



## **International Centre for Asset Recovery (ICAR)**

Basel Institute on Governance

Pedro Gomes Pereira, Selvan Lehmann, Anja Roth, Kodjo Attisso

# **South Africa Anti-Corruption Architecture**

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**giz** Deutsche Gesellschaft  
für Internationale  
Zusammenarbeit (GIZ) GmbH

On behalf of  
 Federal Republic of Germany  
The Federal Government

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BASEL INSTITUTE ON GOVERNANCE



## Authors

Basel Institute on Governance / International Centre for Asset Recovery

Pedro Gomes Pereira

Selvan Lehmann

Anja Roth

Kodjo Attisso

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Steinenring 60, 4051 Basel, Switzerland

Phone +41 61 205 55 11, Fax +41 61 205 55 19

[www.baselgovernance.org](http://www.baselgovernance.org), [info@baselgovernance.org](mailto:info@baselgovernance.org)

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The programme has supported a number of research initiatives in partnership with the Presidency to enable fact-based planning and policy formulation. It has also facilitated the development and application of the Administrative Justice Act and assists with the implementation of related activities through different measures, like training and the development of awareness-raising materials and strategies.

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The Institute's International Centre for Asset Recovery (ICAR), founded in July 2006 with funding from Liechtenstein, Switzerland and the UK, assists developing countries in enhancing their capacities to seize, confiscate and recover the proceeds of corruption and money laundering. For this purpose, the ICAR provides training in financial investigation, MLA and asset recovery, and assists with the investigation of complex cases. It further facilitates co-operation between law enforcement agencies of different jurisdictions.

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BASEL INSTITUTE ON GOVERNANCE



Basel Institute on Governance  
International Centre for Asset Recovery  
Steinenring 60, 4051 Basel, Switzerland  
Phone +41 61 205 55 11  
Fax +41 61 205 55 19  
[www.baselgovernance.org](http://www.baselgovernance.org), [info@baselgovernance.org](mailto:info@baselgovernance.org)

Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH  
Friedrich-Ebert-Allee 40  
53113 Bonn  
Phone: +49 228 4460 - 0  
Fax: +49 228 4460 - 1766

Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH  
Dag-Hammarskjöld-Weg 1-5  
65760 Eschborn  
Phone: +49 6196 79 - 0  
Fax: +49 6196 79 - 1115

[info@giz.de](mailto:info@giz.de)

**giz** Deutsche Gesellschaft  
für Internationale  
Zusammenarbeit (GIZ) GmbH



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ACA	Anti-Corruption Agency
ACCC	Anti-Corruption Co-ordinating Committee
ACECA	Anti-Corruption and Economic Crimes Act
ACIMC	Anti-Corruption Inter-Ministerial Committee
ACTT	Anti-Corruption Task Team
ACU	SAPS Anti-Corruption Unit
AFU	Asset Forfeiture Unit
AGO	Attorney-General's Office
AGSA	Auditor-General
AGU	<i>Advocacia-Geral da União</i>
AU Convention	African Union Convention of Preventing and Combating Corruption
AUD	Australian Dollar
BMZ	German Federal Ministry for Economic Co-operation and Development
CGU	<i>Controladoria-Geral da União</i>
CNJ	<i>Conselho Nacional de Justiça</i>
CNMP	<i>Conselho Nacional do Ministério Público</i>
COGTA	Department of Co-operative Governance and Traditional Affairs
CPIB	Corrupt Practices Investigative Bureau of Singapore
CPS	Crown Prosecution Service
DPCI or Hawks	Directorate of Priority Crime Investigation
DPF	<i>Departamento de Polícia Federal</i>
DPP	Director of Public Prosecutions
DPSA	Department of Public Service and Communication
DSO or Scorpions	Directorate of Special Operations
EACC	Ethics and Anti-Corruption Commission
ECDOH	Eastern Cape Department of Health
ENCCLA	<i>Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro</i>
FIC	Financial Intelligence Centre
G&A Cluster	Governance and Administration Cluster
GIZ	German <i>Gesellschaft für Internationale Zusammenarbeit</i> GmbH
HK ICAC	Independent Commission Against Corruption of Hong Kong
ICAC	New South Wales Independent Commission against Corruption
ICD	Independent Complaints Directorate
ICM	Anti-Corruption Inter-Ministerial Committee

INTOSAI	International Organisation of Supreme Audit Institutions
IPCC	Independent Police Complaints Commission
IPID	Independent Police Investigative Directorate
IPID Act	Independent Police Investigative Directorate Act 2011
JCPS Cluster	Justice, Crime Prevention and Security Cluster
KACA	Kenyan Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
MACC	Minimum Anti-Corruption Capacity Requirements
MFMA	Municipal Finance Management Act
MIG	Municipal Infrastructure Grant
MJ	<i>Ministério da Justiça</i>
MoU	Memorandum of Understanding
MPF	<i>Ministério Público Federal</i>
MPS	Municipal Police Services
MPU	<i>Ministério Público da União</i>
NACF	National Anti-Corruption Forum
NARC	National Rainbow Coalition
NDPP	National Director of Public Prosecutions
NIA	National Intelligence Agency
NPA	National Prosecuting Agency
NPA Act	National Prosecuting Authority Act
NSIA	National Strategic Intelligence Act
NSW	New South Wales
OACU	Overseas Anti-Corruption Unit of the City of London Police
OECD	Organisation for Economic Co-operation and Development
OECD Bribery Convention	Anti- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
PAA	Public Audit Act 2004
PCCA	Prevention and Combating of Corrupt Activities Act 2004
PFMA	Public Finance Management Act 1999
PIC	Police Integrity Commission
POCA	Prevention of Organised Crime Act 1998
PP	Public Protector
PP Act	Public Protector Act 1994
PSA	Public Service Act
PSACS	Public Service Anti-Corruption Strategy

PSC	Public Service Commission
PSC Act	Public Service Commission Act 1997
PSRP	Public Service Reform Programme
RCPO	Revenue and Customs Prosecution Office
RSA	Republic of South Africa
SACU	Public Service Special Anti-Corruption Unit
SADC Protocol	Southern African Development Community Protocol Against Corruption
SAI	Supreme Audit Institution
SAPS	South African Police Service
SARS	South Africa Revenue Service
SARSA	South African Revenue Services Act
SASS	South African Secret Service
SCM	Supply Chain Management
SCPC	<i>Service Central de Prévention de la Corruption</i>
SFO	Serious Fraud Office
SIU	Special Investigations Unit
SIU Act	Special Investigating Units and Special Tribunals Act 1996
SOCA	Serious Organised Crime Agency
StAR	Stolen Asset Recovery Initiative
TCU	<i>Tribunal de Contas da União</i>
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention Against Corruption
US	United States of America or United States
ZAR	South African Rand

