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THE RISK OF CORRUPTION IN URBAN PLANNING

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1. FOREWORD

The government of the territory, in Italy, is one of the sectors where crimes against the Public Administration and, especially, the crime of corruption, are most widespread. Although the literature has highlighted this phenomenon[2], the issue of corruption in the urban planning has not, for a long time, been the subject of particular attention by the institutions, unlike other sectors, such as public procurement or health care[3]. In the first version of the National Anti-Corruption Plan (N.A.P.), the government of the territory was not even expressly included among the general risk areas, and it could only be identified as a specific risk area by local authorities within the respective three-year corruption plans[4]. However, the significant importance of corruptive phenomena in this field led the Italian National Anti-Corruption Authority to include in the 2016 N.A.P. a specific section

[2] S. CASSESE, *Ipotesi sulla storia della corruzione in Italia*, in G. MELIS (ed. by), *Etica pubblica e amministrazione: per una storia della corruzione nell'Italia contemporanea*, Conference held in Naples in the 1997, Naples, 1999, 188; P. URBANI, *Urbanistica consensuale, "pregiudizio" del giudice penale e trasparenza dell'azione amministrativa,* in *Riv. Giur. Edilizia*, 2009, 2, 47 – 57, now in *Scritti scelti*, Torino, 2015, vol. II, 1169 – 1180. M. CAPPELLETTI, *La corruzione nel governo del territorio: forme, attori e decisioni nella gestione occulta del territorio,* Buccino, 2012, in particolare, 34 – 39; A. BARONE, *La prevenzione della corruzione nella "governance" del territorio,* in *Il diritto dell'economia,* 2018, 3, 571 – 595; F. SAITTA, *Governo del territorio e discrezionalità dei pianificatori*, in *Riv. Giur. Edilizia*, 2018, 6, 241.

[3] For the analysis of other sectors interested by anticorruption measures S. FOÀ, *Prevención de la corrupción en las universidades y las instituciones de investigación,* in *Ius Publicum*, 2018, 1, 1 – 15; F. APERIO BELLA, *The powers of the italian anti-corruption authority in public procurement: new tools to pursue good administration?*,in *Ius publicum*, 1/2017, 1 – 26.

[4] National Anti-Corruption Authority, 2015 update to the National Anti-Corruption Plan, Resolution n. 12, 28th of October 2015, 19. Among the general areas of risk, it includes "the measures extending the legal sphere of the recipients with direct and immediate economic effect for the recipient", including building permits that derive from the upstream urban planning regulations. See All. 2, lett. D), Presidency of the Council of Ministers, Civil Service Department, Studies and Consultancy Service Treatment of Personnel, National Anti-Corruption Plan, N.A.P., Law of 6 of November 2012 n. 190 "*Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione*".

dedicated to this sector, in which the main risk factors and possible measures to combat them were clearly identified[5].

The peculiarities of administrative procedures in this field, in fact, are generally recognized as elements that make the sector a particularly fertile ground for the emergence of corrupt practices. The pervasiveness of corruptive phenomena in the field of planning, urban development and construction derives not only from general factors, such as the inadequacy of the control and sanction system and the socio-economic and cultural context, but also from the specific characteristics of the regulatory environment, such as the fragmentation of competences and the non-existence of a framework law containing the general principles of the matter.

In the context of territorial governance, the corruptive risk has been defined as transversal, since it does not depend on the general or special content, nor on the authoritative or consensual nature of the measures adopted. The damage produced by corruption in this sector affects non-renewable resources, "first and foremost the land, whose functions are as essential as they are irreplaceable for the people and the environment"[6]. In order to prevent the risk of corruption, a strategy tailored to the size and complexity of the level of planning appears to be crucial.

2. OPPORTUNITIES FOR CORRUPTION IN THE URBAN PLANNING FIELD

In Italy, the government of the territory is one of the subjects that the 2001 constitutional reform has attributed to the legislative power shared between the State and

[5] National Anti-Corruption Authority, Resolution n. 831, 3rd of August 2016, final approval of National Anti-Corruption Plan 2016 (from now onwards, N.A.P. 2016), 65 – 79.

[6] N.A.P. 2016, 65.

the Regions. It includes the urban planning and construction sectors[7]. In the light of the constitutional provision, in this matter, the State is competent for establishing the general principles, within framework laws, while the Regions must exercise their legislative powers within the latter, defining the instruments by which to achieve the objectives set at central level. However, the non-existence of a framework law containing the general principles of territorial governance has made it necessary to infer them from the existing legislation on urban planning and construction, starting from the Urban Planning Law of 17 August 1942, no. 1150, still in force today[8]. Over time, several regulations have been adopted, both by the State and the Regions, concerning urban planning as well as adjacent matters, such as, for example, the landscape, transport or construction, that overlap with the Urban Planning Law.

The lack of an organic and unitary regulatory framework contributes to increase the discretion of the competent bodies, favouring the emergence of corruptive phenomena[9]. As clarified in the N.A.P. of 2016, the "extreme complexity of the matter, which is reflected in the disorganized, lack of clarity and stratification of the regulations and the persistence of a fragmentary pre-constitutional legislation anchored to the Urban Law, 17th August, 1942, n. 1150"[10], has a negative impact on the definition of competences of the various administrations involved; identification of the contents of the planning acts adopted at the

[7] Corte Cost., Judgement 1° October 2003, n.303. On the term "government of the territory" and its implications see P. STELLA RICHTER, *Diritto urbanistico: manuale breve,* 4° ed, Milano, Giuffrè, 2016, 2 – 9.

