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Keynote speech by Prof. Paola Severino: *Good governance challenges in an increasingly interconnected and competitive economic environment*

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Distinguished delegates and representatives,

colleagues,

ladies and gentlemen,

First and foremost, I wish to address my heartfelt thanks to the Italian Chairmanship of the OSCE, to Ambassador Azzoni in particular, as well as to Ambassador Zugic (Co-ordinator of OSCE Economic and Environmental Activities) for this meeting, which I am confident will yield important insights and food for thought. I would also like to thank and commend the Chairmanship for its highly stimulating and insightful 'food for thought' paper, circulated ahead of this meeting.

The theme we are called upon to consider today – good governance challenges in an increasingly interconnected and competitive economic environment – demands a double effort: engaging in both retrospective and forward-looking analysis, the former with a view to taking stock of the work that has been done so far and the latter more importantly with a view to identifying the most serious issues that are expected to take centre stage in the coming years, as regards regulation and management choices in the public and private sectors.

These two environments, although different from each other, are called upon to tackle the same risks that social change as a whole and ensuing market and economic changes generate by adopting strategies and pursuing goals that are less divergent than one might expect.

From a first standpoint, undoubtedly, public authorities have to take upon themselves the fundamental and complex responsibility of ensuring sustainable economic development, which may take into account many overriding requirements: respect for the environment and human rights; combating corruption as an absolutely essential step to allow real and fair competition amongst enterprises; and the fight against illegal accumulation of wealth and assets allied to protection of rule of law standards in the economy.

In achieving these goals one cannot neglect methods of crime repression, some of which have proved exceptionally effective or at least promising (in particular, I am referring not only to seizure

and confiscation of the proceeds of crime and the crucial role played today by asset recovery, which has proved crucial in the fight against criminal activities for profit, but also to the innovative disruptive administrative means recently employed in Italy, such as the putting into public receivership of enterprises that have been infiltrated by organised crime).

For several years now I have been stressing that the most successful action that good public governance can take actually lies in enhancing prevention and boosting mechanisms that reward compliance by economic actors. Another point which I believe is essential to stress: combating corruption, which is the other side of striving for good governance, has to be regarded not only as morally imperative but also as economically worthwhile.

This means that the regulatory goals of public authorities should basically be focused on creating working mechanisms capable of enabling those authorities to identify and quickly eradicate any actual or potential conflicts of interest as well as any situation that

may pave the way for illegal agreements or any other misconduct whatsoever.

To this end appropriate legal instruments should be adopted, which working on various phases and problems can ensure an integrated approach to the topic at issue, taking into account the need to prevent not only potentially criminal events but also cases of maladministration that can pose a major obstacle to the efficient allocation of resources in the economic environment.

The positive initiatives that have recently arisen in the regulatory framework in Italy and beyond range from the creation of independent regulatory authorities to combat corruption (tasked with important supervisory functions in relation to business enterprises and the public procurement sector) to the adoption of codes of conduct for public sector employees and systems for the protection of whistleblowers. And also from the strengthening of transparency by guaranteeing citizens a right of access to documents along the lines of a Freedom of Information Act to the

spread of action plans (tailored to the characteristics and needs of any given single body) designed to identify, mitigate and concretely manage the risk of corruption in the public sector, in this latter case leveraging the positive experience of crime-prevention organisational models adopted in the private sector in the wake of legislation introducing a form of corporate criminal liability in Italy.

I will focus more on this point later. What I would like to highlight now, however, is that this is evidence that one of the challenges already tackled and likely to epitomise the action to be taken in the years to come will be that of fostering an exchange of experience and good practice between the public and private sectors. We should all be aware that creating a really competitive economic environment capable of successfully addressing the new risks that modernity brings with it implies understanding the importance of shared challenges, strategies and goals.

From a different standpoint, I also attach undoubted importance to those instruments (such as the legality rating of companies) in

the context of public procurement that are capable, on the one hand, of favouring business enterprises that prove their compliance credentials and, on the other hand, disqualifying economic actors unable to provide adequate guarantees in that respect (for example, the Italian experience of anti-mafia regulations leading to so-called 'anti-mafia bans').

These are, therefore, the positive steps taken in various national systems thus far. If these goals have been achieved, it is above all thanks to a globalised fight against corruption and any form of wrongdoing whatsoever in public administration.

