies themselves have different interpretations of procurement regulations. At times these interpretations are at odds with the EC Directives.

- Specific fund audit bodies, the managing authority and the audit authority often differ in their detection of irregularities and the rates of correction to be used.

This situation has all of the ingredients necessary to foster systemic irregularities.

At the regional level, in addition to the problems described above — stemming from the European and regional systems— there are also factors of an internal nature.

Internal factors:

- The cultural element: the incorporation of poor practices and

- lack of training.

COMPARISON OF THE LEGAL FRAMEWORK

With respect to the legislative framework, the main issues were inadequate transposition of European law, unstable procurement law due to constant changes in legislation and the general incoherence of regulations governing funds, i.e. rules for contracts, for aid and for financial auditing at the various regional levels.

Most regional and local governments have begun to undertake some sort of legislative reform to mitigate this problem. Generally speaking, debate policies associated with completeness lie at the heart of current debates. Nevertheless, certain inconsistencies or provisions still exist which may infringe European law, such as the impossibility of initiating a review procedure for certain modifications of public contracts.

OVERVIEW OF THE ACTORS INVOLVED

Multiple actors not provided for in Community law can nevertheless play a decisive role in detecting, controlling, preventing and investigating errors in public contracts funded by the ERDF. This host of different actors varies from one Member State to another. Those that we viewed as key for the purpose of this project are listed below:

Bodies, agencies and similar entities dedicated specifically to public procurement: These entities usually perform detection functions. Other common activities include oversight and coordination of public contracts. Some such entities also play an active role in the prevention of irregularities.

National courts of auditors and external control bodies (audit bodies): These are normally independent courts/bodies whose main function is oversight. They are empowered to oversee the way in which public resources are established, managed and employed.

Prevention bodies: The main aim of these bodies is usually to develop strategies for systematic prevention of the various types of irregular conduct which occur in the public sector, for instance by instituting transparency measures.

Specialised anti-corruption/anti-fraud bodies: Specific anti-corruption or anti-fraud institutions which are normally responsible for investigating corruption/fraud. In some Member States they also perform detection and prevention functions.

Accountability bodies[4]: These bodies design mechanisms for oversight, compulsory transparency, public justification —answerability and responsibility— and penalties for breach of any obligations —enforcement—.

Organised civil society: For instance: trade unions, associations which represent individual or collective interests, citizen platforms, NGOs, etc.

End beneficiaries/tenderers, potential tenderers, successful tenderers: In some Member States, when irregularities have been committed during the procurement procedure the end beneficiaries/tenderers, potential tenderers and successful tenderers may initiate review procedures or bring claims before bodies specialised in public procurement procedures or before the courts.

The actors involved were **analysed** in great detail. They were assessed **individually** and **in relation to each other** to pinpoint the synergies of this complicated web of actors.

To this end, their **capacities, strengths and weaknesses** were identified, with particular focus on whether their ordinary activities included prevention-related tasks and whether they could be an example of best practices.

The weakness lies in the **complexity** of the **web** of **actors**. This is not only due to territorial specialisation; a large portion of the problem originates at the European level. The model of compulsory authorities set out in the regulations is considered a negative factor. Furthermore, the functions performed by internal and external oversight bodies overlap with those performed by other institutions with competence in specific areas.

Another weakness is the **discrepancy** amongst review bodies in regard to how the **rules** governing **procurement** should be **interpreted.** This often impedes observation of the fundamental principles enshrined in the procurement Directives. This is not due to inherent deficiencies in the regulations themselves but rather to the literal and narrow way in which the relevant provisions are construed.

In most cases, the evaluation of **synergies** gives the **best results.** Nearly all of the relevant bodies are capable of instituting preventive measures. Some of them deserve to be rewarded or recognised as examples of best practices.

Many **electronic tools** have been implemented to increase **transparency.** Under the law, audit reports are usually public documents, though operational audit reports are not. Apprehension persists in regard to sharing this information. Not all information is offered to citizens.

However, when some actors inform investigative bodies that an irregularity may constitute an offence, certain top-down synergies are not observed. There is a **widespread problem** with the **exchange** of **information** between the involved parties and specialised **anti-corruption/fraud/public prosecutors,** as no feedback is provided after communication takes place.

4 The actors who uphold accountability may be the same is the other actors described above, or competencies may overlap, as: "(...) they vary based on the type of accountability in question. If it is political or moral, they are citizens, civic associations, the media or political parties themselves. However, if the accountability is administrative or financial, the actor is usually a supervisory or control body such as the Ombudsman, or audit or anti-corruption bodies. In the professional sphere, it is the ethics committees, and finally, in the review of legality, it is the courts".
VV.AA. *Transparencia, rendición de cuentas y participación: una agenda común para la cohesión social y la gobernanza en América Latina. Barcelona:* Diputación de Barcelona (Barcelona Provincial Council), UR-BAL III Programme, 2012, p. 53.

As regards other involved actors, such as **candidates, tenderers, end beneficiaries, successful tenderers and civil society**. Amongst these actors, no awareness was detected of the gravity of irregularities in the area of procurement. A degree of awareness is only seen where irregularities directly affect the actors or are illegal.

These actors may generally intervene via redress mechanisms before specialised procurement bodies or before the jurisdiction concerned. In some regions complaints may be brought before bodies such as the Anti-Fraud Office of Catalonia, but in most regions there are no specific unified 'whistle blowing' mechanisms with sufficient safeguards.

CONTROLS, CONTROL MECHANISMS, LEGAL CONSEQUENCES OF COMMITTING IRREGULARITIES, COMPARISON OF HOW FINANCIAL CORRECTIONS ARE MADE

Regulatory controls are generally carried out in the managing authority with the proper separation of functions. Administrative audits are normally performed on 100% of all operations. In practice, Managing Authorities play a key role in preventing irregularities. The detection of irregularities should be a responsibility shared between Managing, Certifying and Audit Authorities, particularly between Managing Authorities and Audit Authorities.

In most cases the weaknesses in mandatory controls stem directly from European Regulations. Administrative audits do not differ greatly from the operational audits performed by the intervention authority. This system requires an unsustainable number of material and human resources. The next weakness also stems from Europe: the criteria for making corrections are defined subjectively. This leads to differences of opinion amongst the various actors. This is utterly unserviceable and ultimately creates an intolerable degree of legal uncertainty, at least from the perspective of the beneficiary.

Audits are usually comprehensive in nature, not specific to public procurement. A single action is performed to check the eligibility of expenses, the suitability of invoices, publication requirements, etc. Auditors – especially when the service is outsourced – are often not legal experts. Rather, their expertise is financial.

In addition to this mandatory European audit system, there is also the system of the intervention authority, which performs its regular duties as well as audit and investigative functions. All of this occurs at various territorial, horizontal and vertical levels. Furthermore, each of these actors proceeds according to its own rules and criteria.

Moreover, contractual and jurisdictional redress bodies also perform functions of oversight.

Irrespective of any corrections that may be made, irregularities themselves may have various consequences, depending on the region concerned. Nevertheless, no specific administrative penalty was detected as the result of infringement of the law on public procurement financed by European funds.

A weakness seen in all regions was the focus on operational audits. True strategic audits are not performed, nor are audits that take a comprehensive view in order to improve management. Furthermore, in most cases it was observed that evaluators did not use specific red flag indicators for public procurement. They still cling to the 2007 Guidelines or the last European Commission Decision of 2013, without taking a comprehensive view in order to manage the problem of irregularities in public procurement. Patterns are not detected. Evaluators restrict themselves to identifying irregularities in isolation, without proposing solutions or public policies to eradicate the problem.

OVERVIEW OF THE MOST RECURRENT IRREGULARITIES

COMMONALITY	GREATER POLAND	SAXONY-ANHALT	LAZIO	CATALONIA
IRREGULARITIES RELATING TO MODIFICATION OF CONTRACTS	- Reduction in the scope of the contract. - Failure to notify of changes in specifications.	- Contract extensions. - Supplementary or additional contracts.	- Modification of contracts after they have been awarded.	**Modification of contracts.** Includes: concealed price revisions and false extensions).
IRREGULARITIES RELATING TO EVALUATION CRITERIA (SOLVENCY AND AWARD OF CONTRACTS)	- Specifications include specific brands or products (e.g. specification of an operating system) - Too many contract award criteria (including the professional experience of the potential tenderer) - Demand that solvency criteria be met by all members of a consortium (in violation of the rules that govern the consortia themselves) - Too many award criteria for infrastructure works contracts (all successful bidders must meet certain conditions) - Award criteria or conditions which are difficult or impossible to meet - Requiring as a solvency condition that tenderers possess facilities at the site of the works - Solvency criteria unrelated to the subject matter of the contract being tendered - Economic and financial solvency criteria out of proportion to the scale of the project ecto.	- Incorrect evaluation criteria. - Inadequate selection of candidates.	- Unclear selection or evaluation criteria.	**Evaluation criteria.** Includes: use of solvency criteria as evaluation and award criteria; incorrect criteria for evaluating prices or omission of prices; omission of evaluation criteria when improvements are accepted)

IRREGULARITIES RELATING TO THE ESTIMATED VALUE OF THE CONTRACT, ENABLING CIRCUMVENTION OF PROCEDURAL AND ADVERTISING REQUIREMENTS		- Manipulation of the contract's estimated value.		**Splitting of contracts.**
IRREGULARITIES RELATING TO THE CHOSEN TENDER PROCEDURE		- Selection of the procurement procedure.	- Abuse of the negotiated procedure. - Abuse of emergency procedures to avoid competition.	Unwarranted recourse to emergency protocol and exceptional public procurement **procedure** categories**.**
IRREGULARITIES RELATING TO A LACK OF PUBLICATION OR A FAILURE TO MAKE IMPORTANT INFORMATION AVAILABLE TO CANDIDATES OR TENDERERS, OR THE PROVISION OF INACCURATE INFORMATION	- Extension without notification of the time limit for submission of tenders. - Discrepancies between the information in the contract notice and the specifications. - Failure to clarify questions relating to technical specifications to candidates.	- Failure to notify any changes to tender submission deadlines. - Lack of information on formal compliance of tenders.		**Any unjustified exceptions to the obligation to publish tenders.**
THESE IRREGULARITIES INVOLVE CREATING SPECIFICATIONS TO FAVOUR A CERTAIN CONTRACTOR, DELIBERATELY RESTRICTING COMPETITION AB INITIO. THIS ALSO HAPPENS IN SPAIN BUT IS NOT REFLECTED IN AUDITS, AS IN ORDER TO DETERMINE WHETHER THIS HAS OCCURRED IT IS NECESSARY TO ASSESS WHETHER IT WAS INTENTIONAL. **IF WE CONSULT PERCEPTION SURVEYS WE CAN SEE THAT IT DOES APPEAR TO BE A RECURRING IRREGULARITY.**	- The tenderer profile description suggests a specific successful tenderer.		- Specifications adapted to favour certain companies. - Conflict of interest in evaluation of the tender. - Agreed tenders. - Involvement of tenderers in tender specifications.	
				Lack of negotiation in negotiated procedures.

1. MAIN OBJECTIVE OF THE PROJECT: SCOPE AND METHODOLOGY

1.1. GENERAL OBJECTIVES AND SCOPE WITHIN THE FRAMEWORK OF THE "HERCULE II GRANT PROGRAMME 2013"

1.1.1. This project is part of the *HERCULE II Training, Seminars and Conferences – Legal Part Grant Programme 2013. Call for Proposals 2013: to support, enhance and develop the legal and judicial protection of the EU Financial interests against fraud, corruption and any other illegal activities*[5], which focuses on the "Legal Part" of the category of "Training, seminars and conferences aimed at the protection of the EU's financial interests" set out in Decision 878/2007, to improve the legal and judicial protection of the Community's financial interests against fraud.

1.1.2. The project focuses on the following **actions:**

- A comparative law study
- Organisation of a seminar

1.1.3. In accordance with the call and the proposal, the **activities/ topics** addressed are as follows:

- Law and administrative practices relating to OLAF investigations, with special reference to procedural guarantees.
- Law and administrative practices in the field of prevention.
- National and/or EU rules on the financial dimension of fraud against the EU's financial interests, and recovery of funds.

1.1.4. According to the specifications of the call and proposal, the **general results** expected are:

- Organisation of a Seminar on the topics outlined above.
- Production of a study that help OLAF identify measures to protect the EU's finacial interests.
- Production of a study that can serve to stimulate debate on the identified topics.
- Promotion and dissemination of scientific knowledge relating to the protection of the EU's financial interests and the results of the measures referred to above.

1.2. MAIN FOCUS OF THE PROJECT

The main purpose of the project is:

> To detect and reduce irregularities in the management and implementation (execution) of European funds —specifically the ERDF— in public procurement procedures, drawing on data from various sources, with four specific regions used as a sample.

This broad objective is divided into specific sub-objectives which make up the subsequent sections of this document, as described in the summary.

1.3. DEFINITION OF THE SCOPE OF THE PROJECT[6]

1.3.1. Impact on the EU's financial interests
1.3.2 Irregularities
1.3.3 Public procurement
1.3.4 European funds Specifically, the ERDF
1.3.5 Four regions: *Catalonia, Greater Poland, Lazio and Saxony-Anhalt*
1.3.6 Programming period: 2007-2013

1.4. METHODOLOGY

The methodology employed in this project is as follows:

1. BACKGROUND/GENERAL PANORAMA

1.1. OLAF: PURPOSE-GENERAL MISSIONS

· 1.1.1. Achievements

1.2. REALISATION OF THE HERCULE II PROGRAMME. STARTING POINT AT WHICH THE PROPOSAL IS INCLUDED AND THE CONTRACT SIGNED WITH OLAF

· 1.2.1. Expectations. Ways to improve our work.

5 [*On line*] http://ec.europa.eu/anti_fraud/about-us/funding/lawyers/index_en.htm

6 Definition of contentious terms is dealt with extensively in Section 2 of this document.

2. SELECTION OF OBJECTIVES

2.1. Detect and reduce irregularities in the management and implementation (execution) of European funds —specifically, the ERDF— in public procurement processes, drawing on data from various sources, with four specific regions used as a sample.

2.1.1. Before the procurement procedure begins
2.1.2. During the procurement procedure
2.1.3. After the procurement procedure

2.2. Concienciación y difusión de la necesidad de reducción de las irregularidades.

2.2.1. Expert Workshop
2.2.2. Publication and other modes of dissemination

3. TERMINOLOGY STUDY

3.1. Harmonisation of doctrine, working definitions of basic terms

3.1.1. To enable comparison of report and data (OBJETIVE: 2.1)
3.1.2. To consider the various regulations and procedures (OBJETIVES: 2.1.1, 2.1.2 and 2.1.3)
3.1.3. To allow effective solutions to be proposed

3.2. Terminology field study

3.2.1. Selection of key concepts
3.2.2. Data collection, analysis, expert debate

3.3. Formulation of definitions

4. FIELD STUDY (Research)

4.1. Collection and analysis of all data relevant to the OBJECTIVES: 2.1, 2.1.1, 2.1.2 and 2.1.3.

(Includes collection of any data relating to indicators/ parameters with a bearing on the study, i.e. which constitute or improve the problem, as well as identification of all involved actors. This is conducted at three levels —with an increasing degree of specificity—: European, national and regional).

4.1.1. In paper and/or online format, accessible and inaccessible

- On the functioning/general and common regulation of the selected Funds, basic legislation at three levels: European, four Member States and four regions.
- Regulations on the protection of the EU's financial interest, i.e. the original source of the concepts of fraud, errors, irregularities and other contentious concepts.
- Documents —key documents— relating to the chosen funds at the national and regional level: National Strategic Reference Framework (NSRF), Operational Plans and Procedural Manuals detailing —normally at the regional level— management and control of funds, in addition to national rules on eligible expenditure, i.e., expenditure eligible for aid.
- Specific provisions relating to public procurement and structural funds, at three levels: European, four Member States and four regions. Not just legislation in the strict sense, but also instructions, orders, circulars, guidelines, i.e. soft law.
- Evaluation, audit and control reports: any report that might contain data or opinions on irregularities in public procurement procedures. Reports are not limited to those drafted by the fund Audit Authority. Amongst others: external control bodies, public prosecutors, national courts of auditors. To identify which reports —at all three levels— have data on "irregularities" committed in the award of contracts financed with European funds.
- Documents with information on financial corrections by the Commission and the Member State and rectification of declared expenditure.
- European case law on funds and public procurement, identifying the most relevant cases for each region

4.1.2. IT support

We attempted to access reports generated by public sector computer systems containing specific data relevant to the field study, particularly data used to monitor controls in three areas: (i) preliminary controls (ii) monitoring of controls, and (iii) recording of irregularities —similar to the SMI used in the EU.

4.1.3. Interview of authorities

The main relevant authorities in each region were interviewed. Interviews were approached with a positive outlook; i.e. with a view to optimisation and improvement.

4.2. Identification of documents and data relevant to the study, discrimination of data and production of the checklist

In the event that a relevant unpublished document was detected, it was requested from the relevant authority. If the document was not provided, a note was taken of this and of the reason access to the information was not possible. A description was also given of the information we expected to obtain from the relevant document for the purpose of the study.

4.3. Detection and selection of relevant parameters/indicators for OBJECTIVES 2.1, 2.1.1, 2.1.2 and 2.1.3

4.4. Sorting of relevant data obtained (e.g. form of work flow, by procedure, by point in the procedure or by region)

5. EXECUTION

5.1. Preliminary teamwork

5.1.1. Preliminary comparison of data obtained by flow and/or by type and/or by region
5.1.2. Preliminary comparative analysis. Strengths and weaknesses
5.1.3. Preliminary conclusions and proposals

5.2. Expert Workshop. Key issues to address:

5.2.1. Point 3 (Definitions)
5.2.2. Field study data
5.2.3. Initial conclusions and proposals

5.3. Finalisation of project

5.3.1. Contrasting of field study against workshop results
5.3.2. Drafting of the study, including specific proposals to enable expectations to be achieved

5.4. Publication and dissemination

6. DOCUMENTS

- STUDY AND ANNEXES
- CONCLUSIONS and RECOMENDATIONS

7. HUMAN AND MATERIAL RESOURCES, LOGISTICS AND OPERATIONS, COORDINATION, ECONOMIC EVALUATION

2. CONCEPTUAL STUDY AND DEFINITION: FORMULATION OF DEFINITIONS FOR THE PROJECT[7]

To tackle the issue of irregularities in public contracts financed with European funds, with a view to identifying and reducing any such irregularities, we must start out with a specific yet broad concept of what constitutes an "irregularity", putting it into context and defining it in the sphere of public procurement and differentiating it from other similar contentious concepts. To this end, this section will set out some terminological definitions—working definitions— to be used as a reference.

2.1. BASIC STARTING POINT: THE CONCEPTS OF "EU FINANCIAL INTERESTS" AND THE "PROTECTION" THEREOF

The law provides no definition of "EU financial interests". Nevertheless, for our intents and purposes it is essential to define the concept, as it has a direct bearing on the application of Article 325 of the TFEU. Furthermore, as an analysis of the Article clearly shows, the "protection" of these "financial interests" is directly related to "the fight against fraud". "Protection" must therefore be construed as synonymous with the "fight against fraud", that is, as all measures implemented to prevent or reduce fraud against the financial interests of the Community (now the Union).

2.2. AS REGARDS THE CONCEPT OF "FRAUD"

This gives rise to a need to specify what should be construed as "fraud", since the term usually has a strong criminal connotation. For the purpose of this study the concept should be broadly construed, in the same sense it is understood in Regulation 2988/1995 on the protection of financial interests —Article 1(2)— which sets out that:

> "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

For the first time ever, this Regulation defines the concept of "an act prejudicial to Community interests", which equates to an "irregularity". Moreover, recitals 4 and 6 make it clear that fraud is encompassed within the irregularities referred to throughout the Regulation.

This Regulation thus clearly places fraud under the umbrella of the broader term of "irregularity". This study therefore uses the concept of fraud in the broad sense of "irregularity" that is employed in said Regulation, without regard to its possible criminal implications. Only when fraud is defined in this manner can it be understood that the fight against fraud against the EU's financial interests encompasses and must pursue any sort of irregularity that threatens said interests.

2.2.1. As regards the concept of "irregularity" in connection with European funds

If we also limit the concept of irregularity to a specific sphere: European Funds —the ERDF—, we narrow its scope even further.

Prior to the current 2007-2013 programming period there was no definition of how the concept should be construed in regard to the specific application of the legislation governing funds. However, "irregularity" is defined in the present Regulation 1083/2006 in the following manner —Article 2(7)—: "any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget".

This definition in turn contains two controversial points: What should be construed as an infringement of a provision of Community law? And what is an economic operator?

As far as the first question is concerned, this project considers an infringement of domestic law in a Member State to be an indirect infringement of Community law. Any infringement of domestic law is thus an infringement of EU law. For example, violation of the domestic regulatory framework governing aid co-financed with European funds or the eligibility criteria established by a Member State in accordance with Article 56(4) of Regulation 1083/2006.

7 This section approaches definitions at the pan-European level, irrespective of any connotations or contention that may arise from the divergent interpretations of them by Member States or regions. Any such connotations or interpretations are addressed in the specific chapter pertaining to each region.

Or, as we will see in Section 3.2 of this Chapter, breach of national rules on public contracts that are not subject or not fully subject to EC procurement law, or of national provisions that are more stringent than European provisions in that they guarantee greater protection of the EU's financial interests.

Specific definition of what should be understood to constitute an "economic operator" has sparked disagreement. It should thus be made clear that in this project the concept encompasses the individual states and any body or entity that carries out management tasks for any programme funded with European funds, including public administrations. In such cases the Member State does not exercise the traditional prerogatives of public authority. Rather, it acts in the capacity of a managing and implementation authority.

In summary, as described above an irregularity is something that:

✓ Directly or indirectly prejudices or could prejudice the EU budget.

✓ Infringes Community law by act or by omission, either directly or indirectly.

Any breach of Regulations 1083/2006 or 1828/2006 or any failure of a management or control system may constitute an irregularity if it has the potential to cause losses or potential losses of funds.

Irregularities, in turn, can be classified into[8]:

a) Individual or systemic irregularities

Individual or sporadic irregularities: These are irregularities that are independent of other irregularities in the sample —in the population— or of systemic irregularities.

Systemic irregularities: These are irregularities which, irrespective of whether they are recurrent, stem from serious deficiencies in management or control systems with respect to the obligations set out in Title VI of Regulation 1083/2006[9].

b) Quantifiable and non-quantifiable irregularities

With a regard to the impact of the irregularity on the EU budget.

Quantifiable irregularities: The financial impact of the irregularity can be precisely quantified.

Non-quantifiable irregularities: The precise financial impact cannot be quantified.

Moreover, irregularities can be classified by subject matter or category based on the type and scope of any management, quality or financial control verifications —audits— and the management and control systems of the ex post audit authority regulated by the abovementioned Regulations, as the purpose of these control obligations —whether they are internal, external, ex ante or ex post— is to detect irregularities and help prevent irregularities when and to the extent that they are adequately implemented.

A broad overview of the types and scope of management verifications that are performed is given below.

a) MANAGEMENT VERIFICATIONS[10]

– Document verifications for each application for reimbursement by beneficiaries.

✓ Administrative aspects. Verification of declared expenditure in accordance with Community and national law:

- The expenditure coincides with the eligibility period
- Compliance with EC and national eligibility rules
- **Compliance with EC and national public procurement rules**
- Environment
- Information
- Publicity
- State aid and state aid schemes
- Revenue-generating projects
- Durability of operations
- Compliance with the scheme's conditions
- Suitability of reference documents (invoices, proof of payment, implementation reports, etc.), existence of an adequate audit trail, etc.

8 *See: the Commission Decision on the approval of guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Articles 99 and 100 of Council Regulation (EC) N° 1083/2006 of 11 July 2006. [C (2011) 7321] 19 October 2011.*

9 Systemic irregularities are not the same as what are referred to as "deficiencies in the system", which are inadequacies in management or control systems. See: Commission Decision on the approval of guidelines on the principles, 2011. Op. cit. p. 4.

10 See: COCOF guidance document on management verifications to be carried out by Member States on operations co-financed by the Structural Funds and the Cohesion Fund for the 2007 – 2013 programming period [08/0020/04-EN], final version of 5 June 2008.

✓ Financial aspects:

- Correctness of applications for reimbursement
- Lack of double-financing of expenditure with other Community schemes or programming periods

- On-the-spot verifications for specific operations

✓ Technical aspects: investments made and services carried out in accordance with established time limits, the priority axis and the decision that approves the operation.

✓ Physical aspects: authenticity of the expenditure declared and the services provided.

b) VERIFICATIONS BY THE CERTIFYING AUTHORITY: QUALITY CONTROLS

c) FINANCIAL CONTROLS (AUDITS)

d) AUDIT AUTHORITY MANAGEMENT AND CONTROL SYSTEM CHECKS

As is immediately evident, an irregularity may relate to a wide variety of areas. Of interest to us amongst these are irregularities that occur in the area of public procurement. Irregularities arising in any other area fall outside of the scope of this study, e.g. irregularities involving expenditure eligibility or rules on the obligation to publish projects financed with European funds or rules on financial irregularities or on European fund management and control systems themselves.

2.3 AS REGARDS THE CONCEPT OF "ERROR" EMPLOYED BY THE EUROPEAN COURT OF AUDITORS (ECA)[11]

When performing its audits, the ECA has used in the past and continues to use the term "error" to denote numerous and varied inadequacies detected in various areas. The Court's use of its own term, which differs from that used in other European institutions to denote identical situations, has led to contention and confusion. In view of this, the Court recently decided to revise the "Guidelines for DAS errors", although it continues to employ its own concept of "error".

The ECA takes the view that an error occurs when any of the transactions that it audits —at any level— is incorrectly calculated or fails to comply with any regulatory or contractual requirement.

Since 2012 the ECA has classified errors based on various criteria. These are mainly as follows:

a) Whether they are quantifiable or non-quantifiable. This depends on whether it is possible to determine the portion of the total audited amount that has been affected by the error.

b) Based on their nature:

i. With regard to eligibility. Whether the payment complies with eligibility rules.

ii. With regard to whether the transaction is real. Whether there is evidence that the expenditure that has been reimbursed was actually incurred.

iii. With regard to accuracy. Whether the payment is correctly calculated.

c) Based on their seriousness.

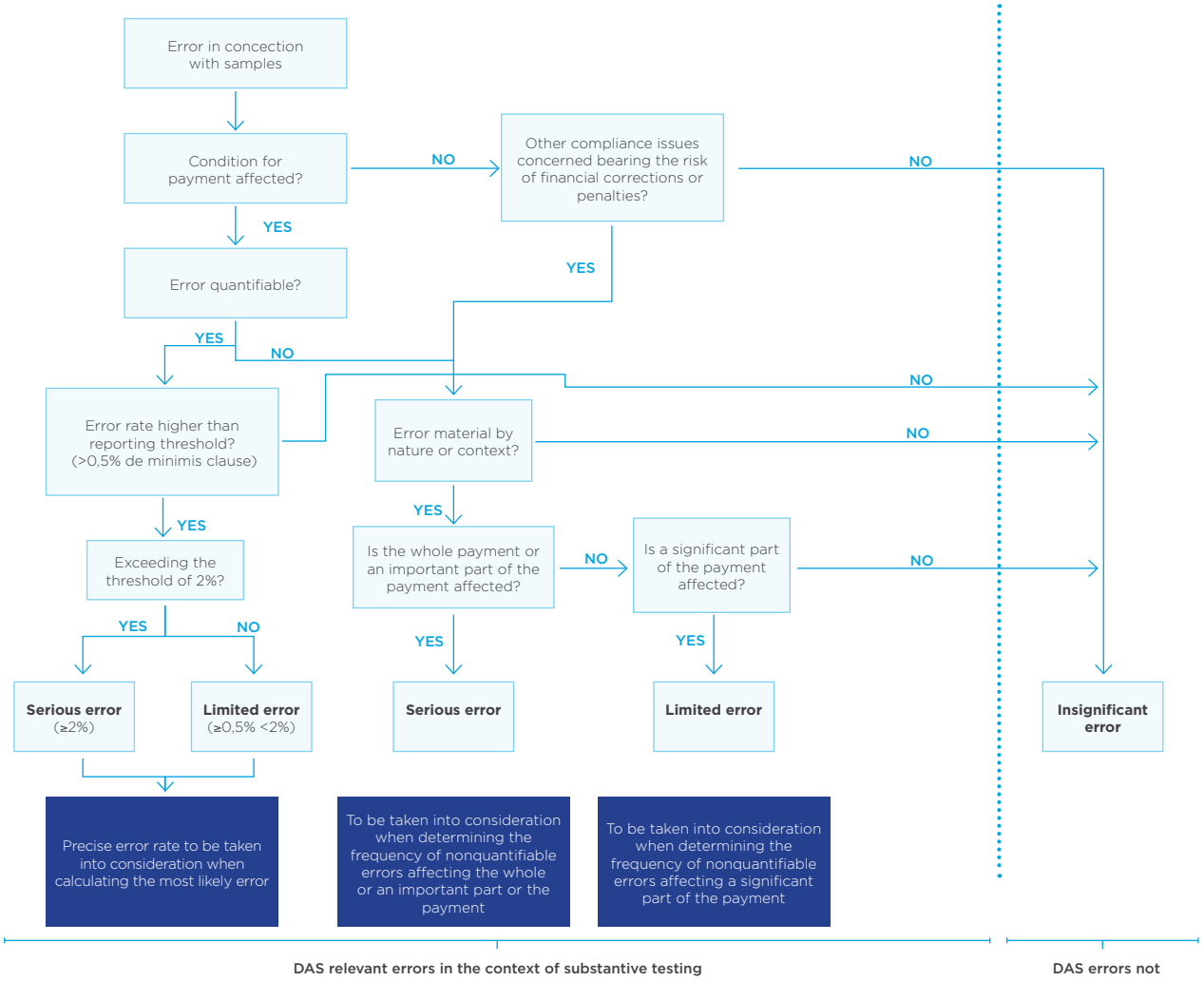
d) Errors that affect payments and errors that affect other criteria with varying degrees of compliance with payment obligations.

e) Systematic or isolated errors.

11 The acronym ECA is used at the European level to refer to the *European Court of Auditors*.

12 Furthermore, it must be remembered that the various transactions may be either wholly or partially affected by errors. Moreover, errors that have been detected or corrected before the control being performed are excluded from calculations and do not count towards the frequency of errors, as the Court believes that such detection and correction shows that control and supervision systems operate effectively. For further details on the new method and classification of errors, see: the 2012 ECA Financial and Compliance Audit Manual [online] http://www.eca.europa.eu/Lists/ECADocuments/FCAM_2012/FCAM_2012_ES.pdf [Consultation: 17 November 2014]; the European Court of Auditors 2012 and 2013 annual reports on the implementation of the budget, respectively approved on 5 September 2013 and 14 September 2014, particularly Annex 1.1 ("Audit Approach and Methodology": Part 2 "Audit Approach and Methodology for the Regularity of Transactions (Compliance Audit")"; and the document drafted by the ECA entitled "Definition and Treatment of DAS Errors" [on line] http://www.eca.europa.eu/Lists/ECADocuments/DAS_ERRORS/DAS_ERRORS_ES.PDF [Consulta: 17 de noviembre de 2014].

CLASSIFICATION AND TREATMENT OF ERRORS BY THE ECA



SOURCE: EUROPEAN COURT OF AUDITORS: "Definition and Treatment of DAS Errors"

With respect to public procurement procedures, it should be noted that the Court has harmonised its approach in regard to the treatment of errors. From now on, "errors" —in the terminology used by the ECA— committed in public procurement will be subject to specific treatment. Observance of and compliance with public procurement procedure requirements will be assessed with respect to the following criterion:

a) Serious quantifiable errors: Errors that affect the objectives pursued by the procurement Directives: open competition and award of the contract to the best tenderer.

Errors are relevant for the purposes of the DAS "if they, individually or aggregated with other errors, would reasonably affect the decisions of the addressees of the audit opinion"[13].

b) Serio us non-quantifiable errors: Errors that do not affect the outcome of the procurement process. The ECA's policy holds that it is not realistic in practice to aim for the complete absence of errors, and "consequently, a degree of tolerance regarding the appropriate level of accuracy is to be considered acceptable"[14].

Only serious errors affecting 100% of the total amount are considered quantifiable. Thus, as the Court has stated: "The quantification by the Court may differ from that used by the Commission or Member States when deciding how to respond to the misapplication of the public procurement rules"[15].

13 Definition and treatment of DAS errors. Op. cit., p. 10.

14 Definition and treatment of DAS errors. Ibid.

Something that constitutes an irregularity for the European Commission may not be considered an error by the ECA, and vice versa. In order to prevent confusion, the two disparate terminologies should not be used in parallel. It is desirable for identical criteria to be employed[16].

In the Workshop held on 12 December 2014, this concern was expressed to the respective representatives of the European Commission and the European Court of Auditors . The authorities consider this divergence to be limited to the quantification of irregularities in public procurement, with no significant effect on determining whether a breach has occurred, as both bodies are subject to the same rules. It has been recognised that there is always a contradictory procedure wherein there are no significant divergences in regard to the fund, but there are clear divergences in regard to how to quantify irregularities and how to make financial corrections.

It should be noted that these authorities reported that the Commission and the Court recently committed to narrowing the gap between their approaches[8], particularly in regard to the legal certainty of the audited parties. The objective for 2015 is for this divergence to cease to be a problem.

From the perspective of the audited party, which will ultimately be inspected by both the Commission and the ECA, it doesn't seem to make much sense for the same illness to be treated with two different prescriptions. The ECA is carrying out an internal review, and we at the Commission are completely open to speaking to them[19].

15 Point 11 of Annex 1.1 in the Report by the European Court of Auditors. Op. cit.

16 As we will see in Section 3.4 of this Chapter, if a contract has been awarded by negotiated procedure with prior publication when it should have been awarded through an open procedure, after detecting an "irregularity" the European Commission will normally apply a 25% correction based on the view that minimal publication requirements were observed, ensuring some degree of access, and that the potential damage to the EU budget is less than 100%. This same circumstance would be quantified by the ECA as a "serious error" of 100%, leading it to determine that competition had not been guaranteed, nor had it been ensured that the contract would be awarded to the best tender in terms of quality/price. Conversely, if discriminatory criteria are detected, such as making specific experience in a certain area a requirement, the ECA might deem that such a requirement does not affect the outcome of the tender procedure and would thus consider it to be a non-quantifiable error, while the Commission would make a financial correction of 25%, 10% or 5%, depending on the gravity of the irregularity and the financial risk to the EU budget.

17 From the Commission: Mr Rafael López Sánchez, Deputy Head of Unit, "Audit Coordination, Relations with the Court of Auditors and OLAF", DG Regional and Urban Policy; from the European Court of Auditors: Mr Michael Bain, Head of Unit.

18 On 8 December 2014, within the context of the 2013 budget discharge presentation.

19 Head of Unit, DG Regional and Urban Policy.

3. IRREGULARITIES THAT AFFECT THE EU BUDGET DUE TO BREACH OF EUROPEAN PUBLIC PROCUREMENT LAW IN CONTRACTS FINANCED BY FUNDS UNDER SHARED MANAGEMENT.

With the working and conceptual definitions of the terms established as detailed above, if we also restrict the concept in question, i.e. irregularity involving European funding —the ERDF— to the specific area of public procurement, we further narrow the scope of the subject.

All irregularities stem from an infringement of European public procurement law, primarily Directive 2004/18/EC of 31 March of the European Parliament and the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and/or Directive 2004/17/EC of 31 March of the European Parliament and the Council, which governs procurement in the water, energy, transport and postal services sectors —traditionally referred to as the "excluded sectors" or "special sectors" , and Directive 2009/81/EC of the European Parliament and the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, amending Directives 2004/17/EC and 2004/18/EC[20]—.

In addition to these reference laws are the 2006 Communication by the Commission on the award of contracts not subject or not fully subject to the EC Directives, as well as European case law on the subject.

3.1. COMMISSION GUIDELINES AND DECISIONS: DOCUMENTS GOVERNING THE IRREGULARITIES THAT AFFECT THE EU BUDGET IN CONTRACTS FINANCED BY EU FUNDS

In recent years the Commission has drafted a set of guidelines on the principles, criteria and percentages to be used to calculate financial corrections in the event of non-compliance with the rules on contracts co-financed with European funds. These guidelines identify specific irregularities for which application of a correction is considered necessary. Although the guidelines are aimed at the services of the Commission itself —rather than at Member State authorities— and are, in principle, merely —soft law— guidelines, in actual practice they are used as benchmarks in the performance of audits. Detailed analysis of these guidelines is thus essential, in order to extract a consolidated list of procurement procedure irregularities which ab initio directly affect the EU's financial interests.

Two documents are of particular note. First, the Guidelines for determining financial corrections to be made to expenditure co-financed by the structural funds or the cohesion fund for non-compliance with the rules on public procurement, issued in 2007[21]—hereinafter, the 2007 Guidelines— and the recent Commission decision on the setting out and approval of guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement, issued in 2013 [C (2013) 9527]. —hereinafter, the 2013 Decision— .

The 2013 Decision should be used when making financial corrections to irregularities detected in procurement procedures after 19 December 2013 —the date of the Decision— for expenditure financed by the EU under shared management and for programming periods 2000-2006; 2007-2013 and the new period of 2014-2020. Its application is thus retroactive.

This notwithstanding, the Decision itself stipulates an exception. If, on the date of the Decision's entry into force, a contradictory procedure with a Member State is ongoing in relation to audit findings and financial corrections of certain funds[22] , the Commission may apply the previous existing guidelines if the stipulated rate of correction is more favourable to the Member State.

Thus, although the 2013 Decision replaces and updates the previous 2007 Guidelines, the latter are still valid for certain situations.

20 O.J. No. L 134, 30 April 2004; hereinafter, Directive 2004/18; O.J. No. L 134, 30 April 2004, hereinafter, Directive 2004/17; and O.J. No. L 216, 20 August 2009, hereinafter, Directive in the field of defence; referred to jointly as: the public procurement Directives.

21 COCOF 07/0037/03 of 29 November 2007 [Online] http://ec.europa.eu/regional_policy/sources/docoffic/official/guidelines/financial_correction/correction_2007_en.pdf [Consultation: 06 October 2014].

22 Specifically: Structural Funds, CF; EFF and the four funds of the "Solidarity and Management of Migration Flows" General Programme —See: p. 4 of the Annex to the Decision—.

3.2. KEY NEW FEATURES IN THE 2013 DECISION. PARTICULAR BEARING ON THE SCOPE OF THE HARMONISATION OF CRITERIA FOR CONTRACTS NOT SUBJECT OR NOT FULLY SUBJECT TO THE PROCUREMENT DIRECTIVES.

Before proceeding to analyse the specific irregularities set out in the Decision, its main new features in comparison with the 2007 Guidelines should be highlighted.

I. First, a note should be made of the **change of legal status:** from mere guidelines to a Commission Decision.

As mentioned above, before issuance of the current 2013 Decision, financial corrections were set out in documents or guides aimed solely at Commission services. This has created problems relating to their application and enforceability which have been brought before the ECJ and the EGC.

Member States have repeatedly objected to application of the rates of correction set out in the guidelines, defending their positions on the basis of the Commission's Resolutions. Aside from specific cases of irregularities —which are quite varied— debate has revolved around three issues. First, the non-regulatory nature of guidelines. Based on this, it has been argued that the rates of correction and the system itself should be provided for in a binding instrument, as otherwise they are internal Commission guidelines with no legal effect or binding force. Secondly, insofar as these guidelines were not aimed at Member States regional audit authorities were not required to employ the criteria when making corrections[23], and, thirdly, the content set out in the guidelines had not been accepted or approved by Member States, meaning that the guidelines —which had no legal basis— could not be invoked when justifying the use of certain methods.

The Court of Justice held that the use of these documents is legitimate as well as positive, as they strengthen the transparency of individual decisions aimed at Member States. They constitute a specific guideline for Member States in the sense that the Commission specifies their powers to make financial corrections directly provided for under its regulations[24]. In other words, internal guidelines impose no obligations on Member States in addition to those set out in existing regulations, and thus cannot be construed as an instrument intended to have binding force[25].

In any event, the debate referred to above was settled with the issuance of the latest guidelines in December 2013, approved by a Commission Decision. It should thus be noted that from now on corrective criteria are set out in a true legal instrument, a legal act that is binding in its entirety (ex-Article 288 TFUE).

II. Secondly, **correction guidelines and criteria for different funds have been harmonised.** As mentioned above, the Decision applies not only to Structural Funds and the CF, but also to: the EFF, expenditure financed by the Union under shared management, —in the event of non-compliance with the rules on public procurement—, including expenditure not constituting continuation of the existing funds. We are referring here to the instrument for financial support for police cooperation, preventing and combating crime, and crisis management within the Internal Security Fund[26]. This harmonisation makes the system more coherent.

III. Thirdly, the aim is to **clarify and systematise the level of corrections** to be applied in specific cases, based on clearer criteria. To this end, as we will see new types of irregularities have been included and details have been provided for others for which no specifications were given in previous versions.

IV. Fourthly, of particular note is the **unification/harmonisation** of the **irregularities** set out for **contracts subject to, not subject to** and **not fully subject to** the public procurement Directives.

One of the most important new features is the harmonisation of the types of irregularities which, when committed, require correction, irrespective of whether the contract is subject to the Directives. This may arouse controversy.

23 Although the 2013 Decision uses the verb "recommend" with the same wording employed in the guidelines [The competent authorities in the Member States are recommended]; it should be noted that it goes a step further by including an explanatory note —(ii)— formulated in the imperative.

24 To this effect: the EGC judgment of 19 September 2012 in Case T 265/08, Germany/Commission —ERDF – Reduction of financial assistance – Operational programme falling within Objective 1 (1994-1999), concerning the Land Thüringen (Germany) —Section 108—: "Such guidelines merely express the Commission's intention to follow a particular line of conduct in the exercise of the power granted to it by Article 24 of Regulation No 4253/88".

25 To this effect, inter alia: EGC judgment of 26 February 2013, Spain/Commission, Joined Cases T 65/10, T 113/10 and T 138/10 —ERDF: Reduction of financial assistance by extrapolation in various operational programmes —; the abovementioned EGC Judgment of 19 September 2012, Germany/Commission; and the ECJ judgments of 6 April 2000, Spain/Commission, C 443/97; of 27 September 1988, United Kingdom/Commission, C-114/86; and of 5 May 1998, United Kingdom/Commission, C-180/96.

26 The instrument harmonises: the abovementioned 2007 Guidelines for the ERDF, CF and ESF; Ref. EFFC/24/2008 Guidelines of 1 April 2008 applicable to the EFF; and SOL-ID/2011/31 REV of 11 January 2012, for the funds of the "Solidarity and Management of Migration Flows" General Programme (See: Recital 5 of the 2013 Decision).

The 2007 Guidelines are structured into two well-defined sections: a) Contracts subject to the EC public procurement Directives; and b) Contracts not or not fully subject to the EC public procurement Directives.

What is of interest to us in regard to contracts not or not fully subject to the Directives is that four types of irregularities were provided for —compared to twenty for contracts subject to the Directives— to which corrections could be applied: 1) Non-compliance with the requirement of an adequate degree of advertising and transparency; 2) Attribution of contracts without competition in the absence of extreme urgency brought about by unforeseeable events or for complementary works and services brought about unforeseen circumstance; 3) Application of unlawful selection and/or contract award criteria; and 4) Breach of the principle of equal treatment.

Providing for corrections for contracts which, in principle, fall outside of the scope of the public procurement Directives is an act supported by the TCE itself, under which contracting authorities must, irrespective of the contract's value, comply with and observe the principles of free movement of goods, freedom to provide services, non-discrimination, proportionality, equal treatment, mutual recognition and transparency[27]. In view of this, any breach of these principles —in the form of committing any of the four irregularities described above— can be construed as entailing a risk to Community funds, giving rise to a need for correction.

The 2013 Decision does away with the previous distinction and harmonises the circumstances in which an irregularity is considered to exist for all contracts, whether or not they are subject to the EC public procurement Directives. Thus, the twenty-five irregularities set out in Section 2 of the Decision's guidelines encompass all contracts, regardless of whether or to what degree they are subject to the Directives.

****SPECIFIC CONSIDERATION OF THE SCOPE OF THE FINANCIAL CORRECTIONS APPLIED TO IRREGULARITIES DETECTED IN CONTRACTS NOT SUBJECT OR NOT FULLY SUBJECT TO PROCUREMENT DIRECTIVES**

Nonetheless, this sweeping statement must be put into sharper focus by European case law. The Court of Justice has established the conditions that Member States must meet in order to conclude contracts in accordance with the principles of the Treaty —essentially, equal treatment and non-discrimination on grounds of nationality—.

First, a general obligation of transparency, i.e. "sufficient degree of advertising" must be ensured[28].

Secondly, it must be ensured, moreover, that certain guarantees are respected during the tender process, even if the procedures are not governed by European contract law. This second point is very important as there is a widespread belief that ensuring a sufficient degree of advertising is enough to make certain that the Treaty's principles are respected, and this is not so. In the Commission's view, the following must be ensured in order for a tender procedure to be fair and impartial: a) Proper definition of the subject matter of the contract —non-discriminatory—[29]; b) Equal access for economic operators in all Member States; c) recognition of certificates, degrees, diplomas and, generally, any document accrediting a specific qualification; d) That time limits give all tenderers time to adequately evaluate their tenderers and to prepare them; e) When negotiation is permitted, that all tenderers have access to the same information and receive equal treatment.

27 Articles 34, 49 and 56 TFEU —respectively, ex-Articles 28, 43 and 49 TCE—.

28 The obligation of transparency "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed". Judgments of the ECJ of 7 December 2000, Case C-324/98, Teleaustria, paragraph 62; of 21 July 2005, C-231/03, Coname, paragraphs 16-19; of 13 October 2005, C-458/03, Parking Brixen, paragraph 49.

In the 2013 Decision the Commission, for its part, —note (vi) — makes the following remarks on the concept of a "sufficient degree of advertising", based on Community case law: "a) The principles of equal treatment and non-discrimination on grounds of nationality imply an obligation of transparency, which consists in ensuring, for the benefit of any potential bidder, a degree of advertising sufficient to enable the contract to be subject to competition. The obligation of transparency requires that an undertaking located in another Member State can have access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining the contract;b) For individual cases where, because of particular circumstances such as a very modest economic interest at stake, a contract award would be of no interest to economic operators located in other Member States. In such a case the effects on the fundamental freedoms are to be regarded as too uncertain and indirect to warrant the application of standards derived from primary Community law and consequently there is no ground for application of financial corrections.

It is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the Commission's view, this decision must be based on an evaluation of the individual circumstances of the case, such as the subject matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location where the contract will be implemented.

As regards the medium and means of advertising, this depends on the contract's level of interest to potential tenderers. The greater the level of interest, the wider the coverage should be. The following methods of advertising are recommended for contracts not subject or not fully subject to the EC Directives: a) Advertisements on the contracting authority's own website; b) Publication of information as part of the buyer profile; c) Publication in National Official Journals, national journals specialising in public procurement announcements; d) Publication in newspapers with national or regional coverage or specialist publications; e) Voluntary publication in the Official Journal when contracts are large enough to justify it; f) Local means of publication, in local newspapers, municipal announcement journals or even notice boards. The last method is only recommended for very small contracts aimed solely at the local market (See: Paragraph 2.1.2 of the 2006 Commission Interpretive Communication).

29 According to the European Commission's interpretation: "The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, types or a specific origin or production unless such a reference is justified by the subject matter of the contract and accompanied by the words 'or equivalent'. In any case, it would be preferable to use more general descriptions of performance or functions" (paragraph 2.2.1 of the 2006 Commission Interpretive Communication). In regard to non-discriminatory definition of the subject matter, see: ECJ Order of 3 December, [preliminary ruling] Case C-59/00. Bent Mousten Vestergaard, recitals 21 to 24.

Thirdly, there are also requirements for the tenderer selection procedure and for the number of candidates invited to submit a tender. This number may be limited provided that this is done in a transparent and non-discriminatory manner[30].

Finally, as regards award of the contract, this must be done in accordance with the procedural rules established at the outset, and the principles of non-discrimination and equal treatment must be fully respected.

That said, it should be noted that for irregularities concerning contracts not subject or not fully subject to the public procurement Directives, **the burden of proof falls on the Commission**, that is, in order for a correction to be made to this sort of contract the Commission must demonstrate that there has been a breach of the principles and rules of the Treaties. Specifically, it must demonstrate[31]:

a) That the contract to be corrected is of "certain interest" for tenderers from other Member States, i.e. of cross-border interest.

In regard to the concept of "certain interest", it is interesting to note that the Court of Justice has said that the fact that a company brings a complaint before the Commission does not demonstrate per *se* that the contract is of cross-border interest. Thus, this would not automatically prove that the State had breached the rules or principles of the Treaties[32]. To demonstrate a cross-border interest, the following factors must be given consideration: 1)The subject matter of the contract; 2) The estimated value with respect to the sector in question, its particular features; 3) The geographic region where the contract will be implemented; 4) That there are tenderers or companies from other Member States that have submitted bids or indicated their interest[33].

b) Effectively, the company did not have access to the information, which prevented it from indicating its desire to become a contractor and submit a bid.

We can thus conclude that the fact that a contract's value is below the thresholds is a reasonable indicator but is not, per se, enough to imply that the contract is not of cross-border interest. The contracting authority shall assess and justify whether a procedure is of cross-border interest according to the criteria outlined above, with regard to the particular circumstances of each individual case[34].

V. Furthermore, irrespective of whether there is a certain cross-border interest, consideration must be given to another new feature introduced by the 2013 Decision which was not included in the previous guidelines: the requirement to assess whether the procedure through which the contract was concluded **complies with national law.** This new feature affects contracts subject to the procurement Directives and contracts not subject or not fully subject to the Directives[35].

Consequently, if it is demonstrated that a cross-border interest did in fact exist, or that there has been a breach of domestic legislation, even if the contract is outside of the scope of the Directives the Commission has legitimate authority to make a financial correction.

In view of the above, it is clear that it is nothing new, nor is it unique to the area of European funds, for certain contracts not subject or not fully subject to the Directives to be required to respect certain

It should also be borne in mind that the service contracts referred to in Annex II B to Directive 2004/18/EC and Annex XVII B to Directive 2004/17/EC must comply with the rules on technical specifications set out in Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC in the event that they exceed the application thresholds of said Directives.
In order to be in accordance with the principles of the Treaty, the technical specifications of such contracts must be established before the contractor is selected and must be made available to all potential bidders by means that guarantee transparency and give equal treatment to all bidders that might be interested. This is the view expressed by Advocate General Mr Jacobs in Case C-174/03 *Impresa Portuale di Cagliari,* —in points 76 to 79 of his Opinion—.

30 In the Commission's view, objective pre-selection criteria may be used, such as applicants' experience in the sector concerned, the size, infrastructure or turnover of their business and their professional and technical abilities, amongst other factors (see: Paragraph 2.2.2 of the 2006 Commission Interpretative Communication).

31 On the burden of proof and the facts that must be demonstrated by the Commission to establish that a Member State has breached the principles of transparency or non-discrimination, see: ECJ judgment of 21 February 2008, C-412/04, Commission v. Italy; of 15 May 2008, C-147/06 and 148/06, SECAP SpA and Santorso coop. arl v. *Comune di Torino*; of 13 November 2007, C-507/03, Commission v. Ireland. All of these involved infringement proceedings and are thus applicable to the subject at hand.

32 In this regard, see the abovementioned ECJ judgment in C-507/03, Commission v. Ireland —paragraphs 34 and following. —.

33 On the criteria to follow when determining whether there is a cross-border interest, of particular relevance is EGC judgment of 29 May 2013, T 384/10, Spain v. Commission. This judicial ruling discusses the calculation of corrections relating to cancellation of part of the assistance —from the Cohesion Fund— granted for certain public works or service contracts. Likewise, see the ECJ judgments cited above, Coname — paragraph 20— and SECAP.

34 In the ECJ's view, the existence of such an interest must be considered on a case-by-case basis *"because of special circumstances, such as a very modest economic interest at stake"*. The award of a contract could, for example, be of no interest to economic operators in other Member States, and its *"effects on the fundamental freedoms (...) to be regarded as too uncertain and indirect"* to have a bearing on the principles enshrined in the Treaties (inter alia, ECJ judgments: Coname Case, paragraph 20, Teleaustria, paragraph 62; Krantz, C 69/88 of 7 March 1990, paragraph 11; BASF, C 44/98 of 21 September 1999, paragraph 16; and the ECJ Order of 12 September 2002, Mertens, C 431/01, paragraph 34). In summary, and in consonance with the interpretation of the Commission, it can be asserted that a decision that a contract is irrelevant for the Internal Market and can thus be awarded without regard to the principles of the Treaties cannot be based on the abstract, unrelated features of the specific circumstances of the relevant contract, or on mere conjectures or habitual practices that are not compared against objective criteria.

35 This can be inferred from Section 1.1 of the Annex to the Decision —"Purpose and scope of the guidelines" [In the paper on the correction of errors issued by the European Commission by means of document C(2014) 7372 of 3 October], and at the end of Section 1.2.2.

fundamental principles of the Treaty. Furthermore, these principles do not amount solely to a general obligation to ensure sufficient advertising; the aim is to safeguard free competition and, ultimately, the Internal Market itself.

Along this line of reasoning, the 2007 Guidelines set out the four irregularities outlined above, each of which relate to a breach of this requirement to ensure "sufficient advertising", competition and equal treatment. In contrast, in principle the current Decision makes no distinction. Each of the twenty-five irregularities set out can be detected in any contract financed with European funds, and should be corrected using the relevant rate of correction.

The Decision could be construed as only requiring corrections to contracts not subject or not fully subject to the EC Directives in the event of irregularities constituting a breach of the principles or rules of the Treaties or national law. In our view, however, this should not lead us to restrict the possible types of irregularities to the four cases set out in the 2007 Guidelines. Bearing in mind the above considerations based on case law and Commission requirements —which have not been internally adopted by most Member States—, as we will see below virtually all of the irregularities set out in the 2013 Decision arise directly from infringement of the principles of the Treaty. Thus, provided that there is a cross-border interest, most of them could be considered to fall short of the conditions that must be met by contracts not subject or not fully subject to the EC Directives.

It is true, however, that there is room for doubt as to whether this instrument can be used to unambiguously harmonise the many existing formal and procedural requirements for any contract involving European funds. The European Commission should clarify this point, or we run the risk that the debate on the nature of the 2007 Guidelines, which has now been settled, will morph into a questioning of the Decision.

In the absence of an interpretation on this issue by the Commission or the Court of Justice, the truth is that the letter of the Decision does not distinguish between contracts. Thus, from the date of the Decision's entry into force all contracts financed with European funds, provided that there is a cross-border interest, are subject to the same requirements irrespective of the degree to which they are subject to the EC public procurement Directives.

VI. As regards the addressee of the Decision, although it is still aimed at the Commission itself it should be noted that there is an insistence that it should be applicable to Member States —unless they themselves employ more stringent criteria—[36] and one new development is that the ECA has been invited to apply its requirements during its audits and to adopt the recommendation of the European Parliament described above.

VII. Finally, it should be noted that **it is expressly permitted to certify expenditure** arising from contracts **after** detection of an **irregularity,** provided that the same corrective percentage is applied to the certified amount.

3.3. IDENTIFICATION AND DETECTION OR IRREGULARITIES. CLASSIFICATION OF IRREGULARITIES BY SUBJECT AREA

This section aims to provide a detailed analysis of the Decision in order to define the types of actions or omissions in procurement procedures which, in the view of the European Commission, constitute irregularities with an impact on the EU budget requiring the application of as many financial corrections as are necessary[37].

Classification of irregularities by group and subject area: The reference document classifies irregularities into the following types and in the following manner:

- GROUP 1. "CONTRACT NOTICE AND TENDER SPECIFICATIONS";
- GROUP 2. "EVALUATION OF TENDERS"; AND
- GROUP 3. CONTRACT IMPLEMENTATION.

Study of the types of irregularities contained in each group reveals that they do not always match the stated classification. Moreover, when grouping the irregularities the Commission did not only take into account the point in the procedure at which the irregularity occurs; it also saw fit to propose sub-classification within each Group based on the subject area that the irregularity concerns.

36 Section 1.1. (end) of the Annex to the 2013 Decision.

37 It should be clarified that the Decision itself stipulates that if a contract is regulated by a Directive issued before or after those currently in force the correction shall still be made in line with the guidelines set out "where possible, or by analogy to the cases described" (Section 1.2 of the 2013 Decision Guidelines).

With respect to **GROUP 1**
"Contract notice and tender specifications"

This group encompasses a set of irregularities that do not relate solely to non-compliance with the rules on publishing the contract notice or tender specifications. Nor do they relate solely to the preliminary stages of the procedure. The following four categories of irregularities can be identified with a view to the subject area concerned by each irregularity:

a) Irregularities relating to advertising requirements in general
b) Irregularities relating to the content of notices and specifications
c) Irregularities relating to time limits
d) Irregularities relating to the chosen tender procedure, and to justification thereof

With respect to **GROUP 2**
"Evaluation of tenders"

a) Modification of contracts: changes to selection or award criteria or to the conditions set out in the notice or specifications
a) Use of unlawful selection or award criteria
b) Lack of transparency or equal treatment, discrimination
c) Conflict of interest

With respect to **GROUP 3**
"Contract implementation"

a) Modification of contracts
b) Irregularities relating to advertising requirements

3.4. ANALYSIS OF TYPES OF IRREGULARITIES ACCORDING TO THE CLASSIFICATIONS PROVIDED

3.4.1 Group 1: "Contract notice and tender specifications"

a) Irregularities relating to advertising requirements in general

1. Lack of publication of contract notice [1][38].

The 2013 Decision is generally much more specific in its identification of irregularities than the 2007 Guidelines. This is seen in the fact that each irregularity is linked to an infringement of a provision of European law.

"Lack of publication", which was already included in the earlier document, is a blanket prohibition on non-compliance with any rule applicable to advertising of the tender.

In other words, this entails any infringement of the provisions of Chapter VI of Directive 2004/18 "Rules on advertising and transparency", encompassing not only failure to publish the contract notice but also failure to publish the award announcement. This interpretation is also supported, in a teleological construction of the document , by the reference to Articles 35 and 58 of Directive 2004/18, i.e. "Notices" and "Publication of the notice concerning public works concessions", respectively.

Furthermore, the Decision has a greater impact on the concept of advertising insofar as it refers to the 2006 Commission Interpretative Communication on EC law applicable to contracts not subject or not fully subject to the procurement Directives.

For contracts not subject or not fully subject to the procurement Directives, the key factors are the provisions of national law and determining whether there is a cross-border interest.[40]

Non-compliance with the rules on advertising is associated with the largest correction — 100%. However, where a certain amount of advertising has been carried out —enough to enable competition and access by tenderers in other Member States—[41] the correction may reduced down to 25%.

38 The number in brackets after each irregularity is the number assigned to the irregularity on the list provided in the Annex to the 2013 Decision.

39 For the Commission, lack of sufficient advertising constitutes a blatant breach of one of the conditions of Community co-financing, more specifically, that all procurement procedures co-financed with European funds must be carried out with as many guarantees as possible. In this regard, it should be noted that the 2007 Guidelines made a general reference to "Non-compliance with the advertising procedures"—irregularities no. 1 and 2—, which would thus encompass any non-compliance, not only incidents relating to publication of the contract notice. Interpreting the 2013 Decision in the sense that only a failure to publish the contract notice constitutes an irregularity, with other forms of non-compliance excluded, would thus be counter to the spirit of the Decision and, in short, would exempt a contract from a duty to comply with the requirements set out in the Directives, or would at least mean fewer repercussions in the event of non-compliance.

Without prejudice to the foregoing, it should be noted that in regard to the advertising requirements of Directive 2004/17, the Decision only refers to Article 42 of said Directive: "Notices used as a means of calling for competition" and not to Article 43 on "Contract award notices". Thus, provided that the Commission or the Court of Justice do not interpret otherwise, for the purpose of making financial corrections non-compliance in the area of advertising —special sectors— is restricted to a failure to publish the contract notice.

40 See: Section 3.2 above of this Chapter.

41 It has been published at the national level, provided that national rules or the fundamental rules on advertising have been observed in accordance with the 2006 Commission Interpretative Communication.

In addition to this general irregularity, there are also the following specific cases:

2. For the award of contracts in the field of defence and security falling under directive 2009/81/EC specifically, inadequate justification for the lack of publication of a contract [7]

3. Lack of publication of extended time limits for receipt of tenders or extended time limits for receipt of request to participate [5]

4. Artificial splitting of works/services/supplies contracts [2]

These three irregularities, which all entail non-compliance with advertising rules, could easily be subsumed under the first of them. The 2013 Decision sets out certain types of irregularities under the general umbrella of non-compliance with regulatory provisions on advertising.

In this regard, the Commission deemed it necessary to expressly indicate that certain advertising obligations are also included in the field of defence contracts —when unjustified— and that the obligation to advertise does not include only the contract and award notice but also lack of publication of any extensions to deadlines for the submission of bids or applications for participation —restricted procedures or negotiated procedures with publication— . Nevertheless, this last irregularity is associated with a correction of just 10%, which can be reduced down to 5% depending on the gravity of the undue action.

The express provision dealing with the splitting of contracts is a new inclusion with respect to the previous guidelines. In effect, Article 9(3) of Directive 2004/18 and 17(2) of Directive 2004/17 prohibit the splitting of a contract in order to lower its value to below the Community thresholds set out in the Directive. In this sense, any splitting enabling the avoidance of publication of the relevant contract notice in the Official Journal of the European Union constitutes an irregularity when, given the total value of the contract, it should have been published.

b) Irregularities relating to the content of notices and specifications

This section comprises the group of irregularities relating to absence of the required information and unlawful or incorrect criteria or specifications. These irregularities can occur in the contract notice itself or in the specifications, and they affect both selection and award criteria.

Irregularities relating to absence of the required information include:

5. Failure to state: the selection criteria in the contract notice; and/or the award criteria (and their weighting) in the contract notice or in the tender specifications [8]

In other words, (i) the contract notice does not contain the selection criteria, or they are set out in insufficient detail; (ii) neither the contract notice nor the specifications contain the award criteria and weighting coefficients, or they are set out in insufficient detail[43].

The correction applicable to these irregularities is 25%, although this may be reduced to 10% and 5% in line with the gravity of the undue action if selection criteria were set out but sufficient detail was not given.

6. Insufficient definition of the subject matter of the contract [12]

This irregularity entails violation of the general principles governing the award of contracts —Article 2 of Directive 2004/18 and Article 10 of Directive 2004/17—. In line with European case law, the Commission takes the view that insufficient definition of the contract's subject matter in the contract notice and/or specifications renders potential tenderers unable to determine the true scope of the contract. This is a direct violation of the principles of equality and transparency. In other words, both the principle of equal treatment and the obligation of transparency arising from said principle require clear definition of the subject matter of each individual contract, as well as of its award criteria[44].

42 See: Articles 2 and 38(7) of Directive 2004/18. Similarly, Articles 45(9) and (10) of Directive 2004/17.

43 Legal basis and specific requirements, see: Directive 2004/18, Articles 36: "Form and manner of publication of notices"; 44: "Verification of the suitability and choice of participants and award of contracts", 45 to 50, inclusive: "Criteria for qualitative selection"; 53: "Contract award criteria". Annexes: VII-A: "Public contract notices", points 17 and 23; VII-B: "Public works concession notices", point 5.
And similar provisions from Directive 2004/17: Articles 42: "Notices used as a means of calling for competition"; 54: "Criteria for qualitative selection"; 55: "Contract award criteria". Annex XIII: "Information to be included in contract notices".

44 The ECJ has reiterated this on various occasions. See, inter alia: ECJ judgments of 10 December 2009, C- 299/08 Commission/France, paragraph 41; of 14 October 2004, C 340/02 Commission/France, paragraph 34; of 25 April 1996, C 87/94 Commission/Belgium, paragraphs 51 to 53; and 7 December 2000, Telaustria paragraph 61.

A 10% correction should be applied; this may be reduced to 5% in line with the gravity of the undue action[45].

Irregularities relating to unlawful or incorrect selection criteria include:

7. Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents [9]

8. Selection criteria not related and proportionate to the subject matter of the contract [10]

9. Discriminatory technical specifications [11]

These three irregularities, found one after another on the list, are closely linked and constitute unlawfulness or discrimination.

For the first of these, selection criteria are included in the contract notice, or the award criteria and weightings are included in the contract notice or specifications, with sufficient detail. The irregularity arises not from the failure to state information or from a lack of transparency, but rather from the unlawfulness of the criteria used or the discrimination[46] entailed by employing any of the criteria, e.g. an ab initio requirement that candidates have facilities in the place where the contract will be implemented, or requiring them to have experience implementing contracts in the Member State or region concerned[47]. As a result, competition is limited or potential candidates are dissuaded from participating in the tender.

In the second case, there is compliance with the advertising and minimum content rules, and selection criteria are lawful. The irregularity stems from requiring minimum capacity levels that are disproportionate or unrelated to the contract's subject matter, e.g. requiring an excessively high business turnover to make it through the selection phase, or a turnover that is not necessary for implementation of the contract. As a result, obstacles are created with respect to access to the procedure, and competition is restricted . It should be noted that the description of this irregularity makes no reference to award criteria.

The last case is essentially identical to that which precedes it but deals with contracts requiring technical standards that violate the principle of equal access or create unreasonable obstacles[49].

The scale of corrections to be applied for the three irregularities described is the same: 25% which can be reduced to 10% or 5% in line with the gravity of each individual case.

c) Irregularities relating to time limits

10. Non-compliance with time limits for receipt of tenders; or time limits for receipt of requests to participate [3]

11. Insufficient time for potential tenderers/candidates to obtain tender documentation [4]

In these two types of irregularity advertising and transparency has also been sufficient; candidates know when they must submit their bids or requests for participation —restricted procedures or negotiated procedures with advertising— but the time limits established for these purposes are shorter than those required by law[50].

The corrections to be applied are: 25% if the reduction in time limits is greater to or equal than 50% of the times stipulated by the Directive; 10% if reduction in time limits is greater than or equal to 30% of said times; and 5% if the reduction in time limits is less than 30% of said times. This last percentage may be reduced to between 2% and 5% in line with the gravity of each specific case.

Similarly, in cases where unrestricted electronic access to all tender documentation needed to put together an offer was not provided, award authorities must provide this documentation as early as is necessary.

Nevertheless, in the proposed correction scheme —whose wording is quite confusing— what must be taken into account is the time that the tenderer has to submit an offer, from the point at which tender documentation is received, as follows: a) If, following receipt of tender documentation, the tenderer has 80% of the established time limit to submit an offer, no correction shall be made; b) If, following receipt of tender documentation, the tenderer has between 60% and 80% of the established time limit to submit an offer, a correction of 5% shall be made; c) If, following receipt of tender documentation, the tenderer

45 The maximum rate of correction to be applied for this irregularity has been lowered with respect to the percentages stipulated for irregularity no. 8 in the 2007 Guidelines, which had a maximum value of 25%. Furthermore, the 2013 Decision specifies that "In case the implemented works were not published, the corresponding amount is subject to a correction of 100%". No correlation is found between the correction and the irregularity it is linked to ("Insufficient definition of the subject matter of the contract"). We will have to wait for an interpretation by the Commission or the Court of Justice or, in its absence, an amendment that clarifies this point.

46 Legal basis infringed: Directive 2004/18, Articles 45 to 50, inclusive: "Criteria for qualitative selection"; 53: "Contract award criteria"; Directive 2004/17, Articles 54: "Criteria for qualitative selection"; 55: "Contract award criteria ".

47 See: European Commission. Annex to the 2013 Decision, description of irregularity no. 9, pp. 14 and 15.

48 Legal basis: Article 44(2) of Directive 2004/18 and Article 54(2) of Directive 2004/17:"

49 Legal basis: Article 23(2) of Directive 2004/18 and, stipulated in identical terms, Article 34(2) of Directive 2004/17.

50 Legal basis: Article 38 of Directive 2004/18 and Article 45 of Directive 2004/17.

has between 50% and 60% to submit an offer, a correction of 10% shall be made; d) If, following receipt of the tender documentation, the tenderer has less than 50% of the established time limit —*sine dies ad quem*—, a correction of 25% shall be made.

In addition to the confusion created by the approach taken with regard to the rate of corrections, it should be noted that it is permitted for a delay in providing candidates with the tender dossier to reduce the established time limit by 25% without incurring any corrections, and that time reductions below 50% are subject to rates of correction that cannot be scaled in line with the gravity of the individual case. It is thus irrelevant whether the tenderer has 40%, 30%, 10% or 5% of the established time limit to submit an offer; the correction in all cases is 25%.

Without prejudice to the foregoing, based on Article 39(1) of Directive 2004/18 we understand that the time limit within which award authorities must, under all circumstances, provide the tender documentation is "within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for the submission of tenders", and that supplementary information on specifications and other issues shall be supplied "not later than six days before the deadline fixed for the receipt of tenders, provided that it has been requested in good time" —Article 39(2)—.

d) Irregularities relating to the chosen tender procedure, and to justification thereof

12. Cases not justifying the use of the negotiated procedure with prior publication of a contract notice [6]

This last irregularity is also unrelated to non-compliance with the advertising rules. In this case, the contract notice has been published in accordance with the law. The irregularity arises in that the contract in question should not have been awarded by negotiated procedure. Remember that negotiated procedures with prior publication can essentially only be used in four scenarios: a) In the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with the provisions of Directive 2004/18, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered; b) In exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing; c) In the case of services, especially services within category 6 of Annex II A, and intellectual services, insofar as the nature of the services to be provided is such that contract specifications cannot be established through open or restricted procedures; d) In respect of works performed for purposes of research, testing or development[51].

The above notwithstanding, we must bear in mind the new Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement, which repeals Directive 2004/18/EC , as it replaces the negotiated procedure with prior publication described above with a procedure of negotiation in which participants compete with each other[53].

In the current Directive 2004/18, the negotiated procedure with prior publication was designed for exceptional cases, such as when open or restricted procedures or competitive dialogues were initiated and the tenders submitted were irregular or unacceptable; exceptional cases with specific intellectual and other similar services.

The new Directive does not refer to the "tender procedure with negotiation" as an exception, nor does it set out specific grounds for an award authority to use this procedure. As with Competitive Dialogue, negotiated procedures with prior publication can now only be used when justified by the nature or complexity of the subject matter of the contract.

The main features of the new negotiated procedure are: a) In response to the call, any economic operator may submit a request to participate; b) After evaluating the information provided, the award authority invites candidates it deems suitable to participate; c) Candidates invited to participate send initial offers, which will be the basis for subsequent negotiations; d) The procedure may be carried out in stages, with tenderers gradually ruled out; e) After the negotiations, participants submit their final offers; f) The award authorities can award contracts based on initial offers without any negotiation when this has been stated in the tender notice or invitation.

3.4.2 Group 2: "Evaluation of tenders"

a) Modification of conditions during the tender procedure: changes to selection or award criteria or to the conditions set out in the notice or specifications[54].

13. Modification of selection criteria after opening of tenders, resulting in incorrect acceptance of tenderers [13]

14. Modification of selection criteria after opening of tenders, resulting in incorrect rejection of tenderers [14]

51 Legal basis: Article 30 of Directive 2004/18 "Cases justifying use of the negotiated procedure with prior publication of a contract notice".

52 O.J. No. L 94 of 28 March 2014, hereinafter, Directive 2014/24.

53 Articles 29 and 32 of Directive 2014/24, respectively.

54 In order for this category (a) to be correctly interpreted and placed into context, Sections 3.4.3 and 3.4.3.1 of this Chapter, regarding changes involving implementation, must be borne in mind.

These two irregularities have the same legal basis —Article 44(1) of Directive 2004/18 and 54(2) of Directive 2004/17— and are a new addition with respect to the 2007 Guidelines. In actuality they entail a single scenario: modification of selection criteria after a tender is opened, resulting in the selection of different tenderers, whether due to acceptance of said tenderers —where they would have been eliminated from the procedure had the criteria not been changed— or rejection thereof —where they would have been accepted into the procedure had the criteria not been changed—. The issue is not whether the criteria themselves are unlawful, but whether the original criteria have been modified. This is a direct violation of the principles of equality and of non-discrimination and transparency —Articles 2 and 10 respectively of Directives 2004/18 and 2004/17. Consider that modifications affect not only the candidates participating in the procedure, but it is also possible that if the criteria had been set out in their modified form at the outset —where the modification reduces stringency— there would have been more competition.

The correction rate is identical for both: 25%, downwardly scalable to 10% and 5% in line with the gravity of the individual case. Although both of these irregularities are actually two sides of the same coin, it is surprising that expulsion of a tenderer resulting from modification of criteria has not been included as an aggravated scenario.

Furthermore, it should be noted that only selection criteria are mentioned; no reference is made to award criteria. We believe this correction should be extended by analogy, on the grounds of the legal basis cited —Articles 44(2) and 54(2) of the relevant Directives— to include cases where award criteria have been modified[55].

15. Negotiation during the award procedure [18]

According to the 2013 Decision, this irregularity arises only when the tender procedure is open or restricted, during the tender evaluation stage. The negotiation must lead to a substantial modification of the initial conditions set out in the contract notice or specifications[56].

This irregularity was already included, and was described in identical terms, in the 2007 Guidelines —irregularity no. 9—. Said document expressly states that negotiations consisting solely of completing or clarifying offers or specifying award authorities' obligations shall not be considered irregularities.

The correction rate to be applied is 25%, which can be reduced to 10% and 5% in line with the gravity of the individual case.

16. Negotiated procedure with prior publication of a contract notice with substantial modification of the conditions set out in the contract notice or tender specification [19]

We must proceed on the premise that the negotiated procedure with prior publication provided for in the Directive —Article 30— is designed to enable the contracting body to negotiate submitted offers with tenderers, so that these can be adjusted as much as possible to meet the requirements set out initially and, where applicable, in any supplementary tender documents. Under no circumstances, therefore, may negotiations entail modification of the conditions and requirements that have been previously set out and defined.

However, corrections are not applied in all cases. The key requirement is that the modification must be substantial —25%, scalable to 10% and 5%—.

b) Use of unlawful selection or award criteria

17. Evaluation of tenderers/candidates using unlawful selection or award criteria [15]

The wording of this irregularity as described in the Decision may give rise to error. It is thus advisable to clarify that, for this irregularity, the selection or award criteria set out in the contract notice or tender dossier are completely lawful —remember that the issue of establishing unlawful criteria is addressed separately, in irregularity no. 7 [9].

The undue action in this case is associated entirely with the award criteria[57]. It consists of using selection criteria as award criteria, or a direct failure to use the award criteria and/or sub-criteria set out in the contract notice and specifications. This irregularity also arises when sub-criteria are used which are not related to the award criteria initially set out, regardless of their lawfulness[58].

The rate of correction is 25%, which can be reduced to 10% and 5%.

55 This omission could also be rectified through an exhaustive interpretation of the irregularity entitled: "Evaluation of tenderers/candidates using unlawful selection or award criteria", see below: irregularity number 17 according to our numbering system and irregularity [15] in the list provided in the Decision.

56 The legal basis are the general principles enshrined in Articles 2 and 10 of Directives 2004/18 and 2004/17, respectively.

57 Although the wording of this irregularity expressly refers to the use of unlawful "selection criteria", in actual fact the irregularity only involves award criteria. This interpretation is supported by the description of the irregularity given by the Commission on p.17 (no. 15 on the list) in the 2013 Decision, as well as by the legal basis it refers to: Articles 53 and 55 respectively of Directives 2004/18 and 2004/17, both of which relate to contract award criteria.

58 Consider that although the parameter chosen as a sub-criterion may, in itself, be lawful, insofar as it is unrelated to the award criteria initially set out in the notice it becomes unlawful or, at least, it constitutes a modification of the award criteria. We would thus argue —footnote 80 above— that a broad interpretation of this irregularity enables modifications to award criteria to be included under its umbrella.

c) Lack of transparency or equal treatment, discrimination

18. Lack of transparency and/or equal treatment during evaluation [16]

19. Modification of a tender during evaluation [17]

20. Rejection of abnormally low tenders [20]

These three irregularities are closely linked, and all of them fall under our proposed category of "Lack of transparency or equal treatment, discrimination".

The legal basis of the first two are Articles 2 and 10 of Directives 2004/18 and 2004/17, respectively —general guiding principles of public procurement— and the legal basis of the third are Articles 55 and 57 respectively of the same Directives —abnormally low tenders—. Although the legal bases infringed are different, each of the three irregularities results in violation of the abovementioned fundamental principles.

Lack of transparency and/or equal treatment during evaluation translates into opacity, insufficiency or absence of tender evaluation or reports.

With respect to the modification of tenders, it should be noted that the Decision explicitly specifies that this entails a situation where "the contracting authority allows a tenderer/candidate to modify its tender during evaluation of offer"[59]. Although the letter of the description is clear (it refers only to "a tenderer/candidate"), the undue action constituting the irregularity must be borne in mind: violation of the principle of equality and/or of non-discrimination. This leads us to conclude that the irregularity would also arise in instances where more than one tenderer or candidate are permitted to modify their tenders, provided that the opportunity is not given to every single one of the tenderers, which would be an infringement of the rules but not a violation of the principles in question.

The rate of correction for the first two cases is identical: 25%, which can be reduced to 10% and 5%.

Finally, rejection of abnormally low tenders shall always constitute an irregularity if the contracting body excludes such tenders without permitting the tenderer to justify the offer or the reasons it is so low. The rate of correction for this irregularity is set at 25%, with no possibility of scaling the rate down in line with the gravity of the individual case.

d) Conflict of interest

21. Conflict of interest [21]

The concept of a "conflict of interest" designated as an irregularity in the area of public procurement is one of the most important new features of the 2013 Decision.

As described above, this irregularity is located in Group 2 of the Annex to the Decision, i.e. irregularities involving the "evaluation of tenders", and its legal basis are the general principles that guide public procurement —Articles 2 and 10 of Directives 2004/18 and 2004/17, respectively. The only description provided for this scenario is that "a conflict of interest has been established by a competent judicial or administrative body, either from the part of the beneficiary of the contribution paid by the Union or the contracting authority"[60] . There is thus no definition of the concept of a "conflict of interest" as an administrative irregularity.

Given that this irregularity is new and of great significance —the rate of correction associated with it is 100% with no scalability— and in light of the vagueness described above, some specific observations should be made.

First, the "conflict of interest" in question occurs during a public procurement procedure, and "irregularity" has the meaning assigned to the concept in the reference working definition. Thus, we must refrain from associating it with any penal connotations or national views which may exist in regard to the concept, irrespective of whether the irregularity may ultimately constitute or result in a criminal offence. This begs the following question: What should be construed as a conflict of interest constituting an irregularity in a procurement procedure involving European funds? —Remember that one of the reasons corrections are made is because the irregularity affects the EU budget either directly or indirectly, by act or omission. In view of this, the answer can be found in Regulation 966/2012 of

59 P. 18, número de orden de la irregularidad 17.

60 P. 19, irregularity no. 21 in the 2013 Decision.

25 October on the financial rules applicable to the general budget of the Union[61], more specifically, under Article 57(2), which provides the following definition: "(...) a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient"[62].

The persons referred to are: Financial actors and other persons involved in budget implementation and management, including preparatory acts, audit or control of the budget, who "shall not take any action which may bring their own interests into conflict with those of the Union" —Article 57(1)—.

From the Regulation itself it can be deduced that a conflict of interests in public procurement has an impact on the correctness of the procedure and infringes the frequently described principles governing procurement: transparency, equal treatment and non-discrimination. Article 102(1) of Regulation 966/2012 adopts the principles of Directives 2004/18 and 2004/17 within the scope of contracts financed by the European budget: "All public contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination".

Furthermore, Article 107(1) of Regulation 966/2012 specifies that the following shall be excluded from the procedure: "(...) candidates or tenderers who, during the procurement procedure for that contract: a) are subject to a conflict of interests". This provision was not contained in the traditional Directives; until now it has been a special feature pertaining to contracts financed by the European budget. Nevertheless, it should be borne in mind that the new generation of Directives does address the question, touching on what the concept means in the context of an irregularity[63].

The new Directive goes a step further, permitting contracting bodies, when evaluating the capacity of a tenderer, to decide that the technical and professional abilities of the candidate fall short due to a conflict of interest[64].

Furthermore, with respect to Governance it stipulates that Member States must draft two types of reports on conflicts of interest detected in procedures and the measures implemented to combat the irregularity. Specifically, from 18 April 2017 onwards every three years Member States must submit to the Commission a monitoring report that covers "prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities"[65]. Moreover, contracting authorities must draft a specific report on each contract or framework agreement and each time a dynamic purchasing system is established, which must include "conflicts of interests detected and subsequent measures taken"[66].

With the concept of a conflict of interest and its importance put into context and defined as described above, in regard to our area of interest it should be noted that when the contract in question is financed by the European budget:

- ✓ The irregularity described as a "conflict of interest" applies to both contracts **subject** to the EC Directives and contracts **not subject** or not fully subject, and to the **same degree.**
- ✓ The irregularity described as a "conflict of interest" can arise in any **type** of procedure.
- ✓ The irregularity described as a "conflict of interest" can arise in any **stage** of the procedure.
- ✓ The irregularity described as a "conflict of interest" can arise in relation to **any party** involved in the implementation, management, audit or control of the budget and, therefore, at any territorial level.

Furthermore, irrespective of how the new 2014 Directives are interpreted, the industry standard, Regulation 966/2012, makes no distinctions as to the value of the contract, the type of procedure or the specific point in the procedure: "all public contracts". The same is true in regard to the parties involved. This does not preclude the applicability of the Directives to the contracts that concern us in all aspects not provided for by the Regulation, such as conflicts of interest concerning not only the contracting body but also the tenderer or candidate.

61 Regulation No. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002 (O.J. No. L 298 of 26 October 2012).

62 The OECD has specified that a conflict of interest —with the assigned meaning— can be present in different degrees: a) Potential, where the person has private interests that may lead to a conflict of interest in the future; b) Apparent, where it appears that an person's private interests could influence theperformance of their duties but this is not in fact the case; c) Actual, which according to the OECD's definition involves: "(...) a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities". (OECD. *Managing Conflict of Interest in the Public Service. OECD Guidelines and Overview. Paris: OECD Publications Service,* 2003, p. 24).

63 This is largely due to the consideration of public procurement as a strategic area of Community policy within the scope of the objectives of the 2020 Strategy, which in addition to innovation, the environment and job creation aims for greater transparency in procurement procedures with the inclusion of anti-fraud measures: conflict of interest, favouritism, etc.. (on the strategic use of public procurement, see the Green Paper of 27 January 2011; on the modernisation of EU public procurement policy, see Towards a More Efficient European Procurement Market [COM (2011) 15]); See: Articles 24 and 57(4) of Directive 2014/24.

64 Article 58(4) —selection criteria—.

65 Article 83 of Directive 2014/24.

66 Article 84(1)(i) of Directive 2014/24.

Thus, although the 2013 Decision places conflict of interests in the second group of irregularities, i.e. "evaluation of tenders", in our opinion this irregularity can occur in any stage of the procedure:

- **Preparation:** When tender documentation is drafted and chosen, whether this occurs within the contracting body or is outsourced.

The **main risks** associated with a conflict of interest in this stage are that "Someone who takes part in drafting the documents may directly or indirectly try to influence the tender procedure to allow, say, a relative, friend, or commercial or financial partner, to take part"[67] and information about the procedure may be leaked.

- **Evaluation and award:** during candidate selection and application of the criteria set out in the notice and in regard to award of the contract.

The **main risks** associated with a conflict of interest during this stage are:

The bids received may be tampered with to conceal a bidder's failure to meet the deadline or to provide all the documentation required.

A member of the evaluation committee may try to mislead or put pressure on the other members to influence the final decision, for example by giving a wrong interpretation of the rules[68].

- **Performance:** modification of contracts and other factors

The **main risks** associated with a conflict of interest during this stage are:

- The contract is not drafted according to the rules and/or the technical specifications and tender documents.

- The contract is poorly executed.

- The contract is poorly monitored.

- False certificates are accepted[69].

As a result, the existence of a conflict of interest under any circumstances and in any stage of the procedure —not just the evaluation stage— should be subject to a rate of correction of 100%.

3.4.3. Group 3: "Contract implementation". Specific reference to modification of contracts and supplementary contracts

a) Modification of contracts

22. Substantial modification of the contract elements set out in the contract notice or tender specification [22]

23. Reduction in the scope of the contract [23]

24. Award of additional works/services/supplies contracts (if such award constitutes a substantial modification of the original terms of the contract) without competition in the absence of one of the following conditions: extreme urgency brought about by unforeseeable events; an unforeseen circumstance for complementary works, services, supplies [24]

b) Irregularities relating to advertising requirements.

25. Additional works or services exceeding the limit laid down in the relevant provisions [25]

The first three irregularities provided for in regard to contract implementation currently constitute modification of the contract. As we know, this is the main cause for application of financial corrections; modifications are the most recurrent irregularity. Under the fourth generation Directives, we will see that the four irregularities described could be condensed into a single general irregularity regarding the unlawful modification of contracts. However, it is in our best interest to address them separately here as the rate of correction would vary depending on the irregularity in question.

The Directives that are currently in force do not specifically regulate the contract modification system —, nor do the previous Directives—. In order to make such corrections, therefore, we must look to the case law of the Court of Justice, especially in the ruling: *Succhi di frutta.* Meanwhile, as long as Directives 2004/18/EC and 2004/17/EC remain in force the legal basis in question is their respective articles 2: and 10 —principles—.

67 VV.AA; COORDINATED BY OLAF'S UNIT D2-FRAUD PREVENTION. "Identifying conflicts of interests in public procurement procedures for structural actions: A practical guide for managers", November 2013, p. 25.

68 VV.AA; COORDINATED BY OLAF'S UNIT D2-FRAUD PREVENTION. Op. cit., p. 27.

69 VV.AA; COORDINATED BY OLAF'S UNIT D2-FRAUD PREVENTION. Op. cit., p. 28.

The basic principle is that no modifications can be made to contracts. There are two exceptions to this general rule. First, where such an eventuality is provided for in the tender documents[70]. In this event the only limitation are the provisions that regulate the specifications; it is understood that any modification of the contract not provided for in the tender notice or in tender documents is a violation of the principles of equality and transparency[71], except where, although no provision for modification is set out in the tender documentation, no change is made to the "essential conditions of the notice"[72]—, which is the second exception to the general rule—.

The theory on whether or not a modification is substantial has been broadened and refined through case law, indicating that the possible scenarios are not a *numerus clausus*. However, after studying the most relevant case law to date it can be concluded that a modification to contract conditions is substantial if it gives rise to any of the scenarios described in the following table.

70 "Should the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out"-Paragraph 118, *Succhi di frutta*-.

71 With respect to the principle of equality: "(...) observance of the principle of equal treatment of tenderers requires that all the tenders must comply with prescriptive requirements so as to ensure objective comparison of the tenders (...). In addition, it has been held that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders" -*Succhi di frutta,* paragraph 17-. And, inter alia: ECJ Judgments: Commission v Belgium, paragraph 54; C-243/89 of 22 June 1993, Commission v Denmark, paragraph 37; C-87/94 of 25 April 1996, Commission v Belgium, paragraph 70; EGC Judgment T-540/10, Commission v Spain, paragraphs 43 to 45, and expressed in identical terms in ECG Judgment T- 35/11.

This principle "(...) constitutes the basis of the Directives on procedures for the award of public contracts [and] implies an obligation of transparency in order to enable verification that it has been complied with" -paragraph 46, Judgment of the General Court of 31 January 2013, Case T 235/11, issued specifically in regard to procurement with European funds, more specifically the Cohesion Fund, wherein a decision is taken to withdraw assistance due to contract modifications "AVE Case"-. And, inter alia: ECJ judgment of 18 November 1999 in C-275/98, Unitron Scandinavia and 3-S, paragraph 31; Universale-Bau of 12 December 2002, paragraph 91; C-251/09 of 17 February 2011, Commission v Cypress, paragraph 38.

As regards the corollary principle of transparency, its basic aim is to eliminate the risk of favouritism or arbitrariness by the award authority -Succhi di Frutta, paragraph 111-. In addition, inter alia: EGC Judgments T-235/11, paragraph 48, T-540/10, section 45.

72 This indeterminate legal concept of the "essential conditions of the notice" was introduced for the first time as a fundamental limit by the leading case cited above, and was further refined in subsequent case law. Of particular note is the Pressetext Case.

The doctrine also applies to contracts subject to Directive 2004/17/EC and to concessions. This is made clear in the Judgment of the General Court of 31 January 2013 -Case T-235/11, Commission v the Kingdom of Spain- and in the Judgment of the Court of Justice of 13 April 2010 -Case C-91/08, Wall AG-, respectively.

CASE LAW PERTAINING TO SUBSTANTIAL MODIFICATIONS

A MODIFICATION IS SUBSTANTIAL IF IT...	OBSERVATIONS
1. INTRODUCES CONDITIONS WHICH, HAD THEY APPLIED DURING THE TENDER PROCEDURE, WOULD HAVE PERMITTED OTHER TENDERERS TO PARTICIPATE QUANTITATIVE OR QUALITATIVE	As mentioned above, the ECJ has ruled that this applies even to concession contracts which are not subject to the procedures set out in Directive 2004/18 — paragraph 38 ECJ Judgment of 13 April 2010 *Wall AG Case* C-91/08—: "An amendment to a service concession contract during its currency may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted".
2. INTRODUCES CONDITIONS WHICH, HAD THEY APPLIED DURING THE TENDER PROCEDURE, WOULD HAVE PERMITTED SELECTION OF A TENDER OTHER THAN THAT ORIGINALLY ACCEPTED	See, by analogy, *Pressetext,* paragraph 35; T-540/10, paragraph 63 and T-235/11, paragraph 70
3. INTRODUCES CONDITIONS WHICH, HAD THEY APPLIED DURING THE TENDER PROCEDURE, WOULD HAVE PERMITTED TENDERERS TO SUBMIT A SUBSTANTIALLY DIFFERENT TENDER	*Succhi di Fruta,* paragraph 116. Note that this scenario is not the same as the previous one, though the two are often used as if they were identical. The distinction between the two scenarios is not a matter of indifference. The first revolves around "selection", whether this means that the tender selected would have been different, or that tenders not ultimately selected would have been. In contrast, the second scenario does not require a tender to have been selected, or that it would have been selected.
4. INTRODUCES CONDITIONS WHICH, HAD THEY APPLIED DURING THE TENDER PROCEDURE, WOULD HAVE PERMITTED THE CONTRACT TO BE AWARDED TO A TENDERER OTHER THAN THE ONE IT WAS ULTIMATELY AWARDED TO	A number of issues should be noted in regard to this. First, we decided to include this scenario due to its extreme importance, even though it is not deduced from the letter of any of the judgments cited. It is, however, stated explicitly by Ms Kokott in the opinions expressed on 13 March 2008 —Pressetext Case—: "there must always be a presumption that there has been a material contractual amendment where other service providers might have been deterred from applying for the public contract by the original less favourable terms, or might now in the light of the new contractual terms be interested in applying for the public contract; or where an application by a tenderer who was unsuccessful at that time might be successful under the new contractual terms" —paragraph 49—. Secondly, —although we consider it to be essential—, Article 72(4) of Directive 2014/24 does not provide for it, although the draft Directive did explicitly do so. This elimination was made by the European Parliament during the parliamentary process, but no explanation was given. The above notwithstanding, we believe that this scenario must under no circumstances be omitted from the general principle that no substantial modification may be made to the terms of a contract.