[8] P. STELLA RICHTER, *I principi del diritto urbanistico,* 2° ed, Milano, Giuffrè, 2006, *passim*.

[9] As stated in the literature, "we are witnessing a particularly articulated and complex body of legislation, difficult to read and interpret. This is the main reason why doctrine and jurisprudence have had and still have wide interpretative space, in order to fill regulatory gaps or resolve any differences in the reading of laws". (M. CAPPELLETTI, *La corruzione nel governo del territorio: forme, attori e decisioni nella gestione occulta del territorio*, cit., 53).

[10] N.A.P. 2016, 65.

different territorial levels; procedural timing; efficient use of public resources; legal certainty and consequent confidence of citizens and businesses in the activities of public authorities.

Traditionally, urban planning has been regulated according to a top-down mechanism, where the administration of the higher territorial level (e.g. the Region) adopts the general acts, aimed at locating large infrastructures, parks and so on, as well as coordinating and directing the detailed planning adopted at municipal level. This implies a fragmentation of competences that can create difficulties in delimiting the powers of the various authorities involved and significantly complicate the process. This aspect is important from the point of view of corruption. The private sector could, in fact, try to circumvent those procedural obstacles and speed up the decision-making process by engaging in corrupted behaviour.

The general town planning (G.T.P.) is a complex act adopted by the Municipality and approved by the Region. It contains provisions regarding the location of spaces for public use, the division of the municipal territory into zones (zoning), the constraints to be respected in historical, environmental and landscape areas and the rules for the implementation of the plans[11]. The adoption of the G.T.P. is the responsibility of the Municipal Council, while its objectives and contents are defined by the political body of the Municipality. Therefore, the decisions on urban planning contain assessments with a strong

[11] Art. 7 of law 17/08/1942 - N. 1150 states that "The general zoning plan must consider the totality of the municipal territory. It must indicate essentially: 1) the network of the main roads, railways and waterways and related facilities; 2) the division into zones of the municipal territory with the specification of the areas intended for the expansion of the urban aggregate and the determination of the constraints and characteristics to be observed in each area; 3) the areas intended to form areas of public use or subject to special easements; 4) the areas to be reserved for public buildings or public use as well as works and facilities of collective or social interest; 5) the constraints to be observed in areas of historical, environmental, landscape character; 6) the rules for the implementation of the plan. On the general theme of urban planning see M.S. GIANNINI, *Pianificazione*, in *Enc. Dir*., XXXIII, Milano, Giuffrè, 1983, 629 e ss.

political value, that are difficult to submit to a preventive control of an administrative nature. Moreover, the number and indeterminacy of public and private interests involved in the decision-making processes related to urban planning make the boundaries of discretion of the decision-makers particularly wide[12].

The Municipal Council, subsequently, designates the planners in charge of drawing up the plan, who may be public officials with a specific technical expertise, or private experts, identified through public procedures. The activity carried out by the designers takes on a fundamental role in the preliminary investigation activities prior to the definition of the discipline of the individual areas of the municipal territory. Although it has a purely technical - executive character, however, it implies room for manoeuvre, to the advantage or disadvantage of private interests[13].

All these decisions are very significant in terms of the risk of corruption. The fact that the political body is primarily responsible for planning decisions creates difficulties with regard to the introduction of preventive administrative measures to control the risk of corruption. In fact, plans for the prevention of corruption are mainly imposed at the administrative level[14]. On the political side, the only measures available are those of a general nature relating to situations of conflict of interest or incompatibility. The difficulty

[12] See F. SAITTA, *Governo del territorio e discrezionalità dei pianificatori*, in *Riv. Giur. Edilizia*, 2018, 6, 241 e ss.; L. MAROTTA, *Pianificazione urbanistica e discrezionalità amministrativa*, Padova, 1988; S. COGNETTI, *La tutela delle situazioni oggettive tra procedimento e processo: le esperienze di pianificazione urbanistica in Italia e in Germania*, Napoli, 1987, 64.

[13] In the literature it has been stated that "a discretionary margin is however constituted by the possibility of modifying and altering land uses in the consolidated fabric, where speculative interests are generally minor" (M. CAPPELLETTI, *La corruzione nel governo del territorio: forme, attori e decisioni nella gestione occulta del territorio*, cit. 67).

[14] G.B. MATTARELLA, *La prevenzione della corruzione in Italia*, in *Giorn. Dir. Amm.*, 2013, 2, 124.

of applying the principle of "separation between politics and administration"[15], in fact, constitutes one of the causes of corruption in the area of government of the territory mentioned in the N.A.P. of 2016 and already identified by the doctrine among the historical sources of corruption[16]. Moreover, the proximity and frequent personal relationships between the citizens and the politicians, which characterizes especially small municipalities, seems to be a factor that facilitates the emergence of corrupt practices.

In order to guarantee transparency and participation in the decisions concerning the territory, the adopted plan is deposited in the Municipal Secretariat for thirty days, during which anyone can view it and submit observations, to which the municipal body must respond with its counter-deductions. The next step is the approval by the Region, which may introduce changes that do not involve substantial innovations to the plan, resulting from the private individuals' observations and accepted in the counter-arguments by the Municipality, or recognized as essential to ensure compliance with the regional coordination plan. Proposals for amendments must be duly substantiated and the Municipality may submit its counter-arguments. The control prior to the approval by the Region and the necessary consistency of the G.T.P. with the provisions of the higher territorial plans, together with the participatory guarantees and transparency obligations, represent important preventive instruments in terms of corruptive risk.

