St. Petersburg International Legal Forum

Discussion sessions: ***Challenges and Opportunities of Governance in a Multipolar World***

18 May 2018

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Excellency Minister Konovalov,

Honourable Mr. Savenkov,

Authorities,

distinguished colleagues and guests,

I am particularly glad to attend this edition of the St. Petersburg International Legal Forum, not only due to the widely acknowledged prestige of the Forum but also because I have fond memories of my previous participation as a speaker some years ago, soon after the end of my term of office as Minister of Justice.

That is why I am truly delighted to deliver here my first public address as Special Representative of the OSCE Chairperson-in-Office on Combating Corruption.

In my remarks I will dwell mostly on the core objective of my mission – combating corruption – but first of all I would like to share with you a few thoughts that draw inspiration from the theme of this session.

The global environment we are facing is that of a multipolar world. Multipolar not only because of the different centres of power, both regionally and globally, but also because of the diverse political, economic and legal systems punctuating the global landscape, each one characterised by a distinct approach to the key question of how to organise relations with its citizens inside the system and, outside, with the other systems. Each system trying to come up with its own original answers to the other key question of how to best address the challenges and seize the opportunities of globalisation.

In other words, globalisation is bringing the different corners of the world increasingly closer together but has not flattened out all the differences. On the contrary, some of these differences are becoming even starker than before. At the same time, the increasing proximity between the international players, and the transnational nature of many of the challenges we face, calls for more cooperation among countries at international level, with the invaluable help of international organisations. Not to trample on national differences, special characteristics or interests but exactly because tackling those challenges effectively is to the advantage of all countries participating in such a common endeavour.

This is particularly true of the fight against corruption: a phenomenon which, like unhappiness in the famous incipit of Tolstoj's Anna Karenina, may vary from country to country. But it can be addressed in an effective and sustainable way only in a framework of multilateral

cooperation – and the organisation I represent here today, the OSCE, is particularly well-suited to support these efforts.

First of all, therefore, I would like to draw attention to some distinctive features of *corruption,* a crime able to hinder the public interest in having resources efficiently and equitably allocated in the economic system, and to inhibit real and impartial competition amongst companies in ever more interconnected global markets. Corruption is in many respects the other side, the negative side of good governance. And, as much as good governance is a key driver of security and prosperity, even of competitiveness in the international marketplace, corruption makes systems that are affected by it less competitive, less prosperous and more insecure.

An effective international fight against corruption is therefore in the interests of greater prosperity and security at global level. And it is undeniable that the globalised fight against corruption – made possible by the recognition of some guiding principles and priorities in several conventions on the topic – has allowed us to reach a remarkable level of supranational harmonisation as regards the legislation designed to combat corruption.

In fact, despite a little (often overcome) averseness to the introduction of some criminal offences – I am referring to corruption in the private sector but also to the offence of *trading in influence*, which is intended to strike against the various kinds of misuse of influence towards public agents and is usually a prelude to corrupting agreements, offences

whose design has to be context-specific to the principles and traditions of the single legal systems – almost all legal systems have been equipped with a consistent set of criminal law provisions to combat this crime, especially able to offer full legal protection to the various range of interests affected by the criminal behaviour in question.

From this standpoint, therefore, the endeavours of the international community have paid off. It seems to me, though, that in the last few years the ongoing debate within many national systems and their relevant experiences have showed that prevention through self-organisation and self-regulation is a winning strategy for the purpose of fighting corruption and any other forms of criminal offence in both the public and private sector.

In the past few years, in fact, several countries have implemented measures aimed at enabling public administrations to identify and promptly counteract any situation or behaviour that, in their daily relationships with citizens and enterprises, might be a prelude to ensuing misconduct. That was due to the acknowledged need to prevent not only possible criminal conducts but also situations of maladministration which could as well disrupt the efficient allocation of economic resources of the various countries.

The actions that have been taken entailed, mainly, the establishment of independent administrative authorities in charge of combating corruption; the introduction of proper mechanisms for the protection of employees who report misconduct (so called *whistleblowers*); the

enhancement of transparency and of the right of citizens to obtain access to documents; the introduction of operating plans – tailored to the characteristics and needs of the single public body – designed to identify, mitigate and concretely manage the risk of corruption in the public sector.

This latter measure, in particular, is intended to transfer to the public sector the positive experience of *corporate criminal liability*, now common to several legal systems with a view to encouraging complex organisations to implement risk-assessment and management activities aimed at preventing the commission of crimes perpetrated in their interests and to their advantage.