CASE LAW PERTAINING TO SUBSTANTIAL MODIFICATIONS	
A MODIFICATION IS SUBSTANTIAL IF IT...	**OBSERVATIONS**
5. THE MODIFICATION AUTHORISES AWARD OF A CONTRACT TO A TENDERER OTHER THAN THAT INITIALLY ACCEPTED	This is affirmed in note xii (b) of the 2013 Decision being studied. The case law cited does not contain any explicit reference to this scenario. From the literal wording, we may deduce that the scenario entails a change in the selection criteria made by the contracting body which allows a tenderer who has not passed the selection process to pass it and, ultimately, be awarded the contract. [It is expressed in identical terms in the English and French versions, respectively: *"elle permet l'attribution d'un marché à un soumissionnaire autre que celui initialement retenu"* and *"the modification allows award of a tender to a tenderer other than the one initially accepted"*].
6. IT EXTENDS THE SCOPE OF THE CONTRACT TO INCLUDE WORKS, SERVICES OR SUPPLIES NOT INITIALLY PROVIDED FOR	*Pressetext* Case —paragraph 36—
7. IT CHANGES THE ECONOMIC BALANCE OF THE CONTRACT WITHOUT THIS HAVING BEEN INITIALLY PROVIDED FOR	"An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract"—paragraph 37 *Pressetext* — and verbatim in: EGC Judgment T-235/11 —paragraph 70— and 540/10 —paragraph 63—, both from 31 January 2013 Commission v Kingdom of Spain. It should be noted that in formulating this scenario we have deviated from the opinion stated in *Pressetext,* In particular, that a modification can be construed as substantial only if it shifts the economic balance of the contract in favour of the contractor. Although in such scenarios it is more apparent that competition has been altered, we must not forget the basic starting point of *Succhi di Frutta,* wherein it is made clear, as described above, that a substantial modification is any change which, had it been present in the initial contract notice, would have enabled tenderers to submit a substantially different tender. Thus, a shift in the contract's economic balance should be considered a substantial modification since, following this same logic, had it been provided for initially the successful tenderer might have been able to submit a different tender. The same is true in regard to changes in price. The case law referenced by the 2013 Decision being studied fully supports our position.
8. IT CHANGES THE PRICE	*Succhi di Frutta*: paragraphs 117 and 121; *Pressetext:* 59 and 60.

CASE LAW PERTAINING TO SUBSTANTIAL MODIFICATIONS	
A MODIFICATION IS SUBSTANTIAL IF IT...	**OBSERVATIONS**
9. IT SHOWS A DESIRE TO RENEGOTIATE THE CONTRACT'S ESSENTIAL TERMS	Case C-91/08, Wall AG —paragraph 43—.
10. IT ENTAILS A SUBJECTIVE NOVATION	*Pressetext* —paragraph 40—: "As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting". The same is true in regard to transfer of the contract—paragraph 47—: "If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract within the meaning of Directive 92/50". And, in the *Wall AG Case*—paragraph 39 —: "A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain".
11. IT ENTAILS AN EXTENSION TO A CONTRACT	Even for concession contracts; see: ECJ Judgment of 13 September 2007, Commission v Italy C- 260/04, paragraphs 35 and following.

As described above, this translates into a general rule precluding any modification not initially provided for in a clear, precise and unequivocal manner[73].

Conversely, the following have been held not to be substantial: a) An arrangement whereby performance of the contract is transferred to a limited liability company, the sole shareholder of which is the initial service provider, which controls the new service provider and gives it instructions and continues to assume responsibility for compliance with the contractual obligations — this is considered to constitute an internal reorganisation of the contractual partner—; b) changes in shareholders in companies listed on a stock exchange and in unlisted companies. Any changes in the composition of the shareholders in such companies, provided that —in both cases— the operation is not carried out in order to circumvent Community rules governing public contracts[74]; c) certain adjustments of the agreement to accommodate "changed external circumstances" such as the conversion of the initial currency to euros, where this does not change the intrinsic amount of the contract's prices[75]; or d) extension of a clause under which the parties agree not to terminate the contract for a specific time period[76].

Furthermore, it should be noted that case law has also taken a very restrictive view in regard to contract price. Until relatively recently, some of the few modifications deemed not to be substantial were reduction of the contract price by 1.47% and by 2.94%[77]. The Court of Justice has ruled that financial corrections should be made for modifications of the initial price of less than 2%[78].

A negative reading of the scant cases in which modifications are not considered substantial confirms what the Acoset Judgment of 15 October 2009 stresses again at a later date —C-196/08, paragraph 62—, and the truth is that practically any modification not provided for in the contract results in an obligation for re-award thereof.

In this regard, in its description of the irregularity in question the Commission reminds us that the essential elements in the award of a contract are not limited to price modifications. They also include: the nature of the contract's subject matter, terms of payment, the materials used and even the implementation period[79].

When a contract modification is identified, under the terms of the relevant case law, the rate of correction to be applied is 25% of the amount of the contract, plus the entire value of the additional amount of the contract. If the modification reduces the scope of the contract [23], the correction is the value of the reduction plus 25% of the final value.

The last two irregularities [24] and [25] require clarification. Both are undue actions arising specifically from "additional" and/or "supplementary" works/services/supplies.

The distinction between the two is confusing and they seem to be alluding to a single scenario. Irregularity no. 24 is particularly confusing in itself. To draw a conclusion as to which cases it encompasses, extensive analysis must be made of case law and the underlying provisions. Furthermore, this analysis must differentiate these cases from those of the preceding irregularity.

73 ECJ Judgment of 13 April 2010, Wall AG Case; and ECJ Judgment of 22 April 2010, C-423/07, Commission v Spain for breach of the adversing and information obligations in procedures for the award of public works contracts.

In any event, in addition to deriving from case law this general rule requiring initial provisions to be clearly, precisely and unequivocally set out also derives directly from the principle of transparency, which requires that: "(...) all the conditions on detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract" -*Succhi di Frutta,* paragraph 111; T-235/11, paragraph 48 and T-540/10, paragraph 45.

74 For scenarios a) and b), see.: Pressetext, paragraphs 39 to 54.

75 Amongst other points, *Pressetext* explored whether conversion of the contract price to euros following the changeover to the euro constituted a material amendment (substantial modification), which would give rise to a new award of the contract. As described above, the Court proceeds on the premise that the price is always an important condition, and any change thereto would thus normally constitute a material amendment. However, where conversion -is carried out in accordance with the existing rules-, it does not constitute a change in the contract's prices, as they remain intrinsically the same: "Where, following the changeover to the euro, an existing contract is changed in the sense that the prices initially expressed in national currency are converted into euros, it is not a material contractual amendment but only an adjustment of the contract to accommodate changed external circumstances, provided that the amounts in euros are rounded off in accordance with the provisions in force" -paragraph 57-.

With respect to this issue, we must be extremely careful not to extrapolate the ruling to include modifications stemming from the need to adjust services to meet technical, urban, safety and other specifications, as the Court of Justice has been very restrictive in regard to this possibility. One example of this is the Judgment of the General Court in T-540/10, which held that an amendment to a contract stemming from the approval of a General Urban Development Plan was improper. (See: footnote 34 in the Chapter on Catalonia).

76 This statement should also be qualified. The contract studied by the ECB was for an indefinite period of time. The Court thus proceeded on the initial basis that it was "in itself at odds with the scheme and purpose of the Community rules governing public contracts" -*Pressetext,* paragraph 73-. Although based on various arguments the ECJ held that the inclusion of a waiver of the right to terminate the contract for a period of three years did not constitute a new award of the contract, it should not be forgotten that this ruling was issued in regard to service contract with an indefinite period which is, per se, at odds with the system.

Furthermore, it should be noted that some authors believe certain increases in rebate rates to be immaterial given that, as pointed out in *Pressetext* -paragraph 83-, they have an economic effect comparable to a price reduction. In our opinion this general conclusion cannot be drawn, as the reason the ECJ decided to consider the increase immaterial was that it was provided for in the clauses of the basic agreement -paragraph 84- and thus did not violate the principles of advertising and competition and, moreover, the change did not shift the economic balance of the contract -85-. The same is true in regard to changes in the CPI -paragraph 64-.

77 See: *Pressetext*, sections 61-62. It should be noted that the Pressetext Case discusses changes in specific prices for various different reasons; these paragraphs deal with a change that does not stem from the changeover to the euro -changed external circumstances-. Rather, it simply results from agreement between the parties. The Court takes the view that this modification is not substantial due to its low value and, "additionally" because it is not intended to benefit the contractor. See, also, note no. xiv in the 2013 Decision issued by the Commission.

78 An example of this are EGC Judgments T 235/11 and T540/10. Although these judgments were set aside on appeal by the ECJ -Commission v Spain in both cases: ECJ Judgment in C 197/13 of 4 September 2014, which annuls the EGC Judgment in T540/10; and, with the same date, Case C 192/13, which annuls the EGC Judgment in T 235/11-, the interpretation in regard to the correction stands unchanged, as the cases were set aside not for issues of substance but for prescriptive reasons-.

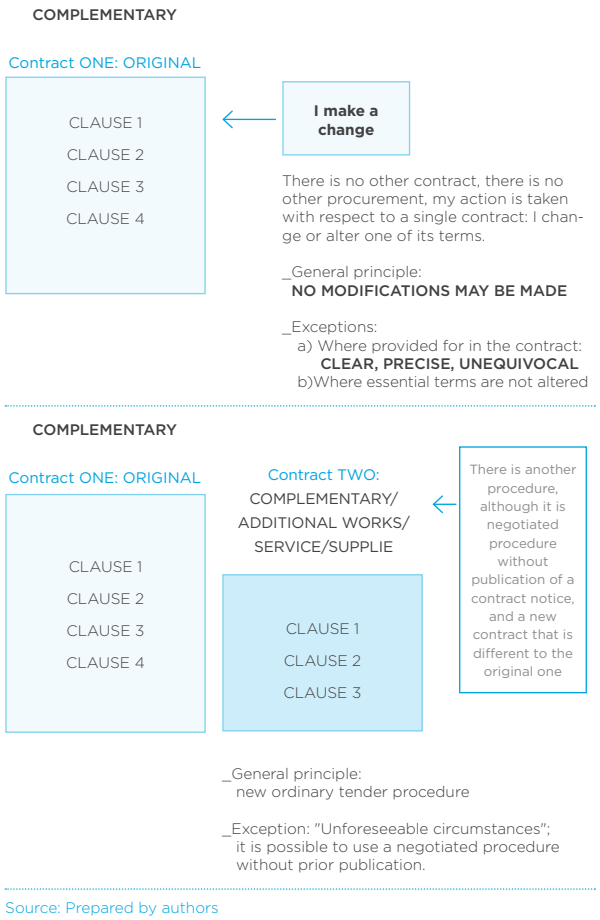
79 See the description of irregularity no. 22 on p. 20 of the 2013 Decision.

As described above, and as we have seen, Directive 2004/18 does not specifically regulate modifications to contracts. The scheme has been deduced through a joint analysis of the basic principles in the area of procurement —equality, non-discrimination and transparency—, and from Article 31. The provisions of this Article do not, strictly speaking, regulate modifications, but they do in practice allow for, on an exceptional basis, addition to and supplementing of —in short, broadening— a contract by a negotiated procedure without prior publication of a contract notice.

The first problem is, as both the European Commission and the Court of Justice have acknowledged, that the line that separates contract modifications in the strict sense of the term from contracts for "additional works", i.e. supplementary contracts —31(4)— is often blurred. This is particularly true due to the fact that on a domestic level many Member States consider changes to the subject matter of the contract to be contract modifications rather than supplementary contracts, which has fostered systematic breach of the principles governing public procurement.

The distinction made at the European level, which has been called into question, understands a "modification" as a change or alteration to one of more of a contract's terms, and therefore in cases where such modification is permitted there is neither a new tender procedure nor a new contract. In contrast, supplementary contracts are viewed as a new contract which broadens, adds to or supplements the original contract —it does not amend it— and enable it to be performed as "described therein".

The main scenario justifying the award of an additional works or services contract by a negotiated procedure without prior publication is where due to an "unforeseen circumstance" it becomes necessary in order for the performance of the works or services as described in the original contract. Additionally: a) when the additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities; or b) when they can be separated from the performance of the original contract but are strictly necessary for its completion[80].



Source: Prepared by authors

80 These provisions expressly state that the contract must be awarded to the economic operator performing the original contract, and limit the aggregate value of supplementary contracts to 50% of the amount of the original contract; -Article 31(4)(a) of Directive 2004/18-.

Nonetheless, the result of making a modification to a contract that is not permitted or of awarding a supplementary contract without prior publication without meeting the criteria laid down in Article 31(4)(a) is the same: the act shall be considered to constitute a new, unlawful award.

With respect to supplementary contracts —considered in isolation—, as regulated by existing legislation they do not pose any major problems. Case law has given satisfactory clarification of the indeterminate concept of the "unforeseen circumstance"[81] —it's another issue entirely whether or not it is in line with the restrictive view taken—. The same cannot, however, be said for modified contracts, as the regulatory vacuum is accompanied by a dearth of case law on an unresolved issue: Would modification of an essential term of a contract be permissible if justified by an unforeseen circumstance?

This dearth of case law is largely due to the radical theoretical and conceptual division described above —supplementary contracts as opposed to modified contracts— which has led debate on the procedure for award of supplementary contracts by negotiated procedure without publication to revolve solely around the existence of an "unforeseen circumstance" —qualifying event—, while the debate on modifications has revolved around the distinction between substantial and not substantial—, i.e. modification of essential terms—. In other words, the notion of foreseeability was not developed in parallel to the need for a substantial modification. Cause —the reason— was irrelevant when assessing the legality of a modification; this was only associated with supplementary contracts[82].

It is sufficient to note here that this problem is largely resolved by Article 72 of the new Directive 2014/24/EU, as we will describe below.

Furthermore, some observations should be made as to Article 31(1) of Directive 2004/18/EC —public works contracts, public supply contracts and public service contracts—. This paragraph does not seem to preclude either contract modifications or supplementary contracts. In actuality, this legal basis permits the same contractor to be awarded a new contract without a requirement for publication in three circumstances: a) when no tenders or suitable tenders or applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered; b) When for technical contract may be awarded only to a particular economic operator; c) "Insofar as is strictly necessary when for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with (...). The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority"[83].

The first paragraph poses no difficulties for our purpose, but the possibilities set out in b) and c) would effectively permit the conclusion of contracts that could be called "accessories" to another previously awarded contract, which could conceal modifications to contracts as well as supplementary contracts.

That being said, we will now proceed to explore what exactly constitutes irregularities [24] and [25].

81 Member States, however, habitually misuse and misinterpret the notion of 'foreseeability', and unforeseen circumstances continue to be the cause of many corrections. In the 2013 Decision, the Commission re-emphasises that the concept "should be interpreted having regard to what a diligent contracting authority should have foreseen". It also provides examples of what might constitute an unforeseen circumstance: "new requirements resulting from the adoption of new EU or national legislation or technical conditions, which could not have been foreseen despite technical investigations underlying the design, and carried outaccording to the state of the art" —note xvi—. It further specifies that additional works/services/supplies caused by insufficient preparation of the tender/project cannot be considered "unforeseen circumstances".

82 Some authors believe otherwise, arguing that causation is associated with modifications in *Succhi di Frutta* and in *Pressetext*, but we do not support this view. In both cases the issue could have been settled, but the truth is that it was not. In the former case, amongst other arguments the Commission claimed that the change in method of payment -peaches instead of apples and oranges- was due to an "unforeseen circumstance" -the fact that apples and oranges were not available in the intervention stocks to be used as payment-. The lack of sufficient apples was not demonstrated and from the administrative dossier it can be deduced that before awarding the contract the Commission had considered the possibility of payment with peaches rather than with apples and oranges. What's more, both the Court of First Instance and the Court of Appeal held that even if the lack of availability had been proven, it "it was for the Commission to lay down, in the notice of invitation to tender, the precise conditions for any substitution of other fruit for that prescribed as payment for the supplies at issue, in order to comply with the principles of transparency and equal treatment. Failing that, it was for the Commission to initiate a new tendering procedure"-paragraph 7 (80), confirmed by paragraph 131-.

The Court did not clarify whether, in the event that it were true that the apples were unavailable, this would be equally irrelevant on the grounds that it did not constitute an unforeseen circumstance or, rather, on the grounds that even in the face of a circumstance that could not be foreseen any modification to the essential terms of the contract would necessitate a new award thereof.

A similar approach was taken in Pressetext. This case was the ideal forum to address the issue of substantial modifications due to actual unforeseen circumstances such as the changeover to the euro. However, there was no real need to explore the issue in said case as there was no substantial change. At times the intrinsic price of the contract remained unchanged, and at others the change was minimal.

83 Of the three possibilities, c) is the one whose interpretation has aroused the most contention, as contains numerous indeterminate legal concepts.

Scenario b) should pose few difficulties in principle: it permits award of a contract to a specific economic operator without prior publication for technical or artistic reasons or to protect exclusive rights. There is no requirement for an unforeseeable circumstance, and the very subject matter of the provision makes it absurd to question whether the essential term limit applies. Nevertheless, we should not discard cases where this limit has been applied arbitrarily, giving rise to financial corrections. One example is the 100% correction imposed by the Commission on ERDF-financed expenditure by Spain. The General Court dismissed Spain's appeal, ruling that the technical specifications of a contract for a pilot project that supplemented the original contract did not legitimise use of the negotiated procedure without publication of a tender notice. It also held that neither could its purpose be considered purely research, experiment, study or development-oriented, as the contract was for installation of defined computer and non-computer equipment that was described in great detail by the Spanish authorities and was already present on the market. This installation was thus something an average provider in that sector would have been capable of doing -EGC Judgment of 15 January 2013, Case T-54/11.

With respect to the first [24]:

> Award of additional works/services/supplies contracts(if such award constitutes a substantial modification of the original terms of the contract) without competition in the absence of one of the following conditions:
>
> - extreme urgency brought about by unforeseeable events;
> - an unforeseen circumstance for complementary works, services, supplies[84].

The essential point is that the contracting authority has awarded a contract for "additional" works, services or supplies by a negotiated procedure without prior publication, without meeting the conditions that would permit it to do so. Secondly, in this case the percentage represented by this contract with respect to any others that the same contractor may be implementing is irrelevant[85]. The key factor is that the contract has been awarded without publication in the absence of the conditions that permit this to be done.

That being said, if read literally this ill-considered —due to its poor wording— irregularity says:

It is possible for contracts to be awarded directly for "additional" works, services or supplies where this is due to: a) extreme urgency brought about by unforeseeable events; or b) an unforeseen circumstance, provided that the "additional" works, services or supplies —a) and b)— do not constitute a modification of the essential terms of the contract (...).

Bearing in mind that the legal basis of this irregularity are Articles 31(1)(c) and 31(4)(a) of Directive 2004/18/EC, as stipulated in the Decision itself, and in the light of the analysis of contract modifications and of these provisions provided above, we believe it is ill-considered to mix the notion of whether the "essential terms" are affected with "supplementary" contracts and with the concept of "foreseeability" in the absence of any clear support from case law, as this promotes confusion between modifications to contracts and supplementary contracts[86].

Consequently, while Directive 2004/18/EC remains in force[87] this irregularity should be construed as follows:

The following are irregularities during the contract implementation stage: a) award of works contracts, service contracts and supply contracts by negotiated procedure without prior publication as set out in Article 31(1)(c), where there is no extreme urgency due to unforeseeable events and said contract is awarded to an economic operator as an additional, complementary or accessory contract to the main contract being implemented by said operator[88] ; b) the award of a contract for complementary works, services and supplies[89] as set out in Article 31(4), in the absence of an unforeseen circumstance.

The correction for the irregularity is 100% of the value of the "supplementary" and/or additional contracts. Although this irregularity occurs irrespective of the percentage represented by the additional works/services/supplies with respect to the original contract, the rate of correction can be reduced to 25% "where the total of additional works/services/supplies contracts (whether or not formalised in writing) awarded without complying with the provisions of the Directives does not exceed the thresholds of the Directives and 50% of the value of the original contract"[90].

84 The literal wording is the same in French and Spanish.

85 It can be deduced that this percentage is irrelevant by comparing this irregularity to the following one [no. 25].

86 It would seem that the 2013 Decision aims to provide an answer to a question that had remained unresolved: yes, it is possible to modify the essential terms of a contract "without competition", at least when this results from extreme urgency due to unforeseeable events. Moreover, this can be done based on the provisions laid down in Article 31(1)(c). The problem is that the Decision refers to such a situation as an "additional contract". This denomination is considered inappropriate as it creates even more confusion with respect to the difference between the supplementary contracts referred to in paragraph 4 and the contract modifications described in case law.

Furthermore, it should be noted that the 2013 Decision only considers a supplementary contract awarded without competition in the face of an unforeseen circumstance to be irregular when there is a substantial modification of the original terms of the contract. In other words, even if there is no unforeseen circumstance the modification is not considered an irregularity if the essential terms of the original contract are not affected. A positive rewording of this formula implies that: a) All supplementary contracts can be awarded by negotiated procedure without publicity provided that the essential conditions of the original contract are not altered; and b) Supplementary contracts that affect the essential terms of the original contract can be awarded by negotiated procedure in the face of an unforeseeable circumstance. Furthermore, although the legal basis invoked is Article 31(4) -works and services-, the Decision also includes supplementary supply contracts, for which there is no requirement for an unforeseen circumstance in the Directive.

Although, as we will see, the Decision to some degree foreshadows Directive 2014/24 on this point, it should not be forgotten that the Court of Justice has repeated ad nauseam that the requirements set out in Article 31 must be interpreted restrictively as they entail award of a contract by negotiated procedure without prior publication and are therefore an exception to the general rule. The intent of this is to stress that the premise of paragraph 4 on supplementary works and service contracts is not that this lack of foreseeability is required when the supplementary contract will modify the essential terms, but rather that the conditions must be met in order to legally award the contract without competition. What's more, if we follow the European logic, a supplementary contract per se modifies the essential terms. Remember that the Court of Justice has made it clear that broadening a contract to include works, services or supplies not initially provided for does not constitute a modification or amendment to the contract as many Member States would understand it to be. Rather, it is a modification to the essential terms of the contract, comprising a supplementary contract. As we have seen, whether or not one agrees with this regulation, the fact is that it does exist in the form of a legal provision, unlike contract modifications, which have been explored in the relevant case law. Supplementary supply contracts are another question; these are regulated by paragraph 2(b) of the same Article.

87 See: section 3.4.3.1 of this Chapter, which explains how Directive 2014/24 puts an end to the contrived distinction between supplementary contracts and modifications.

88 If the contractor is not the same or there is no supplementary, additional or accessory relationship between the two contracts, this would simply be a direct award of a contract rather than an irregularity relating to contract implementation.

89 As described in footnote 113 above, the Decision also includes supplies although complementary supply contracts are not regulated by Article 31(4)(a)-which is the only legal basis referred to-, but by Article 31(2)(b). Furthermore, in this scenario the Directive does not require an unforeseen circumstance.

90 2013 Decision, p. 21.

And, finally, we come to the last irregularity on the list [25]: "Additional works or services exceeding the limit laid down in the relevant provisions" [25] In contrast to the preceding irregularity, in this case the only reference is to "supplementary contracts" —no mention is made of "additional contracts"— and to works and services —supplies are not mentioned—. Furthermore, it does not apply to contracts governed by Directive 2004/17 as it lacks an equivalent legal basis. The difference between this irregularity and the preceding one is that the contract meets the conditions set out in Article 31(4)(a), and could thus be awarded by negotiated procedure without publication, however the permitted limit has been exceeded (50% of the amount of the original contract)[91].

In such scenarios the correction is 100% of the amount exceeding 50% of the value of the original contract.

3.4.3.1. Analysis of the impact of the new contract modification scheme following Directive 2014/24/EU

Now that we have outlined the way in which irregularities involving contract implementation should be construed —under applicable legislation and case law—, we must not overlook the fact that Directive 2014/24/EU specifically regulates modified contracts in their various forms for the first time ever.

In principle, the aim of the Directive is to set out the parameters and principles found throughout European doctrine and case law in a clear and systematic fashion[92]. A priori, therefore, the specific make-up of modifications should remain unchanged. The above notwithstanding, the Community legislator has also expressed a belief that certain modifications should be possible at any time without requiring a new procurement procedure[93]. In our view, the recitals show a laxer attitude than that taken later on in Article 72.

The legal certainty provided by the positivisation of this issue should put an end to problems associated with interpretation and application, and this should in turn reduce the number of irregularities involving modifications. The introduction of this provision is therefore a welcome change. Nevertheless, even at this early stage we can assert that despite these good intentions the provision is neither clear nor does it reflect the relevant case law[94].

As a general rule, modification of contracts is still prohibited except under specific circumstances[95]. These exceptional circumstances are set out in the first and second paragraphs. Thus, any modifications not found in these paragraphs would require a new tender procedure.

The six exceptional circumstances in which a contract can be modified without requiring a new procedure are outlined below, subject to the limits and requirements we will describe later on: Where provided for in the procurement documents —Article 72(1)(a), (d)(i) and (iii)—; for additional works, services or supplies —Article 72(1)(b)—; circumstances that could not be foreseen —Article 72(1)(c)—; subjective modifications —Article 72(1)(d)(ii)—; modifications that are not substantial —Article 72(1)(e)—; and where certain economic thresholds are not exceeded —Article 72(2)—.

Before we go on to analyse each of these scenarios in detail, some overall observations should be made.

These provisions allow modifications to be analysed form various perspectives, with a view to how substantial each modification is: **a) substantial modifications and b) modifications that are not substantial;** but also having regard to the limits laid down to enable specific exceptions to the general rule: the quantitative limit; no alteration of the essential terms; and the overall nature of the contract.

The "overall nature of the contract" is a limit on modifications introduced ex novo, and its meaning has not been expressly defined. We are given only a few specific examples of modifications which would alter the overall nature[96]. Thus, it is crucial for Community authorities to issue an interpretation on this new indeterminate legal concept, especially in order that it can be differentiated from the concept of "modification of the essential terms".

91 Final text of Article 31(4)(a): "However, the aggregate value of contracts awarded for additional works or services may not exceed 50% of the amount of the original contract".

92 This is seen in recital 107 of the Directive, when it affirms that: "It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union".

93 Recital 107 states that: "Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure". Recital 109 on modifications due to unforeseen circumstances, states that: "(...) a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure".

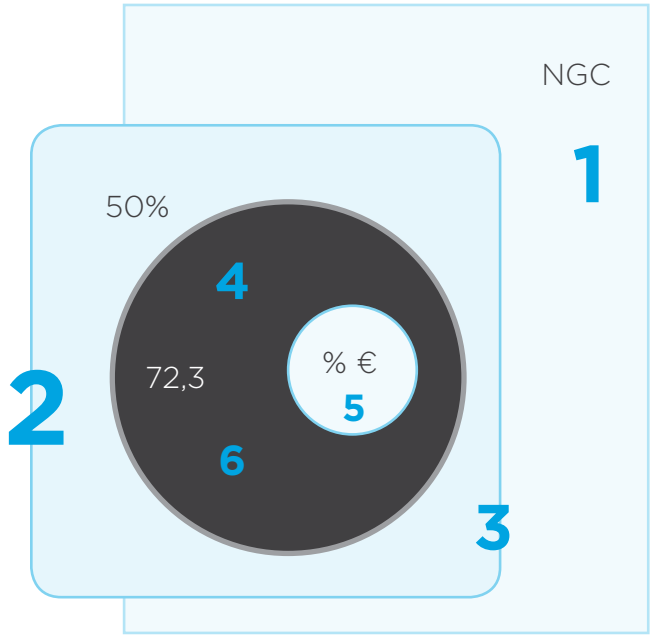
94 All of the authorities interviewed agreed that the provision is unclear. Not all of the authorities interviewed agreed that the new regulation is more permissive or that it differs from what the Court of Justice has said; their views diverge. Differences in regard to possible interpretations were also evident in the Workshop held within the scope of this project on 12 December 2014. In our opinion, as we will argue below, this regulation is more permissive, unless we make a forced interpretation of certain points *in extremis*.

95 La poca claridad hace que no se pueda interpretar el precepto sin la perspectiva teleológica. A tal efecto, los considerandos son esenciales [107: "(...) Es obligatorio un nuevo procedimiento de contratación cuando se introducen en el contrato inicial cambios fundamentales, en particular referidos al ámbito de aplicación y al contenido de los derechos y obligaciones mutuos de las partes(...)] revelan que hay que realizar una lectura inversa del precepto, que el punto de partida es el apartado 5, donde se establece que: "será prescriptivo iniciar un nuevo procedimiento de contratación de conformidad con la presente Directiva para introducir en las disposiciones de un contrato público o un acuerdo marco, durante su período de vigencia, modificaciones distintas de las previstas en los apartados 1 y 2". De este último apartado se extrae la regla general.

96 Recital 109: "(...) where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed".

Based on these criteria as well as the relevant case law, the modification of contracts dealt with under Article 72 can be classified in the following manner:

LIMITATIONS ON POSSIBLE MODIFICATIONS					
			AFFECTS OVERALL NATURE	QUANTITATIVE	ART. 72(3)
AFFECTS THE CONTRACT'S ESSENTIAL TERMS	YES	1. Povided for in the initial procurement documents Article 72 (1)(a); (d)(i) and (ii)	X		
		2. Additional works / services / supplies. Article 72 (1)(b)		X	
		3. Unforeseable circumstances Article 72 (1)(c)	X	X	
	NO	4. Subjective modifications Article 72(1)(d)(ii)		X	X
		5. Below certain thresholds Article 72(2)			
		6. Modifications that are not substntial. Article 72 (1)(e)			X



Source: Prepared by authors

a) Modifications that affect the essential terms of the contract

1. Where provided for in the procurement documents -Article 72 (1)(D)(I) and (III)

The first exception to the general rule is where the possibility has been provided for in a clear, precise and unequivocal manner in the initial procurement documents. The Article specifically states that such initial provisions may include price review or option clauses[97], in which we should include replacement of the contractor —Article 72(1)(d)(i)—, as well as situations where the contracting authority itself assumes the main contractor's obligations towards its subcontractors —Article 72(1)(d)(iii)—.

The limitation laid down is a new feature: such modifications may not alter the overall nature of the contract[98]. Thus, on this point the Directive is more restrictive than the relevant case law to date.

2) Additional works, services or supplies; and

3) Modifications due to unforeseeable events

97 Recital 111 gives some examples of the types of modifications that can be provided for in the initial contract: "price indexations or ensure that, for example, communications equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should also be possible under sufficiently clear clauses to provide for adaptations of the contract which are rendered necessary by technical difficulties which have appeared during operation or maintenance. (...) also (...) could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service".

98 In this regard, recital 111 asserts that: "Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract".

General observations

One of the main problems before now was the lack of clarity in Community theories on how to differentiate modifications from supplementary contracts. According to the relevant case law, a substantial modification to a contract can only be made if the possibility is clearly, precisely and unequivocally provided for in the initial contract documents. Moreover, the debate regarding supplementary contracts revolved not around how substantial the modification was but around the "unforeseen circumstance". There was a regulatory vacuum as well as a dearth of case law on the issue of whether the essential terms of a contract could be modified if justified by an unforeseen circumstance.

The Directive introduces a radical change, providing a solution to both problems. First, it eliminates the distinction between contract modifications and supplementary works and service contracts —now, "additional works or services"—, and, secondly, it extends this to include supply contracts.

However, it should be noted that supplementary supply contracts are still dealt with separately —Article 32(3)(b)—. Thus, additional supplies or services may be added to supply contracts without requiring a new tender procedure with prior publication in two ways: through modification or a supplementary contract. It is considered necessary for European authorities to precisely define the difference between the two.

Thirdly, Article 31(4) of Directive 2004/18 sets out two different scenarios: modifications associated with additional works or services and contract modifications due to unforeseen circumstances.

Thus, we consider this separation between "additional works or services" and "unforeseen circumstances" to be very appropriate, as is the conceptual change from "supplementary contracts" to "modifications for additional works, services or supplies".

Additional works/services/supplies

Modification of a contract or framework agreement in order to add works, services or supplies is permitted even where this has not been provided for in the initial contract documents[99], provided that:

✓ they have become necessary [main requirement: necessity] and

✓ that a change of contractor [additional cumulative requirements]:

- cannot be made for economic or technical reasons —e.g. requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement—; and
- would cause significant inconvenience or substantial duplication of costs for the contracting authority.

✓ A notice of the modification must be published in the OJEU [mandatory requirement][100].

In this scenario, the limit laid down for the modification is that it may not exceed 50% of the amount of the original contract. Paradoxically, for subsequent modifications the limit is measured with respect to each modification, provided that the intent is not to circumvent the Directive[101].

Key issues of note

The term "supplementary contracts" is replaced by "additional works or services".

This terminology change has no impact on the constituent characteristics of the notion[102]; it simply adopts a term that does not create so much confusion with respect to national laws and is consistent with the new conceptualisation. The modification made is no longer an "accessory" to the original contract, but rather the alteration of a single contract that broadens its scope. The unforeseen circumstance requirement has been eliminated.

The main requirement now is that the modifications are "necessary". No specification is made as to what should be construed as "necessary", i.e. whether this is any additional need or only those required for implementation of the contract as described in the initial documents[103].

This applies to works and services as well as supplies.

99 Recital 108: "Contracting authorities may be faced with situations where additional works, supplies or services become necessary; in such cases a modification of the initial contract without a new procurement procedure may be justified, in particular where the additional deliveries are intended either as a partial replacements or as the extension of existing services, supplies or installations where a change of supplier would oblige the contracting authority to acquire material, works or services having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance".

100 Final paragraph of Article 72(1).

101 We believe this is not owing simply to a lack of clear wording, as in other scenarios such as those set out at the end of paragraph 2, it is clearly stated that: "Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications".

102 This seems to be supported by the wording of the Directives issued in the 1990s, which specifically employ the term "additional" in reference to this very scenario. Court of Justice case law has made no distinction between the "additional" contracts referred to in these Directives and the "supplementary" contracts referred to in Directive 2004/18/EC.

103 On two separate occasions, Article 31(4)(a) of Directive 2004/18/EC insists on this notion of the necessity of the supplementary contract for the purpose of completing the original contract: "become necessary for the performance of the works or services described therein" -point (a)-; "when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion"-second indent-.

The quantitative limits have been changed. 50% is measured with respect to each individual modification. In our opinion this could end up being a way to conceal splitting of contracts. The 50% limit should be for the aggregate of all of the modifications.

The limitation regarding alteration of the overall nature of the contract does not apply to this scenario.

Some authorities believe this is due to an oversight by the legislator, but the truth is that in the other scenarios set out involving substantial modifications this general limit is specified, even for modifications provided for in the initial contract documents. In contrast, no such specification is given either here or in the recitals. This point must be clarified.

The above notwithstanding, the provision itself stipulates that consecutive modifications "shall not be aimed at circumventing this Directive". We believe this final clause will permit the ECJ to make any necessary adjustments. However, it should be noted that this same clause closes the next scenario involving unforeseen circumstances —72(1)(c) and, as we will see, should not be taken to mean that the limitation in regard to alteration of the overall nature of the contract is implicit.

The lack of a requirement for unforeseen circumstances and the broadening of the quantitative limitation are clearly intended to make the parameters more flexible. The requirements for such modifications have been relaxed.

Unforeseeable circumstances -Article 72(1)(c)

For the first time ever, this scenario enables modifications to be made to contracts when circumstances that could not be foreseen have arisen. Three conditions —cumulative in nature— must be fulfilled in order for such modifications to be permissible:

- ✓ the need has been brought about by circumstances which a diligent contracting authority could not foresee[104]
- ✓ the overall nature of the contract is not altered
- ✓ the value of each individual modification (where several successive modifications are made) does not exceed 50% of the value of the original contract

As mentioned earlier on, in contrast to the previous scenario the general limitation regarding the overall nature of the contract does apply here. Although we must wait for the Community authorities to provide an interpretation of this limit, its inclusion in this scenario indicates that it is not directly related to the increase in price[105], as the provision permits modifications resulting in a change of up to 50% above the original value. Furthermore, this new limitation is applicable to each individual modification, not to all modifications as a whole. This 50% limit and the limitation in regard to altering the overall nature of the contract should be with respect to the aggregate value of all modifications.

It includes the same final clause as the previous scenario, and thus "consecutive modifications shall not be aimed at circumventing this Directive". This clause, as it does with modified contracts for additional works or services, permits the ECJ to issue any necessary qualifications.

b) Modifications that do not affect the essential terms of the contract

At first glance this provision could be interpreted as meaning that only the modifications set out in (1)(e) and defined in paragraph 4 constitute modifications that are not substantial. However, as we concluded in Section 3.4.3 above, the case law takes the view that the awarding authority and the price are essential terms of a contract, except in very specific and restrictive circumstances. In (1)(d) and (2) the legislator precisely defines when a subjective modification or a change in price are not considered substantial, i.e. the modification to the contract would be permissible without requiring a new award procedure. Whether the regulation is less stringent than the criteria laid down by the Court is another question.

4. Subjective modifications - Article 72 (1)(D)

This is the first time that subjective novation has been dealt with in the legislation. The general rule continues to be that the successful tenderer should not be replaced by another economic operator, as in most cases this would constitute a substantial modification —Article 72(4)(d)—. However, (1)(d) lays down three exceptional circumstances in which changes to the contractor or the contractor's obligations can be made:

104 The notion of "unforeseeable circumstances" is defined in recital 109, which summarises the relevant doctrine and case law in the following manner: "refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value".

105 Similarly, in regard to the end of 72(2), see our remarks on this provision.

i. that the succession is provided for in an unequivocal review clause or option in conformity with point (a)

ii. that it results from corporate restructuring, particularly merger, acquisition or insolvency, of another economic operator, provided that —cumulatively—:

- the operator fulfils the criteria for qualitative selection initially established
- this does not entail other substantial modifications to the contract
- this is not aimed at circumventing the application of this Directive

iii. in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71.

The first and the last scenarios are considered unnecessary; they are reiterations. The first permits modifications where they have been provided for in the initial contract documents[106]; the last details the possibility of the contracting authority paying subcontractors directly where the main contractor has defaulted on payments, either at the request of the subcontractor—Article 71(3)— or where required by law —Article 71(7)—. The first scenario must be provided for in the initial contract documents and the second does not constitute a modification to the contract, since if direct payment of the subcontractor is required under the law, it is thus *ab initio*. Irrespective of this, it is clearly not counter to the principles of transparency, equality and non-discrimination for the contracting authority to take on certain obligations.

The second scenario (ii) is important as it defines the subjective modifications considered not to be substantial, which may thus be made without requiring a new procurement procedure.

Various authorities see these provisions as a positivisation of *Pressetext,* but the issue is open to doubt. Pressetext is extremely restrictive on this point. Remember that it considers this sort of subjective modification to be legitimate, thus constituting an "internal reorganisation of the contractual partner" and expressly states that if shares "were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract".

Until the Court of Justice issues a judgment we must have regard to the fact that in most legal systems an "internal reorganisation" —*Pressetext* Case— is not the same as "corporate restructuring" —the circumstance provided for by the Directive—[107]. Restructuring can be used for the purpose of corporate reorganisation without major consequences, but generally it also includes operations such as global assignment of assets and liabilities which can be used to transfer a company or as a tool to liquidate limited liability companies.

Qualifications must therefore be made in regard to this possibility. To this end, the cumulative requirements laid down in the second and third indents are essential. To interpret these we must look to the *Wall AG Case,* amongst others, in which the Court held that even where the possibility of a change of subcontractor was provided for in the contract specifications, such a change could be unlawful where a specific subcontractor had been a decisive factor in the award of the contract to the contractor ; and Case C-29/04 Commission/Austria, which examines a contrived subjective novation[109].

Finally, it should be noted that no changes found not to be substantial by the relevant case law are set out in the Directive, e.g. changes in shareholders or in the composition of shareholders in listed and unlisted companies. Although it would be logical to consider that if it is permissible to do more, it would be permissible to do less, and that 72(1)(e) would be applicable, the truth is that Article 72(4)(d) lays down this list as a *numerus clausus.*

5. When the value is below certain thresholds - Article 72 (2)

A modification is not considered substantial if its value is below the thresholds laid down in Article 4 of the Directive, and below 10% of the initial contract value for service and supply contracts and 15% for works contracts. Where several successive modifications are made, this value is measured as the cumulative value of all of the modifications. Irrespective of whether the percentage is below these limits, the modification is not permitted to alter the overall nature of the contract. In other words, even if a modification is below the limit laid down it can still alter the nature of the contract.

106 Note that the reference to (a) ensures that the limitation regarding non-alteration of the overall nature of the contract will apply.

107 It is true that the Directive's recitals -110- cite "purely internal reorganisations" as an example of structural change, but the instrument offers it as one example alongside takeovers, mergers and acquisitions, not as the only circumstance in which it is lawful to replace the contractor.

108 See: the Table on substantial modifications provided in Section 3.4.3 of this Chapter.

109 In this Judgment, the Court held that: "(39) It must be borne in mind that the transfer of 49% of the shares in AbfallgmbH took place shortly after that company was made responsible, exclusively and for an unlimited period, for the collection and treatment of the town of Mödling's waste. Furthermore, AbfallgmbH became operational only after Saubermacher AG took over some of its shares.(40) Thus, it is not disputed that, by means of an artificial construction comprising several distinct stages, namely the establishment of AbfallgmbH, the conclusion of the waste disposal contract with that company and the transfer of 49% of its shares to Saubermacher AG, a public service contract was awarded to a semi-public company 49% of the shares in which were held by a private undertaking. (41) Accordingly, the award of that contract must be examined taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order as suggested by the Austrian Government".

Requirements in this area have been made less stringent. As described above, in the past both the Court and the Commission have deemed modifications of 2% to be improper . Furthermore, the parameter was whether the modification altered the essential terms of the contract, not the overall nature of the contract[110].

6. Other modifications that are not substantial - Article 72 (1)(E)

This clause permits any modifications that are not substantial; it is no more than a legal restatement of the case law precedent which permitted insubstantial modifications.

It contains two new features. First, "not substantial" is defined in a negative sense, in opposition to "substantial" as set out in paragraph 4 of the same article. Secondly, such modifications are permitted "irrespective of their value".

The fact that they are permitted "irrespective of their value" is no cause for surprise. Despite the inappropriate location of this paragraph, in reality it is a closing clause that is necessary due to the impossibility of providing for a closed list of cases of all types. In the Article's other paragraphs the legislator sets out specific modifications that are not substantial *ex lege* —subjective modifications and modifications to value—, and thus the quantitative modification limit is laid down in a specific paragraph —72(2)—. The modifications that are not substantial referred to herein are any others that are not specifically regulated by another paragraph.

With respect to what should be construed as "not substantial", this is deduced by contrasting the qualifying condition with paragraph 4, which defines a "substantial modification" in a manner consistent with Court of Justice case law. However, this should be considered an open list and we must await further analysis in the relevant case law. We believe it cannot be considered exhaustive as it does not include all of the rulings from Court of Justice case law. In the absence of an interpretation to the contrary, we believe this would overly distort the precepts laid down by the Court. For instance, it would not be considered a substantial modification to include conditions which, had they been established in the initial tender procedure, would have permitted the participation of different tenderers[111]; or which express a willingness to renegotiate essential aspects of the contract; or would have permitted the contract to be awarded to a tenderer other than the one it was awarded to. However, it should be noted that this last scenario was set out in the draft Directive and, following issuance of a report from the Parliament, its elimination was agreed. It would be advisable for Community authorities to clarify whether this elimination should be interpreted as a specific desire to exclude this scenario from the concept of a substantial modification, for instance due to a belief that should it arise it would alter the overall nature of the contract.

It would also be advisable to clarify whether from now on a shift in the economic balance of the contract can only be considered substantial when it is in favour rather than to the detriment of the contractor.

Finally, it should be stressed that it is essential to define the concept of a substantial alteration in the overall nature of a contract as soon as possible.

The above notwithstanding, we must await an interpretation by the Commission or the Court of Justice for the purpose of discerning whether it will be possible to adapt the 2013 Decision in a manner consistent with the new will of the legislature. Nevertheless, in our opinion the changes introduced by the new fourth generation Directives are so pronounced that they render the Decision obsolete, regardless of its recent nature.

In any event, it is urgent for a specific approach to be established, particularly in regard to irregularities involving contract implementation, as this subject has been a bone of contention in the fight against irregularities in public procurement procedures, especially those involving the EU budget.

110 The Commission recently advised Member States such as Spain of this, urging them to begin to clarify their legislation to ensure that all modifications whose value exceeds 10% of the price of the contract will be considered substantial, although the mere fact that the change in price is below 10% should not automatically imply that the modification is not substantial. See: footnote 34 in the Chapter on Catalonia.

111 Note that the provision only alludes to quantitative participation and qualitative selection.

4. KEY ACTORS INVOLVED WITH EUROPEAN FUNDS

The key actors involved with European funds are divided into compulsory actors and non-compulsory actors. The former are specific national actors set out in European Regulations. The latter vary from Member State to Member State.

4.1. SPECIFIC ACTORS INVOLVED WITH THE ERDF IN MEMBER STATES

The institutional organisation is structured into a complicated network of administrative levels: national, regional and local, led by the services of the European Commission. Relations should be based on the partnership principle —Article 11 of Regulation 1083/2006—, which promotes cooperation between institutions, economic and social partners and an appropriate division of responsibilities.

The structure of the relevant compulsory authorities in management of the ERDF is set out in Article 59 of Regulation 1083/2006. These must be designated by each Member State for each of its operational programmes. These authorities are:

A Managing Authority. A national, regional or local public authority to manage the operational programme[112].

A Certifying Authority. A national, regional or local public authority or body to certify statements of expenditure and applications for payment before they are sent to the Commission[113].

Plays an essential role by ensuring appropriate financial management of the OP, verifying the compliance of statements of expenditure with Community legislation, submitting applications for payment to the European Commission and ensuring that they have been received.

An Audit Authority[114]. A national, regional or local public authority or body designated for each operational programme, responsible for verifying the effective functioning of the management and control system.

Control functions. This authority is responsible for ensuring the smooth functioning of all systems and verifying the compliance of the approved projects with regulatory requirements. It is the body that must inform the Managing Authority and Certifying Authority of any gaps found in the system and any irregularities identified in expenditure.

Non-compulsory authorities may also be involved. These are called:

Intermediate bodies[115]. Any public or private body or service which acts under the responsibility of a managing or certifying authority, or which carries out duties on behalf of such an authority vis-à-vis beneficiaries implementing operations[116]. The delegation of functions to these bodies may be done by agreement with the Managing Authority or through the Operational Programmes or National Strategic Reference Frameworks (NSRF)[117].

These intermediate bodies may, in turn, appoint other intermediate bodies. In addition, sometimes they are also the Beneficiaries of the aid.

To locate the various intermediate bodies it is necessary to consult each NSRF or Operational Programme and to enquire as to any agreements which have been signed.

Powers are delegated without prejudice to the financial responsibility of the Managing Authority and the Member States.

4.1.1. The role of these actors in regard to irregularities

The duty to investigate any possible irregularities in the use of funds falls on both Member States and the European Commission. Thus, it is necessary to implement an effective procedure that enables any individual or systemic irregularities detected to be corrected, in order to ensure the correct functioning of management, monitoring and control systems of the Operational Programmes.

Under Article 70(1) of Regulation 1083/2006, the Member State is responsible for preventing, detecting and correcting irregularities, as well as recovering any amounts unduly paid. Each of the bodies with competence and responsibility over control within the Member State shall be responsible for detecting irregularities in any co-financed operations, and adopting corrective measures. In such scenarios, when the Member State detects a breach of a specific Community or national law by one of the actors, it will make the required

112 Article 60, Regulation 1083/2006).

113 Article 61, Regulation 1083/2006).

114 Article 62, Regulation 1083/2006).

115 The legitimacy of these intermediate bodies is directly supported by the principle of subsidiarity that underlies the implementation of the ERDF. Under this principle, decisions must be made at the level nearest to the interested parties which, in turn, can actively involve themselves and collaborate on managing and implementing the grant.

116 Articles 2(6), 42 and 59(2) of Regulation 1083/2006.

117 Article 42 of Regulation 1083/2006.

corrections to the irregular amount by "cancelling all or part of the public contribution to the operational programme"[118] granted to the relevant Beneficiary by the Managing Authority.

In accordance with the verification procedure[119], the Managing Authority or relevant intermediate body must ensure the legality of operations before statement of expenditure or application for payment —*ex ante*—, through the operation verification procedure.

Specifically, verifications will cover administrative, financial, technical and physical aspects of operations[120]. These verifications shall ensure that the expenditure declared is real, that the products or services have been delivered in accordance with the approval decision, that the applications for reimbursement by the beneficiary are correct and that the operations and expenditure comply with Community and national rules. They shall include procedures to avoid double-financing of expenditure with other Community or national schemes and with other programming periods.

As described earlier on, the verifications that must be carried out generally include: a) administrative verifications in respect of each application for reimbursement by beneficiaries/implementers; b) on-the-spot verifications of individual operations, which can be done on a sample basis; c) where applicable, effectiveness and efficiency control checks on intermediate bodies for one segment of the Operational Programmes.

This verification/control is independent of the control procedures that must be performed by the Audit Authority once expenditure has been certified. The Managing Authority is responsible for establishing the rules and procedures for verifications, as well as for safe storage of the records for each of them, documenting the tasks performed, the date and the results of each, and the measures adopted to correct any irregularities detected[121].

Managing and certifying authorities, intermediate bodies and public bodies that are beneficiaries must provide descriptions of the systems for the current programming period[122]. This regulation must be renewed for the next programming period of 2014-2020.

The principle of proportionality applies to all bodies, in such a way that: "The extent and intensity of Community controls should be proportionate to the extent of the Community's contribution. Where a Member State is the main provider of the financing for a programme, it is appropriate that there should be an option for that Member State to organise certain elements of the control arrangements according to national rules. In these same circumstances, it is necessary to establish that the Commission differentiates the means by which Member States should fulfil the functions of certification of expenditures and of verification of the management and control system and to establish the conditions under which the Commission is entitled to limit its own audit and rely on the assurances provided by national bodies"[123].

118 Article 98.2 of Regulation 1083/2006.

119 As set out in Article 60(b) of Regulation 1083/2006 and Article 3(2) of Regulation 1828/2006.

120 In accordance with Article 13 of Regulation 1828/2006, cited above.

121 Article 13(3) of Regulation 1828/2006.

122 This is set out in Article 22 of Regulation 1828/2006.

123 Recital 68 of Regulation 1083/2006.

CONCLUSIONS AND RECOMMENDATIONS

1. A range of **external determining factors** —system failures— have been detected which foster irregularities committed by Member States: Stemming from the applicable legal framework and controls. This initial situation gives rise to systemic irregularities.

2. With respect to the applicable legal framework and guidelines.

2.1. The legal system applicable to procurement financed with European funds is utterly **variable, complex and incoherent.** The same problem exists, to varying degrees, in the regulations governing the organisation, competencies and duties of the actors involved and of controls, corrective measures and the consequences of infringement. Variability, lack of coherence and complexity gives rise to **confusion** in regard to specific **key concepts**. We have also been beset by large legislative **gaps** such as those in the regulations governing modification of contracts. All of this creates legal uncertainty.

Irregularities in public procurement increase directly in proportion to the instability of the rules, and legal uncertainty is inversely proportional to transparency

2.1.1. Different regulations are issued in each programming period. Each regulatory change requires a new interpretation to be made, as well as training of the actors involved, changes to procedural manuals and, depending on the magnitude of the reform, has the potential to affect the entire system. This creates legal uncertainty.

2.1.2. The public procurement and control system is extremely **complex.**

One of the aims of the fourth generation Directives is to simplify and clarify the law, but the conditions, procedures and rules are still different depending on whether the contracts are above or below the Community thresholds.

It is advisable to **harmonise and simplify the public procurement system** itself, enabling all procurement to be carried out with maximum guarantees of transparency, **without any pretexts based on subject or amount. The same harmonisation and simplification is needed for the law regulating oversight.**

2.1.3. There is no specific body of standards for public procurement involving European funds or for controls and their consequences. The requirements for public procurement with European funds are found scattered across different rules —including budgetary rules—. Notably, in the area of financial aid, European law is forced to draw on procurement regulations, as it lacks its own rules. Legal fragmentation has already occurred at the European level.

Guidance material is unmanageable —guides, guidelines instructions, reports, preliminary drafts—. This information overload often leads to misinformation.

Specific legislation for public procurement financed with European funds should be issued, covering the main areas with a bearing on the subject: procedure, compulsory actors, control mechanisms and the legal consequences of non-compliance. **Alternatively,** a rule, **instruction,** circular or official interpretative document should be adopted which **clearly and systematically sets out the applicable sector-specific regulations.**

2.1.4. The variability and incoherence of regulations and of guideline documents leads to **confusion** as to key **concepts** such as fraud, irregularity, infringement of provisions of Community law, the economic operator and the beneficiary.

2.1.4.1. Fraud should be understood as falling within the broader term "irregularity". Only then can it be understood that the fight to combat fraud against the EU's financial interests encompasses and must pursue any sort of irregularity that may threaten these interests.

2.1.4.2. The concept of **irregularity** insofar as it relates to EU funds should be understood as: "any infringement of a **provision** of **Community law** resulting from an act or omission by an **economic operator** which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget".

2.1.4.3. An **infringement of a provision** of **Community law** should also be understood as an infringement of domestic Member State law. Any infringement of domestic law is an infringement of EU law.

2.1.4.4. An **economic operator** should be understood as any body or entity that carries out management tasks for any programme funded with European funds, including public administrations.

2.1.4.5. The concept of the **Beneficiary** is particularly problematic for various reasons. In the previous programming period of 2000-2006, the beneficiary was the public body that granted assistance rather than the party that received grant, which was referred to as the: "final recipient of funding". "Eligible expenditure" was the grant paid by the Administration, not the expenditure of the implementer.

The definition changed under Regulation 1083/2006, but even so not one but two definitions are provided: a) The beneficiary is any entity responsible for initiating or both initiating and implementing operations; and b) The beneficiary is a "firm" carrying out "an individual project" and receiving public aid. This stems from the regulatory fragmentation of the lumping of grants and aid together under Article 107 TFUE. In addition, there is also the possibility that the beneficiary may be, in turn, the managing body or contracting authority, or that the beneficiary is not the contracting authority but rather a private person.

The diverse nature of the various definitions and views causes Member States to use the concept incorrectly in their operational programmes, guides and even in the checklists used by overseers during their audits. This conceptual and terminological disparity is in no event a matter of indifference, and can give rise to many irregularities. Regulations 1080/2006, 1086/2006 and 1828/2006 set out an extensive range of obligations for beneficiaries. This is particularly important in cases where responsibilities must be established in regard to the repayment of aid.

An assessment should be made of the possibility of harmonising the concept of the beneficiary or of issuing specific guidelines for Member States on each facet of this concept, particularly for cases where it overlaps with other figures such as the contracting authority or private contractor.

2.1.4.6. Irregularities relating to **public procurement** should **not be confused** with other types of irregularities such as the **eligibility** of expenditure or the rules on **advertising,** or with **financial** irregularities or irregularities relating to fund management **systems** themselves.

2.2. THE NEW DECISION ISSUED BY THE COMMISSION IN DECEMBER 2013

Contains a **list** of **irregularities** which have an i**mpact** on the **budget** of the **EU** resulting from non-compliance with European public procurement law governing contracts financed by funds under shared management. The 2013 Decision replaces and updates the previous 2007 Guidelines. The latter are still valid for certain situations.

2.2.1. Key new features identified

2.2.1.1. The 2013 Decision entails a **change** in the **legal status** with respect to the previous guidelines. Corrective criteria are now laid down in a true legal instrument, a legal act that is binding in its entirety (ex-Article 288 TFUE).

2.2.1.2. The level of corrections is clarified and systematised. New irregularities have been included and details have been given for others for which no details were given in previous documents.

2.2.1.3. The criteria to be used for **contracts subject to, not subject to and not fully subject to** the EC public procurement Directives have been **harmonised.** The twenty-five irregularities set out are applicable for all contracts.

This last affirmation must be qualified and interpreted in accordance with European case law. It is nothing new or unique to European funds for contracts not subject to EC Directives to be required to respect the principles enshrined in the Directives.

According to the literal wording of the Decision, all contracts are subject to the same requirements. Therefore, from the date of its entry into force all contracts financed with European funds, provided that there is a cross-border interest, are subject to the same requirements irrespective of the degree to which they are subject to EC public procurement Directives.

This may pose some problems in regard to the ability of a Decision to result in unqualified harmonisation of the levels of formal and procedural requirements applicable in all contracts involving European funds; an issue better dealt with in a Directive or Regulation.

The Decision could be interpreted as meaning that corrections will only be made to contracts that are not subject or not fully subject to the EC Directives where irregularities are detected that violate the principles and rules of Community treaties or of national law. However, this should not lead us to limit the specific types of irregularities to the four situations set out in the 2007 Guidelines, as virtually all of the irregularities set out arise directly from a violation of the principles of the Treaty and, therefore, most of them breach the obligations imposed on contracts not subject or not fully subject to the EC Directives.

The European Commission should clarify this point. If it fails to do so, we run the risk that debate on the nature of the 2007 Guidelines, which has now been settled, will morph into a questioning of the Decision.

2.2.1.4. Authorities should also **verify** that the **contract is compliant with national law,** for contracts subject to the EC Directives and contracts that are not subject thereto.

2.2.1.5. Certification of expenditure arising from contracts **after detection of an irregularity** is expressly permitted.

2.2.2. With respect to types of irregularities

2.2.2.1. Analysis of the types of irregularities contained in each group reveals that they do not always match the stated classification. In grouping them together the Commission has not truly used the point in the process at which they occur as its criterion.

We recommend using the classification scheme proposed, having regard to the specific subject area concerned by each individual irregularity within each group.

2.2.2.2. Observations and recommendations on specific types

Irregularity 4: splitting of contracts: The express provision is a new feature. Most notably, it contains an element or hint of intentionality, but ultimately the rate of correction to apply can be reduced to 25%, under the same terms as a failure to advertise for other reasons.

Irregularity 6: Insufficient definition of the subject-matter of the contract: No mention is made of award criteria

Irregularities 3 and 4, relating to time limits: The wording of these is very confusing. It is difficult to interpret the rates of correction to be applied. Irregularity 4 should be taken to imply that the time limits set out in Articles 39(1) and (2) of Directive 2004/18 must be respected.

Irregularity 12: inadequate justification for the lack of publication of a contract notice: Directive 2014/24/EU needs to be reformulated and adapted. In contrast to the previous Directive, the new Directive does not regulate this procedure as an exception; it is now always permitted when justified by the nature or complexity of the subject matter of the contract.

Irregularities 13 and 14: modification of criteria during the tender procedure: These irregularities are a new feature with respect to the 2007 Guidelines. An aggravated scenario wherein modification of the criteria leads to expulsion of a tenderer has not been included. Only selection criteria are referred to; award criteria are not. This irregularity should be extended to include cases where award criteria have been modified.

Irregularity 17: evaluation of tenderers/candidates: The current wording may lead to misunderstandings. The irregularity in this case relates entirely to award criteria.

Irregularities 17, 19 and 20: All of these could be encompassed under the umbrella of "lack of equal treatment, transparency or non-discrimination". Irregularity 20 refers only to "one tenderer or candidate". However, it should be construed as implying that the irregularity would also arise where one or more tenderers or candidates are permitted to modify their bids, provided that this opportunity is not given to each and every one of the tenderers.

Irregularity 21: conflict of interest: This is one of the most important new features. It is located in the wrong place. There is no definition of what constitutes a conflict of interest construed as an administrative irregularity.

We suggest that the definition set out in EU Regulation 966/2012 be adopted: "(...) a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient".

The "Conflict of Interest" irregularity should not be limited solely to the tender evaluation stage, as laid down in the 2013 Decision. This irregularity should encompass the following situations:

- The "conflict of interest" irregularity applies to both contracts subject to the EC Directives and contracts not subject or not fully subject, and to the same degree.
- The "conflict of interest" irregularity can arise in any type of procedure.
- The "conflict of interest" irregularity can arise in any stage of the procedure.
- The "conflict of interest" irregularity can arise in relation to any party involved in the implementation, management, audit or control of the budget and, therefore, at any territorial level.

Furthermore, based on the new Directives, financial corrections should also be made where the relevant authorities fail to manage or design mechanisms to detect and eliminate the problem of conflicts of interests in public procurement —with EU funds— in a cross-cutting and comprehensive manner.

2.2.2.3. Specific reference to **modification of contracts [irregularities 22, 23, 24, 25: contract implementation].** At present, all of these irregularities entail modification of a contract. However, in this case it was the right decision to address them individually, with different rates of correction based on their gravity.

Irregularities 22 and 23: Constitute **contract modifications in the traditional sense.** In the 2004 Directives there are no detailed regulations governing the contract modification system —nor is this seen in the earlier Directives—. In order to make such corrections, therefore, we must look to the **case law of the Court of Justice.**

The theory regarding modifications has been broadened and refined in the relevant case law, indicating that the possible scenarios **cannot be construed as a numerus clausus.** Analysis of the applicable case law to date allows us to conclude that:

1) The **basic principle** is that **no modifications may be made to contracts.**

2) There are two **exceptions** to this general rule:

2.1) Where provided for in the contract: clearly, precisely and unequivocally. In this case the only limitations are the rules set out in the specifications. It is understood that any modification of the contract not provided for in the initial tender notice or the contract documents constitutes a violation of the principles of equal treatment and transparency, and

2.2) Where the modification is not provided for in the initial contract documents but **does not alter the essential terms of the contract.**

Evaluation of whether the contract's essential terms are affected is also guided by case law. The case law analysed leads to the conclusion that the essential terms are altered if the modification: a) introduces conditions which, had they applied during the tender procedure, would have permitted other tenderers to participate —quantitative or qualitative—; b) introduces conditions which, had they applied during the tender procedure, would have permitted selection of a tender other than that originally accepted; c) introduces conditions which, had they applied during the tender procedure, would have permitted tenderers to submit a substantially different tender; d) introduces conditions which, had they applied during the tender procedure, would have permitted the contract to be awarded to a tenderer other than the one it was ultimately awarded to; e) the modification authorises award of a contract to a tenderer other than the one that was originally accepted; f) broadens the scope of the contract to include works, services or supplies not initially provided for; g) shifts the economic balance of the contract, where such an eventuality has not initially been provided for; h) changes the price; i) demonstrates a desire to renegotiate essential aspects of the contract; j) entails subjective novation(s); k) entails extensions to contracts.

The following modifications have been deemed **not substantial:** a) Where the successful tenderer transfers implementation of the contract to a limited liability company, the sole shareholder of which is the initial service provider, which controls the new service provider and gives it instructions and continues to assume responsibility for compliance with the contractual obligations —this is considered to constitute an internal reorganisation of the contractual partner—; b) changes in shareholders in companies listed on a stock exchange and in unlisted companies, any changes in the composition of the shareholders in such companies, provided that —in both cases— the operation is not carried out in order to circumvent Community rules governing public contracts; c) certain adjustments of the agreement to accommodate "changed external circumstances" such as the conversion of the initial currency to euros, where this does not change the intrinsic amount of the prices; or d) extension of a clause under which the parties agree not to terminate the contract for a specific time period.

The wording of **irregularities 24 and 25** is very confusing, particularly that of 24, and requires some clarification. Both are undue actions arising specifically from **"additional" and/or "complementary" works, services and supplies.**

With respect to irregularity 24: The key factor is that the contracting authority has awarded a contract for "additional" works, services or supplies by a negotiated procedure without prior publication, without meeting the criteria that would permit award in this manner. Secondly, in this scenario it is irrelevant what percentage this new contract represents in relation to any other contracts being implemented by the same contractor. The key factor is that the contract has been awarded without prior publication when qualifying conditions for this were not met.

While Directive 2004/18/EC remains in force, this irregularity should be interpreted as follows:

The following are irregularities during the contract implementation stage: a) award of works contracts, service contracts and supply contracts by negotiated procedure without prior publication as set out in Article 31(1)(c), where there is no extreme urgency due to unforeseeable events and said contract is awarded to an economic operator as an additional, complementary or accessory contract to a main contract being implemented by said operator; b) the award of a contract for complementary works, services and supplies as set out in Article 31(4), in the absence of an unforeseen circumstance.

With respect to irregularity 25: The difference between this irregularity and the preceding one is that the contract meets the criteria set out in Article 31(4)(a)of Directive 2004/18 and, therefore, could be awarded by negotiated procedure without publication, however the permitted limit for this exception has been exceeded (50% of the amount of the original contract).

This group of irregularities must be reformulated as a whole according to the parameters of Directive 2014/24/EU, which regulates the modification of contracts for the first time.

2.2.3. The criteria for making financial corrections are defined based on very subjective judgement. We consider it necessary to increase the objectivity and reduce the percentage margin of the financial correction associated with the description of this irregularity.

2.2.4. The Decision **should include a preliminary irregularity** to detect whether the **manner** in which the **operation** itself was **carried out** is the most appropriate.

> **It would be advisable to oversee the appropriateness of the choice of legal instrument in a professional manner, via an agreement or in-house providing.**

2.2.5. The Decision **should** include a **closing clause** regarding incorrect application of **specific secondary elements** such as, for example, where a contract has been signed in accordance with the provisions of the EC Directives but certain fundamental conditions are not observed, for instance publication of the contract award notice.

2.3. There are certain **ISSUES RELATING TO DIRECTIVE 2014/24/EU WHICH RAISE QUESTIONS AS TO WHETHER THE 2013 DECISION CAN BE CONSISTENTLY ADAPTED TO THE NEW LEGISLATIVE WILL.** In our opinion the changes introduced by the new Directives are so pronounced that they render the Decision obsolete. Most notably, **award criteria** are permitted when this was not previously the case, the **negotiated procedure with publication** has been made more flexible and the **modification of contracts** is regulated. Some of the irregularities will cease to be such, and others are not included.

2.3.1. Inclusion of the organisation, qualification and experience of the personnel charged with implementing the contract is permitted as an **award criterion.** The quality of the personnel used can significantly affect the implementation of the contract.

This possibility is clearly at odds with the 2013 Decision, and previous case law has held that the use of experience as an award criterion is an irregularity.

2.3.2. In contrast to the previous Directive, the new Directive makes no mention of the **"tender procedure with negotiation",** nor does it set out specific grounds for an award authority to use this procedure. Negotiated procedures with prior publication can now only be used when justified by the nature or complexity of the contract's subject matter.

This increased flexibility directly affects all irregularities in which the contract in question should not have been awarded by negotiated procedure with publication.

2.3.3. Specific reference to the modification of contracts. For the first time ever, the new Directive 2014/24 regulates modifications to contracts with a view to systematising, clarifying and creating legal certainty in this area, as well as categorising the relevant case law theory. However, the new regulation is unclear and diverges on key points from case law precedent.

2.3.3.1. As a general rule, modification of contracts is still prohibited except under certain circumstances. The exceptional circumstances in which a contract may be modified without requiring a new procedure, subject to the limits and conditions set out by the instrument, are: a) Where provided for in the initial procurement documents —Article 72(1)(a), (d)(i) and (iii)—; b) For additional works, services or supplies —Article 72(1)(b)—; c) Due to circumstances that could not be foreseen —Article 72(1)(c)—; d) Subjective modifications —Article 72(1)(d)(ii)—; e) Modifications that are not substantial —Article 72(1)(e)—; f) Where the value of the modification is below certain thresholds —Article 72(2)—.

2.3.3.2. These provisions allow modifications to be analysed form various perspectives, with a view to how substantial each one is: **substantial modifications** and **modifications that are not substantial**; but also having regard to the limitations set out to enable specific exceptions to the general rule: the quantitative limit; no alteration of essential terms; the overall nature of the contract.

The **overall nature of the contract** is an undefined limitation on modifications introduced ex novo. It is crucial for Community authorities to issue an interpretation on this new indeterminate legal concept, especially in order that it can be differentiated from the concept of "modification of the essential terms".

The following **substantial modifications are permitted** under the terms and subject to the limitations set out in the Directive: modifications provided for in the procurement documents —Article 72(1)(a), (d)(i) and (iii)—; modifications for additional works, services or supplies —Article 72(1)(b)—; and modifications due to circumstances that could not be foreseen —Article 72(1)(c)— .

The most important new feature associated with modifications provided for in the initial procurement documents is that a limitation is laid down in regard to the overall nature of the contract.

With respect to modifications associated with additional works, services or supplies and those due to circumstances that could not be foreseen, this new feature is radical and solves important problems such as the confusion between contract modifications and supplementary contracts, the regulatory gap and the dearth of case law relating to whether the essential terms of the contract can be modified where justified by unforeseen circumstances.

NEVERTHELESS, WE BELIEVE IT IS NECESSARY FOR COMMUNITY AUTHORITIES TO EXPRESS A VIEW ON AND RESOLVE CERTAIN ISSUES

The phrase **"supplementary contracts" continues to be used in reference to supplies** —Article 32(3) b)—. Thus, additional supplies or services may be added to supply contracts without requiring a new tender procedure with prior publication in two ways: through modification or a supplementary contract. It is considered necessary for European authorities to precisely define the difference between these two concepts.

In regard to modifications for **additional works, services or supplies,** it must be specified what is to be understood as **"necessary"**, i.e. whether this encompasses any additional requirement or only those necessary for implementation of the contract as described in the initial documents.

In regard to the non-applicability of the **overall nature of the contract** limitation on **modifications** for **additional works, services or supplies,** and in regard to taking into account the **quantitative limit,** giving consideration to each **individual** modification rather than all modifications as a whole.

In regard to **modifications** for **causes that could not be foreseen,** in regard to taking into account the **quantitative limit** and the **overall nature** of the contract, giving consideration to each **individual** modification rather than all modifications as a whole.

The following are **not substantial modifications** under the terms and subject to the limitations of the Directive: **subjective modifications** —Article 72(1)(d)(ii)—; modifications whose value is **below** certain **thresholds** —Article 72(2)—; **other modifications that are not substantial** —Article 72(1)(e)—.

Article 72(1)(d)(ii) and (2) give a detailed description of which **subjective** modifications to a contract and changes in price are not substantial and, therefore, are permitted without requiring a new procedure.

Paragraph 1(e) on **"modifications that are not substantial"** should be construed as a closing clause that permits any modification that is not substantial. It amounts to no more than the legal statement of the case law precedent which permitted modifications that were not substantial.

It contains two new features. First, such modifications are permitted "irrespective of their value". Secondly, "not substantial" is defined in negative opposition to the notion of "substantial" set out in paragraph 4 of the same article.

No blanket conclusions should be drawn in regard to modifications being permitted "irrespective of their value", as the insubstantial modifications referred to herein are those not specifically regulated under any other paragraph. The quantitative limit applicable to modifications is set out in 72(2).

With respect to what should be construed as "not substantial", this is deduced by contrasting the qualifying condition with paragraph 4, which defines a "substantial modification" in a manner consistent with Court of Justice case law. However, this should be considered an ***open list*** and we must await further analysis in the relevant case law.

WE BELIEVE IT IS NECESSARY FOR COMMUNITY AUTHORITIES TO EXPRESS A VIEW ON AND RESOLVE CERTAIN ISSUES

In regard to the **subjective modifications** set out in Article 72(1)(d). The permissibility of making subjective modifications due to **corporate restructuring** must be qualified.

It must be clarified what happens in **certain scenarios** that are **not provided for** in paragraph 1(d) which, in contrast, the relevant **case law** has held are not substantial, for instance: a change in the shareholders in listed or unlisted companies, and any changes in the composition of the shareholders of such companies. This is important as it is impossible to include them under the closing clause in paragraph 1(e) since Article 72(4)(d) establishes the list as a numerus clausus.

In regard to the conditions laid down for substantial modifications in paragraph 4: The wording in the draft proposal for the Directive expressly stated that modification of a contract during its term would be considered substantial where it would potentially have resulted in "award of the contract to another tenderer". However, in the parliamentary process a decision was made to eliminate this. It should be clarified whether this elimination should be construed as a specific desire to exclude such a scenario from the concept of "substantial modification".

It would also be advisable to clarify whether from now on a shift in the economic balance of the contract can only be considered substantial when it is in favour rather than to the detriment of the contractor.

2.3.4. Generally speaking, the circumstances in which a contract may be modified are broadened both qualitatively and quantitatively. Irrespective of whether this increased flexibility is desirable, the key factor is that there has been a positivisation of the system governing modifications to contracts. This is considered a very positive development.

2.3.5. The new wording used in regard to the modification of contracts in Directive 2014/24/EU is anything but clear. This, coupled with the fact that the situations set out in the 2013 Decision were designed for the current provisions, can foster the problem of contract modifications, which are the most frequently occurring regularity. It is crucial for Community authorities to express a view, especially as to how Article 72 of Directive 2014/24/EU should be interpreted.

2.4. The institutional organisation is based on a complicated network of administrative levels: national, regional and local, led by the services of the European Commission. A large number of problems were detected in this sphere. Duplication of administrative and control functions which are not operational and which bring about and increase irregularities.

The regulations on the compulsory managing, certifying and audit authorities result in a complicated web of actors.

It must be borne in mind that the functions of the compulsory authorities overlap with those of the key actors in each Member State, which perform identical functions in some areas. This is especially true for the functions performed by supervisory authorities and bodies associated with intervention and audit. Depending on the specific territorial level, duplication and even triplication of functions is seen.

The ability of Member States to designate first and second-level intermediate bodies without any limitations is not viewed in a positive light. These bodies end up taking on the functions of central authorities. This often creates a bureaucratic burden that hinders efficiency. There are too many second-level intermediate bodies, and they should be eliminated. At times the separation of functions required under European law is not ensured.

2.5. The administrative audits by the Managing Authority detailed in the regulations do not differ overmuch from the operational audits by the intervention authority. This system requires an unsustainable number of material and human resources.

> The advisability of compulsory ex ante and ex post oversight being carried out by a specialised domestic audit body in the Member State should be evaluated. This would ensure comprehensive differentiation within the organisational chart, in order that the two controls and the personnel assigned to each could be precisely defined.

3. Issues associated with controls and the detection of irregularities

3.1. The duty of Member States to report fraudulent and non-fraudulent irregularities is appropriately regulated at the European level. It is not a regulatory problem. Despite this, Member States systematically breach this duty.

> European authorities must place more emphasis on raising awareness amongst national authorities of the fact that reporting an irregularity as fraudulent does not imply any prejudgement as to whether a crime has been committed, nor does it violate the presumption of innocence. Efforts must be focused on analysing suspected cases of fraud and their elements.
>
> AFCOS are the most appropriate institution to carry out this task. In the event of recurrence, the possibility of penalties for Member States could be evaluated.

3.2. The European Commission and the ECA proceed on the basis of two different concepts: "irregularity" versus "error". This means that undue actions are detected from two different angles.

Another weakness is seen in the discrepant stipulations regarding the subjective judgement to be used when making financial corrections, and the disparity in the views of the various actors involved. This is completely unworkable and creates legal uncertainty, at least from the perspective of the beneficiary.

> Every effort should be made to harmonise the criteria.

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SUMMARY

INTRODUCTION

The EU regional and cohesion policy for the 2007-2013 programming period is structured around three main objectives: Convergence, Regional Competitiveness and Employment and European Territorial Cooperation. The Catalonia region is included in the "Regional Competitiveness and Employment" objective. As a "Regional Competitiveness and Employment" region, the European Regional Development Fund's (ERDF's) intervention in Catalonia is mainly articulated through the 2007-2013 Operational Programme for the Autonomous Community of Catalonia (Competitiveness/ERDF) —ERDF OP-Cat— which in accordance with European legislation is an ERDF-specific mono-fund[1]. The main objective of the programme is to improve the competitiveness of the Catalan economy and employment with special emphasis on innovation, entrepreneurship and the knowledge economy.

The ERDF-Cat OP includes the priorities related to the objectives set in accordance with the priority lines for development of the region obtained from a SWOT[2] analysis and is aligned with the economic, social and territorial cohesion strategy. The priorities are structured around expenditure categories and implemented through projects co-financed by the ERDF.

The total budget for the ERDF-Cat OP is 1 358.1 million Euros[3], approved spending for EU co-financing is 679.07 million Euros and the rest of the cost is financed by the central government (18.3%), the Government of Catalonia (54.2%) and the local authorities (27.3%).

1 The ERDF-Cat OP was approved by European Commission Decision EC [(2007) 6308] dated 7 December 2007 and is integrated into Spain's National Strategic Reference Framework for 2007-2013, approved by decision of the European Commission dated 16 December 2005 that adopted the 2007-2013 Financial Perspective.
In the competitiveness and employment field, Catalonia also benefits from the Multi-regional Operational Programme for R&D+i for businesses and the Multi-regional Operational Programme for Technical Assistance in addition to the ERDF fund.

2 The priorities are determined on the basis of a SWOT matrix that analyses the strengths, weaknesses, opportunities and threats after diagnosis of the situation of the economic, business, social, demographic and environmental reference sectors, among others.

3 Following amendment by the final Commission Decision C (2011) 9914 dated 21 December 2011 amending Decision C (2007) 6308, the 3rd version of the operational programme incorporating the amendments approved by Monitoring Committee on 17 May 2011.

1. THE LEGISLATIVE FRAMEWORK OF PUBLIC PROCUREMENT WITH EUROPEAN FUNDS IN CATALONIA. MAIN PROBLEMS[4]

1.1. LEGISLATIVE FRAMEWORK

In accordance with Article 60 of Regulation 1083/2006, operations executed through the Operational Programme for Catalonia must be carried out in accordance with public procurement-related EU and national policy and legislation.

Operations co-financed by the ERDF Operational Programme for Catalonia shall be carried out in accordance with the Community rules (primarily Directives 2004/17 and 2004/18) on public contracts for works, supplies and services.

The transposition of these Directives into national law was implemented through Act 30/2007 dated 30 October on Public Sector[5] Contracts and Act 31/2007 dated 30 October on contractual procedures in the of water, energy, transport and postal services sectors[6].

Royal Decree 817/2009 dated 8 May partially implementing the LCSP and partially repealing Royal Decree 1098/2001 dated 12 October approving the General Regulations of the Public Procurement and Contract Act[7]. This regulation incorporates legislative changes since enactment of the LCSP.
Act 34/2010 dated 5 August amending the LCSP and the LCSE were adopted in 2010. The purpose of this Act was to adapt the Spanish public procurement regulations to Directive 2007/66/EC dated 11 December on public procurement review mechanisms[8].

The LCSP was especially amended under Act 2/2011 dated 4 March on the sustainable economy[9]. Among other objectives, the LES aims to finally transpose the correctly way to perform contractual amendments.

Due to the numerous amendments to the LCSP[10], in 2011 all the changes were consolidated in a single law: Royal Legislative Decree 3/2011 dated 14 November approving the consolidated text of the Public Sector Procurement Act[11]. Notwithstanding, the TRLCSP has also been amended. The amendment enacted by Royal Decree-Law 4/2013 on measures to support entrepreneurs, stimulate growth and create employment[12], Act 14/2013 dated 27 September to support entrepreneurs and their internationalisation[13] and Act 25/2013 dated 27 December on the promotion of electronic invoicing and creation of a public sector invoice accounting record[14].

The public procurement provisions of the General Subsidies Act[15] (Act 38/2003 dated 17 November) must also be taken into account. This legislation is supplementary to subsidies funded in whole or in part by EU funds and granted by any government agency. As far as public procurement is concerned, the criteria established by these rules for "subcontracting"[16] of subsidised activities are especially relevant because of the beneficiaries and the implementing regulations[17], which are specific and more restrictive than those contained in the TRLCSP[18].

In addition to the provisions relating to public procurement itself, Article 56.4 of Regulation 1083/2006 rules that the eligibility regulations for subsidies shall be set at national level and shall cover all expenses declared under each operational programme. In compliance with this obligation, the Ministry of Economy and Finance approved Order 524/2008 dated 26 February which establishes the rules for operational programmes financed by the ERDF and the Cohesion Fund[19].

The working document dated 21 July 2011 drawn up by the State Ministry of Finance and Taxation entitled "on possible criteria for application of the provisions of Article 98 of Regulation (EC) 1083/2006 to expenditure financed by the ERDF and CF[20]" is also worth mentioning although it is without legal effect.

4 Note on methodology: Each block within the body of this chapter are studied transversally, i.e. taking all external and internal factors that affect the object into account. For methodological and pedagogical purposes we consider it appropriate to analyse the errors arising from the legislation that are not confined to the substantive and adjectival legislative framework (section one) but extend to and determine the organisation, competences and rights of the players involved, the controls and corrective measures, in a horizontal manner. The conclusions are extracted in a vertical manner. Thus, the study enables an approach from different perspectives depending on the needs of the reader.

5 *BOE* (Official Gazette of Spain) No. 261 dated 31 October 2007, hereinafter LCSP.

6 *BOE* (Official Gazette of Spain) No. 261 dated 31 October 2007, hereinafter LCSE.

7 *BOE* No. 118 dated 15 May 2009 and No. 257 dated 26 October 2001 respectively.

8 *BOE* No. 192 dated 09 August 2011, hereinafter Act 34/2010 and *OJEU* No. L 335/31 dated 20 December 2007, hereinafter the Remedies Directive.
It must be remembered that Spain was specifically reprimanded for incorrect transposition of this Directive under CJEU judgement dated 15 May 2003, Case C-214/00, Commission of the European Communities v Kingdom of Spain.

9 *BOE* No. 55 dated 05 March 2011, hereinafter LES.

10 It is noteworthy that up to ten substantial amendments have been made to this legislation.

11 *BOE* No. 276 dated 16 November 2011, hereinafter TRLCSP.

12 *BOE* No. 47 dated 23 February 2013 [ratified under Act 11/2013 dated 26 July on measures to support entrepreneurs, stimulate growth and create employment (BOE No. 179 dated 27 July 2013)].

13 *BOE* No. 233 dated 28 September 2013.

14 *BOE* No. 311 dated 28 December 2013.

15 *BOE* No. 276 dated 18 November 2003, hereinafter LGS.

16 The LGS takes subcontracting to mean any legal transaction under which the beneficiary "enters into agreements with third parties for execution of all or part of the activity that constitutes the object of the subsidy". This concept does not include the expenses borne by the beneficiary in performance of the subsidised activity on its own behalf – article 29.1 LGS.

17 Royal Decree 887/2006 dated 21 July adopting the regulation for enforcement of the General Subsidies Act (Act 38/2003, *BOE* No. 176 dated 25 July 2006).

18 In the same terms as Directive 2004/18, the TRLCSP scarcely mentions subsidies. Article 17 of the TRLCSP provides that certain contracts are subject to a harmonised regulation when more than fifty percent of the amount is subsidised by the awarding authorities and the estimated value exceeds certain amounts.
Among other issues, the LGS goes beyond the mere regulation of subsidies and, without prejudice to obligations under the TRLCSP, sets up a legal framework for subsidised procurement when the contract is awarded by a contracting authority – as beneficiary in European terms – on behalf of other entities.

19 Order EHA/524/2008 dated 26 February adopting the rules on eligibility expenses of the European Regional Development Fund and Cohesion Fund operational programmes (*BOE* No. 53 dated 1 March 2008), hereinafter the Expenses Eligibility Order.
It should be noted that in 2013 the Directorate General of Community Funds tabled a new Ministerial Order – still at the draft stage – to update the the previous version.

20 Not published officially *[online]* http://municat.gencat.cat/upload/feder/Documento_Art_98_FINAL.pdf [Consulted: 24 November 2014].

Finally, it should be noted that the Government of Catalonia recently promulgated Act 19/2014 dated December 29 on transparency and access to public information[21]. This legislation imposes more restrictive transparency obligations than the State law[22] and will enter force six months after publication[23].

The scope of application of this Law is specified in Article 3. For our purposes the most significant aspect of this Act is that it is applicable to natural or legal persons receiving public funds to operate or perform their activities under any legal title[24]. Title II – transparency obligations – also applies to private entities that receive subsidies or public aid of more than 100,000 Euros per annum or if at least forty percent of their annual income is derived from subsidies or public aid, provided that the total amount exceeds 5,000 Euros.

With respect to the issue under study, the procurement-related obligations connected with active advertising, agreements and subsidies, more restrictive than those of the TRLCSP or Subsidies Act, are of paramount interest. Transparency in the field of public procurement is applicable to all contracts including asset liability and minor contracts[25], joint venture agreements and fund management agreements entered into between the parties subject to the regulations and private and public persons[26]. Regarding subsidies, we would underline the obligation to place all subsidies and aid granted without advertising and competition on public record, indicating the amount, purpose, beneficiaries, and information relating to financial control and accountability of the beneficiaries[27].

It also introduces the requirement that public administrations and agencies subject to the Act must include, in requests for quotes and calls for application for subsidies or aid, ethical principles and rules of conduct to which contractors and beneficiaries must subscribe and the effects that infringement of said principles would entail[28].

In addition to a regime of infringements and penalties for noncompliance (Chapter II of Title VII)[29], the Act establishes a resource system to ensure access to information (article 38) and procedures for appeals and complaints against acts that violate rights recognised under the Act or omissions attributable to governmental or public legal entities, corporations, foundations, consortia or other public bodies that entail infringement of obligations set forth in said Act (article 71 ff).

Although the Act is very recent and not yet in force, to the extent that it contains additional obligations relating to contracts, subsidies and agreements, it is as well to point out some issues that are sure to arouse controversy.

Firstly, we must not lose sight of the fact that there is a State Transparency Act in force and that most of its provisions are basic in nature. The Catalan law, although it is more restrictive overall, is less so in certain respects and even legislates in a contrary sense. Therefore it would be advisable to look for ways to reconcile the two, taking the stipulations of the State-wide measure with basic law status into account.

The scope of application is not clear and does not coincide with the provisions of the TRLCSP on the issue. The most important aspect for our purposes is that Article 3.1 d) provides that the Act is applicable to natural or legal persons receiving public funds through on any legal basis, either to operate or to carry out their activities. This provision does not establish either a financial threshold from which the Law is applicable nor partial application thereof.

Moreover, as previously noted, Article 3.4 provides that private entities that receive subsidies or public aid above certain thresholds are subject to the Act only in relation to the transparency requirements of Title II.

Without a teleological interpretation, these sections are contradictory since under the first, any natural or legal person receiving funds is subject to all provisions of the Act, while under the second, private institutions are only obliged from certain thresholds and only to certain parts of the measure.

It is necessary to resort to a nuance of Article 3.2 and make an interpretative effort to seek the rationale of the regulation. This section lays down that the entities referred to in section d) are obliged to inform the competent authority of activities "directly related" —among other matters— with the receipt of public funds. Therefore, it could be inferred that their obligations are limited to the duty of disclosure. Notwithstanding, the same section states that it is the competent public authorities that must comply with the obligations set forth in the

21 *DOGC* (Official Gazette of Catalonia) No. 6780 dated 31 December 2014, hereinafter the Catalan Transparency Act.

22 Act 19/2013 dated 9 December on transparency, access to public information and good governance (*BOE* No. 295 dated 10 December 2013), hereinafter the State Transparency Act, was published approximately a year ago.

23 However, Title II, on transparency and active advertising, will enter into force one year from publication with respect to entities comprising the local administration.

24 (Article 3.1 d). However, under the provisions of Article 3.2 compliance with the transparency obligations is the responsibility of the competent authority and the duty of private citizens is confined to informing the public administration of the activities directly related to receipt of public funds.

25 *Ex* article 13.1 of the Catalan Transparency Act. Obligations regarding active advertising and public procurement-related statistics (article 13.3) and certain obligations for public service management contracts and concessions (article 13.4) are also regulated.

26 Article 14.2 of the Catalan Transparency Act.

27 Article 15.1 c), d) and e) respectively.

28 Article 55. 2.

29 See section 3.4 of this Chapter.

Act. It does not, however, elaborate on which obligations they must meet as parties responsible for the aforesaid subjects, does not limit the responsibility to a certain part of the Act and fails to define what is meant by activities "directly related" to public funds. Thus many questions remain unanswered. For example: Are contracts entered into by beneficiaries of the ERDF considered to constitute directly related activities? And if so, what is the scope of the information they must disclose to the responsible public authority? Furthermore, what must the responsible government agency do with this information to meet the obligations imposed by the Act? Only comply with the transparency provisions? The provisions of section 13? Less than the provisions of Article 13? On what basis? Neither is the infringement and penalty system for these supposed subjects of Articles 3.1 d) and 3.4 at all clear.

Finally, with respect to the appeals and complaints procedure laid down in Article 71 ff, it should be noted that its object could conflict with Article 40. 3 TRLCSP[30] and that it fails to stipulate exactly who is entitled to lodge said appeals and/or complaints.

1.2. KEY ISSUES REGARDING THE REGULATORY FRAMEWORK FOR PUBLIC PROCUREMENT OPERATION WITH EUROPEAN FUNDS

I. The main problem arising from the regulations on internal public procurement has been the incorrect transposition of Community directives, primarily Directive 2004/18, 2004/17 and the Remedies Directive.

With respect to **contractual amendments** and supplementary agreements, on 8 May 2008 the European Commission sent Spain a warning Notification urging the Government to adapt the domestic legislation to the principles of equal treatment, non-discrimination and transparency set forth in Article 2 of Directive 2004/18 in view of the fact that the "Spanish legislation fails to guarantee that modification of essential terms of public contracts after award will take place only after a new tender".

On 27 November 2008 the Commission initiated infringement proceedings based on the inconsistencies between Spanish legislation (LCSP article 202) and EC Directives[31].

As a result of various convictions handed down by the CJEU for deficient transposition of EU Directives and the aforesaid infringement proceedings initiated by the Commission in 2008, as already indicated, and in 2011 —through reform of the LCSP by the LES— the Spanish legislature finally decided to regulate modification of contracts in accordance with European criteria.

In particular, the seventh transitional provision of the LES regulates the regime of public contracts awarded prior to entry into force of the LCSP[32].

Instances in which modification of the contract is not permitted and that affect all awarding authorities are included. In this respect, it is explicitly stated that modifications are not permitted for the purposes of: a) extending the object of the contract with activities not provided for in the contractual documents or liable to independent use or benefit; b) including additional or supplementary activities not provided for in the contractual documents[33].

The new legislation clearly differentiates between modifications defined in the tender specifications and announced in the request for quotes and those that are not. Modifications not provided for in the RFQ are only permitted if the typical exceptions contained in Article 107 are present and provided they do not involve alteration of the essential conditions of the same[34]. Any change not provided for and not exceptional shall require a new tender process.

