Section 13

Subsidiarity of criminal law in fighting financial criminality and corruption in the public sector:

Prevention measures, improvement of control mechanisms, and organizational interventions

I. The functioning of institutions in the Greek legal order: the roots of deficiencies

In the general field of institutions and their operation (as in all individual areas of the State apparatus), the problem lies not so much in the elaboration over regulations, but in the functioning of existing institutions.

The overall efficiency setbacks stem from several factors. Of those, three are detrimental in tackling corruption:

- From the perspective of public administration, the main rival of any reform effort is the "impulsive" tendency to maintain status quo by those who benefit from it.

- Citizens have a profound lack of trust in public administration institutions.

- The abovementioned already construct an inhospitable landscape for any reform initiative. However, a third factor exists, incorporating more than the crucial elements of financial criminality and corruption: a mindset viewing the citizen as a unit, utterly detached from the collective interest, thus promoting individualism as a paradigm.

The State's reaction to the described circumstances is usually erratic and does not follow an inclusive, long-term planning strategy.

In this environment, it is clear that any institutional intervention should identify the causes of phenomena, and requires the active participation of broader social groups and -above all- dedication to a long-term (and, therefore, not occasional) plan which does not aim to the mere (formal) assimilation of international texts or satisfaction of a volatile "public opinion", but to effective interventions that bear the Greek condition in mind, and especially balance conflicting interests fairly.

II. Monitoring public finances

Monitoring public finances is of central importance to the proper functioning of the State, but also to the effective prevention (and often repression) of financial crime and corruption in the public sector. Since creation of the Greek State, it has been the task of the Court of Auditors, under the French model of Cour des Comptes; according to that, the judiciary is authorized for financial inspections, which aims to identify managerial deficits, particularly those attributable to possibly illegal acts (e.g. embezzlement). In other words, priority is given to the legality reviews carried out by judges, i.e. officials enjoying full constitutional warranties of independence.

This system may have contributed to the consolidation of a legal concept inherent in the management of a newborn State's public finances, but its perpetuation in the same form cannot be justified in today's economic (and, in particular, fiscal) reality.

At a first glance, disengaging the system from the (unambiguous) legality review seems to dispute the traditional approach for combating corruption. However, a closer look reveals that this typical assessment often degenerates into a routine check of compliance with preset processes, which may conceal the real problem.

The existing system is often absorbed in "formalistic" verifications of fixed small-scale expenditures that occasionally fall below the cost of inspections, while significant amounts are disbursed quasi-legitimately, yet without any guarantees of actual transparency. Severing this bond obviously requires amendments to the system profile.

Such interventions dictate a constitutional review in order to establish a special (independent) auditing agency to assist parliamentary work. In its most advanced version, this task could be delegated to the Court of Auditors, enriching its functions by adding a partnering non-judicial operative sector, featuring a multi-disciplinary, parliament-elected staff of officials with special increased qualifications to implement premier fiscal inspections. This would expand the existing jurisdiction of the Court of Auditors by adding advisory responsibilities on the feasibility and effectiveness of public spending, and allowing its gradual transition to a modern mechanism of auditing public finances.

In any case, keeping an "expenditure efficiency record" (at least for spending above certain amounts) would help to easily compare the ex-ante estimated benefits to the ex-post actual product of paid funds.

III. Evaluation and coordination of administrative auditing agencies

The abundance of State auditing agencies with interrelating functions (and an often uncertain "hierarchical relationship") and the overregulation of their operations create intolerable delays, overlapping of powers, and an inevitable waste in assets and human resources. Merging the current General Inspector of Public Administration and the Inspectors-Controllers Body for Public Administration into an Independent Supervisory Authority of Public Administration (ISAPA) is advisable. This agency will supervise administrative auditing bodies, which should be reduced.

Under the proposed scheme, the ISAPA would have, inter alia, the following duties:

- Ordering and supervision of administrative inquiries.

- Coordination of concurrent administrative and criminal investigations.

- Establishing guidelines for delegating inspection authorities.

- Resolving affirmative or negative conflicts of competences ad hoc.

- Bringing disciplinary indictments against disloyal officials and supervising the relevant proceedings

- Conducting regular and exceptional inspections (: i.e. following a complaint) on all monitored agencies.

- Inspecting local and regional authorities (including their subordinate agencies), and also agencies of the broader public sector for which the abovementioned protection of public property applies[1].

- Running regular assessments for each administrative auditing agency.

- Submitting proposals through periodic reports for the adoption of (executive or legislative) measures to combat financial crime and corruption in the public sector.

- Cooperating with foreign counterparts and partaking in international organizations to which Greece participates, to promote international (administrative) cooperation.