# 1. Executive Summary

## 1.1 Background

The German *Gesellschaft für Internationale Zusammenarbeit GmbH* (GIZ) has been commissioned by the German Federal Ministry for Economic Co-operation and Development (BMZ) to implement the Public Service Reform Programme (PSRP) in the Republic of South Africa (RSA). Amongst other areas, the PSRP supports the effective implementation of the national anti-corruption programme of the RSA, which is focused on increased anti-corruption capacity in national and provincial departments, improvements in the investigation and conclusion of corruption cases and enabling civil society to participate in national anti-corruption initiatives.

The RSA does not follow the model of a single body responsible for fighting corruption. Instead, various organisations and structures are in some manner responsible for aspects of preventing and combating corruption. This in itself is fully compatible with applicable international standards and in line with good practice of other comparable countries. However, as 2011 has seen the addition of new organisations and structures to the existing institutional framework, an assessment of the arrangements and capacities of these institutions seems timely.

## 1.2 Aim

The aim of the present study is to conduct an in-depth analytical study of the anti-corruption architecture in the RSA, and to present different country examples as cases studies.

The study follows the methodological approach described below. Critical for the comprehensiveness and accuracy of the research conducted for this study is an extensive knowledge of the legal and institutional framework in the RSA and the countries which have been compared and benchmarked to the South African model. The study will seek to identify the following elements:

- The structure of the current South African anti-corruption architecture;
- The strengths and weaknesses of the said architecture;
- The elements of co-ordination and co-operation between the relevant stakeholders which comprise the South African anti-corruption architecture.

## 1.3 Report Structure

The study is structured as follows:

- Chapter 1 brings forth the executive summary of the present study
- Chapter 2 presents the methodology utilised to undertake the present study;
- Chapter 3 presents an analysis of the current international framework and explores the different models of the single- and multi-agency approach for the anti-corruption framework;
- Chapter 4 presents an analysis of the South African legislation and the structure of its anti-corruption framework;
- Chapter 5 presents an overview of different country models for their anti-corruption framework;

- Chapter 6 presents a comparative analysis between the South African model (chapter 4) and the selected country models (chapter 5);
- Chapter 7 presents the conclusions and the recommendations.

#### 1.4 Key Findings

- The Constitutional Court has determined the need for an independent anti-corruption body with structural and operational autonomy.
- The RSA has a comprehensive anti-corruption architecture composed of a range of important institutions which address corruption from different angles.
- However, the lack of clarity and overlaps between the functions of the institutions comprising the anti-corruption architecture allow for the duplication of efforts which reduce the overall effectiveness of the system.
- The institutions and co-ordination elements of the anti-corruption architecture have been created without a cohesive policy plan from Government. As a result, the mandate of several institutions overlap with others, reducing the overall effectiveness of the response of preventing and combating corruption.
- Moreover, although there are several co-ordination mechanisms between the involved institutions, the effectiveness of these mechanisms seems to be limited as not all relevant institutions are included. The functions of these several co-ordination mechanisms appear also to overlap amongst each other, making functioning unclear for some of the relevant stakeholders.
- Nevertheless, the recent creation of the Anti-Corruption Task Team (ACTT) is a positive step towards greater integration and co-ordination among the enforcement bodies of the anti-corruption architecture of the RSA. This has been achieved through a multi-institutional approach with set targets, and reports indicate a potential high degree of success in the activities undertaken by the institutions through the ACTT.
- At the preventive level, the RSA has set up Minimum Anti-Corruption Capacity Requirements (MACC) in 2002 for all government levels. Although it has been widely adopted, levels of compliance with it still remain low as its implementation remains passive by the responsible units.
- Compliance with the MACC also remain low due to jurisdictional issues, as disbursing entities do not always have an investigation mandate in the event to mismanagement and corruption. Nevertheless, the RSA is seeking to address these shortcomings through the Special Anti-Corruption Unit (SACU), which will be responsible for assisting the government units in the implementation of the MACC and the creation of guidelines for sanctioning.
- The rules and regulations are sometimes unclear and not transparent. This undermines the effectiveness of the anti-corruption architecture of the RSA and hinder the independence of the anti-corruption institutions.

## 1.5 Recommendations

The following recommendations arise from the findings contained in the present report and pertain to the current anti-corruption architecture of the RSA. Gaps and shortcomings have been identified, as well as best practices arising from the architecture itself. These are presented in the following:

1. The establishment of a cohesive policy at the short, medium and long terms for the anti-corruption architecture of the RSA.

The RSA currently lacks a cohesive policy encompassing short, medium and long strategies. As a result, the creation and elimination of institutions that comprise the anti-corruption strategy in the RSA are disjointed and greatly hamper the overall organisation of the structure itself. Furthermore, this absence of a cohesive policy creates difficulties for allowing the integration and the co-ordination of the institutions at an operational level, and makes way for the duplication of roles and responsibilities at both the co-ordination and operational levels.

The creation of a structured cohesive policy would entail the need for conducting a full mapping of the institutions responsible for, directly or indirectly, the prevention and enforcement corruption, as well as the education of anti-corruption, at the national and sub-national levels. This system mapping would be followed by an institutional mapping, whereby the intra-institutional interactions would be plotted and compared with the functions that are to be carried out by each of these institutions (source mapping). Finally, a capacity mapping of the resources (financial, human, etc.) would be done in order to verify the technical needs of the anti-corruption system. The results of the several mappings of the anti-corruption architecture of the RSA would furnish policymakers with the initial resources to help establish a cohesive anti-corruption policy. The needs would further need to be prioritised and established as short, medium or long term goals.

A cohesive anti-corruption policy, integrating all levels of the anti-corruption architecture of the RSA would further separate government actions for political pressures. Furthermore, a policy created outside the realm of political interests and needs would allow for greater autonomy of the system. It should be further underscored that a cohesive anti-corruption policy is to be periodically reviewed and monitored, in order to ensure that the goals set out in the document are reached taking into considerations changes and external influences/pressures which may arise over time. Finally, while the creation of a cohesive anti-corruption policy should encompass the greatest amount of institutions comprising the anti-corruption architecture of the RSA, so as to ensure ownership of the process by all.