Corruptive phenomena may also concern implementation planning, i.e. planning that translates the general provisions contained in the G.R.P. into detailed technical and

[15] This principle has been introduced in Italian Law by the reforms adopted during the Nineties, especially by the legislative decree n. 29 of 1993. In a nutshell, it introduces a distinction between the address functions of the political bodies and the management functions of public officials.

[16] "We must return to the osmosis and symbiosis between politics and administration. The bureaucracy that sees itself excluded from the political body is pushed by an internal force to regain the lost space through corruption, which increases its power and personal income" (S. CASSESE, *Ipotesi sulla storia della corruzione in Italia*, cit. 183.

administrative provisions (detailed plan, allocation plan, plan for social housing, plan for production facilities, recovery plan, etc.). The latter often takes place using hybrid instruments, oriented towards urban regeneration and requalification, such as, for example, complex programmes of interventions[17].

Finally, particularly exposed to the corruptive phenomenon are the tools of so-called consensual urban planning, increasingly widespread in the Italian system[18]. Often, urban planning measures involve particularly complex procedures, which require significant technical and financial capabilities that require municipalities, especially smaller ones, to rely on the skills and economic resources of private individuals, with a very high probability of being captured[19]. The significant information asymmetries between public and private subjects that characterize the planning choices represent another element identified by the National Anticorruption Authority among the reasons for corruption in the

[17] Complex programmes of interventions represent institutions of both programmatic and implementation value, aimed at overcoming the model of traditional planning and rigid zoning of the territory, through the integration of different types of intervention, including works of public interest (secondary urbanization) and the possible competition of operators and public and private financial resources "for the conversion of entire parts of the municipal territory that are obsolete or degraded compared to the emerging urban development"(P. URBANI E S. CIVITARESE MATTEUCCI, *Diritto urbanistico, organizzazione e rapporti*, Torino, Giappichelli, 2000, 235).

[18] See, for example, the case of Cassazione penale sez. VI, 20 ottobre 2016, n.3606, where the crime of corruption aimed at obtaining the change in the urban destination of an area and the consequent permission to build.

[19] As stated in doctrine, "traditionally the most frequent crimes were those of bribery for an official act (granting of building permits), or of extortion for failure to ascertain an abusive work. With the intensification of the consensual aspect not only in the implementation phase of the plans, but also in the planning phase, mainly due to the financial crisis of the municipalities, opportunities for corruption have intensified" (P. URBANI, *L'urbanistica,* in F. MERLONI E L. VANDELLI (a cura di), Volume ASTRID, *La corruzione amministrativa. Cause, prevenzione e rimedi*, Passigli, 2010). See, also, P. URBANI, *Urbanistica consensuale, "pregiudizio" del giudice penale e trasparenza dell'azione amministrativa*. On the general topic of consensuality in the government of the territory and its implications on the principle of legality of the public administration, see M. DE DONNO, *Il principio di consensualità nel governo del territorio: le convenzioni urbanistiche*, in *Riv. Giur. Edilizia*, 5, 2010, 279.

government of the territory[20]. This implies the constancy of the relationships between the regulator and the regulated entities, known as one of the classic causes that favour regulatory capture[21].

On the other hand, consensual instruments are often adopted in order to simplify the relationship between the different local administrations involved in planning, as in the case of the programme agreement, an instrument that has had a strong expansion in the latest years[22], producing an important transformation of traditional forms of urban planning[23]. This tool allows to facilitate the joint action of several public administrations, such as Municipalities, Provinces, Regions, State administrations and other public subjects, involved in the definition and implementation of works or interventions[24]. It automatically produces the variation of urban planning tools and the implicit declaration of public interest and urgency of the works. The programme agreements imply, therefore, automatic changes in the provisions of the general town planning plan and should make it possible to overcome the long timeframes of the ordinary procedure for approval of a variant[25], with a shift in the weight of the government of the territory from the plan to the project[26].

[20] N.A.P. 2016, 65.

[21] On the theory regulatory capture and how the need for information from private individuals constitutes an incentive for the administrations to be captured we can see, among many others, G. STIGLER, *The economic theory of regulation*, in *Bell Journal of Economics,* 2, 1, 1971, 3–21; S. PELTZMAN, *George Stigler's contribution to the economic analysis of regulation*, in *Journal of Political Economy*, 101, 5, 1993, 818 – 832.

[22] M.S. GIANNINI, *Pianificazione*, cit. 873 – 876.

[23] See P. URBANI, *Pianificare per accordi*, in *Riv. giur. edilizia*, 4, 2005, p. 177 ss.; ID., *Dell'urbanistica consensuale*, in *Riv. giur. urb*., 2005, p. 233 ss.

[24] S. CIVITARESE MATTEUCCI, *Accordo di programma (diritto amministrativo)*, in *Enc. Dir.*, agg. III, Milano, Giuffrè, 1999, 20 – 21

[25] In this regard, it has been noted that these instruments of consensual urban planning have produced a "reversal of the relationship with the general land-use plan, in the sense that it is no longer the land-use plan that binds the

In conclusion, among the elements that seem to favour the emergence of corruption in the field of urban planning are: the absence of an organic legislative framework; the fragmentation of competences that contributes to create difficulties in defining the powers of the authorities involved in the decision-making process; the strong political value of decisions on urban planning; the involvement of private individuals in the planning and implementation phase; the proximity between the citizens and the political bodies in the smaller municipalities.