IV. On supervising Local & Regional Authorities in particular

The structure and functioning of local and regional authorities within the existing constitutionally established decentralized administration system has caused several problems relevant (inter alia) to financial criminality and corruption.

The long-standing local authority supervision system admittedly causes more problems than it solves. The Legality Inspector is expected to improve things, but delays in its launching make it impossible to draw firm conclusions so far. In terms of financial audits, overlapping of duties is extreme. Therefore, all auditing and inspection powers should be granted to the (single) ISAPA, which will deliver impartiality in the exercise of the relevant competences.

V. The structure of administration, restoring bureaucracy as rational governance, and upgrading the relationship between citizens and public administration

Overregulation and the resulting complexity in the structure of public administration have an impact on the relationship between State and citizen. Beyond the apparent dysfunction in providing services to citizens, extensive bureaucracy and the consequent lethargy of the public sector lay the eggs of corruption by leaving the doors open for employees to obtain illegal gains from anyone willing to bypass standard procedures. In fact, the intensification of inspections in some areas is directly proportional to the increase in corruption, proving that simplification is the most appropriate solution.

Although this is a priority for the entire public administration, one could glean the following specific activities:

- Corporate licensing: the longstanding thorough screening either by piling a number of documents for licensing has not only failed to prevent unlawful behavior, but creates openings for illicit transactions between businessmen and competent public officials. Licensing applications should be filed with the least possible number of supporting documents and the burden transferred to ex post inspections (via

[1] See section 3.

escalation of penalties for violations). Some steps have already been taken to this direction, but should be applied for business structures as well.

- The need for citizens' physical presence before public agencies and the lengthy, complex procedures offer a large leeway for corruption. It would be preferable to further encourage the remote handling of citizens' cases via e-governance, but also to minimize the required documents ("single points of contact", Citizen's Service Centers for all cases requiring physical presence). In this context, it would be desirable to provide assistance to citizens unable to acquaint themselves with the use of IT systems.

- Nowadays, it is necessary to provide "smart" defaults that will be activated if the interested party does not explicitly opt-out. Such rules could bind both the citizen and the administration.

- Law 4250/2014 is a positive effort to simplify procedures by limiting the need to file certified copies of documents. Validation does not seem to be of critical importance in most cases where criminal sanctions are threatened for presenting forged ("falsified", in the phrasing of Art. 1 § 2 of the Act) photocopies.

- In the information society, a key prerequisite for tackling transgressions in the public sector is the unencumbered information of citizens, which, in turn, requires access to administration data. Therefore, broadening and enhancing the accessibility of existing databases is essential for the relationship between State and citizen.

- A very small (compensatory) fee could be introduced for the (beneficiary) services of public administration for the case handling or service provision. These fees should only be utilized within the same agency, to cover operating costs and improve services. The importance of such an approach would lie especially in shaping a consciousness of a "beneficiary" of a particular service that is incompatible with the hidden payment of another fee ("brown envelope"). Of course, certain citizens should be exempted from such charges (especially upon low income criteria).

- Finally, the relationship between public administration and citizens should designate the latter as service recipients/beneficiaries in terms of filing complaints. It is vital to organize a mechanism for filing complaints actively referring to citizens. Furthermore, anonymity should be ensured for spontaneous complaints (especially regarding criminal behaviors). Complaint hotlines for corruption, tax evasion, etc., which may also inform the public on the prospects of redress are a positive relevant development.

VI. Provisions on the recruitment, evaluation, and status of civil servants in response to financial criminality and corruption in the public sector

Civil servants/officials are key-players in any reform effort for tackling financial crime and corruption. Clearly, Staff Regulations directly reflect upon the discussed phenomena, sometimes inciting their perpetuation. Therefore, a comprehensive strategy in this field is a crucial ingredient of a truly coherent model that aspires to encompass all vital aspects. As for the organization and functioning of public

agencies and public administration staff regulations, we submit the following proposals:

- The emancipation of public administration from political parties is a prerequisite for its efficient, unbiased, equitable, and impartial operation. The continuity of public administration should be ensured (e.g. General Secretaries of Ministries should not be selected by the political leadership; rather, these posts should be staffed by senior public officials of relevant agencies, with permanent tenure).

- The adoption of a system of selection, promotion, and remuneration of staff based solely on meritocracy is a requirement for nonpartisan, objective, and effective functioning of public service. The staffing of public services should be based on uniform and objective criteria. Recruitment should not lead to permanent tenure, but rather be followed by a probationary period, as already envisaged in Art. 40 of the CSC - Law 3528/2007. For jobs or services particularly vulnerable to corruption, recruits will receive specialized training.