30 The TRLCSP, in section 3 of Article 40 on procurement contract-related special appeals, states: "Procedural deficiencies affecting acts other than those referred to in section 2 may be reported to the body responsible for scrutiny of the case or to the contracting authority for the purposes of rectification, without prejudice to the right of the persons concerned to challenge award of the contract in the event of alleged irregularities".

31 In its Opinion dated 1 December 2008 the Commission substantiated the infringement proceedings on the following grounds: "the Commission considers that the regime of modifications of contracts after award, as governed in LCSP, is not in line with the principles of equal treatment, non discrimination and transparency as derived from article 2 of Directive 2004/18/EC on procedures for award of public procurement contracts for works, supplies and services and from Articles 12, 43 and 49 of the Treaty of the European Community.
The LCSP gives contracting authorities wide power to modify essential terms of public contracts after award, without the conditions for modification having been provided for in the contract documents in a clear, precise and unequivocal manner".
Moreover, with respect to execution of works, provision of services and delivery of additional supplies, "The Commission also considers that the LCSP makes it possible for the contracting authority to resort to the use of negotiated procedures without publication, outside the circumstances provided for in article 31 of Directive 2004/18/EC".

32 The basic requirements for contractual modifications introduced by the LES are contained in the current Article 105.1 of the TRLCSP, which makes it clear that: "(...) public sector contracts may be modified only when provided for in the tender specifications or in the request for quotes (RFQ) or in the cases and within the limits set forth in Article 107. In all other cases, if the works or services must be executed in a manner different from that agreed, the contract in force shall be terminated and another award process shall be initiated under the pertinent conditions".

33 Article 105. 2 TRLCSP.

34 These exceptions are set forth in TRLCSP Article 107.1.
The European Commission services urged the Spanish State to clarify certain issues with regard to this new modification regulation. Specifically:
- That modifications associated with errors or omissions in the project must be interpreted under the same criteria those stipulated for amendments resulting from geological, water-related, archaeological, environmental or similar circumstances.
- When changes derive from the need to adjust the contracted activities to technical, urban planning or safety specifications etc. and the same contracting authority has approved the new measures, the tender documents shall define the activities taking the contents of said future measures into account.
Therefore, modifications "not provided for" will only be possible when the authority

At this point in time it is already evident that the LCSP infringes Community law, especially with respect to its contract modification provisions. Deficient transposition of the Directives on this issue until 2011, plus internalisation of a culture of contractual amendment by state and regional procurement bodies has entailed systematic contamination by this irregularity of the majority of the projects financed with European funds. Indeed, the principal malaise of public procurement at state and regional level has been the modifications, the effects of which we are still feeling at the present time.

A priori all the signs are that after the 2011 reform, State legislation in line with E.U. law on these questions. However, several other issues require consideration. Firstly, that Article 105 provides an exception to the general rule that prohibits changes not provided for in the contractual documentation or in the absence of the conditions set forth in Article 107 for changes due to unforeseen circumstances. This article refers to cases of substitution of the contractor and assignment of the contract[35], price revision and extension of the performance period, which according to said Article 105 fall outside the modification regulations. The TRLCSP enshrines our legal tradition under which only changes that affect the object of the contract constitute novation.

Without entering into the question of whether or not the above exclusions are advisable, it should be pointed out that the jurisprudence of the CJEU on changes in the parties and assignment of contracts[36] must be taken into account, pursuant to which substitution of the parties is only possible if provided for in the terms of the draft contract.

The same reflection is applicable to contract extensions which, once again, have nothing to do with contractual amendments[37] under the traditional Spanish legal system, must be provided for and limited by the contractual documentation to comply with the principles of sufficient advertising and transparency. According to these principles an extension would only be permitted under very special circumstances if it were not provided for in the contractual documentation[38].

responsible for the new measure is not the contracting authority.

However, it must be borne in mind that the Court of Justice of the European Union has been very restrictive with this option as well. For example, in the Judgement of the General Court dated 31 January 2013 case T-540/10, it declared the contractual modification deriving from approval of a General Urban Planning Plan (PGOU) to be inapplicable. The contracting authority was the State and the PGOU was approved later by a municipal body. The General Court sentence argued as follows (sections 89 to 94): "(...) The Kingdom of Spain cannot base its argument on the grounds that under Spanish law the approval of the PGOU is under the jurisdiction of the autonomous regions and municipalities and that rail infrastructure projects must take the urban planning performed by municipalities whose territory a railway must cross into account to justify the infringement of Article 20 of Directive 93/38 [currently Article 31.4 of Directive 2004/18].

(...) the Court considers that the awarding authority, during the project draft stage, should act with all due diligence and specifically to obtain prior consensus on the proposed solutions in conjunction with the municipalities affected during this period (...).

Given that (...) the municipalities have administrative and implementation powers in urban planning-related matters, the awarding authority had the duty to perform the actions required to obtain the information on the PGOU in effect in the municipality (...) and any planned amendments thereof.

(...) The Kingdom of Spain is not reproached with not having known, on issue of the initial tendering process, the content of the new PGOU (...), but with not having provided any evidence of the existence of any contact between the awarding authority and the municipality affected prior to said tendering process.

At all events, as the Commission rightly points out, the mere fact that a public body not forming part of the awarding authority requires execution of additional works cannot be considered, in itself, an unforeseen circumstance (...) ".

- That any modification exceeding ten percent of the contract price shall be considered substantial, but the mere fact that the price variation fails to reach said ten percent does not mean that the modification is not substantial. In other wards, a contractual modification of less than ten percent of the price can be substantial.
- And instances in which a contractual modification is permitted when not provided for in the contractual documentation: "only come into play in the event of modifications that do not alter the essential conditions of the RFQ and the award, and according to this same criterion said modifications must be confined to those changes strictly indispensable to deal with the objective cause that make them necessary.

See: Resolution of the Directorate General of the National Heritage dated 28 March 2012 publishing the recommendation of the Public Procurement Advisory Board on interpretation of the provisions of Article 107 of the consolidated text of the Public Sector Procurement Act on modifications to contracts (*BOE* No. 86 dated 10 April 2012).

35 On the subject of substitution of the contractor, article 85 TRLCSP provides that: "In cases of merger involving the contractor, the contract shall continue in force with the acquiring company or with the entity resulting from the merger, which shall be subrogated to all the rights and duties arising from said contract. Likewise, in cases of demerger or spin-off, provision of transmission of companies or areas of activity of the same, the contract shall continue in force with the original contracting entity which shall be subrogated to the rights and duties arising from the same, provided that it has the solvency required at the time of award or that the companies benefiting from the aforesaid transactions and, in the event that it survives, the company from which the assets, spun-off companies or branches derive, accept joint and several responsibility with the company entrusted with performance of the contract. The contract shall be terminated if subrogation is not possible due to failure of the company to which it is attributed to meet the solvency conditions. In this case termination of the contract shall be imputed to noncompliance on the part of the contractor".

36 Substitution of parties, judgement of the CJEU, 19 June 2008 *Pressetext* (section 40): "As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting.

Contract assignment, judgement of the CJEU, 19 June 2008 *Pressetext*. To this effect: case C-29/04, Commission v Austria, judgement dated 10 November 2005 paragraphs 38 to 42: "If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract within the meaning of Directive 92/50. Similar reasoning would apply if the transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary".

According to the CJEU, the following cases do not constitute material amendments of the contract: "(...) where services supplied to the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, the sole shareholder of which is the initial service provider, controlling the new service provider and giving it instructions, provided that the initial service provider continues to assume responsibility for compliance with the contractual obligations" – CJEU 19 June 2008 *Pressetext*.

Therefore the sole shareholder of the company to which performance of the contract is assigned is required to act as the main contractor and completely control the new service provider in addition to assuming responsibility for the contractual duties.

37 However the Public Procurement Advisory Board of the Ministry of Finance (hereinafter JCCA) has found on several occasions that extensions agreed without having been provided for in the tender documents are not real extensions but modifications of the contract. See: Reports 7/06 dated 24 March 2006: "Extension of a public service award contract to maintain the economic balance of the concession and to perform the required works" and 38/98 of 16 December 1998: "Modification of the concession period of a municipal public service".

The JCCA is also of the opinion that where the option of extension is provided for in the contract, it can only be enacted for the stipulated duration and periodicity: Report 59/00, dated 5 March 2001: "Extension of a public service management contract and possible modifications thereof".

38 The CJEU so interprets even for concession contracts: CJEU judgement of 13 September 2007, Commission v Italy, C-260/04, paragraph 35 et seq.

Finally, note that Act 24/2011 dated 1 August on public sector contracts in the fields of defence and security[39] added the following exception in the LCSP: "In compliance with articles 92 a) to 92 c), special procurement review mechanisms shall not be applicable to the decisions of contracting bodies in relation to contractual modifications not provided for in the tender documentation which must be enacted once the contracts have been awarded regardless of whether or not the contract was terminated and a new tender process held"[40].

The inadvisability of expressly excluding the option of appealing the modification of contracts through the special administrative review mechanism should be considered .

II. Another major problem has been the **legal uncertainty** and confusion aroused by so many **legislative reforms**. As noted in the previous section, the LCSP suffered at least ten substantial modifications and the TRLCSP is no better, having undergone eleven substantial modifications to date, and approval of the current draft bill on de-indexation of the Spanish economy[42] will also amend the law of contracts. To all this – although they will not be incorporated into the TRLCSP – the new duties related to contracts, subsidies and agreements laid down by the Transparency Act of Catalonia must be added, which, as already noted, are far from clear.

Apart from the problem of the inherent difficulty of the regulation there is a very serious internal problem of instability of the law due to incessant regulatory change. Each regulatory change requires a new interpretation, education of the stakeholders involved in public procurement and sometimes even changes in computerised systems, internal procurement rules and procedures and, most importantly, creates legal uncertainty.

On a different note but still on the subject of instability, the difficulty of the measure and legal uncertainty, it would not be a bad idea to consider harmonising and simplifying a procurement system that lays down different requirements, procedures and rules depending on the successful tenderer and according to whether the contracts are above the EU thresholds or not. In other words, internalising once and for all the principles of Articles 2 and 10 of Directives 2004/18 and 2004/17 and performing all public procurement with the maximum guarantees of transparency without the pretexts of the nature of the contractor or the amount involved.

The same could be applied to the internal procurement instructions[43] for non-governmental contracting authorities (Spanish acronym: PANAP). The TRLCSP provides for the option that PANAPs approve their own internal procurement rules. This means that each PANAP has its own procedures, deadlines, requirements, etc. which in turn will vary as a result of regulatory changes or on their own sole criteria.

III. The complexity of the funding related system established by the EU must be added to that of procurement legislation in Spain and the fact that **there is no specific body of law** at European, State or regional level to govern award of contracts funded by the EU budgets.

Thus, the regulations specific to public procurement with European funds are dispersed across an amalgam of rules, guidelines, precepts, instructions, jurisprudence, etc., and sometimes in triplicate (EU, MS, region), which can lead to regulatory confusion.

For example, consider the concept of "beneficiary". According to Article 2.4 of Regulation 1083/2006, Beneficiary is understood to mean:

> (...) an operator, body or firm, whether public or private, responsible for initiating or initiating and implementing operations. In the context of aid schemes under Article 87 of the Treaty, beneficiaries are public or private firms carrying out an individual project and receiving public aid;

This concept is already confusing at European level for several reasons. Firstly, in the previous programming period (2000-2006) the beneficiary was the public body that granted the aid rather than that which received it. The latter was known as the: "final recipient of the aid". The costs to be subsidised were the aid paid by the public authority and not the costs paid by the executor.
In the second place, the current definition is not unique but dual: a)

39 *BOE* No. 184 dated 02 August 2011.

40 Current article 40.2 TRLCSP. In general, this provision regulates the so-called "special procurement review mechanism" the aim of which is to harmonise with the review system provided for by the procurement review mechanisms Directive.
Various sectors have already pronounced on this provision and the reflections of the Junta Consultiva de Contratación Administrativa (Public Procurement Advisory Board) of Aragon is especially revealing when it warns of: "(...) the possible incongruence of a provision that treats contract modifications differently depending on the nature of their enabling budget. Taking EU case law into account, application of said provision could be obstructed by the direct effect of EU law in the specific cases submitted to the bodies competent to hear the special review". The Advisory Board believes – on the basis of judgement C-57/01 of the CJEU dated 23 January 2003 *Macedonio Metro and Michaniki* – that the question should be approached from an interpretation compatible with the requirements of Community law and in accordance with CJEU jurisprudence: "(...) so that any decision subject to EU legislation and which produces legal effects – undoubtedly the case of the provisions of a contract – can be appealed, regardless of the content or time of adoption" (Report 12/2012 dated 23 May: "Advertising regime, notification and execution of contractual modifications in application of Article 12 a) of Act 3/2011 dated 24 February on public procurement-related measures in Aragon", p. 11 and 12).

41 See section 1.2 of this Chapter.

42 Draft Bill 121/000074/2013 dated 27 December.

43 Article 191 b) TRLCSP states: "The competent bodies of the entities referred to in this section shall approve mandatory instructions for their own internal regime in which procurement procedures are regulated to ensure the effectiveness of the principles laid down in the previous section and that the contract is awarded to the bidder that presents the most economical tender. These instructions must be made available to all parties interested in participating in the tendering processes to which they are applicable and published in the contracting profile of the PANAP concerned.

the beneficiary is any entity responsible for "initiating" or "initiating" plus "implementing" operations, and b) the beneficiary is a "company" that carries out "a particular project" with "public aid".

Therefore the problematic nature of this concept is already fostered by regulatory fragmentation at community level depending on whether subsidies or the aid contemplated in Article 107 of the TFEU are referred to. To this must be added the possibility that the beneficiary is a contracting authority or a body that, while not being a contracting authority, executes procurement with public funds.

The concept of beneficiary at State level is laid down under Article 11.1 of the LGS as follows: "Beneficiary of subsidies is understood to mean the legal or natural person that will perform the activity on which the grant is based or which meets the conditions that legitimise award of the same."

However, Article 12 of the same Act provides that:

> Collaborating entity is understood to mean that which, acting on behalf of the contracting authority for all purposes related to the subsidy, delivers and distributes the public funds to the beneficiaries as provided under the governing rules, or collaborates in the administration of the subsidy without prior delivery and distribution of the funds received. These funds shall under no circumstance be considered to form part of the assets of the collaborating entity.
>
> Entities that have been declared beneficiaries under community legislation and are entrusted exclusively with the functions enumerated in the previous paragraph shall also be considered to constitute collaborating entities.

Under Spanish law the final recipients of EU subsidies would be the beneficiaries, and the bodies that administer the subsidies and receive EU funds for that purpose would be the grantors or collaborating entities[44].

This diversity of definitions, along with the possibility that the administrating body is itself the final beneficiary, leads to misleading use of the term in operational programmes, guidelines and even in the "audits" lists employed by the control bodies to perform the audits. It has been observed that the Catalan control authorities are abandoning the concept of "beneficiary" in practice and use the terms: “responsible authority” and “implementing body”.

The conceptual and terminological difference is by no means trivial and could give rise to irregularities. It must not be forgotten that Regulations 1080/2006, 1086/2006 and 1828/2006 establish a series of obligations for beneficiaries. This will be particularly important in cases where responsibility for reimbursement of the subsidy must be allocated.

44 See: Opinion of the Directorate General of the State Legal Service dated 14 December 2004 on ERDF-IDEA subsidies.

2. IDENTIFICATION OF STAKEHOLDERS

2.1 SPECIFIC ERDF AUTHORITIES INVOLVED

2.1.1 Mandatory authorities

Full management of any programme financed by European funds is always the responsibility of Member State. The State must designate a Managing Authority, a Certifying Authority and an Audit Authority for each programme[45].

Pursuant to the above, the ERDF OP-Cat for 2007-2013 involves the following mandatory authorities and intervening bodies:

1. MANAGING AUTHORITY: STATE LEVEL

✓ **Sub-directorate General for Administration of the ERDF** (SGA-ERDF) of the Directorate General of Community Funds (DGFC) of the Ministry of the Economy.

2. CERTIFYING AUTHORITY: STATE LEVEL

✓ **Paying Agency of the DGFC (UP-DGFC)** [with rank of sub-directorate general].

3. UDIT AUTHORITY: STATE LEVEL

✓ State Controller's Office **(IGAE)**, *de iure*/ **The General Controller's Office of the Government of Catalonia,** *de facto*.

Notwithstanding that the IGAE is the Audit Authority of the ERDF OP-Cat —at stare level— the Government of the Autonomous Community of Catalonia Public Accounts Department performs certain functions in relation to the ERDF OP-Cat to ensure that compliance with the Community legal order is achieved in the most effective manner possible, in accordance with agreements reached with the State authorities[46].

✓ It performs audits on management and control systems within the framework of the audit strategy.

✓ Performs audits of operations within the framework of the audit strategy.

✓ Contributes to drawing up and updating the audit strategy.

✓ Contributes to drawing up the annual control report.

✓ It provides support, where appropriate, to drawing up the declaration of partial and/or total termination of the programme.

It can be said that the Audit Authority of Catalonia is the *de facto* General Intervention Board of Catalonia. The role of the State Public Accounts Department is mainly to coordinate the controls performed by the Autonomous Communities. This coordination is implemented through an operating framework within which the common criteria and methods are set and monitoring mechanisms established that will be used by the State Public Accounts Department to ensure that the work of the Autonomous Community inspection bodies is of the required quality.

Pursuant to the principles of coordination and cooperation, regular meetings are held with the Autonomous Communities' Public Accounts Departments within the framework of the General Coordination Committee, created to deal with queries and set uniform criteria in relation to the most significant aspects of administration and control of the funds.

The State Public Accounts Department also draws up the annual reports and opinions referred to in Article 62.1.i) of the ERDF Regulation.

It also validates the checks conducted by the various units of the IGAE and performs quality control on a sample of management and control system audits and audit of operations carried out by the Public Accounts Departments of the Autonomous Communities.

The obligation to notify the European Anti-fraud Office (OLAF) of any irregularities detected during audits and of modifications with respect to previously reported cases form part of these coordination functions[47].

Classification: DETECTION

2.1.2. First and second tier intermediate bodies

Regulation 1083/2006 provides for the possibility that the MS appoint "intermediate bodies" in addition to the mandatory authorities. Article 2.6 of the Regulation defines "intermediate bodies" as: "any public or private body or service which acts under the responsibility of a managing or certifying authority, or which carries out duties on behalf of such an authority vis-à-vis beneficiaries implementing operations"[48].

45 Articles 60 to 62 of Regulation 1083/2006.

46 Cf .: Article 141 and Additional Provision to Act 47/2003 dated 26 November, the General Budget Act (LGP), Article 97 of Legislative Decree 3/2002 dated 24 December, the Public Finances Act of Catalonia (*DOGC* No. 379 dated 31 December 2002) – (LFP of Catalonia).

47 This obligation was already established in 1994 and reiterated in 2006. Article 3 of Regulation No. 1681/1994 and 1831/1994 stipulate that: *"during the two months following the end of each quarter, Member States shall report to the Commission any irregularities which have been the subject of initial administrative or judicial investigations".*This reporting is currently performed through the IMS (Irregularities Management System) managed by the OLAF.

Furthermore, Article 448/2001 dated 2 March 2001 states that (Article 2.3): *"Member States shall send to the Commission, as an annex to the last quarterly report of each year supplied under Commission Regulation (EC) No 1681/94(6), a list of cancellation proceedings initiated in the past year, together with information on the steps already taken or still required, where appropriate, to adjust the management and control systems".*

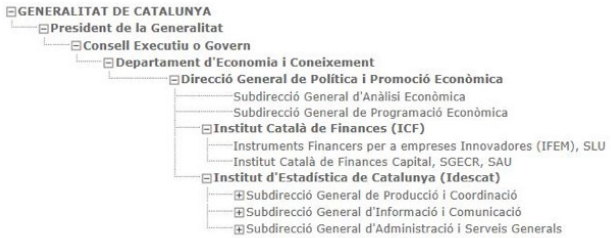
48 See: Article 42 and 59.2 of Regulation 1083/2006.

The following intermediate bodies in Catalonia on the basis of this definition:

1. DIRECCIÓ GENERAL DE POLÍTICA I PROMOCIÓ ECONÒMICA Directorate (General of Economic Policy and Promotion, DGPPE) –formerly Direcció General Afers Econòmics

Within the framework of the ERDF OP, in accordance with the implementing criteria established the application provisions of the 2007-2013 ERDF OP-Cat, the current DGPPE assumes, always in cooperation with the SGA-ERDF, practically all the functions of the State Managing Authority[49].

ORGANISATIONAL CHART OF THE DGPPE



SOURCE: www14.gencat

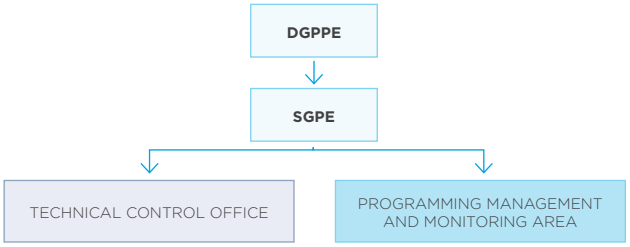
Within the DGPPE the **Sub-directorate General of Economic Programming** is responsible for the management and monitoring functions deriving from the 2007-2013 ERDF OP-Cat [50].

Moreover, without prejudice to the primary responsibility of the Spanish State, the current DGPPE: a) Ensures that all supporting documents for expenditure and audits are kept available to the Commission and the Court of Auditors for the established periods;[51] b) is a member and co-chairman of the Monitoring Committee;[52] c) refers a description of its organisational and procedural systems for the approval of operational programmes to the SGA-FEDER[53]; and e) Designates intermediate bodies within its tranche[54].

The role of the DGPPE in the ERDF OP-Cat 2007-2013 can be summarised as follows: **a)** It acts as a liaison between bodies that perform the co-financed activities and the Managing and Certifying Authorities; **b)** coordinates the management of beneficiaries within its territory, providing instructions and technical support; **c)** receives the beneficiaries' declarations of co-financed expenditure, verifies them, groups them and refers them to the Certifying Authority and ensures custody of the certified expenditure accounting records; **d)** receives and verifies the expenditure statements of the local tranche of the overall subsidy, refers them to the Certifying Authority and ensures custody of the certified expenditure accounting records; **e)** receives notification of payments made by the Certifying Authority and **f)** coordinates monitoring of operations financed by the ERDF OP-Ca, in accordance with the Managing Authority.

This intermediate agency assumes both management and control functions. For the purposes of ensuring the principle of separation of duties imposed by the Regulation[55], these functions have been clearly delimited organically. The personnel responsible for scheduling/managing/monitoring are separated from verification/control by independent units.

INTERMEDIATE BODY OF THE MANAGING AUTHORITY FUNCTIONAL AND ORGANIC DEPENDENCY RELATIONS: SEPARATION OF FUNCTIONS



SOURCE: in-house

49 The attribution of functions to this intermediate body by the Managing Authority was articulated through the Ruling of the Commission that adopted the ERDF OP-Cat. Therefore it does not require the Agreement referred to in article 42 of Regulation 1083/2006 transcribed *ut supra*. (See: Annex I which indicates the competences of the Managing Authority performed by the DGPPE as intermediate body).

50 Among other functions, it: a) schedules the ERDF, prepares the negotiation meetings of the Government of Catalonia with the State and the European Commission, participates as a representative of the Government of Catalonia in these ERDF meetings and monitoring committees; b) draws up the ERDF operational programmes of the regional competitiveness and employment objective and monitors the same in cooperation with other stakeholders; c) participates in drafting ERDF operational programmes European regional cooperation objective in which Catalonia participates and monitors the same; d) certifies the expenses of projects registered in the ERDF operational programmes and proposes the payments within the framework of the functions assigned to the managing and certifying authorities and intermediate bodies of these programmes; e) monitors, inspects and checks compliance with the requirements established by the audit authorities of ERDF operational programmes; f) provides technical support departments of the Government of Catalonia in matters relating to the common strategic framework and the funds that comprise it; g) coordinates, in conjunction with the Delegation of the Government of Catalonia to the EU, monitoring the decision-making with respect to legislative or other types of initiative involving European funds; h) monitors European regional policy managed from Catalonia and i) performs studies related to European funds in Catalonia and disseminates the information. [In accordance with Article 106 of Decree 38/2014 dated 25 March on restructuring the *Departament d'Economia i Coneixement (DOGC* No. 6591 dated 27 March 2014)].

51 Article 90.1 of Regulation 1828/2006.

52 Articles 63 and 64 of Regulation 1083/2006.

53 Article 71.1 of Regulation 1083/2006.

54 Procedures Manual... *Op.* cit., 34.

55 Article 58 b) of Regulation 1083/2006 establishes the following as the general principle of the management and control systems: "compliance with the principle of separation of functions between and within these bodies".

CLASSIFICATION: PREVENTION, DETECTION

By agreement, the DGPPE may delegate part of the tasks assigned to other entities that will then also be considered to constitute intermediate bodies. However, the DGPPE cannot delegate responsibilities that the central government has assigned to it. On the basis of this option the DGPPE can obtain the support of other players designated as intermediate bodies that assume the management, implementation and monitoring of a certain part of the audit process – intermediate bodies of an OP tranche or second tier section. The DGPP is the coordinating intermediate body for all them. In particular, these bodies are the following:

2. The **AGÈNCIA DE SUPORT A L'EMPRESA CATALANA (ACC1Ó) (Catalan Companies Support Agency)** as the Intermediate Agency to manage the overall subsidy provided for in the Operational Programme.

3. The **DIRECTORATE GENERAL OF LOCAL ADMINISTRATION (DGAL)** of the Department of the Interior and Institutional Relations as the intermediate body of the 2007-2013 ERDF OP of Catalonia to manage the ERDF subsidy for the local bodies in the OP which in turn have signed an operational protocol with the **PROVINCIAL COUNCIL OF BARCELONA** pursuant to which they co-manage axis 1 of the OP. The Provincial Council of Barcelona exercises part of the management competences over projects executed in the Province.

4. The **INSTITUT CATALÀ DE FINANCES (ICF, CATALAN INSTITUTE OF FINANCE) AND ITS SUBSIDIARY, INSTRUMENT FINANCERS PER A EMPRESES INNOVADORES, S.L. (IFEM)** as intermediate body of the OP to manage the JEREMIE initiative[56].

A number of intermediate bodies appointed by the managing authority of the central Government responsible for State-wide activities under the 2007-2013 ERDF OP-Cat have also been identified. These agencies could, in turn, in accordance with the Managing Authority, delegate some of its functions —not responsibilities— to other entities which would also be considered to constitute intermediate bodies. The following are the intermediate bodies involved in Catalonia appointed by the central authority:

5. La **DIRECCIÓN GENERAL DE INVESTIGACIÓN (DIRECTORATE GENERAL OF RESEARCH)** (Ministry of Education and Science).

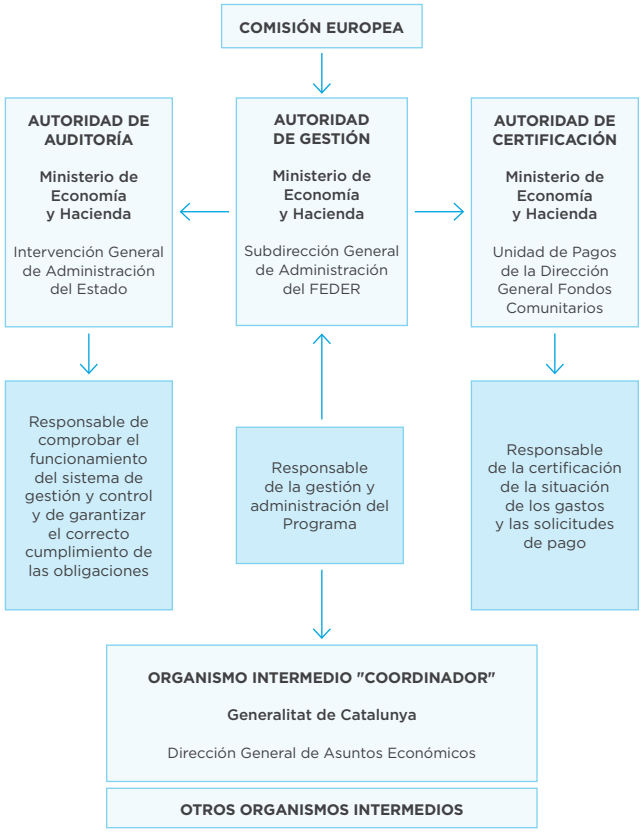
6. The **INSTITUTO DE SALUD CARLOS III (CARLOS III INSTITUTE OF HEALTH).**

7. The **INSTITUTO ESPAÑOL DE COMERCIO EXTERIOR (Spanish Institute of Foreign Trade, ICEX).**

8. The **Barcelona, Cerdanyola del Vallès, Hospitalet de Llobregat and Santa Coloma de Gramenet City Councils,** as beneficiaries of the URBAN integrated projects.

To these bodies, all those designated as management bodies responsible for coordinating the planning, management, monitoring and control of operations co-funded within the scope of the competences of various departments must be added, such as the D**irección General de Telecomunicaciones y Sociedad de Información (Directorate general of Telecommunications and the Information Society)** of the Departamento de Empresa y Empleo (Department of Business and Labour) **Departamento de Agricultura, ganadería y Pesca y Medio Natural (Department of Agriculture and the Environment) ,** the **Gabinete Técnico del Departamento de Territorio y Sostenibilidad (Technical Office of the Department of Territory and Sustainability) and the Secretaría General del Departamento de Salud (Secretariat General of the Department of Health).**

DIAGRAM OF THE AUTHORITIES INVOLVED
IN THE **2007-2013 ERDF OP - CAT**



SOURCE: Procedures Manual of the Government of Catalonia ERDF OP

56 The ICF was the representative of the financial engineering instrument JEREMIE for the period 2007-2013. The terms of the agreement signed with the DGAE state that the ICF is the Fund Manager to implement the JEREMIE initiative in Catalonia in accordance with Article 44 of Regulation 1083 and Act 17/2007 of the Parliament of Catalonia dated 21 December on fiscal and financial measures. Moreover, a subsidiary of ICF has been set up as a separate legal entity: IFEM. Its corporate mission is mainly to hold and manage financial holdings in funds of any kind, companies and guarantee funds, private equity funds, investments in other public or private companies and granting re-bonding contracts. The company, therefore, is responsible for managing funds provided by the Government of Catalonia to develop the JEREMIE programme in Catalonia. The functions inherent in the intermediate bodies are distributed between the two entities.

2.2. KEY ISSUES REGARDING ARTICULATION OF THE MANDATORY AUTHORITIES MODEL

The institutional articulation of the ERDF Operational Programme of Catalonia is complex, probably due to the complexity of the Autonomous Community model. Although —by agreement with the IGAE— the DGPPE as intermediate authority performs practically all the functions of the Managing and Audit Authorities in the first case, and the Public Accounts Office of Catalonia in the second, these authorities are formally State agencies. Certain regional organisations claim to have a fluid and direct relationship with the European authorities; others nevertheless feel the bureaucratic burden imposed by official dialogue with the Commission via the State authorities. The State authorities also certify the expenses and receive the payments. However, the State authorities ultimately assume the final responsibility.

Furthermore, there are a considerable number of second-tier intermediate bodies appointed by the state or by autonomous community managing intermediate bodies —coordinating bodies. Although second-tier intermediate bodies do not take responsibility, they perform not only management and execution but also control functions in connection with the operations to be carried out. Each one has its own procedures manual. At least the control and verification procedures that these bodies perform should be harmonised for these cases of functional decentralisation, or the creation of a body parallel to them, the only mission of which would be verification, could be considered. This would ensure without the shadow of a doubt that the principle of separation of functions established by the EU Regulation is respected.

Various considerations must be taken into account in the specific case of the audit authority. As already mentioned, Regulation 1083/2006 requires each MS to designate an independent audit authority to oversee the certification and management of each operational programme and assume responsibility for verifying effective operation of the management and control system.

It also provides for the option of appointing intermediary bodies, a power that the Spanish state has employed with respect to the Managing Authority. The Audit Authority, however, has not followed suit. As already noted, the autonomous community audit authorities do not work as intermediate bodies, but pursuant to the existing relationship at internal level between them and the IGAE, and consequently of the very structure of the State of Autonomous Communities.

This situation gives rise to the need for a series of complex horizontal and vertical coordination mechanisms between all the de facto Public Accounts bodies and the IGAE. Moreover, without prejudice to the authorities interviewed, have insisted that they maintain very fluid relations with the Commission, there is in fact a single official interlocutor.

There is a certain lack of clarity about the competences assumed by the IGAE in relation to the Public Accounts bodies of the autonomous communities, at least at the regulation level. To acquire an understanding of the functions performed by each Autonomous Community Public Accounts Office it is necessary to examine the Activity reports that these institutions usually issue annually, and on the basis of this to deduce the functions they assume with respect to control of European funds, or to analyse the disperse general regulations that govern the workings of the IGAE and the Autonomous Community Public Accounts bodies.

The LGP only states that the IGAE is responsible for financial control of aid financed with EU funds. It says nothing about costs funded by the EU that are not considered to constitute subsidies or aid or about the Autonomous Community Public Accounts departments.

Meanwhile, the aforesaid LGS assigns a different role to the IGAE depending on whether the ERDF or EAGGF is concerned. The control regulations for the former are minimal compared to those for the agricultural fund[57]. There is no apparent reason for this difference.

That said, and notwithstanding the peculiarity of the Spanish State model, the fact is that the choice of opting for single managing certifying and audit authorities and multiplying them by means of the intermediate body method is not imposed by Europe. The regulation itself enables designation of one authority per operational programme which, moreover, may be national, regional or local. That the European Commission should shrink from the consequences of dealing with as many managing, certifying and audit authorities as there are regions is logical. However, simplification of the structures and procedures should be considered in the interests of management, monitoring and control: ultimately, of good governance.

57 Cf. Article 145 LGS, section 1 (ERDF and others), with section 2 (EAGGF).

2.3 KEY ACTORS

2.3.1. State Court of Auditors

The State Court of Auditors is assigned an important role in the field of control. Both the Spanish Constitution and Act 2/1982 dated 12 May, the Court of Auditors Organic Law[58] that regulates the activity of the Court, define it as the supreme examining body of the accounts and financial management of the entire public sector[59], without prejudice to the supervisory powers of the Autonomous Communities' external control bodies[60].

It is independent of the executive power and is linked directly to Parliament. Its control capacity is embodied in two specific, clearly differentiated functions provided for in the Constitution: a) audit, and b) accounting jurisdiction of financial management.

The Court of Auditors performs compliance, financial, operational and management audits[61]. These audits may be combined. In other words, an entity can be subjected to a compliance and financial audit (known as a regularity audit) or a comprehensive audit (compliance, financial and operational). The Court of Auditors also conducts horizontal audits on certain entities with common features and/or goals[62].

Court of Auditors audits are centred on past events and operations already executed. Thus they are not applicable to future activities. However, they do point the way to good/better management of the public bodies they examine.

The Court exercises its power of prosecution of accounting practice with respect to all entities that collect, administer, have custody of, handle or use public monies or assets. These entities are accountable for intentional acts of commission or omission against the budgetary and accounting regulations that entail loss of public resources.

Accounting liability, which also covers civil cases, is compatible with disciplinary and criminal liability. In other words, the same act may be sanctioned in the criminal, disciplinary and accounting senses without infringing the non *bis in idem* principle.

As regards the specific field of public procurement, the Court of Auditors Act on the operation and functions of the Court subjects all contracts entered into by the State and other public sector entities to audit . This is especially true of those that exceed certain financial thresholds, extensions, modifications after execution and deviations of more than twenty percent from the initial budget. They must also notify termination of contracts for amounts exceeding 60,101.21 Euros and any other contract awarded as a result of said termination.

Contract audit covers all phases of the procedure: drafting of the tendering documentation, award, execution, bond placement, implementation, amendment and termination[64].

In accordance with these functions the TRLCSP provides for the obligation to submit the execution of public contracts with a copy of the tendering documents to the Court to enable control over contracts that have been entered into[65].

In addition to execution, the TRLCSP provides for the obligation to notify changes, extensions or variation of terms and termination of the aforesaid contracts without prejudice to the powers of the Court of Auditors itself and the supervisory bodies of the Autonomous Communities to request any other documentation deemed necessary, regardless of the type or amount of the contract.

Finally, it should be noted that in October 2014 the Court of Auditors signed a Memorandum of Understanding in Luxembourg to carry out a Peer Review. The institutions entrusted with the peer review, which will be performed on the basis of the best practices regime recommended by INTOSAI,[66] are the Tribunal de *Contas* of Portugal and the European Court of Auditors. Among other aspects the review assesses the transparency of the institution, its independence and the legality of its operations. It is expected that the results of the

58 Hereinafter Organic Act 2/1982 (BOE No. 121, dated 21 May 1982).

59 Article 136 EC.

60 The Autonomous Community external control bodies are attributed, in their respective territories, with external control of the financial management of the regional and local institutions and entities. In compliance with the provisions of the respective Statutes of Autonomy or with the subsequent Act of constitution, the majority of the Autonomous Communities have created various external control bodies.
Currently, thirteen of the seventeen Autonomous Communities have their own external control body. In Catalonia this external control body is the Sindicatura de Comptes de Catalonia (Public Audit Office of Catalonia): see Section 2.3.2 of this Chapter.

61 Compliance audits verify that the economic and financial management of the organisation, activity or programme being audited comply with the law.
Financial audits emit an opinion with respect to the reliability of the information reported in the financial statements of an entity on the basis of the degree to which it meets the applicable principles, criteria and accounting standards.
Operational or management audits perform a total or partial assessment of the operations, systems and management procedures of the audited entity, programme or activity with respect to its economic and financial consistency and compliance with the principles of due diligence.

62 The Court of Auditors has the power to use the auditing methods it considers most appropriate depending on the objective of the audit concerned. On the basis of this power, audits usually consist of systematic review, verification and evaluation of accounting records and management and control procedures.

63 Article 39 of Act 7/1988.

64 Article 40.1 Act 7/1988.

65 Article 29 TRCLSP.

66 International Organisation of Supreme Audit Institutions (INTOSAI). This entity brings together the Supreme Audit Institutions (SAI) of 192 countries (full members) and 5 associate members and is listed as a United Nations support agency.

peer review will be issued in June 2015. This measure is an excellent practice, the goal of which is to regain the confidence of the citizens in the Supreme Audit Institution. It is a decisive step towards confirming the transparency of the institution[67].

Classification: DETECTION, INVESTIGATION, ACCOUNTABILITY

2.3.2. Sindicatura de Comptes (Public Audit Office)

The Audit Office[68] is the external supervisory body that audits the accounts and financial management of the public sector of the Autonomous Community of Catalonia[69] to determine compliance with the applicable regulations and laws. The Audit Office depends organically on Parliament but has full organisational, functional and budgetary autonomy. It acts as required under law, on the behest of Parliament or *ex-officio*. Without prejudice to the foregoing, it is free to decide the methods and procedures it uses to carry out the tasks entrusted to it.

The supervisory role of the Public Audit Office is embodied in the preparation and publication of reports which may focus on one or more aspects of its jurisdiction. Once approved, these reports are forwarded to the Parliament for consideration and evaluation.

As far as public procurement is concerned, within the scope of its powers the Office assumes control of the submission of contractual information referred to in Article 39 of Act 7/1988 and article 29 TRLCSP.

Finally, note that the new Transparency Act of Catalonia provides that the Audit Office must ensure compliance with the rights and duties laid down in the Act itself in accordance with its designated functions[70].

- **Synergies and good practices**

Between the Public Audit Office and the Court of Auditors. The Public Audit Office performs its supervisory activity in coordination with the Court of Auditors by means of common supervisory criteria and methods.

This coordination duty is an essential legal imperative[71] to avoid duplication of supervisory activity that could lead to the existence of two bodies of a similar nature since the Court of Auditors, as stated in the previous section, retains its powers of control over the entire public sector regardless of the fact that the Autonomous Communities are provided with similar powers.

The Pamplona Declaration of 19 October 2006 epitomises this principle of cooperation under the general principle of subsidiarity that governs the relations between the external control bodies.

Furthermore, although accounting jurisdiction is not among the functions of the Public Audit Office, it can participate in these procedures. Thus the EAC and Act 18/2010[72] provide that the two agencies shall enter into an agreement to establish the relevant participation mechanisms.

The Office can also act on delegation by the Court of Auditors both in audit-related matters and to undertake the preliminary proceedings prior to filing for accounting responsibilities, and can hear the associated allegations. The aim of these proceedings is to ascertain the existence of infringements. Once the preliminary proceedings are closed the Audit Office refers the case to the Court of Auditors, which is the competent body to prosecute the accounting liability.

Moreover, the Court of Auditors may carry out joint audits with the external control bodies (ECBs), in this case the Audit Office. These audits are more effective and efficient.

To implement measures to coordinate submission of public sector accounts and contract documentation[73] in digital form the Audit Office and the Court of Auditors, within the scope of their respective powers, have entered into agreements under which the public sector entities comply simultaneously with both obligations whether said information is forwarded to the Court or the Office, provided that it is submitted pursuant to instructions issued by these agencies. Submission to both bodies in a single act prevents duplication.

67 For further information on the peer review of the Spanish Court of Auditors see: [*on line*] http://www.tcu.es/tribunal-de-cuentas/es/sala-de-prensa/news/FIRMADO-EL-MEMORANDUM-DE-ENTENDIMIENTO-PARA-LA-REVISION-ENTRE-PARES-DEL-TRIBUNAL-DE-CUENTAS-DE-ESPANA/ [Consulted: 03 February 2015].

68 The Public Audit Office is contemplated under Article 80 ff of Organic Act 6/2006 dated 19 July that reforms the Statute of Autonomy of Catalonia (DOGC No. 4680 dated 20 July 2006; *BOE*, No. 172 dated 20 July 2006), hereinafter the EAC, the fundamental law of the Autonomous Community of Catalonia. The functions of the Office are defined in Act 18/2010 dated 7 June, the Public Audit Office Act (*DOGC* No. 5648 dated 11 June 2010; *BOE*, No. 165 dated 08 July 2010; hereinafter Act 18/2010.

69 Article 3 of Act 18/2010 delimits the scope of application of the institution.

70 Article 75 of the Transparency Act of Catalonia.

71 Article 29 of Act 7/1988 dated 5 April that regulates the activity of the Court of Auditors.

72 Article 80.3 of the EAC and 47.1 of Act 18/2010

73 See: Agreement dated 18 December 2009 under which municipalities, provincial councils, associations, decentralised metropolitan bodies and all public entities in Catalan territory can submit their general accounts through online channels to the Public Audit Office which forwards them to the Court of Auditors, which in turn deems them submitted to all due effects.

Decision of the Presiding Judge of the Court of Audits dated 10 May 2012 publishing the Agreement of the Plenary Session dated 26 April 2012 approving the Instruction on submission of contract documentation and annual summaries of contracts entered into by local public sector entities to the Court of Audits.

Decision of the Government Executive Committee dated 14 January 2013 extending the Court of Auditors' online registry to receipt of documentation relating to procurement performed by State public sector entities.

And the decision of the Presiding Judge of the Court of Auditors on 10 December 2013 publishing the Agreement of the Plenary Session dated 28 November 2013 on the general instruction relating to online submission of excerpts of procurement contracts and lists of contracts, agreements and management commissions entered into by State and Autonomous Community entities to the Court of Auditors.

In connection with this obligation, it should be noted that implementation of a unified online submission system, originally created for local public sector[74] reporting, has been gradually extended to the entire State public sector including the corporations. The goal is for the entire public sector to implement new technologies internally and externally and that excerpts from the public procurement records at all territorial levels be forwarded using online channels.

This *a priori* vast challenge is being implemented successfully. The Instructions approved from time to time by the Court of Auditors and the Public Audit Office have been made available to the public sector entities online, enabling them to comply with their reporting obligations. Criteria have been established for selection of the contracts to be submitted, the accompanying documentation and the form of and requirements for submission. For these purposes a Commission for the coordination of submission procedures public contract information has been created. The Court of Auditors and the Autonomous Community ECBs including the Audit Office are jointly defining the submission system through this Commission with the aim of drafting new Instructions with respect to the obligation of annual submission of the local and regional procurement information and excerpts from the procurement tending documentation.

The current system already enables participation and identification of the contracting bodies responsible for reporting information. This evidently entails optimisation of the quality of external control and the level of compliance with legal reporting obligations with respect to the procurement activity carried out. The procedures and financial and functional costs have been simplified.

An increasing willingness has also been observed on the part of the regional ECBs (in this case the Office) and the Court of Auditors to unify and harmonise criteria in the manner of performing audits. One example is the joint process for harmonising with the ISSAIs[75].

74 www.rendiciondecuentas.es The information on the financial management of local entities as per their annual statements is available to the general public on the Accountability Portal.

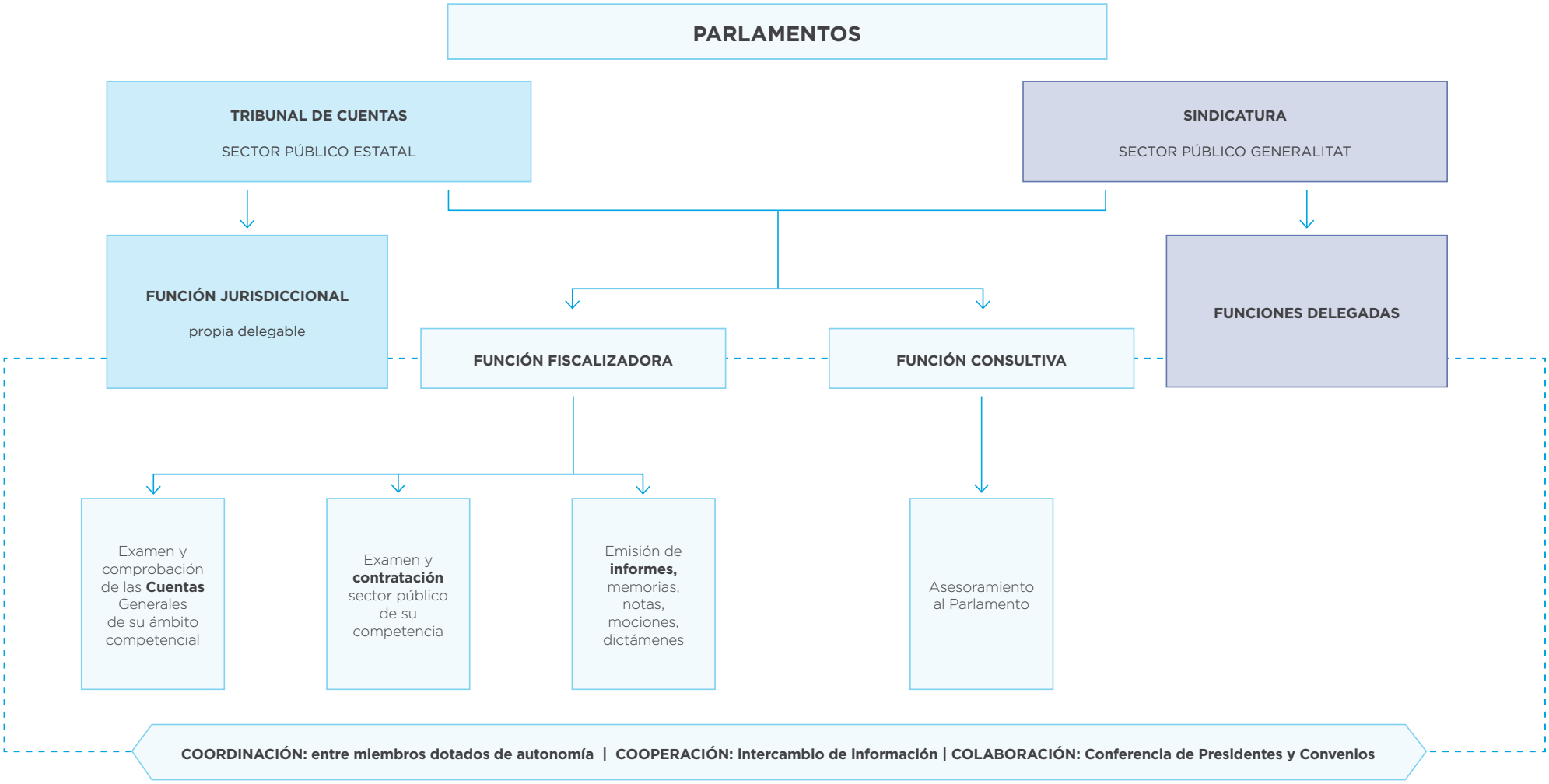
75 *International Standards of Supreme Audit Institutions*. The ISSAI standards contain the basic principles for operation of the Supreme Audit Institutions (such as the Court of Auditors) and the prior requirements for auditing public corporations.

For further information on these rules see: [on line] http://es.issai.org/ [Consult: 01 January 2015].

The Court of Auditors is subject to these rules due to its membership of INTOSAI, but the goal is that all the Autonomous Community ECBs also apply them. As of 20 November 2014 the level three ISSAI rules have been harmonised and adaptation of level four is under way.

ORGANISMOS DE CONTROL EXTERNO

FUNCIONES Y DISTRIBUCIÓN



SOURCE: in-house

Between the Public Audit Office and the General Controller's Office (Intervenció General) of the Government of Catalonia. The Controller's Office is obliged to forward the following information to the Public Audit Office: all information relating to audits and inspection reports performed on public sector entities of the Government and any other report or audit carried out[76].

Between the Public Audit Office and the Public Procurement Advisory Board of Catalonia. In the field of public procurement, through the cooperation agreement signed between the Audit Office and the Public Procurement Advisory Board, the Audit Office obtains all information regarding contracts entered into by the public sector of the Government of Catalonia required to draw up reports and comply with the supervisory role with which the Office is entrusted[77].

Between the Audit Office and Anti-Fraud Office of Catalonia. The Public Audit Office, to fulfil the tasks entrusted within the scope of its brief, may request the Anti-Fraud Office of Catalonia to provide cooperation, assistance and exchange of information[78].

Classification: DETECTION, INVESTIGATION, ACCOUNTABILITY

2.3.3. Public Procurement Advisory Board of Catalonia (JCCA)

The Public Procurement Advisory Board of Catalonia, as a specific advisory body on public procurement across the entire public sector of the Government of Catalonia, ensures due application of the rules, provides continuous advice at regional and local level and pursues the development and progress of responsible, technological, innovative, simplified and accessible procurement. Its main functions are:

Reports, studies and documentation: 1) Resolution of queries on the interpretation and analysis of the public procurement rules; **2)** issuance of mandatory reports on specific issues[79]; **3)** issuance of juridical reports on request of the public sector entities of the Government of Catalonia and businesses representative of the sectors affected by public procurement; **4)** issuance of general instructions and recommendations on public procurement; **5)** to ensure compliance with public procurement rules, especially compliance with the principles of advertising and free competition; **6)** monitoring, analysis and review of legislation, case law and literature in public, regional, national, European and international procurement-related matters.

Company Registries and Classification (RELI): 1) Responsible for classification of companies. Endowed with the capacity to review and suspend the classification of companies; **2)** directs and manages the Electronic Registry of Bidding Companies and the official[80]; **3)** Directs and manages the Public Contracts Registry[81]; **4)** The most important aspects of the JCCA's activity are regulatory and advisory relative to the contractual and registry activity and online procurement[82].

The more than thirty years of experience of this body backs its authority and its existence constitutes a good practice in itself. The JCCA sets an excellent example at all levels. It was a pioneer in the field and is responsible for making public procurement in Catalonia a tool to generate added value for the entire public sector. It promotes public procurement and public policy as a generator of wealth, employment and transparency, to set examples, drive best practice, and combat social inequalities and even climate change: socially responsible public procurement.

On numerous occasions the JCCA has anticipated the obligations established by the European and State regulations in these matters. In 1986, for example, in advance of the third generation of Directives, it took charge of the Official Registry of Contracts created by the Government of Catalonia.

76 Article 82 of Legislative Decree 3/2002 dated 24 December approving the revised text of the Public Finances Act of Catalonia and Article 39.5 of Act 18/2010 on the Public Audit Office.

77 See: Section 2.3.3 of this chapter on the Advisory Board.

78 This possibility is regulated by law, specifically in Article 5. 2 of Act 18/2010. See: Section 2.3.8 of this chapter on the Anti-Fraud Office of Catalonia.

79 See: Article 4 of decree 376/1996-.

80 http://reli.gencat.cat/ El RELI is a digital administrative Registry that records data on the legal basis, capacity, representation, financial, and technical and professional solvency of procurement corporations of the Catalan public agencies. Its aim is to aid bidders in tendering processes for award of public procurement contracts and to contribute to implementation of new technologies in public procurement. Registration of bidders is optional and free of charge.

Registered companies are not required to provide documentation for each procurement procedure. They are only obliged to provide an affidavit of liability that they are registered and that the circumstances set forth in the registration certificate have not changed. The procurement bodies can also consult the full digital dossier of the registered companies.

81 The Registry of Bidding Companies is governed by Article 333 of the TRLCSP under which public authorities have the obligation to record the basic data of the contracts they award. This Registry is the central official information system on public procurement. The data contained in the Registry are essential for any activity related to the analysis, research, statistics, and obligation to exchange and disseminate information on transparency-related activity in public sector procurement.

The TRLCSP provides for the option that regional governments may set up similar registries with the same validity. In these cases the reporting obligations set forth in the TRLCSP are replaced by communication between the respective registries. Catalonia has its own Registry of Bidding Companies (See: Order ECO/47/2013 dated 15 March regulating the operations and approving application of the registry).

82 In line with the Communication from the Commission to the European Parliament and Council, the European Economic and Social Committee and the Committee of the Regions: "End-to-end e-procurement to modernise public administration" dated 26 June 2013 [COM (2013) 453] and the fourth generation of EU directives on procurement.

Its role in the interpretation and analysis of public procurement rules has been fundamental in a context which, as noted earlier, is characterised by a high degree of instability in the regulations. Whenever there has been a policy change the JCCA has assumed the task of explaining and interpreting the modification and disseminating its findings to the contracting authorities for implementation. The role of the Board is especially relevant in connection with the instability and difficulty of the regulations and policy changes themselves. Far from confining its activity to mere interpretation, it goes further and makes the modifications comprehensible to the entities to which they are applicable. In other words, it explains the regulations in language that can be understood by organisations that may not have legal expertise.

I. The registry performs a dual **training effort: it provides advice and answers queries:**

a) On its own initiative: 1) Through reasoned decisions, instructions and recommendations; **2)** Through promotion of and participation in training sessions. In this sense the public procurement group eCatalonia, a virtual space for meeting and exchange of knowledge and information, is especially relevant. Its main objective is to aid and support the entities involved in the transformation of public procurement management and to enhance efficiency in service provision; **3)** Through issue of a digital bulletin of the most important new developments in the sphere of public procurement: news, jurisprudence and regulatory changes at European, State and Autonomous Community level. The Bulletin has more than six thousand registered users; **4)** Issue of guidelines for drawing up contractual tender documents. It should be emphasised that these guidelines are not static but dynamic models. They are constantly reviewed and updated in accordance with the regulatory changes.

b) As required by public sector stakeholders: basically, issuing reports on specific problems they may pose. All these reports and other documents resulting from the Registry's activity are available to the general public online[83].

In 2013, for example, the Registry issued 15 reports to answer specific queries on various issues, most of them relating to the award stage of tendering processes and contract execution. This number rose to 19 in 2014.

b) Answering queries by telephone, email or in person.

The following tables show the variation in the number of cases handled by telephone between 2011 and 2013.

	a 31.12.11	a 31.12.12	a 31.12.13	% variació 2011/12
Generalitat y sector público	195	185	191	3,24
Entes locales	214	196	172	-12,24
Sector privado	129	121	89	-26,45
Otras Comunidades Autónomas	4	1	2	100
Total	**542**	**503**	**454**	**-10,79**

SOURCE: JCCA

83 Reports, opinions and recommendations, instructions, agreements, guidelines and manuals: http://economia.gencat.cat/es/70_ambits_actuacio/contractacio_publica/junta_consultiva_de_contractacio_administrativa/informes_recomanacions_instruccions_acords_i_altra_documentacio/ Public procurement-related search engine and archives of notifications of interest:http://economia.gencat.cat/es/70_ambits_actuacio/contractacio_publica/junta_consultiva_de_contractacio_administrativa/noticies_d_interes/arxiu_de_noticies_i_cercador/ To register with the news Bulletin: http://www14.gencat.cat/pres_push/AppJava/preRegisterAlta.do?butlleti=2183603&nextActiontodo=loginAlta&chlang=es_ES

To date (at November 2014) the Registry has answered fifty more queries than the previous year.

The queries raised and answered involve a wide range of subjects. The most frequent queries are related to drafting and design of tenders, organisational and jurisdictional issues, rationalisation of procurement systems and incidents in specific procedures, especially on the capacity requirements of the bidders, abnormally low bids, guarantees, contract modifications, confidentiality of tenders and right of access to procurement documentation by stakeholders.

II. The following issues, among others, stand out with respect to its role in **driving e-procurement and unification of systems and information:**

It has been instrumental in the evolution and expansion of e-procurement services in general, has consolidated the use of the electronic auction and finalising the design, construction and implementation of the digital envelope; it has also set up services for the use of businesses, in particular bidder profile-related services such as the innovation mailbox.

The JCCAA has played a key role in creating and developing the **Electronic Public Procurement Platform of the Government of Catalonia**[84] and implementation of a corporate tender process management system **(GEEC)** as the backbone and facilitating element for adoption and integration of other components of the model.

An Online Public Procurement Tender Manager **(TEEC)** aimed at public sector entities with smaller procurement volumes is currently at the development stage. This simplified tool aims to facilitate and promote online procurement management. It can also be integrated with the Procurement Platform and the Public Contracts Registry. This tool was awarded the "Catalonia 2015 Information Society" award on 4 February by the Socinfo Foundation the magazine "Sociedad de la Información". It also played a key role in simplification and streamlining of procedures and interoperability of the **RELI** with other information managers.

Users are regularly updated through **(EACAT)**, the Catalan Government Extranet, including the option for bidders from outside the Government of Catalonia and its public sector to register/de-register with the RELI.

The goal is continuous development in search of interoperability between the RELI and (PICA)[85], the Government Integration and Collaboration Platform. The development of a technical process for periodically updating tax obligation information directly from PICA so that this information is continuously updated in the RELI is one of the outstanding achievements in this area.

Consolidation of a contact mailbox as a communication channel between RELI users and technicians and the option of signing several documents at once should also be underlined.

RELI, managed and directed by the JCCA, won the 2010 CATCert Award for the best digital public authority signature initiative[86].

Among others, reduction of costs in the bidding process for all stakeholders, transparency, increased competition and administrative simplification are direct consequences of the preliminary work carried out.

Its involvement in the development and continuous improvement of the **Public Contracts Registry** has also been outstanding. The JCCA analyses the data that the awarding authorities dump into the database in detail. It was the driving force behind extension of the data fields handled by the Public Contracts Registry and making certain previously optional information mandatory. To ensure that this database is updated, the JCCA maintains a constant dialogue with the parties subject to the regulations and the information system managers. Thanks to this work, reasonably reliable and relevant data on tendered contracts, types of contracts executed, the financial volume thereof and incidents at the contract implementation and payment phases are obtained.

84 The electronic platform is a single, comprehensive, integrated portal for the dissemination of information on the procurement activity of the Catalan public sector. In accordance with the provisions of the legislation on public sector procurement, the contracting authorities' contractor profiles are uploaded onto this platform. In addition, the platform is an open system that enables incorporation of other Catalan public authorities which may also post their contractor profiles and access all the services that the platform provides to public and private operators.
Portal: https://contractaciopublica.gencat.cat/ecofin_pscp/AppJava/es_ES/search.pscp?reqCode=start

85 PICA is a technology platform that, among other things, drives government agency data interoperability by managing access the e-document catalogue made available bodies internal and external to the Government of Catalonia. Government agencies can perform data checks on citizens through the data published in the Catalogue.

86 The award recognises the integration of digital certification into RELI and its contribution to the simplification of procedures and relations between government and business.

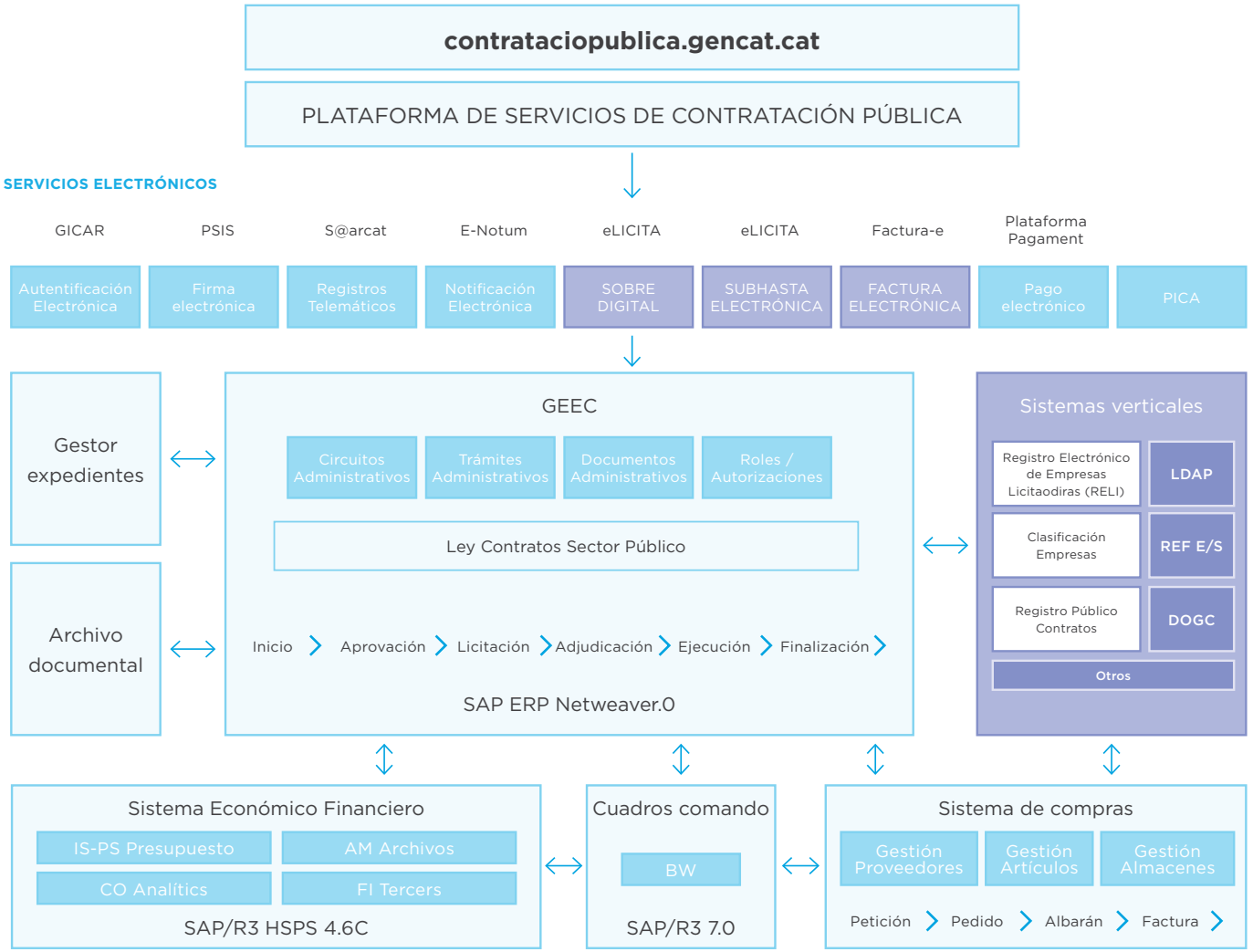
PROCUREMENT-RELATED INFORMATION MANAGED BY **THE JCCA 2013**

Tipo		Núm. de contratos	Volumen económico (MEUR)
Adjudicaciones	Contratos no menores	5.571	1.188,43
	Contratos menores	9.122	51,14
Prórrogas		2.912	1.425,90
Modificaciones		335	48,35
Liquidaciones		7.945	1.783,68

SOURCE: JCCA

As can be seen, in 2013 the JCCA processed and managed 14,693 procurement contracts of which 9,122 (62.08%) were considered to be minor. With respect to incidents: 2,912 extensions gave rise to expenses of 1,425.9 million euros and 335 changes cost 48.35 million euros.

GOVERNMENT OF CATALONIA CORPORATE e-PROCUREMENT MODEL



SOURCE: JCCA. ACTIVITY REPORT 2012.

It could be said that the Government of Catalonia, thanks largely to the JCCA, has integrated the best practices outlined in the European Commission working document dated 4 may 2005 on requirements for conducting public procurement using electronic means. This includes particularly those set forth in: a) conditions for the use of electronic auctions, and especially those relating to accessibility, reliability and availability and various practical aspects of use of electronic auctions; b) conditions for electronic communication systems in the contract award procedure (interoperability of electronic communication systems and the capacity required for direct exchange of information or services between each other and with users; recommendations and best practices to ensure the integrity and security of the data, tenders and requests to participate; recommendations on protection against viruses and traceability-related requirements systems that enable verification of measures implemented at all times); c) notifications and electronic access to procurement processes (practical aspects of full, free access to announcements and all other documents required to participate in procurement processes); and d) receipt of requests to participate in the same[87].

III. **Innovation** in procurement, green procurement, **social** procurement, and continuous **improvement** in **processes.**

The JCCA fosters and is a permanent member of working groups with the aim of analysing and addressing issues in specific fields, promoting the exchange of knowledge and experiences and driving strategies, objectives and measures. All stakeholders involved are represented in these groups depending on the purposes of the same: companies, civil society, public sector entities, etc. The following table shows the most recent the initiatives and best practices.

WORKING GROUP	ESSENTIAL OBJECTIVES	MEASURES
TO DRIVE AND ENHANCE PROCUREMENT PROCESSES	Respecting free competition, equal opportunities, enhanced efficiency, and use of electronic media in processing.	All measures set forth in this study directly or indirectly contributes to achieving this goal.
PROCUREMENT AND THE ENVIRONMENT	Green procurement, especially energy issues and efficient use of resources.	Provision of guidelines and a common method to the procurement bodies to drive green procurement. Participation of the Government of Catalonia as a partner of the 2020 European green public procurement (GPP) project.
SOCIAL ASPECTS	Supporting the third sector	Analysis and study of measures to facilitate access to third sector procurement and encourage responsible procurement. Fostering mechanisms to earmark certain percentages in contracts for special employment centres and occupational insertion programmes.
FEASIBILITY APPLYING R&D+I-RELATED CRITERIA TO PUBLIC PROCUREMENT	Research, development and innovation	Work on the European *Public Procurement of Innovation* and support of cross-border collaboration for innovative solutions, among others.

87 See: Document on the GEEC [*On line]* http://administracionelectronica.gob.es/ctt/geec#.VPmPIDd0ywI [Consulted: 06 March 2015].

• **Synergies**

In the **Plenum**. The composition of this body is a synergy in itself. The JCCA Plenum, the highest decision-making body, includes many of the key stakeholders. In addition to **representation of the public and local sector,** the presence of the **General Controller's Office of the Government of Catalonia** (as the *de facto* authority for audit of European funds) and the **Office for Supervision and Evaluation of Public Procurement**[88] is especially significant. Similarly, there are representatives of the organisations that bring together businesses affected by supply and service contracts, Chambers of Commerce, Industry and Shipping and trade unions.

The very composition of the Plenary embodies the principle of collaboration, coordination and unification of criteria to the highest degree.

With respect to the **General Controller's Office,** the fact that it is a member of the JCCA is a guarantee when performing procurement-related audits involving EU funds that the same interpretive criteria will be applied from a general rather than a divided perspective of public procurement. Bear in mind that although the JCCA possesses real authority among the other parties involved (with which it maintains fluid relations and its doctrine is applied peaceably), its interpretations are not binding and the supervisory bodies, which are usually more adept at financial than contractual control, may interpret the procurement regulations in a variety of ways[89].

With the Public Audit Office. The Audit Office collaborates closely with the JCCA although it is not a Board member. The cooperation agreement signed in 2010 by which the Audit Office provides the JCCA with all the functions of the Public Contracts Registry is especially relevant.

Pursuant to this agreement the JCCA digitally signs and sends all contractual information contained in the Registry to the supervisory body on a monthly basis. The functions of the Registry have been changed to enable the public sector bodies to meet, in a single procedure, the two contract reporting obligations (to the Public Contracts registry under Article 333 TRLCSP and to the external control bodies under Article 29 TRLCSP) to avoid duplication of notification of the data and of IT systems[91].

It should be noted that these are the only public procurement advisory bodies in Spain that dump public contracts registry information directly to the external control body. They obtain excerpts from any tendering document in a single operation by means of the electronic registry.

Classification: PREVENTION

2.3.4. Office for Supervision and Evaluation of Public Procurement (OASCP)

The OASCP was created in 2011[92]. It is responsible to the Department of the Presidency of the Government of Catalonia and represents a firm commitment to implementing the principles of transparency, promotion of competition and equality of opportunity in public procurement to improve its efficiency. It is mentioned as an example of good practice in the latest report of the European Anti-Fraud Office[93].

Its main function is to constantly monitor procurement procedures by establishing indicators to propose continuous improvement measures and foster the development of public policies through procurement[94].

Its activity is aimed at proposing improvements in procurement procedures, unifying criteria and issuing instructions or guidelines to which the contracting authorities can adhere. In this sense, the recent Instruction 1/2014 dated 9 January on optimisation of procurement procedures is worth noting. The OASCP includes guidelines in this Instruction to foster transparency and optimise aspects of public procurement[95]. Its crucial role in reform of the Contract Appeals Body from single-person to a collective body[96].

88 See section 2.3 of this Chapter.

89 This interpretive disparity is additional to those set forth in section 3.2 of this Chapter with reference to the application of financial restatements and the interpretation of the Commission Decision dated December 2013 (formerly the 2007 Procurement Directive).

90 Agreement dated 18 February 2010 between the Department of the Economy and Finances, -now Department of the Economy and Knowledge (Economía y Coneixement), the JCCA and the Office.

91 The Plenary Session of the Audit Office approved the content of the excerpt from the procurement tendering documents pursuant to the Agreement dated 19 January and 8 June 2010 and provided that mandatory reporting of public sector entities of the Government of Catalonia will be structured through the Public Contracts Registry on the basis of Article 29 TRLCSP. The procedure for exchange of information based on the data compiled in the Public Contracts Registry and sent to the Audit Office online is considered to be operative and according to Law under a decision of said Office dated 21 June 2010.

92 Decree 203/2011 dated 18 January setting up the Office for Supervision and Evaluation of Public Procurement within the Department of the Presidency and restructuring of the General Secretariat and the Directorate General of the National Trust of the Department Economy and Knowledge of the Government of Catalonia.

93 Annex to the EU Anti-corruption Report: Brussels, 3.2.2014. COM (2014) 38 final. ANNEX 9. ANNEX. SPAIN p. 14.

94 Its functions are regulated by Article 23 of Decree 118/2013 dated 26 January on restructuring the Department of the Presidency.

95 *[on line]* http://presidencia.gencat.cat/web/ca/ambits_d_actuacio/oficina_de_supervisio_i_avaluacio_de_la_contractacio_publica_osacp/.content/osacp/ambits_actuacio_osacp/acords/instruccio_definitiva_escanejada.pdf [Consulted: 27 October 2014].

96 See: paragraph 2.3.6 of this Chapter.

The OASCP has been the driving force behind creation of the Interdepartmental Committee on Public Procurement and the Sector Contracts Committee of the Government of Catalonia.

• Synergies

The OSACP is in constant contact with other agents involved in public procurement, especially with the JCCA, of which it is a member. Both create working groups to foster and enhance procurement processes and pursue the same objectives within the scope of their respective powers.

Classification: PREVENTION

2.3.5. Public Prosecutor's Office

The main mission of the Public Prosecutor's Office is to further the cause of justice in defence of legality, citizens' rights and public interest protected by the Law as provided for under Article 124 of the Constitution of Spain.

The functions and duties of the Public Prosecutor's Office are regulated its Organic Statute approved by Act 50/81 dated 30 December and amended by Act 24/2007 dated 9 October, currently in force. The Organic Statute contains the basic functions, organisation, structure and principles, rules of conduct, access methods and loss of prosecutor status, the rights and duties of the prosecutors and the disciplinary system of the Office.

In the area of public procurement and for the purposes of this study, the Public Prosecutor's Office intervenes from a dual perspective. On the one hand, initiating criminal proceedings and intervening in all criminal cases to prosecute crimes such as corruption that could derive from irregularities in procurement procedures. On the other hand, to intervene in the cases and in the manner provided by under Article 3.14 of the Organic Statute of the Public Prosecutor in proceedings before the Court of Auditors to defend the legality of contracts awarded by the State public sector. The Public Prosecutor's Office appears before the Court of Auditors in the performance of its supervisory function consisting of examination of the economic-financial activity of the public sector. On its own initiative it may lodge accounting liability legal action before the Court if deemed necessary[97].

In addition there is a special Anti-corruption Prosecutor's Office to combat financial crime related to corruption. The objective of this Special Prosecutor is to intervene in all criminal proceedings in which alleged financial crimes such as fraud or misappropriation of public funds are prosecuted.

• Synergies

The Government and certain offices or agencies have a general and qualified duty to notify the public prosecutor of any alleged irregularities that may lead to crimes such as fraud or misappropriation of public funds[98].

Classification: DETECTION, INVESTIGATION

2.3.6. Administrative Office of Contractual Reviews of Catalonia (TCRC)

The Administrative Office of Contractual Reviews of Catalonia is a recently created specialised administrative body[99] that acts with full functional independence in the exercise of its powers. It exercises its functions within the scope of the Government of Catalonia and the institutions and agencies deemed to be public sector contracting authorities, local authorities within its territory and local government institutions and agencies deemed to be contracting authorities.

The purpose of this body is to enhance the efficiency of administrative procedures, hand down rapid decisions, technical quality, impartiality and legal certainty along the lines of the provisions of Directive 2007/66/EC on appeals.

It has the power to re-establish a legal situation and to oblige contracting authorities to compensate for any damage caused to those concerned through its decisions, which are binding. It also has the capacity to suspend procurement procedures while it arrives at a decision. No legal counsel is required. Judicial review proceedings may be brought before the High Court of Catalonia against decisions of the TCRC.

This body has certain weak points. Although access to these bodies is free of charge in most regions, in Catalonia there is a **fee** of between 750 and 5,000 euros[101], often unaffordable for the interested parties,

97 See the aforesaid Organic Act 2/1982, the Organic Act on the Court of Auditors and Act 7/1988 on operation of the Court of Auditors.

98 Article 30.6 of the State Transparency and Good Governance Act and the general duty established by Royal Decree 14 dated September 1882 approving the Criminal Procedure Act, particularly Articles 262 and 264.

99 As already noted, the LCSP created the special procurement review mechanism (Article 310) prior to recourse to the Administrative Appeal Court against the acts of the awarding authority in the tender preparation phase. After amendment by Act 34/2010, judgement of these appeals is entrusted to a specialised body that acts with full functional independence. The Central Administrative Court of Contractual Appeals (TACRC) attached to the Ministry of Finance was created for these purposes. The Autonomous Communities can create an independent body to hear these appeals or cede the jurisdiction to the TACRC by entering into an agreement with the State.

The procurement appeals administrative body was created in 2011 under the name of "Administrative Office of Contractual Reviews of Catalonia" under Act 7/2011 dated 27 July on fiscal and financial measures of Catalonia (DOGC No. 5931 dated 29 July 2011). At first it was a single-person body. Decree 221/2013 dated 3 September regulates the Administrative Office of Contractual Reviews of Catalonia and approves its organisation and operation (DOGC No. 6454 dated 05 September 2013), transforming it into a collective body and changing its name. This amendment was proposed by the OSACP.

100 Article 10.1 k) of Act 29/1998 dated July 13 regulating the Administrative Offices.

101 The fee was created by Act 2/2014 dated January 27 on fiscal, administrative, financial and public sector-related measures in Catalonia. The fee is applicable in the following cases: a) special procurement-related appeals; b) claims for interim measures requested prior to the filing of a special procurement-related appeal; c) questions of nullity based on the special cases of contractual nullity.

The fee is applied to appeals, claims and nullity questions arising from contractual proceedings heard by the Government of Catalonia, entities and bodies forming part of its public sector that constitute contracting authorities, local government agencies within their territory and the entities and local government agencies that constitute contracting authorities.

to bring a complaint before the Office. Furthermore, in the event that the appeal is declared inadmissible it is not clear whether the applicant is entitled to reimbursement or not. The law only provides for the refund in the event that the Office is declared incompetent to hear the appeal. To this must be added the rule that proof of payment of the fee is a condition *sine qua non* for the Office to accept special appeals on procurement-related issues, requests to adopt provisional measures or questions of contractual nullity.

It must be kept in mind that the raison d'être of these bodies (among other questions) is to remove the burdens, not only of time but also money invested, contingent upon going to court. To this must be added the fact that the right to free justice is not provided for in the law on administrative claims, in contrast to the practice in the jurisdictional field.

A solution to the costs of creating these bodies could be that payment of the fee be borne by the awarding authority against which the action is brought, as occurs in other regions.
Moreover, during the conduct of this study we have detected that these bodies are handing down **certain interpretations of the procurement regulations** that, according to the Review Directive, could be in conflict with the nature and objective of these claims, mainly with reference to the **legal standing** *(locus standi)* of the plaintiffs to lodge them and the formalities required to file the same. With respect to legal capacity, appeals are being declared inadmissible on the grounds that only entities that could be successful bidders can be considered to constitute interested parties[102].

Regarding the **formalities required for lodging an appeal**, there are two main obstacles in the way. In the first place, the requirement that the application for review be lodged physically in the registry of the contractual remedies body. For the purposes of the *dies ad quem*, the Court considers that neither electronic means nor other notification with proof of receipt such as certified fax or registered mail.

Secondly, the date from which the period for filing notice of appeal starts. In this respect, one interpretation considers that the period begins the moment the official award notification appears on the Contractor Profile of the awarding authority. On other occasions it is considered that the period begins with the individual notification to the interested party and on others it is deemed to begin the same day that the Board or technical assessment unit adopts the decision object of the challenge. There has also been division of opinion as to what the dies *a quo* from which the period to challenge the call for tenders should start: publication of the advertisement or the last day of the period for submission of quotes.

In our view, in these cases the problem should not be attributed to the regulation itself but to a rigorously literalistic application of national law taken out of the context of European law. As for the requirement of physical submission of the application for review in the registry, consider the problem if the interested party is located in another region even within the same Member State, and even more if it is in another country. Directive 89/665/EC itself, after the 2007 amendment, provides that: "Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review (...)"[103]. Moreover this interpretation not only ignores, but is in conflict with, the culture of e-procurement as a guarantee of good administration.

102 TRLCSP Article 42 in line with the Review Directive states that: "Any natural or legal person whose rights or legitimate interests have been harmed or may be affected by the decision, may make a request for a special review procedure."

However the Administrative Office of Contractual Reviews of Catalonia is adopting its own interpretation of what it understands "legitimate interests" to mean. To restrict the concept of "interested party" the Court appeals to the theory of legal capacity and the difference between the so-called *"ad processum"* capacity and *"ad causam"* capacity, and claims that the latter is that which determines eligibility to be a party in a specific proceeding: in other words the "legitimate interests".

Based on this differentiation and backed by decisions of the Constitutional Court and the Supreme Court in which legal capacity and legitimate interest are approached from a broad perspective, the Court of Procurement Appeals ends up concluding that the legal capacity to lodge appeals is restricted to cases where the appealing entity will become the successful bidder if the appeal is upheld. Decision 180/2014 may be taken as an example. In this case the Procurement Board decided to exclude one of the bidders after opening the tender to be assessed by formulas. The "interested party" filed a special procurement appeal against said exclusion considering, inter alia, that the Procurement Board's interpretation of the contract price contradicted the regime established in the tendering documentation and that said interpretation infringed the general principle of firm contract prices. The Court decided not to hear the appeal on various grounds. However, for our purposes it rejected the appeal for lack of legal capacity. In other words, it considered the plaintiff "not an interested party" on the grounds that, "Consequently, whether or not the petitioner is excluded from the proceeding will not change the present or past outcome of the tendering process, above all since the company proposed for award of the contract, after being notified to submit all the documentation required to that effect, has already done so (...)

If the tender submitted by the petitioner were admitted (...), its position in the decreasing score order would be second place, so that it would be equally powerless to obtain award of the contract.

The above considerations make it clear that the appeal lodged by the plaintiff cannot attain a positive outcome because said plaintiff would not in any case be awarded the contract".

The Court backs up its reasoning by citing decision No. 746/2014 of the Central Administrative Procurement Appeal Court: "The impossibility of being awarded the contract does determine lack of legal capacity, as this Court has ruled on numerous occasions"; in view of which -the Catalan Court- concludes that: "It cannot be said that the appellant has the necessary legitimate interest to appeal the contested measure while it has no specific interest that could benefit if the appeal is finally upheld".

In 2014 alone the Administrative Office of Contractual Reviews of Catalonia has refused to accept filing of seven appeals on these same grounds (decisions 19, 22, 23, 77, 82, 130 and 180).

The gravity of this interpretation derives not so much from its discrepancy with Community policy, but because the object of the dispute is prejudged: it denies the right to take legal action with the due guarantees – effective judicial protection that is also required of administrative proceedings. To sum up, this interpretation denies legal standing to a plaintiff that *a priori* will not achieve its ends. Only a plaintiff that is in the right *ex ante* will have such standing, provided it will be the successful bidder of the future decision. It could be said that a doctrine of lack of legal standing on the basis of *fumus mali iuris* is being constructed.

That said, we must not forget that Community law ensures that "the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement" (see Article 1.3 of the Directive cited *infra*). This does not mean, of course, that a merely generic desire for legality confers legal standing or the status of interested party. It is clear that "the condition of interested party is not comparable to the generic condition of contractor with capacity to participate in the competition, but that this condition must be exercised either by participating in the procedure or otherwise (...)". Therefore, in our opinion, denying the interest of a bidder contesting a valuation that excludes said bidder from the process on the basis that legal standing is not the equivalent of a mere desire for justice is a legal aberration. We must not forget that even "discarding a challenge a call for tenders lodged by an entity that is not participating due to the very conditions under which the competition is called" is unlawful according to the sentence of the Supreme Court dated 20 June 2005, among many others. Curiously, in the words of the Appeals Court itself, it is not even "necessary to be a bidder to be considered an interested party in the procedure" (Decision 19/2014 dated 28 February).

103 Article 1.5, second paragraph of the Review Directive in its current form.

On these issues, and regardless of the internal debate of a doctrinal nature that may arise concerning the legality and nature of the fee, an effort should be made to leave national categories aside and take account of the provisions of Article 1.3 of the Review Directive.[104]

And ultimately, of the spirit of the Community Directives, the only purpose of which is to articulate every possible means to remove barriers to free competition, inequality of candidates and lack of transparency. Within the scope of this study, moreover, it must be kept in mind that the resources at stake are EU funds and therefore the commission of irregularities in procurement directly undermine the financial interests of the EU.

Under these parameters the administrative bodies and the special procurement-related review play an authentic preventive and corrective role, including as the ideal tool to combat corruption in public procurement.[105]

Classification: PREVENTION, DETECTION

2.3.7. Bidders, candidates, successful tenderers, final beneficiaries, civil society, citizens

Bidders, candidates and successful tenderers are able to detect and irregularities and see that they are corrected by filing for review before the TCRC.

The beneficiaries themselves, in the phase prior to certification of the expenditure, are able to detect and correct certain irregularities *motu proprio* or as a result of prior control as described in section 3.1 of this Chapter.

Civil society and the general public can act as informers or "whistleblowers" before the anti-fraud or anti-corruption institutions. Although there is no unified channel of complaint with legal status, the OAC (Catalan Anti-fraud Office) has articulated a whistleblowing-style mechanism[106].

From entry into force of the new Catalan Transparency Act it seems that they may also intervene in a certain manner by filing for review as provided for in Article 71 *et seq*. against omissions involving noncompliance with the obligations established by law (and for the purposes of this study, those related to the contracts, agreements and subsidies) attributable to the government or public law entities, corporations, foundations, consortiums or other public bodies[107]. It is also provided that "affected persons"[108] may place a complaint with the *Síndic de Greuges*[109] or approach the OAC[110].

Classification: PREVENTION, DETECTION

2.3.8. The special role of the Oficina Antifrau (OAC, Catalonia Anti-fraud Office)

The OAC deserves special attention as an entity that can intervene actively to combat irregularities *(lato sensu)* deriving from public procurement and also when European funds such as the ERDF are involved:

- ✓ It is an **INDEPENDENT** body with its own **PERSONALITY,** of **VOLUNTARY CREATION**
- ✓ Typically **CATALAN,** it has no equivalent in the rest of the State.
- ✓ **ANTI-FRAUD.**
- ✓ **INVESTIGATORY.**
- ✓ **PREVENTIVE.**
- ✓ **CONSULTATIVE.**
- ✓ It has the power of **INDICTMENT** or **PERSUASION.**
- ✓ Flags, investigates and prosecutes **IRREGULARITIES** in **PUBLIC PROCUREMENT.**
- ✓ Flags, investigates and prosecutes **IRREGULARITIES** in **PUBLIC FUNDS** (of all kinds).
- ✓ It is an **EXAMPLE OF GOOD PRACTICE** for the anti-corruption agencies of the **EU.**

104 Said provision states: "Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement".

105 See: Bernat Blay, M. A. "El sistema de tutela de la `buena administración contractual': balance de su implantación y propuestas para un mejor aprovechamiento" ("Judicial Protection of Good Procurement Administration: the Current Situation and Proposals for its Improvement"). *REDA* No. 160, 2013, pp. 189-216.

106 See the section on the OAC where this mechanism is explained.

107 See: section 1.1 of this Chapter, *in fine*.

108 Paradoxically, legal standing to file a complaint or approach the OAC is limited to "persons affected". However, as we have noted in paragraph *Ibid*, there is no such limit for applying for review under Article 71 et seq.

109 The *Síndic de Greuges* is the *ombudsman* in Catalonia.

110 It should be noted that the possible intervention of the Ombudsman or the OAC in this matter not suspend the deadlines for the filing the appropriate appeals or administrative claims (Article 75. 3 of the Transparency Act of Catalonia).

I. The OAC was created in 2008 by the Parliament of Catalonia[111] as a public law entity with legal personality and full capacity to take action. It is independent and is specifically aimed at preserving the transparency and integrity of public administration and personnel in the public sector in Catalonia.

It is worth mentioning that its independence is qualified in relation to the independence enjoyed by other agencies or bodies of a similar nature. The Office does not depend organically on any public authority. It reports directly to the Parliament of Catalonia, a circumstance that strengthens its freedom of action with respect to the executive branch. This fact constitutes a legal precedent in contrast to the entire EU. The director of the Office is elected by Parliament on a proposal by the Government of Catalan.

The **main purpose** of the OAC (ex lege) is: "**to detect** and **investigate** any specific cases of illegal use or allocation of **public funds** or any other **irregular use** thereof deriving from **conduct** involving **conflict** of **interest** or use for private gain of information derived from the inherent functions of personnel in the public sector"[112].

INVESTIGATION > DETECTION > PROSECUTION

The investigative activity of the OAC is based on the criteria of rapidity, economy, simplicity, efficiency and maximum discretion[113].

The following are also OAC objectives by legal imperative: To provide advice and make recommendations to take action against corruption, fraudulent practices and conduct that undermine the integrity and transparency in the exercise of public functions: to train personnel in the public sector and foster all measures required to achieve transparency in public sector management [114].

> PREVENTION > TRAINING

Preventive and educational activity is based on the principle of close cooperation with the various authorities in Catalan territory.

The new provisions of the Catalan Transparency Act must be added to the foregoing. This legislation states that the OAC, pursuant to the mission with which it is entrusted, must ensure compliance with the obligations and rights established under the Act itself[115].

Its **scope of operation** is limited to the Catalan public sector[116] made up of: a) The Government of Catalonia; b) local authorities and agencies and entities related thereto; c) public universities; d) public corporations[117]; and e) foundations and consortiums[118].

And the private sector in the following cases: a) natural persons, organisations and private companies that are entrusted with public services or receive public subsidies; b) contractors that execute works for authorities and entities forming part of the Catalan public sector, or are entrusted with management of public services or public works in the field of accounting, economic and financial management and other legal obligations of the service or works.

Although it may seem a priori that this body is more focused on the prosecution of intentional irregularities or those of a criminal nature, in fact much of the investigation carried out is related to public procurement, subsidies and conflicts of interest, as can be gathered from the following table concerning investigations conducted in 2013.

111 By Act 14/2008 dated 5 November, the Anti-fraud Office of Catalonia, hereinafter LOAC.
Interestingly, the OAC was created in response to the concern expressed by the United Nations in the Preamble of the Convention against Corruption (UNCAC) in view of: "The seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law."

112 Article 1.2 LOAC.

113 Article 22 of the Rules of Operation and internal regime of the OAC.

114 Article 1.2 LOAC.

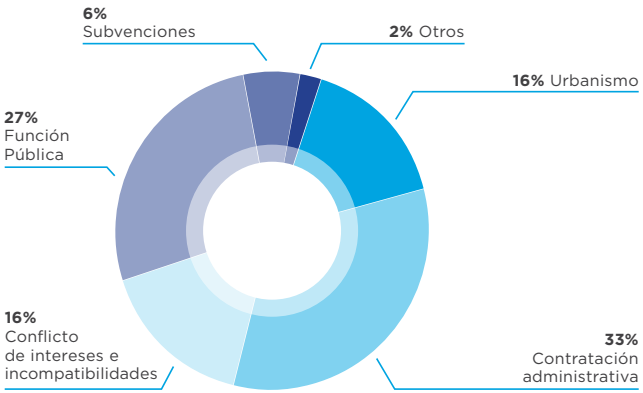
115 Article 75 of the Transparency Act of Catalonia.

116 Article 2.1 LOAC.

117 Public corporation is understood to mean those over which the Government of Catalonia, local authorities or public universities directly or indirectly hold the majority of the called-up capital, control the majority of the votes representing shares or can appoint more than half the members of the governing or management body (Article 2.2 LOAC).

118 Only over those in which authorities and entities forming part of the public sector of Catalonia appoint the majority of the members of the governing body or provide more than fifty percent of the turnover.
If the contribution to revenues is less than fifty percent, said control is confined to management of public services, execution of public works and tax collection functions they perform on behalf of the public sector of Catalonia.

INVESTIGATION FILES CLOSED DURING 2013

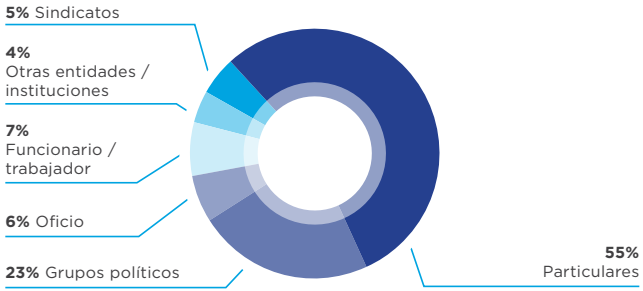


SOURCE: OAC. 2013 ANNUAL REPORT

The decision to initiate a specific investigation to detect conduct that could constitute fraud is formally the prerogative of the Director of the OAC[119], on his/her own initiative or in response to complaints or notifications by natural or juridical public or private persons or even at the request other public bodies or institutions[120].