2. The importance of clear and unambiguous set of rules, regulations and laws.

The study has also identified that the regulatory aspect of the anti-corruption architecture of the RSA is not clear in many respects. In that regard, and in order to ensure the efficiency and effectiveness of the system, there is a need to define clear and unambiguous rules for the actions to be carried out by each of the anti-corruption institutions.

Clear and unambiguous rules are needed in order to ensure the independence and autonomy of the anti-corruption institutions linked to Cabinet Ministers, the Parliament, the President or other political figures. As such, legislative amendments should be sought where the law is unclear or ambiguous with regards to the function of particular institutions. Where the law is clear, but potential interference to the institution may exist, e.g., in the case that a Cabinet Minister may have responsibility over an institution, arrangements should be made to clarify the objective criteria under

which the responsible Cabinet Minister may have access to information contained in the institutions comprising the anti-corruption architecture of the RSA.

3. The resolution of jurisdictional issues which reduce the effectiveness and efficiency of the anti-corruption system in the RSA.

The effectiveness of the anti-corruption system in the RSA may further be hampered due to the fact that the current legislation and regulation do not fully encompass all of the institutions. As mentioned in this study, the National Treasury, under the Municipal Infrastructure Grant (MIG), disburses monies through the Department of Co-operative Government and Traditional Affairs (COGTA). Both the COGTA and the National treasury, however, have little oversight on how the monies are spent by the municipalities. Thus, a revision of the current legislation and regulation is necessary in order to empower the disbursing agencies to have effective jurisdiction and oversight in the expenditure of national monies at the municipal and other subnational levels. This revision of legislation and procedures will further be necessary with the hiring of the Chief Procurement Officer by the National Treasury, with the responsibility of modernising the State procurement system, of ensuring transparent utilisation of resources for improved service delivery, and to guarantee manage and oversee the government assets and resources.

4. Revision of the information management policies, as well as its sharing and retention, at a system-wide level.

The study points to the need for greater implementation of information management and sharing policies at the system-wide level. The Minimum Anti-Corruption Capacity Requirements (MACC) audit indicates that, although the requirements have been implemented, its effectiveness remains low. One of the reasons for this is, also in accordance to the MACC audit, the poor information management, which creates adverse consequences for the overall anti-corruption system. It becomes more difficult to identify corruption risks and trends at both the institution and system-wide levels without effective risk and trend analyses. In turn, without the identification of these risks and trends, it is hard to create a risk-based matrix that enables intelligence agencies to more thoroughly analyse the information made available to them and efficiently identify potential corruption-related actions committed against the system.

Another situation in which a lack of information management and sharing policies hamper the effectiveness of the overall system related to the external auditing of accounts done by the Auditor-General (AGSA). One of the deficiencies of the AGSA is the quality of the audit reports it produces. However, these reports are dependent upon the information which is kept by the respective departments in order to be audited. Thus, the capacity of the AGSA conducting effectively its periodic and forensic audits in the disbursing agencies is dependent also on the quality of the information it provides.

A direct consequence to the reactive approach to the prevention of corruption, as indicated above, pertains to data retention policies and the sharing of information relevant to the anti-corruption system of the RSA. The first one relates to the need of all government departments and institutions of maintaining, for a determined period of time, the information it has produced. It is necessary to ensure that the anti-corruption intelligence produced is retained for an adequate period of time that is also in line with financial intelligence policies of data retention. This is so that it is possible to crossbreed the intelligence for effective prevention and combating of corruption.

5. Increasing the active sharing of information between the relevant anti-corruption authorities.

The effectiveness of the system is also dependent on the sharing of information between the institutions in order to prevent and combat corruption. Due to the complexities of corruption-related crime, as well as the fact that it will commonly intersect with other forms of serious and organised crime (e.g., trafficking in drugs, arms and persons), it is paramount that the information produced by the institutions at all levels be shared amongst them. An institutional mapping is necessary to that effect, especially in regards to sharing policies at the intelligence level. Regarding this latter point, it should be underscored that, due to the nature of intelligence gathering and the sensitivities relating thereto, appropriate mechanisms should be created to allow the sharing of the intelligence between the intelligence community of the RSA, with appropriate mechanisms of checks and balances to ensure that the system itself will not be misused.

6. Ensuring the independence and impartiality of the institutions comprising the anti-corruption architecture of the RSA.

It is paramount that the anti-corruption architecture of the RSA maintain the impartiality and independence of the relevant institutions which comprise the anti-corruption architecture of the RSA. The ruling of the Constitutional Court in the *Glenister* case determined that the RSA lacked an independent anti-corruption agency (ACA). As a direct result, the Directorate of Priority Crimes Investigation (DPCI) has proposed amendments to its enabling legislation with a view to complying with the ruling of the Constitutional Court. While several elements have been addressed with regards to the independence of the several anti-corruption agencies, there are still gaps in which potential dependence to political structures remain, weakening the overall anti-corruption efforts in the RSA. When such is the case, appropriate regulation should be put in place to objectively determine under which cases such interaction with Cabinet Ministers or the Parliament should take place, in order to avoid any type of interference in the investigation and prosecution of corruption.

7. Revision of the functions and responsibilities of the co-ordination bodies currently available in order to eliminate duplications in the system and allow for a more comprehensive approach.

There are, in the anti-corruption architecture of the RSA, several overlaps in functions and duplication of efforts by its institutions at the operational level. Moreover, and as mentioned previously, the lack of a cohesive anti-corruption policy at the system-wide level allows for these duplications and overlaps also at the policy level. Each of the institutions comprising the anti-corruption architecture of the RSA create their own policies to respond to specific operational pressures, and some co-ordination mechanisms are created seeking to encompass specific institutions to relieve those pressures when they comprise the actions of more than one institution. As a result, and due to the fact that these institutions may be represented in these different fora, some confusion with regards to the purpose of the multiple co-ordination structures can be seen among its constituent institutions.

Clearer guidelines should be established by the secretariat of the existing co-ordination structures to determine what the efforts of some of the existing fora should be centred, and how they interact and co-ordinate with each other. As has been seen, even for its constituting members – which are sometimes the secretariat of the forum – it is unclear what and which roles need to be played (e.g., the Department of Public Service Administration (DPSA), the Anti-Corruption Co-ordinating Committee (ACCC) and the Anti-Corruption Inter-Ministerial Committee (ICM)).