3. THE IDENTIFICATION AND ASSESSMENT OF THE RISK OF CORRUPTION

The widespread and hardly measurable nature of the corruptive phenomenon and the inadequacy of the existing repressive mechanisms[27] have led governments to develop prevention strategies that provide for the planning of anti-corruption controls, aimed at creating operating conditions within the administration that reduce the risk of corruptive behaviour. In Italy, Law no. 190, adopted on the 6th of November 2012, contains "Provisions for the prevention and repression of corruption and illegality in the public administration". The general measures of this law are aimed at developing prevention strategies at the administrative level through the preparation of the National Anti-Corruption Plan and the Three-Year Anti-Corruption Plans in public administrations[28]. The latter are aimed at introducing into the organization of public offices strategies for the identification, assessment, management and monitoring of corruption risk, which highlight both the risks arising from the environment in which the body operates and those related to

implementation phase, but it is implementation that modifies the plan as necessary" (P. STELLA RICHTER, *Diritto Urbanistico*, Milano, 2016, 71).

[26] V. MAZZARELLI, *L'urbanistica e la pianificazione territoriale*, in S. CASSESE (ed. by), *Trattato di diritto amministrativo, Parte speciale, tomo IV*, Milano, 2003, 3335 ss.

[27] See M. DE BENEDETTO, *Corruption and Controls*, in *European Journal of Law Reform*, 1, 2016.

[28] F. MERLONI, *I piani anticorruzione e i codici di comportamento*, in *Dir. Pen. e Processo*, 8, 2013, Allegato 1, 4.

the organization itself, based on the model of internal risk management of private companies [29]. The National Anti-Corruption Plan is a guidance for the administrations for the adoption or update of concrete and effective measures to prevent corruptive phenomena. The corruptive risk in this area concerns both the organisational context within the administration and the external context in which the public body operates. In the first case, it is necessary to focus attention on the effectiveness of internal controls within the Public Administration, in the second case on the effectiveness of external administrative controls on private individuals[30].

The analysis of the risk of corruption aims at determining the impact of the exercise of the public function and the possibility that the exercise of that function may be affected or distorted by interests other than the public interest[31]. The first National Anti-Corruption Plan defined the risk in the public sector as "the effect of uncertainty on the correct pursuit of the public interest and, therefore, on the institutional objective of the administration, due to the possibility that a given event may occur". The "event" is defined as "the occurrence or modification of a set of circumstances that hinder the pursuit of the institutional objective by the administration"[32]. Finally, "risk management" means "all the activities coordinated to guide and control the administration in handling the risk"[33].

[29] For the definition of internal risk management see J. BLACK, *The emergence of risk-based regulation and the new public risk management in the United Kingdom*, in *Public Law*, 2005, 515 – 516. See also J. BLACK, R. BALDWIN, *Really Responsive Risk-Based Regulation*, in *Law & Policy*, 2, 2010.

[30] See M. DE BENEDETTO, *Controlli della pubblica amministrazione sui privati: disfunzioni e rimedi*, in *Riv. Trim. Dir. Pubbl*., 2019, 3, 855. See also L. LORENZONI (2017), *I controlli pubblici sull'attività dei privati e l'effettività della regolazione*, in *Diritto pubblico*, 2017, 3, 779 – 825.

[31] See F. MERLONI, *I piani anticorruzione e i codici di comportamento*, in *Dir. pen. e processo*, 8, 2013

[32] N.A.P. All.1, Subjects, actions and measures aimed at preventing corruption, 12.

[33] Ibid., 23.

The rationale of models based on risk assessment is based on the substantial impossibility of reducing the level of risk to zero and on the awareness that interventions aimed at completely eliminating a hazard would be excessively costly, would in turn create risks and divert public authorities from other tasks. Risk analysis, therefore, tends to replace an unacceptable risk with an acceptable one, to reduce unnecessary or disproportionate interventions[34]. The risk assessment imply an upstream decision by the legislator on the level of risk considered to be bearable[35]: "the concretisation of the elastic concept of danger, which precedes any balance with other values and requirements, cannot disregard - in application of the precautionary principle - the prior determination of an acceptable risk threshold"[36]. The risk management process is aimed at identifying the activities in which the probability of breach of obligations and the impact of non-compliance on the general interest are highest. The risk is assessed based on both the type of activity and the willingness to comply of the subject to be controlled. The frequency and content of the inspection are, therefore, programmed according to a priority scale based on the classification of risks, pursuing the principle of proportionality[37].

[34] V. HEYVAERT, *Governing Climate Change: Towards a New Paradigm for Risk Regulation*, in *The Modern Law Review*, 2011, 6, 820.

[35] "The preventive risk assessment can be carried out, and exhausted at the legislative level, with the indication of the assumptions in the presence of which the consent of the administrative authority must be denied (...) In other cases the law refers to the administrative authority for risk assessment. That is, it assumes that a private activity is a source of risk (for others), but at the same time requires that the assessment must be made in practice by the administration" (G. CORSO, *La valutazione del rischio ambientale*, cit. 160 – 161).

[36] S. COGNETTI, *Principio di proporzionalità: profili di teoria generale e di analisi sistematica*, Torino, 2011, 78.

[37] For a brief illustration of the phases of the risk analysis procedure see DIPARTIMENTO DELLA FUNZIONE PUBBLICA, *Linee guida in materia di Controlli ai sensi dell'art. 14, comma 5 del decreto-legge 9 febbraio 2012, n. 5 convertito in legge 4 aprile 2012, n. 35*, 24 gennaio 2013.