The type of complainant varies widely. In 2013 citizen participation of accounted for a noteworthy 55% of the total.

TYPE OF COMPLAINANT



SOURCE: OAC. 2013 ANNUAL REPORT

With respect to complaints, the mechanism set up for natural or juridical persons to inform the OAC of acts alleged to constitute fraudulent or illegal conduct contrary to the general interests or the management of public funds deserves special emphasis. This is a kind of whistleblowing by email[121], registered postal mail or reporting the alleged misconduct directly to the OAC.

However, the aforesaid mechanism neither provides incentives to encourage reporting misconduct nor admits anonymous complaints or notification[122]: the complainant must identify him/herself. To mitigate the restraining effects of providing their identity, complainants may request that their right to confidentiality be respected and their data of a personal nature be properly protected from disclosure. However, it is interesting to note that in 2013 only 11% of the complainants requested non-disclosure of their identity.

IDENTIFICATION OF COMPLAINANTS

SOURCE: OAC. 2013 ANNUAL REPORT

Regarding the effectiveness of this measure, it should be noted that 622 complaints have been handled since the creation of the OAC, of which 78 were pending conclusion in 2013 and only 9 have been discontinued[123].

During 2013, the OAC received a total of 164 complaints in 2013, an increase of 12% over 2012, up 36% from 2011 and 13% from 2012. 30% of all complaints received in 2013 were investigated.

119 Article 16 LOAC.

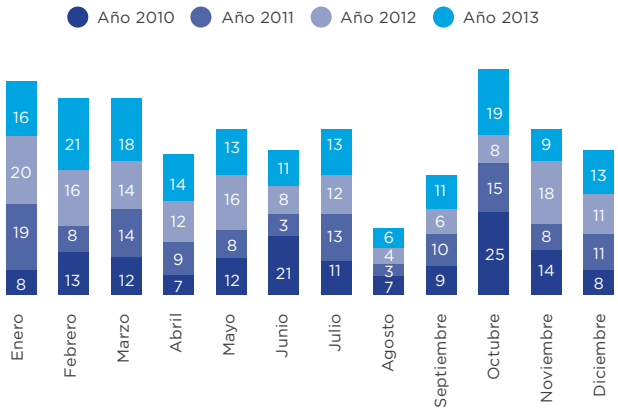
120 Article 16 of the Operational Regulations and internal regime of the OAC.

121 At: bustiaoac@antifrau.cat

122 We mention these two aspects because they are the two pillars on which the whistleblowing mechanisms rest in English-speaking countries. The old *Lincoln Law* (False Claims Act of 1863) still in force, encouraged people to report fraud against the United States and provided the incentive of awarding the complainant a percentage of the recovered value.
See: Lesseps Legal Consulting. "The internal denouncement channels in companies and the protection of personal data", 15 July 2012 *[On line]* http://www.lessepslegal.com/los-canales-de-denuncias-internas-en-las-empresas-y-la-proteccion-de-datos-de-caracter-personal/ [Consulted: 03 December 2014].

123 See: 2013 OAC Annual Report, p. 6.

MONTHLY COMPARISON OF COMPLAINTS



SOURCE: OAC. 2013 ANNUAL REPORT

II. Achievements and implications in the effort to combat irregularities in public procurement at the EU and regional levels

In the EU...

In the specific area of our study it should be noted that the OAC (within the framework of international cooperation and its preventive arm) has been actively involved in all the Commission's proposals aimed at detecting and reducing irregularities in public procurement. For these purposes it has submitted comments and suggestions on the regulations and proposals driven by the European Commission. The comments to the Commission regarding the Green Paper on the modernisation of EU public procurement policy: Towards a more Efficient European Procurement Market are worth noting. This Green Paper includes the various questions raised by the OAC on conflict of interest, operating mechanisms, detection and resolution of situations where such conflicts are observed and other questions of interest[124].

The OAC introduced a definition of conflict of interest in line with the definition adopted by the Commission of Reflection on the Prevention of Conflict of Interest in Public Life of the republic of France[125]. This definition, according to the Catalan Office, should be complemented with methods of prevention of conflict of interest, the obligation to report and information for detection.

With respect to combating conflict of interest, the OAC is committed to promoting the professionalisation of procurement, driving the presence of experts in accordance with the object of the contract; prior control by the awarding authority that could be achieved through an affidavit of liability; establishing a more flexible system of complaints and communication of any infringement (even by telephone or email) without the need to prove legal standing in procedural terms to challenge a decision; and the possibility of creating an independent agency of the awarding authority for this purpose.

Moreover, to prevent the formation of cartels in procurement procedures the OAC proposes: a) prior control systems for procurement; b) creation of a bidders registry coordinated at EU level or a shared sole registry (solvency requirements and causes of exclusion) and c) in general, the OAC defends the need to harmonise European legislation aimed at combating corruption.

At the regional level...

- ✓ Formulation of allegations and proposals in regulatory procedures on requirement by other institutions or on its own initiative[126].
- ✓ Educational and awareness activities specifically directed to persons responsible for public contracts[127].

III. The OAC integrity model: A triple front.

The OAC is committed to fostering preventive measures from a constructive and positive perspective. It proposes a set of measures aimed at strengthening the institutions from the point of view of integrity. The main idea is that each institution or organisation is responsible for strengthening its own integrity system.

In line with this concept the fight against irregularities that compromise the integrity of the institutions must be addressed from three angles:

124 In particular, questions 98, 99, 103.1, 103.2, 105 and 108 were answered.

125 Report dated 26 January 2011 *[on line]* www.conflits-interets.fr

126 During 2013 the OAC took part in drafting a number of proposals, including some on public procurement, aimed at the Government of Catalonia within the framework of two summit meetings on 6 and 22 February 2013, in the interests of democratic regeneration and transparency. At these summits the Government made a commitment to promoting public policies and regulations to encourage the main Catalan institutions to combat all inefficiencies, irregularities, fraud and corruption that may occur (See: http://www.324.cat/multimedia/pdf/9/8/1361551541789.pdf.

In November 2013 the OAC was called upon to make contributions to the proposed Code of conduct and best practices in public procurement that was finally adopted by Catalonia on 1 July 2014 under the name of "Código de principios y conductas recomendables en la contratación pública"(Principles and Code of Conduct for Procurement).

OAC's suggestions focused on how the Code could better serve the purpose that justifies its approval. Special emphasis was placed on ensuring that the Code should have practical application to work as a real tool for integrity.

Suggestions were also made concerning the legal nature of the Code, especially regarding the ethical commitments established *ex novo* in the Code.

In April 2013 the OAC made allegations to the draft Decree in favour of reorganising the Administrative Office of Contractual Reviews of Catalonia.

In April 2014 it made allegations to the draft Decree on the procurement and provision of health services under the Catalan Health Service.

These two rules are of particular importance in the field of public procurement. The contributions made by the OAC are public and can be consulted via the corporate website (See: https://antifrau.cat/ca/almlegacions-a-normes.html).

127 Highlights: Corruption-related risk management course: a course on managerial liability aimed at heads of public procurement in Catalan Government departments and public corporations (24 participants) [Date: 02.28.2014]; Transparency Seminar on public procurement, open to public servants involved in public procurement processes and interested managers from the private sector (235 participants) [Date: 11/10/2013].

1) Guiding and **advising** the **people** who belong to the institution.

The involvement of the organisation's management in leading the campaign for integrity is fundamental to success. This means working from within the institution to drive awareness and training measures. The OAC takes an active role in the design, implementation, and subsequent consolidation.

Every decision and activity of the benchmark institutions must be exemplary and responsible. Patterns of behaviour can be systematised by using tools such as codes of ethics or conduct that the OAC can help to develop.

It is necessary to establish an ethical culture that involves the entire organisation.

2) Ensuring **integrity** in **management**: towards professional public management

The selection, recruitment and promotion of personnel must be conducted under the principles of equality, merit and ability. This fosters institutional integrity.
Professionalisation of the management teams, technical and administrative personnel- enhances the competitiveness and prestige of the institution.

3) Tools for **planning** and **assessing** the activities

Planning is a powerful preventive mechanism and enables systematic evaluation to redirect undesirable situations. The organisations must implement: a) real, significant transparency measures; b) effective accountability mechanisms that strengthen the responsibility of each member; c) specific tools for risk management; d) detection mechanisms built into management processes. Managers of public authorities can detect misconduct by supervising the personnel and through the control processes inherent in the units they manage. The possibility of detection increases if the institution is provided with an internal system for reporting these types of conduct, appropriate channels for receipt and processing of complaints through which risk situations and complaints can be identified and internal audit systems; e) effective response to notifications or suspicions of corruption: carrying out a thorough internal investigation to determine the facts; disciplinary measures; notification of the external control bodies and review of the controls designed to prevent irregularities.

IV. Good practices for combating irregularities in procurement procedures.

The OAC has drawn up a series of observations based on the irregularities in procurement procedures with which it has dealt and its experience in performing investigations. These observations can be summarised in the following recommendations:

a) General recommendations:

- ✓ Transparency measures must be tightened in public procurement, for example by real-time publication of all procurement process documentation on the profiles of the contracting body.
- ✓ Centralisation of the administrative function and award of the procurement contract in a single body is recommended of all Catalan public sector entities that lack sufficient material and human resources to perform said function for themselves, in addition to maintaining centralisation of the political function of detecting and defining the public need that justifies the procurement. Centralisation ensures greater impartiality in the procurement process.
- ✓ A strict but not restrictive interpretation of the conflict of interest regulations is also recommended with respect to all the people involved in the various stages of procurement – members of the procurement board, technical advisers, those responsible for monitoring, project management, etc.

b) Specific recommendations:

- ✓ That the mandatory reports of the service promoting the procurement (justification of suitability and need) be detailed and specific to limit the risk of dividing the supply.
- ✓ Use of procurement procedures that ensure competition and transparency even though the nature of the contract would permit application of other simpler procedures. The open procedure is preferable to restricted and negotiated procedures and, clearly, to direct nomination of the contractor.
- ✓ The request for tenders must contain clear and precise award criteria while specifying the tender assessment method and procedures. Furthermore, the criteria must not be restrictive or impede equal access to all bidders. The requests for tenders must be consistent with the principles of openness, transparency and objectivity and must include award criteria exclusively related to the object of the contract.
- ✓ The use of objective, quantifiable criteria is preferable to criteria that require value judgements.

- ✓ The option of submitting variants should be restricted to ensure that tenders will be exactly comparable.
- ✓ All documents submitted by the bidders must be registered and a full copy of the same deposited in the General Registry of the contracting entity in order to prevent subsequent alterations.
- ✓ The contracting bodies must also differentiate between the subjective and objective assessment phases and establish criteria to ensure that the former is not influenced by the latter.
- ✓ To foster professionalise the contracting authorities.
- ✓ That the technical assessment reports be reasoned and contain sufficient grounds to substantiate the scores awarded.

With respect to works contracts:

- ✓ Increase strictness when drawing up and supervising works projects (avoid modifications during execution).
- ✓ That the performance reports drawn up periodically by project management indicate the work units actually executed and that works certification be consistent with said units.
- ✓ Avoid any change of the object of the contract during its execution.
- ✓ Establish an effective monitoring system prior to payment of the service provided by the contractor in contracts over which periodic inspection has been established.
- ✓ The body responsible for the contract must implement strict surveillance of any subcontracting.
- ✓ That the procurement authority report any facts that may constitute infringement of the competition laws to the appropriate competition watchdog.
- ✓ The monitoring bodies must be endowed with the power to require the procurement bodies to impose penalties on contractors and demand that they compensate all loss and damage caused by errors, negligence or professional misconduct.
- ✓ That the procurement body report any fact that may constitute infringement of the competition rules to the competent procurement-related authority.
- ✓ Avoid extensions of the term of the contract.
- ✓ Broaden the legal standing required to lodge procurement-related complaints.
- ✓ Urgency and delay procedures must be properly documented and substantiated. Inaction or lack of foresight on the part of the procurement authority does not justify the use of negotiated procedures.

V. Differential factor in relation to other investigative or monitoring bodies.

The OAC **acts** in specific cases **with prior indications** of irregularity or on evidence of conduct contrary to the principles of objectivity, efficiency and full compliance with the law.

This represents a differentiating factor in relation to the type of surveillance exercised by other authorities such as the Court of Auditors or the Audit Office. These organisations carry out systematic supervision of all income and expenditure of the public sector in Catalonia through legal, efficient, effective and economical operational audits. The perspective becomes more incisive when prior indications of misconduct exist.

Composition of the team. The personnel involved is multidisciplinary and consists of professionals from various authorities and sectors (law, prosecution and engineering among others) selected according to the principles of equality, advertising, merit and capacity.

Capacity to monitor the activity. The OAC has the power to verify if the authorities meet the administrative, financial, legislative, judicial and other required or recommended conditions. To this end it may take the measures, such as reminders, that it deems appropriate.

If it issues recommendations it may require the bodies concerned to draw up plans to implement the same. The plan must set forth the measures and implementation periods for the purpose with specific mention of the people responsible for each undertaking and, as appropriate, the reasons why it cannot comply with said recommendations.

In the event that the authorities to which the recommendations are addressed ignores them or fails to give reasons for noncompliance, the OAC will include the incident in its annual report. It may also draw up a special report to Parliament.

• **Synergies.** In accordance with Article 15.3 of the LOAC, the Office collaborates and maintains relations with regional, state, community and international institutions that have fraud detection and prevention competences or functions similar to those of the OAC. It should be noted

that there is fluid exchange of information between the various players involved. The relations are particularly close with the other supervisory bodies. As already indicated, the OAC has entered into collaboration agreements[128], including the following:

Between the OAC and the Audit Office. The agreement signed on 6 September 2012a) sets up four broad lines of cooperation based on: a) mutual exchange of information; b) transfer of complaints and inquiries received; c) joint studies and training activities; d) reciprocal transfer of the respective reports and other publications of mutual interest.

Between the OAC and the Office of the Public Prosecutor of Catalonia. The agreement was signed on 15 December 2010: transfer of information to the Prosecutor's Office on the complaints received, transfer from the Prosecutor's Office to the OAC of completed investigations that are not criminal but could constitute irregularities or practices or conduct contrary to probity or contrary to the principles of objectivity, efficacy and full compliance with the law, among other questions.

Both the Prosecutor's Office and the courts have requested the cooperation of the OAC on several occasions. Since September 2011 there have been eight instances of collaboration with management of investigations, on occasions at the request of the court itself or of the Prosecutor's Office, in matters that had not been previously investigated by the OAC. This collaboration has also occurred as a result of investigations carried out by the OAC and subsequently assumed by the Prosecution or the respective Court.

The OAC at international level. The OAC has been committed to collaborate with similar organisations and institutions outside Catalonia since its inception. It is a member of the European anti-corruption networks such as the *European Partners against Corruption* (EPAC)[129]. The Director of the OAC is currently Chairman of this network and the Office, as an institution, holds the Vice-presidency.

The OAC also forms part of the Executive Committee *International Association of Anti-Corruption Authorities* (IAACA) [correct name and acronym] and actively collaborates with the OECD and UNODC, among other institutions, with projects on the international scene.

Finally, it should be noted that the EU Commission's latest Anti-corruption Report[130] refers to this Office as an example of good practice for EU anti-corruption agencies[131]. This report states that OAC is a regional anti-corruption agency specialising in the prevention and investigation of corruption and fraud, unique in the Spanish territory, created for the purpose of preventing and investigating the misuse of public funds, and which holds soft law (non-binding or persuasive) powers especially over the public sector in Catalonia. Moreover, it is the first national organisation to comply with the provision of Article 6 of the United Nations Convention against Corruption[132].

Classification: PREVENTION, DETECTION, INVESTIGATION

2.3.9. National Anti-Fraud Coordination Service (SENECA).

Finally, we cannot end this section without mentioning the recently established (in September 2014) National Anti-Fraud Coordination Service (AFCOS)[133]. The goal of this service is to channel the relations between the OLAF and all State authorities with jurisdiction in the field. Its creation was a direct result of Regulation 883/2013 of the European Parliament and of the Council dated 11 September 2013 on investigations conducted by the OLAF. Spain was one of the EU countries that had not yet met the commitment to create their own AFCOS[134].

128 All agreements signed can be consulted [on line] https://www.antifrau.cat/es/colaboracion-institucional.html [Consulted: 01 January 2015].

129 EPAC brings together 63 [current number] anti-corruption authorities (ACA) and police oversight bodies (POB) from Council of Europe and European Union Member States. The EPAC is an ideal framework for the exchange of experiences and best practices in the fight against corruption between anti-corruption authorities in the European Union who meet annually at the General Assembly of the Association.

130 Report from the Commission to the Council and the European Parliament, EU Anti-corruption Report, Brussels, 03.02.2014, COM (2014) 38 final, p. 14 and Annex 9 "Spain-Report fighting corruption in the EU", p. 10.

131 It also mentions the Spanish anti-corruption Prosecutor's Office.

132 Adopted by Decision 58/4 of the UN General Assembly on 31 October 2003, and ratified by the Kingdom of Spain in 2005, hereinafter UNCAC.

133 Created by Royal Decree 802/2014 dated 19 September, amending Royal Decree 390/1998 dated 13 March regulating the functions and organisational structure of the Economy and Internal Revenue Offices; Royal Decree 1887/2011 dated 30 December approving the basic organisational structure of ministerial departments; Royal Decree 199/2012 dated 23 January establishing the basic structure of the Ministry of the Presidency; Royal Decree 256/2012 dated 27 January establishing the basic structure of the Ministry of Internal Revenue and Public Authorities and Royal Decree 696/2013 dated 20 September amending the previous measure (BOE No. 234 dated 26 September 2014). Its regulations are expected to be promulgated by inserting an additional provision into the LGS.

134 As the Commission noted in July 2014:*"In response to the request to promptly establish an Anti-Fraud Coordination Service (AFCOS), the results demonstrate the recommended action was largely implemented. However, certain states are still setting up an AFCOS, debating where in their public administration to locate it, or have not taken steps to set up an AFCOS. Spain, Greece, Luxembourg, Sweden and the United Kingdom are currently establishing AFCOS".* (Commission staff working document. Follow-up of recommendations to the Commission report on the protection of the EU's financial interests – fight against fraud, 2012. Accompanying the document report from the Commission to the European Parliament and the Council, Brussels, 17.7.2014 [SWD(2014) 245]).

The SENECA is inserted into the IGAE and reports directly to the Auditor General. For the time being its function are limited to coordination and information[135]. It has no powers of investigation and will work on the basis of inputs from the management, monitoring and audit authorities.

According to the Director of SENECA, one of the objectives of this service will be a review of procedures. For these purposes it aims to drive a process to redefine the communication guidelines and review mechanisms relating to reporting irregularities, enhancing the communication mechanisms between national authorities in relation to cases of suspected fraud.

It is expected that the Director of Service will be assisted by an advisory council, to be chaired by the Controller General of the IGAE, in which all entities with responsibility for monitoring, management, prevention and combating fraud in relation to European funds will participate[136]. Nevertheless, the SENECA currently has very limited financial means and human resources. It is also envisaged that this institution will collaborate closely with the judiciary, especially with the anti-corruption prosecution and that the authorities, heads of public institutions and those exercising public functions will have a duty of collaboration with and support of the SENECA.

Pending effective implementation of the SENECA we extend it a warm welcome and trust that it will contribute to solving the problem that generates the diverse and often duplicated or overlapping functional decentralisation typical of the regional scenario. However, all this is conditioned to its future legislative development.

The regulatory and organisational measures to ensure the cooperation and participation of all national authorities involved in combating fraud and the protection of financial interests will have to be adopted. This service should optimise the flow of information and thus provide a unified vision of the management of European funds. Furthermore, it must be noted that in addition its lack of investigative powers, in principle it will not be empowered to assess the controls or activities of the audit authority.

In our opinion, this would mean the loss of a valuable opportunity to put quality auditing in place. SENECA would also be the ideal institution to lead implementation of a unified whistleblowing-style complaint system.

Classification: PREVENTION, DETECTION

135 In particular, it performs the following general functions: a) to oversee the creation and implementation of national strategies and to promote the legal and administrative changes needed to protect the financial interests of the European Union b) to identify possible weaknesses in national systems for the management of European Union funds; c) to establish channels for information and coordination in dealing with irregularities and suspected fraud between different national institutions and the European Anti-Fraud Office and d) to promote training to prevent and combat fraud.

The above general functions are articulated through the following specific functions: (i) contact point with the OLAF; (ii) competent authority to assist OLAF in performing its mission (application for judicial authorisation if necessary); (iii) irregularities/indications of fraud: centralisation and quarterly communication; (iv) indications of fraud: analysis and subsequent monitoring; (v) others: centralisation of information for the report on protection of financial interests.

136 This applies in particular to the Ministries of the Interior, Justice, Foreign Affairs and Cooperation, the Attorney General's Office, the Tax Agency and the Autonomous Communities and local corporations in the manner to be determined.

3. MECHANISMS OF CONTROL AND LEGAL CONSEQUENCES BEFORE THE COMMISSION OF IRREGULARITIES ON FUNDS AND PROCUREMENT

3.1 SPECIFIC ERDF CONTROLS

PHASE 1. ADMINISTRATIVE AND FIELD CONTROLS PRIOR TO CERTIFICATION OF EXPENDITURE

Agency entrusted: **Technical Control Office** (TCO) of the DPPE intermediate body of the State Management Authority or **second tier intermediate bodies**[137].
Nature of the control: *Ex ante* and preventive
Type of inspection: a) Administrative: Documentary b) on the ground, c) on inspections performed by the second-tier intermediate body.
Limitation: in accordance with the Community and State legislation on procurement.
Scope of control:
-Documentary: 100% of all procurement procedures deriving from the expenditure statements.
-On the ground: a representative sample.

PROCEDURE AND CONTENT OF INSPECTIONS
a) Inspection Documentary:

✓ The beneficiaries register the relevant contract in SIFECAT[138]. The following information shall be attached: Administrative and technical documentation of the call for tenders; reports and minutes of the contract award board; documents relating to advertisement in official journals; award decision and signed contract.

✓ The TCO checks that the agent has been notified and all the required documentation has been submitted.

✓ The TCO accepts the certification and forwards it to the DGPPE through SIFECAT.

✓ The administrative inspection is performed.
This takes place at the beneficiary's head office. The information provided in the expenditure statements is scrutinised and compared with all supporting documentation using a standardised checklist.
There is a specific checklist for compliance with public procurement.

✓ Once the DGPPE has the public procurement checklist the TCO will proceed to verify it using a software tool. Successful verification means that all the information relating to the contract is correct.

✓ The results of the verification are loaded into a document called "*Audit 1*. Administrative Checklist" and sent to the beneficiaries so that they can file allegations and correct any errors as they see fit. The amount contracted, any incidents or irregularities detected and the economic impact are indicated in the final Audit. From that time on these results are taken into account and in subsequent verifications to ensure that the beneficiary is not required to bear further costs beyond what is stated or quantified in the Audit.

✓ A half-yearly report is issued on the overall results of the administrative inspection. The report also includes recommendations for the beneficiaries and the total amount of expenses to be certified is calculated.

b) Inspections on the ground or *in situ:*

In situ inspections are performed after the documentary verification but can take place at the same time. Their aim is to check various technical and physical aspects of the project including verification of all administrative and technical documentation. The aspects verified are contained in the "Audit 2Checklist. Checklist on the ground". For our purposes the following aspects are verified as reflected in the Checklist:

✓ The material reality of the co-funded operation.

✓ The corrective measures taken by the beneficiary as a result of internal and external controls and monitoring of the same, and

✓ Whether there are written procedures to act in the event of irregularities or fraud.

137 As already noted these organisms are ACC1O, the Directorate General of Local Administration with the Provincial Council of Barcelona and the ICF in conjunction with those designated as management bodies for coordinating the planning, management, monitoring and control of the operations co-funded in the field of competences of departments such as the Directorate General of Telecommunications and the Information Society of the Department of Business and Labour, the Department of Agriculture, Livestock and Fisheries and the Environment, the Technical Office of the Department of Territory and Sustainability and the Secretariat General of the Department of Health.

138 SIFECAT is the Government of Catalonia management platform of the 2007-2013 Structural Funds. This software application facilitates management of information and procedural formalities of projects co-funded with ERDF. It covers the selection, expenditure substantiation and project control phases. SIFECAT provides electronic communication across the entire chain from the beneficiary to the Commission, enabling reliable real-time assessment of the status of the funds.

These prior checks are performed by the TCO itself or outsourced to a private company and charged to Priority 5 Technical Assistance. If they are outsourced the TCO is responsible for checking the controls and the company is subject to the guidelines of the DGPPE.

- ✓ In the event that incidents are detected the beneficiary is required to make the necessary adjustments. If the irregularities are irreparable the items involved or the entire project are excluded from certification.
- ✓ An interim report on each revised project is drawn up and forwarded to the beneficiary to enable filing of allegations as appropriate.
- ✓ A favourable or unfavourable final report is then prepared. The beneficiaries can also file allegations against this report.
- ✓ The final Audits are registered in SIFECAT once the administrative and in situ inspections have finished. The final conclusions, recommendations, follow-up activities and, as appropriate, the corrective measures to be performed, are placed o record.
- ✓ The TCO will check that the beneficiaries have followed the recommendations. If they have done so in due time and form, the monitoring file will be closed.

The TCO must monitor the aforesaid inspections in the event that they are performed by second tier intermediate bodies.

- ✓ The co-funded part of the project is paid once the administrative and in situ inspections have verified the technical and financial execution of the project and the certification of expenses and application for the respective payment are forwarded to the Certification Authority[139].

Therefore, as can be seen, the TCO follows a standardised procedure to fulfil its main function of monitoring expenditure prior to certification.

This prior control enables detection of specific public procurement-related irregularities on the basis of which it applies the appropriate corrective measures on one hundred percent of contracts funded by the ERDF.

PHASE 2. AUDIT CONTROL
AFTER CERTIFICATION OF EXPENSES

Agency entrusted: **The General Controller's Office of the Government of Catalonia** by agreement with the State Controller's Office (IGAE).
Nature of the control: *Financial-corrective.*
Type of Inspection: *Regulatory or comprehensive.*
Limitation: in accordance with the Community and State legislation on procurement.
Scope of the control: random representative sample.

The aim of this type of control, completely independent those performed by the TCO, is to check that the EU funds that co-finance projects have been obtained and used in accordance with the law and best practices. The audit authority can perform the checks it deems necessary but is required to perform at least audit control of the systems and to audit particular operations. The former detects errors or irregularities of the management system itself. The latter detects irregularities in procurement procedures. This control is performed on a random representative sample in order to verify expenditure already declared on the basis of an Annual Control Plan.

The Annual Plan of Control designates the entities to be inspected during the year and the type and scope of the control. Like the administrative inspection, these controls can be outsourced.

They verify the following, among others: **a)** the origin of the expenses; **b)** that they are calculated in accordance with European legislation; **c)** that they are consistent with the approved tendering conditions and the operations actually performed; **d)** that the effective or foreseen destination of the project is consistent with the description set forth in the application for European co-funding.

Special attention is paid to the condition that co-funded projects must be carried out in accordance with European public procurement rules.

Once the inspection has been performed the Office issues a provisional report containing the results and key findings. This report is submitted to the DGPPE and the beneficiary, which can make the allegations it sees fit.

139 The Certification Authority sends the application to the European Commission, which must make the payment within two months from the date on which it officially receives the application.

Once the process has been completed, the Office issues the final substantiated report, wholly or partially accepting or rejecting the allegations (in the event of discrepancies) and is forwarded to the DGPPE and the beneficiary.

If irregularities are detected as a result of this control, the irregular amount will be corrected by total or partial cancellation of the public contribution approved by the Management Authority in accordance with the provisions of the European regulations.

In Catalonia the procedure for correction of irregularities is articulated through the aforesaid SIFECAT software that includes a module dedicated to management and control of the Funds. For these purposes, according to the Procedures Manual[140] three areas are envisaged for monitoring the controls: **prior controls, monitoring of the controls and registry of irregularities**[141].

Furthermore, **rectification of the declared expenditure** is the procedure by which the data on certification of payments already made are amended. These modifications may be due to: a) errors detected during verification by any of the agencies with responsibilities for control; b) implementation of the conclusions drawn within the framework of audits and other control operations.

The procedure varies according to whether the certificate to be amended has been included in a declaration of expenditure sent to the Commission or not.

3.1.1. Observations on the controls performed by the OTC and the Controller's Office

In addition to *in situ* inspections, European legislation assigns a fundamental role to the Managing Authority in the administrative controls: this role is not confined to verification but also includes custody of documentation, records, audit logs, monitoring, etc. of one hundred percent of the operations for which certification is requested. All this implies an unaffordable deployment of human and material resources, especially in a context of economic crisis like the present. In fact the cost is doubled because once the expanse has been certified the audit authority performs further controls. To fulfil these obligations the authorities are forced to resort to outsourcing the controls.

In addition, both the procedure and the content of the control performed by the two authorities are very similar. The IGAE is an institution especially created for internal control of public administration. Therefore, the option of this authority performing both controls should be considered, with the only proviso that organic differentiation on the organisational chart must be established so that both the controls and the personnel involved in each one are clearly separated[142].

Outsourcing of controls to the private sector should also be reviewed. Controls on the suitability of the legal basis of the procurement procedure are usually performed simultaneously with those on the eligibility of expenditure, the adequacy of substantiating invoices, payments, performance reports, compliance with environmental requirements, systems to avoid duplication of payments, etc. Specific procurement audits are not usually performed. This aspect must be taken into account especially when said controls are outsourced to the private sector, since major companies in the sector are usually experts in financial audit rather than technical and legal issues.

There is no evidence that the criteria applied when performing the audits include assessing whether or not the management process applied to the operation is itself the most suitable. In other words, the "executing bodies" of operations approved for co-funding by the ERDF OP are responsible for the effective implementation of these activities and the management of the aforesaid expenditure. The execution process depends on several factors or variables, such as the nature of the body or of the specific activity. These processes are basically the following: a) procedures for execution of operations by granting of subsidies; b) procedure for execution of operations by the award of contracts; c) procedure for execution of operations under agreements; d) procedure for execution of operations by management order.

Thus the operations can be implemented by any of the above methods. In many cases the legal instrument through which the operation is articulated does not pose serious problems, but in other cases it does. Recourse to management agreements or orders instead of issuing a call for tenders may be questionable in terms of free competition, equal opportunity and transparency. Therefore it would be advisable to pay attention to the legal instrument as a control over the decision of how to conduct the operation, especially if the formal instrument is a management order or agreement rather than by contract.

140 2007-2013 ERDF Operational Programme Procedures Manual of the Government of Catalonia in the amended text adopted by decision of the Director General for Economic Affairs on 24 October 2011.

141 Operations subject to control are registered through the prior controls under Article 13 of Regulation 1083/2006 with explicit detail the recommendations made and rectifications implemented. Monitoring of controls enables monitoring of *ex ante* and *ex post* controls. The system enables creation of a record of *ex post* controls and monitoring of the recommendations made and corrective measures carried out. Finally, monitoring of the corrections of declared irregularities is enabled through the irregularity record. It enables identification of the corrective measure applied, the certification on which the correction has been implemented and the control number assigned to the operation.

142 Several of the authorities interviewed are of the same opinion.

3.2. APPLICATION OF FINANCIAL CORRECTIONS

From 2011 to the present the criteria used by almost all regional authorities when performing financial corrections have been those set forth in the working document on criteria for the application of Regulation (EC) 1083/2006 to expenditure co-funded with ERDF and the Cohesion Fund. This document, which lacks legal force and has not been officially released, was drawn up by the Ministry of Economy and Finance on 21 July 2011. Prior to that date there were no internal benchmark criteria common to all supervisory authorities. In addition, the State has been reticent on numerous occasions to apply the 2007 (and earlier) Guidelines of the Commission[143].

The 2011 document has been widely welcomed. It sets forth a series of criteria to assess the scope of financial corrections for each specific case of irregularity although it does not cover the issue of extrapolation of irregularities. It draws on the 2007 Commission guidelines. The most recent domestic jurisprudence is also abandoning its misgivings about basing decisions on the Commission guidelines[144].

The sentence positively emphases the explicit admonition that the guidelines should not be considered "a classification of the various irregularities but is offered as a mere reflection on the possible criteria that could be used to estimate the financial corrections be applied in the event of infringement of the applicable regulations."[145] It also notes that the document has no legal or binding effects and that therefore application of its provisions is not mandatory.

The document also contains a list of corrections to be applied to various infringements of the procurement procedures such as the eligibility of expenditure, gender equality, environmental protection, proper audit logging, information and advertising among others.

In general, the guidelines issued by the Ministry are consistent with the 2007 European Commission guidelines. The underlying premise is that all the declared expenses must be regular and in accordance with national and Community legislation, but that there are certain cases in which the total cancellation of the subsidy would be disproportionate and contrary to the purpose of the funds themselves and that in such cases, lump-sum corrections may be applied. On this question we would only point out that according to the decision of the Commission on 7 December 2011 , lump-sum corrections are applied when the loss and damage generated by the irregularity cannot be accurately determined in the EU budget. Therefore, it is neither a question of full cancellation of the subsidy nor of applying a generic percentage, but of attempting to calculate to what degree the irregularity is detrimental to the interests of the European Union.

Like the Guidelines of 2007, the Ministry's Working Paper differentiates the corrections to be applied depending on whether or not the contract is subject to harmonised regulation. The ratios range from two to one hundred percent. The description of the irregularities is clearer than that contained in the 2007 Guidelines. The list describes a total of thirty-two cases of irregularities to which the appropriate correction is applied.

However, since publication of the Decision of the Commission dated December 2013 these criteria are obsolete and should no longer apply. In the opinion of various regional control authorities interviewed, the current reference document is said Decision of the Commission.

Notwithstanding the foregoing, several other questions require attention. Firstly, and as noted in the working document itself, corrective criteria are applied to irregularities detected by different indicators standardised[147] (checklists or audits, especially in the prior control stage). As already pointed out, procurement requirement compliance checklists are drawn up on the basis of the requirements of national legislation and, moreover, provide for the possibility of applying not only the LCSP, but also the previous TRLCAP (Public Administration Contracts Act) of the year 2000.

We must not forget that Spain has been condemned several times for poor transposition of the public procurement directives and therefore verifying compliance with the procurement-related requirements of domestic legislation is no assurance of compliance with Community rules, at least until approval of the TRLCSP in 2011.

Consequently, if the previous criteria and/or indicators used to detect irregularities are not in line with European directives, even though the irregularities detected on the basis of these indicators are subsequently corrected according to the European method (correction scale of the 2007 Guidelines or the Decision of 2013), many other irregularities escape correction.

143 See: the paradigmatic decision of the Court of Justice dated 6 April 2000, C-443/97: Kingdom of Spain v European Commission, among other more recent cases: Sentence of the CJEU dated 26 February 2013, Joined cases T-65/10, T-113/10 and T-138/10 on reduction of ERDF to various regional operational programmes in Spain.

144 A good example is the decision of the Superior Court of Catalonia No. 531/2014 dated 6 June which discusses a financial correction imposed on an ERDF beneficiary. To focus on the issue under discussion, the Court dismissed the appeal on the grounds that "the appellant has failed to refute the justification for the decertification or deduction challenged, which is deemed to be in accordance with the aforesaid Community regulations COCOF07/003/02-FR (paragraphs 2 and 22 of the same)" Legal basis three.

145 p. 1 and 2.

146 COCOF 11-0041-01.

147 The Working Document states (p.2) that "The existence of an irregularity must have been declared prior to application of the provisions of this document".

In connection with the problem of effectuating corrections based on contractual modifications, it must be pointed out that rule 2 k) 3. of the aforesaid eligibility for subsidies Order provides that "payments made by the beneficiary deriving from modifications of public contracts while their eligibility Directorate General of Community Funds". On the basis of this premise the Managing Authority and Intermediate Body of the Government of Catalonia used to individually analyse and communicate its criteria on the eligibility or otherwise of certain modifications until 2012, when it was established as a rule that contractual modifications performed in accordance with regulations prior to the TRLCSP are only eligible if they do not entail an increase in the initial award price of the contract and the modification does not change the overall legal nature of the same. At all events price reviews, additional expenditure for final certification and payments processed under the currently applicable legislation are deemed eligible for subsidy[148].

It must be remembered that contractual modifications go well beyond mere variation of the award price. Moreover, the wording of the limitation "change in the overall legal nature of the contract" instead of "alteration of the essential terms of the contract" draws the attention.[149]

The other circumstance that adds uncertainty to the process of determining lump-sum corrections does not originate in Catalonia. We refer to the fact that the criterion for application of correction ratios is, in the final analysis, the subjective judgement of the authority that happens to be performing the control. This means that although the percentage range to be applied is defined according to the type of irregularity, the actual amount depends on a subjective interpretation.

This problem at domestic level has been repeatedly pointed out throughout this Study. The correction percentage deemed appropriate by the managing authority in the prior control frequently differs from the criterion of the audit authority, the Commission and even the European Court of Auditors. Thus a beneficiary could be faced with the perplexing situation that up to four different authorities, in the performance of their control duties, all modify the correction percentage of the awarded funding. The opinion of the Court of Justice of the European Union may also differ in decisions on when deciding on challenges lodged by the Commission against the State[150].

Moreover, beneficiaries habitually file appeals before the prosecuting authority itself and even more so before the administrative courts against decisions that impose financial correction. A reflection on the confusion generated from the point of view of the beneficiary and mismanagement from the point of view of the administrative procedure and institutions would not be out of place.[151]

3.3. OTHER CONTROLS EXERCISED BY NATIONAL AND REGIONAL INSTITUTION

Leaving to one side the inspections specifically required by European regulations, ERDF-funded projects are also subject to controls imposed by national and autonomous community authorities. In other words, the various national audit authorities do not distinguish between contracts financed with European funds in their day-to-day supervision or investigative tasks. Therefore they are subject to the same controls as other public sector activity

The following are the main channels through which irregularities can be detected.

- General Controller's Office of the Government of Catalonia and the IGAE:

The normal function of these supervisory agencies is to control the public sector by performing various types of audit with special emphasis on compliance with legality (supervision, constant financial control and public audit).

The Controller's Office, as the audit authority of the public sector of the Government of Catalonia, can detect irregularities in public contracts co-financed with European funds as a result of ordinary controls different from those it performs as the "European funds audit authority".

The IGAE, on the other hand, can detect irregularities in the course of its activity as the audit and coordination authority not only as a consequence of its obligation to draw up reports and opinions to be submitted to the EU, but also as a result of activity on its own initiative as the internal supervisory body of the State public sector.

- Public Audit Office: **a)** as a result of an external control performed on its own initiative or as ordered by Parliament or by legal imperative; **b)** on the basis of audit and supervisory body reports systematically forwarded by the Controller's Office of Catalonia across the entire public sector; **c)** as a result of a control assumed related to referral of contractual information under Article 39 of Act 7/1988 and Article

148 See: Circular 1/2012 of the DGFC on the eligibility of modifications and along the same lines Instruction of the DGAE dated 4 June 2012, both cited above.

149 See: Part one of this study The European Bloc and section 1.2 of this chapter of Catalonia in which the question of contractual modification and the fourth generation Directives are treated in detail.

150 See: Part one of this Study (The European Bloc) where, in addition to the discrepancy between the European Commission and the Court of Audits on the concepts of "irregularity" and "error", the different positions in relation to what constitutes detriment to the financial interests of the EU are revealed.

151 STSJ-Cat No. 548/2013 dated 9 September (Section 5, Administrative Court) is a textbook case that perfectly portrays the risk of duplication, the situation of the beneficiaries and the disparity of criteria. After two separate proceedings initiated by various audit management authorities to decertify the expenses of certain projects financed 50% by ERDF funds with diverse criteria and results, the beneficiary ended up challenging the decisions before the highest jurisdiction. The Supreme Court upheld the appeal and reversed the decisions on the grounds that they were unlawful.

29 TRLCSP within the scope of its competence and direct access to all digital information loaded into the Registry of Bidding Companies; **d)** as a result of assumption, as delegated by the Court of Auditors, of prior controls and requirement of accounting responsibilities; **e)** as a result of its obligation to ensure compliance with the rights and duties set forth in the Transparency Act of Catalonia.[152]

Court of Auditors: a) financial control. As a result of the control it assumes over the duty of forwarding contracts provided for under Article 39 of Act 7/1988 and Article 29 TRLCSP to the extent that it retains its supervisory powers over the entire public sector regardless of the fact that the Autonomous Communities have their own supervisors; **b) accounting responsibility**. As a result of its accounting jurisdiction and regardless of whether these are exercised on the same acts or criminal or administrative penalties; **c) other responsibilities.** As a result of its competence to rule on the responsibilities incurred by persons or entities that receive subsidies, loans, bonds or other public aid.

- OAC: a) As a result of taking action on its own initiative; **b)** as a result of a collaboration agreement with the Public Audit Office pursuant to which mutual communication of information and mutual transfer of complaints and consultations received; **c)** as a result of complaints received.

- THE PUBLIC PROSECUTOR'S OFFICE: a) as a result of complaints; **b)** as a result of the general obligation to inform the public administration of irregularities that could constitute crimes; **c)** as a result of taking action on its own initiative.

3.4 INTERNAL LIABILITY FOR NONCOMPLIANCE WITH AN ACCOUNTABILITY OBLIGATION OR WITH THE SUBSIDISED PROCUREMENT REGULATIONS.

The consequences of noncompliance with accountability obligations under the reporting requirements of the supervisory bodies or as a result of accountability or of the subsidised procurement regulations fall into three broad groups:

a) Consequences of a political nature for the reputation of the institutions and their managers

This is achieved through reports, opinions and recommendations issued by the control, supervision and investigating authorities and carry considerable weight and moral authority.

In addition, it has recently become possible to make a public declaration of accountability noncompliance published in the *Official Gazette of Spain* or the respective autonomous community gazette[153].

b) Financial and personal liability. Aimed at responsible institutions and individuals implicated in noncompliance.

- ✓ Requirements, coercive fines, disciplinary sanctions and proposals, dismissal, debarment, removal from office[154].
- ✓ Pecuniary liability[155].
- ✓ Accounting liability[156].

c) Criminal liability

3.4.1 Considerations on the responsibilities contained in the State and Catalan Transparency Acts and the consequences for noncompliance with the procurement rules

I. As noted above, State law provides for a system of infringements and sanctions linked to breach of certain obligations provided for in the legislation. However it must be noted that the penalties provided

152 Article 75.1 of the Transparency Act of Catalonia.

153 Public recrimination is provided for in Article 30.2 a) of Act 19/2013 dated 9 December, the State Transparency Act.

154 The following legal provisions are noteworthy: a) Regulation of the internal procedure of the Public Audit Office [Decision dated 26 November 2012 by which the Regulations of the Public Audit Office of Catalonia approved on 23 October 2012 are published] provides that when a supervised entity fails to provide the requested documentation, it shall be required to do so in the terms of a notification advising that failure to submit may constitute a criminal offence (Article 37). If the body concerned disregards this warning, the Audit Office may inform Parliament and (as required) the law courts or the Public Prosecutor's Office of reiterated lack of cooperation or obstruction of access to data that impedes or obstructs the exercise of its inherent functions (Article 8 s) of Act 18/2010, the Pubic Audit Office Act; b) Act 7/1988, the Court of Auditors Act. It is provided that noncompliance with the requirements ordered by the Court competent to impose fines on the responsible party and power to notify Parliament of the lack of collaboration and to propose imposition of disciplinary sanctions including removal from office or dismissal of the civil servant involved to the Government, Ministers or competent authorities (Article 30.5 of Act 7/1988); c) State Transparency and Good Governance Act. This recently adopted legislation governs infringements of financial and budgetary management and disciplinary penalties depending on severity (minor: reprimand; serious: public declaration of noncompliance; very serious: removal from office, etc.) (Articles 27 ff.); d) General Subsidies Act. Penalty regime under the Budget Act; e) Public Finance Act of Catalonia 2002. Sanctions regime.

155 To the extent that the object of the infringement is co-funded by the national budget. This responsibility is generally regulated by Article 176 of the LGP. They constitute the following offences, among others, entailing pecuniary liability: having incurred in misuse in the administration of public funds; entering into commitments regarding expenditure; liquidating obligations and ordering payments without sufficient credit to do so or in breach of the provisions of this Act or the applicable budgetary legislation and issuing refundable payments.

156 See: the section on the Court of Auditors.

for under this Act only apply to offences relating to the duty of good governance and not to transparency in public activity. Infringement of obligations relating to the active advertising of procurement activity is therefore exempt from responsibility.

The Catalan Act, the penalty regime of which does not discriminate between the transparency and good governance obligations, is more apt. However, the obligation to remit information or that of active advertising as transparency measures must not be confused with responsibilities arising from infringement of the procurement rules. In other words, the object of this contingent sanctioning procedure is ascertain compliance or otherwise with the obligations of the Transparency Act and not to assess compliance of the procurement activity with the law on procurement[157].

II. On the consequences of noncompliance with the legislation on public procurement.

In spite of this wide range of sanctions, unlike the situation with respect to other fields such as taxation, there is no specific administrative disciplinary proceeding to penalise infringement of the public procurement legislation.

Withdrawal of a subsidy or the imposition of a financial correction must not be confused with or made out to be comparable to the assumption of a liability deriving from infringement. Beneficiaries often perceive revocation or corrections as aggression or punishment, but it must not be forgotten that a revocation or a financial correction is no more than reimbursement of a debt. The rights of the entity receiving the subsidy only exist to the extent that it meets the established requirements. Thus if it fails to meet these requirements the right to receive the grant no long exists and the receiving entity must return what does not belong to it.

There are numerous sanctions that could indirectly chastise illegality in public procurement, but the truth is that irregularities in this field are not linked to a coercive penalty *per se*. Some of the authorities interviewed consider that setting up a system of penalties aimed directly at those responsible for procurement as a means of combating irregularities would be a positive measure regardless of any corrections applied and independently of other liabilities they may incur (accounting, criminal, etc.).

> Imposing sanctions as a result of an infringement will always be an effective prevention measure. In accordance with the theories of prevention, the purpose of penalties and sanctions is to prevent crime as a means to protect certain social interests. From the point of view of special prevention, the certainty of punishment can also prevent a particular person from re-offending[158].
>
> The existence of sanctions associated with infringement of the procurement rules would be fine and would put an end to the issue of "political will" but it must be aimed at the real offenders, the contracting body[159].

Others, however, opt for the culture of prevention from a non-punitive point of view and consider that the political, prestige and reputation-related repercussions that the reports of external supervision bodies entail is punishment enough. Sanctions, therefore, would be used as *ultima ratio*.

> Proactive management of the risks of corruption is essential to reduce the opportunity for improper conduct. This means drawing up a corruption risk prevention plan that would include preventive measures to reduce the likelihood of misdemeanour and the opportunities that enable the risk of corruption to become real, and measures designed to reduce the severity if risk develops into reality. These measures would enable the organisation not only to respond to the situation but also to learn to avoid such circumstances in the future.[160]

157 For example, ten minor contracts could be directly awarded and the information published on the transparency portal or in the relevant contractor profile. Said publication would meet the transparency duty governed by the Act, while in fact these ten minor contracts derive from splitting up a major contract that would have required award by open competition.

158 Personal opinion expressed by an investigating authority. This position is endorsed by the Consejo de Estado (State Council) and set forth in the Opinion it issued on the Transparency and Good Governance Draft Bill: "(...) The transfer of inalienable moral standards to the legal sphere can be problematic in certain cases, to the extent that the main instrument available to the judiciary to force compliance with the law is coercion, whereas compliance with moral or ethical norms is based more on persuasion, or even on the threat of social ostracism that such noncompliance may entail".

159 Personal opinion expressed by a specialised procurement body.

160 Personal opinion expressed by an investigating authority.

4. SYSTEMIC AND MOST FREQUENT IRREGULARITIES

Access to the cases themselves and other relevant statistical data would be required to determine the most frequently encountered irregularities in ERDF-funded procurement and how they have varied after the preventive, educational, legislative and coercive effort of recent years. The availability and accessibility of these data has been one of the biggest problems we have faced when conducting this study, either for legal reasons, in the case of ongoing investigations or controls, or due to reticence to cooperate. For these purposes, being able to examine the list of irregularities that Member States must periodically report to the OLAF through the IMS *(Irregularities Management System)* is essential. After repeated telephone and e-mail contacts with several of the authorities involved including EU agencies the end result has been that we have not been granted access to these data. All the agencies consulted claim that they are not the owner of the file and therefore they cannot disclose its contents.

In this scenario the voluntary cooperation of the authorities interviewed, examination of decisions, the most recent sentences of a representative sample of cases and the annual reports of the stakeholders have proven crucial.

4.1 KEY RESULTS FROM THE 2013 ANNUAL CONTROL REPORT OF THE AUDIT AUTHORITY (EXPENDITURE CERTIFIED IN 2012).

ERDF REGIONAL OPERATIONAL PROGRAMMES 2007-2013 AND IRREGULARITIES NOTIFIED TO THE EUROPEAN INSTITUTIONS.

In 2012 the Spanish Audit Authority detected irregular expenditure of around 11%[161] of the certified expenditure across the total sample audited.

With respect to audits of operations in the Autonomous Communities tranche, the audited expenditure ranges from 62% to 9% of total certified except in three cases, where it is lower. The error rate is higher than 2% in nine of the Operational Programmes. The total error rate in the sample is 11%.

Catalonia was given qualified approval. A local tranche body was intervened for irregularities and deficiencies detected in 2012. An action plan was drawn up that has been partially accepted. This shows the need for improvements in the selection of operations eligible for subsidies and their modifications, calculation of revenues and in procurement in general.

The most common type of irregularity is three times more frequent than the next and public procurement is the one that accounts for the most irregular expenditure. It is followed by subsidies and EU policies.

The following have been identified as systemic irregularities[162]:

- ✓ **Procurement-related** procedures and **selection** of operations.
- ✓ **Defective monitoring** of procurement performed by **beneficiaries** of **subsidies** for **R&D+i.**
- ✓ **Expenditure** managed by **instrumental bodies.**

The audit authority notified the European institutions of three fraudulent irregularities in 2012 and one in 2013 compared to 491 and 277 respectively that were not reported as fraudulent. Financial corrections totalling 1952 million euros and 193 million euros were executed in 2012 and 2013 respectively[163].

	Cohesion Policy[164] ERDF			
ITEM	Number		Euros	
	2012	2013	2012	2013
Fraudulent irregularities notified	3	1	93.447	197.681
Irregularities not reported as fraudulent	491	277	516.657.968	86.834.854
2013 Financial corrections implemented within the framework of shared management			1.952 million euros	193 million euros

161 Total expenditure audited: 1,302,530,297.37 euros; Total irregular expenditure: 143,252,341.36 euros.
The Annual Opinion of the Audit Authority expressed an unqualified favourable opinion on 11 subpopulations, qualified approval on 7 and expressed reservations on 10. The reservations were for errors detected in audits of operations, systems or both.

162 Other systemic irregularities not directly related to public procurement but which do involve European funds are: improper application of eligibility criteria, certification of ineligible VAT, improper recognition of indirect costs, lack of results of R&D+i subsidies and calculation of self-financing requirement for subsidies.

163 Commission reports to the European Parliament and the Council. Protection of the European Union's financial interests — Fight against fraud 2013. Annual Report COM (2014) dated 17 July 2014 and 27 July 2013 COM (2013) 548-end.

164 In 2012 the cohesion policies were still not differentiated by the fund under which they were implemented.

According to the Director of SENECA this low rate of fraudulent irregularities is not due to lack of detection or reticence or unwillingness to notify them. She asserts that the concept of "fraudulent" irregularities is extremely problematic because it is considered that it is the judicial authorities who must decide if an irregularity is fraudulent or not. She also believes that said authorities influence other questions such as data protection or the presumption of innocence, which mean that the issue is a sensitive one.

Regardless of this sensitivity and the internal arguments, no matter how reasonable, the fact is that this irregularity rate is unsustainable and unjustifiable in European terms. Special emphasis should be placed on the fact that reporting an irregularity as fraudulent in no way implies the assertion that fraud has actually been committed, nor does it violate the presumption of innocence. Focussing efforts on the analysis of indications of fraud and its elements is a matter of urgency.

One of the first missions of SENECA and the State equivalent ARCOS should be that all types of irregularities are reported truthfully to the Commission at regular intervals.

To properly contextualise the Annual Control Reports and the weakness of the notified data, it is as well to remember that in 2013 the services of the European Commission adopted four suspension decisions (cancellation of ERDF payments) three of which were against Spain. In January 2014 two decisions were adopted, both against Spain[165].

4.2 MOST CONFLICTIVE REASONING

According to private sector perception surveys the following are the most frequent irregularities:

1. 80% The **design** of **tender** specifications that bias the award process in favour of a particular candidate[166].
2. 79% **Conflict of interest** in tender assessment.
3. 72% Abuse of the **negotiated procedure.**
4. 72% **Confusing** selection or assessment **criteria.**
5. 71% **Collusive**[167] tendering processes.
6. 69% **Modification** of contractual conditions during execution of the object of the contract.

As the European Commission has stated on several occasions, these surveys must be contextualised. In the case under study the context is clearly the repercussion that the effect of the economic recession has on the citizens, and above all the flagrant cases of corruption being revealed. Nevertheless, perceptions are always indicative.

The authorities involved coincide with several of the above points (3, 4 and 6) identified by the private sector, but not with all. Irregularities involving intention often escape operational audits because perceiving conflict of interest or bias towards a certain contractor in procurement processes is traditionally associated more with criminal activity than with administrative infringement. In this sense, under the terms established by the new decision of 2013 it will be difficult for the audit authorities to apply corrections when conflict of interest is present.

The following are the most frequent irregularities and problems detected both through audits of the authorities and through court rulings and interviews:

1. Modification of contracts[168]. This irregularity is still the biggest problem. There is no evidence that the problem has been attenuated after harmonisation of the Directives with domestic legislation.

Commission of serious infringements concerning modification of the scope of the contract after award has continued after 2013. One example is an ERDF project aimed at updating and renovating the water supply network. In its latest budget execution report the European Court of Auditors states: "It constitutes infringement of the public procurement rules of the EU, and therefore the declared expenditure in said contract is irregular. In addition, the works actually carried out were not in conformity with the amended contract"[169].

While the problem is not currently directly caused by erroneous regulation, the fact is that the procurement authorities are unable to regulate the modifications provided for in the TRLCSP in the bidding conditions.

Some of the authorities interviewed assert that the contractual changes are so problematic that they should be prohibited[170].

No improvement is expected regarding this irregularity, but quite the contrary. The authorities interviewed agree with respect to the ill-advised drafting of the new Directives. At the present time discrepancies on the interpretation of this assiduous provision are

165 p. 20 et seq., 2013 Annual Report of the Commission to the European Parliament on the protection of EU financial interests-fight against fraud.

166 Deliberate misuse of the "transparency notice" is also an example of intentional *mala praxis*. This notification is not regulated in Directive 2004/18 but in the Appeals Directive and is a little-known notice in the region. The engineering in this case consists of deliberately ignoring a mandatory step in the procedure and publishing the notice *a posteriori* to simulate good intentions.

167 A rare but striking and very current example that accurately represents the extreme interiorisation of the *mala praxis* is provided by a query raised by the mayor of a city - of some size - before a consultative body. The question was: what part of the LCSP public procurement regulations governs courtesy bidding? "Courtesy", or "cover" bidding in the jargon, is a form of bid-rigging consisting of certain bidders acting in cartel to submit tenders to simulate open competition. A group of bidders agrees to submit bids that intentionally contain unacceptable conditions so that another conspirator can win the contract. The winner will return the favour to the others in future competitions. "Cover bids" may also be rigged by the contracting authority, which then incurs in conflict of interest.

168 European jurisprudence: the aforementioned STGUE T-235/11 and 540/10 dated 31 January 2013. These sentences clearly reflect the contract modification issues in the Spanish state and the confusion caused by complementary contracts.

169 Budget Implementation Report 2014, p.149 (*OJEU*, No. C 398 dated 12 de November 2014).

170 Personal opinion of a supervisory authority.

already evident. Some commentators consider that the Directive entails a turnaround with respect to the strict position of the CJEU in this field and that from now on the modification rules will be more permissive. Others, however, maintain that while a first reading of the provision may give this impression, the truth is that nothing has changed with respect to the current regulations under the TRLCSP.

> Modification remains the chief problem (...). The assessment of the new Directive is not favourable. It is confused; it does not solve the major problems.
>
> The wording of the modifications is another hornets' nest. From a first and tenth reading it seems to be a backward step or change in criteria and that we will have more leeway with modifications. But when you read it a hundred times from finish to start and upside down, the conclusion is that it seems to be the same. Our current internal regulation is much clearer on modifications than the new Directive (...).
>
> It would be a huge mistake to transpose the Directive literally because nothing can be understood from its wording[171].

Contractual modification is especially problematic in construction contracts. Too often there are incidents, cost increases and delays which could have been foreseen in the initial engineering and planning. They constantly appeal to deviations in the measurements, manufacturing parameters and defects of supervision and surveying.

There are contract modifications of all kinds. Some conceal price reviews and others opt for unjustified extensions although, as we have seen, the internal regulation does not consider that an extension constitutes a modification.

2. Assessment criteria

2.1 The use of solvency criteria as assessment and award criteri the second irregularity in order of importance and frequency. The authorities involved are practically all of the same opinion. Only one authority considers that this irregularity has declined[172].

Although commendable prevention work has been done on awareness of those responsible for procurement on the illegality of using solvency criteria in assessment and award, experience, occupational training, the quality control system and the fact that the candidate has offices or presence in the area are still taken into account.

2.2 The use of **erroneous criteria (formulas) for evaluating prices or omission of the calculation method** is often part of the assessment criteria problem. The criteria are substituted by a mere explanation of the way the contract budget was calculated.

Application of the average price method and the treatment of abnormally low bids has entailed numerous financial corrections. However at present this error has been practically eradicated. Most contracting authorities are aware that Europe considers these formulas to be contrary to EU directives[173].

However, the issue of abnormally low bids remains an issue. The overall supervision of the regional public sector in 2014 detected that the majority of the bidding conditions determine the abnormality of the bids simply by the presence of certain reductions, without offering the bidders the chance to substantiate their quotes. The limit for assessing these reductions is usually set in relation to the tender budget and not in relation to the average reduction of the bids submitted.

Errors in price weighting are also very common. The highest score is not attributed to the lowest price or not all points attributed to this criterion are actually awarded, which causes distortion of the initial weighting[174].

Serious infringements continue to be identified. In a project co-funded by the ERDF in 2013 related to the renovation of a public building, the formula specified in the bidding conditions to determine the lowest bid improperly altered the outcome of the tender and the contract was therefore awarded irregularly[175].

It has been detected that shortcomings when setting and implementing the objective award criteria and determining the formulas and methods for assessing and weighting the criteria also mean that the procurement boards establish assessment criteria or rules complementary to those originally provided in the bidding conditions[176]. Any criteria added *a posteriori* constitutes an irregularity because the bidders cannot take it into account when they are drafting their bids.

> The drafting of the objective award criteria is very unsatisfactory due to lack of content and assessment formulas or methods[177].

171 Personal opinion of an expert authority on public procurement.

172 Personal opinion of a supervisory authority.

173 Benchmark European jurisprudence: STJUE dated September 16 2013. This sentence confirms STGUE T-402/06 that reduces aid to the Autonomous Community of Catalonia (the Catalan Water Agency (ACA) and Catalonia Waste Agency (ARC)) in eight projects for different reasons. To focus on the issue under discussion, the TSJUE strongly condemns application of the average price method as illegal and closes the case (Article73).

174 See: Overall Report on the Regional Public Sector, 29 May 2014.

175 Report of the Court of Auditors of the European Union 2014, *ibid.*

176 This is the opinion of the State Court of Auditors in its 2014 Report on the Regional Public Sector.

177 Court of Auditors 2012 Report after analysing a sample of 2,500 contracts awarded at national and regional level and the Court of Auditors 2014 Report.

2.3 Omission of the **assessment criteria** on acceptance of improvements over the bidding conditions. Improvements are regulated without specifying the content or under what conditions they will be accepted.

> Assessment of experience is still a struggle and with respect to subsidies one of the biggest problems is posed by bids that improve the bidding conditions[178].

2.4 The old system of differentiating between the financial and technical tenders and value judgements are still used instead of deciding on the basis of objectively assessable criteria. Consequently, the award criteria are a mix of objective and subjective assessment criteria. This also entails that the order in which the envelopes should be opened is not respected and that the aspects of the bid assessable by applying formulas and those that require value judgements are not evaluated consecutively and separately[179].

> This is confusing for bidders and diminishes the transparency of the assessment and contract award[180].

3. Contract splitting. Contract splitting or division of a project into multiple contracts is often, but not always done to avoid exceeding a value threshold. Sometimes, rather than intentional, it is the result of bad planning or lack of training. Sometimes the contracting authority does not know how to detect the fact that it has awarded two or more contracts with the same object.

The supervisory authorities, however, easily detect this type of irregularity. To do so they do not confine the audit to the procurement documentation of each contract in isolation, but request invoice lists per client. The accounting reveals any contract splitting that may have occurred.

In the most recent comprehensive audit of the regional public sector, the analysis of expenditure splitting and compliance with the law of the greater part of the minor contracts audited "clearly shows that the object of procurement is the same and that the total amount thus eludes the stipulations Article 74.2 of the LSCP[181].

4. Unsubstantiated use of urgent and exceptional approval procedures in public procurement. Many contracts subsidised with ERDF are awarded under the umbrella of the uniqueness of the services provided or the technology employed, especially in R&D+i-related projects. Beneficiaries employ negotiated procedures without advertising on the grounds that the purpose o f the contract is research, experimentation, study or development or that it has specific technical features that justify the use of exceptional procedures[182].

In its 2014 Report on supervision of the State public sector the Court of Auditors of Spain detected that under certain circumstances the negotiated procedure has been justified on the grounds of signature of a prior agreement with the successful tenderer "due to the technical complexity of the services to be provided"[183]. In these cases, even though the choice of this procedure could be justified for technical reasons, the prior agreement limits the opportunity of other companies in the sector to submit bids.

These irregularities are difficult to identify because they deal with technical criteria and functions that are often beyond the expertise of the auditors.

This category also includes unjustified direct award of additional works contracts in the absence of unforeseen circumstances. In these cases the irregularity is not due to confusing a contractual modification with an additional service provision. In European terms, they are authentic complementary contracts in which exceptional "unforeseen" circumstances that would substantiate use of the negotiated procedure without advertising are absent. ERDF projects (the transport sector) in which the complementary works were needed due to deficiencies in the preparation, planning and execution of the project, not by unforeseen circumstances, were detected in 2013. These direct awards are illegal and should have been tendered through the ordinary channels[184].

Although the internal supervisory bodies have observed a significant improvement, cases of undue use of complementary contracts to avoid an open tendering procedure are still being detected[185].

178 Personal opinion of an expert authority on public procurement.

179 See State Court of Auditors Report No. 1011 dated 23 December 2013 on supervision of procurement contracts entered into by public sector agencies in 2010 and 2011, p. 286 et seq.

180 Court of Auditors Report 2014 and the Court of Auditors of the EU report 2014.

181 Section X.2. 13 of the overall supervision of the regional public sector 2014, and along the same lines Report No.1011 2013 section V.3 Nine.

182 For example, the sentence of the CJEU dated 15 January 2013, Case T-54/11. The Commission imposed a correction of 100% of the expenditure financed by the ERDF. The CJUE dismissed the action brought by Spain on the grounds that the technical reasons that enabled the negotiated award - without advertising - of a pilot project complementary to the main contract was not justified. The court considered that the information technology services contracted, in spite of consisting of development of a particular computer-based product, program or application (which did not exist on the market) are defined and described in detail in the bidding conditions and therefore the purpose of the contract cannot be research, experimentation or development.

183 Report on Supervision of the State Public Sector 2014, *Op. cit.*, p. 209.

184 Report of the Court of Auditors of the European Union 2014, *ibid.*

185 Report on Supervision of the State Public Sector 2014, *Op. cit.*, p. 209.

In its latest overall supervisory report on the regional public sector the Court of Auditors notes that the object of contracts processed by the emergency procedure has been extended to operations unrelated to its purpose: "to remedy loss and damage produced or satisfy the need that has arisen, obviating the application of section 2 of Article 113 LCSP". Furthermore, "delays inconsistent with and totally lacking the urgency that should characterise operations processed under this exceptional regime are observed" in the main contract processed by this procedure[186]. Tenders processed in this way show an absolute disregard for the principles of advertising and open competition.

5. Non-negotiated negotiated contracts. Nothing is negotiated in the negotiated procedure. The financial and technical questions that should be subject of negotiation are not resolved. The contracting authorities confine their activity to issuing an assessment report and award the contract on the basis of the same[187]. Nor does the tendering documentation provide evidence of request for at least three quotes[188].

6. Omission and/or **lack** of **definition** by which bidders must **prove** financial, technical and professional **solvency.** This occurs especially when classification of non-Spanish companies is required.

7. The technical tender assessment **reports** fail **to provide sufficient grounds** for the conclusions they draw. Not infrequently the reasoning is comprised of no more than the score awarded to each bidder. Furthermore, in certain instances there is no **evidence** that an **experts' committee** to assess the award criteria the quantification of which requires a value judgement ex Article 150.2 TRLCSP.

8. A common practice in the **end of execution** section is to omit certification of verification of changes or the documentary evidence of full performance of the contract to the satisfaction of the beneficiary or formal acceptance of the service or the latter is replaced by partial or provisional acceptances on the invoices that certify payments made.

9. Finally, we must call attention to the **generalised tendency** to use **management orders** extended to instrumental entities for execution of contracts that should be awarded through open competition. This trend has been highlighted by both the Court of Auditors and the external control bodies of the Autonomous Communities. The CJUE has consistently held that use of this method must always be an exception, and to be lawful the entities so entrusted must be considered to form part of the contracting authority or technical services of the same.

The supervisory authorities have noted that companies to which management orders (labelled as "in-house") are extended subcontract to third parties that perform the practical totality of the order because the former lack the means to execute it directly[189].

186 Both quotes are from the Report on Supervision of the Regional Public Sector *Op. cit.*, pp. 360 and 361.

Article 113 TRLCSP establishes an exceptional procurement regime for situations in which the government has to act immediately because of catastrophic events, situations involving grave danger or needs that affect national defence. However, section 2 of the provision makes it clear that: "All other services required to complement the measure taken by the Government and that do not constitute emergencies shall be contracted by the ordinary procedure regulated under this Act".

187 Declared by the State Court of Auditors as a significant conclusion drawn from the results of supervision of the State sector, Report dated 20 December 2014.

188 Section X.2. 9 of the 2014 Report on Overall Supervision of the Regional Public Sector.

189 The Court states that the entities so entrusted: "(...) do not have the 'appropriate means for performance' of the order, the very reason for which the ordering body contracts said entity in the first place. In practice, these public corporations (...) only perform activities of a legal nature such as procurement to which they provide support or activities including material activity but which do not constitute the particular material activity object of the order "(Overall Report, *Op. cit.*, p. 363).

CONCLUSIONS AND RECOMMENDATIONS

1. A variety of **external determining factors** or system failures have been detected which, added to similar European factors, give rise to irregularities.

1.1 **Deriving from the legislation.** The Spanish State failed to transpose the Directives on public procurement correctly until 2011 and at present there are still certain points the adaptation to European regulations of which could be questioned.

The internal procurement regulations has been and continues to be subject to constant changes. It is complex and dispersed. The same is true, to different degrees, of regulation of the organisation, competence and rights of the stakeholders, controls, corrections and the consequences associated with infringements.

1.2 **Deriving from the authorities involved.** The specific bodies engaged in public procurement and the courts themselves interpret the procurement rules in diverse manners. These interpretations sometimes out of line with EU Directives and case law. The relations between the parts is complex.

1.4 **Deriving from the controls.** The specific auditing bodies of the funds, the managing and audit authorities, differ in the detection of irregularities and the percentages to be applied. The relations between the parts is complex.

1.5 This scenario has all the ingredients required to provoke systemic irregularities.

2. Two internal factors must be added to the above: the **cultural component** and the **lack of training.**

2.1 **Cultural component.** The authorities interviewed consider that the existence of irregularities in the region reflects a cultural problem rather than the difficulty of the legislation and lack of training. Therefore, the cultural component with respect to procurement is still a determining factor in the region.

2.2 **Lack of training.** As we have seen throughout this study there are numerous resources available for training personnel and institutions. Several of the players specifically and proactively focus on training.

However, training is not mandatory. It depends solely on the will of the civil servants or personnel responsible for the contract and is not a required.

A good indicator of the level of training of the contracting bodies is the type and number of queries directed to the advisory bodies. *A priori,* the greater the legal certainty, training and knowledge of the legislation, the fewer enquiries should be needed. Paradoxically, an upward trend is observed after analysing the variation in the number of enquiries made by said contracting authorities to the Public Procurement Advisory Board of Catalonia (JCCA).

However, the reason for the increase in enquiries could be that the contracting authorities are more aware, regardless of the underlying reasons, of the importance of responsible procurement.

> Mandatory professionalisation, not only the awarding authority but also of the public procurement agencies in general, is required. A "seal of quality" attesting to responsible procurement.

The effort to achieve correct transposition of the rules on public procurement, together with training in the technical aspects and ethics (integrity) in public administration, should have helped to clarify things and increase legal certainty. This should, in turn, reduce the percentage of irregularities arising from the cultural component and lack of training.

3. The legislative framework. With respect to the regional legislative framework, the main problems have been poor transposition of the European legislation, the instability of the procurement regulations due to continuous regulatory changes and general dispersion of the regulation to apply in respect of funds: rules on contracts, rules on subsidies and provisions for financial audits, and all this at various territorial levels.

Both the central and the autonomous governments have introduced a battery of significant legislative reforms to mitigate this problem and in general, policies related to integrity are the focus of the current debate. However, certain gaps, inconsistencies or provisions that may be contrary to European law still remain, such as the obstacles to filing a special appeal against certain contract modifications. Contract modifications appear to have been properly regulated in 2011, but there are still some ongoing issues that question this perception.

3.1 The decisive factor is the **poor transposition of the procurement-related Directives** especially in the field of contract modifications. This, combined with the internalisation of a culture of contractual modification by the State and regional procurement bodies, has meant that the majority of contracts financed with European funds were systematically flawed.

There is widespread belief that after the 2011 reform State legislation is now consistent with European law. However, there are certain issues of questionable compatibility with the principles of the Treaties and procurement that require fine tuning.

3.1.1 **Contract modifications.** The key pathology of public procurement at State and regional level has been modifications, the burden of which we still have to bear today.

Article 107 TRLCSP requires certain clarifications.

It is essential to make clear that **the instances that enable implementation of a contractual modification not foreseen in the original contract only come into play when said modifications in no way alter the essential conditions** of the bidding and award process. Furthermore, **they must be confined to making the changes strictly necessary to address the objective cause that makes the modification lawful.**

The exceptions linked to **errors and omissions in the project** must also be **reinterpreted.** They must be construed with the same diligence demanded of modifications deriving from external sources: those arising from the **requirement to match the service provided to the technical, urban planning and safety specifications** that can only be lawful when the body responsible for the new measure is not the awarding authority (nevertheless, in relation to this last exception the interpretation must be very restrictive, in line with the TJUE); and those deriving from a **variation of less than ten percent of the contract price**, in the sense that not all modifications are non-substantial by the mere fact of being below said threshold.

The TRLCSP has followed our juridical tradition of considering that only changes that do not affect the object of the contract constitute contractual novations. Substitution of the contractor and assignment of the contract, price revision and extension of the performance period are excluded from the general regime. Irrespective of the internal legal categorisation, for the purposes of European legislation these do constitute contract modifications, and therefore to comply with the principles of advertising and transparency they must be provided for in the contractual documentation in a clear, precise and unequivocal manner. If not, they shall only be lawful in exceptional cases. This conclusion is reinforced by the new regulation under Directive 2014/24UE, which expressly treats subjective novation.

Substitution of the contractor, **assignment** of the contract, price **review** and **extension** of the performance period **must be treated as contractual modifications.**

3.1.2 With respect to **special procurement-related appeals**, the TRLCSP expressly prohibits lodging special procurement-related appeals not provided for in the specifications against contract modifications implemented during execution.

This exclusion is contrary to the spirit of the Appeals Directive and should be **declared null and void.**

Moreover, **Article 40 TRLCSP** should be **interpreted** in the sense that **modifications of the contract can in fact be appealed before award of the same, and those provided for in the bidding conditions can be appealed at any time.**

The special appeal is provided for in most cases for harmonised contracts and coexists with administrative appeals. This double regulation is not satisfactory and leads to legal uncertainty and confusion. Nor it is considered appropriate from the point of view of protection of the financial interests of the EU and special appeals as a whistleblowing mechanism.

Bidders and the financial interests of the EU should have the same protection regardless of the value of contracts.

3.2 **The legal regime** applicable to contracts financed with European funds is absolutely **unstable, complex** and **disperse.**

3.2.1 The LCSP suffered eleven substantial modifications and the TRLCSP has currently undergone a dozen even before the reform envisaged in the draft law on de-indexing the Spanish economy and the transposition of the fourth generation of Community Directives.

This instability, moreover, is not confined to changes in the TRLCSP itself but extends to all regulatory developments with a bearing on public procurement, for example the provisions of the new transparency and good governance laws as they affect contracts, subsidies and agreements and all changes that affect other applicable sectoral regulations, for example the General Subsidies Act.

The legal changes are incessant. Each regulatory change entails a new interpretation, training of the players involved in public procurement, even changes in computer systems, internal procurement rules and procedures and, most importantly, they create legal uncertainty.

The instability of the legislation is directly proportional to the increase in irregularities in public procurement and the legal uncertainty is inversely proportional to transparency.

3.2.2 The public procurement and control system is extremely complex. Different requirements, procedures and rules are set depending on the contracting entity and on whether contract prices are above the EU thresholds or not, and depending on the supervisory entity.

Harmonisation and simplification of the procurement system itself is required to perform all procurement with the maximum guarantee of transparency, **without pretexts based on the contracting entity or the contract price. The same harmonisation and simplification is necessary regarding regulation of the controls.**

3.2.3 There is no special legislative corpus for award of contracts financed from the EU budget or for controls and their consequences. The specific provisions relating to public procurement with European funds are dispersed across an amalgam of rules, guidelines, precepts, instructions, jurisprudence, etc., and sometimes in triplicate – at State, autonomous community and local government level. This causes a regulatory mess and legal uncertainty, and creates confusion on the role of key figures such as beneficiary.

The problems arising from the fact that the General Subsidies Act regulates procurement-related issues additional to and more restrictive than those contemplated in the TRLCSP are especially noteworthy.

So does uncertainty about the powers assumed by the IGAE in relation to the autonomous communities' supervisory agencies at the regulatory level. To find out what role each supervisory body plays in control of EU funds one must either turn to the Annual Activity Reports and figure out which is which, or search the disperse general legislation that governs the functions of the IGAE and the public accounts offices of the autonomous communities. Referral in the Public Finances Act (LFP) of Catalonia to the former General Budget Act (LGP) are obsolete.

The General Budget Act (LGP) only states that the IGAE is responsible for financial control of aid financed with EU funds. It says nothing about costs funded by the EU that are not considered to constitute subsidies or aid or about the Autonomous Community Public Accounts departments.

Meanwhile, the LGS assigns a different role to the IGAE according to whether the ERDF or the EAGGF is involved. The control regulations in the former case are scanty compared to those for the agricultural fund. There is no apparent reason for this difference.

3.2.4 The intermediate bodies' PANAP Internal Procurement Instructions and ERDF procedure and control manuals are the paradigm of complexity, instability and dispersion.

The **internal procurement instructions** should be **abandoned.**

The ERDF **procedure and control manuals** should be **harmonised,** at least, with the verification and control procedures implemented by the second tier intermediate bodies.

3.2.5 A **specific regulation for public procurement with European funds** should be enacted that addresses the main fronts that affect this matter: procedure, mandatory players, control measures and the legal consequences of noncompliance. **Subsidiarily,** a regulation, **instruction,** circular or official interpretative document should be enacted **that makes clear which sectorial regulation is systematically applicable.**

3.3 Regulation of the **consequences of noncompliance** with the legislation contains certain **deficiencies.** They are also **complex** and **disperse.**

3.3.1 The criteria applicable to financial corrections in line with the European criteria are implemented by means of broad subjective judgements. The percentage margin of the financial correction associated with the description of the irregularity must be objectivised or reduced.

In addition, after publication of the Commission decision dated December 2011, the **Ministerial Guideline has become obsolete and should not be applied.**

The rules established in Circular 1/2012 of the DGFC and DGAE Instruction to consider a contractual amendment eligible for subsidy or, to the contrary, impose financial corrections do not ensure that the contractual modification is in line with European principles.

Having internal criteria for applying financial corrections is considered inappropriate. Those of the European Commission or the European Court of Auditors should be adopted directly.

3.3.2 Without prejudice to any corrections that may be applied, commission of irregularities could be associated with consequences: of a political and reputational nature against the institutions responsible; financial and personal; pecuniary liability, accounting liability and ultimately criminal liability.

However there is no specific administrative sanctioning procedure as a consequence of infringement of public procurement rules. The commission of an irregularity (unlawful act) in the procurement process, therefore, is not associated with a coercive sanction *per se.*

The benefits of establishing an administrative disciplinary proceeding for procurement with public funds should be considered.

Furthermore, the entire array of sanctions provided for is completely dispersed in regulations: LGS, LGP, Court of Auditors Act, Regulation of the Catalan Public Audit Office, etc. that do not specifically refer to procurement or to the funds.

3.4 There are no specific **infringement reporting mechanisms** with legal status. There is no anonymous reporting system or regulated protection of whistleblowers.

> Implementation of a unified whistleblowing-style reporting system is recommended, and the option of including incentives could e considered.

3.5 Recently, the State and autonomous community **Transparency and Good Governance Acts** and a **Code of Ethics and Conduct** have been published. They set forth the recommended public procurement principles for the public sector of Catalonia.

3.5.1 Spain was one of the last EU member States to adopt transparency laws. Transparency laws clearly represent an instrument of regeneration of the system and could help to reduce irregularities. Furthermore, both these laws include a number of new obligations, stricter than those contained in the TRLCSP or Subsidies Act, on active advertising of contracts, subsidies and agreements.

Nevertheless, these laws have serious weaknesses. The most important weakness of State law is that noncompliance with the duty of transparency is irrelevant. It is not considered an offence and is not sanctioned.

Moreover, the subjective scope of application of the Catalan measure is confused. It does not coincide either with the State law or with the TRLCSP.

The Catalan law seems to introduce a new appeal mechanism against omissions that entail noncompliance with the obligations set forth in the law and are imputable to the liable parties (Article 71 ff.). It should be noted that the aim of this new system of appeals and complaints may conflict with the provisions of Article 40.3 TRLCSP, and fails to establish who is entitled to lodge such appeals. It is also provided that "affected persons" may file a complaint with the *Síndic de Greuges* or contact the OAC.

> The Spanish authorities are urged to clarify the weaknesses observed in the transparency laws as soon as possible.

3.5.2 Publication of the code of ethics and recommended behaviour is undoubtedly a good practice. Even though the Code has no legal standing and can be described as a *soft law*, it does represent an action guideline for top civil servants, directors, managers, administrators and public employees in general as well as all those directly or indirectly involved in public procurement of the Government of Catalonia and the public sector entities (recipients of public funds) and all local entities that freely decide to adopt it. Adoption, furthermore, is an indication of integrity in public administration.

> Codes of ethics should provide added value, best practices that go beyond what is required by law.

4. Stakeholders. We have examined, both individually and from the relational viewpoint, the stakeholders involved in the field of public procurement in detail to establish the synergies of this complex web of players.

To do so we have located their competences, strengths and weaknesses, focussing above all on ascertaining whether or not they perform prevention activities and if they can be used as examples of good practice.

4.1 **Strengths and best practices.**

4.1.1 Certain players specialise in the prevention, detection and investigation of irregularities. Many of them carry out more than one or all of the functions and the majority perform prevention tasks ex lege or *motu proprio.*

The key players in the prevention, detection and investigation of irre

PREVENTION: Technical Control Office (TCO), Public Procurement Advisory Board of Catalonia (JCCA), Anti-Fraud Office of Catalonia (OAC), Office for Supervision and Evaluation of Public Procurement (OSACP), National Anti-Fraud Coordination Service (SENECA).
DETECTION: TCO, OAC, SENECA, State Public Accounts Office, General Controller's Office of Catalonia, Public Prosecutor's Office, Administrative Office of Contractual Reviews of Catalonia, bidders/ successful tenderers/final beneficiaries.

INVESTIGATION: OAC, State Court of Auditors, Audit Office of Catalonia, Public Prosecutor's Office.

4.1.2 The composition, operation and best practices of all the above entities have been examined. They obtain excellent scores for synergy. In general their relations are smooth and they have entered into various collaboration agreements.

The fluid exchange of information between these bodies is especially noteworthy and their willingness to cooperate to carry out their mission, especially between the Audit Office of Catalonia *(Sindicatura de Comptes)* and the State Court of Auditors. The information in the

custody of the Public Contracts Registry is available to all. They avoid duplication and have simplified the system, with all that entails for enhanced transparency.

They make the majority of their data available for public scrutiny and have implemented many electronic transparency tools.

Various organisations have won awards in recognition of their good practices including the OAC, OSACP, JCCA and the Prosecutor's Office. The State Court of Auditors has submitted to a voluntary Peer Review with the aim of recovering the trust of the institutions and public alike. This fact deserves recognition on our part.

4.1.3 The JCCA of the Government of Catalonia obtains the best score. The more than thirty years of experience of this body backs its authority and its existence constitutes a good practice in itself. The JCCA sets an excellent example at all levels. Its role has been decisive for procurement in Catalonia and it is developing into a tool that generates added value for the public sector, responsible procurement, innovation and continuous improvement of processes. It also carries out constant training, consultancy and query response work.

The promotion of e-procurement and unification of information and systems are especially noteworthy. The best practices outlined in the European Commission services document dated 4 May 2005 on requirements for the use of electronic means in public procurement have been integrated into all e-procurement processes.

4.1.4 The OAC plays a special role as an entity that can also take an active part in combating irregularities arising from public procurement when European funds such as the ERDF are involved. The OAC is a regional anti-corruption agency specialising in the prevention and investigation of corruption and fraud, unique in the Spanish territory, created for the purpose of preventing and investigating the misuse of public funds, and which holds soft law (non-binding or persuasive) powers especially over the public sector in Catalonia. Moreover, it was the first national organisation to comply with the provision of Article 6 of the United Nations Convention against Corruption.

The OAC has articulated a mechanism that enables natural or legal persons to be informed of acts allegedly constituting fraudulent or illegal conduct, conduct contrary to the general interest or mismanagement of public funds, a model of integrity and recommended good practices to combat irregularities in procurement procedures.

These are differential factors with respect to other investigation or control bodies: the OAC acts in view of prior indication of an irregularity or conduct contrary to the principles of objectivity, efficiency and full compliance with the law. The perspective changes when acting from the viewpoint of prior indications: the process, composition of the team and the monitoring capacity are more incisive.

4.1. 5 There is an independent governmental body specialised in resolving procurement-related appeals. Its decisions are binding, it has the power to restore legal situations, impose indemnities and take protective measures. No legal counsel is required.

4.1.6 The Public Audit Office of Catalonia performs its auditing tasks in coordination with the Court of Auditors through common criteria and supervisory methods. They may conduct joint audits that are more effective and efficient than if each body acted alone.

They have made a considerable effort to develop powerful software systems that are proving to be excellent tools. Implementation of a unified online system to manage accountability of the entire public sector.

The Government of Catalonia Controller's Office forwards all information relating to audits and inspection reports performed on public sector entities of the Government, and any other report or audit carried out, to the Public Audit Office.

4.1.7 SENECA, the National Anti-Fraud Coordination Service, is a newly created body the mission of which is to channel all OLAF relations between all national authorities with jurisdiction in these fields. We welcome the creation of this body since Spain was one of the few EU Member States that had not met the commitment to create its own AFCOS.

> We consider that this body is the ideal instrument to lead and foster the creation of a unified whistleblowing-style system.

4.1.8 There is a Special Anti-corruption Prosecutor's Office with the mission combating corruption-related financial offences. The aim of this Special Prosecutor's Office is to take part in all criminal proceedings in which alleged financial crimes such as fraud or misappropriation of public funds are prosecuted.

4.1. 9 Bidders, candidates, successful tenderers, final beneficiaries, civil society and the general public can intervene from different perspectives.

The synergies of the beneficiaries with the Technical Control Office are fluid and obtain excellent results.

4.3 Weaknesses.

4.3.1 The ERDF network of specific players is excessively complex. The first tier intermediate bodies are the *de facto* agents for the State authorities, but all official communication with the European Commission is handled by the central government. This often results

in bureaucratic burdens that are an obstacle to efficiency. There are too many second-tier intermediate bodies that should be removed. On occasions, the separation of duties established by the European regulations is not ensured.

Opting for single Managing, Certifying and Audit Authorities and multiplying them by interposing first and second-tier intermediate bodies of is and internal decision. European regulations allow the appointment of one authority per operational programme.

4.3.2 The roles of the Fund control authorities overlap with the ordinary functions of the prosecuting and supervisory authorities. The functions are duplicated and even sometimes tripled at State, autonomous community and local government level.

A simplification of the structures to optimise the management, monitoring and control is considered necessary.

Increased collaboration observed among the external control bodies should be extended to internal control to both the information flows and harmonisation of measures and tools.

4.3.3 There are differences in the interpretation of procurement rules between the various players with competence in the matter. Certain interpretations by the procurement appeals courts also constitute obstacles to the fundamental principles of the Procurement Directives. This is not driven by a lack of internal regulation but literal and reductive interpretation of the provisions.

4.3.4 After analysing the functions, role and involvement of the various players in the prevention, detection and investigation of irregularities in public procurement, the financial and human resources of the Technical Control Office, the Public Procurement Advisory Board of Catalonia and the Anti-Fraud Office of Catalonia are considered to be especially insufficient.

More financial and human resources should be allocated to the TCO, the JCCA-Cat and the OAC.

4.3.5 There is no agency specifically created for the prevention, detection and investigation of irregularities in public procurement. The functions of prevention, detection and investigation in this matter overlap between different agencies with broader specialisations. Few organisations have effective investigatory powers.

Creation of an agency for the prevention, detection and investigation of irregularities in public procurement should be considered.

4.3.6 The SENECA does not have an investigatory role and consists of a single person. It does not have the power to perform inspections or assessments on the activities of the audit authority.

This body should have sufficient capacity to lead implementation of the measures required to solve the problems deriving from functional decentralisation and the statutory and organisational powers to ensure the cooperation and participation of all the national authorities involved in combating fraud and protecting the financial interests of the EU. It should also be competent to conduct high-quality audits on controls of public procurement funded by the EU.

4.3.7 The vertical synergies from the Prosecutor's Office to other stakeholders do not merit a positive assessment. We have observed problems in the exchange of information between the parties involved when suspected irregularities that may constitute fraud or corruption are referred to the Prosecutor's Office.

Measures should be taken to ensure that the information flows both ways.

4.3.8 The authorities continue to show reluctance to share information on operational audits and procurement-related irregularities. These data are not made public. There is neither active nor passive transparency in this environment.

Making both the operational assessment reports and the irregularity statistics public is recommended.

4.3.9 The private sector is not sensitive to irregularities in subsidised public procurement unless directly affected are if they are indicative of offences such as fraud or corruption.

The awareness of civil society of the negative consequences of irregularities in procurement, even if criminal conduct is not involved, should be raised.

5. Controls and detection of irregularities

5.1 The binding authorities carry out regulation controls with proper separation of duties within the managing authority. 100% of the operations are submitted to administrative audit.

5.2 The weaknesses in the mandatory controls originate directly in the European regulations. The administrative audits do not differ greatly from those performed by the public audit authority. This system requires an untenable quantity of material and human resources.

> The benefits of both the ex ante and *ex post facto* audits being performed by the Public Audit Office as the specialised internal body should be considered. It would be necessary to ensure the proper differentiation of functions in the organisational structure and the personnel involved to ensure watertight separation of the two control measures.

5.3 The corrective criteria are applied to irregularities detected by various indicators, standardised checklists or audits, especially in the prior control phase. The checklists of compliance with procurement requirements are drawn up on the basis of the provisions of national law and, moreover, provide for the possible application not only of the LCSP, but also of the previous TRLCAP passed in the year 2000.

Verifying compliance with the procurement requirements on the basis of the provisions of national law does not ensure consistency with European legislation, at least before adoption of the TRLCSP in 2011.

Consequently, if the criteria used to detect irregularities are not in line with the European Directives, even though the irregularities detected by the use of these indicators are corrected according to the European method (financial corrections scale of the 2007 Guidelines or the 2013 Decision), many other irregularities escape correction.

5.3.1 Irregularities arising from contractual amendments are still not being detected the proper way.

> The supervisory bodies should take into account that the rules established by Circular 1/2012 DGFC and the DGAE Instruction do not ensure that the contract modification is in line with European principles.
>
> 5.3.2 Selection of operations per call for subsidy requests and their modifications, calculation of revenues and procurement in general must all be improved.
>
> 5.3.3 Audit checklists should be drawn up on the basis of the 2013 Commission Decision (or the measure that succeeds it once transposition of the fourth generation Directives becomes mandatory). However, they should also contain all the provisions of the internal regulations that are more stringent than the European measures. To this end, they should incorporate all the new obligations under the Transparency and Good Governance Act.

5.4 Irregularities involving an intentional factor are not flagged by operational audits. Conflict of interest or designing procurement conditions for a particular contractor is associated with criminal activity. It is not considered to constitute an administrative infringement. Conflict of interest should be included in the Audits as an administrative irregularity.

5.4.1 The national authorities do not report fraudulent irregularities properly or with the required frequency to the European Commission.

> The authorities must be made aware that reporting an irregularity as fraudulent does not prejudge commission of an offence, nor does it violate the presumption of innocence. Efforts must be focussed on analysis of suspected fraud and on its elements.
>
> SENECA is the most appropriate institution to carry out this task.

5.5 The authorities do not use direct indicators or *red flags* in their assessment of the corruption o fraud procedures.

> Standardising their own red flags based on the most conflictive internal pockets of corruption or at least using those proposed by the European authorities is recommended.

5.6 Another weak point is the divergence in the realization of subjective judgement in applying financial corrections; the difference of opinion between the different players involved is absolutely inoperative and ultimately creates an intolerable legal uncertainty, at least from the point beneficiary of view.

> Greater efforts should be made and criteria unified.