Notwithstanding, the example of the Anti-Corruption Task Team (ACTT) is a notable one which could be used as a best practice example from within the anti-corruption architecture of the RSA. Although the ACTT is not a statutory body and it primarily focuses on operational aspects of combating serious crime, it has been set up with specific goals, and is project oriented. As such, it is easier to define results and deliverables, and thus measure success. Nevertheless, while the set up of the ACTT is a notable one, attention should be given in order to ensure that it too is able to capture and manage its own information which may be relevant to other co-ordination mechanisms at the policy level (e.g., data pertaining to trends and risks to the anti-corruption system, which would allow for corrective measure at the preventive level). Again, even though the anti-corruption architecture of the RSA may require or may choose to have several different co-ordination mechanisms, a cohesive anti-corruption policy at a system-wide level should ensure that these too share information amongst themselves in order to fulfil the goals established in the said policy.

Finally, it should be further noted that, as no impact assessment on the work and its functions carried out by the DPCI vis-à-vis the anti-corruption architecture of the RSA has been conducted prior to the proposal of the aforementioned amendment bill, the effects of these changes throughout the entire anti-corruption system may not have been taken into account or foreseen. With the new enabling legislation, it is unclear if the DPCI will be conducting the same work currently undertaken at a co-operative level at ACTT. Should this duplication exist, the co-ordination effort undertaken by the several institutions comprising the ACTT since its inception may be lost, at the loss of the anti-corruption architecture as a whole.

8. Increasing the co-ordination capacity of the institutions comprising the anti-corruption architecture of the RSA, at both the preventive and enforcement levels.

As mentioned above, it is possible to determine which co-ordination structures are overlapping or duplicated in the anti-corruption architecture of the RSA through an appropriate system mapping of the existing co-ordination structures. As a consequence to this system mapping, remedial action can be taken with a view to merging duplicated structures, eliminating overlaps and removing excesses which in turn allow for a more efficient use of the available resources in these revised co-ordination structures. This in turn increases the co-ordination capacity of the institutions comprising the anti-corruption architecture. Furthermore, by setting up the desired outputs and deliverables, it is possible to measure the co-ordination capacity, and its overall effectiveness in the system.

## 2. Methodology

The applied methodology includes the following data collection:

- Desktop analysis of the international standards relating to anti-corruption;
- Literature review of international standards and academic debate;
- Desktop analysis of the legal instruments and organisational structure of the anti-corruption architecture in South Africa;
- Identification of strengths and weaknesses of the South African anti-corruption architecture against the relevant international standards;
- Desktop review of the legal and institutional anti-corruption framework of five jurisdictions, and identification of particular strengths and weaknesses as relevant to the needs and priorities of the South African anti-corruption context and as benchmarked with the applicable international standards;
- Identification of key elements from the selected five jurisdictions cases studies to be transposed to the South African model, if applicable and possible;

The data collected in order to undertake the above-mentioned methodology includes the use of primary (Laws, regulations, etc.) and secondary (academic journals, reports, etc.) sources.

The five comparable jurisdictions were chosen taking into consideration similarities with the South African context, as well as considerations pertaining to geographical size and economic strength. Close co-ordination with GIZ was sought when choosing said jurisdictions. The chosen jurisdictions were:

- Brazil;
- Kenya;
- New South Wales, Australia;
- Tunisia;
- United Kingdom.

With regard to these specific profiles, the study took the following three elements into consideration: (i) description of the anti-corruption system of the jurisdiction; (ii) evaluation of said anti-corruption system; and (iii) how the jurisdiction co-ordinates its anti-corruption efforts.

### 2.1. Legislation and Literature Review

An internet-based review of academic journals was conducted, including relevant studies carried out since 2000 with regard to the South African anti-corruption framework. The relevant international standards were reviewed, as well as pertinent reports from South Africa and the selected countries.

### 3. International Standards

The RSA has ratified the following international instruments relevant to anti-corruption and the present study: the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation of Economic Co-operation and Development (OECD Anti-Bribery Convention), the African Union Convention on Preventing and Combating Corruption (AU Convention), the United Nations Convention against Corruption (UNCAC) and the Southern African Development Community (SADC) Protocol against Corruption. The following subsections will give a short overview of the respective instruments with a focus on the nature or the characteristics of an Anti-Corruption Agency (ACA) and the question of its independence contained in each of those instruments, where applicable.

#### 3.1 African Convention on Preventing and Combating Corruption

The RSA ratified the AU Convention in 2005. The AU Convention applies to both the private and the public sector. It includes offences such as “bribery (domestic or foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property” (Anti-Bribery Resource Guide 2012). Importantly, this Convention’s provisions are binding on all its Member States which makes it a somewhat stronger tool than certain other international instruments that contain non-binding provisions.<sup>1</sup> The AU Convention is as comprehensive as the UNCAC as it contains provisions on a broad array of anti-corruption components, including “prevention, criminalisation, regional co-operation and mutual legal assistance as well as the recovery of assets”. Furthermore, the AU Convention calls for the establishment of an ACA: Article 5 (3) asks signatories to “[e]stablish, maintain and strengthen independent national anti-corruption authorities or agencies.” This requirement is central especially for the purposes of this study and can be categorised as one of the strengths of the AU Convention. As will be shown, not all international conventions have such provisions.

However, some weaknesses have been identified. It has been criticised that the AU Convention does not provide for any concrete sanctions,<sup>2</sup> and as with other international instruments, the option of making reservation is given according to Article 24 (Transparency International 2012). This, of course, has the potential of limiting the Convention’s effectiveness and coherent application throughout the circle of its signatories. Moreover, there is no further clarification made as to whether Member States can opt out of any one of the articles, or only specific ones. Article 24 only states that reservations are possible as long as they are not incompatible with the objective and purposes of the Convention.

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<sup>1</sup> The UNCAC, for example, starts some articles with “states shall consider”; those are only recommendations whereas some articles are clearly mandatory, with the wording being “states shall”.

<sup>2</sup> Although this is also the case with many of the other international instruments.