The adoption of several international conventions on this subject, the work carried out by the bodies those conventions have created and the constant attention paid by multilateral forums like this one here today that encourage the exchange of ideas and political views are starting to show that they are bearing fruit.

In this regard, I have particularly appreciated the Declaration of 7 December 2012 further to which the OSCE has renewed its

commitment to support the participating States in their effort to create a common legal framework and basis for cooperation in combating corruption, aware that these governance problems prevent governments from ensuring economic and social development, stability and security.

The OSCE has served as a platform for dialogue that has been and will continue to be a key reference point for a fruitful exchange of best national practices. Moreover, the said Declaration acknowledged the importance of promoting public-private partnerships with a view to boosting the fight against corruption. Well, I am truly convinced that reaffirming today our commitment to involving civil society and the business world in these processes is of utmost importance and – as I will have the chance to say later – I believe that from this perspective the international community has made real progress in the past few years.

Therefore, international public governance cannot but go along with this encouraging evolution, trying to achieve also further

coordination amongst national legislation as regards measures to prevent and stamp out bribery and any other crime whatsoever in both the private and public sectors.

After all, the growing supranational interconnection amongst markets and economic frameworks make it desirable to strengthen uniformity in the law (as regards several aspects) in the business sector so as to create a level playing field for all of the players involved.

Only in such circumstances can economic players really compete, without gaps amongst the various systems and mismatches between legal frameworks that can negatively affect the effective allocation of economic resources in the market place. At the same time, such an approach could allow each country to attract investments while ensuring that its own community remains true to the indispensable requirements of legality in business that I mentioned before.

I believe that this latter aspect is really crucial.

Without harmonisation of rules at an international level, the commitment of a single country to establish a regulatory system that is effective in preventing corruption and related offences risks creating the negative counter-effect of scaring away from that country the investments of companies that might well prefer to allocate their resources to those countries whose systems dedicate less attention to the prevention of corruption in relations between the public and private sectors.

An easier choice, this latter one, also as a consequence of the progressive crumbling of trade and markets barriers, made even more possible by the growing digitalisation of the economy.

Therefore, the real challenge for the international community will consist in avoiding these governance problems by paving the way for the creation of a shared regulatory basis for this sector because interconnected economic environments necessarily imply that the 'rules of the game' are likewise interconnected and coordinated.

Looking back then and in line also with the critical reasoning that has always guided the OSCE, we need to realise what has failed in the past and why the challenges persist. That way, we can reflect together on the new challenges that public governance faces.

Firstly, all of the preventive measures I have touched on so far are often seen as a burden by both public authorities and the enterprises under supervision, as if the measures were mere bureaucratic duties creating obstacles that preclude the efficiency of public administration on the one hand and the free pursuit of business on the other hand.

This is due, I believe, to cultural reasons as well as perhaps to lack of adequate communication.

From the first point of view, clearly, it is essential to foster a change in society's approach to these instruments and to the reforms put in place, which will take time to be fully appreciated by the business world. In doing this it is essential, in the first place, to start again from the young generations, harnessing the power of the

academic world and education in general to spread of the culture of legality and respect for the rules. However, it is equally essential, in my opinion, for public authorities to change their communication strategies so as to convey the message that the measures put in place are not a burden but an important opportunity for both government and business.

By embracing prevention each and every public body can contribute to triggering a virtuous process that will restore full public confidence in the State, thus improving relations with citizens and, above all, with businesses, which can deal with public authorities with a reasonable assurance that they can expect the impartiality and transparency that are indispensable to enabling them to effectively and fairly compete with the other operators on the market.

We must therefore communicate the key message that *it pays to be a compliant company* because that will confer undoubted

advantages in the market compared to competitors who do not respect the rules, especially in the long-term.

The company willing to pay a bribe may well win that single contract but in the long run there is a good chance that it will be caught and ousted from the deal to the benefit of competitors that by contrast have committed themselves to observing the law.

Therefore, in communication strategies we must absolutely publicise the numerous incentives that have been devised in recent years for companies that respect those standards of legality. In short, the tools exist and it is the responsibility of all concerned to make every effort to ensure that they are applied to the maximum extent and naturally also with the correct attitude.