5.7 The audits are usually general and not specific to public procurement. The eligibility of the expenditure, the suitability of the invoices, the advertising requirements, etc. are checked in a single activity. In many cases the auditors, especially when the service is outsourced, are not legal but financial experts.

5.8 There is no evidence that the criteria employed to perform the audits include assessment of whether the way the operation is processed is in itself the most suitable.

Qualified control of the suitability of the legal instrument would be desirable, especially when the operation is articulated by means of an agreement or a management order *(in house provision)*.

5.9 The scope of the Audit Office in the course of its ordinary functions and that of supervision and investigation (Courts of Audit/ Catalan Audit Office-Prosecutor's Office/OAC) are added to the mandatory control regime. All this operates at various horizontal, vertical and territorial levels: State/Autonomous Community and sometimes even local Public Administration. In addition, as indicated in the conclusions concerning the law, each of these players acts according to its own rules and criteria.

To the above must also be added the controls performed by the procurement appeals bodies and jurisdictional controls.

5.10 The control bodies cannot confine themselves to what has already been done *ex post*, but must synchronise with the reality and do more that merely auditing the *fait accompli* in the sense meant by INTOSAI and EUROSAI.

We consider that enhancing the assessment of public policies as the necessary scope of control of public funds is required. This assessment should tend to take subsidies and public procurement into account from a more comprehensive viewpoint as a strategy for better management.

5.11 Internalisation the principle of transparency in the field of control requires a change in the concept of control from being an end in itself to control as a means to achieve effective and transparent governance.

Bodies subject to supervision or control must be encouraged to implement good practices to achieve accountability for once and for all.

3

CHAPTER OF ITALY

COMMUNITY FUNDS AND PUBLIC PROCUREMENT IN ITALY

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1 If it is true that the whole research is based on the common elaboration of the group components, Chapters II and III can be attributed to Gianfrancesco Fidone; Chapter I to Francesco Mataluni; Annexes I, II, III, IV and V to Rocco Motolese. The conclusions were written by the three authors together.

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CHAPTER I

The European Structural Funds with particular reference to the European Regional Development Fund (ERDF) and Lazio Region.

1. EUROPEAN STRUCTURAL FUNDS AND INSTITUTIONAL FRAMEWORK IN ITALY

Each EU Member State is obliged to implement European regulations on the management of the structural funds. These regulations are a direct implementation of art. 174 of the Treaty on the Functioning of the European Union (TFEU), which provides that, in order to strengthen the economic, social and territorial cohesion within itself, the Union must reduce the gap between the levels of development of the various regions and the backwardness of the least favoured regions or Islands, and that particular attention must be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic disadvantages.

Moreover in 2013, the EU adopted the Regulation (EU) 1303 of December 17, 2013, containing common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Fund for Maritime Affairs and fisheries and general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Fund for Maritime Affairs and fisheries. This regulation repeals the previous regulation (EC) no 1083/2006.

As regards the European Regional Development Fund (ERDF), the Regulation (EU) No. 1301 of December 17, 2013 has been approved, which aims to achieve "*Investments in favour of growth and employment*" and repeals the previous regulation (EC) n. 1080/2006.

For the programming period 2007-2013, the EU has provided funding for regional and cohesion policy amounting to 347 billion € (equivalent to the 35.7% of the EU budget for that period).

These resources have been allocated among the different funds:

- European Regional Development Fund (ERDF) = 201 billion €;
- European Social Fund (ESF) = 76 billion €;
- Cohesion Fund (CF) = 70 billion €[2].

The funds were also allocated among the following objectives:

- Convergence = 283 billion €;
- Competitiveness and employment = 55 billion €;
- European territorial cooperation = 9 billion €.

The funds were allocated and assigned to the various Member States, on the basis of the needs of the individual States and taking into account their size. According to data provided by the European Commission for the reference period 2007-2013, Italy was at the third place for the amount assigned (27,957, 85 million €), only behind Spain (34,657, 73 million €) and Poland, which ranks first (67,185, 55 million €, more than twice the amount allocated to Italy)[3]. Germany received an amount slightly inferior than Italy (25,448, 62 million €). Lower amounts of funding were allocated to France (14,449, 33 million €) and the United Kingdom (9,890, 94 million €), which are positioned in the middle of this particular "ranking".

Yet the data regarding the percentage of funds paid to each Member State are more alarming. Italy is at the 24th place among Member States, with a little comforting 54.3% of funds paid. In other words, Italy loses almost half of the funds it could receive, for causes anyway due to internal inefficiencies. Worse than our country, only Bulgaria (52.2%), Slovakia (52.8%), Romania (45.2%) and Croatia (21.7%). Significant the difference with other larger States, such as Germany, which uses the 73.9% of the assigned funds, France that uses the 65.3% of them or the United Kingdom using the 64.8%. Moreover, at the top of that list we find Estonia (84.5%) and Portugal (83.5%).

In this section, we will report about the Italian legislation implementing European regulations governing the European Regional Development Fund (ERDF), with special reference to the case of Lazio region. We will have as a reference 2007-2013 programme, since Italy is still currently in definition phase for the 2014-2020 programming.

2 Source European Commission, www.ec.europa.eu

3 Source European Commission, www.ec.europa.eu

With reference to the 2014-2020 period it can only be recalled that, in accordance with Commission Regulation (EU) 1303/2013, in April 2014 partnership agreement 2014-2020 with Italy was established, which defines the country's strategy, priorities and modalities of use of structural funds for the period 2014-2020. That agreement, sent to the European Commission on April 22, 2014, is the result of a consultation process expanded to ministries, regions, local authorities and social and economic partnership and of the informal dialogue initiated with the Commission.

It is useful first to identify the principles that, on the basis of the indications from the European Union, also inspire Italian legislation about the management of the structural funds. In particular, these principles are:

- **co-financing and concentration;** the funds from the European Union add (not replace) to State funding assumed; Italy is so called to predetermine regional development goals which intends to achieve, on which concentrate all available resources;

- **multi-level co-ordination;** in a legislation like the Italian one, in which local government levels have important autonomy and are at the same level as the central one (see art. 114 Const.), it is necessary to ensure their coordination on the management of the ERDF; to this end it is necessary to resort to restrictive practices and multilevel agreements in all phases of the management of the funds, from the programming and identification of objectives, to the implementation and practical management of resources;

- **State responsibility;** it is a principle that comes from the European Union and from the structure of its regulation that requires to consider the Member State —and not the organs of local government established inside it (in the case of Italy, regions, provinces and municipalities)— as responsible for managing funds, so the State has an important role in terms of coordination of management of funds in coherence with the Italian constitutional rules which tend to interpret in an increasingly broad manner the scope of legislative intervention of the State in the field of "*coordination of public finance*" under art. 117, paragraph 3, Const.;

- **partnership with the social partners;** it requires, in addition to the principle of multi-level coordination, the need to enhance the position and needs of the social partners, who must be involved in both planning and implementation of European funds management; often, the last beneficiary of funds are individuals who realise the necessary infrastructure to pursue development objectives.

The above principles should not be considered individually because they connect and complement each other. Together, these principles form the general framework of action of Italy —considered as a Republic "consisting of municipalities, provinces, metropolitan cities, regions and the State" (art. 114 Const.)— in the management of European structural funds. These principles must also be considered into the Italian constitutional context, so as to gain a better understanding of their meaning and their contents. In this way, it is possible to define the background in which programming and implementation measures of the European Funds intervene.

In particular, attention may focus on the following constitutional provisions:

- art. **114, Const.** stipulates that "the Republic consists of the municipalities, provinces, metropolitan cities, regions and the State"[4]; therefore, it affirms equality between the different territorial levels of Government that together form the "*one and indivisible*" Italian Republic (art. 5 Const.); the levels of Government are in equal ratio (not hierarchically) among them and differ only for a different territorial scope of action, wider for the State and gradually narrower until getting to the municipal one. For these reasons, the State cannot take independent decisions concerning the distribution of European funds to territorially smaller government levels because they have equal right to assert their own idea;

- art. **117, Const**., as mentioned, introduces the topic of "coordination of public finance" within the State-regions concurrent legislative competence[5]; in such matters, moreover, the regions participate in decisions "aimed at the creation of Community regulatory acts" and, at the same time, give implementation and enforcement to "EU acts" (par. 5); if regions default their obligations, the State can intervene in their place (paragraph 5, last sentence). The State, therefore, as territorially higher institution is called upon to coordinate the intervention of regions (and other local bodies) that must

4 Text in force after modification by Cost. L. 18.10.2001, n3.

5 Pursuant to art. 117, paragraph 3 of the Constitution, in matters of concurrent legislative competence, the regions exercise their legislative power in accordance with the basic principles determined by the state Legislator.

- be able to participate in the implementation of European instruments (such as the Regulations on the structural funds); at the same time, art. 117 legitimates the recognition of the State responsibility because it has the power to substitute defaulting regions in the correct implementation of European action;

- art. **119, Const.** establishes the "financial autonomy" of regions and of local authorities (par. 1), which, in addition, "have autonomous resources" (paragraph 2); it is also provided that the State must allocate to regions and local authorities additional resources than those at their disposal in order to "promote economic development, cohesion and social solidarity, to remove economic and social imbalances, to facilitate the effective exercise of the rights of the person, or to provide to purposes other than normal performance of their functions" (par. 5). To achieve these objectives, the Italian Government uses the Fund for underused areas (FAS), which has the same purpose of the ERDF and is the assumption for European funding, to help underdeveloped areas of the country. In this way, the principles of co-financing and concentration are implemented which ensure efficient use of available resources to guarantee the economic development of the regions in greatest difficulty.

On the basis of these principles, it is possible to describe, in brief, as Italy implements European regulations on the ERDF. This activity is based on the greatest possible coordination of actors (institutional and not) involved, since the multiannual programming phase. So the implementation of Regulations is the result of sharing and of the agreement of all.

ERDF management is divided into two phases: a first phase of planning of the interventions financed by the European Fund; a second phase of implementation of the programme outlined, by defining operational plans of intervention.

1.1. The National Strategic Framework (NSF)

As regards the first phase, with reference to cohesion policy 2007-2013, it is necessary to recall the Agreement[6] dated 3.02.2005, n. 820 adopted within the Joint Conference[7]. With this Agreement, the Joint Conference has defined the "guidelines for the preparation of the national strategic framework for cohesion policy 2007-2013" (hereinafter the Guidelines), which are attached to the same.

By implementing the European guidelines, in fact, Italy has decided to adopt a National strategic reference framework, called National strategic framework (NSF), in which the cohesion policy strategy for the economic rebalancing of the territories of the Member States is programmed. To this end, in Italy, it was considered appropriate to use the Agreement as the most fit instrument to involve and coordinate all the interests involved. In this way, Italy gave a reading of European cohesion policy which "enhances the central role of the regions in the programming process, the decisive contribution to the exercise of that role that must come from local authorities and the indispensable contribution of representatives of private interests" (paragraph 1 of the Guidelines).

To promote the principles of co-financing and concentration, the Joint Conference has provided that the NSF contains not only the programming of ERDF resources, but also of the FAS ones. In doing so, there is a "programmatic convergence between national and Community regional policy" to pursue the objectives common to the two policies, through the loyal cooperation and agreement with local governments (paragraph 2 of the Guidelines).

On the basis of the experience gained in the previous programming period, the NSF 2007-2013 is designed to be the meeting point not only of State and EU regional policies, but also to contain both a strategic and an operational component.

First, the Joint Conference identifies what are the five strategic profiles that the NSF should establish in order to pursue the objectives of European cohesion policy (point 3 of the Guidelines):

1. cohesion and competitiveness objectives for 2013 - identify what are the results that Italy and regions can predetermine through regional policy, taking into account the resources available and the existing economic situation;

2. priorities for intervention : identify what are the interventions that have priority in being financed from national and European resources, taking into account the needs of all the actors involved;

6 The agreement is a tool with which the Italian government, in the conference with the regional and / or local authorities, promotes *"the harmonization of relevant legislations or reaching of unity positions or the achievement of common objectives"* (art. 8, paragraph 6, l. 06.05.2003, n. 131).

7 It is the Conference where the State-city conference and local governments and the State-Regions Conference were unified pursuant to Art. 8, Leg. 28/08/1997, n. 281.

1. financial and programmatic integration - find out how to put together European and national funds to achieve a unitary regional policy;

2. integration between regional policies and national policies - determine how to ensure cooperation between central and local authorities (in particular the regions), in order to ensure an integration between national and regional policy;

3. *governance* and institutional capacity - determine which institutional interventions are needed to ensure the use of funds in accordance with the principles and strategies outlined in the agreement.

Secondly, the Conference requests that the NSF also contains a brief operational section, to implement the strategic objectives outlined. In particular, this section must indicate the operational programmes we want to achieve and the resources required, leaving, for the rest, space for the implementation phase (point 4 of the Guidelines).

Finally, the Guidelines contain a description of the three phases of the process of formation of the NSF (point 5 of the Guidelines):

Phase 1- extrapolation and strategic vision, during which all parties involved – regions and central Governments – must prepare a preliminary strategy paper (DSP) with which they implement the strategic profiles identified; in this way, taking account of programmes already being implemented and of those that they intend to implement, the actors concerned must indicate their priorities, the resources required to implement them and the appropriate tools to do it.

Phase 2 - State -regions strategic dialogue, during which, on the basis of the DSP preset, the needs and objectives of the regions and the Central Government are compared; in this way, there is a definition of what are the priorities to be pursued and in what order, trying as far as possible to meet all needs emerged during the first phase.

Phase 3 - Preparation of QSN, during which the results achieved by the two previous stages are realized in a programmatic scheme for the use of European and national resources. So outlined, the NSF should be able "to combine both pragmatism and vision, strategic settings of individual regions and of the Central Government but also to ensure a substantial contemporaneity between the preparation of the final version of the NSF and the preparation of the individual operational programmes that implement it" (paragraph 5 of the Guidelines).

This phase also includes the participation of the European Commission, to which the State submits the NSF for approval. Any changes or corrections requested by the Commission shall be made to the Framework while respecting the principles of coordination and understanding that characterise its adoption. The National Strategic Framework for regional development policy 2007-2013 was adopted on 22.12.2006 and approved by the EU Commission on 13.07.2007.
In the allocation of ERDF funds by QSN 2007-2013 among the various regions for the regional competitiveness and employment programme, total resources amounting to € 371,756,338 were allocated to Lazio region. In this way, Lazio was at third place, behind to Sardinia (€ 680,671,765) and Piedmont (€ 426,119,322).

When the final NSF is adopted, the second phase opens that leads to the implementation of the NSF, in compliance with art. 27, par. 4, item c), of the Funds General regulations ("The Strategic reference framework contains[...] the list of operational programmes for the Convergence objectives and the regional competitiveness and employment "). In particular, the collection of operational programmes through which the Framework strategy is implemented are the regional operational programmes and, for the regions of the "convergence" objective and for the area of the South, five National operational programmes with the ERDF Community contribution, three National operational programmes under the ESF Community contribution (with the same priorities as three of the five PON ERDF) and two Interregional operational programmes (with ERDF Community contribution).

The description of these tools is in part IV (pp. 215 et seq.) of the NSF. The definition of *"programming and implementation"* of regional policy is contained in part VI of the same NSF (pages. 254 et seq.).

The first level of implementation is the **strategic planning document** (SPD) of the regions and Central Governments involved (point VI. 1.3 NSF). Together with this document the strategic and financial planning support to achieve pre-established objectives is identified. At the same time, the administrations involved need to prioritize their needs, the interventions they deem appropriate to implement and the related implementation methods, taking into account also the

Organization measures as well as the involvement of the necessary stakeholders. The difference between the SPD of the regions and the one of the Central Government is that the regions make a strategic programming specific to their own territory, while the Central Government create a program per area of expertise. The needs expressed by the different SPD are compared during the cooperation between the State and the region and between regions (point VI 1.4 NSF). In this way it is possible to identify what are the regional policy priorities considered in uniform manner and what are the actions necessary to implement them, including through appropriate forms of cooperation between State and regions.

With regard to the ERDF, the implementation tool for the regions are Regional Operational Programmes (POR) which identify the strategic priorities and objectives that the region intends to pursue over the period 2007-2013.

As for Lazio region, the **budget** was € 743,512,676, of which € 371,756,338 (equal to 50% of the total) with ERDF contribution and the remaining 50% covered by national and regional funds.

The program fits into the strategy of the region which aims to "promote environmentally compatible, equitable, inclusive development, respectful of human rights and equal opportunities, aimed at strengthening the competitiveness of Lazio system" (overall objective).

Lazio ERDF POR was approved by the European Commission on 2.10.2007 within the Community objective "regional competitiveness and employment" and is valid for the period 1.01.2007-31.12.2013. Subsequently, on **28.03.2012**, the European Commission approved the revision of the Lazio ERDF POR 2007-2013, submitted by Lazio region to enhance the community resources made available within the framework of cohesion policy. The reprogramming of ERDF POR provided an increase of resources for the competitiveness of enterprises and the digital agenda **(70 million Euros)** and for renewable energies **(60 million Euros).**

Another novelty is the introduction of a **fifth strategic priority of intervention (Axis V) for local and urban development**, for which **80 million Euros** are allocated (including both national and Community funding). This fifth axis is added to the four already existing (research and innovation, environment, accessibility, technical assistance).

The total investments of the Lazio ERDF POR (**743.5 million** Euro for the period 2007-2013) is distributed as follows among the five priority axes:

- Axis I - Research, innovation and strengthening of the productive basis = €325,6 million
- Axis II: environment and risk prevention = €219,9 million
- Axis III – Accessibility = €90,5 million
- Axis IV- Technical assistance= €27,5 million
- Axis V - local and urban development = € 80 million

POR funds can be used by small and medium-sized enterprises alone or in association, consortia, research centres, universities, technology parks and clusters, public-private system, local authorities. Such legal persons must apply for access to funding programmed for the actions necessary to achieve the objectives set. In the name of transparency and publicity of administrative action, the names of the final beneficiaries of the structural funds must be made public by the Administration in order to ensure compliance with the procedures laid down for the awarding of these funds.

The goal declared by the region in its official website is to **Select high quality projects and interventions** to ensure durable and sustainable impact, within the framework of the Europe 2020 Strategy; in particular, the region wants to develop an economy based on innovation and knowledge, more resource efficient, greener, more competitive and aimed at promoting social and territorial cohesion.

2. MONITORING AND CONTROLS IN THE MANAGEMENT OF THE STRUCTURAL FUNDS

With regard to structural funds, with the term "*control*" it is possible to refer to the instruments of control over the management of funds or, in a wider sense, to the system of supervision that both the Italian State and regions have developed in relation to the structural funds, following the European guidelines. In this second meaning, the controls are part of the implementation of the National Strategic Framework (NSF) and aim, in particular, to ensure the quality of the activities of the institutions called upon to operate at this stage.

Monitoring of the implementation phase consists of several tasks:

- The **assessment**, which involves the collection of data and information to be spread to improve fund management;
- The **monitoring**, that is the activities of elaboration and communication (to competent authorities) of the data about funds management;
- The **surveillance** on concrete implementation of funds management;
- The **control**, namely the verification of any irregularities in the management of funds to intervene to correct them.

In order to allow these forms of supervision the transparency of administrative action is required. For this reason, there is a need to publish the results obtained, both positive (demonstrating good management of EU funds) and negative ones (demonstrating forms of bad, illegal, illegitimate management). Only in this way it is possible to correct the administrative action, punish punishable behaviour and improve the work of public administrations in the management of European funds. The European Union also demands increased efforts by the Member States on the themes of communication, advertising, transparency.

The supervisory activities must not have the sole purpose to punish bad behaviour, but also to check the past action to correct and improve the future one, using as a model the best practices eventually emerged and, conversely, without committing again any errors detected.

The **assessment** consists in collecting data and information on the management of EU funds and, more generally, on the action of the Administration considered overall. In practice, it involves the analysis of past experiences to correct mistakes and not to repeat them in the future.

To this end, the assessment is based on four pillars:

1. the ultimate goal is the publication and dissemination of the results collected to verify what are the effects (including on the environment) of regional policy to enhance the action of Administrations;
2. to achieve this objective, it is necessary that the auditors are really independent with respect to the subjects evaluated that manage the funds;
3. the task of assessment must be carried out at different territorial levels and with the participation of the stakeholders; for this reason, the evaluation must be properly planned and coordinated;
4. the assumption of proper assessment is the transparency of Governments, which must keep the necessary information and ensure access to the evaluators.

The evaluation activity accompanies all stages in the management of funds and, therefore, we can distinguish three types:

- the ***ex ante*** **evaluation** relates to the planning and programming phase; it is a prerequisite for subsequent ones since it is aimed at obtaining a strict and clear programming, in which clearly define the goals to achieve and that will be the parameters of future evaluations;
- the **mid-term evaluation** takes into consideration what performed in the *ex ante* evaluation and assesses the first results obtained from the use of the funds, with reference to the objectives set; the results of this stage are the benchmarks for *ex post* evaluation;
- the ***ex post*** **evaluation** intends to give an account of what has been done in the management of European funds, on the basis of the results obtained with the previous evaluations; the final objective of this assessment is to identify models of good practice in the management of the funds, which are in evidence on the basis of the diligent conduct of the Administrations assessed or, conversely, on the basis of the bad management detected.

The guidelines of the evaluation activities are contained in the NSF and, for the period 2007-2013, these were changed to try to improve the criticality and correct the errors found in the previous period. To this end, it was decided to extend the assessment to the entire Italian regional policy – not just to that financed with European funds – and to provide a plurality of evaluations focused on different measures of implementation of the NSF, defining differentiated assessment tasks and procedures made through independent procedures. To coordinate these activities, at the State level, the National Evaluation System for regional policy (SNV) was established, which helps the

Government to collect the information necessary for the evaluation. To this end, the SNV creates meeting occasions among the actors involved in the evaluation of national and European regional policy.

In particular, the regions give implementation to the guidelines of the NSF through special regional Evaluation plans (PdV) to *"organize assessments"* (CIPE 9.11.2007, n. 166, p. 73). In other words, the PdV identifies what the region wants to do for the purpose of assessing regional development policy, the timing to accomplish that task and also the method of implementation. To this end, the PdV should be flexible in order to adapt to the various needs which may arise in the implementation phase.

With reference to the period 2007-2013, Lazio region adopted a PdV based on the idea of putting at the centre of the evaluation the actors interested in the funds management: since the evaluation must respond to their needs, stakeholders are the point of departure and arrival of such activity. Therefore, first, "the path to define the evaluation questions will necessarily follow a participatory logic", with the participation of the "largest possible number of stakeholders"(p. 9 PdV Lazio). Secondly, "the final communication of results [of the assessment] will be not only passive (publications, web, etc.) but rather active with presentations and open discussions", with the dual objective to allow interested parties to know the results and participate in the discussion (p. 3 PdV Lazio).

The PdV of Lazio detects in an analytical way the times of the evaluation activities, the parties involved and their responsibilities (pages. 4-9 PdV Lazio). In particular, among the most relevant topics, we can remember:

- the Responsible of the evaluation plan, with coordination of the activities of those involved, in particular in the initial phase of the evaluation, when it is necessary to define the questions on the basis of the needs expressed;

- the *Steering groups* are composed of representatives from the regional sectors and individuals affected by the evaluation as well as from industry experts; they collaborate in the definition of the evaluation questions, monitor the production of the results of this activity and make them public for the purposes of discussion; they are the primary participatory tool in an assessment process;

- the external evaluators perform assessment analysis and, if necessary, support the activities of other parties involved;

- the Nucleus of assessment and verification of public investment (NVV), composed of experts, has the task to accompany and assist the evaluation activities.

Lazio also prepares the necessary tools to ensure the good quality of evaluation activities and the publication of their results. Thus, as regards the quality, there are mechanisms for quality control of the assessments that are an integral part of the process at all stages, from the preparation of questions, to communication to exploitation of results. The *Steering groups* are responsible for quality control (pages. 11-13 PdV Lazio). All stakeholders (public or private) should easily know the assessment data. To this end, it is not enough to advertise them, but it is necessary to ensure that they are known, so "the communication of results represents the final moment of the assessment cycle" (p. 15 PdV Lazio).

Given the purpose of data collection, the assessment is closely related to monitoring.

Monitoring is carried out using special computer systems that allow the recording of data relating to the implementation of regional policies and is aimed at the development and communication of information obtained in relation to each intervention, mainly for monitoring purposes. The principles that guide the monitoring activities are three:

- **integration >** it must be understood as an integration of European and national monitoring systems to obtain a comprehensive view of Italian regional policy, covering both the European Union and State funding; to this end it is necessary to ensure the homogeneity of the data monitored as well as of the monitoring procedures with which this activity and the subsequent control are carried out; this is the only way to watch together the actions of implementation of regional policy to verify if the objectives set in the programming phase (in the NSF and operational plans) are actually pursued, realised and with what results;

- **coordination >** it is necessary to ensure the implementation of the principle of integration and translates, firstly, in the coordination

of monitoring activities to obtain reliable data related to different phases of the management of funds, from programming to implementation, to the analysis of the results. Secondly, coordination also affects those involved because it ensures cooperation between the administrations involved in the implementation of funding programmes. The Ministry of Economic Development (MED) and the Managing Authority (Ma) operate in this sense. The former, through the Department of economic cohesion and development (DPS), accompanies the monitoring phase; the latter must receive the information necessary to carry out its task that, with respect to monitoring activities, is to ensure activation and operation and good functioning of an adequate system. To this end, it is necessary that the MA has adequate information about resources available for monitoring tasks, the projects to be monitored, the data relating to them, with particular attention to any difficulties met; only in this way, the MA can properly plan and monitor the activities of monitoring of implementation of programmes and plans on management of funds.

- **efficiency >** it serves as the basis for the principles of integration and coordination; it must cover not only the activity of the Administrations involved, but also monitoring procedures considered alone, which must be efficient to achieve adequate results.

To give a concrete implementation to the three principles set out above, the monitoring systems should ensure the collection of unique, homogeneous data and must be based on uniform and efficient procedures feeding the same system. This ensures an efficient integration between different monitoring systems required for proper processing of data and information to be used for the purposes of supervision on management of EU funds and, more generally, on the implementation of regional policy in Italy, ultimate goal of monitoring.

There are three types of monitoring:

1. the **financial monitoring** deals with the control of financial data relating to expenditure actually incurred by the beneficiaries of the regional development funds; for the purposes of monitoring, the data are compared with the financial plan initially scheduled within operational plans relating to individual operations;

2. the **physical monitoring** relates to the physical data of projects, which are compared with indicators, results and impact defined during the programming phase;

3. the **procedural monitoring** relates to the procedures which led to the adoption of plans and is realised until the activation of projects.

The **surveillance** is aimed at ensuring the effective implementation of national and European regional policy. The aim is to ensure consistency, transparency and effectiveness of such implementation, taking into account the specificities of individual programs and individual plans outlined.

On the basis of previous experience, Italy has decided to extend the surveillance activities from European funds only to the entire regional policy (including the national one), in order to ensure better control over the policy financed by State funds and, at the same time, ensure greater integration of the two regional development policies. We try, therefore, even on the subject of surveillance, to give an overview of Italian regional policy as a whole, emphasizing the unitary character of State and European funds, in the name of their integration and their concentration on common objectives for the development of the most disadvantaged local realities.

At the same time, the extensive nature of the surveillance matter also refers to its object because the NSF has subjected to surveillance also aspects related to the protection of the environment to pursue sustainable development and facilitate the integration of economic and social policies with environmental ones, as requested by the European Union. In other words, the needs of underdeveloped areas cannot and must not counter the need for protection of the environment; these needs must coordinate to achieve common development.

In Italy, the surveillance system in individual regions should be implemented on the basis of data supplied by the Inter-Ministry Committee for the Economic Programming (CIPE). In particular, the Committee, on the basis of the provisions in the NSF, outlined a system of supervision which must respect the following principles:

- **proportionality** of surveillance tools that should not affect the conduct of controlled activities more than is strictly necessary;

- **simplification** of procedures and monitoring tools, which need not be particularly complex, so that they can be easily implemented in concrete;

- **effectiveness** of the supervisory system, which must be able to achieve its goals of control over implementation of the funds management plans;

- **transparency** with regard to both the scope of surveillance activities (i.e. the implementation of the funds), with regard to the surveillance activity considered in itself in order to ensure effective and serious controls, made public through tools necessary and adequate to enable appropriate controls;

- **participation** of the subjects dealing with implementation of program plans about funds management, which must not obstruct surveillance activity while, on the contrary, facilitate it as much as possible;

- **responsibility** for those who have committed irregularities; the surveillance is aimed at finding errors in the implementation phase as well as the subject, the office, the body responsible for the mistake; and this should apply to all stages of the implementation of joint programming because to all these the surveillance is addressed.

Moreover CIPE, with the resolution 22.12.2006 No. 174, set up at national-level the National Committee for coordination and monitoring of unit regional policy which has functions of coordination and guidance in the implementation of the NSF. The decision of CIPE is not autonomous, it depends on data supplied by the NSF which had already identified the essential characteristics of the Monitoring Committee. This serves as a meeting point of different actors concerned because consists of representatives of the Presidency of the Council of Ministers, the central authorities of the sector, the Ministry of economy and finance, of the Regions, of those involved in institutional and economic social partnership. The coordination of the activities of the Monitoring Committee is entrusted to the Ministry for economic development. In addition, the Committee is called upon to accompany the implementation of NSF and to verify that the individual operations reach the goals defined in the programming phase.

The coordinating role of the Committee is underlined by the fact that the latter is called by NSF to perform functions that are attributed also within individual regions. Thus, the Committee, even in individual regional territories, carries out tasks of coordination and control over the implementation of operational plans, in terms of surveillance of the operations realising them.

The control has a very broad scope of intervention because it addresses not only to the management in a strict sense, but also to all subsequent activity in which the management is realised. Therefore, control relates to the management of EU funds, the financial accounts of individuals using them and/or benefiting from them, the effectiveness of the management system as well as of the system designed for control. In the control activities there is also a component of "control on controllers ", in order to ensure that all actions related to the implementation of European funds programmes – from managing *tout court,* to the surveillance forms above mentioned – are made in an efficient, adequate way in compliance with European and national regulations.

The control system is established to protect the good and sound financial management of Public resources and, therefore, is expression of the principle of the good performance of PA pursuant to article. 97 of the Italian Constitution. That goal can be pursued through the use of rational management and control systems, which are able to guarantee an efficient pursuit of objectives during the programming phase.

To that end, the control system is based on transparency, both on the side of administrative action and of the results achieved. Thus, first, it verifies that the public administration is acting transparently when handling European funds in order to facilitate a supervision of legality. On the other hand, the same monitoring activities should be transparent, with the consequence that their results must be public so as not to hide any problems detected. It is necessary, in fact, to bring out those problems in order to correct them and, at the same time, to punish those who are responsible.

Within their operational plans, the regions must identify the authorities responsible to perform the monitoring activities. Among these, the most important ones are three and are structured in such a way as to integrate with each other to achieve a more efficient control. The management and control system on the European structural

funds (SIGECO) is also defined at European level (EC Regulation 1083/2006, 1828/2006, 846/2009, 2035/2005). In this context, the monitoring activities on proper management of European structural funds is entrusted to a vast number of subjects established at both national and local level. Such parties may independently assess the commission of possible irregularities, but remain part of the organisation of the managing authority (MA).

- The **Managing Authority (MA).** That authority has responsibility for the management and control of the interventions co-financed by European structural funds, in order to capture and record any information collected by virtue of the controls carried out by Authorities or SIGECO internal/external bodies.

- If the verification procedure detects an irregularity, the competent administration proceeds with the drafting of an initial report stating the type and the amount of the irregularity itself. This report is then sent to the MA that initiates the procedure of investigation on the irregularity. The same MA, once completed a formal evaluation of the irregularity detected, proceeds to report it to OLAF.

- In Lazio, for the 2007-2013 programme, the MA was appointed by resolution of the Regional Council of 3.04.2007, n. 39. Its activity, includes all the controls on the implementation phase listed above: from surveillance to monitoring, to assessment, to the management in a strict sense. The MA, then, not only ensures the correct selection of the operations to be financed with funds from national and European regional development fund under the regional operational Plan (POR) and the reference legislation, but also cooperates with the Supervisory Committee with reference to these selections; still, the MA checks the declarations of beneficiaries with regard to expenditure, supervises — as seen— on the existence and proper operation of an adequate monitoring system to ensure adequate evaluation activities. These are just some of the tasks performed by the MA, yet they make clear the broad role it has : that Authority operates on the entire front of the implementation of programmes and plans of management of European funds. To this end, it is clear that the MA cannot act alone and, therefore, not only cooperates with other supervisory authorities, but can also make use of organs and offices internal to the Regional administration.

- The **Certification Authority (CA)** essentially performs monitoring activities, but it is also a medium between individual Administrations that use or win European funds and the Commission of the European Union. In Lazio, it was appointed with deliberation of the Regional Council dated 3.04.2007, n. 39. In its activity, the CA uses the information which the MA provides directly or through the computer monitoring system set. The CA also verifies this information and "certifies" their correctness, with particular reference to statements relating to expenditure, to ensure compliance with European and national rules on the subject. The CA then transmits these certified declarations of expenditure to the European Commission so that the necessary checks can be carried out.

- The **Audit Authority (AA)** could be regarded as an authority that controls the controllers, the AA, in fact, is called upon to ensure that the management and control system established by the region is effective and efficient. To this end, it performs random checks on operations carried out to verify the adequacy of its management and control systems. The AA inserts the results obtained in documents that it must periodically submit to the European Commission to report on the effectiveness of the management and control system on European funds. In addition, at the end of the program, the AA is entrusted the task to draft a "closing statement" to attest the validity of the claim for payment of the final balance and the regularity of the transactions covered by the declarations of expenditure submitted. The AA shall also submit to the Commission a final control report which refers to all the activities carried out during the entire period of the programme.

As regards the control instruments with which the competent authorities shall carry out their activity, we can briefly outline the following ones.

The audit trails are tools that are arranged by the MA for each activity and each operation for the implementation of the POR and that, therefore, involve the use of resources of regional development funds. They must be structured as a dynamic and flexible instrument, capable of adapting to the needs that arise in relation to the single operation and must, therefore, take account of the context in which they are included.

The check lists are control tools of documentary character, that is based on literature, containing the information and data related to the activities to be controlled. They are used, with different contents and purposes, at all stages of implementation of the regional plans, always having the objective to monitor such implementation:

- in the phase of selection of the operations, *check lists* ensure the application of a correct selection procedure, respectful of the principles and standards in the industry and consistent with the selection criteria predefined by POR;

- in the physical and financial implementation of operations, the control is addressed to the beneficiary and is designed to verify the accuracy of the expenses it claims and reports; in this case, the benchmark is constituted by the feasibility study and economic plans;

- during the conclusion of operations, account is taken not only of final expenditure reported by the beneficiary but also of the concrete activities carried out by the same; in other words, it is necessary to ensure that the work, supply or service financed with regional development funds have been actually made in accordance with the provisions set out in the plan and have actually met the needs for which they were programmed.

The Opencoesione is a website that contains all information and data of projects financed by the European structural funds (www.opencoesione.gov.it). Anyone interested can access the site and the information contained therein and control how the European funds were used. It is a tool of control by citizens who can assess if the projects approved and implemented correspond to their needs and if resources are used efficiently. It is an expression of the utmost transparency of the Administration as well as of the participation of citizens that are the final beneficiaries of administrative activities. It remains, however, the problem of verifying how the information from the site can be effectively used; in other words, it is necessary to understand what citizens can make concretely if they feel that the projects prepared and financed by Governments are not responding to their needs or if the resources were used in a non-efficient manner.

The Opencoesione system can be considered a summary of implementation instruments analyzed since it consists of a collection of data and information of operations financed with regional development funds that will be made public to allow an adequate control over the activity of administrations and the management of funds. The aim is to improve the weaknesses found and point to an increasing efficiency of public administrations, with the necessary cooperation of the citizens.

3. NATIONAL AUTHORITIES WITH FUNCTIONS OF CONTROL OVER THE MANAGEMENT OF THE COMMUNITY FUNDS.

There are national authorities which, in the broad context of their activities, have functions of control on the management of EU funds. In particular, we can remember:

a) Court of Auditors.

According to the Constitution of 1948, the Court of Auditors is an autonomous and independent body with monitoring (art. 100 Const.) and judicial functions (art. 103 const.). At regular intervals the Court submits to Parliament reports about the outcome of those functions. The control activities in matters of public accounting finds its foundation in the Constitution arts. 97 (good performance and impartiality of public administration), 81 (fulfilment of budgetary balances) and 119 (coordination of public finance). The analytical framework of the functions of the Court of Auditors is contained in the law January 14 1994, n. 20.

For the purposes of this research, between the different functions of the Court of Auditors we should consider the activity of control on the Administrations management. This control is aimed at checking the correspondence between the results of administrative activities carried out and the objectives set out by law.

Pursuant to art. 3, paragraph 4, l. 20/1994, the Court of Auditors shall exercise the further control on the management of the budget and

government assets as well as off-balance management and on European funds, "verifying the legality and regularity of the management, as well as the functioning of internal controls for each Administration". In addition, "it ensures, also based on the outcome of other controls, the consistency of the results of administrative activities with statutory objectives, comparatively assessing costs, modes and times of performance of the administrative action". In the case of regional Governments, "the management control relates to the pursuit of the objectives laid down by the laws of programme and principle" (par. 5). Therefore, the object of the provision is invoked in the verification of the proper management of European funds.

As regards the control over funding from the European Union, the regional sections of control have a particular importance because the regions are the main managing bodies of EU funds. For the Head Office the control section for community and international affairs has a great importance. Also the Central Section of control over management of the State authorities is in charge of control over EU funds, in case controlled managements involve European co-funding.

This check verifies that the management of resources of European origin is compatible with the objectives set by the State and by the EU; it also verifies the existence of possible fraud or irregularities committed to the detriment of European budgets. The outcome of the examination on the management, however, does not affect the effectiveness of the controlled act. At the conclusion of the proceedings, the Court only draws reports and observations addressed to the competent Administrations, in which it indicates the irregularity detected. These reports have a value of direction for the Administrations that, in case of non respect of these suggestions, do not undergo any penalty.

b) Ministry of Economy and Finance (MEF).

The Ministry of economy and finance participates in the control and monitoring function in the management of European structural funds by means of the Office of the General Inspectorate for Financial relations with the European Union (IGRUE)[8]. In agreement with the European Commission, the Inspectorate ensures that management systems enabled by regional and State administrations are compliant with the formalities required by European legislation. Together with the European Court of Auditors and the European Commission, the IGRUE controls the use of the funds by the beneficiaries.

This Institute was born as the end of a long journey undertaken by General State Accountancy which led to the creation of an Office dedicated to relations with the European Union. Its objective, therefore, is to collect information concerning financial flows between Italy and the European Union to assess their impact on national public finance. So, a centralised monitoring system has been created capable of gathering information on the destination of European funding and their use by the final beneficiaries. It is, therefore, a task which falls within the General functions of the Ministry of economy and finance, which deals with programming public investments, coordinating government spending and ensuring its developments.

c) Committee for combating fraud against the European Union (COLAF).

The Committee for combating fraud against the European Union (COLAF) operates at the European policy Department of the Presidency of the Council of Ministers, pursuant to art. 3, d.P.R. 14.05.2007, n. 91 and art. 54, l. 24.12.2012, n. 234. It is chaired by the Minister for European Affairs or his/her delegate and also includes, among others, the Commander of the Nucleus of Guardia di Finanza for the prevention of fraud against the European Union.

The Committee has an advisory and guidance capacity for the coordination of activities of fight of fraud and irregularities in the fiscal sector, in the common agricultural policy and in the structural funds. It also takes care of issues related to the flow of communications on the subject of undue perceptions of EU funding and it recovers amounts unduly paid, referred to in Regulation (EC) no 1828/06 of Commission dated 8.12.2006, and Regulation (EC) no 1848/06 dated 14.12.2006. It develops the questionnaires on annual reports to be sent to the European Commission, pursuant to article 325 of the Treaty on the Functioning of the European Union (TFEU).

d) Guardia di Finanza.

The Special Police Corps of the Guardia di Finanza is another subject involved in the prevention and contrast of fraud to the detriment of European budgets. The Guardia di Finanza is part of the armed forces and of the public force and depends directly on the Ministry of economy and finance. Through a directive, this Ministry determines annually

8 On this point see www.ministerodelleconomiaefinanza.it

the strategic objectives to be followed within the competences assigned to the Guardia di Finanza by lgs.d. 19.03.2001, n. 68 (implementation of delegation l. 31.03.2000, n. 78). For the fight against fraud on European funds, the Guardia di Finanza works together with COLAF.

4. IRREGULARITIES AND FRAUD: ADJUSTMENTS AND RECOVERIES.

European law defines the irregularities as "any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the Community budget through reducing or losing revenue accruing from own resources collected directly on behalf of the community or because of an unjustified item of expenditure" (Council Regulation 2988/95 of 18.12.1995).

Fraud detrimental to the financial interests of the EU are a case of more serious irregularities and are defined as "any intentional act or omission relating to the use or submission of statements or false, inaccurate or incomplete documents, which has as its effect the misappropriation or retention of funds (with regard to expenditure) or illegal decrease (with regard to revenue) of resources of the general budget of the European Communities" or "non-disclosure of information in violation of a specific obligation" or "the misapplication of such funds for purposes other than those for which it was granted ... or of a legally obtained benefit, which achieves the same effect" (article. 1.1, EU financial interests Protection Convention 26.07.1995).

Fraud, therefore, is qualified by such an irregularity (such as the willingness of the action or omission) and its implementing rules. The fight against fraud and irregularities is based on art. 325 of TFEU (ex art. 280 EC Treaty).

Irregularities and fraud may relate to the management of EU funds. In accordance with European regulations, Member States shall prevent, detect and correct irregularities relating to the management of EU funds. The States are responsible for appropriate financial corrections and recoveries needed in the investigation of such cases of irregularities. If it is impossible to recover funds already paid irregularly, the Member States are liable to the Union if there are profiles of inadequacy in the action of prevention, contrast and recovery, in accordance with articles 32 and 33 of Regulation 1290/2005 (CE) and art. 70 of Regulation 1083/2006 (EC).

In Italy, the procedure for management of irregularities and the related responsibilities are entrusted to the Managing Authority (MA) established within individual regions and central Governments for the implementation of Operational Plans. A MA was established also in Lazio, competent to manage the procedure of investigation of irregularities in the management of EU funds and to take the subsequent corrective measures and to recovery sums unduly paid.

For these purposes, a control section operates within the Authority for data collection and management of irregularities, which plays a key role in the procedure considered. The Authority also operates through the Area Organization and Implementation of Human Capital Measures, incorporated within it. The MA is also flanked by other entities that are involved in different ways in the field of controls: the certification authority (CA), the Audit authority (AA), the intermediate bodies.

In Lazio, the irregularities management system is based on the collection of data and information related to projects being implemented. In this first phase, all the actors responsible for monitoring are involved. First, there is the MA that uses an information system for the recording and analysis of the data under consideration. In particular, within the MA there is the data collection Section of control and management of irregularity which is responsible for recording information about controls coming from controllers. In fact, during the performance of their functions, the latter (the CA, the AA, the intermediate bodies) must forward to the MA all information and data relating to irregularities, even alleged, that they meet in the implementation of the regional plan and the realisation of the related operations. Control bodies are complemented by the same fund management Administrations and by beneficiaries, who, in the name of transparency and publicity of their activities, have to provide the MA the information and data necessary to verify the proper use of EU funds (so called self-control).

After collecting all the data and information it needs, the MA will analyse and evaluate them to see if there are potential violations of standards on the funds:

- If the audit ends with a fail, then there is nothing to suggest the existence of irregularities, the MA makes a communication not

- to prosecute; in addition, if during a quarter no irregularities are detected, the MA must give express notice to the Department of Community policies at the Presidency of the Council of Ministers (PCM-DPC);

- If the audit has a positive outcome, then there is a breach of European and/or national standards likely to affect the use of EU funds, the MA will transmit the report and adopt all consequential measures.

The irregularities which may arise in the course of such verification can be classified in different categories, taking into account different criteria:

a) depending on the **moment in which the irregularity emerges**, we can have:

- irregularities on operations for which the public contribution has not been granted yet, in which case there is a procedure to adjust the contribution and the amount payable or, in serious cases, the whole intervention is withdrawn;

- irregularities on operations for which advance payments or the entire public contribution were granted, in which there is a recalculation of what is yet to be paid, or the recovery of what unduly paid.

b) depending on the seriousness of the irregularity, we distinguish between:

- systemic irregularities, namely relating to serious deficiencies and/or errors in systems of management and control of EU funds, such as to lead to the financial adjustment and careful investigation of additional work that might be affected by the defects of the system;

- isolated irregularities, they must be corrected, yet they do not denote a problem of the entire management system because due to isolated incidents.

Once proven the irregularity, the MA gives notice to the DPC-PCM (through the information system Irregularities Management System -IMS) and the European Commission (through relevant OLAF established at European level for similar reports). The MA must also update the Commission on the activities undertaken as a result of the investigation of irregularities, both from an administrative point of view and from a legal point of view and with regard to any recovery and rectification procedures.

Once established the existence of one or more irregularities, the MA must also take action to correct it. Depending on the type of irregularities found, there will be different consequences:

a) Rectification consists in the elimination of all or part of the public contribution for an operation deemed irregular. The funds in question may be reused for other measures of implementation of the plan, but not for the operation subject to adjustment or related operations potentially irregular. For the purpose of reuse, the MA modifies the list of projects of the plan to redistribute the funds covered by the rectification. The amount to be rectified depends on the inspections by the MA and varies from the value of 100% of the amount in the most serious cases up to lower values for less serious violations. The choice is made according to the scheme outlined by the region in the programming phase, on indications by the European Commission.

b) The **recovery,** instead, is the instrument with which the MA operates in the case in which the irregularity is detected after the payment of the contribution to the beneficiary; in this case, the authority should recover sums already unduly paid, calculating also legal interests on them. The sums recovered shall be returned to the Treasury of Lazio and are at disposal of the MA that orders their restitution to the budget of the European Union.

If the MA considers that recovery is no longer possible, it gives notice to the Commission, indicating the extent of the amounts unduly paid, as well as the reasons why recovery is not achievable. The Commission then assesses who is the responsible for the loss and, if it considers that this is attributable to negligence or fault of the management system, reimbursement to the EU budget will only in part be paid from the State budget.

c) The **so-called decertification** is another possible consequence. The procedure of certification of expenditure requires the MA of

an operational programme to submit to the European Commission, through the CA, the sum of all costs incurred for the implementation of projects from the start date of eligibility (in 2007/2013 this date is the 1.1.2007). The MA is entitled to exclude from a certification of expenditure already certified amounts. This ability, known as decertification, responds to different needs, including:

- Elimination of expenditures of projects that are no more strategic for the Programme implementation;
- Elimination of expenditures for projects that stop due to failures or for judicial or administrative issues;
- Elimination of costs associated with the identification of irregularities or fraud against the European budget.

The decertification practice involves the need to replace cancelled expenses with other projects expenditures, or to return these amounts to the EU budget.

Finally, we can provide some data on irregularities and fraud in the management of Community funds in Italy, with particular reference to the ERDF[9].

Compared to the total number of irregularities and fraud detected in the various sectors at European level, the percentage of 33% of irregularities/fraud in 2013 focuses in the field of Structural Funds, representing the sector most exposed to risk.

Italy is one of the Countries with the highest number of irregularities, which is 465; more than twice the French ones (just 177), more than Germany (300) but less than the United Kingdom (569). The Czech Republic, with its 928 irregularities, takes the first place in this area. The datum in question must also be compared with that of the amount of the irregularities reported in the same year 2013. For Italy, this amounted to about € 34 million, compared to € 13 million of France (among the best in Europe), € 22 million of Germany and € 56 million of the United Kingdom (confirming a worse figure than Italy). The amount of irregularities in Italy falls in the average of the European Union. It follows that in Italy there are many irregularities which, however, are of all small amount.

The Italian situation appears severe regarding the reported fraud and for their amount. In Italy in 2013 280 frauds were reported, amounting to approximately €56, 7 million. Second, after Italy, is Poland that, however, has a far less serious situation than ours with only 105 reported frauds (less than half of Italy) equal to the amount of €39,4 million. Really hard to make a comparison with Germany, where only 41 frauds have been reported, although all of relevant value, for a total amount of approximately €23,6 million (in each case half of Italian amount). Almost impossible the comparison with the United Kingdom (14 frauds for a total value of € 4, 71 million) or France (19 frauds for € 1,52 million). Not surprisingly, in Italy, fraud accounted for 37% of irregularities committed in the management of funds, compared with a European average of 11%.

Coming to the field of structural funds, 37% of the total of the irregularities of such sector relate to ERDF-ESF and FC (the data does not change if we consider the financial impact of the irregularities). With regard to fraud, while within the EU only 5% of the total is attributable to the funds ERDF-ESF and CF, in Italy, this percentage reaches 10%.

In 2013 in Italy, 383 reports of irregularities (311) and fraud (72) were communicated to OLAF, 26 of which refer to 2000/2006 programming and the remaining 134 to 2007/2013 programming. The amount of such reports was a total of € 59,807,810. Almost half of those reports came from Calabria region that with 160 reports is firmly positioned at the top. After it, Sicily (32) and Campania (31). Lazio region is in mid-table with 8 reports, a number actually limited when compared to Calabria.

Without doubt, the fund most affected by irregularities is the ERDF, with 322 reports (about 88.3% of the total); many fewer the reports of irregularities relating to the ESF (33), the EAGGF (27); only one for the FIFG. This difference is reflected, of course, on the amounts of such reports. Of the total 59,807,810 € above, almost all are related to the ERDF (€ 53,786,602). The remaining approximately € 6 million are divided between ESF (€ 3,262,262), EAGGF (€ 2,442,138) and FIFG (€ 316,808).

In the year 2013, in Italy, the managing authorities defined 832 cases, of which 250 relate to ERDF funds. Many of the cases are concentrated in Abruzzo (112); Lazio, instead, did not provide any data about

9 Cfr CO.L.A.F. annual report for the year 2013

it. Lazio provided data about ESF (5 cases defined) and EAGGF (5 cases defined too).

Of the sums involved in irregularities (taken into account, without distinction for all funds) management authorities claim to have recovered € 7,011,102, 89% of which refer to programming 2000-2006 (approximately € 6,254,394).

Such recoveries have occurred especially in Campania (€ 3,111,631), Sicily (€ 2,475,379) and Apulia (€ 533,923). It is not possible to make a comparison with Lazio because it did not provide all necessary data, so it is not taken into account. Like Lazio, many other Italian regions which, therefore, cannot be included in the present analysis (less than half of the regions have delivered all their data).

With respect to the same period, cases defined for decertification show a total amount of € 57,564,228. Once again, Apulia confirms its good results, classifying at the top (€ 26,308,094), followed by, in order, Calabria (€ 7,731,904), Sardinia (€ 3,327,507) and Campania, also in this list among top positions (€ 2,772,078). Once again, in the absence of data, the situation of Lazio cannot be analysed nor it can be compared to that of other regions.

It should be stressed, however, that only a very small part of the sums involved in irregularities/fraud is recovered. It is good to point out that the total amount of the sums subject to decertification (€ 57,564,228) is much higher than the amount of the sums recovered (€ 7,011,102).

With regard to the irregularities/fraud, there is no doubt that most of these arise from the violation of the rules on public procurement (40%). This sector alone records a number of irregularities almost equivalent to all the other together: non-observance of obligations assumed (11%), missing or incomplete documents (10%), missing or incomplete supporting documents (9%), falsified supporting documents (8%), other irregularities (7%), non-eligible expenditure (6%), other irregularities committed by the beneficiary (5%), closing, sale or reduction (4%). It should be noted, however, that they are not necessarily linked to phenomena of corruption, but also to more common violations of law, which can be caused also by the high level of legislative uncertainty in the field of public contracts. This particular issue will be discussed in the next chapter[10].

10 Committee for the fight against fraud against the European Union, annual report for the year 2013, p. 76, in www.politicheeuropee.it.

CHAPTER II

The regulatory framework of public contracts in Italy, the institutions susceptible to corruption and trend lines of the Legislator.

1. THE CODE OF PUBLIC CONTRACTS

Until the adoption of the code of public contracts, lgs.d. n. 163/2006, national regulation about public works, services and supplies was distinct for each scope[11]. Similarly there were distinct disciplines of contracts in the fields of ordinary and special sectors.

The discipline of routine works, after the well-known facts of Tangentopoli, with Law February 11, 1994, No. 109 so called Merloni, was profoundly changed. The new discipline, animated by a purifying soul and aimed at the opposition of corruption, had the effect of shifting the balance between flexibility and rigidity (through the absolute restriction of administrative discretion and the provision of nearly automatic award schemes) in favour of the latter, assuming a generalised mistrust both in respect of contracting authorities and of the enterprises. These choices resulted in a downturn in the industry as a whole, despite the growing demand for new infrastructure and the inadequacy of existing ones[12].

The disciplines of the services and supplies were, instead, dictated respectively by lgs. d. March 17, 1995, n. 157 (as amended by the lgs. d. n. 65/2000) transposing Directive 92/50/EEC and from lgs. d. July 24, 1992, n. 358 (as amended by the lgs. d. n. 402/1998) transposing directives 77/62/EEC, 80/767/EEC and 88/295/EEC. There was also the lgs.d. March 17, 1995, n. 158 (amended by lgs. d. n. 625/1996 and by lgs. d. n. 525/1999), transposing Directives 90/531/EEC and 93/38/EEC, which regulated the so-called special sectors (also called excluded sectors).

With the lgs. d. April 12 2006, n. 163 «Code of public contracts for works, services and supplies», the legislator brought together in a single legislative text all matter of public contracts.[13] The code has merged and rearranged in a single text the disciplines of public contracts for works, services and supplies, until now contained in separate legislation and repealed a total of 29 laws, regulations and decrees, and over 100 articles of law contained in 30 different regulatory bodies. Therefore, the code has operated a reorganization and consolidation of the previous regulations with a view to greater openness to competition and at the same time has got some Community based source institutions based on a greater flexibility of the procedure, confirming a certain trend towards openness that could already be found in the latest of series of Merloni laws[14].

However, the move towards greater flexibility was, perhaps, too long and quick, showing immediately all its limitations. The unhappy season of precariousness in the legislation of public works, indeed, continued, and the entry into force of the code could be considered a "false start". Immediately after such entry into force, in fact, with the approval of the law of conversion July 12, 2006 n° 228, with amendments, of L. Decree May 12, 2006, n. 173, so called milleproroghe (thousands of extensions), a suspension was made until February 1, 2007, of many provisions innovating the subject, including in our legislation some institutes that moved the boundary between rules and flexibility towards the latter and that, consequently, the legislator looked at with suspect.

The season of the decrees to correct the Code opened, and persisted from 2006 to 2008, in which (by virtue of the power granted by the same delegation law that had originated the code) the Government issued three organic decrees to reform the original code text. It is worth noting in particular that the third corrective lgs. l. September 11, 2008, n. 152 answered the need for adaptation to the infringement procedure no. 2007/2309, started against Italy.

11 About the evolution of the discipline of public contracts, please refer to: G. Fidone, *"The Code of public contracts"*, in CLARICH M. (eds), *Commentary on the Code of public contracts*, Torino, 2010.

12 It became necessary, therefore, corrective action operated with the L.D. April 3, 1995, n. 101 converted with amendments into law June 2, 1995, n. 216 (Merloni *bis)*, and with the law 18 November 1998 n. 415 (Merloni ter). The regulatory body was completed with the implementing regulation, dPR December 21, 1999, n. 554, with the Presidential Decree January 25, 2000, n. 34, Regulation on the classification of implementing subjects and with the DM 145 of 19 April 2000 (*Regulation containing the General Tender and Specifications of Public Works)*.

In the early 2000s, the Legislator made changes to the regulation of public works, which also had the aim of involving private bodies and capital in the construction of infrastructure, broadening the reference models possible, even in the sense of greater flexibility. It was, thus, created a sort of double track: on the one hand, the rules for those big infrastructure projects deemed to be of strategic interest for the country's development, with the Legislative Decree no. 20 August 2002, n. 190 which implemented the enabling law 12 December 2001 n. 443, so-called objective law, which provided for exemptions to the law framework, to simplify procedures and to speed up the realization of the works; on the other hand, the ordinary rules laid down for all other works, last time updated with the Law of 1 August 2002, n. 166, which amended for the fourth time the law n. 109/1994, also called Merloni *quater*.

13 The new legislature implements the authorization contained in. 25, Law 18 April 2005 n. 62 (Community Law 2004) for the implementation of the new EU directives 2004/18/EC (on the coordination of procedures for the award of public works contracts, supplies and services) and 2004/17/EC (on the procurement procedures of bodies operating water and energy providers as well as organizations that provide transport and postal services). These directives indicated as deadline for their implementation the 1 February 2006.

14 Among the comments on the legislative decree. N. 163/2006, among others, please compare: M.A. SANDULLI - R. DE NICTOLIS -R. GAROFOLI, *Treaty on public contracts*, Milan, 2008; R. DE NICTOLIS, the new public procurement code, rome, 2006; a. Cancrini - p. Peas - v. Capuzza, *The new law on public contracts*, Rome, 2006; M. GREEK - A. MASSARI, *The new public contracts code*, Bologna 2006; M. SANINO, *Commentary on the code of public contracts for works, services and supplies*, Turin, 2006; L. FIORENTINO - C. LACAVA, *Code of public contracts for works, services and supplies, in Admin. Law Journal*., *Quaderni 15,* Milan, 2007; R. GAROFOLI - G. FERRARI, *Code of public contracts*, in P. DE LISE - GAROFOLI, *"The codes of professionals"*, Rome, 2007; Clarich M. (eds), *Commentary on the public contracts code*, Giappichelli, 2010

However, not even the end of the season of remedial decrees ended the troubled story of the amendments to the code. In fact, starting from 2009, the legislator abandoned the way of organic operations on code and undertook the inclusion of the amending provisions in a number of legislative measures, heterogeneous and often involving different sectors of the code. As can be seen from Annex 1 to the present, the amount and consistency of modification interventions to the text of the code has created a situation of great uncertainty on the law to be applied with clear consequences in terms of efficiency and timeliness of the procedures. In particular, especially in recent years, such interventions appear not to be founded on a programmatic planning but on reasons of urgency and contingency.

2. LEGISLATION ON PUBLIC CONTRACTS AND THE ROLE OF THE REGIONS.

The object of this research is also oriented towards the study of Regional peculiarities of individual countries, for Italy with particular reference to Lazio region. Well, in the case of Italy, with regard to the discipline of public contracts and the criticality of the institutes that compose it, the distinction among the different regions has no importance. To explain this, it appears useful to refer to the subject of the Division of Legislative powers between Italian State and the regions, in the field of public contracts.

As well known, art. 117 of the Constitution governs the legislative powers of State and Regions on the basis of an allotment for subjects: the provision firmly lists the subjects having exclusive legislative competence of the State[15] and those of concurrent legislative competence[16] and recognizes a regional legislative authority of residual character on all those matters not expressly identified[17]. The Division of legislative powers as outlined in art. 117 has been the subject of numerous interventions that the Constitutional Court has interpreted in a more or less strict way[18].

With regard to public contracts, the problem arose because this matter is not expressly listed in the first two groups of subjects (i.e. those of exclusive Legislation of the State and those of shared State-regions Legislation). The consequence would be that public contracts were exclusive regional legislation[19].

However, the Constitutional Court intervened on this issue[20] expressed the principle that public contracts are a *"non-subject"*, with the consequence that, although not expressly covered by art. 117 of the Constitution, they do not necessarily fit neatly within the residual competence of the regions[21]. Therefore, it is necessary to break the theme of public contracts in the various matters that relate to it which, in accordance with art. 117 of the Constitution, should be attributed to the various legislative powers.

On this basis, being the protection of competition the foundation and the ratio legis of the code of public contract, the majority of the provisions contained therein have been attributed to the exclusive legislative competence of the State, to which is attributed specifically the competition matter[22]. In the field of public contracts, the protection of competition is expressed as "the need to ensure

15 They are the subjects referred to in art 117, paragraph 2, which need a uniform regulation at State level and, therefore, only State Legislator can intervene in them.

16 The subjects of shared competences, strictly identified in art. 117, paragraph 3, are those attributed to the legislative power of the regions, which, however, must exercise it in accordance with the "fundamental principles", determined by the law of the State.

17 Referring to "any matters not expressly reserved to State law," Article. 117, paragraph 4, recognizes the possibility of legislative action exclusive of the Regions, each one in its own territory of reference.

18 The Consulta, in general, held that Article. 117 of the Constitution should not be read in an overly strict and rigid way (Constitutional Court 01.10.2003, n. 303). In this way, the Court has had the opportunity to expand, if necessary, the scope of the matters expressly identified by art. 117 by widening the mesh of the legislative competence of the State or of the shared one. The Court, moreover, has also brought back into art. 117 certain matters not expressly covered by the constitutional provision and that, therefore, should have been attributed to the residual powers of the Regions.

19 The same issue arose before the code in relation to the framework law on public works, L.109 / 1994 and its constitutional legitimacy in reference to supervening changes to Title V of Part II of the Constitution, made by the Constitutional Law October 18, 2001, n. 3. On this point, the Constitutional Court, with judgment no. 303/2003, has shown that the non-inclusion of public works in listing of the new art. 117 of the Constitution, does not imply that they are subject to a residual legislative power of the regions. That of public works, in fact, would not be a matter to be assigned as a whole to the competence of one or the other (State or Region), but would provide inside institutions that, depending on the object governed, fall within the competence of one or the other.

20 Among the various interventions of the Consulta, the judgment of 23.11.2007, n. 401, deserves special mention which is considered a cornerstone in the matter of apportionment of legislative powers in the field of public contracts. Also worthy of consideration is the judgment of 1.10.2003, n. 303 of the Constitutional Court, which was one of the first rulings on the subject of public contracts after the reform of Title V. Although prior to the Code, that judgment, stressing the need to interpret Article. 117 of the Constitution in an elastic way, has the merit of recognizing that public works are "areas of legislation that do not incorporate a real matter, but qualify depending on the object to which they are intended and can therefore be treated, from time to time to exclusive legislative authority of the State or to shared legislative powers "(Constitutional Court, 01.10.2003, n. 303, section 2.3 of the considered in law).

21 The Consulta, in fact, stated that "*the provisions of the Decree. N. 163 of 2006, for the variety of interests pursued and objects involved, do not relate to a single area of law*"(Constitutional Court, 23.11.2007, n. 401, paragraph 3 of the considered in law). Expanding to the entire field of public contracts what stated previously only for work (see. Constitutional Court judgment no. 303/2003), the Consulta recognizes that the contract is an activity of the Public Administration which, far from being classified as material in accordance with art. 117, is inherent to any individual substance in the constitutional provision. Hence also the constitutionality of legislative intervention of the State in public contracts cannot be assessed in the abstract but needs to be analyzed in concrete, with reference to the substantive content of the single provisions.

22 Art. 117, par. 2, item e), Cost.

the widest opening of the market to all economic operators in the sector"[23] and, therefore, State interventions designed to achieve this aim[24] legitimately fall within its exclusive legislative authority[25].

For these reasons, the provisions concerning procedures for selection of candidates and the award of public contracts, the conclusion and performance of the contract awarded and the related litigation are the exclusive jurisdiction of the State.

The theme of "administrative organisation", intended as an organization of regional structures called to tendering procedures[26], falls instead in the common legislative competence. Only in this respect, therefore, the State legislator should confine itself to find the base principles, leaving to Regions the detail discipline. On the basis of these principles, art. 4 of the Code regulates "Legislative powers of State, Regions and autonomous provinces" in the field of public contracts.

Therefore (unless the recalled case of provisions concerning organisation) national requirements of the Code of public contracts cannot be derogated from regional disciplines. Therefore, in recognition of the institutes which are more permeable to corruption we can only refer to national legislation. The various data on corruption, some of which will be discussed in chapter III below, do not depend on regional disciplines on the sector (which, as mentioned, do not exist) but on the more general environmental and cultural factors peculiar to regions, unrelated to the subject of the contracts.

3. CORRUPTION IN PUBLIC CONTRACTS

In the field of public contracts corruption phenomena are widespread, intended (in the broadest sense of the definition of the criminal offence of corruption) as abusive behaviours of administrative function to the pursuit of personal interests at the expense of the public ones. The reasons for such a concentration in the area of public contracts appear different: it is an area characterised by the use of large sums of public money, that attract illegal interests; in the face of great resources for public contracts, there is a strong *spray* of demand, that is many contracts are awarded with very low average amounts and, therefore, more easily subtracted to the controls and rules laid down in national legislation; the large number of contracts awarded correspond to a huge number of contracting authorities, which makes controls complex (since they cannot be focused only on a few subjects) and lend themselves to be more permeable to associations having criminal character.

All stages of public procurement (from preparation and programming of the contracts to design, awarding and execution) lend themselves to the occurrence of corruption phenomena. The underlying principle is that the more opaque is the action of contracting authorities and less under appropriate supervision, much more concrete is the risk of corruption. Trying to do a brief analysis that takes into account also the findings from the (cancelled) AVCP over recent years, it is possible to detect, without claim of completeness, a series of critical institutions, which must be placed at different stages in the life of a public contract.

The special Eurobarometer 2013 shows that the Italians deem the following practices particularly widespread in public tendering: specifications tailored to favour certain companies (52%); abuse of negotiated procedures (50%); conflict of interest in the evaluation of tenders (54%); bid rigging (45%); unclear selection or evaluation criteria (55%); bidders participation in drafting of specifications (52%); abuse of emergency motivation to avoid competitive tenders (53%); modification of contractual terms after signing of the contract (38%)[27].

3.1. The phase preceding the award.

The phase prior to award is at high risk of corruption since characterised by few controls. It is no coincidence that the European Commission's surveys showed that, in Italy, corrupt practices perceived as the most common are related to earlier stage of the tenders[28].

The concerns related to this phase are linked mainly to the **involvement of economic operators** and therefore of their interests that risk, even before the tender, to impose on the public ones. The more widespread phenomena of corruption, in fact, are the **tailored tenders or specifications:** a Contracting Authority, at the time of writing the **lex specialis** and technical documents that outline the contract needed, may require performance, features, requirements which, although apparently meant for a tender, in reality are designed *ad hoc* for one or more pre-selected companies that, in concrete, are the only real candidate to win the contract.

23 Constitutional Court, 23.11.2007, n. 401, paragraph 6.7 of the law considered. The same Consulta recognizes that the protection of competition, having the dual purpose of promotion and creation, encompasses both *"measures to guarantee the maintenance of already competitive markets" and "the tools of market liberalization themselves"* (in compliance with it, see. Constitutional Court, 01.02.2006, n. 29, Id., 27.07.2004, n. 272; Id., 13.01.2004, n. 14).

24 Also consider that there are some principles associated to the protection of competition - such as, for example, transparency, freedom of movement and establishment - which also ensure fairness and good performance of public administration in accordance with art 97 of the Constitution (Constitutional Court, 23.11.2007, n. 401, considered in paragraph 6.7 of the law). It is evident that the state Legislator is required to pursue these further objectives too.

25 Moreover Protection of Competition also has "cross" nature (See, ex multis, the Constitutional Court, 20.07.2012, n. 200; Id., 27.07.2005, n. 336) and therefore allows the State to intervene beyond the strict limits of art. 117, also on objects different from those identified

26 Constitutional Court, 23.11.2007, n. 401, paragraph 5.7 of the law considered

27 The percentages correspond to the sum of those who believe such practices widespread and quite common. The data are not very distant from the European average: specifications tailored to favor certain companies (57%); abuse of negotiated procedures (47%); conflict of interest in the evaluation of tenders (54%); bid rigging (52%); selection criteria or assessment unclear (51%); participation of bidders in the drafting of the tender (48%); abuse of the motivation of urgency to avoid competitive tenders (46%); modification of contract terms after the signing of the contract (44%)

28 Flash Eurobarometro 2013, n. 374.

This will undermine the transparency and tools to control the award stage, even before it comes into existence, moreover, determining a major violation of the competition principle and the interests of other bidders, substantially unable to win the bid.

To deal with a similar problem, it would be necessary to increase checks on decisions of contracting authorities during the programming and planning of its action and ensure greater transparency of choices, often of political character, with regard to the contracts they intend to award. In this way, the fight against corruption wouldn't be followed by a limitation for contracting authorities about the possibility to request a private sharing in preparation for tenders, thus guaranteeing a high level of efficiency and quality of their action. It is clear that, in some cases, the participation of private bodies in the phase that precedes the tender can be important to ensure that the choice of management contain a better balancing of interests (public and private) involved or even essential to ensure a good choice on the typology and characteristics of the contract to be awarded.

The involvement of private institutes before the tender, therefore, is inherently exposed to an increased risk of manipulation, but this danger can be effectively reduced if greater transparency and an effective system of controls are ensured.

3.2 The award phase.

The award of the contract appears as the least exposed to the risk of corruption because it is the most regulated at European and national levels and, within the framework of this discipline, more subject to observance of the principle of transparency as well as to more controls. These rules, however, are not always sufficient to eliminate corruption risk completely.

The corruption phenomena in the tendering phase can be broken down by type, which take account of their nature and of their cause.

a) Circumvention of the principles of tender.

Although the code of public contracts and the European directives ensure adequate transparency of administrative action during the awarding stage, accompanied by appropriate controls, there are cases where these provisions are "legitimately" waived in the name of principles or needs considered more important. In certain cases behind the non-application of the rules on transparency can hide corruption phenomena:

- derogation dictated by urgent or emergency situations, allowing the Administration to act in a less transparent way because of the need for a timely and rapid intervention. In some cases, **the concept of urgency is abused,** and is expanded to cover non exceptional or unforeseeable events (e.g. art. 5-*bis*, item 5, l.d. 7.09.2001, n. 343, converted into l. 9.11.2001, n. 401 – now repealed – equated big events to natural disasters, leading to several scandals such as those of World Swimming Championships in Rome in 2009, the G8 at Maddalena and the celebrations for the 150th anniversary of the unification of Italy); in other cases, interventions dictated by real urgency lead to the adoption of appropriate special laws, but then, in practice, result in operations that last for years, well beyond the need of the moment (e.g. the case of Mose, to which reference is made in annex 3 to this work);

- exemptions provided by the Code, which expressly excludes some categories of contracts from the application of its provisions, while calling for the respect of the fundamental principles of matter, including transparency and publicity of administrative action. This is what happens to the **services listed in Annex IIB of the Code**, for **secret contracts,** for certain **types of contracts in special sectors,** and other cases provided for by law. Escape from Code in such cases – despite the high value of the amounts concerned – is not assisted by adequate controls on administrative action, therefore, lends itself to be the most fertile ground for corruption. Consider, for example, that secret contracts are entirely omitted from the supervision of AVCP and since 2010 they are only subject to the obligation to request for a tender identification Code (TIC), which allows an attenuated monitoring by Authorities.

b) Abuse of discretion in the Administration.

The contract awarding institutions characterised by a wide discretion are particularly dangerous for contracting authority because they are likely to result in an abuse of that power of choice by the same. The danger is even greater in the context of negotiation without tender, where the lack of advertising and appropriate supervision, together with the lack of competition, make the administrative action more exposed. For these reasons they can be deemed at risk of corruption:

- the moment of **evaluation of tenders,** is a problem perceived as real risk of corruption since exposed to the danger of unlawful involvement by private interests or otherwise contrary to the public ones; add to this, that the assessment of contracting authorities, especially when concerning quality elements of tenders, can be included within the so-called administrative excellence, i.e. the area of the Administration's decision that cannot be appealed in court, so removing the control by the Court;

- the **negotiated procedures,** especially those without a prior publication of notice, are dangerous due to strong reduction of publicity of the administrative action; Administration, in these cases, has freedom of choice both with regard to the subjects to be involved in the negotiations and on how to behave during the same, without being obliged to particular forms of publicity of these choices; it is clear therefore, that corruption can easily nestle in similar negotiations, where the guarantees laid down in the tender procedures are waived or powerless;

- the **direct assignment,** this is a hypothesis of discretionary choice of the negotiated procedure because in these cases there is no real procedure but it is the Administration that by means of the person in charge of the process (RUP), chooses at its discretion the body to entrust the contract to; in such cases, the guarantees of transparency of administrative action are reduced to almost zero, making greater the risk of corruption phenomena, so much so that, according to AVCP data, the reports that the Authority receives focus in some areas where it is easier to use direct assignment (source AVCP's 2013 Annual report).

c) Overconfidence in automatism.

As mentioned, the automatisms are not the cure for corruption, but on the contrary, may be cause of inefficiency of public administration as well as of manipulation phenomena. Just take as examples two institutions:

- Automatic exclusion of abnormal deals, a criterion that not only violated the principles of competition and *par condicio* among operators, but also lent to forms of collusion among bidders who could, by agreeing in advance, manipulate at will the anomalous thresholds, eluding in fact, the related discipline;

- criterion of the lowest price, often considered safer as compared to that of the most economically advantageous offer, is instead usable for corruption purposes; there are common cases where an economic operator offers a very low price in order to win the contract, knowing that during execution, it will be able to increase it through reserves and other forms of compensation; the lowest price also lends itself to be abused by companies linked to organised crime, which have huge capital and can, therefore, operate in more advantageous conditions than other economic operators.

d) Collusion between companies.

The problems of manipulation of tenders are not due only to conduct directly related to the Administration because they can also be caused by collusion between economic operators, which may agree illegally to satisfy their own interests. In such cases, it is evident that the transparency of administrative action may not be sufficient to eradicate certain behaviours, connected to the action of individuals. In this case, the controls are the most effective tool: controls, though, not so much on administration but by the Administration towards applicants, in order to ascertain manipulative behaviours in the tender, and then punish them appropriately.

e) Connection with the execution phase.

Further corruption phenomena that occur during the award are those that produce their adverse effects at the time of execution of the contract. This is the case, for example, of **inadequate bids,** submitted to win a contract whose amount will be systematically increased during execution through variants, litigation or reserves (it is what happens, as seen, for the lowest price).

3.3 The execution phase of the contract.

This is the most critical phase, in which the AVCP finds the greatest number of reports[29]. Not surprisingly, the European Commission noted that "according to empirical studies corruption in Italy is particularly lucrative in the phase following the award, especially in the quality controls or completion of works/supplies/services"[30]. The reason is simple: it is the less regulated one, where there is a lower application of the administrative action, less competition guarantee and, above all, fewer controls. There are many institutions at risk that lend themselves to manipulation of the Administration on behalf of private interests.

- modifications of contractual terms after the award: through the Institute of **variations in the way** it is given a chance to the Administration and the contractor to modify, even substantially, the contents of the project initially placed as a basis of the tender or of the contract awarded, thus frustrating the entire public procedure; these changes are not subjected to careful controls and often are decided following a personal confrontation between the contracting authority and the contractor therefore, without the publicity and transparency needed. This is what happens in the case of the **renegotiation** of contracts awarded which are often necessary to meet new requirements emerged during the tender or to update those contracts which, due to their long duration, are likely to become obsolete. These changes, related to the increase in contractual costs resulting with the registration of **reserves** or **price compensation for rise in materials,** are fertile ground for corruption phenomena which can give the possibility to the contractor to get a financial rebalance of operations that are required or, in any case, an increase in revenues due.

- subcontracting: through such institution, the contractor has the option to engage in the contract subjects unskilled to deal with the public administration or even bring back players who had been excluded during the tenders; the contractor has wide discretion in the choice of its subcontractors, with the ability to circumvent the principles of transparency and control that, instead, focus on contracting authority at the award stage. Subcontracting is also critical because the more is long and articulate the subcontracting chain, the more is complex the implementation of adequate control systems and, at the same time, the structure of those who refer to contracting authorities is more permeable by criminal associations. Also consider that the difficulties on controls, in similar circumstances, are also due to increased opacity regarding subjects that lend their activities in favour of the contracting authority.

  The problems arising with regard to subcontracting are also related to **the availment,** the institution in which the economic operator who lacks some economic, financial, technical, organisational requirements established in the tender may take advantage of those provided by another company (so called auxiliary) in order to obtain the contract.

- arbitration: in Italy, arbitration has been very frequent (not to say that it was the normal outcome of a public contract) and led most of the time to an adverse outcome for the Public Administration[31]. Arbitration-related problems are due to the lack of transparency in the appointment of arbitrators as well as to their fees. With the l. 6.11.2012, n. 190 (so-called anti-corruption law), rules have been introduced that introduce transparency requirements relating to the appointment of arbitrators in public contracts (art. 1, par. 21); doubts remain with regard to the compensation that may be paid to arbitrators because, despite the anti-corruption law has provided the obligation for contracting authorities to establish the maximum amount payable to a public officer acting as arbitrator (art. 1, paragraph 24), nothing is said about other arbitrators. It is no coincidence, therefore, that in 2013 the recourse to arbitration was high and that almost always the partial losing of the Administration was declared (AVCP 2013 Annual report).

Especially during the execution of contracts, it appears necessary to ensure greater transparency and more appropriate controls. It is necessary that transparency translates into concrete measures of contracting authorities, whose work must be knowable and known, even through the diffusion of the content of contracts and additional acts. At the same time, controls (including judicial ones) should be real, timely and effective. On these aspects, with regard to the phase of execution of contracts, domestic law appears to be particularly inadequate.

29 Annual Report 2013 Supervisory Authority on Public Contracts (AVCP).

30 Report of the European Commission on Corruption, 03.02.2014, COM 2014/38, annex 12 on Italy.

31 Annual Report 2009 Supervisory Authority on Public Contracts (AVCP).

4. TRENDLINES IN COMBATING CORRUPTION IN PUBLIC CONTRACTS

Over the last two decades, in the field of public procurement in Italy, the fight against corruption was primarily undertaken through the tightening of administrative procedures, the removal of administrative discretion, the creation of automatisms. Such moralizing spirit characterised the l. 109/1994 on public works, launched in response to the phenomena of corruption in public procurement, emerged in the early 90 's with the investigation of the pool of magistrates of Milan "Mani Pulite (clean hands)" with reference to the so called *Tangentopoli.* The same trend has been transposed (in contrast to Community directives of 2004) in the code of public contracts, lgs. d. 163/2006.

However, it is shown that the rigidity of procedures creates inefficiency. Consider, for example, the selection of the contractor and the choice of the best offer. Well, in the presence of informational disadvantage with regard to management of the private contractor, a selection based only on automatic criteria such as price leads to an inefficient choice (phenomena occur arising from the so-called "adverse selection")[32]. This is not the appropriate place where deepen that reasoning but, for example, we can refer to the bins market (market for lemons) of the Nobel Prize winner George Ackerlof[33]. By the equivalence theorem of the other Nobel Prize winner William Spencer Vickrey[34], fundamental in the theory of tenders, we can deduce, without going into detail, that (in the absence of hypothetical conditions justifying the equivalence, not found in nature) the type of award procedure must be carefully chosen in relation to the object of the contract.

Therefore, the most suitable choice of procedure for the award of a public contract should depend on the specific case, namely the characteristics of the market and of the goods to be procured. Limiting the reasoning to the public contracts sector and to the tender models that are covered by positive law, the choice to be made concerns on the one hand the selection criterion and on the other the tendering procedure. If, for example, for contracts having as an object standardised goods it may be true that the best bid selection criterion is that of the minimum price, for contracts having as an object peculiar goods the criterion of the most advantageous offer will be considered preferable. The goal of the reasoning is that for complex contracts, where the disadvantage of public administration information on the qualities and characteristics of the asset to be contracted is particularly large, it is necessary to resort to flexible procedures (alternative to open or restricted ones) such as competitive dialogue or negotiations that would allow the Administration to learn (and improve their initial information) in the course of the procedure. The final choice will be made on the basis of an information baggage possessed at the beginning of the procedure and in this way the risk of adverse selection will be reduced[35].

Well, the undeniable tendency of the Italian Legislator was to combat corruption through the total deprivation of administrative discretion and the strong opposition to the use of flexible procedures. In response to the flexibility of community models, a multitude of procedures for the award of contracts have been provided (think of all those applicable to the award of works concessions), each of them with specific rules.

The legislator has thus chosen the road of multiplying of rigid typed models compared to the road of flexibility of procedures. The law predetermines award systems, trying to replace them at the discretion of the Administration (to be implemented through the detection of a customized contract award or the procedure best suited to the specific case), which in theory and if well used enables increased efficiency. Therefore, the tendency is to make *ex ante* management choices with detailed procedures and pre-determined contractual templates.

The example of a tailor is often used: Community law imagines that the Administration can take on the role of a tailor to make a tailored suit (tendering procedure) related to the object of assignment. The legislator, contrasts this model with the pattern of the *stores* where you can find a variety of pre-packaged sizes (pre-determined procedures). However, in relation to complex contracts, typed models (pre-packaged sizes) will never be able to fully meet the needs of

32 Economists define effect of adverse selection that effect for which are most likely to participate in voluntary exchange those subjects [buyers or sellers] not possessing the qualities that you like. For example: Frank R. H. "Microeconomics", Milan, 2004 (Italian version).

33 Ackerlof G., *The market for lemons: quality uncertainty and the market mechanism,* in Quarterly Journal of Economics, 1970. The word "lemon" is used in American slang to indicate a defective car that is discovered only after it has been purchased and could be translated in Italian with the slang term *"bin"*. George Akerlof, Michael Spence, and Joseph Stiglitzin 2001 received the Prize Nobel for Economics for their research into information asymmetries. Imagine a high asymmetric information market to the detriment of the buyer with reference to a seller, like for example the one of used cars, where only the vendors know exactly the quality of car in their possession while buyers do not have adequate tools to verify it. In this market, if the buyer sets price as the only criterion for selection (even calling rebates on the price), sell could be done only by sellers having a quality car at or below the price set by the seller. Sellers who have higher-quality cars than that corresponding to the price indicated by the buyer could not be part of the exchange. Since the buyer is not able to recognize the quality of the car offered, he would accept the exchange with the seller willing to sell his car at the lowest price, even if he/she is the one having a poorer quality machine correspondent to that price (since who is aware that his/her car is worth more than the price of exchange would not be available to sell for that price). So this tender mechanism would select the worst asset quality, using a classic example of adverse selection.

34 Cfr W. S. Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, Journal of Finance, Volume 16, Issue 1 (Mar., 1961), 8-37. Vickrey won the nobel Prize for Economics in 1996.

35 About this point please see Fidone G., *Concessions as complex contracts: between demands for flexibility and multiplication of models*, in Cafagno M. – Botto A. – Fidone G. – Bottino G., (edt), Public Procurement – Writings on concessions and public-private partnerships, Giuffrè, 2013

the case as it could be done in the case of the proper exercise of administrative discretion (sartorial dress). The issue of Legislator is, of course, that he/she does not trust the ability of the tailor- administration (ability to exercise administrative discretion) and its honesty (i.e. fear that the exercise of the discretion can turn into corruption).

It is also apparent that disproportionate obsessive attention has been given to the award of the contract with respect to the minor focus on the execution of the contract itself. This disproportion may be justified at Community level, where Directives only deal with the phase of selection of the contractor, since the execution phase does not pose any problem related to single market and competition. Less explainable is the choice of the national legislator that to the execution of contracts only dedicates the provisions referred to in articles from 113 to 120 and from 126 to 141 for works, which in principle, should be applicable to grants too, without prejudice to the special provisions laid down for the granting of works under art. 148 of the code and articles from 156 to 160, in relation to project financing. These latest standards, however, are mainly concerned with the phase of implementation of the work. So we have an internal discipline inattentive to the phase of execution of contracts left almost entirely to the initiative of the parties.

The gap appears particularly serious also with reference to the phase of service management in concessions of works and services (entirely without regulation), considering that this phase in the case of works concessions may be carried-over for a long time (usually up to 30 years), thus engaging even future generations.

The road followed by the legislator to combat corruption has been widely criticized for the fact that, by implementing it, there was an a priori waiver to the procedure *efficiency*. This, however, proved to be totally inadequate to counter the phenomenon of corruption as evidenced by increasing data about the spread of this pathology in Italy and finally the impressive scandals of Mose in Venice and Milan Expo 2015, come to the forefront of legal news in 2014. So Italy has a regulation on public procurement which creates inefficiency and is not able to solve the pathology of corruption.

As a confirmation of the above, we can provide the Italian data of incidence rate of flexible procedures (competitive dialogue and negotiated procedures) in reference to the total number of notices issued for amounts higher than the Community threshold, in comparison with other European countries for the period 2009-2013[36]: in Italy, the sum of the competitive dialogue and negotiated procedures is equal to 3.83% of the notices published in the face of 10% in France, 16.79% in Germany and 9.95% in the United Kingdom. These data, therefore, measure the ability to use flexible procedures for challenging and economically relevant operations. For a more complete framework please refer to Annex 3.

On the contrary, in Italy negotiated procedures are often used, almost without notice, for simple contracts and modest amounts (below the EU thresholds). On this point, see tables and analysis contained in the annual report for 2012 of the Supervisory authority on public contracts[37]. In this case, the use of negotiated procedures does not reflect a readiness of national law to deal with the complexity of contracts through flexible competitive procedures but highlights an unjustified escape from competition (probably itself a symptom of corruption) for the award of small and standardised contracts (and therefore, not complex).

6. TOWARDS THE IMPLEMENTATION OF NEW DIRECTIVES: PROSPECTS FOR REFORM

The new directives on public contracts (2014/23/EU on concessions, 2014/24/EU on procurement 2014/25/EU on special sectors) must be transposed by March 2016. In particular, for the concessions, it will be not a mere updating of pre-existing discipline but the necessary transposition of the new EU text in a special text that can either merge the code of public procurement or constitute a separate regulatory body. This is causing in Italy a reflection on the same philosophy of this transposition, in order not to repeat mistakes made in the past. This debate appears to rotate around the following aspects.

Firstly, with regard to the issue of flexibility of procedures and associated margins of discretion for public administration, it was observed that the matter of complex public contracts, such as the concessions of works and services, is characterised by a strong asymmetry of public administration towards the private contractor, which increases with the complexity of the contract, which often does not allow PA to direct their preferences accordingly. The use of flexible award procedures, designed to enhance information of public administration through a progressive learning resulting from negotiating with the

36 For these data, we referred to the work by M. CAFAGNO, "*Flexibility and negotiation. Reflections on assignment of complex contracts*" in Magazine of public Community law, 2013, pp. 991-1020. The author obtained the data from the archives of the TED (Tenders Electronic Daily) - the online version of the Supplement to the Official Journal of the European Union for Public Procurement (http://ted.europa.eu/TED/main/ HomePage.do).

37 The document is available on the website of the 'Supervisory Authority on Public Contracts (today ANAC), http://www.avcp.it).

private operator, can reduce this information deficit of the Administration's and lead to efficient choices. This solution is, therefore, preferable to rigid procedures that prevent administration the necessary learning, before performing a final choice.

Secondly, it is necessary to avoid the mistake made in the past to translate a relatively modest amount of European standards (those of Directive 2004/18/EC), practically self-applicable, in hundreds and hundreds of articles of the code of Public contracts and its implementing regulation. This legislative hypertrophy is considered by many people as the source of inefficiencies, obstacles and uncertainties of the current sector discipline in force in our Country. Excessive regulation, which purports to regulate *ex ante* all the many abstract possibilities, constitutes a wrong approach to complexity while a correct management of the same complexity requires variety. The variety of institutional responses to socio-economic problems should assume the flexibility of choices of subjects who are to act in a complex world. On the contrary, the multiplicity of internal rules designed by the legislator has the purpose to thwart flexibility and discretion of the Public Administration, in an effort to attempt to replace skills with rules, management with regulation, Administration with legislation.

Therefore, excessive detail rules could be replaced by more agile acts of *soft laws*, as happens in many European countries. These tools are certainly more flexible than the law and can be constantly reviewed and updated by the Authorities that enact them. However, it is necessary to avoid the risk that this practice creates further uncertainty among operators, guaranteeing the authority and independence of the emanating Authority, also in relation to any judicial checks.

Thirdly, we must not make the mistake of fighting corruption through renunciation to efficiency of procedures and contracts. As already noted, for too long, from the l. 109/1994 so called Merloni, it has been believed that corruption could be hampered by the tightening of administrative procedures and contractual models and creating automatisms such as to impede the exercise of administrative discretion. Limitation of administrative discretion, however, is a source of inefficiency, since it prevents the construction of assignment procedures and contractual models exactly calibrated on the contract to be awarded and executed. The absence of negotiation (both during the choice of the contractor and in the course of execution of the contract) prevents Public Administration from improving its knowledge of the contract and making better informed choices.

In a nutshell, in our country, to combat corruption we have renounced a priori to efficiency. A rethink of the whole matter of public procurement presumes the pursuit of efficiency and contrast of corruption with measures other than those based on deprivation of administrative discretion.

Fourthly, the flexibility of assignment procedures and contractual models, with the subsequent exercise of discretion by Public Administration, must involve the responsibility of the administrative officers in relation to the achievement of the results of the entire administrative operation made of planning, assignment and performance of a public contract. The usual division of various contractual phases and their charge to different decision-making centres removes responsibility from the officers and makes it difficult to attribute responsibility for failures and the merits for the achievements related to a certain contract. We must, therefore, rethink the management of administrative operation linked to the realization of a certain public contract in the sense of unification of the different phases in a single decision-making centre.

Finally (knowing that this moment is beyond the simple transposition of the directive and involves a wider and complex retelling of the system), the pursuit of efficiency of public negotiations should involve the overcome of the formal control of the legality of individual administrative acts, which has always characterized the administrative justice and the accounting procedures of our country. The judicial control should move to the result of the overall administrative activity, such as the outcome of a procedure of assignment or execution of a contract, in terms of cost, quality and timeliness. For these purposes, it appears necessary to determine *a priori* which should be the programmed result (performance) of public administration, including through recourse to standard values universally recognized, and then proceed to verify the result achieved. Moreover, this form of control does not necessarily imply an assessment of merit by the Court since if achieving a specific performance of contract was due in virtue of a law requiring the Administration at first to schedule and then to reach it, the same control would have the nature of a review of legality of the overall work (not a single act) of the administration.

However, the text of the enabling act for the transposition of three new directives, recently approved by the Council of Ministers, does not seem to have addressed many of the points covered by the debate of the doctrine. This draft law, in general, prescribes the delegate legislator the streamlining of the regulatory framework in the areas of public procurement and concessions in order to achieve a greater level of legal certainty and simplification of the procedures. Therefore, the legislator, within the boundaries set by the enabling act, could have wide power to move, even in relation to the issues raised in this paper.

CHAPTER III

ANTI-CORRUPTION MEASURES: the reform of the biennium 2012-2014.

1. THE REFORM OF ANTI-CORRUPTION LEGISLATION

The concept of corruption is a multi-level concept that oscillates between legal, ethical and economic dimension. However, in the collective imagination the term corruption is often associated with specific types of crime, subject to criminal law, to be contrasted with mere repression. This restrictive interpretation of the term dovetails with a broader notion of corruption, which has various forms of political and administrative malpractice, more properly attributed to administrative law, which can be prevented through the application of measures related to this discipline.