In fact, getting the private sector proactively involved in countering criminal activities is crucial for successful action by governments aimed at guaranteeing an effective fight against corruption.

From this perspective, *asset recovery*, as well as other measures such as confiscation (of the proceeds from crimes) are decisive in countering the illegal accumulation of capital. These measures have, in fact, proved particularly effective for the repression of economic crimes and are thus able to make the perpetrators of these kinds of crimes think twice.

Recently, we have come across a fruitful exchange of best practices between public and private that – we must acknowledge – is particularly commendable. This is so not only as regards *hard law* but also *soft law*, which is growing in importance at an international level.

I am alluding, in particular, to international forums such as the Global Compact within the UN as well as the OECD with its own guidelines intended for multinational corporations, the reporting and certification instruments devised by private actors and able to circulate at an international level (like the Fairtrade Marks, for example).

In fact, these are mechanisms meant to encourage the dissemination of the principles of private governance, and which can be associated with the wider concept of *corporate social responsibility*: that implies that corporate decision-making should take into account the impact that operations may have on the community at large. This actually shows the remarkable commitment of the business sector to ensure the circulation of the best principles of corporate governance: a commitment that public authorities should strongly endorse.

These are, therefore, the main steps taken at an international level with the aim of combatting corruption and spreading good examples of (public and private) governance. There are still some challenges, however, which it is expected will be tackled in the years to come.

To begin with, it should be acknowledged that if a noteworthy level of harmonisation of rules at a supranational level has been achieved as regards punishing corruption, this is not yet the case as regards preventing corruption. It would be desirable, therefore, that the various governments, in Europe and beyond, direct their efforts towards achieving better harmonisation of law and regulations concerning the prevention of corruption and related offences in public

administration. Indeed, the lack of alignment of the laws of the various countries risks thwarting the efforts of those nations that are at the forefront to ensure respect for legality in the economic sector and driving investments away from them as enterprises may prefer to invest in other countries whose legal systems are less severe when it comes to preventing corruption. An easier choice, the latter, also as a consequence of the crumbling of trade and market barriers, made even more possible by the growing digitalisation of the economy.

Likewise, the same change of approach is necessary also with respect to corporate criminal liability, a type of liability that is neither classified nor regulated in the same way in the various legal systems that have introduced it. In some countries, the onus of devising crime prevention measures in the risk management plan is on the private entities themselves; only afterwards – that is in court – will their suitability to prevent offences actually be established.

Similarly, there are still legal systems where, at least in some sectors, legal entities are not afforded any opportunity to prove in court the absence of any organisational fault since forms of strict liability are established with reference to offences committed by company's agents.

The drawbacks stemming from these differences amongst laws are clear. In fact, the risk of massive *forum shopping* by companies operating in the international markets – which could be tempted to

choose to operate in countries where the regulation on prevention is weaker – is very high also in this case, possibly leading to:

- gaps and competitive disadvantages for those companies that, on the basis of the relevant regulatory framework, are bound to comply with different and more stringent obligations than their international competitors;
- barriers to effective cross-border judicial cooperation.

Needless to say, harmonising rules implies designing clear principles, possibly drawing on also international or national guidelines that may enable companies to understand in advance the right behaviour that should be adopted in order to make sure they are not held liable, as they can prove the relevant organisation has a structure actually oriented to preventing crime.

In this sense, the enhancement of reward mechanisms to conclude prosecutions against entities that have eliminated those structural flaws that made committing the offence possible in the first place is also necessary (I am referring to the ongoing debate regarding the possibility to introduce the concept of a *deferred prosecution agreement* also in systems that provide for mandatory prosecution).

But there is another, often overlooked point, which is indeed fundamental to fostering a change in the cultural attitude that both public opinion and many public authorities tend to exhibit towards such new regulatory tools. These tools, in fact, are often seen as burdens or

mere bureaucratic duties that prevent inefficiencies in public administration from being removed. Such an attitude is damaging to bringing out the most positive attributes of the reforms enacted, which however need some time to prove their value. I believe that public governance will be called upon to tackle an important challenge in the future: to convey to public opinion and the business environment the message that regulatory compliance is really worth it, which is especially true if a proper long-term vision is adopted.