### 3.2 Southern African Development Community Protocol Against Corruption (SADC Protocol)

The SADC protocol (ratified by the RSA in 2001) focuses on prevention as well as enforcement of corruption-related offences. It aims at establishing anti-corruption mechanisms on the national level, and on the other hand, international co-operation between its signatories is promoted through its provisions (BIAC 2012). The SADC Protocol, in contrast to the other listed instruments except for the UNCAC and its articles 6 and 36, does also foresee the establishment of an ACA. Article 4(1)(g) encourages states to maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption (Art 4 (g) SADC). Yet, as with the AU Convention, the SADC Protocol does not provide for any sanctions against Members States in case of non-compliance, and its oversight co-ordinating mechanism, the Committee of the State Parties, is tasked with reactive rather than active powers. This committee is tasked to review country's submissions, outlining their efforts to implement the SADC Protocol. It can also organise and initiate trainings and facilitate communication between the state parties but there is no sanctions mechanism if any of the parties do not hand in their progress reports.

### 3.3 OECD Anti-Bribery Convention

The OECD Convention (ratified by the RSA in 2007) is the most focused of the international instruments as it deals specifically and in detail with the issue of bribery. Criminalisation and law enforcement stand at its centre. It seeks to ensure that its signatories criminalise the bribery of foreign public officials in international business transactions. Unique to the OECD Convention is its focus, which is put exclusively on the supply-side of the bribery of public foreign officials (BIAC 2012). All Member States must put in place provisions that ensure that none of their nationals or companies registered in their territory can bribe foreign public officials and stay unpunished. The OECD Convention can be seen as a milestone in the fight against corruption as it for the first time acknowledges the fact that corruption is a two-sided process and that there is not only the corrupt public official, but also the side supplying the bribes to achieve a certain goal. For obvious reasons, the OECD Convention is central to international business transactions. Most of its Member States are home to big international companies that could potentially be a source of bribe money (OECD 2012).

Yet, according to Transparency International, the “levels of enforcement [of the OECD Convention] vary between individual countries and there is a need for improvement in all countries” (TI 2012). Because of the specific focus of this Convention to bribery, reference to the establishment of an ACA is not made.

### 3.4 United Nations Convention Against Corruption (UNCAC)

The UNCAC is often described as the most comprehensive instrument on anti-corruption in the international stage. It attempts to look at the issue of

corruption in a holistic way, incorporating provisions on prevention, criminalisation and enforcement, international co-operation and asset recovery. One of the strengths of UNCAC is its broad definition of “public official”, which allows the encompassing of a broad range of persons. Also, the UNCAC encompasses provisions that are mandatory for its signatories, in addition to non-mandatory provisions that States Parties are encouraged to adopt. Regarding this last point, it is both one of the strengths and weaknesses of the UNCAC because it leaves room for States Parties to adjust the requirements to their national needs. However, the mandatory provisions can certainly be seen as making the UNCAC a strong instrument in many respects.

Important in the context of this study are several specific articles of the UNCAC, the first being article 6, which obliges states to ensure the existence of a body (or bodies) tasked with the prevention of corruption; the second is article 36 that deals with the establishment of a body or bodies (or even persons) specialised in combating corruption and responsible for anti-corruption law enforcement. Article 6 requests states “to ensure the existence of a body or bodies, as appropriate, that prevent corruption”. This body, or bodies, is encouraged to do so by ensuring that the UNCAC-stipulated policies are implemented, co-ordinated and supervised and increasing knowledge about the prevention of corruption in general. As short as this list of responsibilities of the anti-corruption body or bodies might appear at first glance, it is a challenging task when examined in more detail. Most countries, as in the case with South Africa, do not have one single anti-corruption body that is responsible for the implementation of anti-corruption policies, its oversight, prevention of corruption and maybe even also enforcement. Rather, most countries have several different agencies officially complementing each other in fulfilling the range of anti corruption functions, whereas of course in reality, their realities oftentimes overlap and are duplicated.

As a result, different entities or agencies may fulfil the functions of prevention, education and enforcement. Co-ordinating their efforts and ensuring communication is the first hurdle that has to be overcome when implementing article 6 of UNCAC. As mentioned by the StAR in their guidebook on Barriers to Asset Recovery, lack of co-ordination between domestic anti-corruption agencies can impede mutual legal assistance and asset recovery. It recommends the international joint task force approach, which could be extended to task force arrangements or multi-agency working groups at the domestic level (Stephenson et al, 2011, 37). As will be seen in section 4 of the present report and further discussed in its section 7, the RSA has established a wide range of institutions responsible for the prevention and combating corruption through different means. These institutions, however, still seem to lack an effective co-ordination mechanism amongst them at both the policy and the operational levels, despite the wide range of committees, working groups and task forces which have been created. As will be shown further below (in particular in section 7), the institutions themselves are at times uncertain of the purposes of the existing co-ordination mechanisms available.

As for the implementation of UNCAC Chapter II, it is important to keep in mind that it does not only include initiatives clearly labelled as “anti-corruption policy”, but also more sector-specific pieces of regulation referring to, e.g., public procurement, property, transparency and access to information policy (Hechler et al. 2009, 7). This approach ensures a more thorough anti-

corruption framework as it is more specific and detailed than a general anti-corruption policy piece of legislation.

When turning to the oversight function that the required body or bodies should take, it has to be noted that this might be one of the weaker requirements of UNCAC. In most cases, many different actors will be involved in implementing anti-corruption policies, and oversight will naturally also take place on different levels. These include intra-institutional, inter-institutional and oversight at a national level. On all of these levels, appropriate mechanisms of checks and balances will have to be ensured so as not to render the oversight undemocratic or illegitimate. As a result, one can say that UNCAC is rather vague on how this oversight should be implemented in practice. Article 6 also requires the increase and dissemination of knowledge about the prevention of corruption.

One important point that will re-occur in section 3.6.1 below, on the independence of ACAs, is that Article 6 UNCAC requires the body or bodies tasked with corruption prevention to be independent, “to enable the body or bodies to carry out its or their functions effectively and free from any undue influence” (Hechler et al. 2009, 6). The requirement of independence is therefore looked at in more detail in a separate section.