According to ANAC (National Anti-Corruption Authority) and the Department of civil service, the term "corruption" must be understood as including: *(i)* the full range of crimes against the public administration covered in book II, title II, chapter I, of the Penal Code; (ii) "situations in which, regardless of criminal significance, there is a malfunction of the Administration due to the private use of the functions entrusted"[38]. Therefore, this formula also blames private use of public functions, despite not having criminal relevance. In this sense, it may be useful to recall the perspective proposed by social sciences that looks at corruption as "the abuse of entrusted power for private gain".[39] Under this definition, there would be four elements characterising the corruption that are: the power entrusted, the person who holds the power, the abuse connected to a distorted exercise of power, the private benefit obtained.

Corruption comes from an Agency relationship existing between agent (for example, politicians, Mayor, etc.) and principle (administrative activities, recipients that will benefit the public work or service)[40]. In fact, administrators and politicians are subjects that should make the interests of the collectivity administered and by them are directly (in the case of politicians with the elections) or indirectly (if public administrators are employed by other public administrators should always treat the public interest of the collectivity administered and, in this case, there should be a further problem of Agency) elected.

In such a relationship of Agency there is an asymmetry to the detriment of the principle- collectivity administered, which concerns the work of the administrators- *agent.* Consequently, not necessarily public administrators protect the interest of individuals (for example, in the procedures for the award of a contract, its execution or renegotiation). It could happen that profiting the informational disadvantage of collectivity administered the administrator (which is supposed to represent and manage their interest) encourages his/her personal advantage to the detriment of the public interest. In this context, therefore, corruption phenomena could insert since, in the absence of adequate controls and information of citizens represented, officials might find it convenient to bribe and realize their interest (coinciding with private ones) and not the one of the collectivity administered.

A picture of the troubling data on corruption in Italy can be found in Annex 4.

In recent years, the public interest for the phenomenon of corruption has certainly grown and increasingly national public opinion has considered it a cause of social alarm[41].

In this context, we can place the introduction of the anti-corruption law reform referred to in the l. November 6, 2012, n. 190, Provisions for the prevention and repression of corruption and lawlessness in public administration, which redesigned the general discipline of the measures to prevent and repress corruption.

This law falls within the wider framework of Italian legislative measures aimed at combating corruption and fulfils the obligations imposed by international law: it adds, in fact, to law August 3, 2009, n. 116, of ratification of the Convention of the United Nations against corruption, adopted by the UN General Assembly on October 31, 2003 and to laws June 28, 2012, no. 110 and 112, of ratification and implementation of the two Conventions signed at Strasbourg in 1999. Overall it can be said that the indications from supranational

38 Anti-Corruption National Plan, year 2012, p. 13 available on www.funzionepubblica.gov.it

39 POPE J., *"Confronting corruption: The elements of a national integrity System"*, Trasparency International Source Book, 2000.

40 Napolitano G., *Economical Analysis of Public Law,* Il Mulino, 2009, pp. 203 e ss.. Also see Napolitano G., *The logic of administrative law*, Il Mulino, 2014, pp. 28 e ss..

41 For example, many organizations / associations representing society work together in the common purpose of the analysis and denunciation of the phenomenon. Among the various ones, we remember: 1) The association ITACA founded in 1996 that aims to ensure the transparency of public procurement and public spending in general transparency constituting an effective means of preventing corruption. The institution which has a federal organization, collects about 90% of regional administrations and sits as a technical body in the State-Regions Joint Conference. It also supports the activities of the individual Regional Observatories in public procurement. 2) The program ABLE *(Creation of autonomed procedures against criminal infiltration* www.cbi-org.eu) is a project for the monitoring of financial flows that characterize the construction of major works financed with European funds. The project envisages the creation of a database summarizing the bank transfer system and abnormal behaviour that may be indicative of corruption. The project is committed to report such irregularities to the competent authority. 3) *The association Libera, Associations, names and numbers against mafias* (www.libera.it) was founded in 1995 with the aim of promoting in civil society a widespread culture of legality and justice. It is a coordination of over 1500 heterogeneous bodies whose action converges on the objective indicated. The efforts made in its business has led to concrete results as the law on the social use of property confiscated from the mafia, education to democratic legality, the anti-mafia fields of education, projects on work and development. Useful for the purpose of this paper is a call to full-bodied and comprehensive work done by the association regarding corruption entitled *"Corruption. The hidden tax that depletes and pollutes the country."* 4) The association COSA PUBBLICA (www.cosapubblica.it), aimed at providing means and services adapted to the fight against corruption and any criminal offense produced by them. The association promotes social and political battles for the approval of laws to ensure the fight against corruption. 5) Finally, the initiative taken by the Ministry for Public Administration and simplification *Compass for Transparency* (www.magellanopa.it). Also this project is designed to assess the availability and access of government data on the relevant websites.

organisations have highlighted the need to pursue three main objectives in the context of prevention strategies[42]:

- reduce the opportunities that cases of corruption take place;
- increase the ability to discover cases of corruption;
- create a context unfavourable to corruption.

For the pursuit of these objectives, the Reform acts basically on three fronts:

a. It modifies the existing system of criminal-law protection of the Public Administration, having as main distinguishing characteristics, in terms of strictly criminal contents, on the one hand, a significant increase of punishment frames prescribed by law, on the other the renovation of the main figures of corruption-crime, to which new types of crime have been added;

b. It dictates measures to prevent and suppress corruption and lawlessness in P.A., intervening in this sense even in procurement and public contracts, laying the groundwork for an articulated action of preventing corrupt conduct, and introducing some new legal[43] institutions that providing new tools (e.g., anti-corruption plans) should be able to foster a resizing of the phenomenon;

c. It creates the precondition for further implementation and derivative specific regulations. For example it includes: delegation for an *ad hoc* law on transparency (hence the lgs. d. 33/2012 on transparency); the establishment of a code of conduct for civil servants (later adopted by the d.P.R n. 62/2013); it dictates the delegation for a new system of incompatibility (hence the subsequent d.lgs. n. 39/2013 regarding incompatibility).

1.1 GENERAL MEASURES FOR THE PREVENTION AND REPRESSION OF CORRUPTION AND LAWLESSNESS IN PUBLIC ADMINISTRATION

On the administrative measures taken to prevent and suppress corruption and lawlessness in the public administration, anti-corruption law introduces many new features, that can be synthesized.

a) Designation of CVIT (now become ANAC) as National Anti-Corruption Authority.

The legislator of 2012 first changed the provision as per art. 6 of l. n. 116 of 2009 that designated as a national anti-corruption authority, the Minister for Public administration and simplification, identifying as national anti-corruption authority the Commission for evaluation, transparency and integrity of Government (CIVIT) (art. 1, par. 2, L. 190/2012). Then the CIVIT (pursuant to art. 5, par. 3 of the L. 125/2013) took the name of National Anti-corruption Authority for the evaluation and transparency of public administrations (A.N.AC.). Later on, with art. 19 of l. 11.08.2014, n. 114 (conversion law with modifications of l.d. 24.06.2014, n. 90), as you will see, the ANAC also absorbed the functions of the suppressed Supervisory Authority on Public Procurement (AVCP).

In the field of anti-corruption this authority takes functions and tasks of active, inspection and advisory administration in a framework of collaboration with the Department of public service and with the Inter-ministerial Committee provided for by art. 1, paragraph 4, of the law.

It is a task of the Commission to approve the National anti-corruption Plan (PNA) as well as to analyse the causes and factors of corruption and identify preventive and contrast interventions, including through cooperation with foreign agencies and with regional and international organizations concerned. It also provided for an annual report to Parliament, within the 31 December of each year, on contrast of corruption and lawlessness in the public administration and the effectiveness of the existing provisions on the subject (art. 1, paragraph 2, item g), l. n. 190/2012).

The Commission expresses optional opinions to State bodies and all public administrations with regard to compliance of acts and conduct of public officers, to law, the codes of conduct and collective and individual contracts, governing the public employment. It also expresses optional opinion regarding permissions to external assignments by the administrative State leaders and national public institutions, with an emphasis on new limits introduced by the same law, which forbids to the employees who, over the last three years of service, have exercised authoritative powers or negotiations on behalf of public administrations to carry out, in the three years following

42 In Anti_corruption National Plan, p.15

43 Consider, for example, art. 54 bis of the Legislative Decree no. 165 of 30 March 2001, introduced by art. 1, paragraph 51 of Law 190/2012, which protects the civil servant denouncing irregularities.

the termination of public service, to work or perform professional activities in private entities receiving government activities carried out through the same powers[44].

The supervisory powers of the Commission regard the application and effectiveness of anti-corruption prevention measures adopted by public administrations and compliance with the new rules on transparency of administrative activities introduced by law[45] and required by other laws in force.

In the exercise of inspection functions, the Commission may request news, information, acts and documents to public administrations, and order the adoption of acts or measures demanded by anti-corruption prevention plans and rules on the transparency of administrative activity, i.e. the removal of behaviours or acts contrary to the plans and the rules on transparency above mentioned. The Commission and the administrations concerned publish news of the measures consequently adopted in their respective official *web* sites.

The Department of public function works as promoter of prevention strategies and as coordinator of their implementation: for this purpose it defines the *standard* of information and data necessary for the achievement of the objectives foreseen by the law, in a manner that will enable their management and computerized analysis. It must also define criteria to ensure the rotation of managers in areas particularly vulnerable to corruption and measures to avoid overlapping of functions and heaps of appointments of public managers, even external.

b) National Anti-corruption Plan (PNA).

Art. 1 par 2 item b) of l. 190/2012 provides that CIVIT (now known as ANAC) approves the National anti-corruption Plan prepared by the Department of public service on the basis of the indications provided by the Inter-Ministerial Committee formed by d.p.c.m. dated January 16, 2013. The first PNA was approved by CIVIT resolution n. 72 dated 11.09.2013[46]. This is the first level (national) of the system of corruption prevention, outlined by the Reform.

The PNA is not configured as a one-off activity, yet as a cyclical process in which the strategies and tools are refined, modified or replaced depending on the *feedback* obtained from their application. The adoption of the PNA takes account of the need for a gradual and progressive development of the system of prevention, in the awareness that the success of interventions depends to a large extent on the consensus on prevention policies, on their acceptance and concrete promotion by all the actors involved.

c) Triennial Anti-corruption Plans (PTPC) and responsible for the prevention of corruption.

The second level (the decentralized one) consists of the **Triennial Anti-corruption Plans** that each public administration draws up on the basis of the directions contained in the PNA, with reconnaissance of the specific risks of corruption and further indication of organizational interventions designed to prevent them. These plans also provide organizational fulfilment foreseen for public administrations, consisting of planning activities for the prevention of corruption and a consequent liability regime.

Central authorities define and transmit to the Department of civil service a triennial plan of prevention of corruption, in which the different levels of exposure to the risk of corruption should be assessed, and organizational interventions aimed at preventing the same risk must be provided for, including through appropriate staff training procedures[47].

The triennial plans for prevention of corruption have spread to all the administrations and also private individuals subjected to public scrutiny engaged in administrative functions, production of goods and services for public administrations or public services management[48], while leaving to the prefect, on request, the task of informational and technical support to local authorities also in order to ensure consistency of such acts in relation to the guidelines of the national plan approved by the Commission.

For the regions, the autonomous provinces, local authorities, public bodies and private legal entities under their control, the definition of the obligations and terms regarding the preparation of the triennial plan of prevention of corruption is entrusted to agreement in unified conference, starting from the one related to years 2013-2015, and its transmission to the region concerned and to the Department of public service; as well as the adoption of regulations for finding

44 Cfr. Paragraph 16 ter-introduced in the text of Article 53 of Legislative Decree no. 30 March 2001, n. 165. The same provision sanctions with the invalidity the contracts and appointments made in violation and prohibits private individuals who have concluded them to negotiate with the government for the next three years with an obligation to return the fees possibly received and certified referring to them.

45 Art. 1, paragraphs 15 to 36, Law no. 190/2012

46 The National Anti-Corruption Plan is structured in three sections and an introduction. *The first section* sets out the objectives and strategic actions planned to be implemented at national level in the period 2013-2016. Responsibility for the implementation of the actions lies with the Department of Public Administration and other institutions that work for prevention at the national level. It also shows the expected *target* for the entry into force of the law, the decrees and the spread of the PNA. The *second section* is devoted to the illustration of the prevention strategy on a decentralized basis, ie at the level of each administration, and contains directives to the government for the implementation of preventive measures, including those required by law. A key role in this context is the adoption of the *Triennial Plan for Prevention of Corruption* (TCP), which is drawn with the prevention strategy for each administration. The indications to administrations are described in summary, while the deep interpretation of procedural and methodological character are provided in the Appendices. The *third section* contains information about communications data and information to the Department of Public Administration and the finalization of the data after the collection for monitoring and the development of further strategies.

47 Article. 1, paragraph 11, Law no. 190/2012 stipulates that the Higher School of Public Administration, with no new or increased burdens on public finances and using human resources, equipment and financial resources available under current legislation, draws up paths, even sector-specific, for the training of state public employees on issues of ethics and legality. Periodically and in agreement with the administrations, it provides training of civil servants who are to work in areas where the risk of corruption offenses is higher, based on the plans adopted by the Administration.

48 Art. 1, paragraphs 49, 59, 60 and 61, L. n. 190/2012.

assignments prohibited to civil servants under art. 53, paragraph 3-*bis*, lgs. d. 165 of 2001[49].

It is the responsibility of the political body to identify, usually between administrative leaders of first level service, the **responsible for the prevention** of corruption: in the local authorities that role is assigned to the Secretary-General, unless otherwise motivated determination, apparently referring to organizational profiles and thus hardly opposable on its merits. This responsible has the burden to propose to the political direction the triennial plan of prevention of corruption, to be approved by 31 January each year, and transmitted to the Department of civil service. Given the prohibition to entrust the plan elaboration to subjects outside the Administration, the law is particularly attentive to the procedures for the selection and training of staff for work in areas particularly vulnerable to corruption. The results of the activities carried out by the person in charge must be published no later than 15 December of each year on the web site of the Administration, by means of a report transmitted to the political authority, to which the responsible reports, upon request or on its own initiative.

From the point of view of accountability, the lack of preparation of the plan and the failure to adopt procedures for the selection and training of employees constitute the elements for the assessment of the managers responsibility[50]. In addition, a general form of managerial, disciplinary and administrative responsibility is provided (for tax assessment and damage to the image of the public administration) with reference to the figure concerned in case of the commission, within the Administration, of a corruption offence established by judgment of res judicata[51]. The prevention plan before the commission of the fact, together with the evidence that there has been a monitoring on the functioning and compliance of the plan allow exemption from liability profiles related (excluding the profile of *culpa in vigilando*, but being able to raise doubts about the effectiveness of the planning choices made). This is a profile of responsibility that places itself between objective imputation, connected to the role, and responsibilities for bad prognostic capabilities culpable in terms of prevention[52].

These tasks of control and liability profiles connected, extend to the verification of the effective implementation of the plan and its eligibility, with the obligation to propose a change when "significant violations of the requirements" are found or when changes occur in the administration organisation or activity. From the organisational point of view, the responsible must also ensure, in consultation with the competent officer, the actual rotation of offices in charge of assignments for the development of activities where the risk of corruption phenomena is higher[53].

d) Measures for the transparency of administrative activities.

It also dictates new measures on transparency of administrative activity which is brought back into the riverbed of the essential levels of performance concerning social and civil rights as per art. 117, paragraph 2, item m) of the Constitution. These measures, which also extend to the field of public procurement and the use of arbitration, refer both to cautions introduced in relation to the allocation of positions, and to the measures for the fulfilment of the obligation of information of the citizens by the administrations[54].

"The law states that the plan of prevention of corruption detects 'specific obligations of transparency in addition to those provided for by law". This provision implies a link between the prevention plan and the triennial programme for transparency that the Government must adopt pursuant to art. 11 of lgs. d. n. 150 of 2009.

Claiming the State competence on the subject, both referred to the identification of the essential level of services provided by public administrations for the purpose of transparency, prevention, contrast of corruption and mismanagement, as well as to the function of statistic and information coordination of data processing by State, regional and local administration (art. 117, paragraph 2, item r), cost), the law delegates the Government to adopt within six months a decree for the reorganization of the rules concerning disclosure requirements, transparency and dissemination of information by Public administrations, by modifying or supplementing existing provisions, or by using the prediction of new forms of advertising, although there is a list of guiding principles and criteria which the Government will have to follow[55].

49 Art. 1, paragraph 60, L. n. 190/2012.

50 Art. 1, paragraph 8, L. n. 190/2012.

51 Art. 1, paragraph 12, L. n. 190/2012.

52 Foà, *New Anti-Corruption Law*, cit., 293

53 Art. 1, paragraph 10, L. n. 190/2012.

54 Under Article. 1, paragraph 34, Law no. 190/2012, the provisions also extend to subsidiaries companies and their subsidiaries, pursuant to art. 2359 cc, limited to their public interest activities governed by national or European Union law.

55 Art. 1, paragraphs 35 and 36, Law no. 190/2012, whose principles and criteria are listed in paragraph 35, item a) to h). *In the implementation of this delegation see*. Lgs. D. 14.03.2013, n. 33, *Reordering of the provisions applicable to disclosure requirements, transparency and dissemination of information by public authorities*, approved by the Government 15 February 2013.

Transparency rules relating to administrative procedures and *on-line* services of PP. AA are dictated[56].

With regard to administrative procedure, the law strengthens the application to private bodies in charge of the administrative activities of the principles laid down in art. 1 of l. n. 241 of 1990, providing the related implementation "with a level of security not inferior to the level Public Administrations are obliged to under the provisions of this law"[57].

It also introduced a conclusion of the procedure in a simplified form[58], by the contemplation of a measure whose motivation may be a reference to the synthetic point of fact or of law deemed decisive, when the Administration considers the manifest processing inadmissibility, ineligibility, inapplicability or lack of foundation of the application.

Even agreements between Administration and private bodies as per art. 11 of l. n. 241 of 1990 must now be justified pursuant to art. 3 of l. n. 241 of 1990, thereby confirming the full extension to the exercise of administrative activities and avoiding that the contract discipline dictated by the civil code may encourage inappropriate and sole use of administrative discretion[59].

e) The other main administrative anti-corruption instruments foreseen by the Reform.

In summary, other anti-corruption instruments foreseen by the Reform are:

- Provision of codes of conduct;
- Staff turnover;
- Obligation not to act in the event of a conflict of interest;
- Specific rules relating to conduct of office assignments-activities and extra institutional assignments;
- Specific rules concerning the conferral of management positions in case of particular activities or previous assignments (pantouflage– revolving doors);
- Specific incompatibilities for managerial positions;
- Specific discipline on commissions set-up, assignment to offices, assignment of executive positions in case of criminal conviction for crimes against the public administration;
- Specific discipline on activities after the termination of the employment relationship (pantouflage– revolving doors);
- Specific rules on the protection of the employee carrying out spontaneously reports of illegalities within the public administration, so called Whistleblower (Art. 1, paragraph 51, of L. 190/2012 amending art. 54 bis of the lgs. d. 165 of March 30, 2001). This new Institute is particularly interesting. The arrangement provides that outside the cases of liability for slander or defamation, a public employee who reports to the judicial authorities or the Court of Auditors, or refers to his/her superior illicit conduct of which has become aware by reason of the employment relationship, he/she cannot be punished, dismissed or subjected to discriminatory measures, direct or indirect, having effects on working conditions for reasons directly or indirectly linked to the complaint. The identity of the reporter is also protected as part of the disciplinary proceedings against the author of the offence. Any discriminatory measures against the signaller are reported to the Department of civil service and to the most representative trade unions. Literally for "whistleblowing", we mean "blowing in the whistle".
- l. Training on ethics, integrity and other issues relating to the prevention of corruption.

56 Art. 1, paragraphs 29 and 30, Law no. 190/2012. For proceedings at instance by one of the parties, the list of all the documents to be produced in support of the instance will be published and it is forbidden the use of forms that have not been published online; telephone numbers and e-mail boxes to for each procedure and the holder of substitution powers to be activated in case of non-response must be published (on the consequences of the failure, see. TAR Basilicata, September 23, 2011, n. 478 , according to which the failure by a Region to publish a certified e-mail address on the home page of the corporate website and the inability to use, for individuals, the certified mail for communications with that entity represent inertia of the obligation on the adoption of Pec, resulting from multiple standards and the tax on the public body, and so it constitutes pursuant to Article 1, Legislative Decree. n. 198 of 2009, "non-adoption of general compulsory administrative acts not having normative content "). It is also required to make available at any time to the parties concerned, by means of electronic identification, the information relating to actions and administrative proceedings affecting them, including those relating to the state of the procedure, to its times and the specific department responsible in each phase.

57 New text of Article 1, paragraph 1-ter, of Law no. 241 of 1990, as amended by art. 1, paragraph 37, of Law no. 190/2012.

58 Article. 1, paragraph 38, Law no. 190/2012 as amendment of Article. 2, paragraph 1, of Law no. 241/1990

59 Art. 1, paragraph 47, Law no. 190/2012.

1.2. Specific measures in the field of public procurement

In addition to the general anti-corruption measures that relate to the general administrative tasks (which also apply in the field of public procurement), the Reform provides for specific measures relating to the field of public contracts.

a) Transparency and publicity.

Without prejudice to the provisions on advertising laid down by the code of Public Contracts (lgs. d. April 12 2006, n. 163), the law provides for a minimum content of advertising on institutional sites of the contracting authorities[60]: proposing structure; the object of the tender; the list of operators invited to submit tenders, the successful applicant; the amount of the award; the timing of completion of the work, service or supply; the amount of the sums liquidated. Every year, before 31 January, the same information for the previous year, shall be published in summary tables, freely downloadable in digital open standard format that allows to analyse and rework the computer data[61].

The measures on transparency concern in particular the procedures for authorization or concession[62]; of contractor's choice for the award of works, supplies and services, with reference to the chosen selection mode for the purposes of the code of public contracts for works, services and supplies[63]; for granting and payment of grants, contributions, subsidies, financial aids, as well as allocation of economic benefits of any kind to persons and public and private entities[64]; of selective trials and competitions for the recruitment of staff and career progression under art. 24 lgs. d. n. 150 of 2009[65].

For what specifically concerns information on the costs of implementing public works and production of services provided to citizens, Reform refers to a standard scheme compiled by the authority for the supervision of Public Contracts (now suppressed and merged in ANAC).

It is the responsibility of the AVCP (now known as ANAC) to publish information received by the administrations, in their web site within a section which can be accessed freely by all citizens, catalogued according to type of contracting authority and per region[66]. The list of defaulting Governments is transmitted by AVCP (now known as ANAC) to the Court of Auditors no later than 30 April each year and in each case the infringement involves the imposition on the contracting authority of a penalty for failure to comply with the request for data and information formulated by the Authority[67].

Under other terms, failure or incomplete publication by public administrations, of the information listed above constitutes violation of the qualitative and economic standards pursuant to art. 1, par 1, lgs. d. n. 198 of 2009, relating to actions for government efficiency and public service concessionaires (so-called public class action)[68], and integrates on the defaulting party the details of the managerial responsibility. Additional penalty charge is provided for service responsible that delay in updating the content on the relevant IT tools.

b) Integrity pacts and legality protocols.

Another guideline on which the Reform on public procurement moved has been to emphasize the breadth of the negotiating powers of the contracting authority, allowing the provision, already confirmed by law, in notices, invitations and letters of invitation that the non-observance of the clauses contained in the protocols of legality or integrity pacts is cause for exclusion from the tender[69].

The **Integrity pacts,** invoked even by the National Anti-corruption Plan approved by resolution C.I.V.I.T. No. 72 dated 11.09.2013 , are expressly covered by art. 1, paragraph 17, of the l. 190/2012, and represent a set of rules of conduct aimed at preventing corruption phenomenon and aimed at promoting ethically appropriate behaviours for all the applicants. This Pact consists in a document that the contracting authority requires to the applicants and that allows mutual control and sanctions for the case where some of the participants try to evade it.

Like the integrity pacts, also the **Legality Protocols** (already provided for, in general, by the directive of the Ministry of the Interior on June

60 Article. 1, paragraph 16, item b) of Law no. 190/2012 provides that the Public Authorities ensure the essential levels of services referred to in paragraph 15 of the same article, with particular reference to the *"choice of the contractor for the award of works, supplies and services, including with regard to the selection mode chosen under the Code of Public Contracts referred to works, services and supplies, as per legislative decree 12 April 2006 n. 163"*. Currently, with reference to the detailed sections on tenders and budgets, you must refer to dpcm 26 April 2011 on the publication of acts and regulations concerning public procedures or budgets, adopted pursuant to art. 32, l. 69/2009.

61 Art. 1, paragraph 32, l. 190/2012.

62 Art. 1, paragraph 16, item a), l. n. 190/2012.

63 Art. 1, paragraph 16, item b), l. n. 190/2012.

64 Art. 1, paragraph 16, item c), l. n. 190/2012.

65 Art. 1, paragraph 16, item d), l. n. 190/2012.

66 Art. 1, paragraph 15, l. n. 190/2012. On November 6, 2012 CIVIT and AVCP signed a memorandum of understanding to carry out activities of common interest, whose content is of a general nature.

67 Art. 6, paragraph 11, lgs. D. N. 163 of 2006: *"By decision of the Authority, the persons who are required to provide the information referred to in paragraph 9 shall be subject to an administrative fine up to EUR 25,822 if they refuse or fail, without justification, to provide the information or to produce the documents, or to an administrative fine up to €51,545 if they provide untrue information or documents.*

68 About it, most recently, Fidone, *The efficiency action in the administrative process: from the judgment on the act to judgment on the activity,* Turin, 2012, spec. 150 ff .; Patroni Griffi, *Class action and action for the efficiency of public administrations and dealers,* in Federalismi, 2011

69 Article. 1, paragraph 17 of the l. n. 190/2012 provides that *"contracting authorities may provide in the notices, or letters of invitation that failure to respect the clauses contained in the protocols of legality or in terms of integrity constitutes grounds for exclusion from the tender".*

23, 2010) enshrine a common commitment to ensure the legality and transparency in the execution of a public contract, especially for the prevention, control and contrast of mafia infiltration attempts, as well as for verification of the safety and regularity of workplace. In the protocols administrations have, as a rule, the obligation to enter into call for tenders, as a condition of participation, prior acceptance, by economic operators, of certain clauses which reflect the prevention purposes indicated.

According to the AVCP[70] the provision of acceptance of legality and integrity pacts as possible cause of exclusion is still allowed, even in a legislative framework of binding nature, since these means are placed to protect the highest level interests and the obligations thus undertaken descend from the application of mandatory rules of public policy, in particular with regard to legislation on the prevention of organised crime and law enforcement in the field of procurement[71].

By accepting the terms laid down in the integrity pacts and legality protocols at the time of submission of the application form and/or the offer, the applicant company agrees rules that reinforce behaviours already due for those who are eligible to participate in the tender and that provide, in case of breach of such duties, penalties of financial character, apart from the consequence, common to all insolvency proceedings, of exclusion from the tender[72]. In this framework there is also the measure of enforcement of safe deposit, which is useful to identify and quantify from the origin the form and the extent of liability of the participant in the tender as a result of failure to comply with the obligation assumed by signing the Pact of integrity or the acceptance of the clauses of the Legality Protocol[73].

c) White list of companies.

Reform also introduced the so called white list, or lists to be established in the prefectures of companies operating in sectors particularly exposed to the action of organised crime, and so to be subjected to periodic inspections[74]. The institution compulsory in each prefecture of lists of manufacturers, providers of services and performers of works, covers the sectors of activity most exposed to risk of mafia infiltration[75]. The lists contain the traders that, after prefecture checks, are not subjected to attempt of mafia infiltration: verification is comparable to that provided for the release of the anti-mafia information by art. 10, par. 7, D.P.R. June 3, 1998, n. 252 and by art. 86 Lgs. D. September 6, 2011, n. 159, anti-mafia code[76]. The inscription on the lists of the prefecture in which the company has a registered office meets the requirements for anti-mafia information for the exercise of its activity: the findings useful for inclusion in the white list already complete the necessary preparatory tasks[77]. Prefecture communication may be replaced by the inscription on the white list for all economic activities whose exercise requires anti-mafia communication namely the prefecture declaration of absence of causes of disqualification or prohibition laid down in art. 67 of anti-mafia code[78]. The verification is renewed periodically and, in the event of a negative issue about the absence of risk of mafia infiltration, the company's cancellation from the list is ordered. For the purposes of the checks, the company included in the list must notify the Prefecture of any change of ownership structure and its governing bodies, within thirty days after the change. The failure to communicate involves the cancellation from the list.

e) Arbitration discipline modification.

A further new element concerns the amendment of the rules of the arbitration referred to in art. 240 and 241 lgs. d. 163/2006[79], through rules for the appointment of an arbitrator by the Administration in respect of transparency and limitation of costs to the public system[80] and by extending the application of the provisions on arbitration to disputes relating to companies subsidiaries of public administrations or anyway linked to them having as an object performances financed by public funds[81].

70 Cfr. Note 49

71 In this sense, AVCP, determination October 10, 2012, n. 4 entitled *"Typical call. General guidelines for the preparation of calls for tenders in accordance with Articles 64, paragraph 4-bis and 46, paragraph 1-bis of the Code of public contracts"*, spec. Part II, Item 3 (acceptance of general conditions of contract)

72 State Council, sec. VI, 8 May 2012, n. 2657; State Council, sec. V, 9 September 2011, n. 5066; State Council, sec. V, 9 November 2010, n. 7963

73 Const. Court., ord., 13 July 2011, n. 211

74 Art. 1, paragraphs 52, 52a, 53, 54, 55 and 56, Law no. 190/2012. These prefecture lists had already been provided by rules of the sector (remember the steps to the post-earthquake reconstruction in Abruzzo in art. 16, dl 28 April 2009, n. 39, and Prime Ministerial Decree 18 October 2011, for jobs related to Expo 2015 pursuant to Art. 3-d dl 25 September 2009, n. 135 and DPCM October 18, 2011, for the Prisons Special Plan in art. 17-ter dl 30 December 2009, n. 195 and for the reconstruction of areas affected by the earthquake in Emilia Romagna, Lombardy and Veneto pursuant to art. 5-bis, dl June 6, 2012, n. 74, as amended by art. 11 dl 10 October 2012, n . 174) and Article. 4, paragraph 13 of Decree Law May 13, 2011, n. 70.

75 Sectors strictly specified in art. 1, paragraph 53 of Law no. 190/2012. These are activities "downstream" the procurement and which are relevant to the cycle of quarries, concrete and bitumen, the piecework, freight rates for hot and cold, landfilling. The natural monopoly that often characterizes the activities of the operators of the sector inevitably affects the choice of the subcontractor by the contractor.

76 Entered into force on 13 February 2013, pursuant to the provisions of art. 119, paragraph 1, as amended by Article. 9, paragraph 1, item a) of Legislative Decree no. 15 November 2012, n. 218

77 Consider the cases in which the protocols of legality extend the obligation to acquire the prefecture information for subcontracts related to the activities most exposed to risk of mafia infiltration, regardless of the amount of the subcontract itself: so Foà, *New Anti-Corruption Law in Urban Planning and procurement,* 2013, 3, 293

78 Such as the absence of action or proceeding for the imposition of preventive measures and the absence of convictions for certain offenses.

79 Art. 1, paragraphs 19 to 25 of Law no. 190/2012. The new provisions do not apply to arbitrations conferred or authorized before the entry into force of the law in question.

80 Art. 1, paragraph 19 of Law no. 190/2012, amending art. 240 of Legislative Decree no. 163/2006.

81 Art. 1, paragraph 20 of Law no. 190/2012, amending art. 241 of the Code of Procurements

The new rules aim to limit the application of the Institute of arbitration that is traditionally inconvenient for the public administration and lends itself to corruption penetration. The Reform envisages, for example, that the referral to the arbitrators of disputes relating to the execution of public contracts can only be substantiated prior authorization by the governing body of the administration. It is also provided for the invalidity of the arbitration clause without prior authorization or "recourse to arbitration without prior permission".

Other provisions cover the rules on the appointment of the arbitrator by the Administration and shall prohibit participation in arbitration to administrative, accounting and military magistrates, to lawyers and State prosecutors and tax committees (all previously widespread practice). In disputes between public administrations, the arbitrators are selected exclusively among public managers. In disputes between private bodies and public administration, the arbitrator is appointed by the administration, with priority to public managers and, in cases where this is not possible, the arbitrator is chosen among persons of particular expertise in the subject matter of the contract. The appointments must be made in accordance with the principles of publicity and rotation.

1.3. Reform implementation decrees.

The l. n. 190/2012 has created the assumption (even through special powers granted to the Government) for more specific and implementation and derivatives regulations. Upon completion of the path taken, the following executive or implementation measures were issued:

- lgs. d. 31.12.2012, n. 235, Consolidated text of provisions concerning ineligibility and ban to cover elective and government charges following final judgements of conviction for intentional crimes, in accordance with Article 1, paragraph 63 of Law 06.11.2012, n. 190, so called Severino law. Among the various measures envisaged: ineligibility for the elections for those who have reported final sentences with more than two years' imprisonment; ineligibility occurred during the parliamentary elective office; ineligibility of candidates with deletion from the list of candidates and decadence of Italian members of the European Parliament who have reported final sentences with more than two years' imprisonment. There are also many provisions of ineligibility for charges at regional, provincial or municipality level.

- lgs. d. 14.03.2013, n. 33, Reorder of the discipline concerning the disclosure, transparency and dissemination of information requirements by public administrations, approved by the Government on February 15, 2013, in implementation of paragraphs 35 and 36 of the art. 1 of L. 190/2012. In particular, this measure has strengthened and extended the obligations of transparency and publicity. Transparency is understood as total accessibility to information on the organisation and activities of public administrations in order to promote widespread forms of controls on the pursuit of institutional functions and the use of public resources, dictating their rules and limits (arts. 1, 2 and 3). There are so many specific provisions, according to which, inter alia, information, documents and data for publication are placed in the "home page" of institutional sites, in the section called "Transparent Government" (article. 9, par. 1). The above-mentioned Section should be divided into Subsections, one of which is called "Invitations to tender and contracts". In this subsection information relating to procedures for the award and execution of works and public works, services and supplies must be published (art. 37, par. 1). In case of negotiated procedure without prior publication of a call for tenders, the provision for negotiation must be published (art. 37, par. 2).

- lgs. d. 8.04.2013, n. 39, Provisions on incompatibility of positions in public administrations and private bodies of public audit, in accordance with article 1, paragraphs 49 and 50, law November 6, 2012, No. 190;

- d.P.R. 16.04.2013, n. 62, Code of conduct for government employees, pursuant to art. 54 Lgs. D. n. 165 of 2001, as replaced by L. 190/2012.

2. THE LATEST PROVISIONS FOR FAIRNESS AND TRANSPARENCY IN PUBLIC WORKS

In 2014 in Italy important episodes of corruption emerged in the field of public procurement which have revived, at a distance of more than 20 years, the well known facts of *Tangentopoli* occurred in 1990s. The reference is, inter alia, to the works related to Mose in Venice and Milan Expo 2015 (see annexes 3 and 4 to this document). In response to these facts, with d.l. 26.06.2014 n. 90, converted into

l. 11.08.2014 n. 114, the Government issued further provisions aimed at ensuring a better level of legal certainty, fairness and transparency of procedures in public works. Among the measures adopted, which have to be added to those of the Reform of 2012, we should point out:

a) Rearrangement of the ANAC and suppression of Supervision Authority on Public Procurement - AVCP.

The task of monitoring the level of transparency and corruption in public administration it's a function of National Anti-corruption Authority (ANAC). An administrative authority independent from the executive power, it is made up of five members appointed by Decree of the President of the Republic, having regard to the agreement of the competent parliamentary committees. The subjects indicated bear particular knowledge in technical, economic and legal fields.

Already formed with the l. 101 of 2013, at first it inherited the anti-corruption functions that l. 190/2012 had attributed to the CIVIT (already established with l. 150/2009) in accordance with the UN Convention in Stockholm on January 27, 1999. The procedure for modifying the structure and functions of ANAC ends with d.l. n. 90 of 2014 with the abolition of the Supervisory Authority of Public Procurement (AVCP) and the attribution of its competence to ANAC. The same law also removes from the ANAC the control of performance of the Administrations (inherited from CIVIT) and transfers it to the Civil Service Department of the Presidency of the Council of Ministers.

So, today ANAC is in all regards an authority responsible for the fight against corruption in all areas of administrative activity. In this context, ANAC, among other things, participates in memoranda of understanding concluded with the Guardia di Finanza, Community policy Department, Department of Accountancy in the State as well as there in the cooperation with the Prosecutor of the Court of Auditors. The authority shall draw up activity reports at regular intervals with which it refers Parliament and Government, and also put forward proposals for amendments to the rules of the functions.

Furthermore, with specific reference to public contracts (following the abolition of AVCP) ANAC becomes the Sector Authority that carries out the task of supervision and assurance, of quality efficiency and effectiveness of administrative action. The effectiveness of the action performed is in fact ensured by sanctioning powers granted in the same matter. Furthermore, the absorption of AVCP in ANAC highlights what is the reputation (that is of a sector heavily corrupted) enjoyed by the public procurement sector in Italy, assumed by the Government.

Lastly, on 15.07.2014, in agreement between ANAC and the Interior Minister a memorandum of understanding was adopted containing **Guidelines for the establishment of a stable and cooperative circuit between ANAC – Local Bodies- UTG Prefectures** for prevention of corruption and the implementation of administrative transparency.

These guidelines are articulated in:

- a section devoted to local authorities, which is based on an analysis of the two fundamental pillars of the system of prevention of corruption, such as the triennial plan of prevention of corruption, governed by art. 1, paragraphs 5 to 9, of the L 190/2012 and the triennial programme for transparency and integrity, regulated by art. 10 of Lgs. D. 33/2013 and by resolution A.N.A.C. No. 50/2013;

- a section concerning public procurement where: *(i)* interpretative guidance for the implementation of extraordinary measures of management and support of enterprises referred to in art. 32 of Decree 90/2014 is offered, with listing of relevant offences for the purposes of the application of such measures[82]; *(ii)* directions are provided concerning the protocols of legality in public procurement, expressly providing for the need to include in the latter the possibility for the Contracting Authority to activate the resolution instrument in any case where, by consolidated judicial evidence in precautionary measure or a measure of prosecution, corrupt agreements between the awarding authority and the successful company are revealed[83].

b) Interventions on companies responsible for corruption phenomena.

Art. 32 of Decree 2014/90 provides that in cases where the court proceeds for bribery offences, corruption, and bid rigging or in the presence of abnormal relevant situations anyway symptomatic

82 Cfr. Annex D to Guidelines

83 Cfr. Annex C to Guidelines

of illegal conduct or criminal events attributable to the successful company of a public service contract (including jobs dealers and general contractors), the President of ANAC shall inform the Prosecutor and in the presence of serious and proved facts, proposes to the prefect responsible the adoption of the following alternative measures:

- order of renewal of the social organs through the replacement of the subject involved and, if the company does not act within the period prescribed, temporary and extraordinary management of the contractor company, only for the complete execution of the contract or concession;

- directly provides to extraordinary and temporary management of the contractor company limited to the complete execution of the contract or concession.

The prefect, upon verification of the assumptions and after assessing the particular gravity of the facts under investigation, intimates to the company to ensure the renewal of the social organs by replacing the subject involved within 30 days; where the enterprise does not adjust in this period or in more severe cases, it directly provides, by Decree, the appointment of one or more Administrators (not more than 3) to whom it attributes all powers and functions of disposition and management owned by the previous ones. During the period of validity of this measure, payments to the company are paid net of Administrators compensation, and corporate profits are set aside in a special fund, until the outcome of the criminal proceedings. In case the investigations relating to the offences mentioned above involve components of corporate bodies other than those recipients of the actions referred to in the above-mentioned items a) and b), it is possible to adopt support and monitoring measures, through the appointment by the prefect of one or more experts (no more than three), who should provide companies with operational requirements. Also in this case the remuneration of consultants is to be borne by the company. It is also attributed to the prefect, in cases where anti-mafia preliminary information was issued and there is an urgent need to ensure the completion of the execution of the contract or for other reasons set out in the standard, the right to dispose on his/her own initiative all extraordinary measures covered by article in comment, informing the President of ANAC.

As per Ann. 4, such a measure was adopted for the first time within the framework of EXPO 2014.

c) Extension of the cases justifying the termination of the contract.

Another important novelty in the procurement sector is the extension of the list of crimes that justify the termination of the contract pursuant to art. 135 of lgs. d. n. 163 of 2006, extending it to the case referred to in art. 51, paragraph 3-*bis* and 3-*quater* of c.p.p. (conspiracy to make trafficking in persons, or encourage illegal immigration, or the exploitation of child prostitution or sexual violence on minors; association for the purpose of counterfeiting or trade of fakes or kidnapping crimes; mafia-type association; the association aimed at drug or tobacco trafficking; smuggling activities organized for illicit trafficking in wastes; crimes with purpose of terrorism), as well as to the following types of crimes: embezzlement; embezzlement at the expense of the State; concussion; corruption; undue inducement to give or promise utility.

d) Other measures.

Further measures of preventive control for inclusion in the list of manufacturers, providers of services and performers of works not subject to mafia, infiltration attempt[84], measures relating to the execution of public works,[85] supplies and services and, within these, extraordinary measures of support for management and monitoring of companies, entrusting the implementation to the President of ANAC and the competent Prefect.

3. THE PENAL REPRESSION OF CORRUPTION IN NEW ANTI-CORRUPTION LEGISLATION

The reform of anti-corruption legislation has not neglected the suppression of corruption through criminal measures. In relation to this aspect, the reform has moved in the direction of:

- a generalised increase in punishment prescribed by law for the offences of *Embezzlement* under art. 314 (art. 1, paragraph 75, item c)); of Concussion under art. 317 (art. 1, paragraph 75, item d)); of *Corruption for the exercise of the function* of art. 318 (art. 1, paragraph 75, item f)); of Corruption for an act contrary to the duties of the Office according to art. 319 (art. 1, paragraph 75,

84 Article 29 dictates new rules on registration in the list of suppliers, service providers and performers of works not subject to attempt of mafia infiltration, amending Article 1, paragraph 52 of Law 190/2012 and entering the art. 52a, which provides that *"the inclusion in the list referred to in paragraph 52 takes the place of anti-mafia communication and information also for the signing, approval or authorization of contracts or subcontracts concerning activities other than those for which it was required"*.

85 We should mention the measures relating to Expo 2015 Special Task Unit (art. 30); the ban until the adoption of EU directives 2014/24/EU and 2014/25/EU, of transactions of government with foreign companies or entities domiciled in countries that do not allow the identification of the persons who own their property or control (art. 35); financial monitoring of works related to strategic infrastructure and production facilities; the obligation to transmit to ANAC certain types of variations during construction (those referred to in paragraph 1 letter. b), c) and d) art. 132 Procurement Code) for contracts with a value equal to or above the EU threshold where the amount of variation exceeds the 10% of the original amount of the contract (Art. 37).

item g)); of Corruption in judicial acts referred to in art. 319 *ter* (art. 1, paragraph 75, item h)); of *Abuse of Office* under art. 323 (art. 1, paragraph 75, item p)).

- a renovation of the main figures of corruption-crime: the crime of concussion as per art. 317 was changed; [86]the crime of international corruption as referred to in art. 322 *bis*[87]; art. 317 *bis* provides now an accessory penalty of disqualification from public office for the offences referred to in articles. 319 and 319 *ter*[88]; the confiscation for same amount referred to in art. 322 *ter,* paragraph 1, envisaged for crimes against the public administration referred to in articles from 314 to 320, has been extended to the entire range of the proceeds of crime[89]; among the offences-assumption of administrative responsibility by the offence of institutions were included the offences of "undue inducement to give or promise utility" and "corruption between individuals"[90]; paragraph 2 *bis* in article. 308 of c.p.p.[91] was introduced;

- Introduction of new types of crime, such as the *"illegal influence trafficking"* under art. 346 bis[92], the "corruption for the exercise of the function" referred to in art. 318[93] and "undue inducement to give or promise utility" under art. 319 *c* instead of concussion for induction[94].

- Finally, it should be also reported that the Reform has also introduced measures to strengthen the effectiveness of monetary liability judgement of the Court of Auditors resulting from criminal judgement of conviction for offences against the public administration (such as corruption and bribery). The new text art. 1-sexies of the l. 20/1994 provides that "in the judgement of liability, the extent of the damage to the image of the public service resulting from the commission of an offence against the public administration itself determined by judgement of res judicata is presumed, unless otherwise proved, equal to twice the amount of money or the value of other utility illicitly perceived by the employee". In such cases, where there is a well-founded fear of attenuation of the monetary credit guarantee the seizure of the assets of the person responsible can be provided.

86 Article. 1, paragraph 75, item d), L. Nov. 6, 2012, n. 190 so reforms art. 317: *"Art. 317. - (Extortion). - A public officer who, abusing his or her powers, forces someone to give or promises unduly, to him or to a third party, money or other benefits, shall be punished with imprisonment from six to twelve years."* Compared to the previous formulation is removed from the list of active players the person in charge of a public service, and from the behaviour structure "incitement", which was intended as an alternative to "compulsion", also the minimum prison sentence is increased from four to six years. Induction, assisted by the same connotations that qualified it as extortion and declared it possible also by a person in charge of a public service, has been the subject of autonomous provision in a new article of the Criminal Code, art. 319 c (art. 1, paragraph 75, letter i)). See about Vinciguerra, *Reform of concussion, in Jur. Com.,* 2012, 12; Corbetta, *The crime of concussion after the changes introduced by Law n. 190 of 2012, in Dir. Pen. and Process,* 2013, 3, 284; Seminara, *Crimes of concussion, bribery for the exercise of the function and induction embezzlement, in Dir. Pen. and Process,* in 2013, 8 - Appendix 1, 15

87 For further details, see. Mongillo, *Corruption in the inner sphere and international dimension,* Naples, 2012, 231 et seq .; Centonze-Bone, *The international corruption. Profiles of responsibility of individuals and institutions,* in Riv. en. dir. and proc. pen., 2013, 194 et seq .; Marra, *Contrast and prevent "transnational" public corruption* in Rosi E. (ed) Transnational organized crime and the criminal justice system Italian. The UN Convention of Palermo, Milan, 2007, 126 et seq .; Patalano, *Problematic profiles of international corruption,* (eds) Id., *New strategies for the fight against organized crime, Turin, 2003, 400 ff .; Parisi-Rinoldi, Multiple instruments of international pacts to fight against corruption and adjustment of the Italian law,* (eds) G. Sacerdoti, *Enterprises responsibilities and international anti-corruption instruments,* Milan, 2003, 254 ff .; Manacorda, *International corruption and criminal protection of Community interests,* in Dir. Pen. and Process, 2001, 415 et seq .; Rosi, *Transnational bribery and / or international corruption: a brief reflection,* in Dir. Pen. and Process, 2013, 8 - Appendix 1, 51

88 Art. amended by art. 1, paragraph 75, item e), L. Nov. 6, 2012, n. 190.

89 Art. amended by art. 1, paragraph 75, item o), L. Nov. 6, 2012, n. 190. On this point see. Bevilacqua, *The penalty system outlined by the anti-corruption law,* in Jur. Com., 2012, 12.

90 Articles. 25 and 25 ter of Legislative Decree 8 June 2001, n. 231 are amended by art. 1, paragraph 77,items a) and b), L. Nov. 6, 2012, n. 190

91 Article. 1, paragraph 78, L. Nov. 6, 2012, n. 190 introduces paragraph 2 bis art. 308 of the Criminal Procedure Code, which states: *"If we proceed for one of the crimes referred to in Articles 314, 316, 316-bis, 316-ter, 317, 318, 319, 319-ter, 319 quater, first paragraph, and 320 of the Criminal Code, the disqualification measures expire six months from the start of their implementation. In any case, if they were willing to evidentiary requirements, the court may order its renewal even more than six months from the start of the understanding that in any case their effectiveness is undermined if the beginning of their execution after a period of time equal to three times the terms provided for in Article 303".* For further information on the procedural aspects of the anti-corruption law see Voena, *Procedural profiles of the anti-corruption law*, in *Jur. It.*, 2012, 12, according to which the L. 6 November 2012, n. 190 would invest only marginally matter of criminal procedure because the changes introduced, in themselves few in number, were solved, mostly, in the simple insertion of the newly minted criminal offenses in the list of those subject to special rules of criminal procedure (so changes made by paragraphs 79 and 80 of art. 1 of the Act). Also according to the author, *"Increased analytical commitment deserves art. 1, paragraph 78, which places a paragraph 2a in art. 308 Code of Criminal Procedure The new law increases the effectiveness of temporal precautionary disqualification measures to obvious detriment of coercive ones, moving in a direction that has some point of consonance with the design that animates the most significant among the procedural maneuvers undertaken by DL December 22, 2011, n. 211, converted with amendments into Law 17 February 2012, n. 9".*

92 Article. 346 bis, introduced by art. 1, paragraph 75, item r), L. Nov. 6, 2012, n. 190 provides that *"Whoever, apart from cases of complicity in the crimes referred to in Articles 319 and 319-ter, leveraging existing relationships with a public officer or a representative of a public service, unduly gives or promises, to him/her or to others, money or other pecuniary advantage, as the price of their illegal mediation to the public officer or a person in charge for a public service or to remunerate him/her, in relation to the performance of an act contrary to the duties of the office or the failure or delay of a act of his/her office, shall be punished with imprisonment from one to three years.The same penalty applies to those who unduly give or promise money or other pecuniary advantage.*

The penalty is increased if the person who unduly gives or promises, for him/her or for others, money or other asset benefit covers the charge of public officer or representative of a public service. If the facts are not particularly serious, the sentence is reduced."

The case above is intended to strike conducts prodromal to corruption or anyway incriminate "paid" interference of subjects tending to divert the assets of the PA towards goals contrary to law. They clarify the relationship with the crime provided by art. 346, the application of which is limited to the conduct of intermediaries that claim a nonexistent credit to people with public qualification. For further details, see. Pisa, *The "new" crime of trafficking of influences*, in Dir. Pen. Process and, in 2013, 8 - Appendix 1, 33

93 Article. 318, Corruption for the exercise of the function, previously entitled *"Corruption for an official act," as a result of changes introduced by art. 1, paragraph 75, item f), L. Nov. 6, 2012, n. 190 provides that "A public officer who, for the exercise of its functions or powers, unduly receives, for himself or for a third party, money or other benefit, or accepts a promise, shall be punished with imprisonment from one to five years". For further details, see. Seminara, Crimes of extortion, concussion for the exercise of the function and embezzlement induction, cit., 15 and, by the same author, The reform of the crimes of corruption and concussion as a legal and cultural issue,* in Dir. Pen. and Process, 2012, 10, 1235

94 Article. 319 quater, introduced by art. 1, paragraph 75, item i), L. Nov. 6, 2012, n. 190 in place of concussion by induction provides that *"Unless the act constitutes a more serious offense, the public officer or civil servant who, abusing his or her powers, induces someone to unduly give or promise him or a third party, money or other benefits shall be punished with imprisonment from three to eight years.*

In the cases covered by the first paragraph, who gives or promises money or other benefits shall be punished with imprisonment up to three years."

For further details, see. Corbetta, *Undue induction to give or promise utility,* in Dir. Pen. and Process, 2013, 5, 537 and, by the same author, *Still on the difference between "coercion" and "induction" after the news n. 190 of 2012*, in Dir. Pen. and Process, 2013, 4, 424.

- It is also necessary to point out, even if outside the criminal sector, both the reformulation of the case referred to in art. 2635 c.c., now officially called "corruption between individuals"[95], and the introduction by art. 1, paragraph 51, of l. n. 190/2012, art. 54 bis of Legislative Decree No. 165 of March 30, 2001, "Protection of the public servant who reports wrong doing"[96].

4. FIRST COMMENTS ON REFORM

The new measures described constituted a definite change from the previous arrangement of anti-corruption legislation.

Although it appears difficult to operate an assessment on the general reform process up to now, it appears useful the reference to the Report on the first year of implementation of law No. *190/2012,* drawn up by CIVIT (now known as ANAC) in December 2013. The above Report provides a first assessment of the state of implementation of anti-corruption legislation, reporting the first concrete evidence through the analysis of the activity of those involved, highlighting the light and shadows and offering possible suggestions for improvements.

It is recognised that the organisational problems and difficulties of implementation are inevitable in the early stages of any process of change in public administration. In the specific case of law No. 190/2012, they have been compounded by the complexity and innovative extent of the reforming project which is involved, inter alia, in the delicate sphere of relations between policy and administration. The same authority considers emblematic that during the first year of implementation of anti-corruption legislation it has been able to establish that the rules of direct relevance to political leaders at various levels of Government and, in particular, non assignment and discipline of incompatibility and transparency obligations for political bodies, have aroused special attention and concern within the administration.

The delays incurred in relation to the original statutory deadlines, determined, as well as by the complex mechanisms of implementation, also by special political circumstances, did not then permit to report on results. However, the first steps of this process of implementation have been reported that represent the starting point of a process of adaptation to general principles of law, with the aim of improving the integrity of public administrations. It is a dynamic process that, in the light of the experience gained and the difficulties expressed, albeit in different ways, by the administrations, should be oriented towards complementariness to other reform policies aimed at improving the efficiency and effectiveness of public action[97].

Apart from the difficulties of application, in substance, the Reform was positively welcomed by the European Commission[98], which highlighted how it strengthens the prevention profile overcoming the traditional (and insufficient) anti-corruption policy based on mere repression; even the OECD[99] has promoted the efforts by the Italian Government in establishing a more effective policy of prevention of corruption in public administration. In contrast, unfortunately, once again the assessments on the reform by some exponents of the Italian political class who constantly call for limiting or even abolishing it[100].

95 Art. 1, paragraph 76, Law no. 190/2012. For further details see. Spena, *Corruption between individuals*, in Dir. Pen. Process and, in 2013, 8 - Appendix 1, 39

96 For further details see. Patumi, *The whistleblowing, as introduced by the anti-corruption law*, in Azienditalia - Il Personale, 2013, 8-9, 365

97 For further details see *Report on the first year of implementation of the law* n. 190/2012, CIVIT, December 2013

98 EUROPEAN COMMISSION, Brussels 3.2.2014, COM(2014), *Final Report from the Commission to the Council and the European Parliament EU Anti-Corruption Report.*

99 OECD, Public Governance Reviews, OECD Integrity Review of Italy, REINFORCING PUBLIC SECTOR INTEGRITY, RESTORING TRUST FOR SUSTAINABLE GROWTH, 2013

100 Do not forget that in application of the l. Severino and related delegated decree 235/2012 *("Consolidated provisions on ineligibility")*, the former Italian Prime Minister Berlusconi, criminally convicted for four years (become one after the application for the pardon) of imprisonment for tax fraud, has suffered the loss of his position as a Senator of the Republic and the penalty of disqualification from public office for two years.

CONCLUSIONS

As we have seen, the majority of irregularities and fraud in the management of European funds (and, in particular, the ERDF) arise from violations of the rules on public procurement. These are not, of course, necessarily phenomena related to the concept of corruption, but there is no doubt that this pathology represents an important critical issue for the sector.

The road followed by the legislator to combat corruption (i.e. the administrative discretions deprivation) was widely criticised for the fact that it a priori renounced to the efficiency of procedures. In other words, in our country to combat corruption we have waived a *priori to* efficiency, especially in the case of complex contracts, with the consequence of bad conditions, overspending, poor quality, unnecessary assignment, poor design, etc. Experience shows that the rigidity of current regulation of public procurement did not oppose in any way the spread of corruption, which is a serious pathology of the Italian public procurement sector. The alleged only medicine to combat inefficiency and corruption, consisting in deprivation of administrative discretion has therefore failed[101].

In fact, we observe that inefficiency and corruption are two distinct diseases of public procurement. The inefficiency refers to the waste of public money, the award and performance time dilation, the poor quality of goods purchased by the public administrations. This pathology has not corruption as only pre-condition, since it is perfectly possible also in presence of very loyal officers, especially when the sector discipline does not put them in a position to operate efficiently.

On this point, we should instead stress that the main concern of the Community legislator is, the efficiency of the Administration's choices, pursued through the great flexibility of the award. For example, consider the great flexibility of the procedures and the allocation to the Administration of increasingly wide margins of discretion contained in new procurement and concessions directives 24/2014/EU and 23/2014/EU. Therefore, the Community legislator does not renounce to efficiency and moves the fight against corruption on measures other than those based on deprivation of administrative discretion, but without going into and leaving the Member States to adopt the appropriate solutions.

It can also be observed that the rigidity of award procedures laid down by the general discipline has resulted in their becoming unusable for many large and complex works and has forced the legislator to provide for appropriate internal derogating disciplines. Anyway, many exceptions to the general discipline have not translated into competitive negotiations (aimed at improving knowledge of public administration through the competitive comparison with economic operators, such as a competitive dialogue) but into direct assignment without any competitiveness, resulting in further loss of efficiency[102].

The scandals that emerged in the course of this year and the related criminal investigations have highlighted the whole corrupt system which has governed certain works. However, no estimate is probably possible to calculate the losses of efficiency (in terms of cost, quality and timing) which, apart from corruption events were caused by inadequate tendering systems or even by inefficient systems of conducting negotiations for the renegotiation of contracts in the course of contract.

Only in recent times, it seems that the legislator has acknowledged that inefficiency and corruption are two different evils that must be fought with the appropriate medicine. Corruption must be fought without renouncing in advance to the efficiency of contracts, through measures *external* to award procedures, in the awareness that the tender may not be the magic wand that solves the problems of inefficiency and corruption. The tender must have as a goal to select the best offer possible. Out of the tender, we must find measures against corruption.

This philosophy seems to be finally enacted by the legislator starting from the Anti-corruption law Reform of 2012 establishing an administrative system of corruption prevention, which is accompanied by the tightening of repression both with administrative and judicial measures. Another cornerstone of recent measures is the pursuit of greater transparency of public procedures in order to reduce the information disadvantage of citizens -public administration clients - which creates the condition for the opportunistic behaviour of public administrators.

101 Think of the recent judicial events that have affected the Mose of Venice and Expo Milan 2015

102 For example, in the case of Mose of Venice the dealer Consorzio Venezia Nuova was selected as an exception to the general rules on public works on the basis of the law 29/11/1984 n. 798 on *"new interventions to protect Venice"* (so-called *second special law for Venice*). That derogation justified general granting and all subsequent acts. Thirty years later, the work is not yet completed and the completion scheduled for 2016. The scandals linked to episodes of widespread corruption that emerged in 2014 are well known.

All these measures (described briefly in the text) show a significant change of strategy of the legislator with respect to the fight against corruption. It seems, in fact, definitely overcome the idea (inherited from the Merloni law) that the medicine against corruption can be found in the rules of procedures for the award and through their hardening. Anti-corruption measures of recent years, in fact, are out of the tender and find their basis in greater transparency of the work of the public administration, with respect to all phases of the contractual relationship.

Many actors now call loudly for a reform of the entire sector and a debate on the direction to be taken has developed.

There is no doubt that the opportunity to be grasped is the implementation of the new directives on public procurement (2014/23/EU on concessions, 2014/24/EU, on procurement, 2014/25/UE on special sectors), which must be transposed by March 2016[103]. This leads us to reflect on the same philosophy that will inspire new actions of the legislature[104].

Transposition of directives must avoid the mistake made in the past to translate a relatively modest amount of European standards (those of Directive 2004/18/EC), practically self-applicable, in hundreds and hundreds of articles of the code of Public Procurement and its implementing regulation[105]. This legislation hypertrophy is by many considered to be the source of inefficiencies, obstacles and uncertainties of the current sector discipline in our country[106]. Excessive regulation, which purports to regulate *ex ante* all the many abstract possibilities, constitutes a wrong approach to complexity while a correct management of the same complexity requires variety. The variety of institutional responses to socio-economic problems should assume the flexibility of choices of subjects who are to act in a complex world. On the contrary, the multiplicity of internal rules designed by the legislature has the purpose to thwart flexibility and discretion of the Public Administration, in an effort to attempt to replace skills with rules, the management with regulation, Administration with legislation.

We don't have to make the mistake of fighting corruption through measures involving the renunciation to the efficiency of procedures and contracts. Limitation of administrative discretion is a source of inefficiency, since it prevents the construction of assignment procedures and contractual models exactly calibrated on the contract to be awarded and executed. The absence of negotiation (both during the choice of the contractor and in the course of execution of the contract) prevents the public administration to improve its knowledge of the contract and to make better informed choices[107]. A rethink of the whole matter of public procurement presumes the pursuit of efficiency and contrast of corruption with measures other than those based on deprivation of administrative discretion.

03 On the subject, we can mention the following contributions, all in the volume of CAFAGNO M. - BOTTO A. - FIDONE G.- BOTTINO G. (ed) *"Public Procurement - reports on concessions and public-private partnerships"*, Giuffrè 2013: PICOZZA E., *Concessions in European Union Law. Profiles and Perspectives;* S. LEVSTIK, *the proposed Directive on concessions: a first reconnaissance analysis;* RAGANELLI B., *Public, Private and Concessions in Europe: some limits of the discipline;* COZZIO M., *First considerations on the proposed European directives on the subject of Public Procurement;* On ALEO E., *The revision of the directives on public contracts: problems and prospects.*

104 Remember that, in the transposition of previous directives of the sector in 2004 (Directive 2004/17/EC for special sectors and the 2004/18/EC for ordinary sectors), the different countries of the Union have had very different approaches. At a formal level, it must be noted that the transposition was implemented in two different ways by different countries: most countries have launched two separate and autonomous legislations, the Directive 17 and the 18; few countries, namely Italy, France and Portugal have adopted a single text for both directives. Germany has, however, incorporated the two regulations, launched separately, in the general law on procurement -GWB -. Here follow the principal implementation standards in the main Member States: in addition to Italy, which implemented with Legislative Decree no. 163/2006 the *"Code of public contracts for works, services and supplies"* we can cite: for the United Kingdom, the *Public Contracts Regulations and the Utilities Contracts Regulations*, in force since January 31, 2006 implementing, respectively, Directive 18/2004/EC and Directive 17/2004/EC; for France the Code de Marches Publics; for Germany the Gesetz gegen Wettbewerbsbeschränkungen (antitrust law), the Vergabeverordnung- VgV (the order on awarding public contracts) and regulations VOB, VOL and VOF; for Spain, the Ley 30/2007 of 30 October 2007, in force since April 31, 2008, "Ley de contractos del Sector Público" for implementation of the Directive 18 and the Ley 31/2007 for the transposition of the Directive 17. As to contents of transposition, it should also taken into account the type of legal system of the different countries, due to several general patterns: the administrative one, similar to the Italian (Belgium, France, Spain, Portugal); the civil one (for example, Germany, Austria, the Netherlands); the common law (UK, Ireland). The common law countries have carried out a faithful transposition of EU directives (so-called photocopy transposition); in countries with a civil law system a transposition fairly faithful to the necessary modifications and the addition of technical regulations prevailed; in countries with administrative system, a re-elaboration transposition prevailed, which found highest expression in the Italian Code, in the following two Code (2004 and 2006) of France, in the laws 30 and 31 of 2007 in Spain. Moreover, the examination of the infringement procedures initiated by the Commission on the transposition measures of States, shows how to these countries the greater remarks of scope and system have been moved (eg France and Italy), while the majority of the other States received requests for compliance with Community law even important, yet detailed.

105 The same recital 2 of Directive 2014/23/EU states that *"the rules of the legislative framework applicable to the award of concessions should be clear and simple. They should take due account of the special concessions from public procurement and should not lead to undue bureaucracy". Recital 1 states that "an appropriate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory market access to all Union economic operators and legal certainty thus promoting public investment in infrastructure and strategic services for citizens"*

106 For a comparison with other European countries: FIDONE G., *The Spanish system of public contracts: the flexibility of the models provided by the programming and controls, in* COMPORTI GD, (eds), The public tenders: the future of a model, Editoriale Scientifica, 2011; Zanettini L., *Procedures for the award of public contracts in the UK. Confidence in the assessment by the awarding and the importance of dialogue with businesses*, in COMPORTI GD, (eds), The public tenders: the future of a model, Editoriale Scientifica, 2011; TORNOS MAS J., M. DEL MAR MARTÍNEZ MARTÍNEZ, *Las concesiones Dercho en el español. Concesión de obra pública y colaboración público-privada*, in CAFAGNO M. - BOTTO A. - G. FIDONE - BOTTINO G., (ed), *Public Trading - Writings on concessions and public-private partnerships, Giuffre, 2013; SARTORIO L., Operations of contractual partnership between public interest and competition: economic development and the role of individuals in Italy and in France*, in CAFAGNO M. - BOTTO A. - G. FIDONE - BOTTINO G., *(ed), Public Trading - Writings on concessions and public-private partnerships, Giuffre, 2013*

107 The common law countries, which have taken over as closely Directives 2004 and are traditionally less prone to hyper-regulation, have shown less concern about the dangers of the flexibility of the procedures. The history of these countries, however, did not present relevant phenomena of corruption in procurement. So, in those States public administrations retain large areas of discretion of choice and new flexible institutions required by the Directives have been transposed without too many fears, because to a large extent coincide with systems already in use in the same countries. On the contrary, most resistance to flexibility can be found in the countries of administrative law. In these countries, more accustomed to the regulation making procedures, the concern was to regulate individual aspects of discretion, ending sometimes, limiting it. The need to regulate in detail the new institutions with flexible character has also led to coordination problems and delays in implementation that have hindered practical application. A special reference, among these countries, deserves Italy that, on the one hand, has shown worried by the possibility of repetition of scandals and corruption in procurement and, second, had a pre-existing legal framework of the sector (the Merloni law) particularly restrictive which severely affected the Code. Well, Italy is probably the country that has expressed major concerns in the transposition of flexible institutions, as demonstrated by the suspension made with various corrective actions and the continuing postponement of the competitive dialogue until the entry into force of the Regulation implementing the Code.

The pursuit of efficiency of public procurement presupposes that the procedure of assignment should have as exclusive purposes, through the competition, the selection of the best tender. The rules of the call for tender should not be considered the means to combat corruption if this means that the main goal of the selection of the best offer is lost. All this must be accompanied by the formal control of the legality of individual administrative acts, which has always characterized administrative and accounting justice in our country. The judicial control should move to the result of the overall administrative activity, such as the outcome of a procedure of assignment or execution of a contract, in terms of cost, quality and timeliness. For these purposes, it appears necessary to determine *a priori* which should be the programmed result (performance) of public administration, including through recourse to standard values universally recognized, and then proceed to verify the result achieved. Moreover, this form of control does not necessarily imply an assessment of merit by the Court, since if the achievement of a specific *performance* of contract was due in virtue of a law requiring the Administration to schedule and then to reach it, the same control would have the nature of a review of legality of the overall work (not a single act) of the Administration[108].

Anti-corruption measures that have to be cross-cutting in all stages of the life of the contract must be designed out of the tender and must constitute an "environment" which makes difficult the pursuit of interests other than the public one, ensuring the necessary assumption of maximum transparency. From this point of view appears significant the trend line followed by the legislature from 2012 with the reform of anti-corruption legislation and probably not yet fully completed.

It is clear, however, that for the effective work of the measures introduced it will be necessary also to intervene on the control system (internal and external) and, especially, to the jurisdictional ones. For example, the case of Mose, showed the inadequacy of the current criminal justice and accountant system. Suffice it to say that in the report 2009 on Mose[109], the Court expressly stated some inefficiencies through which pathological aspects of the system could be guessed, yet the Court of Auditors, the public prosecutor or other supervisory bodies did not give any follow to that report (if not five years later, with criminal investigations currently under way). Nothing, instead, could be done remedy the reported inefficiencies in the same report.

The creation of a clear legal framework, stable and efficient in sector of public procurement, accompanied by a rational and effective discipline for the contrast of corruption based on transparency should also constitute the basis of the cessation of the bad practice of derogations for specific works (which are presupposed in the inapplicability of general discipline to complex works) that often have been the assumption of inefficiency and corruption.

Therefore, the transposition of the new directives should not be lost, if we want to establish the definitive course change compared to past trends and achieve a procurement system that is not only impervious to corruption (and this must be ensured by appropriate anti-corruption measures which may be envisaged in the completion of the Reform begun in 2012) but also efficient (and for this the public contracts Code should be heavily innovated). This suggests a new and more aware vision of the relationship between law and administration, based on the latter's responsibility. Probably, the same principle of legality and the form of rationality that supports it, require an afterthought, in the face of complex dynamics[110].

108 On this point, we propose again FIDONE G., *The action for efficiency in the administrative process: from the judgment on the act to the judgment on the activity,* Giappichelli, 2012

109 Court of Auditors, the control section on the management of government departments, *"Progress of the project to protect the lagoon and the city of Venice"*, 20.2.2009

110 It must be also noted that the text of the draft law for the implementation of these three directives, recently approved by the Council of Ministers, does not seem to have addressed many of the issues raised in this paper and the subject of the conclusions of this paragraph. This bill, in general, requires the Legislator to streamline the regulatory framework in the areas of public procurement and concessions in order to achieve a higher level of legal certainty and simplification of procedures. With respect to the transposition of Directive 2014/23/EU, this bill merely provides for the creation of *"a regulation of the matter of licenses and identification, in terms of procurement procedures, of arrangements to ensure minimum levels of competition, transparency and equal treatment required by European law"*(Art. 1 paragraph 1 item n). More generally it is also expected the *"rationalization and extension of the forms of public-private partnership, promoting their use through the use of innovative and specific financial instruments"* (art. 1 paragraph 1 item H). Therefore, the legislator, within the boundaries set by the enabling act, could have wide power to move, even in relation to the issues raised in this paper.

ALLEGATO 1

DATI SULLE IRREGOLARITÀ NELLA GESTIONE DEI FONDI

1. FONDI EUROPEI – QUADRO DI RIPARTO COMUNITARIO E QSN

Per il periodo di programmazione 2007-2013 i finanziamenti stanziati per la politica regionale e di coesione ammontano a € 347 miliardi (pari al 35,7% del bilancio UE per tale periodo). Le risorse, complessivamente indicate, sono state ripartite in base alla tipologia del fondo e dell'obiettivo che, attraverso le stesse, si intendeva assicurare.

Fondi:

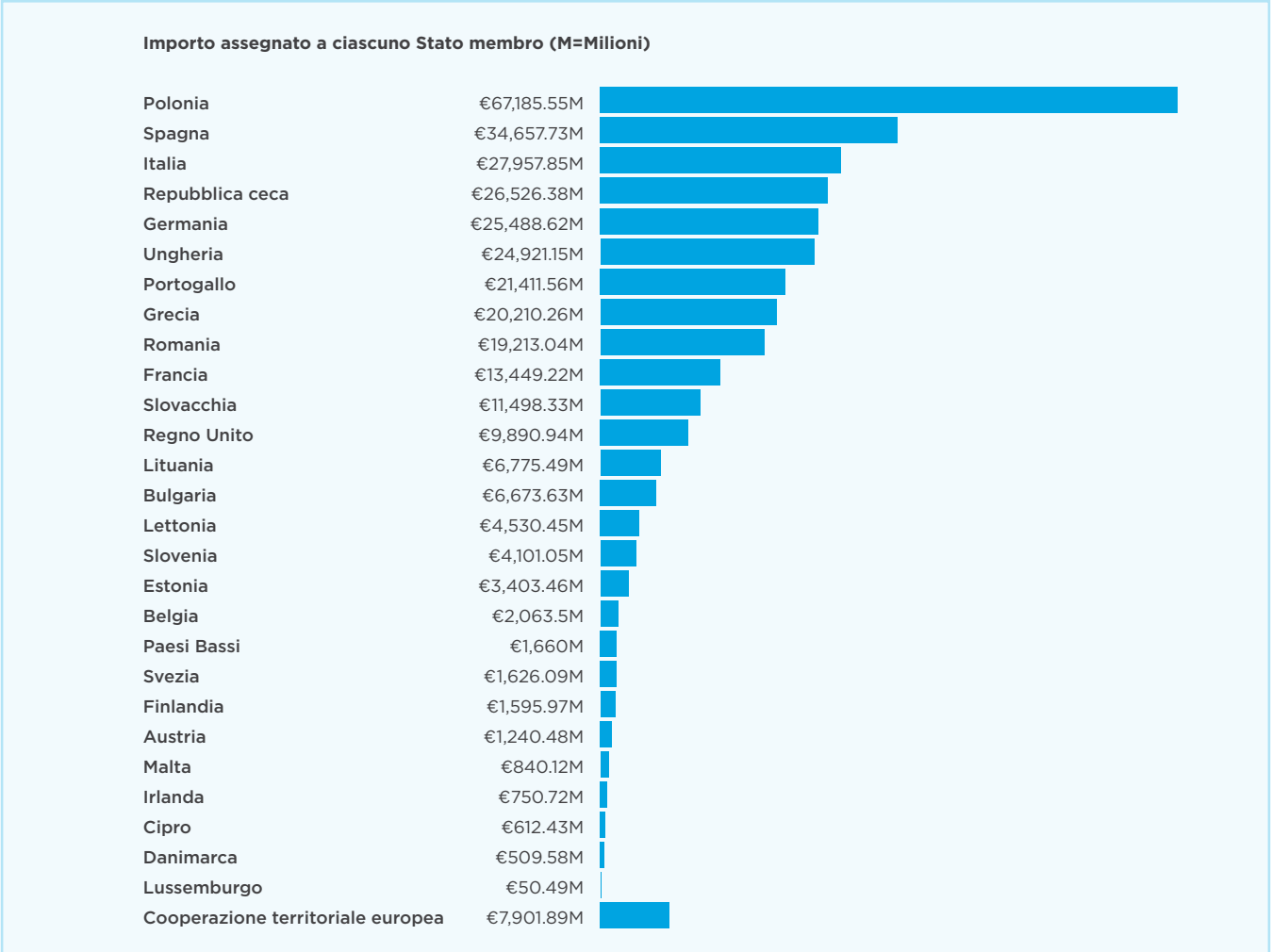
- Fondo europeo di sviluppo regionale (FESR) € 201 miliardi;
- Fondo sociale europeo (FSE) € 76 miliardi;
- Fondo di coesione (FC) € 70 miliardi.

Objetivos:

- Convergenza € 283 miliardi;
- Competitività e occupazione € 55 miliardi;
- Cooperazione territoriale europea € 9 miliardi.

I finanziamenti europei sono stati divisi e assegnati ai diversi Stati membri, in base alle esigenze dei singoli Stati e tenendo conto delle rispettive dimensioni. Secondo i dati forniti dalla Commissione Europea, per il periodo di riferimento 2007-2013, l'Italia si è collocata al terzo posto per l'ammontare dell'importo assegnato (pari a € 27.957,85 milioni), dietro solamente alla Spagna (€ 34.657,73 milioni) e alla Polonia, che con un importo di € 67.185,55 milioni, dispone della più ampia quota dei fondi a livello europeo. La Germania ha invece ricevuto una somma di poco inferiore a quella italiana pari a € 25.448,62 milioni. Più basse sono poi le risorse assegnate a Francia (€ 14.449,33 milioni) e Regno Unito (€ 9.890,94 milioni), che si assestano a metà di questa particolare "classifica" (cfr. **Figura 1**).

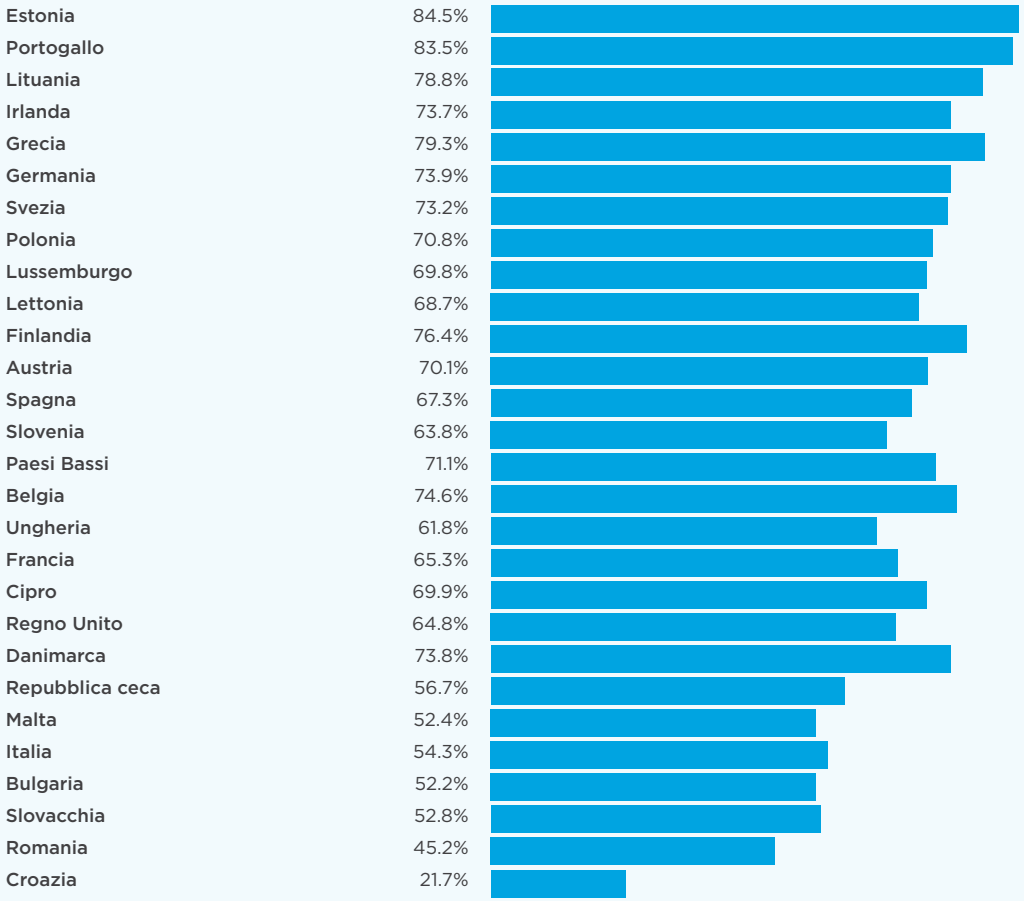
FIGURA 1 (Fonte www.ec.europa.eu)



I rilievi statistici appaiono tuttavia più allarmanti laddove si valuta la capacità di spesa dei fondi europei da parte dei singoli pesi membri. In tale classifica l'Italia si colloca infatti solo al ventiquattresimo posto tra gli Stati membri, con un poco confortante 54,3% di fondi pagati. In altri termini, l'Italia perde quasi la metà dei fondi che le spetterebbero, per cause comunque riconducibili ad inefficienze interne. Registrano un risultato peggiore solamente la Bulgaria (52,2%), la Slovacchia (52,8%), la Romania (45,2%) e la Croazia (21,7%). Significativa appare quindi la differenza con altri Stati, come la Germania che utilizza il 73,9% dei propri fondi, la Francia che ne impiega il 65,3% o il Regno Unito che utilizza ancora il 64,8%. Peraltro, ai primi posti di tale classifica si collocano l'Estonia (84,5%) e il Portogallo (83,5%) (cfr. **Figura 2**)

FIGURA 2 (Fonte www.ec.europa.eu)

Percentuale dell'importo assegnato pagata a ciascuno Stato membro



I fondi complessivamente attribuiti all'Italia sono poi stati ripartiti fra le diverse Regioni con il QSN per il periodo di riferimento 2007-2013. Alla Regione Lazio, considerata ai fini del presente lavoro, sono state assegnate risorse complessivamente pari a € 371.756.338. La regione si classifica quindi al terzo posto per consistenza delle risorse ricevute, dietro solo alla Sardegna (€ 680.671.765) e al Piemonte (€ 426.119.322) (cfr. **Figura 3**).

FIGURA 3 (Fonte QSN 2007-2013, p. 243)

Quadro Srategico Nazionale 2007-2013 - Italia | Dotazione indicativa annuale per Fondo e per programma (Importi in Euro a prezzi correnti)

Competitività regionale e occupazione			Participazione comunitaria						
PO	**Fondo**	**Totale**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Por Abruzzo	FESR	139.760.495	18.799.458	19.175.446	19.558.956	19.950.135	20.349.137	20.756.120	21.171.243
Por Emilia Romagna	FESR	121.107.883	17.232.042	17.576.683	17.928.216	18.286.781	18.652.516	19.025.567	19.406.078
Por Friuli Venezia Giulia	FESR	74.069.674	7.963.255	10.162.522	10.365.773	11.073.088	11.284.550	11.500.241	11.720.245
Por Lazio	FESR	371.756.338	50.005.673	51.005.785	52.025.901	53.066.419	54.127.748	55.210.303	56.314.509
Por Liguria	FESR	168.145.488	22.617.579	23.069.931	23.531.328	24.001.955	24.481.994	24.971.634	25.471.067
Por Marche	FESR	210.887.281	28.283.409	28.877.649	29.483.773	30.102.020	30.732.631	31.375.855	32.031.944
Por Lombardia	FESR	112.906.728	15.187.305	15.491.051	15.800.872	16.116.889	16.439.227	16.768.012	17.103.372
Por Molise	FESR	70.765.241	9.518.771	9.709.146	9.903.329	10.101.396	10.303.424	10.509.492	10.719.683
Por P.A. Bolzano	FESR	26.021.981	3.500.268	3.570.273	3.641.678	3.714.511	3.788.802	3.864.578	3.941.871
Por P.A. Trento	FESR	19.286.428	2.594.255	2.646.140	2.699.062	2.753.044	2.808.105	2.864.269	2.921.553
Por Piemonte	FESR	426.119.322	57.318.144	58.464.506	59.633.796	60.826.472	62.043.003	63.283.862	64.549.539
Por Toscana	FESR	338.466.574	45.527.801	46.438.357	47.367.124	48.314.467	49.280.756	50.266.371	51.271.698
Por Umbria	FESR	149.975.890	20.173.550	20.577.021	20.988.562	21.408.333	21.836.500	22.273.230	22.718.694
Por Valle d'Aosta	FESR	19.524.245	2.626.244	2.678.769	2.732.345	2.786.992	2.842.731	2.899.586	2.957.578
Por Veneto	FESR	207.939.920	27.970.405	28.529.814	29.100.410	29.682.418	30.276.066	30.881.588	31.499.219
Por Sardegna ST	FESR	680.671.765	160.537.595	136.972.659	112.400.912	86.791.505	60.112.761	61.315.016	62.541.317

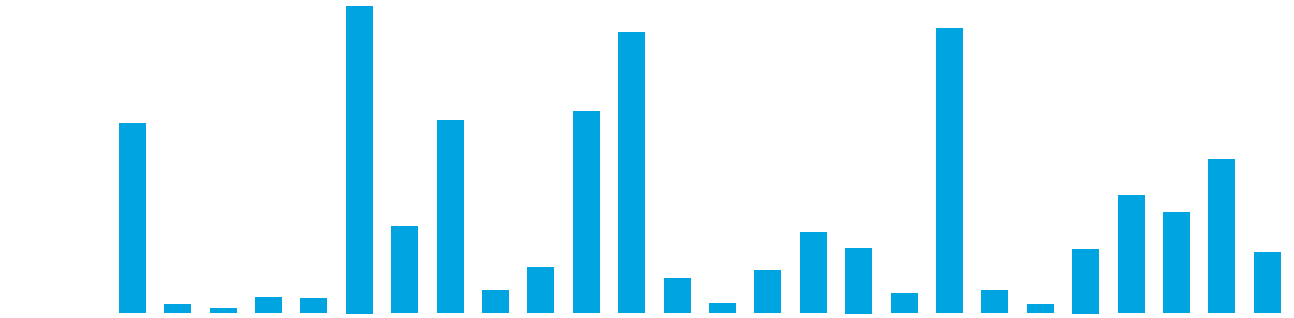
2. IRREGOLARITÀ E FRODI NEI FONDI EUROPEI

Nel solo 2013, ben il 33% delle irregolarità/frodi complessivamente rilevate, hanno interessato i Fondi strutturali europei. Il dato emerso mostra l'elevato livello ormai raggiunto dei sistemi di controllo elaborati dai Paesi europei: a fronte un alto numero di controlli ha fatto seguito un altrettanto numero di irregolarità riscontrate. L'Italia è uno fra i Paesi con il maggiore numero di irregolarità rilevate pari a ben 465. Si tratta di un risultato pari a più del doppio di quello francese (appena 177), comunque maggiore di quello tedesco (300) ma inferiore rispetto a quello del Regno Unito (569). La Repubblica Ceca, con le sue 928 irregolarità rilevate, è al primo posto in questo peculiare ambito. (cfr. **Figura 4**)

Il rapporto fra Paesi muta ancora sensibilmente laddove poi si valuta l'impatto economico collegato alle irregolarità rilevate. Per l'Italia, ad esempio, queste ammontano a circa € 34 milioni, contro i € 13 milioni della Francia (fra i migliori d'Europa), i € 22 milioni della Germania e ai € 56 milioni del Regno Unito (che conferma un dato peggiore di quello italiano). Nello specifico caso italiano è quindi possibile evidenziare come a fronte di un elevato numero di irregolarità segua un minore impatto economico delle stesse. (cfr. **Figura 5**)

FIGURA 4 (Fonte Relazione annuale COLAF anno 2013, p. 51)

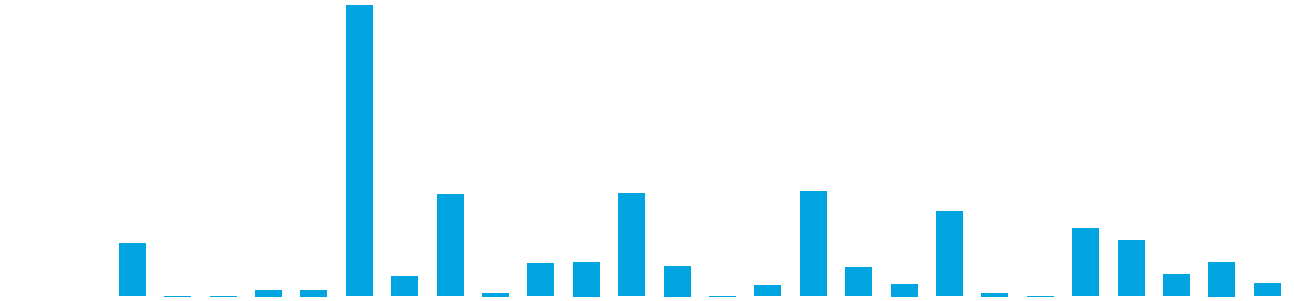
NUMERO IRREGOLARITÀ PER PAESE UE



	UK	AT	MT	DK	SI	CZ	PT	ES	SE	SK	HU	PL	LV	FI	EE	GR	LT	BG	RO	BE	CY	NL	IE	DE	IT	FR
SERIE 1	569	18	7	46	39	928	256	583	61	135	610	850	105	28	126	238	189	55	859	61	18	187	353	300	465	177

FIGURA 5 (Fonte Relazione annuale COLAF anno 2013, p. 52)

IMPORTO IRREGOLARITÀ PER PAESE UE

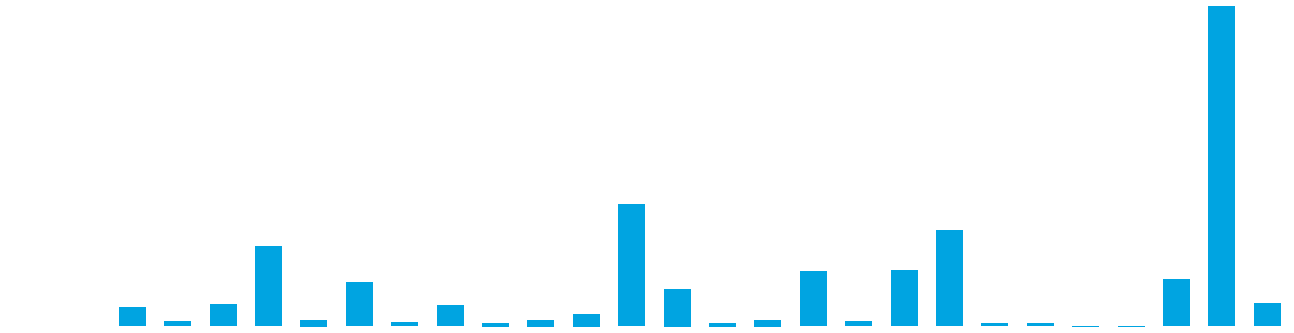


	UK	AT	MT	DK	SI	CZ	PT	ES	SE	SK	HU	PL	LV	FI	EE	GR	LT	BG	RO	BE	CY	NL	IE	DE	IT	FR
SERIE 1	56.	943	363	3.3	4.0	296	20.	103	3.1	35.	35.	130	32.	6.8	12.	106	30.	13.	86.	2.8	1.1	70.	57.	22.	34.	13.