- Promotions of civil servants should be meritocratic and depend upon diligence and efficiency. Employees should be assessed regularly (as expressly provided in Art. 81 of the CSC - Law 3528/2007) through the most objective/"quantifiable" criteria possible. Significantly skilled and over-performing officials should be allowed to bypass seniority and rapidly advance to higher echelons.

- Organization and functioning of public agencies should be directed towards prevention and early identification of corruption and financial criminality against public property. Such measures should not be fragmented, but incorporated in a thorough plan to tackle corruption, where each service will cooperate with the National Anti-Corruption Coordinator on the following issues (indicatively):

- Adoption of Codes of Ethics and Conduct for public officials,

- Obligation of public officials to file declarations on non-official ("external") activities to competent authorities, and report significant gifts or benefits obtained that could cause a conflict of interest in the exercise of their duties,

- Establishing guidelines for good procedures and practices; along with the codes of conduct, they could be assigned to a National Agency of Public Service Ethics (NAPSE), delegated with the monitoring of compliance.

- Regular rotations of public officials serving in positions vulnerable to corruption.

- More participants in decision-making processes in areas particularly vulnerable to corruption ("more eyes principle"). Similar measures should be taken for officials who, due to their position, have enhanced access to public property.

- Supporting the work of officials in critical posts through continuous training, and delegation of authorities based on rational (qualitative and not quantitative) criteria, to achieve specialization and expertise acquisition in relevant fields. Furthermore, continuous training on corruption issues for officials employed in sensitive posts or agencies (e.g. State control mechanisms). Each separate agency (or the proposed

NAPSE) will be responsible for carrying out the relevant training programs, and their coordination should belong with the National Anti-Corruption Coordinator.

- Reviewing the conditions and scope of civil servants' permanent tenure and the terms for the dismissal of public officials, to prevent the practical warranty of "permanent tenure" for disloyal officials.

- Establishing employee efficiency incentives, not through per capita wage "premiums", but by enabling speedier promotions for positively assessed officials.

- Enhancing the computerization of public agencies to significantly facilitate the task of monitoring and auditing mechanisms.

- Extending the application of modern technology to enable all financial transactions between citizens and the State in the form of e-payments or deposits in State bank accounts. Similarly, VAT payments should be carried out "automatically", via "real-time" issuing of transaction documents and through direct interconnection of cash registers of shops with the General Secretariat for Information Systems.

- Promoting interventions that compromise the effective outcome of corrupt transactions, i.e. envisaging lenient treatment for any involved party that participates in severing the illegal bond (see "leniency measures" for perpetrators of active or passive bribery), as well as the possibility for immunity from disciplinary action for public officials who substantially contribute to cracking corruption cases.

- Where feasible, limiting discretionary powers and establishing disincentives against their abuse, e.g. by reforming the provisions on civil liability of public officials.

- Adopting a single salary across the public sector, to ensure meritocracy of remunerations, with minimum possible variations for specific agencies whose particular duties justify the maintenance of special payrolls.

VII. Upgrading the regulatory framework for public procurement

Public procurement is a classic turf of corruption; thus, its primacy in any reform effort is unquestionable. In this sense, Law 4281/2014 on the codification of public procurement is a positive step towards establishing a single institutional framework in the field. Its implementation will determine the success of the codification.

However, the question persists on the long undetermined number of contracting authorities, allegedly several thousands. Their documentation and categorization, [already begun at the initiative of the Uniform Independent Public Contracts' Authority (UIPCA)] as well as their "clearance", are crucial for field rationalization.

However, ensuring transparency could be a priority for Greek legislation. A step to this direction has been the establishment of the National System of Electronic Public Procurement (NSEPP), together with the Central Electronic Registry of Public Contracts (CERPC) where all national public contracts are published. Nevertheless, a rapid promotion of secondary legislation is required to regulate the activation of the relevant provisions and get specific measures further than the drawing board.

Still, the simplification of procurement awards is a positive side of Law 4281/2014.

In Greece, a particular drawback of public procurement relates to the gradually increased participation fees to discourage bidders, which the new regulations do not seem to address.

As for judicial protection, the new institutional framework of public procurement introduces the adjudication of administrative appeals (in the pre-contractual stage) by independent body of experts. More emphasis should be given on essential criteria that will render a different meaning to the auditing process. However, the "integrity clause" (see Art. 46 of Law 4281/2014) is a positive aspect; through it, the contract is forcibly terminated if the contractor is found to have committed illegal acts (before or during the award process, and even at the stage of the contract performance).

Finally, the regulatory gap between contracts falling under EU law and those governed solely by national law remains, resulting to vast complications in detecting obscure and/or irregular practices in the latter. Additional monitoring of nationally regulated contracts is expected to reduce their (virtually very frequent) circumventions.