In Italy, the introduction of risk management models by private individuals subject to public control has initially acquired importance for the purposes of judicial control over the legal entities' liability[38]. Subsequently, this instrument assumed an essential role in the context of "punctual checks on compliance with general obligations" by private individuals[39] and in areas where the external supervision of administrative authorities is closely linked to internal controls by corporations[40]. In these areas, risk analysis contributes to the setting of objectives and methods of intervention to limit illegal acts or dangerous events.

The recent Italian anti-corruption legislation has conceived the corruptive risk mainly as an internal element of the administrative organization, highlighting the need to develop prevention strategies aimed at creating operating conditions in the administrations that reduce the risk of corrupt behaviour by public officials, although, as highlighted by some authors, the controls on private activity also constitute a significant opportunity for corruption[41].

[38] See artt. 6 e 7 del d.lgs. 8 giugno 2001 n. 231. Pursuant to the decree, the adoption and effective implementation by private collective entities of risk management models suitable for preventing certain crimes is the means to avoid incurring administrative liability. In this field, the control over the adequacy of the organisational models adopted is subsequent and possible by the criminal judge called upon to assess the so-called organisational fault.

[39] A. MOLITERNI, *Controlli pubblici sui soggetti privati e prevenzione della corruzione*, cit. 207.

[40] "Even in traditional controls, it is not infrequent that the controller contributes to define the parameters of the control, even on a conventional basis with the recipients of its action (think of the circularity of the process of planning and strategic control or the definition of the instruments of the sector in the field of fiscal inductive control)". (M. DE BENEDETTO, *Controlli, II) Controlli amministrativi*, cit. 2)

[41] Art. 1, comma 5 of law 6 november 2012, n. 190, *Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione*, provided that the central government's corruption prevention plan should provide an assessment of the different level of exposure of the offices to the risk of corruption and indicate the organisational interventions aimed at preventing the same risk. It is clear from this provision that in the field of anti-corruption, the planning of controls has been based on the internal risk

4. THE STRUCTURE AND FUNCTION OF THE THREE-YEARS CORRUPTION PREVENTION PLANS

Article 1, paragraph 5 of Law 190/2012 provides that the central government's corruption prevention plan must provide an assessment of the different level of exposure of offices to the risk of corruption in order to identify the organisational measures aimed at preventing the same risk. Paragraph 8 provides that, as part of the three-year prevention plans, the person responsible for preventing corruption shall define the appropriate procedures for selecting and training employees to operate in sectors particularly exposed to corruption and that activities at risk of corruption shall be carried out, where possible, by staff trained at the "*SNA - Scuola Nazionale dell'Amministrazione*"[42]. Paragraph 9 included, among the requirements to which the prevention plan responds, the identification of the activities in which the risk of corruption is highest and the provision of mechanisms for training, implementation and control of appropriate decisions to prevent the risk of corruption. It also provides for the rotation of appointments in the offices responsible for carrying out the activities where the risk of corruption is highest. Paragraph 16 identified a number of procedures, united by the element of attribution of utility by the administration to private parties, in which transparency must be particularly guaranteed, given the high risk of corruption, including authorisation or concession procedures and procedures for the attribution of economic advantages to public and private persons and entities[43]. Paragraph

management model, i.e. the introduction in the organization of public offices of risk identification, assessment, management and monitoring strategies on the model of those adopted by private companies, in order to reduce the risk of conduct that hinders the pursuit of the institutional aims of the administration.

[42] Art. 1 co. 11 Law n. 190 of 6 of November 2012.

[43] The procedures particularly subject to risk identified by law are a) authorization or concession; b) choice of the contractor for the assignment of works, supplies and services, also with reference to the selection method chosen in accordance with the code of public contracts relating to works, services and supplies, referred to in Legislative Decree no. 231/2001. 12 April 2006, n. 163; c) granting and disbursement of grants, contributions, subsidies, financial aids, as well as the attribution of economic advantages of any kind to public and private persons and

60 imposed the adoption of models of organisation and risk management, as part of the three-year plan for the prevention of corruption, also on the regions and autonomous provinces of Trento and Bolzano, local authorities, as well as public bodies and private law subjects subject to their control[44].

The National Anti-Corruption Plan has provided for the identification of risk areas to select the areas where to implement preventive measures. Some risk areas that are mandatory for all administrations are indicated in Annex 2 to the N.N.A., which provides a minimal list, to which are added the additional areas identified by each administration[45]. With respect to these areas, the three-year plan must then identify their characteristics, actions, and tools to prevent risk, establishing priorities for intervention through the following activities.

First of all, the mapping of the processes implemented by the Administration, i.e. the identification of the process, its phases and the responsibilities for each phase, so as to be able to catalogue all the processes managed by the reference Administration in the risk areas.

Once the processes have been mapped within the institution, it is necessary to carry out a risk assessment for each of them. To this end, it is necessary to identify the risk,

bodies; d) competitions and selective tests for the recruitment of personnel and career progression as per article 24 of the aforementioned Legislative Decree n. 150 of 2009. In this sense, see article 16 of Law no. 190 of 6 November 2012.

[44] For the latter, it is provided that "if these entities already adopt models of organisation and risk management on the basis of Legislative Decree no. 231 of 2001 in their anti-corruption prevention activities, they may focus on them, but extending their scope not only to crimes against the public administration provided for by Law no. 231 of 2001 but also to all those considered in Law no. 190 of 2012, on the active and passive side, also in relation to the type of activity carried out by the entity (instrumental companies/companies of general interest)". N.A.P., 33.