La situazione italiana risulta tuttavia grave per quanto riguarda invece le frodi segnalate e il relativo importo. Nel solo 2013 sono state infatti rilevate ben 280 frodi, per un importo di circa € 56,7 milioni. Seconda, dopo l'Italia, è la Polonia che, però, esprime un quadro di gran lunga meno grave del nostro con sole 105 frodi segnalate (meno della metà di quelle italiane) per un importo di €39,4 milioni. Davvero difficile appare quindi il confronto con la Germania, che segnala appena 41 frodi, sebbene tutte di valore rilevante, per un importo totale di circa €23,6 milioni (in ogni caso la metà dell'importo italiano). Il confronto da ultimo quasi impossibile con il Regno Unito (14 frodi dal valore totale di €4,71milioni) o la Francia (19 frodi per €1,52 milioni). (cfr. **Figure 6-7**)

FIGURA 6 (Fonte Relazione annuale COLAF anno 2013, p. 53)

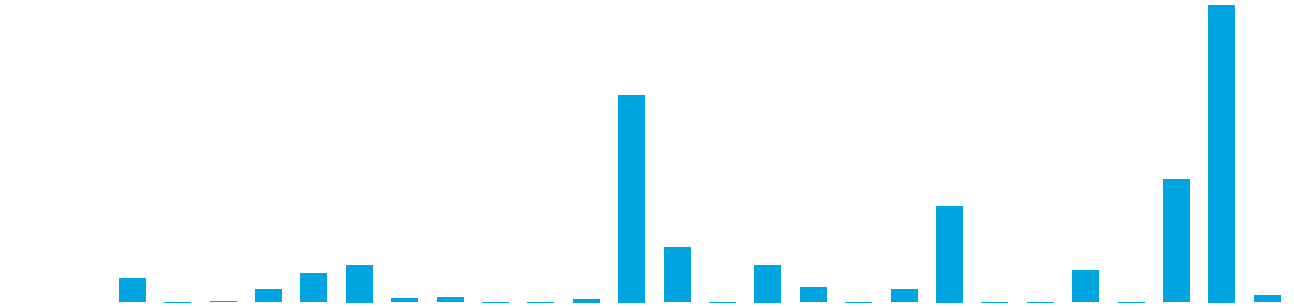
NUMERO FRODI PER PAESE UE



	UK	AT	MT	DK	SI	CZ	PT	ES	SE	SK	HU	PL	LV	FI	EE	GR	LT	BG	RO	BE	CY	NL	IE	DE	IT	FR
SERIE 1	14	3	18	69	4	38	3	18	3	4	12	105	31	2	5	48	2	49	82	2	3	1	1	41	280	19

FIGURA 7 (Fonte Relazione annuale COLAF anno 2013, p. 54)

IMPORTO FRODI PER PAESE UE



	UK	AT	MT	DK	SI	CZ	PT	ES	SE	SK	HU	PL	LV	FI	EE	GR	LT	BG	RO	BE	CY	NL	IE	DE	IT	FR
SERIE 1	4.71	34.6	346.2	2.61	5.28	7.31	955.	1.10	42.1	237.	895.	39.4	10.7	179.	7.53	3.09	10.6	2.56	18.5	390	13.8	6.34	25.2	23.6	56.7	1.52

Il dato esaminato è poi confermato dal confronto fra la situazione italiana e quella europea considerando che, nel periodo di riferimento 2013, in Italia, rispetto la media europea, appare maggiore l'incidenza delle frodi rispetto le irregolarità complessivamente rilevate. A fronte infatti del rapporto europeo di 11% Frodi contro l'89% Irregolarità, segue il dato italiano del 37% Frodi e il 63% di Irregolarità. (cfr. **Figure 8-9**)

FIGURA 8 (Fonte Relazione annuale COLAF anno 2013, p. 44)

UNIONE EUROPEA · Raporto Irregolarità - Frodi · Anno 2013

FIGURA 9 (Fonte Relazione annuale COLAF anno 2013, p. 44)

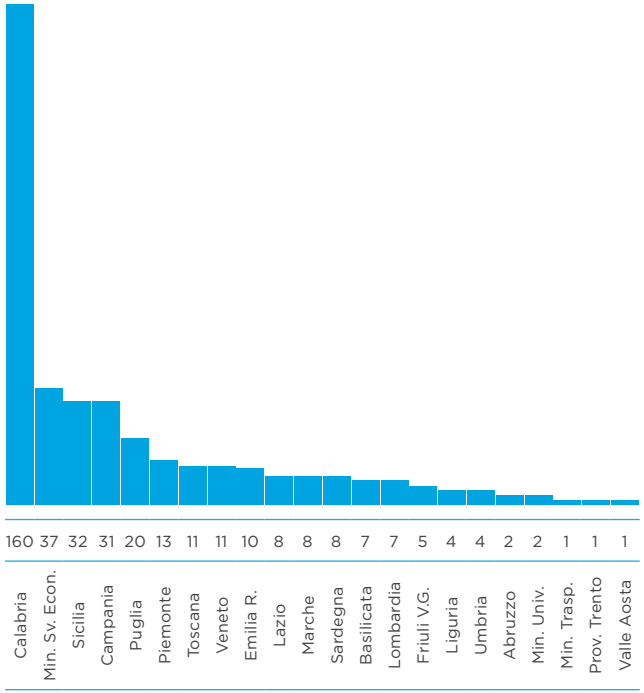
ITALIA · Raporto Irregolarità - Frodi · Anno 2013

3. LA SITUAZIONE ITALIANA

In Italia, nel corso dell'anno 2013 sono state comunicate all'OLAF 383 segnalazioni di irregolarità/frodi (di cui 26 riferite alla programmazione 2000/2006 e le restanti 134 alla programmazione 2007/2013). La maggior parte di queste, pari a 160, sono state segnalate dalla sola Regione Calabria, seguita dalla Sicilia e dalla Campania (cfr. **Figura 10**).

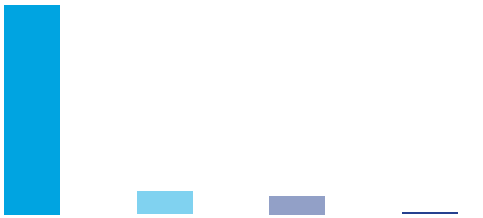
FIGURA 10 (Fonte Relazione annuale COLAF anno 2013, p. 61)

COMUNICAZIONI SEGNALATE · Anno 2013



Il fondo maggiormente interessato dalle irregolarità è il FESR con 322 comunicazioni pari all'88,3% del totale di quelle complessivamente rilevate (cfr. **Figura 11)**.

FIGURA 11 (Fonte Relazione annuale COLAF anno 2013, p. 62)



	FESR	FSE	FEOGA	SFOP
Totale	322	33	27	1

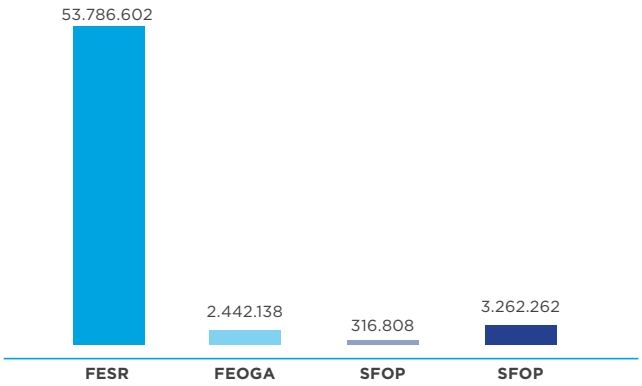
Nel rapporto fra irregolarità e frodi appare prevalente il dato afferente alle prime, atteso il diverso periodo di riferimento considerato (cfr. **Figura 12**).

FIGURA 12 (Fonte Relazione annuale COLAF anno 2013, p. 63)

	Irregolarità	Sospetta Frode
Totale	311	72

L'impatto finanziario delle 383 segnalazioni di irregolarità/frode è complessivamente pari a € 59.807.810 di cui € 53.786.602 relativi al fondo FESR, contro i 2.442.138 dei fondi FEOGA, i 316.808 dei fondi SFOP e i 3.262.262 del fondi FSE (cfr. **Figura 13**)

FIGURA 13 (Fonte Relazione annuale COLAF anno 2013, p. 66)



Dalla figura 13 si evince come, nel corso dell'anno 2013, le Autorità di Gestione hanno definito ben 832 casi, dei quali 250 riguardano i fondi FESR. Il maggior numero dei casi è concentrato nella Regione Abruzzo (112). Rileva l'assenza, nella presente classifica, della Regione Lazio che dunque non ha ancora provveduto a definire i casi di irregolarità rilevati. Nel complesso le regioni che hanno maggiormente invece contribuito con un più alto numero di "casi chiusi" sono la Puglia, la Sardegna, la Calabria e l'Abruzzo. La Puglia è l'unica regione che ha definito casi della programmazione 2007/2013. (cfr. **Figura 14**)

FIGURA 14 (Fonte Relazione annuale COLAF anno 2013, p. 78)

	AÑO 2013				
FONDO/Autorità	PROGRAMACIÓN				
	1989-1993	1994-1999	2000-2006	2007-2013	Total complessivo
SFOP			**36**		**36**
Campania			11		11
Sicilia			18		18
Puglia			7		7
FEOGA-sez. OR	**4**	**10**	**525**		**539**
Basilicata			24		24
Liguria		1			1
Calabria			119		119
Sardeña	1		152		153
Puglia			227		227
Toscana		2			2
Veneto		1	2		3
Min. Pol. Agricole	3				3
Molise			1		1
Lazio		5			5
Piemonte		1			1
FESR	**3**	**14**	**172**	**61**	**250**
Campania	1	3			4
Abruzzo	1		111		112
Liguria		6			6
Prov. A. Trento		1			1
Friuli V. G.			1		1
Puglia		2		61	63
Veneto		1			1
MiSE	1	1	55		57
Min. Università			5		5
FSE			**7**		**7**
Prov. A. Trento			1		1
MiSE			1		1
Lazio			5		5
Totale complessivo	**7**	**24**	**740**	**61**	**832**

Delle somme coinvolte in irregolarità (indistintamente per tutti i fondi) le Autorità di Gestione dichiarano di aver recuperato € 7.011.102, di cui l'89% della quota totale è legata al periodo di programmazione 2000/2006 (vedi Figura 14). Nella presente tabella tabella figurano ai primi posti la Regione Campania, Sicilia e Puglia mentre non figura la Regione Lazio (come molte altre Regioni). (cfr. **Figura 15**)

Per lo stesso periodo di riferimento i casi invece definiti per decertificazione ammontano complessivamente a € 57.564.228, con la Puglia prima in classifica seguita da Calabria, Sardegna e Campana (cfr. **Figura 16**).

FIGURA 15 (Fonte Relazione annuale COLAF anno 2013, p. 79)

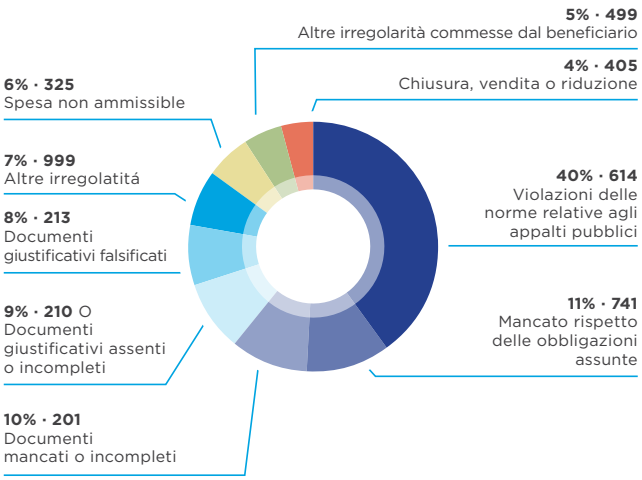
ANNO 2013				
Autorità	PROGRAMMAZIONE			
	1989-1993	1994-1999	2000-2006	Total complessivo
Campania			3.111.631	3.111.631
Sicilia			2.475.379	2.475.379
Puglia		480.000	53.923	533.923
Min. Università			315.987	315.987
Abruzzo			192.162	192.162
Min. Pol Agricole	174.841			174.841
Calabria			70.000	70.000
Liguria		59.770		59.770
Prov. A. Trento		37.908		37.908
Sardeña	0		26.312	26.312
Toscana		13.299		13.299
Totale complessivo	**174.841**	**509.977**	**6.245.394**	**7.011.212**

FIGURA 16 (Fonte Relazione annuale COLAF anno 2013, p. 79)

ANNO 2013				
Autorità	PROGRAMMAZIONE			
	1994-1999	2000-2006	2007-2013	Total complessivo
Puglia		24.535.186	1.772.908	26.308.094
Min. Sv. Economico		14.240.273		14.240.273
Calabria		7.731.904		7.731.904
Sardeña		3.327.507		3.327.507
Campania		2.772.078		2.772.078
Abruzzo		2.513.115		2.513.115
Liguria	307.182			307.182
Prov. A Trento		229.758		229.758
Veneto		102.386		102.386
Molise		31.931		31.931
Basilicata		0		0
Totale complessivo	**307.182**	**55.484.138**	**1.772.908**	**57.564.228**

Dunque, solo una modesta parte degli importi coinvolti in irregolarità / frodi appare recuperata,essendo molto più alto l'ammontare delle somme oggetto di decertificazione. Quanto all'oggetto delle irregolarità / frodi, il grafico della figura 16 mostra, in ultimo, come le stesse siano per ben il 40% dei casi riconducibili alla violazione delle norme relative agli appalti pubblici. Si precisi che dette irregolarità non sono necessariamente derivanti da fenomeni anche latamente riconducibili al concetto di corruzione ma anche da più normali violazioni di legge, dipendenti dall'alto livello di incertezza normativa che è presente nel settore (cfr. Capitolo I) (cfr. **Figura 17**).

FIGURA 17 (Fonte Relazione annuale COLAF anno 2013, p. 76)



Elenco della casistica raggruppata per macro voce riferita al codice "614"	
Assenza nel fascicolo di progetto dell'evidenza di avvenuta pubblicazione del bando e degli esiti di gara	Ricorso alla procedura di urgenza senza giustificato motivo
Mancato rispetto dei termini di pubblicazione del bando	Cambiamento della commissione di gara non supportato da motivazione e autorizzazione
Procedura negoziata senza previa pubblicazione del bando ed assenza di pubblicità per la manifestazione d'interesse utilizzata	Mancanza della dichiarazione di indipendenza dei membri della commissione di gara
Carenza documentale relativa alla procedura di gara	Il contratto di appalto risulta stipulato prima del termine di cui all'art. 11 comma 10 del D. Lgs. 163/06
Carenza documentale relativa alla gara per la progettazione a direzione lavori	Frazionamento artificioso delle attività di progettazione
Assenza della documentazione inerente la gara per l'affidamento dei lavori	Mancato rinvenimento dell'allegato meccanografico al verbale di gara
Irregolarità nella procedura di affidamento per l'esecuzione dei lavori	Mancato espletamento dell'iter conclusivo dell contabilità finale

ALLEGATO 2

QUADRO RIASSUNTIVO DEGLI INTERVENTI DI EMENDAMENTO AL CODICE DEI CONTRATTI PUBBLICI (2006 - 2014).

1) Legge 12 luglio 2006, n. 228, di conversione, con modificazioni, del d.l. 12 maggio 2006, n. 173, c.d. *milleproroghe,* che ha operato la sospensione, sino al 1 febbraio 2007, di molte disposizioni che innovavano nella materia, recependo nel nostro ordinamento di istituti che spostavano il confine tra regole e flessibilità verso quest'ultima e che, conseguentemente, il legislatore guardava con sospetto. Il riferimento è, ad esempio, alle norme: sulle centrali di committenza (art. 33, commi 1, 2 e 3); sull'avvalimento, limitatamente al divieto, a carico di chi mette a disposizione i requisiti, di partecipare ai lavori come appaltatore o subappaltatore (art. 49, comma 10); sul dialogo competitivo (art. 58); sugli accordi quadro (art. 59); sulla procedura negoziata (artt. 56 e 57); sull'appalto integrato nei settori ordinari (art. 53, commi 2 e 3). In luogo delle disposizioni sospese, si sono continuate, invece, ad applicare e hanno rivissuto le disposizioni della legge Merloni, già abrogate dall'art. 256, comma 1, del Codice.

2) Il d.lgs. 26 gennaio 2007, n. 6 (primo decreto correttivo) ha apportato alcune modifiche di impatto minimo, estendendo il termine di sospensione degli istituti già sospesi al 1° agosto 2007.

3) Il d.lgs. 31 luglio 2007, n. 113 (secondo decreto correttivo), in vigore dal successivo 1° agosto, ha apportato invece rilevanti modifiche alla disciplina codicistica in materia di appalto integrato, di procedura negoziata, di dialogo competitivo, di accordo quadro, di concorsi di idee e progettazione, di finanza di progetto, di opere di infrastrutturazione primaria, di subappalto, di sicurezza sul lavoro, di infrastrutture strategiche, di *leasing* immobiliare. Le norme sospese dal d.l. n. 173/2006 sono tornate a vivere così come modificate dal d.lgs. n. 113/2007 o, se non modificate, nella loro formulazione originaria. Tuttavia, l'operatività di alcuni istituti quali il dialogo competitivo e l'appalto integrato è stata rinviata.

4) Sentenza della Corte Cost. n. 401/2007 che si è pronunciata sui ricorsi proposti in via principale da alcune Regioni che avevano lamentato la violazione, da parte delle norme vigenti, di prerogative costituzionali regionali ed ha sostanzialmente salvato il Codice dei contratti pubblici e confermato la sostanziale coerenza del nuovo testo normativo con il riparto di legislazione previsto dal riformato Titolo V della Costituzione. In linea con la propria precedente giurisprudenza, la Corte ha difatti ribadito la sussistenza della legislazione esclusiva dello Stato *ex* art. 117, comma 2, lett. e), Cost. in nome della clausola della tutela della concorrenza: la legittimità della disciplina da parte dello Stato deve essere valutata alla stregua della proporzionalità e della ragionevolezza delle singole disposizioni rispetto alla funzione primaria dell'apertura alla concorrenza.

5) Procedura di infrazione della Commissione Europea n. 2007/2309 in relazione ad alcune disposizioni del Codice dei contratti pubblici A fronte del quadro normativo che si era così delineato, la Commissione Europea aveva però avviato contro l'Italia, ex art. 226 del Trattato. In particolare, nella lettera di costituzione in mora di cui alla nota C(2008) 0108 del 30 gennaio 2008, erano state segnalate una serie di disposizioni ritenute incompatibili con le direttive comunitarie o incomplete rispetto alle corrispondenti regole delle direttive di cui dovevano costituire recepimento. Si tratta delle disposizioni: sugli appalti aggiudicati a scopo di rivendita o locazione a terzi (art. 24, comma 1); sui soggetti ai quali possono essere affidati i contratti pubblici (art. 34, comma 1); sulla partecipazione dei raggruppamenti temporanei di imprese e dei consorzi (art. 37, comma 11); sulla verifica della capacità dei candidati (artt. 41, comma 4 e 42, comma 4; art. 48; art. 74, comma 6); sull'iscrizione dei fornitori o prestatori di servizi in elenchi ufficiali (art. 45): sulla possibilità di avvalersi della capacità dei terzi, c.d. avvalimento (art. 49, comma 6); sul dialogo competitivo (art. 58, commi 13 e 15); sulle informazioni dei candidati offerenti (art. 79, commi 1 e 2); sui criteri utilizzati per l'aggiudicazione dell'appalto (art. 83, comma 4); sull'attribuzione diretta di appalti pubblici in caso di fallimento o di risoluzione del contratto (art. 140, comma 1); *sul project financing* (artt. 152-160); sulla realizzazione di opere di urbanizzazione a scomputo del contributo previsto per il rilascio del permesso di costruire (art. 32, comma 2, lett. g); sulla società pubblica di progetto (art. 172); sulle disposizioni relative ad infrastrutture strategiche (art. 174, comma 5); sulle regole applicabili alle infrastrutture strategiche nel settore dell'energia (art. 179, comma 7).

Venivano, inoltre, censurate norme contenenti riferimenti ad altre disposizioni del Codice (c.d. riferimenti incrociati) ritenuti erronei e che non appaiono garantire l'applicazione corretta del diritto comunitario degli appalti pubblici. Infine, veniva segnalato il mancato recepimento di alcune disposizioni della direttiva 2004/17/CE (artt. 12, 35, 39, par. 2, direttiva 2004/17/CE).

6) D.lgs. 11 settembre 2008, n. 152 (terzo decreto correttivo), varato per rispondere alle censure della Commissione Europea, ma anche per dare soluzione ad alcune ulteriori problematiche emerse già nel corso delle prime applicazioni concrete delle norme del Codice. Il provvedimento, da un lato, contiene le *«disposizioni di adeguamento comunitario»,* che, appunto, hanno la finalità di recepire le osservazioni contenute nella procedura d'infrazione già descritta; in tale gruppo di norme, risalta la sostanziale riforma della "finanza di progetto", con l'integrale riformulazione delle procedure di scelta del concessionario previste dall'art. 153 del Codice. Vi sono, però, anche modifiche alla disciplina pre-vigente in tema di accesso agli atti (art. 13), di raggruppamenti temporanei di imprese e consorzi (art. 37), di controllo dei requisiti per la partecipazione alle gare (art. 48), avvalimento (art. 49), di dialogo competitivo (art. 58), di progettazione (art. 90), valutazione dell'offerta economicamente più vantaggiosa (art. 83), di lavori sotto soglia (artt. 122 e 124), di società pubblica di progetto (art. 172), di promotore di infrastrutture (art. 175). Dall'altro lato, vi sono le *«disposizioni di coordinamento»* che apportano al Codice ulteriori modificazioni e integrazioni, indipendentemente dalla richiamata procedura d'infrazione comunitaria; da segnalare, a tal riguardo, in primo luogo, l'inserimento, all'art. 3 del Codice, del

comma 15 ter norma questa che, per la prima volta, ha definito i *«contratti di partenariato pubblico privato»,* richiamando espressamente gli «indirizzi comunitari vigenti» e le decisioni Eurostat; altre modifiche o integrazioni, tra le tante, riguardano i consorzi stabili (art. 36), i raggruppamenti temporanei di imprese (art. 37), i requisiti di partecipazione alle gare (art. 38), la qualificazione (art. 39), la capacità economica delle imprese (art. 41), il dialogo competitivo (art. 58), le offerte (art. 74), le garanzie a sostegno delle offerte (art. 75), la disciplina delle offerte anomale (art. 88), il subappalto (art. 118), il collaudo (art. 120), la finanza di progetto (artt. 159 e 160), il leasing immobiliare pubblico (art. 160 bis), la definizione delle riserve (art. 240 bis), le norme transitorie di cui all'art. 253.

7) Legge 27 febbraio 2009, n. 14, di conversione del d.l. 30 dicembre 2008, n. 207, recante *«Proroga di termini previsti da disposizioni legislative e disposizioni finanziarie urgenti»*, pubblicata in G.U. 28 febbraio 2009, n. 49.

8) Legge 18 giugno 2009, n. 69, *«Disposizioni per lo sviluppo economico, la semplificazione,la competitività nonché in materia di processo civile»,* pubblicata in G.U. 19 giugno 2009, n. 140 – Supplemento ordinario n. 95.

9) Legge 15 luglio 2009, n. 94, *«Disposizioni in materia di sicurezza pubblica»,* pubblicata in G.U. 24 luglio 2009, n. 170 – Supplemento ordinario n. 128.

10) Legge 23 luglio 2009, n. 99, *«Disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonché in materia di energia»,* pubblicata in G.U. 31 luglio 2009, n. 176 – Supplemento ordinario n. 136.

11) Legge 3 agosto 2009, n. 102, di conversione, con modificazioni, del d.l. 1 luglio 2009, n. 78, recante *«Provvedimenti anticrisi, nonché proroga di termini e della partecipazione italiana a missioni internazionali»,* pubblicata in G.U. 4 agosto 2009, n. 179 – Supplemento ordinario n. 140. Tale provvedimento contiene l'importante riforma dell'istituto delle offerte anomale di cui all'art. 87 del Codice.

12) Legge di conversione del d.l. 25 settembre 2009, n. 135, recante *«Disposizioni urgenti per l'attuazione di obblighi comunitari e per l'esecuzione di sentenze della Corte di giustizia delle Comunità europee»,* pubblicata in G.U. 25 settembre 2009, n. 223 (rettifica G.U. 30 settembre 2009, n. 227). Tale provvedimento contiene le modifiche di adeguamento degli artt. 34, 38 e 49 del Codice alla sentenza della Corte giustizia CE 19 maggio 2009, resa nella causa C-538/07, in tema di partecipazione alle gare di imprese che si trovino in una situazione di controllo.

13) Il d.lgs. 12 aprile 2010, n. 53 pubblicato in *G.U.,* serie generale, 12 aprile 2010, n. 84, ha recepito la direttiva 2007/66/CE (che modifica le direttive 89/665/CEE e 92/13/CEE) del relativa al miglioramento dell'efficacia delle procedure di ricorso in materia d'aggiudicazione degli appalti pubblici, la c.d. "Direttiva Ricorsi". La relativa delega era contenuta nell'art. 44 della legge comunitaria del 2008, legge 7 luglio 2009, n. 88. La nuova disciplina, tra l'altro, ha introdotto molteplici e rilevanti novità in tema di: rapporti e termini tra aggiudicazione definitiva e stipula del contratto (art. 11 del Codice); accordo bonario (art. 240); arbitrato, con la previsione di un tetto massimo per il compenso del Collegio Arbitrale e della possibilità di impugnare il lodo anche per *«violazione delle regole di diritto relative al merito della controversia»* (art. 241); giurisdizione esclusiva del G.A. che è stata estesa *«alla dichiarazione di inefficacia del contratto a seguito di annullamento dell'aggiudicazione e alle sanzioni alternative»* (art. 244); regole del processo in materia di contratti pubblici innanzi al TAR e al Consiglio di Stato, con la previsione, tra l'altro, dell'accorciamento dei termini di impugnazione e di quelli processuali e della competenza territoriale inderogabile e rilevabile d'ufficio; inefficacia o meno del contratto in caso di violazioni gravi e non gravi (nuovi artt. 245 bis e ter); nuove sanzioni amministrative applicabili da parte del G.A. (nuovo art. 245 quater); tutela in forma specifica e per equivalente in caso di mancata dichiarazione di inefficacia del contratto (nuovo art. 245 quinquies); disposizioni sulla disciplina processuale per le infrastrutture strategiche (art. 246).

14) Le norme processuali del Codice dei contratti pubblici sono state, poi, traghettate nel nuovo Codice del processo amministrativo, di cui al d.lgs. 104 del 2 luglio 2010. Gli artt. 244 – 246 del d.lgs. 163/2006 ora operano, infatti, un rinvio agli artt. 119 comma 1 lettera a), 120-125 e 133 lett. e) n.1 e 2 del d.lgs. 104/2010. All'interno del Codice del processo, vi è dunque un vero e proprio rito speciale per le controversie in materia di contratti pubblici.

15) Regolamento di attuazione al Codice dei contratti pubblici che sostituisce il d.P.R. 554/1999 relativo ai soli lavori e che disciplina i settori dei lavori, servizi e forniture. Il nuovo Regolamento, approvato in via definitiva dal Consiglio dei ministri in data 18 giugno 2010, ha preso il numero del d.P.R. 5 ottobre 2010 n. 207 ed è entrato in vigore dopo 180 giorni dalla sua pubblicazione, ossia in data 9 giugno 2011.

16) D.l. 13.05.2011 n. 70 pubblicato su G.U. del 13.05.2011 n.110 - Semestre Europeo - Prime disposizioni urgenti per l'economia, c.d. *"decreto sviluppo",* convertito con modifiche nella l. legge 12 luglio 2011, n. 106. Si tratta di un provvedimento legislativo su larga scala che apporta rilevanti modifiche in vari settori dell'ordinamento tra i quali quello dei contratti pubblici.

Tra le modifiche di maggior rilievo al Codice si segnalano le disposizioni in tema di: tipizzazione e tassatività delle cause di esclusione dalla gara (art. 38) che sono estese puntualizzate e precisate; controlli essenzialmente ex post sul possesso dei requisiti di partecipazione alle gare da parte delle stazioni appaltanti (art. 48,commi 2 bis e 2 ter); standardizzazione dei bandi di gara "bandi-tipo" (art. 64, comma 4bis) disposti in base ai modelli approvati dall'Autorità di Vigilanza dei Contratti Pubblici, previo parere del Ministero infrastrutture e trasporti e sentite le categorie professionali interessate con la

previsione di un obbligo di motivazione in capo alle stazioni appaltanti per eventuali deroghe al bando; forma e contenuto delle offerte in ordine ai requisiti di partecipazione generale e di partecipazione economico finanziaria (art.74 comma 2bis); introduzione di un tetto di spesa (5%) per le "varianti" in corso d'opera (art.132); scorrimento della graduatoria in caso di risoluzione del contratto (art.140); finanza di progetto (art.153, commi 9,19,19 bis, 20) si tratta delle disposizioni sull'asseverazione, diritto prelazione e leasing su iniziativa privata; infrastrutture strategiche di preminente interesse nazionale ed in particolar modo sul progetto preliminare (art.165, commi 2,3,4,5, introdotti 5bis e 7 bis) e definitivo (art.166, commi 3, 4, 4bis, 5bis e ter), sulla procedura di approvazione dei progetti (art.167, commi 5, 7bis e 10) sulla conferenza di servizi e varianti (art.168 e 169), sugli accordi bonari (art.240, commi 1, 5, 6, 10, 14), sul limite alla possibilità di iscrivere riserve (240bis).

17) Ulteriori interventi correttivi al Codice sono stati apportati dal d.l. 06.12.2011 n. 201 (in Supplemento ordinario n.251 alla G.U. n.284 del 6.12.2011) recante **"disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici",** e convertito con modifiche nella l. legge 22 dicembre 2011, n. 214 cosiddetta legge "Salva Italia" pubblicata su G.U. del 27.12.2011 n.300. Si tratta di un provvedimento legislativo che apporta rilevanti modifiche in tema di sviluppo ed equità, rafforzamento del sistema finanziario nazionale e internazionale, consolidamento dei conti pubblici, pensioni, riduzione del debito pubblico e di spese, promozione e tutela della concorrenza (liberalizzazioni), sviluppo industriale e sviluppo infrastrutturale.

18) Anche la legge *Salva-Italia* tra le misure per lo sviluppo infrastrutturale ha apportato modifiche al d.lgs.163/2006 in tema di contratti pubblici. Si segnalano le disposizioni: volte a favorire l'accesso delle piccole e medie imprese (art.2 comma 1bis e 1ter); sulla definizione di concessione di lavori pubblici (art.3,comma 11); sulla consultazione preliminare per i lavori di importo superiore a 20 milioni di euro da affidarsi con procedura ristretta (art.112 bis); sulle caratteristiche della concessione di lavori pubblici (art. 143 commi 1, 4, 5, 8 – in tema di opere connesse a quelle oggetto della concessione; equilibrio economico finanziario della concessione; durata fino a 50 anni); sulle infrastrutture strategiche ed in particolar modo in tema di programmazione (art. 161, commi 1 bis e ter), compiti del Ministero delle infrastrutture (art.163, comma 2, lett. f- ter), approvazione unica del progetto preliminare (art. 169 bis), promotore e finanza di progetto (art. 175, commi 1-14).

19) Altri interventi sono apportati dal d.l. 24.01.2012 n. 1 cosiddetto decreto "**Cresci Italia**" recante "disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività", presentato in parlamento per la conversione il 24 gennaio e convertito con modifiche nella l. legge 24, marzo 2012, n.27 (GU n.19 del 24-1-2012 - Suppl. Ordinario n. 18). Tra le modifiche al d.lgs.163/2006, vi sono le disposizioni in tema di: concessione di lavori pubblici (art.143 comma 5 -che riguardo alle modalità di utilizzazione ovvero di valorizzazione dei beni immobili aggiunge che, per la concessione di cui all'art.153, sono definite nello studio di fattibilità- e comma 7 concernente il preliminare coinvolgimento degli istituti finanziatori nonché all'art.144, il comma 3bis volto ad assicurare adeguati livelli di bancabilità delle opere); project bond (art. 157); subentro (art. 159,comma 1 lett. a)); introduzione del contratto di disponibilità (art. 3,comma 15-bis.1. e 160-ter); infrastrutture strategiche (art. 175 comma 14 che introduce il diritto di prelazione nella finanza di progetto e art.177 comma 2 sul documento a base di gara per l'affidamento della concessione). Inoltre la legge ha disposto che si ricorra in via prioritaria alla finanza di progetto art.153 per fronteggiare l'eccessivo affollamento delle carceri.

20) Il decreto legge n.5 del 2012 **"Semplificazioni e sviluppo"** convertito in legge, 4 aprile 2012, n.35 in materia di appalti pubblici riduce gli oneri amministrativi per le imprese pubbliche che partecipano ad appalti pubblici (saranno le amministrazioni aggiudicatrici ad accedere direttamente ai dati e alle informazioni presso la Banca dati nazionali dei contratti pubblici per verificare il possesso dei requisiti di carattere generale, tecnico-organizzativo ed economico finanziario; aggiunge una disposizione specifica per l'affidamento dei contratti di finanziamento all'art.27, comma 1; inserisce l'art.199 bis recante la disciplina delle procedure per la selezione dello sponsor per una disciplina più esaustiva in tema di sponsorizzazioni aventi ad oggetto i beni culturali; introduce modifiche anche al regolamento di attuazione del codice appalti.

21) Il decreto legge 22 giugno 2012, n.83 **"Misure urgenti per la crescita del Paese"** pubblicato in G.U. n.147 del 26.06.2012 convertito in legge 7 agosto 2012, n.134 dispone misure per l'attrazione di capitali privati (capo I) su: project bonds - gli interessi delle obbligazione di progetto emesse dalle società di cui all' art.157 sono soggetti allo stesso regime fiscale previsto per il debito pubblico - ; finanziamento tramite defiscalizzazione di infrastrutture realizzate tramite contratti di PPP; l'indizione della conferenza di servizi per la predisposizione degli studi di fattibilità o progetti preliminari in relazione alle procedure di cui all'art.153 del Codice (tramite inserimento del comma 1bis, art.14bis, LPA); modifiche al contratto di disponibilità e alla percentuale minima di affidamento a terzi nelle concessioni (incrementata con la soglia del 60%). Sono, inoltre, disposte misure di semplificazione e accelerazione (capo II) in particolare per l'utilizzazione di crediti d'imposta per la realizzazione di opere infrastrutturali e investimenti finalizzati al miglioramento dei servizi pubblici locali.

22) Con il d.l. del 6 luglio 2012 n. 95 sulla ***spending review*** convertito in l. n. 135 del 7.8.2012 si segnalano le seguenti modifiche al codice Appalti: all'art. 41, comma 2, l'aggiunta del periodo "sono illegittimi i criteri che fissano, senza congrua motivazione, limiti di accesso connessi al fatturato aziendale"; all'art.75,comma 1, in riferimento all'importo della garanzia a corredo dell'offerta di procedure di gara realizzate in forma aggregata da centrali di committenza (nella misura massima del 2% del prezzo base); all'art.113, comma 1, sempre per il caso di procedure di gara realizzate in forma aggregata da centrali di committenza, con riguardo all'importo della cauzione definitiva (nella misura massima del 10 per cento dell'importo contrattuale). Si segnala, inoltre, la disposizione di cui all'art.4 della legge 135/2012 relativa alla messa in liquidazione e privatizzazione di società pubbliche.

23) D.lgs. 19 settembre 2012 n. 169, *(Ulteriori modifiche ed integrazione al decreto legislativo 13 agosto 2010, n. 141)*, si segnala la modifica all'art. 75 del Codice degli appalti. In tema di "Garanzie a corredo dell'offerta", la Novella prevede che l'offerente possa liberamente optare fra fideiussione bancaria, assicurativa o quella rilasciata dagli intermediari iscritti nell'albo di cui all'articolo 106 del decreto legislativo 1° settembre 1993, n. 385.

24) Con il d.l. 19 ottobre 2012 n. 179, (Misure urgenti per la crescita del Paese), poi convertito in Legge 17 Dicembre 2012, n. 221, il Legislatore ha indicato nuove condizioni di svincolo parziale delle garanzie di buone esecuzione, prestate all'ente aggiudicatario. L'art. 237-bis, così introdotto, prevede che la garanzia possa essere parzialmente svincolata nel caso in cui in cui le opere realizzate siano state poste in esercizio in tutto o in parte.

25) Legge del 6 novembre 2012 n. 190, che delinea un sistema finalizzato ad assicurare la prevenzione e repressione del fenomeno della corruzione. Con riferimento alla disciplina dei contratti pubblici sono prescritti gli obblighi delle stazioni appaltanti di rendere note le informazioni relative ai singoli contratti stipulati. I dati, una volta elaborati, sono poi trasmessi all'AVCP che provvederà a sua volta a pubblicarli. L'onere in esame, formalizzato al comma 32 della legge 190, risulta prodotto di quell'indirizzo normativo che guarda alla trasparenza dell'azione ammnistrativa, quale efficace strumento di lotta al fenomeno corruttivo. Con i commi 17 e seguenti sono poi previste garanzie e restrizioni in materia di arbitrato. La norma indica infatti limiti sul piano della scelta dell'arbitro nonché su quello della definizione del relativo compenso. E' altresì formalizzato il divieto per magistrati, avvocati di stato e membri delle commissioni tributarie di svolgere funzione arbitrale in materia di contratti pubblici. Tali misure forse giustificate dall'insoddisfacente funzionamento dell'istituto, non fanno che allontanarne la regolazione dalla disciplina in tema di arbitrato di diritto comune. Infine i commi 52 e seguenti, modificando la disciplina dei controlli antimafia, mirano da un lato a rendere più efficaci le certificazioni richieste, dall'altro a semplificare i relativi oneri burocratici.

26) Legge 6 giugno 2013 n. 64 di conversione del decreto legge 8 aprile 2013 n. 35, si segnala la modifica all'art. 133 del Codice degli appalti. La Novella definisce le condizioni perché l'esecutore possa esercitare nei confronti della stazione appaltante l'eccezione di compensazione ex art 1460 c.c. Tale disposizione vuole quindi essere una misura che agevola il pagamento dei debiti da parte della pubblica amministrazione.

27) Legge n. 98 del 2013 di conversione del d.l. 21 giugno 2013 n. 69, sono dettate alcune regole finalizzate ad assicurare il rilancio dell'economia nazionale. In aggiunta ad alcune modifiche in tema di concessioni e defiscalizzazione, l'art. 26-bis, rubricato "suddivisione in lotti" introduce, all'art. 2 del Codice, il comma 2-bis. La nuova disposizione prescrive l'obbligo delle stazione appaltanti di motivare in ogni caso, la mancata suddivisione in lotti della gara indetta. La norma denota quindi l'interesse del Legislatore all'apertura del mercato del *Public procurement* alla realtà delle piccole e medie imprese, costituenti l'ossatura del sistema economico nazionale. Degne di nota sono poi le modifiche agli artt. 38 e 118 del Codice aventi formalizzato l'onere della stazione appaltante di provvedere d'ufficio al recupero del documento unico di regolarità contributiva.

28) Legge del 21 febbraio 2014 n. 9, di conversione del decreto legge 23 dicembre 2013 n. 145 che ha introdotto alcune disposizioni in tema di contenimento delle tariffe elettriche e del gas, per la riduzione dei premi RC-auto, per l'internazionalizzazione, lo sviluppo e la digitalizzazione delle imprese, nonché misure per la realizzazione di opere pubbliche ed EXPO 2015. Con riguardo ai contratti pubblici, modificando l'art. 118 del Codice, al fine di assicurare la corretta prosecuzione dei lavori, è così previsto che anche laddove l'affidatario versi in condizioni di difficoltà finanziarie o sia pendente una procedura di concordato preventivo, l'amministrazione possa procedere al pagamento delle prestazioni eseguite, per la realizzazione unitaria dei lavori, a favore degli eventuali soggetti che compongono l'affidatario.

29) Legge del 27 dicembre n. 147 (legge di stabilità 2014), il Legislatore, modificando l'art. 176 del Codice, ha previsto l'onere della stazione appaltante prima di effettuare qualsiasi pagamento in favore del contraente generale, di assicurarsi che lo stesso abbia ottemperato a ciascuno dei relativi oneri. In caso contrario potrà applicare detrazioni o sanzioni.

30) Legge del 23 giugno 2014 n. 89, di conversione del decreto legge 24 aprile 2014 n. 64, ha introdotto alcune disposizioni in tema di semplificazione dell'apparato burocratico ed aggregazione della domanda. Per i comuni non capoluogo di provincia l'art. 9 della legge prevede, ai fini dell'acquisizione di beni e servizi, la partecipazione obbligatoria all'unione dei comuni ex art. 32 del decreto legislativo n. 267 del 2000. Ulteriori disposizioni, dispongono poi l'obbligo delle stazioni appaltanti di assicurare un'adeguata pubblicità degli avvisi e bandi delle gare indette. Tali dati confluiranno altresì sul profilo informatico del

Ministero dei trasporti e delle infrastrutture e su quello dell'Osservatorio dei contratti pubblici.

31) Legge n. 114 del 2014 di conversione del decreto legge n. 90, ha apportato importanti modifiche in tema di semplificazione e trasparenza amministrativa. L'art. 19 abroga l'Autorità di vigilanza dei contratti pubblici, trasferendone le funzioni alla nuova Autorità anticorruzione (ANAC). L'art. 39, modificando il contenuto degli artt. 38 e 46 del Codice, propone una soluzione normativa più aderente al principio del *favor partecipationis.* In caso di incompletezza, mancanza o irregolarità nella documentazione sostitutiva prodotta, l'impresa concorrente può infatti procedere alla integrazione della stessa, regolarizzando quindi la propria partecipazione. Sul punto la norma prevede poi una procedura differenziata a seconda dell'"essenzialità" dell'omissione. L'art. 13-bis infine detta alcune disposizioni in tema di costituzione e gestione delle risorse finanziarie confluenti in un fondo dedicato alla progettazione e innovazione.

32) D.l. 12 settembre 2014 n 133, detta misure urgenti per l'apertura dei cantieri, realizzazione delle opere pubbliche e semplificazione burocratica. Il nuovo comma 4-ter dell'art 174 specifica le condizioni per cui in caso di sviluppo del progetto per stralci funzionali o per fasi successive, il bando possa prevedere la caducazione automatica della gara laddove la sostenibilità finanziaria del progetto non sia assicurata da primari istituiti finanziari entro tre anni. Gli art. 13 e 34 introducono infine norme in materia di project bond e in materia di semplificazione delle procedure in materia di bonifica e messa in sicurezza di siti contaminati.

ALLEGATO 3

DATI PROCEDURE FLESSIBILI IN ITALIA

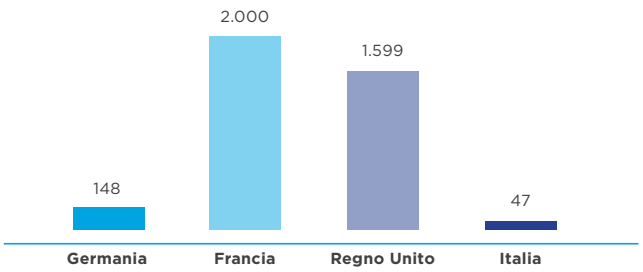
Si possono fornire alcuni dati sulle procedure di dialogo competitivo sinora attivate in Europa e sulla loro distribuzione geografica[114].

Alla fine di ottobre del 2013, sono stati nel complesso pubblicati 8994 atti relativi a procedure di dialogo competitivo. Circoscrivendo la ricerca ai soli bandi, emerge che soltanto 47 di essi sono stati pubblicati in Italia, contro i 2000 della Francia, i 1599 del Regno Unito, i 148 della Germania.

In pratica, la Francia ed il Regno Unito hanno fatto uso del dialogo competitivo con un'intensità rispettivamente 40 volte e 30 volte superiore, all'incirca, rispetto all'Italia, ove l'istituto è nella sostanza rimasto arbitrariamente congelato sino al 2010 (**Figura 1)**.

FIGURA 1 (fonte TED).

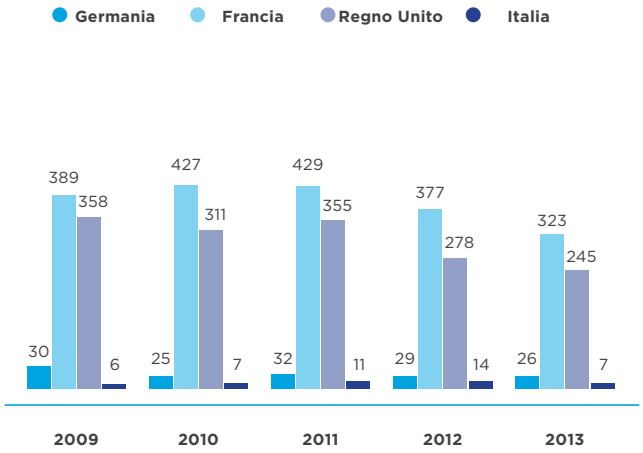
TED · bandi dialogo competitivo per paese



L'Italia è superata, con distacco non marginale, persino da paesi come la Romania, la Slovenia, l'Estonia o la Polonia; ma volendo limitare l'attenzione al confronto con Francia, Inghilterra e Germania, l'istogramma che segue, indicativo del numero di bandi pubblicati per anno, dal 2009 al 2013, offre indicazioni eloquenti (**Figura 2**).

FIGURA 2 (fonte TED)

TED · bandi relativi a procedure di dialogo per paese e per anno

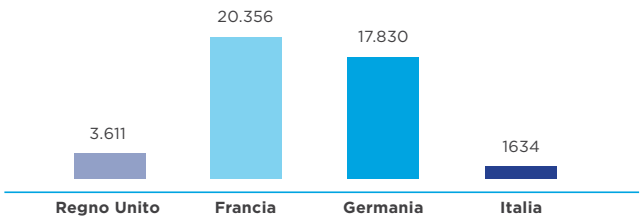


Nel 2009 si contano in Italia 6 bandi per l'esperimento di procedure di dialogo, contro i 358 del Regno Unito e i 389 della Francia; nel 2010 i bandi nazionali sono 7, contro 311 e 427 rispettivamente, nel 2011 passiamo ad 11, contro 355 e 429; nel 2012 arriviamo a 14, contro 278 e 377; le proporzioni non cambiano significativamente, nel 2013.

E' ben vero che la Germania non si distacca dal nostro quanto gli altri due Paesi, tuttavia il quadro va completato con la casistica delle procedure negoziate competitive. Anche su questo versante i dati confermano la riluttanza delle amministrazioni nazionali a fare appello alla flessibilità, diversamente da quanto accade negli altri paesi.

FIGURA 3 (fonte TED)

TED · bandi procedure negoziate competitive per paese



114 Per questi dati, si è attinto dal lavoro di CAFAGNO M., *Flessibilità e negoziazione. Riflessioni sull'affidamento dei contratti complessi*, in Rivista di diritto pubblico comunitario, 2013, pp. 991-1020. L'autore ha ricavato i dati dagli archivi del servizio TED (*Tenders Electronic Daily*) - la versione online del Supplemento alla Gazzetta ufficiale dell'Unione europea, per gli appalti pubblici (http://ted.europa.eu/TED/main/HomePage.do).

I due grafici successivi rielaborano i dati misurando l'incidenza percentuale dei bandi di dialogo competitivo **(Figura 4)** e di procedura negoziata competitiva **(Figura 5),** sul totale dei bandi nei doversi Paesi.

FIGURA 4 (fonte TED)

TED · Incidenza percentuale dei bandi per dialogo competitivo, sul totale dei bandi, per paese

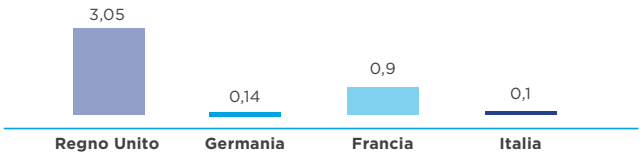
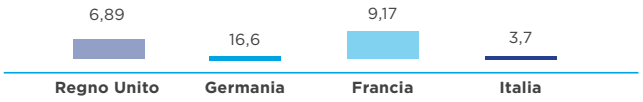


FIGURA 5 (fonte TED)

TED · Incidenza percentuale dei bandi per p. negoziata competitiva, sul totale dei bandi, per paese

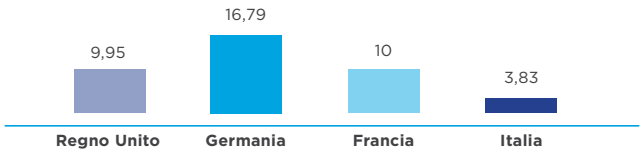


L'Italia si posiziona in coda ad ambedue le classifiche, con un trascurabile 0,1% nell'uso del dialogo ed un modesto 3,7% nell'uso della procedura negoziata competitiva, sopra soglia.

Sommando i valori, otteniamo il grafico seguente, che descrive l'incidenza percentuale congiunta, in ognuno dei paesi, delle due procedure flessibili (**Figura 6**).

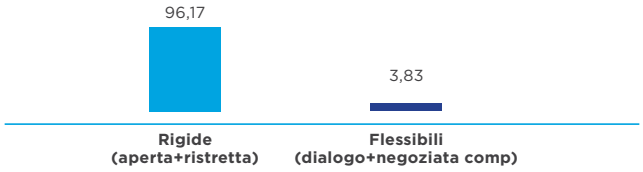
FIGURA 6 (fonte TED)

TED · Incidenza percentuale della sommatoria dei bandi per dialogo e per negoziata comp., su totale bandi



Il rapporto, in Italia, tra procedure flessibili (dialogo più procedura negoziata con bando) e procedure rigide (aperta e ristretta) è rappresentato nella **figura 7**.

FIGURA 7 (fonte TED)



Deve essere anche segnalato che i dati TED si riferiscono ai contratti sopra soglia e dunque misurano l'attitudine al ricorso a procedure flessibili per transazioni impegnative ed economicamente rilevanti.

Al contrario l'Italia si dimostra viceversa molto ben disposta ad impiegare le procedure negoziate, non di rado senza bando, per contratti semplici, di importo modesto, inferiore alle soglie comunitarie. Sul punto, si vedano analisi e tabelle contenute nella relazione annuale per il 2012 dell'Autorità di vigilanza sui contratti pubblici[115]. Tale rapporto rileva, con qualche preoccupazione, una tendenza al crescente impiego di procedure negoziate, ma questa tendenza non deve trarre in inganno; essa non riflette una disponibilità dell'ordinamento interno a fronteggiare la complessità con procedure concorrenziali flessibili, nella logica consentanea al dialogo, bensì incorpora la propensione ad impoverire, spesso a discapito della competizione, le procedure preparatorie dei contratti più esigui e standardizzati, che giacciono al di sotto della guardia europea.

115 Il documento è reperibile sul sito dell' Autorità di vigilanza sui contratti pubblici (oggi ANAC), http://www.avcp.it).

ALLEGATO 4
DATI CORRUZIONE ITALIA IN ITALIA

1. DATI GENERALI SULLA CORRUZIONE IN ITALIA

A scopo meramente esemplificativo e senza alcuna pretesa di esaustività, si possono fornire alcuni dati sulla corruzione in Italia, desunti da alcuni siti istituzionali italiani e comunitari.

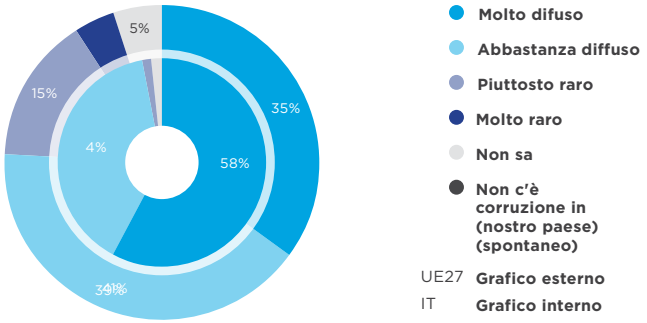
Secondo il Procuratore generale della Corte dei Conti, *"Il fenomeno della corruzione all'interno della P.A. è talmente rilevante e gravido di conseguenze in tempi di crisi come quelli attuali da far più che ragionevolmente temere che il suo impatto sociale possa incidere sullo sviluppo economico del Paese anche oltre le stime effettuate dal servizio Anticorruzione e Trasparenza del ministero della Funzione pubblica, nella misura prossima a 50/60 miliardi di euro all'anno costituenti una vera e propria tassa immorale ed occulta pagata con i soldi prelevate dalle tasche dei cittadini"*[116]. Si tratta, dunque, di un enorme peso che grava sull'intera realtà nazionale e che desta un significativo allarme sociale anche a livello internazionale.

Secondo il *Global Competitiveness Report* 2013-2014[117], la distrazione di fondi pubblici dovuta alla corruzione e alla criminalitàorganizzata, il favoritismo dei pubblici ufficiali e la progressiva perdita di credibilità etica della classe politica agli occhi dei cittadini sono le note più dolenti della governance in Italia, tali da influenzare negativamente la fiducia degli investitori.

La *Commissione Europea*[118] ha cercato di fotografare lo stato di fatto della corruzione in Italia. Tale studio delinea purtroppo una natura sistemica della corruzione, profondamente radicata nelle diverse sfere della vita pubblica. Il documento fornisce alcuni dati desunti dallo Speciale Eurobarometro del 2013, che devono essere letti con la specificazione che si tratta di sondaggi sulla percezione del fenomeno e non di stime reali.

Circa il 97% dei soggetti intervistati ha risposto che il fenomeno della corruzione rappresenta una realtà dilagante nel Paese, contro una media UE del 76% **(Figura 1)**.

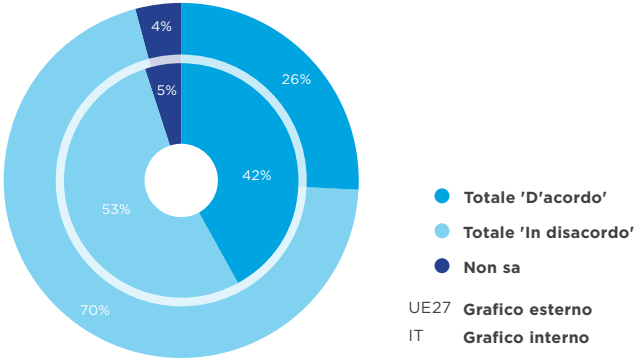
FIGURA 1 (Fonte Speciale Eurobarometro 2013)



Inoltre, a fronte di una media Europea del 26%, il 42% degli intervistati in Italia dichiara di essere d'accordo sul fatto di essere personalmente colpito dalla corruzione nella vita quotidiana, come indicato dalla **figura 2.**

FIGURA 2 (Fonte Speciale Eurobarometro 2013)

Per ciascuno dei seguenti aspeti, mi dica se lei è c'accordo o in disaccordo. È personalmente colpito/a dalla corruzione neclla vita quotidiana



Evoluzione 02-03/2013-09/2011

	UE27		IT	
	EB79.1	EB79.1 - EB76.1	EB79.1	EB79.1 - EB76.1
Totale 'D'accordo'	26%	-3	42%	-4
Totale 'In disaccordo'	70%	+3	53%	+6
Non sa	4%	=	5%	-2

116 Corte dei Conti, 2009, *Giudizio sul rendiconto generale dello Stato 2008*, memoria del Procuratore generale, udienza del 25.06. 2009, Roma..

117 World economic forum - www.weforum.org.

118 *European Commission, Report from the Commission to the Council and the European Parliament. EU anti-corruption report*, Brussels, 3.2.2014.

Nella **figura 3** è indicata la percezione del fenomeno corruttivo in relazione ai vari settori dell'attività produttive. Si noti che il dato italiano è superiore a quello della media Europea di almeno dieci punti in relazione alle gare d'appalto, al rilascio di permessi edilizi, al rilascio di licenze commerciali,al sistema sanitario, alle autorità fiscali,alle autorità competenti per la previdenza e assistenza sociale. Si avvicina al 10% la differenza tra Italia e media europea con riguardo ai partiti politici e ai politici (nazionali e locali) e al settore dell'istruzione. In controtendenza sono i dati che riguardano la polizia e i funzionari doganali e le aziende private.

Inoltre, come mostrato dalla **figura 4,** la corruzione coinvolgerebbe in modo rilevante il settore imprenditoriale, facendo parte della cultura di tale settore (per il 90% degli intervistati nel sondaggio Eurobarometro 2013, a fronte del 67% della media europea). Ancora, l'88% degli intervistati ritiene che in Italia la corruzione ostacoli la libera concorrenza, a fronte del 67% della media europea; l'88% ritiene che la corruzione sia generata da legami troppo stretti tra imprenditoria e politica (contro una media UE del 81%); per il 75% le conoscenze politiche sono l'unico modo per riuscire nel lavoro (contro una media UE del 56%).

FIGURA 3 (Fonte Speciale Eurobarometro 2013)

Secondo lei in (NOSTRO PAESE) tangenti e abusi di potere per ottenere vantaggi personali sono diffusi nei seguenti settori

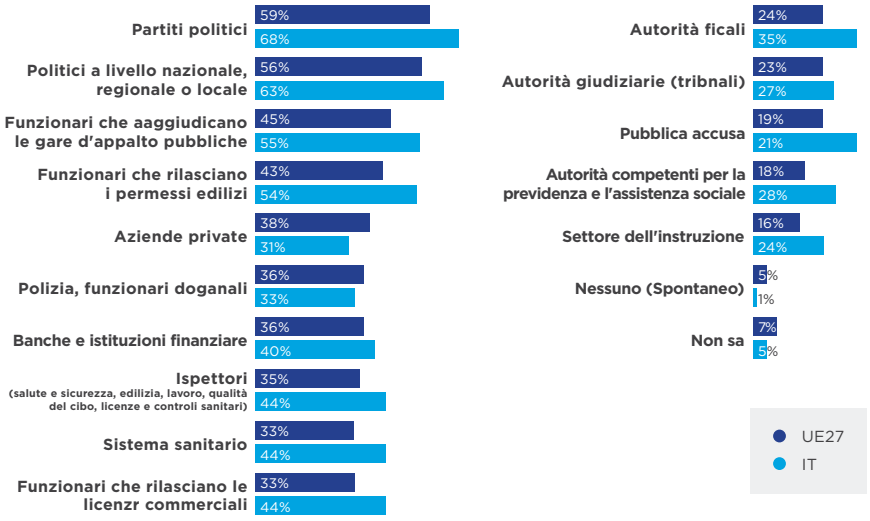
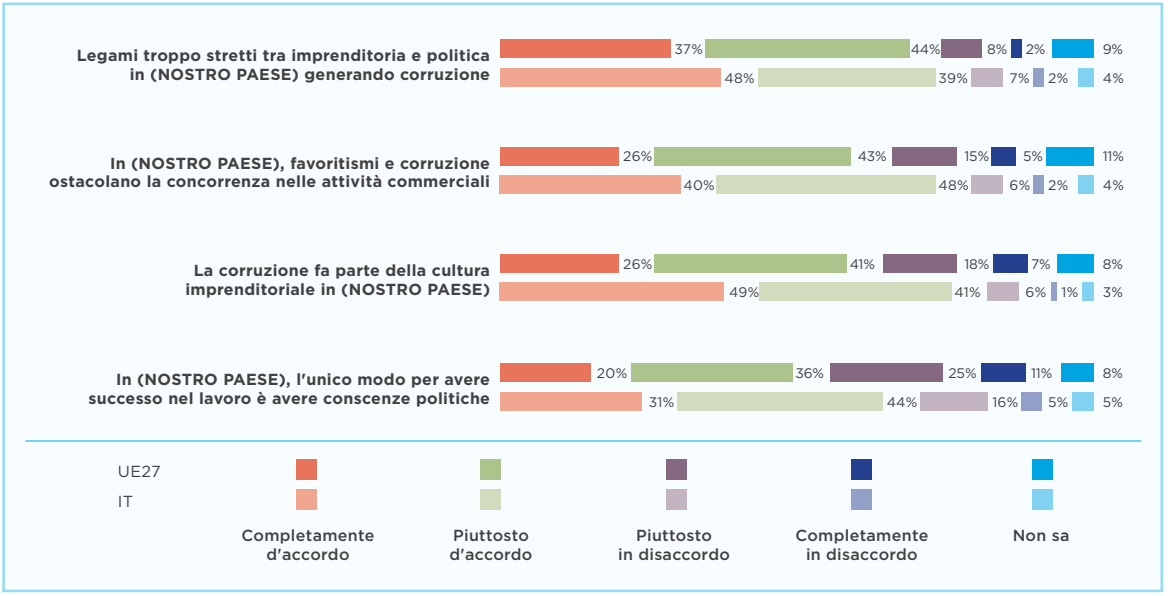


Figura 4 (Fonte Speciale Eurobarometro 2013)

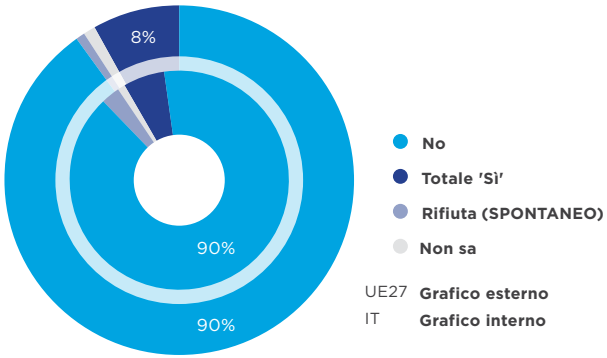
Per ciascuno dei seguenti aspetti, mi dica se lei è d'accordo o in disaccordo



Un dato in controtendenza è quello per il quale la percentuale di intervistati italiani che confermano di aver patito direttamente casi di corruzione è inferiore a quella UE pari all'8% **(Figura 5)**.

Figura 5 (Fonte Speciale Eurobarometro 2013)

Negli ultimi 12 mesi, ha vissuto o assistito a un episodio di corruzione?



I dati, dunque, confermano una preoccupante estensione del fenomeno della corruzione a livello nazionale. Tale risultato viene altresì confermato dal *Corruption Perception Index* (CPI) EU and Western Europe, elaborato a livello internazionale dal *Transparency International,* del 2013 (www.Transparency.org)[119]. Con un punteggio pari a 43, l'Italia si colloca nel 2013 al 69° posto nel ranking dei 177 Paesi analizzati. Si noti che tale risultato è ben peggiore del 55° posto assegnato all'Italia nel 2008 e al 35° che aveva nel 2003. Tale continuo peggioramento, sempre stimato con indicatori di percezione, riflette all'estero l'immagine di una Paese incapace di essere integro e trasparente. Ciò potrebbe, peraltro, disincentivare gli investitori virtuosi ad operare nel Paese.

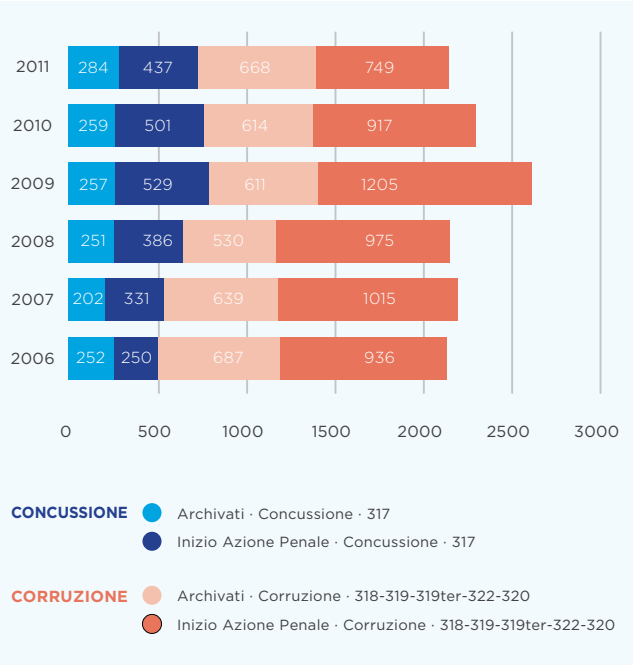
2. LA CORRUZIONE NEI DATI GIUDIZIARI CON RIFERIMENTO ALLE DENUNCE DI REATO E ALLE CONDANNE.

Si passi ora ad alcuni reali che riguardano il sistema giudiziario italiano. I dati sono dell'Autorità Nazionale Anticorruzione (ANAC)[120]. Si tratta di un'analisi delle denunce e delle condanne penali su base nazionale e regionale a partire dalle statistiche giudiziarie per i reati di concussione (317 c.p.), corruzione per un atto d'ufficio (318 c.p.), corruzione per un atto contrario ai doveri d'ufficio (319 c.p.), corruzione in atti giudiziari (319 ter c.p.), corruzione di persona incaricata di un pubblico servizio (320 c.p.) e istigazione alla corruzione (322 c.p.). Sono dunque esclusi dall'analisi altri reati come il peculato, le malversazioni a danno dello Stato, l'abuso d'ufficio, l'indebita percezione di erogazioni a danno dello Stato. Le elaborazioni utilizzano i dati delle denunce delle 165 Procure (Rilevazioni RE.GE.) e i dati sui condannati per gli stessi reati a seguito di sentenze passate in giudicato del Casellario Giudiziale Centrale forniti dall'ISTAT.

Si cominci dai **dati relativi alle denunce** distinte tra quelle che hanno avuto esito con l'esercizio azione penale o con l'archiviazione.

FIGURA 6 (fonte ANAC, 2013)

Reati denunciati per tipologia di richiesta del Pubblico Ministero (2006-2011)

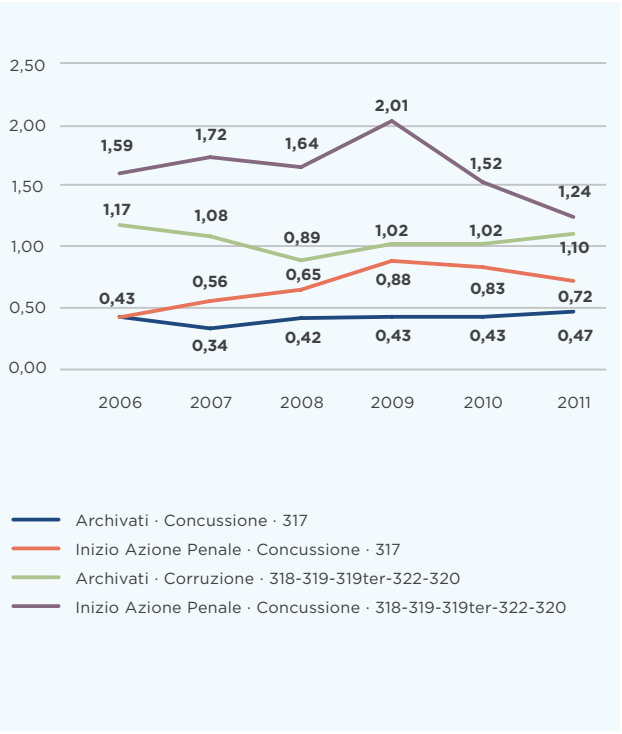


119 Gli indicatori più utilizzati per misurare la corruzione percepita sono sono il *Corruption Perception Index* (CPI), il Bribe Payers Index (BPI) e il Global Corruption Barometer (GCB), elaborati da *Transparency International*; il *World Business Environment Survey* (WBES), il *Business Environment and Enterprise Survey* (BEEPS) e i *Worldwide Governance Indicators* (WGI) sviluppati dalla Banca Mondiale. Il *Corruption Perception Index* (CPI) è un indice aggregato costruito sulla base di una serie di interviste che vari istituti di ricerca indipendenti e accreditati, tra cui il *World Economic Forum*, *PriceWaterhouseCoopers*, *Freedom House* e *Gallup International*, sottopongono a un campione di esperti, manager, analisti politici e finanziari. Le interviste sono relative all'abuso di potere per fini privati posto in essere dai funzionari pubblici attraverso, ad esempio, la riscossione di tangenti per appalti pubblici, l'appropriazione indebita di fondi pubblici, ecc. L'indice determina la percezione della corruzione nel settore pubblico in 180 paesi circa (nel 1995 il campione includeva solo 41 paesi), attribuendo a ciascuno un punteggio che varia da 0 (massima corruzione) a 100 (assenza di corruzione).

120 I dati sono analizzati ed elaborati nello studio del 2013 dell'Autorità Nazionale Anticorruzione (ANAC) *"Corruzione sommersa e corruzione emersa in Italia: modalità di misurazione e prime evidenze empiriche"*, su www.anac.it.

FIGURA 7 (fonte ANAC, 2013)

Reati denunciati per tipologia di richiesta del Pubblico Ministero (2006-2011) *(valori per 100.000 abitanti)*



Di seguito la distribuzione geografica per Regione, con valori per 100.000 abitanti, in relazione all'avvio dell'azione penale con riferimento al reato di concussione (Tabella 1) e di corruzione (Tabella 2). I dati evidenziano una sostanziale differenza nella distribuzione del fenomeno tra le regioni italiane, fenomeno che risulta più grave nel Centro-Sud.

TABELLA 1 (fonte ANAC, 2013)

CONCLUSIONES - ar. 317 c. p.						
	2006	2007	2008	2009	2010	2011
Piemonte	0,02	0,39	0,09	0,07	0,25	0,02
Valle Di Aosta	0,00	0,00	0,00	0,00	0,00	0,00
Liguria	0,50	0,44	0,19	0,99	2,04	0,74
Lombardia	0,36	0,59	0,38	0,47	0,25	0,78
Trentino Algo Adige	0,20	0,20	0,40	0,69	0,10	0,00
Veneto	0,13	0,15	0,10	0,63	0,53	0,57
Friuli Venezi Giulia	0,08	0,33	0,41	0,24	0,24	0,16
Emilia Romana	0,38	0,69	0,51	0,60	1,75	0,59
Marche	0,33	0,33	0,32	0,57	0,77	1,34
Toscana	0,69	0,38	0,22	0,43	0,97	0,48
Umbria	0,12	0,11	0,23	0,67	0,33	0,33
Lazio	0,49	0,40	0,61	1,07	0,90	0,98
Campania	0,54	1,02	1,20	0,57	1,24	1,23
Abruzzo	0,77	0,46	3,17	4,87	3,21	0,22
Molise	0,93	0,00	7,79	4,68	2,50	0,63
Puglia	0,49	1,08	1,15	3,01	0,91	1,22
Basilicata	0,67	1,01	2,37	1,19	1,36	0,68
Calabria	1,00	1,20	0,95	0,65	1,19	0,60
Sicilia	0,68	0,46	0,80	0,77	0,52	0,91
Sardeña	0,18	0,30	0,00	0,66	0,30	0,24
Italia	0,43	0,56	0,65	0,88	0,83	0,72

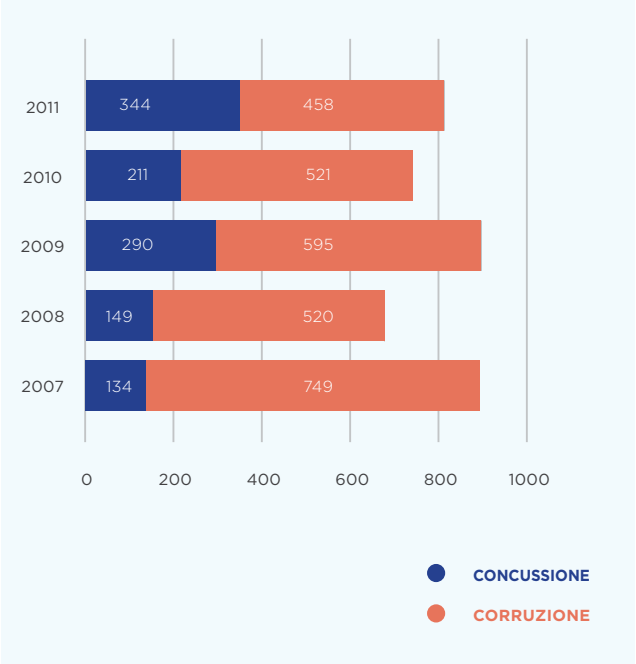
TABELLA 2 (fonte ANAC, 2013)

CORRUPCIÓN - ar. 318-319-319 ter-320-322 c. p.						
	2006	2007	2008	2009	2010	2011
Piemonte	0,18	0,18	0,07	0,25	0,09	0,00
Valle Di Aosta	0,00	0,00	0,79	0,00	0,00	1,56
Liguria	2,55	2,92	0,12	2,72	0,87	1,11
Lombardia	1,34	1,34	1,09	1,76	1,03	0,79
Trentino Algo Adige	0,51	0,40	1,79	0,69	0,39	0,48
Veneto	0,72	0,25	0,87	0,94	1,16	1,11
Friuli Venezi Giulia	1,49	1,07	0,74	0,81	1,22	0,89
Emilia Romana	1,50	0,83	1,01	0,88	0,71	0,81
Marche	0,33	0,39	0,39	0,51	0,90	1,79
Toscana	1,99	1,59	1,69	1,86	2,84	1,20
Umbria	0,58	0,46	1,70	0,89	2,22	0,77
Lazio	2,45	2,82	1,76	5,72	2,48	1,59
Campania	1,88	3,23	5,63	4,03	3,06	3,05
Abruzzo	1,38	1,53	2,42	1,57	2,39	2,53
Molise	39,89	0,31	1,56	1,87	0,62	0,31
Puglia	1,28	1,99	2,75	2,60	1,20	1,22
Basilicata	1,85	1,86	1,69	1,35	0,68	1,36
Calabria	2,84	6,01	0,90	1,54	4,38	1,94
Sicilia	0,60	2,35	1,25	1,11	0,97	1,09
Sardeña	1,39	0,42	0,24	0,54	0,48	0,48
Italia	1,59	1,72	1,64	2,01	1,52	1,24

Si passi all'analisi dei **dati sulle sentenze di condanna passate in giudicato** per concussione e corruzione, con riferimento all'anno di iscrizione nel Casellario Giudiziale Centrale. Mentre il numero dei condannati per corruzione diminuisce notevolmente dal 2007 al 2011 (si passa da 749 a 458), il numero dei condannati per concussione si triplica, passando da 134 a 344 (Cfr. **Figura 8**).

FIGURA 8 (Fonte ANAC, 2013)

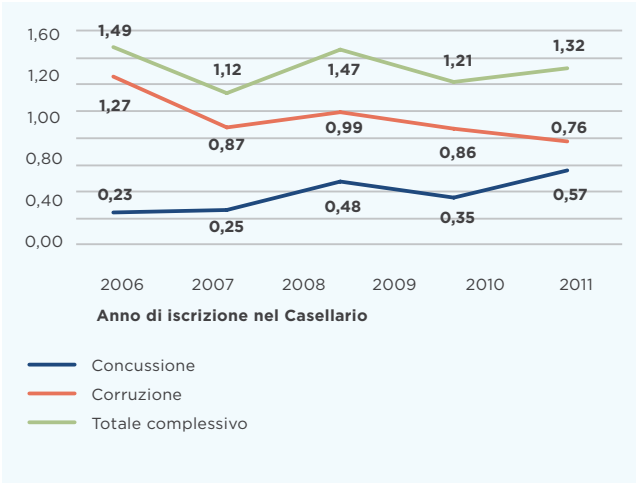
Condannati per tipologia di reato e anno di iscrizione nel Casellario (2006-2011)



Il dato dei condannati per 100.000 abitanti conferma l'andamento decrescente dei reati per corruzione (da 1,27 nel 2006 a 0,76 nel 2011) e quello crescente di quelli di concussione (da 0.23 nel 2006 a 0,57 nel 2011) (Cfr. **Figura 9**).

FIGURA 9 (Fonte ANAC, 2013)

Condannati per tipologia di reato e anno di iscrizione nel Casellario (2006-2011) *(valori per 100.000 abitanti)*



La distribuzione del tasso di condanne può contribuire a dare la dimensione degli esiti della lotta alla corruzione condotta nelle singole Regioni. Le inchieste giudiziarie che hanno portato a una significativa emersione della criminalità corruttiva nel 2011 hanno interessato soprattutto, in ordine decrescente, la Liguria, la Puglia e l'Abruzzo, per la concussione, e il Lazio, la Campania, la Calabria e la Lombardia, per la corruzione.

Il numero dei condannati per concussione raddoppia dal 2007 al 2011 nelle regioni del Nord, aumentando costantemente da un anno all'altro, registra un andamento oscillante nel Centro e aumenta considerevolmente nel Sud e nelle Isole da 0,25 a 0,71, dove assume i valori sistematicamente più elevati **(Tabella 3).**

TABELLA 3 (Fonte ANAC, 2013)

CONCLUSIONES - ar. 317 c. p.					
	2007	**2008**	**2009**	**2010**	**2011**
Piemonte	0,16	0,11	0,79	0,38	0,29
Lombardia	0,26	0,25	0,29	0,31	0,34
Trentino Alto Adige/ Südtirol	0,90	0,10	0,20	0,49	0,00
Veneto	0,04	0,08	0,23	0,16	0,14
Friuli-Venecia Giulia	0,16	0,74	0,16	1,30	0,24
Liguria	0,62	0,12	0,00	0,43	2,29
Emilia-Romana	0,00	0,58	0,18	0,20	0,86
Toscana	0,25	0,16	0,30	0,27	0,59
Umbria	0,00	0,00	0,11	0,89	0,44
Marche	0,26	0,26	0,13	0,06	0,06
Lazio	0,24	0,25	0,55	0,12	0,65
Abruzzo	0,23	0,15	1,95	0,15	1,49
Molise	0,31	0,00	0,00	4,68	0,31
Campania	0,28	0,26	0,53	0,17	0,26
Puglia	0,29	0,42	1,03	0,93	1,98
Basilicata	0,51	0,00	0,00	0,68	0,00
Calabria	0,05	0,10	0,25	0,05	0,55
Sicilia	0,26	0,34	1,07	0,42	0,30
Sardegna	0,24	0,12	0,06	0,12	0,30
ITALIA	**0,23**	**0,25**	**0,48**	**0,35**	**0,57**

La corruzione invece diminuisce in tutte la macro-aree passando da 1,14 nel 2007 a 0,73 nel 2011 nelle regioni settentrionali e negli stessi anni, rispettivamente, da 1,12 a 0,89 nel Centro e da 1,51 a 0,71 nelle regioni meridionali e nelle Isole. L'andamento dei reati di corruzione è ciclico nel Nord e nel Centro mentre si presenta stabilmente decrescente nel Sud del paese **(Tabella 4).**

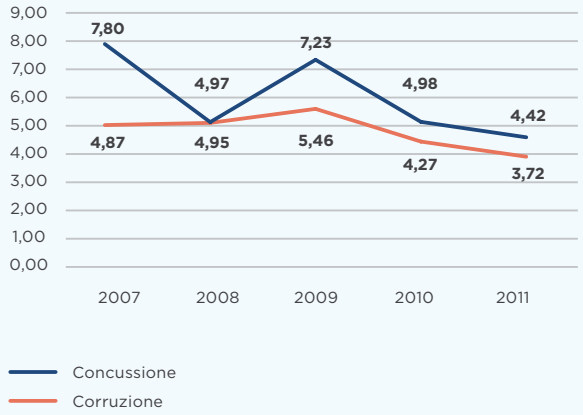
TABELLA 4 (Fonte ANAC, 2013)

CORRUZIONE - artt. 318-319-319ter-320-322 c.p.					
	2007	**2008**	**2009**	**2010**	**2011**
Piemonte	0,92	0,59	1,02	0,72	0,56
Valle d'Aosta/Vallée d'Aoste	0,80	0,00	2,36	0,00	0,78
Lombardia	2,26	0,81	1,28	0,72	1,03
Trentino Alto Adige/ Südtirol	0,40	1,19	0,49	1,26	0,58
Veneto	0,34	0,60	0,43	0,43	0,26
Friuli-Venecia Giulia	1,65	0,65	0,32	0,41	0,40
Liguria	0,31	0,99	0,37	0,50	0,93
Emilia-Romana	0,12	0,16	1,08	0,52	0,83
Toscana	0,66	0,84	0,43	0,78	0,45
Umbria	0,11	1,24	1,57	2,22	0,22
Marche	0,26	0,32	0,25	0,06	0,45
Lazio	1,82	0,72	0,71	0,90	1,40
Abruzzo	1,45	0,45	0,37	0,07	0,37
Molise	28,12	0,94	0,62	0,00	0,31
Campania	2,47	2,79	2,12	2,59	1,35
Puglia	0,64	0,71	0,83	0,49	0,32
Basilicata	1,86	0,34	0,17	1,02	0,17
Calabria	0,25	0,60	0,45	0,40	1,19
Sicilia	0,34	0,62	1,79	1,17	0,42
Sardegna	0,12	0,72	0,06	0,12	0,24
ITALIA	**1,27**	**0,87**	**0,99**	**0,86**	**0,76**
ITALIA (Totale Concussione e Corruzione)	**1,49**	**1,12**	**1,47**	**1,21**	**1,32**

Una considerazione conclusiva riguarda la durata del processo penale misurata con il numero di anni che intercorre tra l'anno in cui il reato è stato commesso e l'anno di passaggio in giudicato della sentenza. Questo dato risulta in media più elevato per i reati di concussione che per quelli di corruzione ma per entrambi è diminuito considerevolmente tra il 2007 e il 2011 di circa 3 anni passando da 7,80 a 4,42 per la concussione, e di circa un anno (da 4,87 a 3,72) per la corruzione **(Figura 10).**

FIGURA 10 (Fonte ANAC, 2013)

Numero di anni intercorsi tra reato e passaggio in giudicato della sentenza per tipologia di reato e anno di inscrizione nel Casellario *(valori medi)*



3. L'ACCERTAMENTO DEL DANNO ERARIALE DA PARTE DELLA CORTE DEI CONTI CONSEGUENTE A SENTENZA PENALE DI CONDANNA PER CONCUSSIONE O CORRUZIONE.

Nel proprio studio *"Corruzione sommersa e corruzione emersa in Italia: modalità di misurazione e prime evidenze empiriche"* l'ANAC ha anche esaminato la totalità delle sentenze pronunciate dalla Corte dei Conti nel periodo 2001-2012 per gli stessi reati di concussione e corruzione. La commissione di tali condotte può, infatti, integrare i presupposti del danno erariale dell'amministrazione, con Giurisdizione della Corte dei Conti, ai sensi dell'art. 1 l. 20/1994. Secondo tale disposizione, l'accertamento della responsabilità da danno erariale cagionato dal funzionario pubblico nello svolgimento della propria attività costituisce una responsabilità personale limitata ai fatti ed alle omissioni commessi con dolo o con colpa grave, ferma restando l'insindacabilità nel merito delle scelte discrezionali.

Si tratta di un universo numericamente non molto consistente ovvero 341 sentenze, delle quali il 79% (270) sono relative a procedimenti di primo grado e il 21% (71) a procedimenti di secondo grado.

Vale la pena sottolineare che si tratta di un numero di pronunce particolarmente basso, tenuto conto della percezione diffusa del livello di corruzione nel paese molto elevata, già descritta in precedenza. Deve anche evidenziarsi il limite temporale dell'analisi, poiché le sentenze fanno riferimento a fatti commessi in tempi spesso lontani dal momento di emissione della sentenza.

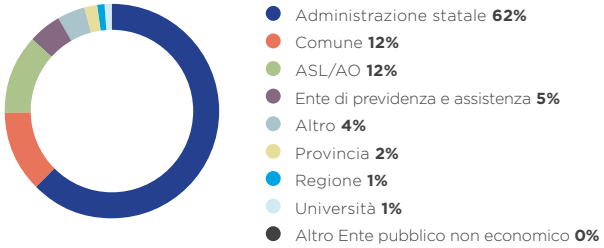
Dall'analisi di tali sentenze si è constatato che delle 341 sentenze esaminate 300 (88%) sono di condanna al risarcimento del danno, mentre le altre 41 (12%) sono di rigetto degli atti di citazione,

assoluzioni, accoglimenti delle domande di appello proposte dalle parti condannate in primo grado, etc. Delle 300 sentenze di condanna, 239 si riferiscono al primo grado di giudizio e 61 al secondo grado (Cfr. **Figura 15**).

Declinando le evidenze dell'analisi per tipologia di amministrazioni, si evince che oltre la metà delle condanne al risarcimento del danno erariale per reati di concussione e concussione ha riguardato dipendenti di amministrazioni statali (62%). Il fenomeno appare rilevante anche nei comuni (12%), nelle ASL e Aziende ospedaliere (12%) e negli enti di previdenza e assistenza (12%), mentre i reati che riguardano province, regioni e università sono residuali.

FIGURA 11 (Fonte ANAC).

Composizione percentuale delle sentenze con esito di condanna al risarcimento del danno per comparto (2001-2012)



Più della metà delle sentenze di condanna nel periodo di riferimento sono state pronunciate per episodi di corruzione e concussione avvenuti nelle Regioni del Nord (59%) di cui oltre la metà nella sola Lombardia (33%); risultano invece equamente distribuite le pronunce nelle Regioni del Centro (20%), di cui oltre la metà nel Lazio (12%), e nella macro-area del Sud e Isole (20%). Tali dati sono riportati nella **tabella 5** che segue.

FIGURA 12 (Fonte ANAC)

Composizione percentuale delle sentenze con esito di condanna al risarcimento del danno per ripartizione geografica (2001-2012)

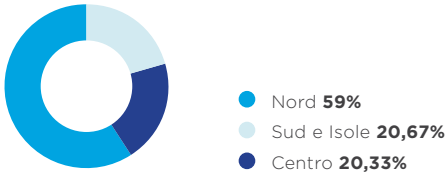


TABELLA 5 (Fonte ANAC)

Sentenze con esito di condanna al resarcimento del danno per Regione (2001-2012)

Macroarea	Regione	N. sentenze
NORD	Lombardia	101
	Liguria	34
	Piemonte	12
	Emilia Romagna	10
	Veneto	8
	Trentino Alto Adige	7
	Friuli Venezia Giulia	4
	Valle d'Aosta	1
	Totale	**177**
CENTRO	Lazio	36
	Toscana	19
	Marche	4
	Umbria	2
	Totale	**61**
SUD E ISOLE	Puglia	21
	Sicilia	20
	Abruzzo	7
	Molise	5
	Campania	4
	Calabria	3
	Sardegna	2
	Totale	**62**
Totale ITALIA		**300**

Considerando invece l'ammontare delle condanne per risarcimento del danno erariale, la quota maggiore risulta essere quella della Regione Lazio, seguita da Lombardia, Sardegna, Campania e Piemonte (**Tabella 6**). Come si può notare, l'ammontare del risarcimento del danno richiesto all'atto di citazione viene ridotto significativamente in termini di risarcimento comminato.

TABELLA 6 (Fonte ANAC)

Importo dei risarcimenti per Regione (2001-2012)

Regione	Risarcimento richiesto	Risarcimento comminato
Abruzzo	264.011,61	625.088,55
Calabria	1.568.870,50	524.811,21
Campania	5.136.041,97	4.160.497,65
Emilia Romagna	250.079,37	177.855,98
Friuli-Venecia Giulia	595.669,12	294.056,70
Lazio	158.941.318,88	23.425.761,08
Liguria	4.668.107,09	1.886.877,02
Lombardia	23.436.209,33	11.971.743,32
Marche	1.451.891,53	822.400,00
Molise	2.101.821,80	910.192,98
Piemonte	6.707.453,54	3.546.796.55
Puglia	3.268.569,08	1.779.323,65
Sardegna	8.319.506,39	8.148.970,19
Sicilia	1.184.279,31	888.739,60
Toscana	3.049.890,37	764.911,68
Trentino Alto Adige	1.052.120,10	799.586,73
Umbria	478.228,45	80.000,00
Valle d'Aosta	1.459.646,02	500.000,0
Veneto	3.059.522,45	2.360.487,7
TOTALI	**226.963.236,92**	**63.668.100,67**

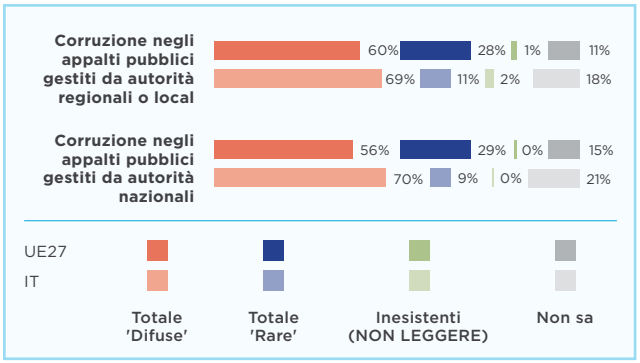
Come si può notare dai dati riportati vi è enorme divergenza tra la percezione del fenomeno della corruzione e dati giudiziari, sia penali che contabili. Vi è, dunque, una evidente insufficienza del sistema giudiziario nel perseguire e reprimere il fenomeno. Anche per tali motivi si è resa necessaria la c.d. Riforma della disciplina Anticorruzione del 2012, di cui si tratterà nel capitolo IV.

4. GLI APPALTI PUBBLICI E LA CORRUZIONE.

Si passi ora ad alcuni dati che riguardano in modo specifico il settore dei contratti pubblici. Dallo speciale Eurobarometro del 2013 emerge che secondo i soggetti intervistati, la corruzione sarebbe una prassi largamente diffusa negli appalti gestiti sia da autorità centrali che autorità locali (Figura 12). Per gli italiani la corruzione sarebbe un fenomeno diffuso negli appalti pubblici gestiti dalle autorità nazionali (70% dei rispondenti italiani contro il 56% della media UE) e negli appalti gestiti dagli enti locali (69% dei rispondenti italiani contro il 60% della media UE).

FIGURA 13 (Fonte Eurobarómetro 2013)

Secondo Lei, quanto sono diffuse le seguenti pratiche in (NOSTRO PAESE)?

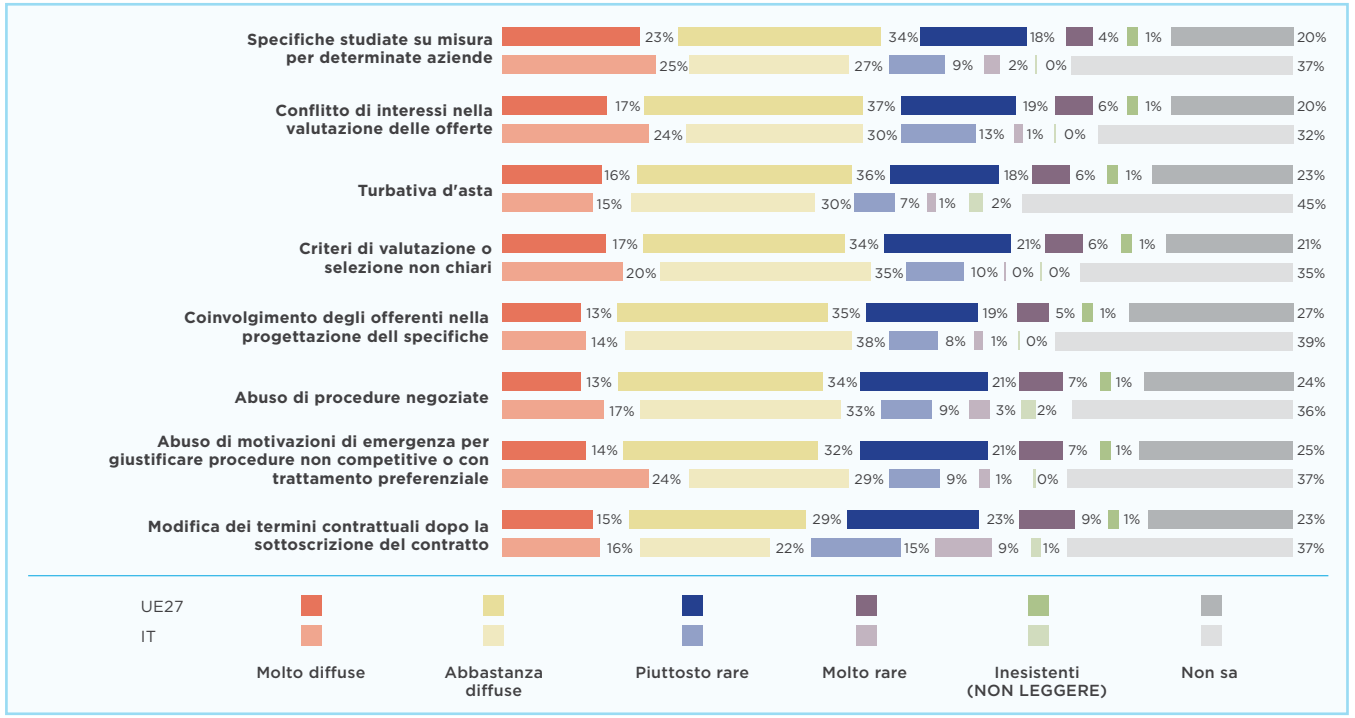


La figura 14 mostra che gli italiani ritengono le seguenti pratiche particolarmente diffuse nelle gare d'appalto pubbliche: capitolati su misura per favorire determinate imprese (52%); abuso delle procedure negoziate (50%); conflitto di interesse nella valutazione delle offerte (54%); offerte concordate (45%); criteri di selezione o di valutazione poco chiari (55%); partecipazione degli offerenti nella stesura del capitolato (52%); abuso della motivazione d'urgenza per evitare gare competitive (53%); modifica dei termini contrattuali dopo la stipula del contratto (38%).