In fostering this new cultural approach, corruption measurement methodologies play an important and often underestimated role. The truth is that everybody is influenced by their surrounding social environment and information. This means that if one lives in a country where negative indicators of the perception of corruption

are disseminated, that could well slow down the process of changing cultural attitudes, which as mentioned before is essential for the correct application and for the efficient and effective functioning of the regulatory framework that has been introduced. Those negative indicators could indeed instil in public opinion the erroneous conviction that all legislative efforts have been in vain and have merely scratched the surface of the structural and systematic dimension of corruption and wrongdoing in the public sector.

Of course it is not intended in any way to challenge the publication of such surveys, which are always indispensable in fostering a collective awareness of the problem. In particular, the work of organisations like Transparency International is essential in the internationalisation of the fight against corruption. However, a change of tack is also desirable in devising methods for detecting corruption. Indeed, measurements that are based exclusively on individual perception would not seem to be totally capable of

grasping the actual dimension of the phenomenon just as objective methods (such as judicial statistics) do not take into full account the real scale of corruption.

Therefore, the international community's recent efforts (for example, the recent G7 workshop on corruption measurement held in Rome in 2017) are worth supporting, as they aim to develop a shared and multi-stakeholder measurement approach, which allows one to better grasp the real extent of the problem, an essential prerequisite that is key to ensuring that public opinion is properly informed and that regulatory measures are better implemented.

Moreover, the rapid pace of technological development not only affords a great opportunity but can also give rise to significant governance-related issues for public authorities, called upon to make complex regulatory choices. For example, new digital financial mechanisms that enable wealth to be moved around easily, often without specific controls and public regulation.

Although enhancing interconnection between markets and creating new business opportunities, those technological tools, precisely because (often) unregulated, are particularly attractive for criminals, who can exploit them to easily channel illicit funds (used to evade tax, pay bribes, launder money and finance terrorism) that then pollute the legal economy. Therefore, legal systems will be called upon in the coming years to offer adequate responses to emerging demands for protection against the misuse of these new technological tools.

In making the indispensable legislative choices in these fields, without relinquishing the opportunities for development afforded by these new technologies, once again prevention and above all transparency must be at the forefront.

In this regard a favourable eye is to be cast on the recent efforts of the European Union to include service providers among the persons obliged to comply with the regulations on the prevention

of money laundering also in connection with the use of cryptocurrencies.

In short, even in this case we are faced with complex and difficult challenges. However, where we can implement means that prevent illicit funds from flowing through the economy and that ensure transparency in transactions and trade relations, we can guarantee sustainable development, with adequate standards of legality and without obstacles to competition, capable of broadening market horizons.

As I pointed out before, similar goals and challenges also arise in the sphere of corporate governance in the private sector.

Business enterprises, moreover, are (and must be) the economic actors that (really) guarantee sustainable economic development that manages to effectively combine the achievement of business objectives with the equally necessary respect for the interests of stakeholders. Since the 1930s it has been well established in the international economic literature (especially the US) that

companies have fiduciary obligations not only to shareholders but also to anybody who may have a stake of any sort in their business. In short, they are enterprises who should not shy away from compliance with a series of precise obligations towards society.

With the growing acceptance of the concept of corporate social responsibility, an absolutely central role has been played above all in the OECD context, through that organisation's publication of very important guidelines for multinational companies, and in the UN context, through the Global Compact forum. This is because they are venues for dialogue between public organisations and private sector actors that have greatly fostered a common commitment to the recognition of the principles related to respect for human rights and the environment as well as the fight against corruption.

The European Union itself has been one of the main institutions strongly committed to supporting the view that social and

environmental issues must be factored into enterprises' decision-making processes and their relations with others.

In this regard, the world of private governance has certainly not shirked its responsibilities, having instead undertaken an absolutely praiseworthy task in spreading such principles of good corporate governance which, I believe, should be fully recognised. Today, in fact, it is precisely to the commitment and efforts of the private sector that we owe the development of codes of ethics and codes of business conduct aimed at defining a company's core values and standards of behaviour for all those who in one way or another contribute to achieving the company's mission.

Proper corporate governance cannot but depend on full involvement of all persons who participate in the life of the organisation. The idea that a true culture of legality and respect for the rules is strongly linked to the concrete commitment shown in this sense by top management (so-called 'tone at the top') has gained currency in recent times. Important in this regard are also

the self-regulatory codes of listed companies, which tend to standardise the minimum standards of corporate governance applicable in certain financial environments.