Articles 6 and 36 are closely intertwined. Whereas Article 6 talks about a body or bodies working in the area of corruption prevention, Article 36 deals with law enforcement anti-corruption functions (UNODC 2006, para 55). Article 36 states that “[e]ach State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.” As to the practical implementation of Art. 36, it is noted that corruption is often interconnected with other economic crimes. As a result, it makes sense to locate the enforcement body or bodies in the realm “of police, prosecution, judicial and other (e.g., administrative) bodies.” It has also been stated that creating a separate new body for the task of law enforcement could be counter-productive because of the above-mentioned reason, namely that corruption is often intertwined with other criminal offences, and effective prosecution would be able to look at all such offences and not have to take them apart and investigate and prosecute them separately (UNODC 2006, para 463). Even when a separate body is created to dedicate its efforts exclusively to combat corruption, a co-ordination and co-operation between it and other elements which combat different types of crime (e.g., organised crime) are needed due to the fact that corruption seldom occurs by itself.

It is important to say that even though the UNCAC deals with prevention and law enforcement in two different articles, the respective responsibilities could nevertheless also be assumed by one single body if that better suits the structure of a state (UNODC 2006, para 57). The single-versus multi-agency debate will be looked at in more detail in the following sections.

### 3.5 Analysis of the different models of Anti-Corruption Agencies

As mentioned above, the UNCAC requires the existence of anti-corruption institutions fulfilling the following tasks (articles 6 and 36 UNCAC):

- A body or bodies that prevent corruption (article 6 UNCAC);

- A body, bodies or persons specialised in combating corruption through law enforcement (article 36 UNCAC).

Those bodies must fulfil a large number of multidisciplinary functions to effectively contain corruption such as policy development, research, education and awareness raising, investigation and prosecution. While the UNCAC does not specify how such a body must be organised and what approach, e.g., centralised vs. multi-type, should be pursued, it refers to a set of functions and how these preventive and law enforcement functions can be implemented.

In regard to prevention, the UNCAC states that a specialised body (or bodies) must be created with anti-corruption and co-ordination functions, meaning here that an institutional approach should be taken. The UNCAC also requires the specialised body (or bodies) to address law enforcement but, in contrast to prevention bodies, specialised persons can be assigned to conduct the law enforcement functions of article 36 UNCAC, as opposed to a (body or bodies) (UNODC 2006, para 57). Both the preventive and law enforcement functions and their corresponding bodies are mentioned under different articles (articles 6 and 36 respectively); however, States parties may decide to entrust one body with a combination of preventive and law enforcement functions (UNODC 2006, para 57).

Consequently, the UNCAC establishes an institutional approach and makes it clear that ACAs must accomplish a combination of functions, which need to be well co-ordinated. However, their organisational structure and institutional design leaves room for debate in academic literature and policy guidelines that benchmark performances of various types of anti-corruption bodies and their separation of functions. Consensus on a single best model or a universal type of agency to be recommended does not exist. This is also due to the fact that institutions need to be adjusted to the national context, as well as its legal, political, and cultural circumstances. There are, however, various standardised approaches, trends and best practices that can be identified in terms of prominent types of ACAs, which will be discussed in the subsequent section.

### 3.5.1 Types of Anti-Corruption Agencies

The OECD (2008, 21-24), for instance, distinguishes ACAs in the following structures: (i) Multi-purpose agencies, which are represented by the most prominent example of a single-agency approach based on Hong Kong, Singapore; Latvia and Lithuania; (ii) Law enforcement agencies, departments or units, including specialised institutions, such as found in Spain, Romania, Croatia; and specialised police services: Belgium, Norway and the United Kingdom; and (iii) Preventive, policy development and co-ordination institutions such as France (SCPC or *Service Central de Prévention de la Corruption* – Central Service for the Prevention of Corruption), the Former Yugoslav Republic of Macedonia (State Commission for Prevention of Corruption), Albania (Anti-corruption Monitoring Group), and Malta (Permanent Commission against Corruption).

Heilbrunn (2004, 1-18) examines in his study commissioned for the World Bank why certain anti-corruption commissions either fail or are successful. He differentiates between four models of ACAs. The first, the universal model fulfils investigative, preventative, and communicative functions such as the

Hong Kong's Independent Commission Against Corruption (HK ICAC).<sup>3</sup> The second type is the investigative model and operates as a small and centralised investigative commission which is typified by Singapore's Corrupt Practices Investigation Bureau (CPIB).<sup>4</sup> In contrast to the former two types, which are accountable to the executive, the third type, called the parliamentary model, reports to the parliamentary committees and is independent from the executive and judicial branches of state (e.g., New South Wales Independent (NSW) Commission Against Corruption – ICAC).<sup>5</sup> The multi-agency model, on the other hand, is characterised by a number of offices that are individually separated but together make up an overall web of agencies to fight corruption such as the United States Office of Government Ethics, which represents a distinct agency specializing in prevention in an overall anti-corruption system (Heilbrun 2004, 3).<sup>6</sup>

Countries have had both success and failures adopting agency types such as those mentioned above. Experts and scholars have attempted to identify benchmarking methods and the causes of success or failure, which has proved to be a difficult task due to the complex and politicised nature of corruption and its institutional countermeasures. The most common agency types or models discussed in this regard are the multi vs. centralised (single) approach.

Various case studies of the two approaches and their respective literature may provide insight into their strengths and shortcomings. These will be dealt with in the following subsections.

### 3.5.1.1 Centralised or Universal Agencies

The centralised or single agency model is characterised by shifting multiple anti-corruption activities into a single agency. It has to be noted that a centralised or universal agency in this case does not require a single agency but an overarching body with strong leadership in overseeing a multitude of functions and individual entities. A centralised agency, for instance, can be defined as “a separate, permanent government agency whose primary function is to provide centralised leadership in core areas of anti-corruption activity”(USAID 2005, 5). The HK ICAC has been often cited as a success story for a centralised agency and encourages other countries to adopt similar anti-corruption bodies. This type of agency tends to be established when, “corruption has spread so widely and the police are so corrupt that offences of bribery are no longer investigated or prosecuted” (cited in MacMillan 2011, 600). Another reason why a universal or centralised agency is created is when a legitimacy crisis occurs and a political statement, both to the citizenry and the international investor community, has to be made to stabilise the country. In Hong Kong and Singapore, the ACAs were established in response to major corruption scandals. Their single agency approach is known for its large-scale investigations, particularly of high-profile cases (Meagher 2004, 72-73). It may further be noted that the single agency model is also noted for its zero tolerance approach such that each and every allegation of corruption,

<sup>3</sup> More information about the HK ICAC can be found at <http://www.icac.org.hk/en/home/index.html>

<sup>4</sup> More information about the CPIB can be found at [http://app.cpiib.gov.sg/cpiib\\_new/user/default.aspx?pgID=21&action=clear](http://app.cpiib.gov.sg/cpiib_new/user/default.aspx?pgID=21&action=clear)

<sup>5</sup> More information ICAC can be found at <http://www.icac.nsw.gov.au/>

<sup>6</sup> More information about the United States Office of Government Ethics can be found <http://www.oge.gov/>

regardless of size or scale is investigated. This type of agency also helps gathering information and centralising intelligence on corruption, which can reduce co-operation procedures.