VIII. Improving the monitoring of political party funding

Political party funding is regulated via Law 3023/2002, which was recently amended by Law 4304/2014, effective as of January 1, 2015.

As for the status quo, the following observations can be made:

(a) The law correctly sets restrictions on private funding. To safeguard national interests, parties and candidates may not be financed by foreign legal or natural persons. The same applies for domestic legal entities under public law. Furthermore, the prohibition of funding by mass media owners is also reasonable.

(b) Private funding must obey requirements of absolute transparency and publicity. Independently of the voices in favor of increasing the maximum level of private funding (since the stipulated limits do not seem realistic), it is important that all revenues of parties and candidates from such sources be declared and published in the press and on the web, and thus accessible to all citizens. Failure to comply with this obligation should be entail administrative and criminal sanctions. Of course, mandatory disclosure would not solve the problem of disproportionate publicity of candidates, which could be addressed in other ways, such as the fragmentation of electoral districts.

Private funding should be taxed and used solely for campaign publicity, etc.

IX. Preventing the use of the financial system for tax fraud and money laundering through "offshore" companies

One of the fundamental snags in financial criminality against the public sector is that of "offshore" companies.

Tackling the problem requires effective international cooperation, promoted in recent years by initiatives of organizations such as the OECD. It is no coincidence that the EU has made it a priority to address the illegitimate use of the financial system via offshore companies in the proposal for the new (fourth) Directive on money laundering. In any case, endorsing preventive and repressive measures to limit the actions of such companies in the economy (which -especially in Greece- are linked to particular tax offenses) is not only an international obligation but an obvious choice for the national legislator. Relevant measures for adoption include:

- Utilization of the banking system for monitoring all transactions allegedly involving offshore companies.

- Request for disclosure of the "beneficial owner(s)" behind every offshore company and listing of the relevant data in a special register, accessible to judicial authorities and administrative monitoring agencies.

- Utilization of this register and formation of a detailed list with the specific characteristics of each corporate arrangement.

- Drastic increase of taxation for real-estate property whose ownership cannot be linked to specific natural persons. This policy was introduced in Art. 57 of Law 3642/2010, but a limitation of its exceptions could be discussed.

- Drastic increase of the fees for interbank transactions concerning or involving offshore companies through high bank levies.

- Measures to restrict intra-group transactions or even render them "irrelevant" to corporate taxation.

- Bilateral cooperation with third countries and participation in international projects of organizations such as the OECD initiative on BEPS (Base Erosion and Profit Shifting).

X. Other prevention measures

Preventing corruption could also rely on initiatives involving the separation of powers (the exercise of legislative activity in particular) and the positive activation of civil society to spur reaction against the discussed phenomena.

(1) On the separation of powers, particularly in relation to legislative activity:

- Measures should be taken to ensure the independent functioning of powers, such as the incompatibility between being an MP and holding ministerial office and the election of Justice's leadership by the judiciary rather than the executive. Specifically for the latter, the current constitutional provision of Art. 90 § 5 seems inadequate to ensure real judicial independence and serve a profound (warrantying) function. Proposals have included the election of the leadership of Justice by the individual Supreme Courts in plenum or even by composite bodies comprised by drawn senior magistrates, Law School professors, and lawyers chosen among the senior Supreme Court attorneys. Alternatively, the electorate could be comprised of all magistrates serving in the individual branches of Justice.

- Legislation and administrative measures designed to prevent and combat financial criminality and corruption in the public sector should be assessed regularly by the National Anti-Corruption Coordinator (in cooperation with international and regional organizations responsible for tackling corruption), who will submit reports to the Prime Minister and the Parliament.

- Moreover, a corruption risk assessment should be incorporated in the lawmaking process for each proposed piece of legislation, carried out by the competent departments of the Ministry introducing the draft, which may request the opinion of the National Anti-Corruption Coordinator.

(2) An important factor in preventing corruption is also the activation of citizens to this purpose. Such awareness is feasible (i) by adopting systems and procedures that facilitate citizen access to public service, (ii) by ensuring full transparency in the public administration decision-making, and (iii) through continuous education.

Educating citizens on corruption may be promoted through special programs, but the value of integrating relevant courses in the curricula of all educational levels (from kindergarten to the university) is crucial. These educational programs should be coordinated by a single authority (e.g. National Anti-Corruption Coordinator). However, encouraging people to report corruption and financial criminality in the public sector should never be linked to economic incentives. The current situation cannot be reversed with sporadic measures based on self-interest, but only by consolidating a new culture and an overall paradigm shift.