We also have private initiative to thank for the creation of authoritative international certification systems (such as *Fairtrade Marks* and *Ecolabel* brands) as well as reporting that goes beyond merely financial issues to encompass the social and environmental commitments of a company in the knowledge that this can constitute added value likely to sway consumers and consequently improve the company's economic results.

All of these initiatives basically demonstrate how the business world has become fully aware not only of the importance of incorporating these values into economic activities – in order to manage the ever-increasing interaction between markets and associated new business opportunities without however sacrificing the principles of sustainable development on the altar of profit –

but also of how they have been a real driver of the international community's commitment in that regard.

Corporate governance and private sector self-regulation have further played an absolutely central role in spreading the culture of compliance as an indispensable tool today for the management of the legal risk of non-compliance with the rules and in particular the prevention of crimes and wrongdoing within complex organisations.

Nowadays, proper corporate governance cannot be separated from the presence of a corporate compliance function, which constantly verifies the company's compliance with the rules of the multilevel legal system. Indeed, not only the business world but also the legal systems themselves are closely interconnected and coordinated with each other. This means that in order to correctly manage the risk of legal non-compliance, it is essential to constantly monitor compliance by the company with increasingly complex and wide-ranging legislation that is always evolving.

A central concept today is therefore that of risk management through organisation. That is a guiding principle that assumes key importance especially in relation to the prevention of crimes and wrongdoing within a company, especially in light of the law governing a company's liability for crimes, legislation that is now a feature of many legal systems due to an awareness of the central role that corporate governance can play in the fight against the spread of business crime.

Moreover, the fight against this form of crime is essential to ensure that any strengthening of interconnected economic relations at an international level actually develops with sufficient standards of security and legality.

Valuing the organisational component in combating corruption and more in general criminal activities for profit is therefore today one of the most important issues that must be faced and managed by private governance.

Moreover, from the standpoint of a cost-benefit analysis, the expense incurred by companies to introduce corporate compliance functions is more than offset by the benefits obtained in terms of minimising the legal risk of non-compliance with the rules. A risk that under modern law is one of those typical business risks that companies cannot ignore if not at the cost of incurring legal expenses (for court proceedings, damages, etc.) far higher than what the company would have needed to spend implementing compliance programs.

Being a compliant company is undoubtedly worth it in this respect. And not only to avoid legal risks but also – and here I recall the theme of corporate social responsibility – reputational damage to the organisation. Indeed, today a company that makes the headlines for all the wrong reasons, be it for corruption or in general unwelcome stories about environmental damage or products with adverse side effects for consumers, will end up being cast in a negative light in the court of public opinion and risks being

punished by the market in terms of consumers turning away from its products and services. So, it is easy to understand how a commitment to abide by the principles of corporate social responsibility could also be economically beneficial to a company over and above any ethical kudos it might earn.

In this sense, the issue of human rights is also of central importance, which mainly international corporate groups operating in high-risk contexts in this regard are called upon to respect (for example in supply chains where multinationals rely on local companies to manage certain phases of the business).

Well, for all the reasons mentioned earlier, a principle is gaining strength to the effect that these international groups have a specific duty to commit themselves to respect for human rights, making sure that their foreign business partners also do the same because corporate social responsibility is not something that can be totally avoided simply by moving it downstream.

These are therefore the guiding principles of proper private governance, with particular reference to the central role played by companies in crime prevention alongside the role played by the governments of various nations in the fight against corruption and any form of wrongdoing.

In this last respect, the theme of corporate criminal liability comes to the fore. In order to avoid being made liable for crimes committed in its interest or to its advantage a company will normally have to adopt a compliance model to prevent, manage and control the risk of crime. An approach that once again hinges on risk-based prevention and combating crime through organisation, self-regulation, the preparation of operational protocols for identifying and mitigating within tolerable limits the risk of commission of crime within the company. In other words, precisely the mechanism that it is sought – as I pointed out at the beginning – to export also into the public sector.

Over the years the commitment of large industrial groups to developing those tools of prevention has been truly remarkable and laudable. In that regard, the business world has played and continues to play a truly proactive role in the collective effort to combat business crime that has naturally involved national governments but also the private sector thanks to the said tools. Which, it must be said, has often implemented really efficient prevention models, relying on input also from various associated and subsidiary companies within the (international or domestic) corporate group as a whole.