While the HK ICAC has been effective in many ways, most other countries which have adopted the universal approach have faced much greater difficulties. Governments in Indonesia, Botswana, Uganda and Malaysia have created such types of agencies with mixed results. There are numerous and diverse reasons for this. Governments for instance have to be prepared with the high initial implementation costs that accompany a centralised agency approach (MacMillan 2011, 623). According to Heilbrunn, a centralised or universal type of anti-corruption body involves greater costs because the more functions that an anti-corruption agency seeks to fulfil, the more expensive the agency is to operate. As a consequence, “the universal model entails high costs that for many governments are simply prohibitive for already limited budgets” (Heilbrunn 2004, 14). However, from a different point of view, one might also argue that a single or centralised agency may actually save costs. In contrast to multi-agency models, single ACAs do not have duplicative functions, as this would be the case with numerous individual agencies having multiple human resources, finance and IT-departments.

Another argument is that centralised agencies are only effective in small jurisdictions. Centralised or single agency models “require jurisdiction over a slew of corruption related offences, including both public and private sectors” (USAID 2005, 72). In small jurisdictions such as in Hong Kong, it was relatively easy to group all corruption-related offences into one investigative body (USAID 2005, 72).

Meagher (2007, 97-98) also points out that the larger the country in question is, the more difficult it is for a single anti-corruption agency to play an effective role. He notes that the two most famous success stories – Hong Kong and Singapore – are both geographically compact city-states. Other countries with larger populations and a federal state system could cause a single agency to be overburdened with the widespread and decentralisation of corruption issues.

### 3.5.1.2 Multi-agency approach

In contrast to the single agency model, the multi-agency model avoids setting up a lead agency in combating corruption. This multi-agency approach creates several measures to address gaps, weaknesses, and new opportunities for corruption. In most cases, traditional state institutions are combined with one or more specialised anti-corruption units or agencies (Meagher 2005, 95).

Multi-level agency models take different forms of specialisations, and can be implemented as investigative, prosecution or preventive bodies. In South Africa, which will be discussed in further detail in section 4 below, the mandate to fight corruption is divided amongst the South African Police Services (SAPS), the National Prosecuting Authority (NPA), the Auditor-General (AGSA), the South African Revenue Services (SARS), the Public Service Commission (PSC) and several other entities.

In some countries specialised institutions are equipped with exclusively preventive competences, whose tasks are to “conduct scientific research on

corruption, develop and advise on corruption control policies for decision-making bodies, monitor the rules on conflicts of interest and declarations of assets, draft and implement codes of conduct, assist public servants on corruption matters, facilitate international cooperation in this field and act as intermediaries between civil society and state bodies with competences in the area” (Sousa 2009, 13). Examples of such models include: France’s SCPC, the State Commission for Prevention of Corruption in Macedonia, the Albanian Anti-corruption Monitoring Group, the Permanent Commission against Corruption in Malta, and the United States Office of Government Ethics.

As mentioned previously, the multi-level approach does not provide clear results in terms of its efficiency. One main advantage that has been identified in the literature is its capability to set up specialised bodies with expertise in specific areas such as in prosecution, investigation or prevention. For instance, specialised bodies can have special powers to supervise and direct the investigation function. Notwithstanding, a successful example which can be mentioned is the United States (US) Government of Ethics, whose role is entirely preventive. Its specialisation seems to work effectively in this case. While it specialises solely on prevention without having to deal with investigation and prosecutorial challenges, it allows investigative and prosecution agencies to focus on their respective functions. Through their specialisation, multi-level models may also establish particular security measures to protect the staff (UNDP 2005). In addition, the division of responsibilities and tasks in separate bodies also lowers the risk in agitating the balance and separation of governmental powers (Meagher 2005).

Nevertheless, the multi-level approach has had several shortcomings. Countries such as Nigeria, which has several separate bodies responsible for the investigation and prosecution of corruption, has faced problems with the multi-agency model. According to Heilbrunn (2004, 12-13), Nigeria, a federal state where its ACAs are linked to federal authorities, was confronted by political interests from legislature, government, or otherwise powerful people who abused their power to hinder the several agencies from investigations and prosecution. The problem faced in this case is twofold. On the one hand, large federated states often have conflicting elements at the federal and state levels. On the other hand, and particularly in the Nigerian case, the Nigerian anti-corruption experience has been confronted with powerful interests and patronage networks at different levels of government (Heilbrunn, 2004, 13).

Moreover, a number of specialised institutions can cause jurisdictional conflicts and rivalries amongst several competencies in fighting corruption. These additional institutions may even create another layer of ineffective bureaucracies or divert resources from existing institutions (OECD 2005).

### **3.6 Assessment and Performance of Anti-Corruption Agency Models**

Most of the literature is in agreement that, regardless the approach taken, systems are likely to fail if they are not adequately adapted to the local political, cultural, social, historical, economic, constitutional and legal background. It is noteworthy that the centralised multi-purpose agencies of Hong Kong, Singapore, and even Latvia and Lithuania, which are often cited as examples of good models – and sometimes acclaimed by international experts and the literature – function in a very specific context (OECD 2008).

Efforts to copy this model in bigger or federal states, or countries with endemic corruption and other important different characteristics have so far brought mixed results.

Assessing agencies only according to their types may also not provide the full picture. Often success and failures are not related to the type of agency but rather to external circumstances that have to be adequately measured. Doig (2005) points out that assessing the performance of ACAs fails due to a failure in measurement.

There are, nevertheless, a few common elements in both the single and multi-agency approaches to identify why ACAs fail or are successful. A crucial factor for many ACAs has been its funding. Often expectations are inconsistent with the available resources (financial, human, knowledge). As a result, a failure element becomes the fact that the ACAs are unable to meet the expectations (Meagher 2005).