[45] Allegato1 N.A.P., Soggetti, azioni e misure finalizzati alla prevenzione della corruzione.

also thanks to consultation and comparison between the parties involved, taking into account the specificities of each administration and of each process, as well as judicial (in particular, criminal or administrative liability proceedings and decisions) or disciplinary (proceedings initiated, penalties imposed) measures that have affected the administration. The risks are then entered in a "risk register". In order to determine the overall risk level of the process, the Plan provides for an assessment of the degree of probability that the event will actually occur and the related economic, organizational and reputational impact. Subsequently, the risk weighting phase takes place, through comparison with other risks and the setting of priorities and urgency of treatment.

The third stage is the treatment of the risk, based on the priorities identified, and the provision of a scale of interventions by the prevention officer. The identification of treatment priorities is a prerequisite for the preparation of the proposed three-year corruption prevention plan.

Finally, the monitoring phase is foreseen, which involves the assessment of the level of risk following the prevention measures introduced, to verify the effectiveness of the prevention systems adopted and, therefore, the subsequent implementation of further prevention strategies.

Annex 5 of the N.N.A. has outlined some risk assessment criteria of the different procedures such as, for example, the level of discretion, the organizational impact, the external relevance, the economic impact, the complexity of the process, the reputational impact, the fractionability of the process and the controls foreseen. Annex 4, then, enumerates some additional measures to prevent the risk of corruption without any claim to completeness and without prejudice to the discretion of individual entities to define others[46].

[46] See P. COSMAI, *La mappatura e la gestione del rischio per i p.t.p.c.*, in *Azienditalia - Il Personale*, 1, 2014, 13-

In essence, the function of three-year plans is mainly to ensure the concrete implementation of the directives provided by the N.A.P. on the basis of the specifics of the context, internal and external, of the organizational structure, identifying the procedures most exposed to possible corruptive phenomena and the related measures to prevent them.

The 2015 update of the N.N.A. has provided principles and methodological indications to overcome the shortcomings found in the risk analysis and management in the three-year plans for corruption adopted since the entry into force of the anti-corruption law. The document specified the contents of the different phases of the risk management process relating, in particular, to the analysis of the context, external and internal; the identification of risk events; the identification of the level of exposure to risk of the activities and related processes; the treatment of risk based on the priorities that emerged during the assessment of risk events and the monitoring of three-year plans for corruption[47].

A recent reform of the legislation regarding the Italian public administration has imposed greater precision in the identification of the main risks and related remedies[48]. The legislative decree on the prevention of corruption, publicity and transparency, implementing the delegation contained in the aforementioned law, has provided for some amendments to Law n. 190/2012, clarifying that it is up to the N.N.A. to identify the main risks of corruption and related remedies[49] and specifying that the three-year plans for the prevention of corruption of central government, in identifying the activities where the risk

[47] National Anti-Corruption Authority, Resolution n. 12 del 28 ottobre 2015, Update 2015 al National Anti-Corruption Plan, 15 – 24.

[48] Legge 7 agosto 2015 n. 124, Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche.

[49] Art. 41, lett. b) D.Lgs. 25 maggio 2016, n. 97, cit.

of corruption is higher, must also consider areas other than those provided for by the N.N.A. and indicate the related measures to combat them[50].

The 2016 update of the N.N.A. has introduced a series of general provisions in order to implement recent legislative changes, international guidelines and to address the critical issues highlighted by the evaluation of the three-year plans for corruption for the period 2016 - 2018. The second part of the Plan contains a series of in-depth studies concerning, on the one hand, those exposed to the risk of corruption (small municipalities, metropolitan cities, professional bodies and colleges and educational institutions) and, on the other hand, certain thematic areas such as the protection and enhancement of cultural heritage, health, and territorial governance.

5. THE 2016 NATIONAL ANTI-CORRUPTION PLAN AND THE PROVISIONS FOR IDENTIFYING AND ASSESSING THE RISK OF CORRUPTION IN THE GOVERNMENT OF THE TERRITORY

As anticipated, the 2016 update of N.A.P. contains an entire section about the area of territorial government. After a first generic identification of the main causes of corruption in the sector – analysed in the first paragraph – it moves on to the identification of some risks inherent, mainly, to the general planning phase at municipal level and identifies the related organizational measures to prevent corruption. The N.N.A. does not consist in a rigid scheme binding on the administrations, but in a simple guideline to support the elaboration of the three-year plans, which, however, must be contextualized and adapted to the specific size and characteristics of each administration. A brief passage identifies the main risk areas in the context of regional, provincial or metropolitan territorial planning, in the environmental or landscape protection regulations that entail significant limitations on the use or transformation of the territory, as well as in the approval of specific variants that provide for cartographic changes in relation to the boundary areas.

[50] Art. 41, lett. i) D.Lgs. 25 maggio 2016, n. 97, cit.

It then moves on to the analysis of planning at municipal level. The processes taken into consideration by the N.N.A. are those of general urban planning, implementation planning and building permits.

Within the General Town Plan several risk areas are identified. First, the approval of specific variants, from which a significant economic advantage may arise for private parties, in terms of increasing the building powers or the value in use of the buildings concerned. The risks identified relate to the increased land consumption that may give an undue advantage to the beneficiaries of the measure, the possible unequal treatment between different operators and the underestimation of the higher value generated by the variant. The N.N.A. does not identify specific preventive measures but has exclusively highlighted the need to careful mapping the processes by the individual P.A. as part of their three-year plans.