A legal framework to be applauded. Moreover, it would be far more complicated to guarantee market legality and an effective fight against corruption without involving companies in indispensable crime prevention steps, also from a practical and concrete point of view.

Moreover, it is precisely that type of exchange of good practice between the public and private sectors, the involvement of the

business world in the fight against illegality and corruption, which I mentioned earlier and which in this sector is also an OSCE mission.

While these are the positive aspects of the steps taken so far by corporate governance – especially in terms of combating criminal activities for profit – in light of the problems arising from an increasingly interconnected and competitive economic environment, we still need to understand what future challenges will be faced in this field. Despite the increasing spread of best practice in terms of compliance and the adoption of principles of correct corporate governance, the sector is not without its problems.

From the standpoint of the desirable dissemination of the culture of corporate social responsibility, in particular, the various instruments existing at international level are characterised by their non-binding nature since they are merely voluntary. This could adversely affect the efficient circulation of these principles of good corporate governance. That said, especially in the Euro-EU

area, the progress made in this regard in recent times concerning corporate non-financial reporting seems to favour something very close to making the measures compulsory, at least for large institutions.

The provisions concerning the need to publicly disclose the steps taken (mainly) in relation to respect for human rights, the environment – on the basis however of a mechanism based on the 'comply or explain' principle – appears to be a legal policy choice that is moving in the right direction of making compliance with these principles an obligation not only of a social but also of a legal nature for companies.

The challenge of the future in this field would thus seem to be to implement new regulatory mechanisms, especially in the international field, capable of encouraging companies to effectively and actually adhere to the principles. For example, the introduction of reputational sanctions (through the publication of black lists) could be considered for those companies whose socially

irresponsible behaviour has been definitively established in judicial proceedings at national or international level.

Regarding corporate criminal liability, one of the major problems encountered in some of the legal systems that have introduced that concept lies in the fact that in some cases national law places the onus of devising crime prevention measures squarely on the company without however providing any guidelines to aid them only to then judge *ex post* the actual suitability of the model on which exemption from liability is premised. By contrast in other jurisdictions forms of strict liability are envisaged in some sectors in which the company is not afforded any opportunity at all to prove that there was no organisational fault involved in the commission of the crime.

This is a key problem because that approach undermines (in the first case in practice and in the second case even in theory) the actual value of deploying a model from a criminal prosecution standpoint with all that this entails in terms of making the adoption

of preventative measures less likely in the business world in light of their reduced value for companies beyond the indispensability of having a corporate compliance function to manage the risk of non-compliance with law.

Another central theme, which I briefly mentioned at the beginning of my speech, is the lack of harmonisation of the law on corporate criminal liability in various legal systems. Not every country classifies a company's liability for criminal activities in the same way, even at the formal level, and there are also significant differences in the rules (more or less favourable to companies), with the clear risk of acting as an incentive for forum shopping by companies and of creating regulatory gaps and disadvantages for companies operating in countries with more rigorous regulatory systems.

This is plainly a clear obstacle to the creation of real competition between companies in interconnected economic environments at the international level.

Therefore, the true challenge of the future in this sector appears once again to concentrate the efforts of governments in promoting the harmonisation and approximation of the relevant legislation in the various legal systems in order to provide a uniform regulatory framework at international level, creating that common legal framework essential for guaranteeing real competition among companies.

Once the rules on corporate criminal liability have been made uniform, I believe it is essential to provide companies with clear guidelines and rules so that they can understand in advance what behaviour has to be exhibited in order be reasonably certain that they will be exempted from liability if they demonstrate an effective capacity to prevent wrongdoing through self-organisation.

In this regard, it is also worth giving some thought to rewarding companies facing prosecution that repent in the wake of the crime by fixing precisely those organisational flaws that made it possible

to commit the offence to its advantage or in its interest (and I refer, in particular, to the example of the deferred prosecution agreements provided for in UK legislation).

In short, there are so many reflections and challenges of the future.

As I have said, we are dealing with political, cultural, communication and regulatory challenges. A road, therefore, that is extremely long and difficult. But opportunities for dialogue like today and the work of precious discussion forums such as the OSCE will contribute – I am sure – to coming up with winning solutions.

Thank you.