Sono scarsi i dati reali sulla corruzione nel settore dei contratti pubblici. Tuttavia, la rilevanza del fenomeno si può desumere da alcuni riscontri empirici.

FIGURA 14 (Fonte Especial Eurobarómetro 2013)

Secondo Lei, quanto sono diffuse le seguenti pratiche nelle procedure di appalto pubblico in (NOSTRO PAESE)?



Ad esempio, l'alta velocità in Italia è costata 47,3 milioni di euro al chilometro per il tratto Roma - Milano, 74 milioni a chilometro per il tratto tratta Torino – Novara, 79,5 milioni a chilometro per il tratto Novara-Milano e 96,4 milioni a chilometro per il tratto Bologna - Firenze. Tali dati sono allarmanti, considerando che analoga opera è costata appena 10 milioni a chilometro della tratta Parigi-Lione, 9,8 milioni a chilometro per il tratto Madrid – Siviglia e 9,3 milioni per il tratto della Tokyo-Osaka (fonte: CICCONI I., *Il libro nero della TAV,* 10.09.2011, su www.ilfattoquotidiano.it. Dati citati anche dal documento della Commissione Europea COM(2014) 38 final Bruxelles, 3.2.2014 - ANNEX 12 - Allegato sull'Italia della Relazione della Commissione al Consiglio e al Parlamento Europeo - Relazione dell'Unione sulla lotta alla corruzione). E' chiaro che tali differenze possono dipendere da molti diversi fattori di inefficienza e non necessariamente da fenomeni corruttivi ma il dato resta certamente allarmante.

Si consideri anche che l'esperienza ha insegnato che negli anni '90,successivamente ai noti fatti di Tangentopoli, si verificò un drastico abbattimento dei costi rilevato per la realizzazione dei lavori pubblici, probabilmente anche per effetto della nota inchiesta giudiziaria di "Mani pulite". Ad esempio, è stato osservato che se la realizzazione del passante ferroviario a Milano nel periodo precedente a tali fatti (anni precedenti al 1992) era costata quasi 100 miliardi di lire a chilometro, per effetto dell'inchiesta, il prezzo sostenuto per i medesimi lavori si ridusse drasticamente anche in misura del 45-50% (fonte: dossier *"Corruzione. La tassa occulta che impoverisce e inquina il Paese"*, curato da Associazione Libera e Legambiente)

E' stato anche notato che la fase della vita del contratto più a rischio di corruzione sia quella di esecuzione del contratto stipulato e non tanto quella della procedura di aggiudicazione. Anche a fronte di una regolare procedura di aggiudicazione, infatti, si possono verificare in sede di esecuzione del contratto ingiustificati aumenti dei costi originariamente pattuiti (si confronti: *"Public Procurement in Europe: cost and effectiveness",* 2011, su www.ec.europa.eu). Secondo il quotidiano La Repubblica, le indagini svolte da più Procure nel triennio 2007-2010 su 33 Grandi opere affidate hanno svelato come il costo sostenuto dalle casse dell'Erario sia passato dagli iniziali 574 milioni di euro a 834 milioni finali, con un aumento, quindi, pari al 45% del valore iniziale dell'aggiudicazione (fonte: www.larepubblica.it 22 dicembre 2011).

ALLEGATO 5

RASSEGNA DELLE PRINCIPALI FATTISPECIE DI REATO RICORRENTI NEI CONTRATTI PUBBLICI.

- INDEBITA PERCEZIONE DI EROGAZIONI A DANNO DELLO STATO
art. 316 ter cp

[I]. Salvo che il fatto costituisca il reato previsto dall'articolo 640-bis, chiunque mediante l'utilizzo o la presentazione di dichiarazioni o di documenti falsi o attestanti cose non vere, ovvero mediante l'omissione di informazioni dovute, consegue indebitamente, per sé o per altri, contributi, finanziamenti, mutui agevolati o altre erogazioni dello stesso tipo, comunque denominate, concessi o erogati dallo Stato, da altri enti pubblici o dalle Comunità europee è punito con la reclusione da sei mesi a tre anni.

[II]. Quando la somma indebitamente percepita è pari o inferiore a 3.999,96 euro si applica soltanto la sanzione amministrativa del pagamento di una somma di denaro da 5.164 euro a 25.822 euro. Tale sanzione non può comunque superare il triplo del beneficio conseguito.

competenza: Trib. collegiale
arresto: non consentito
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: v. 2892 c.p.p.
procedibilità: d'ufficio

- CONCUSSIONE art. 317 cp

[I]. Il pubblico ufficiale [357] che, abusando della sua qualità o dei suoi poteri, costringe taluno a dare o a promettere indebitamente, a lui o a un terzo, denaro o altra utilità è punito con la reclusione da sei a dodici anni,

(1) Articolo così sostituito dall'art. 1, comma 75, l. 6 novembre 2012, n. 190. Il testo recitava: « Il pubblico ufficiale o l'incaricato di un pubblico servizio, che, abusando della sua qualità o dei suoi poteri, costringe o induce taluno a dare o a promettere indebitamente, a lui o ad un terzo, denaro od altra utilità, è punito con la reclusione da quattro a dodici anni». Precedentemente l'articolo era già stato sostituito dall' art. 4 l. 26 aprile 1990, n. 86.

arresto: facoltativo
fermo: consentito
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite
procedibilità: d'ufficio

- CORRUZIONE PER L'ESERCIZIO DELLA FUNZIONE art. 318 cp

[I]. Il pubblico ufficiale che, per l'esercizio delle sue funzioni o dei suoi poteri, indebitamente riceve, per sé o per un terzo, denaro o altra utilità o ne accetta la promessa è punito con la reclusione da uno a cinque anni.

(1) Articolo così sostituito dall'art. 1, comma 75, l. 6 novembre 2012, n. 190. Il testo recitava: «Corruzione per un atto d'ufficio. [I]. Il pubblico ufficiale, che, per compiere un atto del suo ufficio, riceve, per sé o per un terzo, in denaro od altra utilità, una retribuzione che non gli è dovuta, o ne accetta la promessa, è punito con la reclusione da sei mesi a tre anni. [II]. Se il pubblico ufficiale riceve la retribuzione per un atto d'ufficio da lui già compiuto, la pena è della reclusione fino ad un anno». Precedentemente l'articolo era già stato sostituito dall'art. 6 l. 26 aprile 1990, n. 86.

competenza: Trib. collegiale
arresto: facoltativo
fermo: non consentito
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite
procedibilità: d'ufficio

- CORRUZIONE PER UN ATTO CONTRARIO AI DOVERI D'UFFICIO
art. 319 cp

[I]. Il pubblico ufficiale [357], che, per omettere o ritardare o per aver omesso o ritardato un atto del suo ufficio, ovvero per compiere o per aver compiuto un atto contrario ai doveri di ufficio, riceve, per sé o per un terzo, denaro od altra utilità, o ne accetta la promessa, è punito con la reclusione da quattro a otto (4) anni [32, 32-quater, 319-bis, 319-ter, 320, 321, 322, 323-bis; 381 c.p.p.].

competenza: Trib. collegiale
arresto: facoltativo
fermo: consentito
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite
procedibilità: d'ufficio

- CIRCOSTANZE AGGRAVANTI art. 319 bis cp

[I]. La pena è aumentata se il fatto di cui dall'artículo 319 ha per oggetto il conferimento di pubblici impieghi o stipendi o pensioni o la stipulazione di contratti nei quali sia interessata l'amministrazione alla quale il pubblico ufficiale [321, 357] appartiene [32-quater] nonché il pagamento o il rimborso di tributi.

- INDUZIONE INDEBITA A DARE O PROMETTERE UTILITÀ art. 319 quater cp

[I]. Salvo che il fatto costituisca più grave reato, il pubblico ufficiale o l'incaricato di pubblico servizio che, abusando della sua qualità o dei suoi poteri, induce taluno a dare o a promettere indebitamente, a lui o a un terzo, denaro o altra utilità è punito con la reclusione da tre a otto anni.

[II]. Nei casi previsti dal primo comma, chi dà o promette denaro o altra utilità è punito con la reclusione fino a tre anni.

(1) Articolo inserito dall'art. 1, pfo. 75, l. 6 noviembre 2012, n. 190.
competenza: Trib. collegiale
arresto: facoltativo (primo comma); non consentito (secondo comma)
fermo: consentito (primo comma); non consentito (secondo comma)
custodia cautelare in carcere: consentita (primo comma); non consentita (secondo comma)
altre misure cautelari personali: consentite (primo comma); v. 289, secondo comma, c.p.p. (secondo comma)
procedibilità: d'ufficio

- PENE PER IL CORRUTTORE art. 321 cp

[I]. Le pene stabilite nel comma 1 dell'articolo 318, nell'articolo 319, nell'articolo 319-bis, nell'articolo 319-ter e nell'articolo 320 in relazione alle suddette ipotesi degli articoli 318 e 319, si applicano anche a chi dà o promette al pubblico ufficiale [357] o all'incaricato di un pubblico servizio [358] il denaro od altra utilità.

- ISTIGAZIONE ALLA CORRUZIONE art. 322 cp

[I]. Chiunque offre o promette denaro od altra utilità non dovuti ad un pubblico ufficiale [357] o ad un incaricato di un pubblico servizio [358], per l'esercizio delle sue funzioni o dei suoi poteri (4), soggiace, qualora l'offerta o la promessa non sia accettata, alla pena stabilita nel comma 1 dell'articolo 318, ridotta di un terzo [323-bis].

[II]. Se l'offerta o la promessa è fatta per indurre un pubblico ufficiale [357] o un incaricato di un pubblico servizio [358] ad omettere o a ritardare un atto del suo ufficio, ovvero a fare un atto contrario ai suoi doveri, il colpevole soggiace, qualora l'offerta o la promessa non sia accettata, alla pena stabilita nell'articolo 319, ridotta di un terzo [323-bis] .

[III]. La pena di cui al primo comma si applica al pubblico ufficiale o all'incaricato di un pubblico servizio che sollecita una promessa o dazione di denaro o altra utilità per l'esercizio delle sue funzioni o dei suoi poteri .

[IV]. La pena di cui al comma secondo si applica al pubblico ufficiale [357] o all'incaricato di un pubblico servizio [358] che sollecita una promessa o dazione di denaro od altra utilità da parte di un privato per le finalità indicate dall'articolo 319 [32-quater, 323-bis].
competenza: Trib. collegiale
arresto: non consentito (primo e terzo comma); facoltativo (secondo e quarto comma)
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: consentite (secondo e quarto comma); primo e terzo comma: v. 2892 c.p.p.
procedibilità: d'ufficio

- ABUSO D'UFFICIO art. 323 cp

[I]. Salvo che il fatto non costituisca un più grave reato, il pubblico ufficiale o l'incaricato di pubblico servizio che, nello svolgimento delle funzioni o del servizio, in violazione di norme di legge o di regolamento, ovvero omettendo di astenersi in presenza di un interesse proprio o di un prossimo congiunto o negli altri casi prescritti, intenzionalmente procura a sé o ad altri un ingiusto vantaggio patrimoniale ovvero arreca ad altri un danno ingiusto è punito con la reclusione da uno a quattro anni.

[II]. La pena è aumentata nei casi in cui il vantaggio o il danno hanno un carattere di rilevante gravità.
competenza: Trib. collegiale
arresto: facoltativo
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: consentite
procedibilità: d'ufficio

- TURBATA LIBERTÀ DEGLI INCANTI art. 353 cp

[I]. Chiunque, con violenza o minaccia, o con doni, promesse, collusioni o altri mezzi fraudolenti, impedisce o turba la gara nei pubblici incanti [534, 576-581 c.p.c.] o nelle licitazioni private per conto di pubbliche Amministrazioni [354], ovvero ne allontana gli offerenti, è punito con la reclusione da sei mesi a cinque anni e con la multa da 103 euro a 1.032 euro (1).
[II]. Se il colpevole è persona preposta dalla legge o dall'Autorità agli incanti o alle licitazioni suddette, la reclusione è da uno a cinque anni e la multa da 516 euro a 2.065 euro (1).

[III]. Le pene stabilite in questo articolo si applicano anche nel caso di licitazioni private per conto di privati, dirette da un pubblico ufficiale [357] o da persona legalmente autorizzata [354]; ma sono ridotte alla metà.

(1) Comma modificato dall'art. 9 della l. 13 agosto 2010, n. 136 che ha sostituito alle parole «fino a due anni» con le parole «da sei mesi a cinque anni». Per l'aumento delle pene, qualora il fatto sia commesso da persona sottoposta a misura di prevenzione, v. art. 71, d.lg. 6 settembre 2011, n. 159, che ha sostituito l'art. 7 l. 31 maggio 1965, n. 575.
competenza: Trib. monocratico
arresto: non consentito (terzo comma); facoltativo (primo e secondo comma)
fermo: non consentito
custodia cautelare in carcere: consentita (primo e secondo comma)
altre misure cautelari personali: consentite (primo e secondo comma); v. art. 290, comma 2, c.p.p.
procedibilità: d'ufficio

- TURBATA LIBERTÀ DEL PROCEDIMENTO DI SCELTA DEL CONTRAENTE art. 353 bis cp

[I]. Salvo che il fatto costituisca più grave reato, chiunque con violenza o minaccia, o con doni, promesse, collusioni o altri mezzi fraudolenti, turba il procedimento amministrativo diretto a stabilire il contenuto del bando o di altro atto equipollente al fine di condizionare le modalità di scelta del contraente da parte della pubblica amministrazione è punito con la reclusione da sei mesi a cinque anni e con la multa da euro 103 a euro 1.032 (1).
(1) Articolo inserito dall'art. 10 della l. 13 agosto 2010, n. 136.
competenza: Trib. monocratico
arresto: facoltativo
fermo: non consentito
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite; v. art. 290, comma 2. c.p.p.
procedibilità: d'ufficio

- ASTENSIONE DAGLI INCANTI art. 354 cp

[I]. Chiunque, per denaro, dato o promesso a lui o ad altri, o per altra utilità a lui o ad altri data o promessa, si astiene dal concorrere agli incanti o alle licitazioni indicati nell'articolo precedente, è punito con la reclusione sino a sei mesi o con la multa fino a 516 euro.
competenza: Trib. monocratico
arresto: non consentito
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: non consentite
procedibilità: d'ufficio

- INADEMPIMENTO DI CONTRATTI DI PUBBLICHE FORNITURE art. 355 cp

[I]. Chiunque, non adempiendo gli obblighi che gli derivano da un contratto di fornitura concluso con lo Stato, o con un altro ente pubblico, ovvero con un'impresa esercente servizi pubblici o di pubblica necessità, fa mancare, in tutto o in parte, cose od opere, che siano necessarie a uno stabilimento pubblico o ad un pubblico servizio, è punito con la reclusione da sei mesi a tre anni e con la multa non inferiore a 103 euro.

[II]. La pena è aumentata [64] se la fornitura concerne:
1) sostanze alimentari o medicinali, ovvero cose od opere destinate alle comunicazioni per terra, per acqua o per aria, o alle comunicazioni telegrafiche o telefoniche;
2) cose od opere destinate all'armamento o all'equipaggiamento delle forze armate dello Stato;
3) cose od opere destinate ad ovviare a un comune pericolo o ad un pubblico infortunio.

[III]. Se il fatto è commesso per colpa [43], si applica la reclusione fino a un anno, ovvero la multa da 51 euro a 2.065 euro.

[IV]. Le stesse disposizioni si applicano ai subfornitori, ai mediatori e ai rappresentanti dei fornitori, quando essi, violando i loro obblighi contrattuali, hanno fatto mancare la fornitura [251, 356].
competenza: Trib. monocratico
arresto: non consentito
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: v. 290 c.p.p.
procedibilità: d'ufficio

- FRODE NELLE PUBBLICHE FORNITURE art. 356 cp

[I]. Chiunque commette frode nella esecuzione dei contratti di fornitura o nell'adempimento degli altri obblighi contrattuali indicati nell'articolo precedente è punito con la reclusione da uno a cinque anni e con la multa non inferiore a 1.032 euro.

[II]. La pena è aumentata [64] nei casi preveduti dal primo capoverso dell'articolo precedente [252].
competenza: Trib. monocratico
arresto: facoltativo
fermo: non consentito
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite
procedibilità: d'ufficio

- FALSITÀ IDEOLOGICA COMMESSA DAL PRIVATO IN ATTO PUBBLICO art. 483 cp

[I]. Chiunque attesta falsamente al pubblico ufficiale [357], in un atto pubblico, fatti dei quali l'atto è destinato a provare la verità, è punito con la reclusione fino a due anni.

[II]. Se si tratta di false attestazioni in atti dello stato civile [449 c.c.], la reclusione non può essere inferiore a tre mesi.
competenza: Trib. monocratico
arresto: non consentito
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: non consentite
procedibilità: d'ufficio

L'art. 483 cp è richiamato dall'art. 76 d.P.R. n.445/2000 in materia di dichiarazioni sostitutive di certificazioni e di atti notori.

- FALSITÀ IN SCRITTURA PRIVATA art. 485 cp

[I]. Chiunque, al fine di procurare a sé o ad altri un vantaggio o di recare ad altri un danno, forma, in tutto o in parte, una scrittura privata falsa, o altera una scrittura privata vera, è punito, qualora ne faccia uso o lasci che altri ne faccia uso, con la reclusione da sei mesi a tre anni [490, 493-bis].

[II]. Si considerano alterazioni anche le aggiunte falsamente apposte a una scrittura vera, dopo che questa fu definitivamente formata [491].

competenza: Trib. monocratico
arresto: non consentito
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: non consentite
procedibilità: d'ufficio se si tratta di testamento olografo; a querela di parte in tutti gli altri casi

L'art. 485 cp è richiamato dall'art. 76 d.P.R. n.445/2000 in materia di dichiarazioni sostitutive di certificazioni e di atti notori.

- Art. 40 comma 3 del Dlgs. n. 163 del 2006 "Qualificazione per eseguire lavori pubblici"

Le SOA nell'esercizio dell'attivita' di attestazione per gli esecutori di lavori pubblici svolgono funzioni di natura pubblicistica, anche agli effetti dell'articolo 1 della legge 14 gennaio 1994, n. 20. **In caso di false attestazioni dalle stesse rilasciate si applicano gli articoli 476 e 479 del codice penale.**

- FALSITÀ MATERIALE COMMESSA DAL PUBBLICO UFFICIALE IN ATTI PUBBLICI Art. 476 cp

[I]. Il pubblico ufficiale [357] che, nell'esercizio delle sue funzioni, forma, in tutto o in parte, un atto falso o altera un atto vero, è punito con la reclusione da uno a sei anni [491].

[II]. Se la falsità concerne un atto o parte di un atto, che faccia fede fino a querela di falso [2699, 2700 c.c.], la reclusione è da tre a dieci anni [482, 490, 492,493].
competenza: Trib. monocratico (udienza prelim.)
arresto: facoltativo
fermo: non consentito (primo comma); consentito (secondo comma)
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite

- FALSITÀ IDEOLOGICA COMMESSA DAL PUBBLICO UFFICIALE IN ATTI PUBBLICI Art. 479 cp

[I]. Il pubblico ufficiale [357] che, ricevendo o formando un atto nell'esercizio delle sue funzioni, attesta falsamente che un fatto è stato da lui compiuto o è avvenuto alla sua presenza, o attesta come da lui ricevute dichiarazioni a lui non rese, ovvero omette o altera dichiarazioni da lui ricevute, o comunque attesta falsamente fatti dei quali l'atto è destinato a provare la verità, soggiace alle pene stabilite nell' articolo 476 [487, 493; 1127 c. nav.].
competenza: Trib. monocratico (udienza prelim.)
arresto: facoltativo
fermo: consentito (in relazione all'art. 476)
custodia cautelare in carcere: consentita
altre misure cautelari personali: consentite
procedibilità: d'ufficio

- SUBAPPALTO NON AUTORIZZATO (art. 21 della l. n. 646 del 1982)

"Chiunque, avendo in appalto opere riguardanti la pubblica amministrazione, concede anche di fatto, in subappalto o a cottimo, in tutto o in parte le opere stesse, senza l'autorizzazione dell'autorità competente, è punito con l'arresto da sei mesi ad un anno e con l'ammenda non inferiore ad un terzo del valore dell'opera concessa in subappalto o a cottimo e non superiore ad un terzo del valore complessivo dell'opera ricevuta in appalto. Nei confronti del subappaltatore e dell'affidatario del cottimo si applica la pena dell'arresto da sei mesi ad un anno e dell'ammenda pari ad un terzo del valore dell'opera ricevuta in subappalto o in cottimo. È data all'amministrazione appaltante la facoltà di chiedere la risoluzione del contratto (1).

L'autorizzazione prevista dal precedente comma è rilasciata previo accertamento dei requisiti di idoneità tecnica del subappaltatore, nonché del possesso, da parte di quest'ultimo, dei requisiti soggettivi per l'iscrizione all'albo nazionale dei costruttori. L'autorizzazione non può essere rilasciata nei casi previsti dall'artículo 10-quinquies della l. 31 maggio 1965, n. 575.

Per i rapporti di subappalto e cottimo contemplati nel presente articolo, che siano in corso alla data di entrata in vigore della presente legge, l'autorizzazione deve intervenire entro 90 giorni dalla data anzidetta. L'ulteriore prosecuzione dei rapporti stessi, in carenza del titolo autorizzatorio, è punita con le pene stabilite nel primo comma, ferma restando la facoltà dell'amministrazione appaltante di chiedere la risoluzione del contratto (2)".

(1) Comma sostituito dall'articolo 2-quinquies del D.L. 6 settembre 1982, n. 629, convertito con modificazioni dalla L. 12 ottobre 1982, n. 726 e, successivamente, modificato dall'articolo 8 della l. 19 marzo 1990, n. 55 e, da ultimo, modificato dall'art. 2, d.l. 29 aprile 1995, n. 139, conv. in l. 28 giugno 1995, n. 246.

(2) Comma così modificato dall'art. 2-quinquies del D.L. 6 settembre 1982, n. 629, conv. in l. 12 ottobre 1982, n. 726.
Reato contravvenzionale ai sensi dell'art. 21 l. n. 646/1982 sanziona entrambi i contraenti con la pena dell'arresto e dell'ammenda.

- TRAFFICO DI INFLUENZE ILLECITE Art. 346 bis cp

[I]. Chiunque, fuori dei casi di concorso nei reati di cui agli articoli 319 e 319-ter, sfruttando relazioni esistenti con un pubblico ufficiale o con un incaricato di un pubblico servizio, indebitamente fa dare o promettere, a sé o ad altri, denaro o altro vantaggio patrimoniale, come prezzo della propria mediazione illecita verso il pubblico ufficiale o l'incaricato di un pubblico servizio ovvero per remunerarlo, in relazione al compimento di un atto contrario ai doveri di ufficio o all'omissione o al ritardo di un atto del suo ufficio, è punito con la reclusione da uno a tre anni.

[II]. La stessa pena si applica a chi indebitamente dà o promette denaro o altro vantaggio patrimoniale

[III]. La pena è aumentata se il soggetto che indebitamente fa dare o promettere, a sé o ad altri, denaro o altro vantaggio patrimoniale riveste la qualifica di pubblico ufficiale o di incaricato di un pubblico servizio.

[IV]. Le pene sono altresì aumentate se i fatti sono commessi in relazione all'esercizio di attività giudiziarie.

[V]. Se i fatti sono di particolare tenuità, la pena èdiminuita

(1) Articolo inserito dall'art. 1, comma 75, l. 6 novembre 2012, n. 190.

competenza: Trib. collegiale
arresto: non consentito
fermo: non consentito
custodia cautelare in carcere: non consentita
altre misure cautelari personali: v. art. 289 c.p.p.
procedibilità: d'ufficio

4

CHAPTER OF GERMANY

ANTI-FRAUD ACTIVITIES IN SAXONY-ANHALT ESPECIALLY IN PUBLIC PROCUREMENTS INVOLVING

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1. INTRODUCTION

Government and utility expenditure is a significant and influential factor in any economy —every year approximately one-fifth of the EU GDP is spent on goods and services by various government entities and utility service providers.

It is estimated that almost 20% of this total is spent on purchases exceeding the value thresholds set in public procurement directives.

The data regarding the amount involved is not yet complete and because data collection methods are not standardised estimates from the EU Commission are considerably higher than the amounts reported by member states.

Public procurement rules have been established to ensure fair competition and price transparency and so avoid public losses through fraud, corruption, bid rigging, kick-backs and conflicts of interest.

The aim of any anti-fraud measure is to reduce public losses and so save taxpayer money.

According to statistics from OLAF, EU-wide recoveries from detected frauds in 2012 amounted to €691 billion, of which €525 billion came from structural fund financing.

Below I will describe anti-fraud activities in Saxony-Anhalt related to public procurement. The focus is on the involvement of EU funds, mainly the ERDF.

2. ANTI-FRAUD ACTIVITIES IN SAXONY-ANHALT

Article 325 (1) Chapter 6 of the Treaty of Lisbon (TFEU) states: the Union and Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

In Germany anti-fraud or anti-corruption measures are implemented in various legislative acts.

With regard to public procurement, the general legislation is regulated in the Restriction of Competition Act *(Gesetz gegen Wettbewerbsbeschränkungen - GWB).*

Additionally, the Federal Ministry of Economics has published a list of recommended anti-corruption measures that federal states are asked to observe.

The Ministry of the Interior in Saxony-Anhalt published in 2010 various anti-corruption regulations for all employees of public organisations (Az. 34.31-002080/100 MBl. LSA. 2010, 434).

This regulation contains the following chapters:

a) Preliminary remarks

In the preliminary remarks the **public procurement process** (including the justification for the type of tendering procedure used, notification of the contract to be awarded, the procedure for selecting the best offer, the actual award, the audit of the work or service rendered, as well as the audit of individual invoices) is identified as being at risk of corruption.

b) Scope

Anti-corruption rules have to be observed by all direct and indirect public entities in Saxony-Anhalt.

c) Definitions

Officials in the sense of this ruling are employees of the Federal State of Saxony-Anhalt, independent of the nature of their legal relation to the federal state, i.e. civil servants, full-time employees, or trainees, and all persons who act on behalf of the federal state and its institutions, bodies, offices and agencies.

Areas considered particularly at risk of corruption are the following:

- **Public procurement of contracts,** including the decision on the type of procedure, evaluation of bids, award of the contract, control of the works and services delivered, as well as the audit of the respective invoices and accounts;
- Assignment of grants and subsidies including the decision on terms and conditions, revocation, recovery, interest charges, and control of the proof of the use of funds;
- Distribution of permissions, concessions, determination of conditions as well as taxes and costs;
- Decision on the deferment or prolongation of payments due, or the striking down of payments, changes to contracts, or court settlements;
- Control and supervisory activities.

Personnel considered particularly at risk of corruption are all employees whose professional activities may result in:

- a tangible or intangible advantage to a third party or the prevention of disadvantages, as well as
- an unauthorised advantage for the respective employee.

If personnel considered at risk of corruption are additionally authorised to decide individually or to evaluate processes on their own, or have specialised knowledge, or a large number of external contacts with third parties, then the risk of corruption increases considerably.

d) Activities with regard to personnel at risk of corruption

- Awareness raising and personnel training
- Selection of personnel and rotation of jobs
  Individuals for administrative jobs at risk of corruption must be selected carefully and job rotation is strongly advised.
- Rules for additional or secondary employment
- Rules forbidding the acceptance of presents or rewards

e) Organisational activities

- Identification of personnel in sensitive positions
- Supervision of personnel in sensitive positions or working in sensitive areas

- Observation of the four-eyes-principle or dual control
- Obligation of transparency in administrative actions and the respective documentation
- *Public procurement is regulated nationally by the 'official contracting terms' (Verdingungsordnungen)*.
- Internal audits
  Corruption can be detected by controls. The Ministry of the Interior strongly recommends establishing internal audit units to prevent corruption.

f) 'Anti-corruption' contact

All ministries and their administrations should name a person who should monitor measures and act as a point of contact.

g) Measures to be taken if corruption is suspected

- Duty of employees to take necessary steps
- Official complaints
- Disciplinary and labour law action
- Liability and compensation for damages caused. Information from other public institutions.

h) Public procurement

- Principles
- Third-party participation
  The responsibility for a public procurement procedure remains with the procuring authority even if third parties/experts are involved.
- Exclusion of bidders
  If a bidder is excluded from the procurement due to unreliability the procuring entity must justify the decision in writing
- Involvement of investigating authorities
  If price fixing in a public procurement procedure is suspected the investigating authorities must become involved.

3. PUBLIC PROCUREMENT LEGISLATION IN GERMANY/SAXONY-ANHALT DEFINITION

DEFINITION

Public procurement legislation obliges the state, public authorities, and institutions to follow certain legally defined procedures when buying goods and services.

Procurement or purchase in this context means the procurement of any service on the market that a government cannot produce itself. Therefore, public procurement rules concern nearly all market areas.

The main goal of public procurement rules is to ensure fair competition and that the public authority procures goods and services economically.

All procurement procedures must observe the following basic principles:

- Enhancement of competition
- Non-discrimination and equality of treatment
- Prohibition of negotiations in open/non-open procedures
- Protection of confidential information
- Transparency

GENERAL

In Germany public procurement rules according to Directive 2004/18/EC were added separately (Part 4) to the Restriction of Competition Act *[Gesetz gegen Wettbewerbsbeschränkungen (GWB)]* in 1999, which contains the basic legal regulations for all public procurement procedures above given thresholds.

The 'GWB' refers to the national regulation for public procurements, the so-called 'Regulation for awarding public contracts' *[Verordnung über die Vergabe öffentlicher Aufträge (VgV)]*, based upon Articles 97 (6) and 127 of the aforementioned GWB.

The National Regulation for Public Procurements, or 'VgV', is defined in the 'Official Contracting Terms' (Verdingungsordnungen) and divided into: 'terms for Contracting Construction Services', or 'VOB' *(Vergabe- und Vertragsordnung für Bauleistungen),* which regulates the procurement of works contracts; 'terms for contracting supplies and services', or 'VOL' *(Verdingungsordnung für Leistungen)*, for the procurement of supplies and services; and 'terms for Freelance Services', or 'VOF' *(Verdingungsordnung für freiberufliche Leistungen),* for the procurement of self-employed services and contracts, such as engineering or planning or legal contracts.

These rulings regulate the exact procedures for any public procurement measure in Germany.

The 'official contracting terms' (Verdingungsordnungen) are neither law nor legal regulations by definition but remain **legally binding** because of the obligatory national regulation as referred to in the 'Regulation on Awarding Public Contracts' *[Verordnung über die Vergabe öffentlicher Aufträge (VgV)]*. This sort of top-down legal structure is a German specialty and difficult for others to understand.

Additionally, the national and federal financial regulations also contain rulings to achieve best value for money through public procurement.

All public entities are obliged to observe these legal procedures

Private beneficiaries of public funds in Saxony-Anhalt are also generally obliged to respect public procurement regulations when the public contribution exceeds €100,000. This value threshold differs between federal states.

Private beneficiaries are informed of their respective obligation to observe public procurement rules in their grant contracts – which refer to a specific addition called:

'General Administrative Provisions' *[Allgemeine Nebenbestimmungen (ANBest-P)],* which is an annex to their contract and also published in the administrative regulations of each German federal state.

Some national and federal grant programmes have exempted private beneficiaries from the obligation to observe public procurement rules as it is assumed that private beneficiaries have their own interest in awarding best value for money contracts when investing their own funds as well as public funds. The exemption only asks private beneficiaries to obtain three offers prior to awarding a contract in order to ensure a market price is reached.

Structure and legal references in German public procurement legislation

EU regulations/directives

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Part 4 of the Restriction of Competition Act (GWB)

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Regulation on the Award of Public Contracts (VgV)

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Official contracting rules *'Verdingungsordnungen'*

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VOB/A	VOL/A	VOF

Structure of the official contracting rules *(Verdingungsordnungen)*:

VOB, VOL	VOF

Parte A	**Parte B**	**Parte C**	
Cláusulas Generales de Contratación	Cláusulas Generales del Contrato	Cláusulas Técnicas Generales del Contrato	Solo aplicable por encima del umbral (Art. 1 II VOF)
Normas de Contratación Pública	Ley del Contrato	Normas Técnicas	**Normas de Contratación Pública**

European public procurement rules

European public procurement rules apply when the overall contract reaches certain values or thresholds.

The thresholds are determined by the European authorities and German legislation 'GWB' makes a reference to these thresholds.

Due to these thresholds, public procurement legislation in Germany is divided into two parts:

A. Rules for procurements above the thresholds

B. Rules for procurements below the thresholds

Procurements above the thresholds

Open procedure

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Exceptions possible

Non-open procedure

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Exceptions under more stringent requirements

Negotiation procedure
Competitive dialogue

The general rule is to procure Europe-wide in an open procedure while observing the 'Regulation on the Award of Public Contracts' (VgV) and the 'Official Contracting Terms' *(Verdingungsordnungen)* according to Articles 97 (6), 101 (7) of the Restriction of Competition Act ("GWB").

Exemptions from this general rules are clearly defined.

Procurements below the thresholds

For all procurements below the thresholds the federal and federal financial regulations state that procurements must follow the public procedure if the nature of the underlying contract or the individual circumstances does not justify an exemption.

Justified exemptions are technical, artistic, or other reasons connected with the protection of exclusive rights or reasons for extreme urgency brought about by unforeseen events such as natural catastrophes (for example, the floods in Saxony Anhalt in 2002 and 2013). Exceptional circumstances cannot be attributable to the contracting body.

All procurement procedures are ruled by the 'official contracting terms' *(Verdingungsordnungen),* VOB/A and VOL/A Section 1, which are legally binding by reference in the national regulation for public procurements *(Verordnung ueber die Vergabe oeffentlicher Auftraege 'VgV)'.*

Public procedure

ß

Only based upon exception rules

Limited procedure

ß

Even more stringent exception rules have to be observed

Free-hand Procedure

The difference in the German terminology for below the threshold procedures to the terminology used for procedures above the thresholds often leads to confusion.

The German term 'public' procedure nearly equals the term 'open' procedure and the respective rulings differ little.

The term 'limited' procedure nearly equals the term 'non-open' procedure and the respective rulings apply mostly in accordance.

The term 'free-hand procedure' is supposed to nearly equal the negotiation procedure and obliges contractors to obtain at least three offers before awarding a contract to ensure that the agreed price reflects current prices. However, contracting authorities often erroneously translate this term as 'direct award' and this leads to unnecessary errors.

4. LEGAL PROTECTION FOR BIDDERS

GENERAL

Public procurement rules for any procedures above the thresholds are observed according to Article 97 VII 'GWB'. This includes national public procurement.

Primary legal protection for bidders can be achieved by placing a demand before the regional procurement tribunal, or in exceptional cases, by filing a lawsuit directly at the court of appeal.

Compensation for damages can be claimed at the civil courts.

For below the threshold procurements, Section 1 of the VOB/A and VOL/A does not reserve any procedure for bidders to legally enforce their rights. But even if such rights are not reserved in the directives, the basic principle of equal treatment opens the way for bidders to have their rights protected by the courts.

Public award courts *(Vergabekammern)*

Public contract tribunals have been established in each German federal state.

These are court-like public institutions which follow up complaints or demands made by bidders.

Bidders are obliged to lodge any demand immediately (generally within 1-3 days) after violation of any procurement rule has been detected or suspected.

The public contract tribunals must re-examine the respective documentation within 15 days and come to a decision within five weeks. Public contract tribunals cannot act ex officio. The initiative must come from bidders.

5. TYPICAL SOURCES OF ERRORS

a) Estimation of the contract value

The estimation of contract values is often complex and difficult – leaving room for manipulation.

b) Deadlines and missing preliminary notification

Miscalculations of deadlines are common. Preliminary notifications are sometimes omitted.

c) Choice of the procedure applicable

Exemption rules from the regular open/public procedures are not properly followed and/or their justification is often unrecorded.

d) Faulty selection of bidders

Procurement criteria are not applied equally or can be interpreted as being discriminatory or disproportionate, i.e. the steering of the procedure to a bidder preferred by the contractor can occur. At times, selection criteria are changed during the procedure.

e) Incorrect use of evaluation criteria

Many contracting authorities mix the selection and evaluation stages.

Public contract tribunals cannot act ex officio, i.e. they depend on bidders to file demands.

f) Prolongation of contracts

Prolongation of contracts can lead to a breach of the procurement principles requiring the opening of contracts to wider markets.

g) Addenda of contracts

The terms 'unforeseen' and 'urgent' are interpreted leniently.

h) Documentation

Detailed documentation is often lacking.

i) Complexity/bureaucracy

Public procurement requirements are considered cumbersome and too complex.

j) Public contract tribunals

Bidders who feel eliminated from contracts by overly short deadlines or additions to contract descriptions (or any other reasons for unfair treatment) must quickly file demands to have their rights protected. They often shy away from the additional burden of fully describing the justification for their demand.

Procedures of reprimand interrupt the tendering process and are therefore costly as the services cannot be awarded.

During my interview with the public contract tribunal officials in Saxony-Anhalt, the officials assumed that in a regionally restricted market bidders do not want to risk angering the contracting authorities because they hope to win another contract in the near future.

They also suspected that some bidders even threaten to file a demand in order to be selected for another contract in the near future or even to receive a kickback.

Reprimanded contracting authorities are often unaware of their obligation to make all respective tendering documents available to the official tribunals —which hampers the process and leads to even further delays.

6. AUDIT FINDINGS 2010 - 2014 IN SAXONY-ANHALT

Of the 489 projects audited in the ERDF operational programme between 2010 and 2013, 50 public procurements were reported as faulty, mainly resulting from miscalculated deadlines and unjustified additional contracts or contract amendments without procurement procedures.

a) Deadlines

In 2010 the auditors of DG Regional Policy re-performed a number of sample audits of operations from the Saxony-Anhalt audit authority. The auditors confirmed the detection of cases where deadlines for the notification of the contract to be awarded were miscalculated. As no prospective bidder had filed a demand in these cases with the federal procurement contract tribunal, the number of bidders was adequate, and the procedures were followed correctly, the audit authority considered these erroneous deadlines of minor importance as the principles of openness, transparency, and competition were respected. No financial corrections were applied. The audited entity was informed of a formal error and asked to observe deadlines more carefully in the future. This justification for not applying financial corrections was confirmed by DG Regional Policy.

In summer 2014 the auditors of DG Regional Policy performed another audit of the sample the audit authority of Saxony-Anhalt had drawn from payment claims declared in 2013. In similar cases as those described above, the auditors from the commission insisted on financial fines being levied according to the COCOF guidelines (under the commission's decision of December 2013 **any breach** of the underlying legislation should be sanctioned).

The stricter attitude of the auditors from the commission regarding the financial correction of unobserved deadlines was legally justified but difficult to translate to audited entities, especially with respect to equal treatment.

b) Type of procedure used

The audit authority found that the contracting authorities often fail to follow the exact procedure, i.e. they choose the type of procedure they consider justified without properly following the exemption rules. Therefore, use of the wrong type of procedure led to the application of financial fines mainly due to inadequate documentation.

c) Competitive dialogue

In 2007 the Ministry of Finance of Saxony-Anhalt had awarded the outsourcing of the management of a financial engineering instrument. As certain tax issues and other structural issues had to be considered the contractor had decided on the negotiation procedure with prior notification of a contract notice. The bidders were asked to present ideas on how to structure the financial instrument. During the negotiation process three out of initially seven bidders were invited to present their offers.

Auditors from the European Court of Auditors in 2010 concluded that in this procurement the competitive dialogue instead of the negotiation procedure should have been applied because solutions or ideas were to be presented. The ECA considered this finding as an error without financial impact as a competitive procedure was followed and no financial impact on the EU-budget was suspected.

The procedure for competitive dialogue is rarely use In Germany. Neither contractors nor bidders are familiar with it and both prefer the negotiation procedure.

d) Faulty selection of bidders

Auditors from the audit authority found that the differentiation between the pre-selection process and the evaluation process is sometimes followed incorrectly, i.e. contractors tend to limit the number of offers in the pre-selection process by applying evaluation criteria.

e) Tendering to general contractors

Private beneficiaries prefer to award contracts to so-called general contractors who delegate the task of supervising complex works contracts. The auditors from the audit authority have questioned this practice during their audits (as it is difficult to confirm that the award of a contract to a general contractor respects market prices) and have evaluated the respective selection procedure.

Auditors from DG Regional Policy criticised in the summer 2014 an ERDF co-financed project where the awarded general contractor is legally affiliated to the beneficiary. DG Regional Policy asked the Saxony Anhalt managing authority to prove that the agreed price between the contracting parties is a relevant market price either by obtaining three independent offers or by presenting an independent expert. The process is still open.

f) Failure to state the award criteria and their weighting in the contract notice

The auditors from the audit authority came across several cases in which the award criteria and the respective weighting was not described sufficiently in the tender specifications. The rate of correction in such cases is 25% of the procured amount.

g) Lack of transparency and/or equal treatment during the evaluation

In one case, the contractor also assessed the lowest price bidder on the basis of his previous successful working relationship with the project engineer. This is a subjective and discriminative treatment of the other bidders.

h) Award of additional works to an existing contractor

EU directives include strict rules with regard to the award of additional contracts. The applicable national regulations for procurements below the thresholds do not regulate the award of additional contracts, i.e. bidders are only protected by the general rule of equal treatment.

Additional contracts above the threshold can only be awarded to the same contractor if the additional works have been **unforeseen** and if they are **urgent** and if **the cause cannot be attributed to the contractor.**

The term 'unforeseen' must be interpreted very strictly. Auditors from the audit authority and from DG Regional Policy often detect cases where the purchasing entity considers any additional contract as unforeseen – even if sufficient planning and timely supervision had prevented additional work or had left sufficient time to follow a new tendering procedure.

h) Weaknesses in the management and control system

In 2008 the Commission notified the description of the management and control system (MCS) of Saxony-Anhalt. The MCS describes a single audit approach (i.e. Article 13 controls are performed by the intermediate bodies authorised but not controlled by the managing authority). Weaknesses in these controls should be detected by audits of the audit authority.

DG Regional Policy criticised this approach and asked the managing authority to perform quality checks on the Article 13 controls.

With regard to public procurements and their controls, the managing authority always referred to existing legislation and regulations at federal and regional levels and did not apply its own rules or checklists with regard to controls of public procurement procedures within the ERDF. Recommendations by the audit authority were not followed.

Not all intermediate bodies performed in-depth public procurement controls when performing controls according to Article 13 of Regulation (EC) No. 1083/2006.

In several cases intermediate bodies did not follow the strict interpretation of the term 'unforeseen' when controlling additional works to existing contracts and the level of awareness must be strengthened considerably.

7. CONCLUSION

Anti-fraud measures in Saxony-Anhalt are implemented by legislation of the federal government as well as the government of the federal state of Saxony-Anhalt.

As part of these measures, public procurement rules should be followed by all public entities awarding contracts.

In Germany, annexes to grant contracts also bind private beneficiaries of public funds to observe public procurement rules when the public contribution exceeds certain value thresholds (i.e. in Saxony-Anhalt this is €100,000).

As EU authorities assume that private beneficiaries are investing their own contribution alongside any public grant, I strongly recommend exempting private beneficiaries from public procurement rules as these are time consuming and complicated and often lead to errors through a lack of understanding.

Public procurement rules in Germany are too complicated and non-specialised personnel from public contracting entities often fail to follow all aspects of a procedure out of ignorance.

The purchase of goods and services is not centralised at the federal or regional level, i.e. any public entity in its role as a contractor has to produce the respective contract by itself. Contractors often seek out external and expensive legal advice.

I strongly recommend establishing central public procurement entities at federal and regional levels, staffed with well-trained public procurement specialists who can advise purchasers on legal aspects of a public procurement.

With regard to the ERDF, the internal systems of the management authority and the audit authority set up in Saxony-Anhalt have to be improved to further prevent, detect, and correct irregularities in public procurement according to an audit performed by DG Regional Policy in July 2014.

Audit irregularities found by the audit authority were mostly based on incorrect interpretations of the complex rules, on ignorance, and/or on poor record-keeping.

Detection of deliberate mismanagement, bid rigging, or kickbacks is nearly impossible when auditing all aspects of each ERDF payment claim to the commission, i.e. use of the proper application procedure, correct grant procedures, and the actual payment claim (i.e. the audit of all applicable EU and national rules for the audited project). The audit of public procurement is just one aspect among many others that requires in-depth knowledge of all applicable EU, federal, and regional legislation. Some auditors within the audit authority are specialising in certain fields, i.e. public procurement or state aid. These 'experts' are called whenever cases need their specialised knowledge.

When audited operations are related to larger works or service contracts, the public procurement files often consist of many individual contracts.

Budget considerations have resulted in sampling a limited number of contracts as otherwise the cost of financial control would exceed the benefit of the detection of errors.

Regarding the recommendation to rotate staff in critical positions I was informed by administration managers for the implementation of anti-fraud measures that the rotation of sensitive staff is rarely applied and that training on corruption risk management and public procurement could be improved considerably.

Public organisations that deal with larger work contracts have developed a certain expertise with regard to public procurement, but as personnel are not rotated according to the recommendation from the Ministry of the Interior a certain affinity with certain bidders may have developed – as well as a reluctance to follow procedures when purchasing additional goods or services and recording each and every step taken according to the rules.

I strongly recommend that the existing anti-fraud measures are followed more closely, especially with regard to rotating personnel and I will contact the Ministry of the Interior shortly to emphasise my recommendation.

I further suggest that the Public Procurement Award Tribunal should be able to act ex officio and perform its own investigations.

5

CHAPTER OF POLAND

PUBLIC PROCUREMENTS IRREGULARITIES DETECTED DURING IMPLEMENTATION OF THE REGIONAL OPERATIONAL PROGRAMME FOR THE WIELKOPOLSKA REGION

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1. INTRODUCTION

1.1. AIM OF THE REPORT

The aim of the report is to deliver information regarding the irregularities in public procurements that occurred during the 2007-13 Regional Operational Programme (WROP) in the Wielkopolska Region of Poland – as well as to describe the types of irregularities and statistical data regarding the irregularities. The report describes the management and control system, the way in which irregularities were detected and monitored, as well as the financial consequences of the irregularities. The main aim of the report is to provide conclusions regarding irregularities – including the reasons for occurrence and present some recommendations for avoiding irregularities in the 2014-20 period.

1.2. METHODOLOGY OF THE REPORT

The report was prepared using officially published data, official programme documents, data provided by the Irregularity Management System (IMS), and interviews discussing public procurement issues with individuals from the management and control system.

The interviews were carried out with:

- Audit Authority (AA) – Ministry of Finance – Department for the Protection of UE Financial Interests (Ms. Beata Kowalewska – Deputy Director),
- Regional Division of Audit Authority – Treasury Control Office (TCO) in Poznań (Mr. Bogdan Marciniak – Head of the Unit)
- Management Authority (MA) – Wielkoposka Marshall's Office (MO) (Department of the Regional Operational Programme – Mr. Przemysław Maćkowiak – Deputy Director; and Ms. Agnieszka Juskowiak – Head of Inspection and Irregularities Unit).

The interviewees were aware of the aim and objectives of the interviews.

1.3. THE WIELKOPLSKA REGION

Wielkopolska (Greater Poland) is the second largest region in Poland and a NUTS 2 entity. The region is located in the central-western part of Poland. The region includes the historical land of the same name and covers 29,826 square kilometres. The region is dominated by farmland and forests – with lakelands to the north and lowlands on the south. The population is 3.4 million (9% of the Polish population). The economy of Wielkopolska is based on farming and food processing, chemicals, heavy industry (represented by vehicle companies such as MAN, VW, Solaris, as well as ship and train engine manufacturers such as SKF, ZF or HCP), brown coal mining, and energy production (PAK power plant). Wielkopolska is also very well connected with central Poland (Lodz and Warsaw) and eastern Germany (Berlin). There are various East European logistic and service centres in Wielkopolska (for example, Amazon's central European hub started operations in August 2014).

The rate of unemployment in the region is less than 10%; however, for young people under 25 the rate is about 22%. The region is attractive for investors due to the relatively low cost of labour and localisation. The challenge for the region is to not only to compete on cost and convenient transport connections, but also by creating an advanced economy with research capabilities.

The capital of the region is the historic city of Poznan – an early medieval residence of Polish rulers. The city is located mid-way between Berlin and Warsaw on the trans-European A-2 motorway and the E-30 railway. The population of the city is 560,000 (or 650,000 if surrounding towns are included). During last ten years there has been considerable migration from the city centre towards the suburbs.

Poznan is a super-regional academic centre – there are ten public universities (general, medical, economical, agricultural, technical, and others) and a number of private high schools. In common with the rest of Poland, the local universities teach at an acceptably high level but research lags behind the leading universities in Europe.

2. DESCRIPTION OF THE OPERATIONAL PROGRAMME

2.1. OBJECTIVES OF THE PROGRAMME

The regional operational programme for Wielkopolska 2007-2013 (WRPO-CCI number 2007PL161PO017) was officially approved by the European Commission (EC) on the 4 September 2007 and amended by the commission on 21 October 2008.

It is one of the 16 regional programmes implemented in each Polish region (apart from central-management programmes).

A total of €1,952,088,350 was allocated for the implementation of WRPO, out of which €1,272,792,644 came from the European Regional Development Fund and €679,295,706 from national funds. The maximum co-financing level was established at 74.54% of eligible costs. The main objective of the programme was to strengthen Wielkopolska's potential for growth, competitiveness, and employment – and this was achieved through the following specific objectives:

1. Improvement of investment conditions,
2. Growth in professional activities,
3. Growth of the share of knowledge and innovation in the regional economy.

As part of regional operational programme for Wielkopolska, beneficiaries can apply for co-financing projects implemented under seven priorities (with allocation):

1.	Business competitiveness:	€328,887, 000
2.	Communication infrastructure:	€493,361,547
3.	Natural environment:	€172,821,000
4.	Revitalisation of problem areas:	€54,060,000
5.	nfrastructure for human capital:	€121,284,097
6.	Tourism and cultural environment:	€61,470,000
7.	Technical assistance:	€39,909,000

At present (Autumn 2014) the implementation of WPRO is very advanced. Some 2173 project were contracted, of which 1863 are completed. The total amount spent was €2,347,389,495[1] (UE co-financing was €1,277,169,925). There is still €51,703,833 to be spent during the final calls.

2.2. MANAGEMENT AND CONTROL SYSTEM

The programme is managed at a regional level, although national authorities have control and coordinating powers.

The programme management authority (MA) (described in Article 59, Paragraph 1, Point 1a, of Regulation 1083/2006) is the *Wielkopolskie Voivodeship* Executive Board *(Zarzad Wojewodztwa Wielkopolskieg)* chaired by the Marshall of the *Voivodship (Marszalek Wojewodztwa)*. The unit directly responsible for managing the programme is the Department of Regional Operational Programmes at the Marshall's Office (DRO). At the same time, the Regional Fund for Environmental Protection and Water Management (an intermediate body described in Article 59 paragraph 2 of Regulation 1083/2006) in Poznan was responsible for implementing priority 3 natural environment measures.

Coordination of regional programmes across the whole country is the task of the Ministry of Infrastructure and Development (Department of Coordination of Regional Programmes). This department is responsible for coordinating the development and implementation of regional programmes (including the transfer and settlement of funds for the coordinating body (ROP) implementation) and coordinating horizontal issues essential for programme implementation.

The management authority is responsible for:

- Programme development,
- implementation,
- monitoring and evaluation,
- calls for applications,
- selection of projects,
- control of projects including control of public procurements,
- reporting on irregularities.

The role of the certifying body described in Article 59 Paragraph 1 Point c of Regulation 1083/2006 is assumed by the Department of Certification within the Marshall's Office.

1 The differences between the figures is a result of the currency exchange rate. The WPRO as a programme was contracted in 2007 in euros, however the grants were made in Polish Zloty – PLN.

The role of the audit authority provided for in Article 59 Paragraph 1 Point c belongs to Treasury Control (TC)– the service responsible for audits of public income and spending. The Chief of the Treasury Control (General Inspector of Treasury Control and Secretary of the State within Ministry of Finance) is also appointed by the government as an Office for Irregularity Avoidance (GP IR)

Within the structure of treasury control the following entities are in charge of auditing EU measures:

- The Department of EU Measures Protection (DMP) within the Ministry of Finance and supervising the work of:
- 16 regional treasury control offices. The treasury control office in Poznan is responsible for the WROP.

The AA audits the implementation system and makes on-the-spot checks based on a sample. It is responsible for winding-up orders issued for all operational programmes including the WROP.

It is also an OLAF counterpart for exchanging information regarding frauds and irregularities and an operator within the IMS system. The unit within the department is responsible for transferring data to the European Commission.

The regional TCO in Poznan is responsible for on-the-spot checks of the sample prepared by the DMP. The WROP is not the only field for TCO activities. The TCO is also responsible for checks on projects co-financed by the Cohesion Fund, ESF, ERDF, agriculture funds and Norwegian/EEA grants.

The TCO cooperates with the implementation of regional funds and law enforcement institutions. The platform of exchange of information regarding fraud and irregularities was established in 2008 with the Regional Board for Irregularity Avoidance. The following authorities belong to the board:

- Management Authority (the Marshall's Office),
- Regional Agency for Implementation of Agriculture Funds,
- Regional Agency for Agriculture Markets,
- Treasury Control Office,
- Regional Police Command (organised crime unit)

The aim of the board is to coordinate activity connected with fighting fraud and irregularities at the regional level.

3. IRREGULARITY REPORTING SYSTEM

The current reporting system for irregularities was established in August 2010 and is based on the document entitled 'Procedure for Informing the European Commission on Irregularities Detected during Implementation of the Structural Funds and Cohesion Find in Years 2007-2013' (PION). The document was issued by the Government Office for Financial Irregularities in Polish and European Union Budgets (GP IR).

The aim of the PION is to implement the system in accordance with the provisions (Article 70 Paragraph 1 Point b of the Regulation 1083/2006). It is applicable to all operational programmes including regional programmes. PION consists of the following:

1) Definition of irregularity, legal infringement, fraud and bidder

2) Institutions responsible for detecting and reporting irregularities

The detection and reporting of irregularities is obligatory for all institutions in the management and control system.

The main responsibility belongs to the management institutions or intermediate bodies making checks on projects. This is the first and main source of information regarding irregularities.

In case of the WROP, the responsibility for gathering data on irregularities belongs to the Marshall's Office.

3) Flow of the reports

The reports are prepared by the management authorities and are submitted to the certifying body and the MF-R – which then submits the verified reports to OLAF.

4) Content of the reports

- Number of irregularities,
- Type of irregularity,
- Date of detection,
- How detection was made,
- Indication of the persons benefitting and entities involved,
- Short description of the irregularity,
- Value of irregularity.

Irregularities of a value under €10,000 are not reported. Data regarding small-scale irregularities should be gathered by the management authority and submitted to the audit authority in a consolidated report on unreported irregularities.

5) Terms of reporting

Reports on irregularities are submitted to the EC quarterly. The management authority is obliged to prepare and transmit the reports on irregularities within 40 days. The reports should be sent to the certifying authority (CA) and audit authority. AA transfer the reports directly to OLAF within 40 days.

In case of irregularities of a new type, or which may have consequences in other EU member states, the reports should be send immediately.

6) Monitoring

Information on irregularities should be issued from detection to final liquidation. The management authority must prepare quarterly reports on irregularities – including reimbursement procedures and criminal prosecutions.

7) Data protection rules

8) Analysis of information

The audit authority is obliged to analyse information on irregularities and submit information to the institutions of the management system regarding the type of irregularities that occurred and suggest how further irregularities can be avoided.

9) The informatics system (IMS)

The IMS system was implemented by the EC in 2012. It is an electronic system for gathering and sharing reports on irregularities.

4. PUBLIC PROCUREMENT SYSTEM

4.1. LEGAL BASES

The Polish public procurement system is based on public procurement legislation (PPL) approved by Parliament on 29 January 2004. This is the basic legislation in this area and provides for a unitary public procurement system in Poland. There are no local or regional exemptions or modifications to the system.

The PPL specifies the rules and procedures for awarding public contracts, legal protection measures, control of the award of public contracts, and the competent authorities with respect to matters addressed in this act.

It provides the definitions of issues connected with public procurement such as: price, tender, dynamic purchase system, supply, awarding procedure, sensitive equipment, contracting authority, services, contract, sub-contracting, and framework agreements.

4.1.1 Scope of regulation

The PPL shall apply to public contracts awarded by:

1) public finance sector units within the meaning of provisions of the Public Finances Act;

2) unincorporated state organisations, other than those specified in item 1;

3) entities (other than those specified in item 1) established for the specific purpose of meeting general interest needs, not having an industrial or commercial character, providing the entities referred to in these provisions and in items 1 and 2, separately or jointly, directly, or indirectly through another entity:

a) provide more than 50% of the finance, or
b) have more than half of the shares or stocks, or
c) supervise their managerial board, or
d) have the right to appoint more than half of the members of the supervisory or managerial board;

4) associations of the entities referred to in points 1 and 2, or entities referred to item 3;

5) entities other than those specified in points 1-4, providing the contract is awarded for the purposes of exercising one of the public activities referred to in the PPL, if such an activity is exercised on the basis of special or exclusive rights, or if the entities referred to in items 1-4, separately or jointly, directly or indirectly through another entity, have a dominant influence over them, in particular:

a) provide more than 50% of the finance or
b) have more than half of the shares or stocks, or
c) have more than half of the votes resulting from the shares or stocks, or
d) supervise their managerial board, or
e) have the right to appoint more than half of the members of their managerial board;

6) entities other than those specified in items 1 and 2, providing all of the following circumstances occur:

a) more than 50% of the value of the contract awarded is financed from public funds or by entities referred to in items 1-3,
b) the value of a contract is equal to or exceeds the amounts specified in the provisions issued under the regulation,
c) the contract subject-matter comprises of activities in the field of engineering, construction of hospitals, sport, recreation and leisure centres, school buildings, facilities used by the universities or buildings used by the public administration or services connected with such works;

7) entities with concession for works

The PPL shall not apply to contracts and contests whose value does not exceed the equivalent in PLN of €30 000;

4.1.2. Rules for public procurement

The PPL provides the following rules for procurement:

1. Contracting authorities shall prepare and conduct contract award procedures in a manner ensuring fair competition and equal treatment of bidders.

2. The preparation and conduct of contract award procedures shall be performed impartially and objectively.

3. Contracts shall be awarded only to bidders chosen in accordance with the provisions of the PPL.

4. Contract award procedures shall be public.

5. Contract award procedures shall be conducted in writing, subject to the exceptions specified in the PPL.

6. The contracting authority may limit access to information connected with the award procedure only under the circumstances specified in the PPL.

Notices referred to in the PPL:

1) will be placed in the Public Procurement Bulletin available on the portal of the Public Procurement Office, hereinafter referred to as the 'PPO';

2) will be published in the Official Journal of the European Union if they are sent to the Publications Office of the European Union.

4.1.3 Procedures provided by the PPL:

1. Open tendering – contract award procedure in which, following a public contract notice, all interested bidders may submit tenders. This is the basic procedure of public procurement. The other procedures can be used with restrictions.

2. Restricted tendering – contract award procedure in which, following a public contract notice, potential bidders submit requests to participate in a contract award procedure, and tenders may be submitted by those bidders invited to submit.

3. Negotiated procedure with publication – contract award procedure in which, following a public contract notice, the contracting authority invites potential bidders to participate in the contract award procedure to submit initial tenders not containing prices, negotiate the terms, and then invites them to submit tenders.

4. Competitive dialogue – procedure in which, following a public contract notice, the contracting authority conducts a dialogue with selected bidders and then invites them to tender.

5. Negotiated procedure without publication – a procedure in which the contracting authority negotiates the terms of the contract with selected bidders and subsequently invites them to submit tenders.

6. Single source procedures – the contracting authorities may award their contracts by single-source procurement procedure only if at least one of the following circumstances has occurred:

Supplies and services may be provided by only one bidder:

a) for technical reasons of an objective character,
b) for reasons connected with protection of exclusive rights, resulting from separate provisions,
c) in the case of the award of contracts in the field of creative and artistic activities;

7. Request-for-quotation –the contracting authority sends a request-for-quotation to selected bidders and invites them to submit tenders.

8. Electronic bidding – using a form available on a website the necessary data can be entered on-line and bidders submit successively more advantageous tenders (bid increments) that are subject to automatic classification. The contracting authority may award a contract under an electronic bidding procedure when the contract value is less than the amounts specified in the provisions issued under the PPL.

9. A design contest – a special procedure or public promise, in which by means of a public notice the contracting authority promises a prize (for the execution and transfer of rights) to the design selected by a jury, used in the fields of spatial planning, town planning, architecture and construction, and data processing.

4.1.4. Contract rules

1. Public procurement contracts shall be regulated by the provisions of the Act of 23 April 1964 - Civil Code, unless the provisions of the PPL provide otherwise.
2. A procurement contract shall, under the pain of nullity, require a written form, unless separate provisions require a particular form.

3. Procurement contracts shall be open and be made accessible pursuant to rules laid down in the provisions concerning public information.

4. A procurement contract shall be null and void if the contracting authority:

1) used the negotiated procedure without publication, or single-source procurement in breach of provisions of the PPL;

2) failed to place the contract notice in the Public Procurement Bulletin or submit it to the European Union Publications Office;

3) concluded the contract in breach of provisions regarding the time for appeal, if this prevented the National Appeals Tribunal from examining the appeal before the conclusion of a contract;

4) prevented bidders who were not admitted to participate in a dynamic purchasing system from submitting indicative tenders or prevented bidders who were admitted to participate in a dynamic purchasing system from submitting tenders in a contract award procedure conducted under the framework of that system;

5) awarded a contract under framework agreement prior to the expiry of the time limit for appeal;

6) used the request-for-quotation in breach of the provisions of this act.

Two other specific procedures for public procurements are provided for in national legislation:

- Concession for works – based on the Concession of Works or Services Act of 9 January 2003. This is a specific procedure for awarding tenders for huge infrastructure projects.

- Public Private Partnership (PPP) – based on the PPP Act of 19 December 2008. There are very few examples of PPP contracts in Poland, one of them – the Thermal Waste Treatment Plant in Poznan (under construction) is located in Wielkopolska Region and is not co-financed by the WROP.

4.2. INSTITUTIONAL SYSTEM AND LEGAL PROTECTION MEASURES

4.2.1. Public Procurements Office

The central government body responsible for matters concerning public contracts is the Public Procurement Office (PPO). The president of the PPO answers to the prime minister. The PPO is responsible for:

1) preparing drafts of regulatory acts on public contracts;

2) deciding on individual issues stipulated in this Act;

3) issuing by electronic means the Public Procurement Bulletin, where notices provided for in this Act are placed;

4) keeping and publishing on the PPO website a list of organisations authorised to submit legal protection measures;

5) ensuring the functioning of the system of legal protection measures;

6) preparing training programmes, organising, and encouraging training in the field of public procurement;

7) preparing and disseminating standard criteria for assessment of the substance of training;

8) preparing and disseminating exemplary standard forms for public procurement contracts, rules of procedures, and other documents used when awarding public contracts;

9) monitoring public procurement system rules and controlling the contract award process within the scope stipulated in this Act;

10) disseminating the principles of professional ethics to persons performing tasks within the public procurement system;

11) providing uniform application of the procurement provisions, considering the judicature of courts and the constitutional court, and publishing decisions of the national appeal tribunal, courts, and constitutional court which refer to public procurement;

12) maintaining international co-operation on issues relating to public contracts;

13) analysing the functioning of the system of public contracts;

14) preparing and presenting to the Polish Council of Ministers and to the European Commission annual reports on the functioning of public procurement systems, including information on performance of tasks, referred to in point 10;

15) proposing the appointment of the disciplinary agent of the National Appeals Tribunal;

17) carrying out activities related to e-Procurement;

18) delivering annually to the European Commission the decisions passed by the National Appeals Tribunal in the previous year with regard to appeals concerning contract award procedures, where the contract was not annulled for important public interest reasons.

The PPO shall also conduct controls of the awarded contracts co-financed by EU funds prior to the conclusion of a contract (ex-ante control), if the value of the contract or framework agreement for:

1) works - is equal to or exceeds the PLN equivalent of €20,000,000;

2) supplies or services - is equal to or exceeds the PLN equivalent of €10,000,000.

The submission of the copy of the contract award procedure documentation to the PPO begins the ex-ante control.

On request of the management authority, the PPO may refrain from conducting ex-ante control, if according to the management authority, the contract award procedure was conducted in accordance with provisions of the act. The PPO shall send such information to the contracting authority and to the applicant.

4.2.2. Public Procurements Council

The Public Procurements Council is an advisory and consultative body of the PPO and is established by the PPO.

The Council shall:

1) express opinions on important matters regarding the public contracts system presented to it by the PPO;

2) give its opinion on normative acts concerning public contracts;

3) give its opinion on the annual reports of the PPO concerning the functioning of the public contracts system;

4) establish the principles of professional ethics for individuals performing tasks specified in this act within the public contracts system;

4. 2. 3. National Appeals Tribunal

The National Appeals Tribunal is established by the PPO and is competent for the examination of appeals lodged during contract award procedures. This is a quasi-judicial body for public procurement cases.

An appeal is only be admissible against actions performed by the contracting authority in the course of a contract award procedure that does not comply with the act, or a failure by the contracting authority under the terms of PPL.

The rulings of the tribunal are as binding as the court's decisions.

The parties and participants in the appeal procedure may appeal to the court against the tribunal's ruling.

5. IRREGULARITIES

5.1. TYPES OF IRREGULARITIES BASED ON COMMISSION (COCOF) GUIDELINES

5.1. 1. Budgetary and general irregularities in the planning process

1) Artificial splitting of works/service/supply contracts.

Infringed provisions:
Article 9(3) of Directive 2004/18/EC
Article 17(2) of Directive 2004/17/EC

Description:
A works project or proposed purchase of a certain quantity of supplies and/or services is subdivided to avoid falling within the scope of directives, i.e., preventing its publication in the OJEU for the whole set of works, services, or supplies.
Not found in the WROP

2) Conflict of interest

Infringed provisions:
Article 2 of Directive 2004/18/EC
Article 10 of Directive 2004/17/EC

Description:
A conflict of interest is established, either on the part of the beneficiary of the contribution paid by the Union or the contracting authority.

Not found in the WROP

3) Substantial modification of the contract elements in the contract notice or tender specifications

Infringed provisions:
Article 2 of Directive 2004/18/EC
Article 10 of Directive 2004/17/EC

Description:
The essential elements of the award of the contract include but are not limited to price, nature of work, completion period, terms of payment, and the materials used.

Not found in the WROP

4) Reduction in the scope of the contract

Infringed provisions:
Article 2 of Directive 2004/18/EC
Article 10 of Directive 2004/17/EC

Description
The contract was awarded in compliance with the directives, but a reduction in the scope of the contract followed.

Found in the WROP. See chapter 5.2.

5.1.2. Transparency issues

1) Lack of publication of contract notice.

Infringed provisions
Articles 35 and 58 of Directive 2004/18/EC
Article 42 of Directive 2004/17/EC
Section 2.1 of the Commission interpretative communication number 2006/C 179/02

Description
The contract notice was not published in accordance with the relevant rules (e.g. publication in the Official Journal of the European Union (OJEU) where required by directives.

Found in the WROP. See chapter 5.2.

2) Non-compliance with
Time limits for receipt of tenders;
or
Time limits for receipt of requests to participate

Infringed provisions
Article 38 of Directive 2004/18/EC
Article 45 of Directive 2004/17/EC

Description
The time limits for receipt of tenders (or receipt of requests to participate) were lower than the time limits in the directives.

Not found in the WROP

3) Insufficient time for potential tenderers/candidates to produce tender documentation

Infringed provisions
Article 39(1) of Directive 2004/18/EC
Article 46(1) of Directive 2004/17/EC

Description
Time given for potential tenderers/candidates to obtain tender documentation was too short, thus creating an unjustified obstacle in the opening of public procurement to competition.

Not found in the WROP

4) Cases not justifying the use of the negotiated procedure with prior publication of a contract notice.

Infringed provisions
Article 30(1) of Directive 2004/18/EC

Description
Contracting authority awards a public contract by a negotiated procedure after publication of a contract notice, but such a procedure is not justified by the relevant provisions.

For the award of contracts in the field of defence and security falling under directive 2009/81/EC, there was inadequate justification for the lack of publication of a contract notice.

Directive 2009/81/EC

Contracting authority awards a public contract in the area of defence and security by means of a competitive dialogue or negotiated procedure without publication of a contract notice whereas the circumstances do not justify the use of such a procedure.

Not applicable to the WROP

5) Failure to state:
- selection criteria in the contract notice;
and/or
a. the award criteria (and their weightings) in the contract notice or in the tender specifications.

Infringed provisions
Articles 36, 44, 45 to 50 and 53 of Directive 2004/18/EC and Annexes VII-A (public contract notices: points 17 and 23) and VII-B (public works concessions notices: point 5) thereof.

Articles 42, 54 and 55 and Annex XIII of Directive 2004/17/EC

Description
The contract notice does not set out the selection criteria.
And/or
When neither the contract notice nor the tender specifications describe in sufficient detail the award criteria as well as weightings.

Not found in the WROP

6) Unlawful and/or discriminatory selection and/or award criteria laid down in the contract notice or tender documents

Infringed provisions
Articles 45 to 50 and 53 of Directive 2004/18/EC
Articles 54 and 55 of Directive 2004/17/EC

Description
Cases in which operators have been deterred from bidding because of unlawful selection and/or award criteria laid down in the contract notice or tender documents. For example:
- obligation to already have an establishment or representative in the country or region;
- possession of experience by tenderer in the country or region.

Found in a few procedures co-financed by the WROP

7) Selection criteria not related or proportionate to the subject-matter of the contract.
Infringed provisions
Article 44 (2) of Directive 2004/18/EC
Article 54(2) of Directive 2004/17/EC

Description
When it can be demonstrated that the minimum capacity levels of ability for a specific contract are not related or proportionate to the subject-matter of the contract, thus not ensuring equal access for tenderers or having the effect of creating unjustified obstacles to the opening of public procurement to competition.

Found in the WROP. Most detected irregularities match this description.

8) Lack of transparency and/or equal treatment during evaluation
Infringed provisions
Articles 2 and 43 of Directive 2004/18/EC
Articles 10 of Directive 2004/17/EC

Description
The audit trail for the score given to each bid is unclear/unjustified/lacks transparency, or is non-existent.
And/or
The evaluation report does not exist or does not contain all the elements required by the relevant provisions.

9) Modification of a tender during evaluation.
Infringed provisions
Article 2 of Directive 2004/18/EC
Article 10 of Directive 2004/17/EC

Description
The contracting authority allows a tenderer/candidate to modify its tender during evaluation of offers

10) Modification of a tender during evaluation
Infringed provisions
Article 2 of Directive 2004/18/EC
Article 10 of Directive 2004/17/EC

Description
The contracting authority allows a tenderer/candidate to modify a tender during the evaluation of offers

11) Negotiation during the award procedure

Infringed provisions

Article 2 of Directive 2004/18/EC

Article 10 of Directive 2004/17/EC

Description

In the context of an open or restricted procedure, the contracting authority negotiates with the bidders during the evaluation stage, leading to a substantial modification of the initial conditions set out in the contract notice or tender specifications.

Not found in the WROP

12) Negotiated procedure with prior publication of a contract notice with substantial modification of the conditions set out in the contract notice or tender specifications

Infringed provisions

Article 30 of Directive 2004/18/EC

Description:

In the context of a negotiation procedure with prior publication of a contract notice, the initial conditions of the contract were substantially altered, thus justifying the publication of a new tender.

13) Award of additional works/services/supplies contracts (if such award constitutes a substantial modification of the original terms of the contract without competition in the absence of one of the following conditions

- extreme urgency brought about by unforeseeable events;

Infringed provisions

- an unforeseen circumstance for complementary works, services, supplies (point 1(c) and point 4(a) of Article 31 of Directive 2004/18/EC).

Description

The main contract was awarded in accordance with the relevant provisions, but was followed by one or more additional works/services/supplies contracts (formalised or not in writing) that were awarded without complying with the provisions of the directives (i.e., the provisions related to the negotiated procedures without publication for reasons of extreme urgency caused by unforeseeable events, or for the award of complementary supplies, works, and services).

Not found in the WROP

14) Additional works or services exceeding the limit laid down in the relevant provisions.

Infringed provisions

Last subparagraph of §4 (a) of Article 31 of Directive 2004/18/EC

Description

The main contract was awarded in accordance with the provisions of the directives, but was followed by one or more supplementary contracts exceeding the value of the original contract by more than 50%

Not found in the WROP

5. 1.3. Equal treatment issues

1) Discriminatory technical specifications

Infringed provisions

Article 23(2) of Directive 2004/18/EC

Article 34(2) of Directive 2004/17/EC

Description

Setting technical standards that are too specific, thus not ensuring equal access or having the effect of creating unjustified obstacles to the opening of public procurement to competition.

Most irregularities detected in the WROP match this description.

2) Insufficient definition of the subject-matter of the contract

Infringed provisions

Article 2 of Directive 2004/18/EC

Article 10 of Directive 2004/17/EC

Description

The description of contrast notice and tender specification is insufficient for tenderers to determine the subject matter of the contract

Not found in the WROP

3) Rejection of abnormally low tenders

Infringed provisions

Article 55 of Directive 2004/18/EC

Article 57 of Directive 2004/17/EC

Description

Tenders appear to be abnormally low in relation to the goods, works, or services – but the contracting authority, before rejecting those tenders, does not request in writing details of the relevant and constituent elements of the tender.

Not found in the WROP

5.2. IRREGULARITIES DETECTED IN THE WROP BY THE MANAGEMENT AUTHORITY

The above compilation indicates that the irregularities detected during the WROP implementation are rather limited. No frauds were detected. The irregularities belong to the group which can be described as a failures or errors during the application of the procurement procedure. These irregularities belongs to three main groups — errors of procurement notice, errors connected with transparency, and errors associated with the equal treatment of tenders. In total 54 irregularities were detected by the management authority. The ineligible expenditures were established at €4,095,279. Across the WROP as a whole (totalling €1,952,088,350) this was less than 0.2 % of error on public procurement procedures.

Less optimistic figures were found in the audit authority report. Errors were established at 0.79 % in 2012 and 0.63% in 2013.

Irregularities connected with budgetary issues (related to point 5.1.1)

- Reduction of the contract scope.

Irregularities in transparency (related to point 5.1.2.)

- Differences between information published in the notice and specification,
- Lack of notification regarding the change of specification,
- Lack of information regarding the formal compliance of the tender ,
- Extending the term for application without notice,
- Lack of notice regarding the procedure of the contracting entity.

Irregularities connected with equal treatment of tenders (related to point 5.1.3.)

- Specification includes specific producers/trademarks (IT operational systems),
- Description of the procurement suggested just one provider,
- Excessive award criteria (regarding professional experience of potential contractor),
- Extensive criteria for awarding a road construction contract (all of the consortia members required to fulfil certain conditions that were against the rules regarding consortia),
- Extensive criteria for awarding the contract (conditions impossible to fulfil),
- Requirement to possess construction equipment when tendering,
- Requirements for certificates unconnected with subject of procedure,
- Reduction of the scope of contract,
- Requirements for the indication of financial solvency irrelevant to the scale of the project,
- Lack of clarification of the provisions of the specification despite official questions from bidders.

6. CONCLUSIONS

The general question is how to avoid irregularities during the new programming period. This is the essential question. The task of the EC, member states, and beneficiaries/contracting authorities is to achieve following goals:

- high level of EU and national budget protection
- high level of co-financing efficiency
- high level of law enforcement

To achieve these goals the following activities should be continued or implemented by the players within the system.

6.1. MEMBER STATES – PUBLIC PROCUREMENTS OFFICE

The PPO on behalf of the member state should provide clear guidelines for public procurement. The member state as an UE budget payer is interested in protecting budgets. Member states are also interested in full compliance of the national legal system with EU legislation. It is also important for the functioning of the public procurement system that the state can ensure stable conditions for implementing public projects (not only EU co-financed projects).

The public procurement office should ensure following processes:

- continuous monitoring of the compliance of the national law with UE law
- keeping legal provisions as simple and as clear as possible
- delivering examples of best practices and guidelines for the contracting authority. The PPO should cooperate with the audit authority in the area of case studies referred to in chapter 6.2.

The member state (PPO) should be an active player in this field. The implementation of the Cohesion Fund in Poland is an example where the member state bears not only a legal and political responsibility for irregularities. Due to the lack of harmonisation of national legislation with EU legislation in the field of public procurements, the beneficiaries (the territorial self-governing entities) followed the national rules but infringed EU legislation (mainly in areas described on chapter 5.2). The Commission decided to charge the beneficiaries a 2% flat rate reimbursement. The reimbursement was technically paid by charging the final Commission payment made to the beneficiary. However, the responsibility of the state was evident. In these circumstances, the government decided to cover the losses of the beneficiaries in order to avoid legal action.

6.2 MEMBER STATE - AUDIT AUTHORITY

The role of the audit authority in public procurements is presently limited to ex-post verification. Obviously, the AA is not responsible for the controls made during the contracting stage. However, some elements of its activity should be improved:

- The AA could deliver the 'case-studies' and these could be made available for the beneficiaries/management authorities. The content of the book should be decided in consultation with the PPO.
- The IMS system (managed at the national level by the AA) should be more operative. There is the impression supported by experience, that the IMS prevents many operations that could be useful for institutions in the system. It should be friendlier for users and enable the generation of data in all the required formats. Today this is not possible (according to the observation of the researcher). Several difficulties connected with data gathering occurred during the preparation of the report. The IMS should not be only a tool for transferring data, but also a tool for data analysis. The observation made during the preparation of the report is that the IMS needs some improvements. An example of failure of the IMS was the situation when the MA was unable to use the data gathered in the IMS.
- It would be useful to extend access to the IMS for institutions of all levels, or even for open public use. The IMS contains data regarding public funds, so the information regarding irregularities with public money should be transparent. It is a matter of discussion if the personal data or data regarding the identity of beneficiary should be transparent, however description of the reason, practice, value, and monitoring of fraud or irregularities should be available.

The Regional Board for Irregularity Avoidance should become more active. The impression of the interviewees (at the regional level) is that the board provides one way information – from management authorities to the police or prosecutor's office. Transfer in the opposite direction does not occur. It is obvious that enquiries conducted by the police should be secret; however, the police should share experience and information (regarding for example new types of irregularities). As indicated above, no frauds were detected in the WROP (frauds detected in Wielkopolska were connected with agricultural funds); however, the fluent flow of information in both directions should be ensured. It seems to be a task for the audit authority to establish guidelines for more effective cooperation between institutions – in cooperation with the National Prosecutor's Office and police commanders.

6.3 MANAGEMENT AUTHORITY

The management authority can ensure suitable behaviour by:

1. Strengthening the control capacity without increasing the number of staff or costs. The question is how to increase the efficiency of the public procurement checks. The solution is to use all available human resources to make ex-ante checks, before contracting and invoicing occurs. This would enable the avoidance of irregularities at later stages and would make the ex post controls easier and less time consuming. It is just a matter of management methods and ability to plan work.

2. The management authority should consider the possibility of appointing a central contracting authority. This solution was used in Poland in the pre-accession period due to the requirements to use specific procurement procedures (PRAG). This solution could be used on a regional scale. The central contracting authority could provide a service for the beneficiaries obliged to follow a public procurement procedure. The advantage of this solution would be:

    - high level of assurance,
    - lower level of risk for the beneficiary,
    - possible decrease in tendered prices due to an increase in the volume of tendering (for example in the case of goods purchasing).

The possibility of appointing the CCA is provided for in the PPL.

6.4 BENEFICIARIES

The beneficiaries of the contracting authorities are the bodies causing the irregularities. As indicated above, no frauds were detected in the WROP. Typical irregularities in the WROP could be described as an errors caused by wrongly interpreted legalisms.

It may seem surprising but many irregularities were caused by the intention of the beneficiary to secure UE funds. This was the reason for establishing extended and unsuitable requirements connected with:

- equipment possession
- experience, especially with EU financed contracts
- consortia
- the origin of supplied goods

This effect could be caused by the experience gathered during the pre-accession period and rules provided by the Commission and the PRAG.[2]

The beneficiaries should increase their knowledge regarding public procurements by undertaking more training and analysing the case-studies or interpretations prepared by the PPO or AA.

They should ensure a proper level of qualified staff for conducting public procurement. The risk of a fine or reimbursement should be a factor in strengthening public procurement units.
In case of smaller beneficiaries (such as small communities or entities who cannot afford to strengthen human resources) the solution could be to outsource services connected with procedures. These services could be delivered by the above mentioned CCU or by external lawyers. In this second case, the services of the external lawyer should be treated as a cost paid as technical assistance within the operational programme.

6. 5. CONCLUSIONS REGARDING THE LEGISLATION

All the interviewees said no change in the legislation was necessary and emphasised that legal stability is an important factor for the contracting procedure.

The goals regarding the security of public spending and procedures should be achieved by the above listed non-legislative measures. The legislative actions made between 2004 and 2010 caused formal errors during the procedures – especially in the case of beneficiaries/ contracting authorities with limited experience and capacity. This legislation was necessary to achieve compliance with the UE; however, changes in the PPL made during this period caused difficulties with the proper PPL application (especially the number and frequency of the changes, compounded by a lack of experience and proper guidelines).

2 PRAG – Practical Guide to Contract Procedures for EU External Actions – official EC guidelines for public procurement tendered during the pre-accession period.

PROFESSIONAL PROFILES OF THE INTERVIEWEES

AUDIT AUTHORITY
Ms. Beata Kowalewska:

Education
1992-1997 Adam Mickiewicz University in Poznan – Faculty of Law,
2001-2002 Robert Bosch Foundation Fellowship – German Federal Ministry of Finance.
Certified Internal Auditor (CIA),
Certified Government Auditing Professional (CGAP).

Professional trajectory:
1997-2005 Treasury Control Office in Poznan – EU Funds Unit,
2005-2014 Ministry of Finance – Department of Protection of UE Financial Interests – Deputy Director - responsible for audits of EU measures.

AUDIT AUTHORITY – REGIONAL DIVISION IN POZNAN
Mr. Bogdan Marciniak
Education:
1976-1981 High School of Transport and Communication in Zylina (former Czechoslovakia),

Professional trajectory:
1981-1983 State Revenue Office in Poznan,
1983–1992 Tax tribunal in Poznan,
1992-2014 Treasury Control Office in Poznan – Inspector of treasury control since 2004 – Head of the UE Funds Unit – responsible of audits of EU funds.

MANAGEMENT AUTHORITY
Mr. Przemysław Mackowiak

Education:
1998-2003 Technical University in Poznan – Faculty of Management and Marketing,
Post-graduate study – University of Economics in Poznan – Management of the EU funds by autonomous units.

Professional trajectory:
2003-2007 Unit of the UE in the Marshall's Office in Poznan – Specialist/Head of the Unit.
2007-2014 Department of Regional Operational Programme within Marshall's Office in Poznan – Deputy Director – responsible for implementation of the WROP including audits and irregularities management in EU Funds.

Ms. Agnieszka Juskowiak
Education:
1998-2001 Adam Mickiewicz University in Poznan – Faculty of Law,
Post graduate studies:
- Audit and internal control in public sector,
- Audit of UE Funds.

Professional trajectory:
2001-2004 Treasury Control Office in Poznań- UE Funds Unit
2007-2014 Department of Regional Operational Programme within Marshall's Office in Poznan, Head of the Control unit responsible for checks of the projects financed by the WROP and the IMS.

7. ATTACHMENT TO THE REPORT

Based on observations gathered during the ESADE Conference held on 12 December 2014.

1. LINKS BETWEEN MANAGEMENT SYSTEM AND LAW ENFORCEMENT SYSTEM

Public procurement is an especially sensitive area. It is crucial to ensure a high level of cooperation between the institutions of the management system such as the management, implementation, audit authorities, and law enforcement institutions (police or the prosecutor's office). The situation when both systems work separately is unacceptable. This approach can seriously damage projects or even operational programmes co-financed by European funds. Detection of irregularities or frauds during an advanced phase of implementation or after completion of a project can be – from the point of implementation – destructive for the project. Irregularities and frauds should be detected at an early stage of implementation. Of course, it is a general postulate that this is not always possible. However, there are some factors that can help prevent fraud. First of all, the flow of information between both systems must be ensured. The law enforcement institutions should implement a practice of 'red flagging' – informing the management system institutions about suspected fraud. It is not necessary to submit very specific information regarding specific companies or personal data (presumption of innocence); however, clear messages regarding specific tendering should be possible. The management institutions should be warned and made aware of the possibilities of fraud and take suitable precautions (for example, by changing the members of tendering committees).

2. LEGISLATION

Most irregularities (not frauds) in public procurements were caused by an inadequate implementation of EU law. This caused a number of financial corrections issued by the Commission.[3] Polish public procurement legislation is now fully harmonised with EU legislation. The interviewees and opinions expressed during the conference emphasise the need to keep the law as stable as possible.

3. CONTROL QUALITY

3.1. Internal controls

Internal controls are the front-line in the detection of irregularities. Quality depends on many factors such as staff training and experience, ethical attitudes, available resources, and planning of the control process. By focusing on planning, management and implementing institutions should be able to prepare the process properly. It is possible to determine when and how the tendering procedure is conducted. The available human resources, including outsourced resources, should concentrate on tendering in the critical phases. It is also necessary to ensure the transparency of the process. The tendering committees can also be strengthened by external members, or monitoring from, for example, the public procurement authority.[4]

3.2 External controls

External controls are basically carried out ex post. These controls should be conducted *ex ante* if possible. This demands a change of approach. Controls should not be focused on detecting the irregularities after completing the project but on detecting irregularities at an early stage and/or preventing them. This formal approach should be replaced by a material approach. The auditors should focus on the nature of the tendering and the aims of the projects instead of focusing on tendering documentation.

4. EDUCATION

The key issue for avoiding irregularities is education. The staff responsible for public procurements should be continuously trained in best practices, examples, and types of detected frauds and irregularities – as well as the most commons errors that can occur during the tendering procedure. A platform of exchange of experience should be established.[5] This training should also include ethical topics. Managers should be aware of the meaning of conflicts of interests or unprofessional behaviour. Training should focus on methods of reacting assertively, preventing corruptive offers, and stopping political influence. Institutions in the system should implement clear guidelines for cases of suspected bribery or conflict of interests. The officers responsible for public procurements should feel the support of the rest of the team and their institution. The institutions should support and protect whistle-blowers.

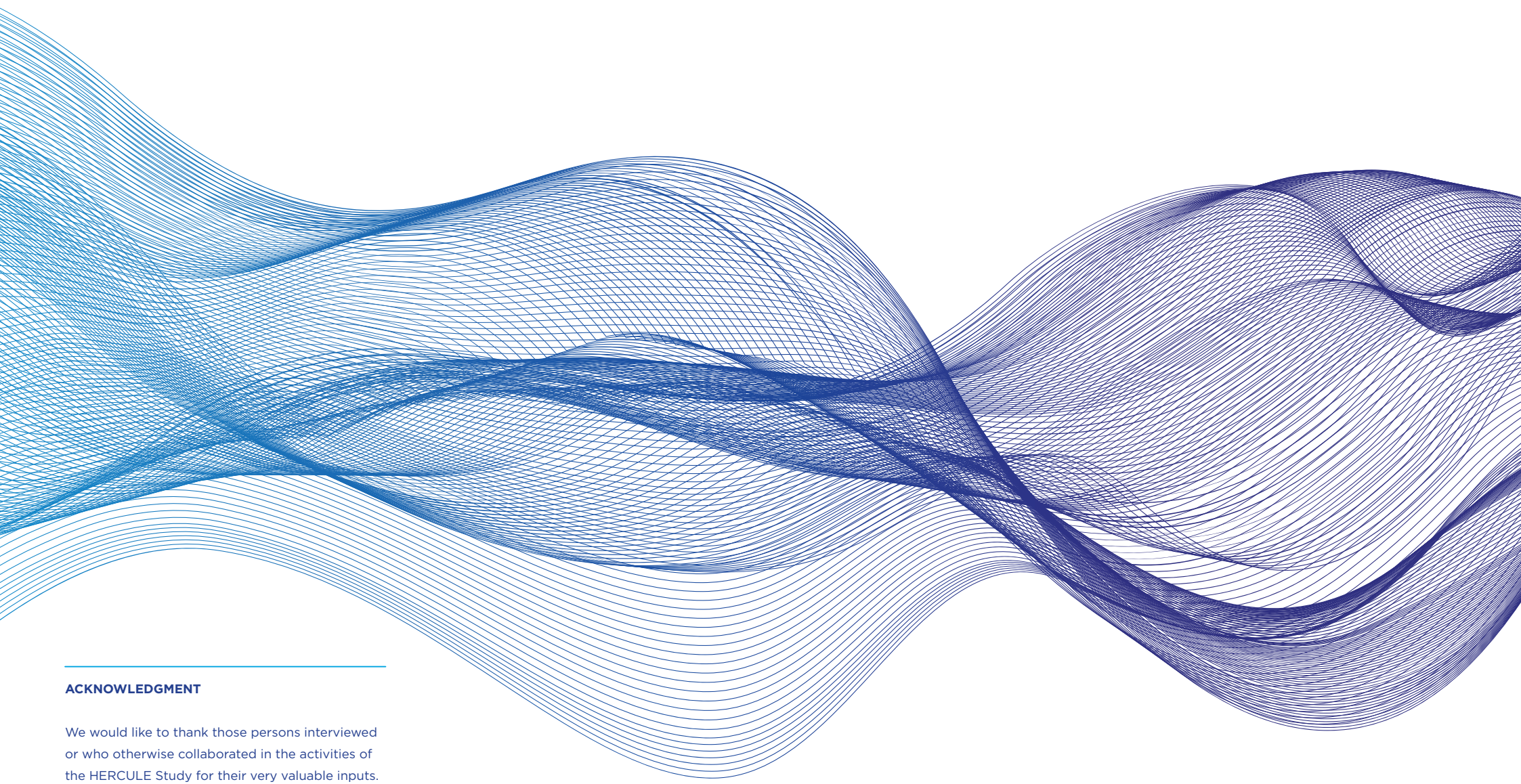
3 Corrections occurred by the implementation of the Cohesion Fund, not the WROP.

4 In Poland – the Public Procurement Office.

5 The website of public procurement office includes this type of platform; however, the interviewees indicated the need for a wider exchange of information dedicated to the irregularities detected by the implementation of EU funds.

5. PROJECT PLANNING

This remark extends the scope of the report. It is not *strictly* connected with the legal issues but with the planning process. Decision makers, both at central and regional level should be conscious of the aims of the projects and be sure that a proper value for money ratio is achieved. The nature of democracy causes political impact on investments connected with the election process and this is not a bad practice. Politicians are elected and appointed to manage public affairs – including public administration. The problem begins when the political impact on planning investments is too strong and when projects are over-planned. The needs of local or regional communities should be satisfied; however, public spending should be controlled not only from a formal point of view, but also from a material point of view. The question is how should the audit authorities monitor the use of funds needed to pay for specific investments.



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ESADE
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