Secondly, the risks associated with the methods and techniques used to draw up the plan or variants are highlighted. In particular, the risk is determined by the difficulty of objective and transparent verification of the correspondence between the technical solutions adopted and the political choices underlying them, since the public interests that are actually intended to be pursued are often not clear. Among the measures suggested by the National Anticorruption Authority is the transparency of the reasons that determine the choice to entrust the drafting of the plan to private professionals, as well as the procedures for their identification and the related costs. The assignment must comply with the public procurements' principles. Moreover, it advices agreements between small neighbouring municipalities for the drafting of their respective plans, to achieve cost savings and the acquisition of a broader vision of the territorial context, as well as the direct involvement of technical and legal municipal structures. The importance of a prior analysis on the absence of causes of incompatibility or conflict of interest for all members of the working group is also highlighted. Furthermore, a clear and explicit indication of the general objectives of the plan and the elaboration of general criteria and guidelines for the definition of the consequent planning choices, to be submitted to the participation of the local population, is requested in order to allow the verification of the coherence between territorial policy guidelines and technical solutions.

Thirdly, the risks associated with the publication phase of the plan and the collection of comments are examined. One of the main causes of corruption in this phase is linked to the information asymmetries in favour of private interest groups that can be exploited to guide and condition planning choices. Among the preventive measures, the National Anticorruption Authority has identified the disclosure and transparency of plan decisions, through the circulation of explanatory documents drawn up in non-technical language and the provision of information points for citizens; a strict control on compliance with the publication obligations under Legislative Decree no. 33/2013 by the person in charge of the procedure; an explicit attestation of the publication of the measures and the documents to be attached to the approval measure.

Finally, consideration is given to the approval phase of the plan by the local authorities at a higher level, where the main risk is to amend the plan with the acceptance of observations that are contrary to the general interests of protection and rational land use underlying the plan. The possible preventive measures consist in the prior determination and publicity of the general criteria to be followed in the preliminary investigation for the assessment of the observations; in the specific justification of the decisions to accept the observations modifying the adopted plan, with particular reference to the impact on the environmental, landscape and cultural context and in the subsequent monitoring of the acceptance or not of the observations of private individuals and their motivations. If several local authorities (region, province and metropolitan city) will take part in the process of approving the municipal plans in order to ensure consistency between the various levels of government in the area, a number of risky events are identified, mainly linked to opportunistic inertia of the authorities, superficiality in the preliminary investigation by the person responsible for the procedure and the lack of justification for accepting the municipal counterclaims. The preventive measures, in this context, are based on increasing transparency and strengthening internal control measures, including sample checks, procedural time frames and the content of the documents.

N.A.P. 2016 then goes on to examine the implementation planning phase, which involves a wide range of detailed urban planning tools, including the above-mentioned complex programmes. It should be noted that in the implementation plans the risk is higher

due to the direct proximity of the plan decisions to the economic and financial interests of the individuals concerned.

First of all, private initiative implementation plans are characterized by the presence of a private promoter who agrees on preparing an urban planning tool, in exchange to the realization of primary and secondary urbanization works and the sale of the necessary areas. Inevitably, these instruments have been identified by the National Anticorruption Authority as particularly exposed to undue pressure from particularistic interests. Among the risky events in this area is the possible inconsistency between private initiative implementation plans and the G.T.P., which results in improper land use. On this point, we suggest a greater enhancement of the prescriptive effectiveness of the G.T.P. with a clear and precise definition of the objectives to be achieved during the implementation phase. The preventive measures indicated in the N.N.A. mainly concern the increase of transparency in the procedural phase. For example, the adoption of internal guidelines, subject to publication, that regulate the procedure to be followed, specific forms of transparency and reporting, check lists to verify the requirements to be put in place, as well as the preparation of a register of meetings with the implementing parties. Regarding public initiative implementation plans, the National Anticorruption Authority limits itself to directing the attention of the administrations towards variant plans that produce a reduction in the areas subject to scaler constraints.

The N.A.P. then moves on to the analysis of urban development agreement, considered in doctrine as "the archetype of the public/private agreement in urban planning"[51]. The risk inherent in the stipulation of the agreements does not seem to be as high as that relating to the implementation plans, since the permitted volumes, the use of the areas, and so on are already indicated in the plan. The National Anticorruption Authority has attached particular importance to the convention schemes that set out the

[51] P. URBANI, *L'urbanistica,* in F. MERLONI E L. VANDELLI (a cura di), Volume ASTRID, *La corruzione amministrativa. Cause, prevenzione e rimedi*, Passigli, 2010, 1.

commitments made by the private party for the execution of the urbanisation works connected with the intervention. Administrations are urged to adopt convention schemes - of a type designed to ensure comprehensive and transparent regulation of all aspects relating to the agreement. Possible risky events relate to the calculation of urbanization charges, the identification of urbanization works, the transfer of areas necessary for primary and secondary urbanization works and the monetization of standard areas. With regard to urbanization charges, in order to prevent the risk of their inadequate measurement, it is suggested to introduce a certification that the parametric tables on which the charges are calculated have been updated, that they have been published and that the calculation has been entrusted to personnel other than those who is in charge of the investigation of the implementation plan and the convention. As far as the identification of the works, the risks are represented either by the predominant benefit of the private operator, or by the circumstance that the costs of implementation may be higher than those that the municipality would face with direct execution. Among the preventive measures proposed in the N.N.A. there is the obligation of a specific reasoning about the need to have the secondary urbanization works carried out directly by the private builder and the provision of an opinion of the person responsible for planning the public works. As regards the identification of the areas to be acquired in order to carry out the urbanization works, the risks relate to the quality and quantity of the areas and the preventive measures concern the identification of a person responsible for the acquisition of the areas, as well as the monitoring of the municipality on the timing and fulfilment of the acquisition. If, as an alternative to the sale of areas, it is envisaged that they will be monetised and a sum of money paid to the municipality instead of the sale of areas, it is suggested that general criteria for quantifying the value of the areas will be established, that checks will be introduced by collective bodies, and that payment will be made at the same time as the agreement is signed. Finally, with regard to the execution by private operators of urbanization works, reference is made to the risks associated with the execution phase of public works and the need for effective supervision, possibly entrusted to an internal technical structure set up for this purpose.