In this process of cultural change, measurement tools are crucial to monitor corruption. While the role of *Transparency International* is to be acknowledged as fundamental to heightening awareness of the problem at an international level and while the Corruption Perception Index is important and useful, it is not however a sufficient tool to thoroughly understand the real dimension of the complex and multifaceted problem at stake. In very many ways, this could even delay the desired change in the cultural approach to the new prevention measures. That is why I believe that the recent endeavours of the international community – aimed at implementing weighted, consensus-based and multi-stakeholder mechanisms and criteria of detection of corruption – should be strongly supported, as they can concretely enable public opinion to correctly grasp the problem, while at the same time enabling governments to measure the impact of policies and make appropriate adjustments accordingly. Such a task should involve all the actors engaged in combating corruption at a

supranational level: if a common normative ground, interestingly combining *hard* and *soft law*, has been created at that level over time, I find it natural that common indicators to determine how to measure corruption should be developed within that context as well.

Before I close my speech, I would like to make some remarks about the role that the measures and instruments I have touched on so far can have in countering seemingly unrelated crimes, namely international terrorism in particular.

As some recent surveys conducted by the OECD show, terrorist organisations in the world often resort to corruption to facilitate their criminal activities in different countries. Corruption as such, then, can even indirectly strengthen terrorism (i.e. weakening defence in those developing countries where corruption cases involve military forces). Furthermore, some criminal dynamics – money laundering, for example – have a connection with both corruption and terrorism. If, from the first perspective, reaction tools at the legislator's disposal seem to be the established ones, the second aspect requires that public authorities will have to make more complex assessments.

As well as offering unprecedented opportunities, the extraordinary evolution of new technologies often creates serious problems of governance for public authorities. I am referring, for example, to the new digital financial mechanisms that allow a rapid and flexible movement of financial resources, in the absence of systems of control and specific public regulation.

Undoubtedly these instruments can stimulate greater interconnections by creating new business opportunities. However, because of the (frequent) absence of specific regulations, they turn out to be attractive for the commission of crimes like corruption and terrorism, which can pollute the economy. In the coming years, legal systems will be called upon to adequately respond to the protection demands that arise as a consequence of the adoption of these new technological instruments.

It is my opinion that in order to make appropriate normative choices in these fields, preventive measures capable of ensuring transparency in the trade and economic relationships will need to be assessed. In this sense, we should look with favour on the recent efforts by the European Union, intended to include virtual currency service providers amongst the persons obliged to comply with regulations on the prevention of money laundering.

This last aspect, after all, is strictly connected to another core topic: that of *cyber-security*. It goes without saying that I cannot go through each and all the main aspects related to this matter. Nevertheless, I wish to briefly address the issues that I believe should take centre stage for the future regulatory policies of authorities in this framework.

First and foremost, when dealing with the topic of cyber-security, it is important to consider the high flexibility of the attack techniques that are a feature of computer crimes, which are extremely difficult to combat due to the continuous transformation of computer attacks as a result of continuous technological advances.

This implies that for this field one must devise an approach to legislation which considers the special features of the phenomenon it is intended to combat. Above all, it is necessary to create legislation on prevention and repression with a transnational dimension because the unlawful conduct in question knows no borders and differs from traditional crimes. The continuous drafting of common rules and the joint commitment to their equal implementation is, here, even more essential. These steps, as we have seen, are crucial to guarantee the effectiveness of the counter measures.

Once again, the involvement of the private sector in this challenge will be indispensable to promoting the dissemination of a culture of risk management: for example, the creation of national framework of cybersecurity with the aim of offering companies an effective support to measure their areas of risk, to promote the propagation of adequate cyber business strategies, and to promptly renew their respective defence systems.

After all, the underlying characteristic of the supranational legislative framework – I am referring to the well-known EU General Data Protection Regulation as well as to the NIS Directive – is to encourage corporate compliance and cooperation between the public and private sectors as winning tools for the prevention of possible cyber-attacks and unlawful conduct.

With reference to *cyber-laundering*, which I mentioned earlier, an interesting challenge could be that of creating block chain systems that

prevent operations deriving from encrypted addresses from being completed, by recording in an accessible and traceable way the different transactions, especially with reference to bitcoin.

A final, very brief word on the role and possible added value of the OSCE in this respect. As I believe I have explained, corruption is a complex, multi-faceted phenomenon with wide-ranging repercussions, including on security. The OSCE has always advocated a holistic approach to security and in this vision an effective fight against corruption plays a critical role. For the reasons I have outlined before, combating corruption calls for a participatory, multistakeholder approach, based on constructive cooperation among equals, mutually beneficial comparison and exchanges of experiences and best practices. The OSCE is uniquely placed to perform these functions in support of its participating States and in cooperation with other international organisations.

I repeat once again: when faced with such an important challenge, only the joint effort of the international community can furnish an adequate response.

Thank you.