N.A.P. 2016 dedicates its last paragraphs to the control of building permits, governed by Presidential Decree 380 of 2001. In this context, the presence of centralised

technical bodies, such as the "One Stop Shop for construction" and the "One Stop Shop for production activities", the fact that the activity of issuing building permits and checks in relation to applications submitted by private individuals for liberalised activities is of a restricted nature, and the presence of unified and transparent forms are all preventive elements of corruptive risk. Nevertheless, corruption offences in this area are particularly frequent. On this point, the delicate question of the relationship between criminal judge and administrative action has fuelled the interest of the legal scholars, which have observed the significant incisiveness of the criminal courts' review of decisions taken by the administration in the construction sector[52].

6. CONCLUSIONS

The government of the territory represents an area particularly exposed to maladministration. The analysis of the main sources of risk and the consequent preventive strategies proposed by the National Anticorruption Authority in 2016 revealed that the characteristics of urban planning make this matter, in part, unsuitable for the implementation of the classic prevention mechanisms introduced in the three-year anti-corruption plans.

The risk analysis model, generally adopted for the preparation of three years plans, is based on the introduction of organizational measures within the administrations, aimed at clearly identifying the areas of responsibility of each official involved in the various procedures within the administration and to intervene preventively on the most delicate phases, through the imposition of rotation obligations, double checks systems, and so on. Such one-off measures appear to be effective in the most restricted contexts, such as in the field of building practices, where the key decision-making role is played by public officials.

[52] B. TONOLETTI, *La pubblica amministrazione sperduta nel labirinto della giustizia penale*, in *Riv. Trim. Dir. Pubbl.*, 2019, 1, 76 e ss.

On the contrary, the corruptive risk in urban planning is part of a particularly wide and difficult to control dimension, with a strong political imprint. The most important decisions in this field are taken by municipal and regional government bodies. Moreover, in the increasingly numerous cases of consensual definition of urban planning arrangements, the involvement of the private sector is a further obstacle to the introduction of preventive control systems.

Given these peculiarities, the most effective prevention measures seem to be those linked to participation and transparency.

First, the extent of the discretionary power in the preparation of acts with a general and planning content attributes central importance to the discipline of the procedural investigation and to the rules on participation[53]. The rights of participation in matters of territorial governance are provided for by the sectorial regulations, since they are not applicable to the activity of the P.A. aimed at issuing acts of general and planning content[54]. This creates a proliferation of participatory models, introduced by regional laws. The latter frequently provide for rather significant participatory instruments, such as, for example, the submission of a preliminary draft plan to the consultation of economic and social stakeholders or to the observations of the associations concerned. The possibility for a large number of actors to participate in the procedure undoubtedly constitutes a mechanism for greater awareness of public decisions and reduces opportunities for corruption.

Regarding transparency, Legislative Decree no. 33 of 2013 on publicity and transparency duties for public administrations has dedicated a specific provision to the planning and governance of the territory. It requires public administrations to publish, in

[53] See G. DELLA CANANEA, *Gli atti amministrativi generali, passim.*, in particolare 269 e ss. M. DE BENEDETTO, *Istruttoria amministrativa e ordine del mercat*o, Torino, 2008, 127 – 135; N. RANGONE, *Le programmazioni economiche. L'intervento pubblico tra piani e regole*, Bologna 2006, 170.

[54] Art. 13 legge 7 agosto 1990, n. 241.

the first place, the acts of government of the territory, including territorial plans, coordination plans, landscape plans, urban planning, general and implementation instruments, as well as their variants. In addition, it establishes that "the documentation relating to each procedure for the submission and approval of proposals for private or public initiative urban transformation as a variant of the general urban planning instrument, as well as proposals for private or public initiative urban transformation as a variant of the general urban planning instrument that involve building priorities in return for the commitment of private parties to carry out extra-charge urbanisation works or the transfer of areas or volumes for purposes of public interest are published in a special section on the website of the municipality concerned, which is continuously updated". Compliance with these publicity obligations represents an essential condition for the effectiveness and the validity of the acts[55].

In conclusion, on the one hand, the attention given by the National Anticorruption Authority to the area of government of the territory and the consequent inclusion of this area in the 2016 N.A.P. has undoubtedly constituted an important evolution, implying a greater awareness by the administrations on the need to focus their resources on the prevention of corruption in this area. On the other hand, however, the three-year plans alone and the specific measures classically foreseen in the prevention of corruption in other sectors do not seem sufficient to combat corruption within the territory government field, especially with regard to the urban planning. Therefore, the existing measures on participation and on transparency need to be strengthen to allow widespread public scrutiny of the political decisions underlying planning choices.

[55] Art. 39 decreto legislativo del 14 marzo 2013, n. 33.