Another reason which determines success or failure of an ACA relates to recruitment processes. If these ACAs are not able to adequately map their processes and conduct a needs assessment in order to conduct their activities, they will be unable to properly understand their human resource needs, leading to inadequate recruitment processes (Meagher 2005).

Some scholars such as Meagher (2005) list, for instance, several pre-conditions in regard to centralised agencies:

- Adequate public and political support,
- Adequate funding,
- Adequate data collection and enforcement by individual government agencies, and
- Properly functioning, honest, and cooperative judiciary and police.

The OECD stresses, no matter whether a single or multi-agency approach is pursued, “co-ordination, monitoring and research are three additional functions which are considered necessary for comprehensive national anti-corruption strategies and require institutionalisation through specialised bodies. Even where a single law enforcement specialised body has jurisdiction to investigate and prosecute corruption, institutionalised co-ordination with other state control bodies is needed, e.g., tax and customs, financial control, public administration” (OECD 2008).

The literature suggests various factors accounting for institutional failures and success of ACAs. Depending on the country-specific context a certain type of agency (single- versus multi-) may be more suitable, which requires a thorough analysis of its institutional design.

### 3.6.1 Independence debate

The concept of independence, even though anchored in the UNCAC in its articles 6 and 36, leaves room for interpretation. Even during the negotiations of the UNCAC it was not possible to reach an agreement on how to describe the meaning of independence more clearly. Different terms were discussed to make it clearer but no consensus on any such a word could be reached. There

were different suggestions regarding wording, such as “necessary”, “adequate”, and “operational” independence, but none of them convinced a majority (Hechler et al. 2009, 12).

As a result, different national and international actors have attempted to unravel the discussion around independence of anti-corruption institutions. Some of them will be reflected in the following subsections aimed at presenting a comprehensive overview of the debate around independence as it currently stands. Generally, it has to be kept in mind that independence cannot mean total autonomy – even a national ACA with investigative or prosecutorial powers working on politically sensitive cases has to be subject to a certain degree of checks and balances within the domestic political system to ensure that political support for the work of the ACA is maintained, and it does not lose its legitimacy.

In the context of the debate around independence of ACAs, one important contribution is made by the recent judgment of the South African Constitutional Court in the case of *Glenister v President of the Republic of South Africa and Others (Glenister Case)*.<sup>7</sup> The following subsections will start off with a study of how the Court interprets “independence”, and will then seek to look at the relevant international discourse and different sources referring to independence. This debate will be of particular importance when analysing the institutions that comprise RSA anti-corruption architecture, both individually (Section 4) and when comparing it with other models (sections 5 and 6).

### **3.6.2 The judgment of the South African Constitutional Court (Glenister Case)**

The *Glenister* case and the judgment of the South African Constitutional Court came about in the context of the abolition of the Directorate of Special Operations (DSO) and the inauguration of the Police’s Directorate for Priority Crime Investigation (DPCI). This judgment questioned the independence of the DPCI as an institution combating corruption.

It can be said that the judgment was controversial and the Constitutional Court had a split ruling. The slim majority ruling was in favour of the line of argument adopted by Justices Moseneke and Cameron. Nevertheless, it has to be noted that there was a broad area of agreement between the minority and majority opinions, and for this reason weakening the final outcome of the ruling from the Constitutional Court. The bottom line is that the majority came to the conclusion that “Chapter 6A of the South African Police Service Act 68 of 1995, as amended, is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the DPCI”.

Although there were broad areas of agreement between the minority and the majority opinion in the *Glenister* case, they differ in some crucial respects. The minority judgment, in contrast to the majority, comes to the conclusion that while the Constitution does oblige the state to fight corruption it “does not specifically impose an obligation [...] to establish an independent corruption-fighting unit.” Furthermore, the minority did not see “the structural and

<sup>7</sup> Case CCT 48/10 [2011] ZACC 6 (*Glenister Case*). The full text of the court decision is available at <http://www.saflii.org/za/cases/ZACC/2011/6.pdf>.

operational autonomy of the DPCI” to be endangered, as it “is secured through institutional and legal mechanisms that are adequately designed to prevent undue interference and safeguard the independence of the DPCI.” This second finding stands in sharp contrast to the findings of the majority.

Looking at both sides in more detail, the Chief Justice, in the minority opinion, stated that “this judgment recognises an obligation arising out of the Constitution for the government to establish effective mechanism for battling corruption”.

Turning to the question of where an anti-corruption unit should be located and how its independence could be guaranteed in the specific South African context, the minority opinion made it clear that this independence could be guaranteed if the unit was located within either the NPA or the SAPS. Locating the unit within existing structures did not, per se, endanger the independence of the unit. Yet, in the minority judgment, the Chief Justice also emphasised that in such cases there was an elevated risk of interference which had to be met through clear legal mechanisms, limiting any possibility of abuse (Glenister Case, para 120).

According to the minority opinion, it stated that the South African Constitution requires the ACA to be sufficiently independent to work shielded from undue political influence; complete or absolute independence, however, is not required (Glenister Case, para 121). What is required is that, “the structure and location of the unit accord with the fundamental principles embodied in the South African Constitution”. As a consequence, the Chief Justice further states that locating the ACA within the SAPS is constitutional and does not stand in opposition to the idea of independence, even though the police is overseen by the Cabinet.

In the majority opinion of the Court, on the other hand, Justices Moseneke and Cameron came to the conclusion that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives and the subordination of the Hawks’ power to investigate to the hands of members of the executive, via a Ministerial Committee, provided for in the legislation which controls its policy guidelines, are in fact harmful to the degree of independence required (Mabuza and Mkokeli, 2011). The Court came to this conclusion by arguing that it is through the Constitution itself that the state is obliged to create an anti-corruption entity that is sufficiently independent (Glenister Case, para 194). Thus, in this regard, they agree with the opinion of Chief Justice.

They further state that, “the scheme of [the South African] Constitution points to the cardinal need for an independent entity to combat corruption”. This independence however, according to the majority opinion, is curtailed by the fact that “the DPCI is insufficiently insulated from political influence in its structure and functioning”. As mentioned before, this becomes evident in “the absence of secure tenure protecting the employment of the members of the entity and in the provisions for direct political oversight of the entity’s functioning”. Therefore, the definition of the concept of independence of the majority opinion of the Court is broader than the one contained in the minority opinion. Notwithstanding, it is interesting to note that the arguments contained in both the majority and the minority opinions support their intrinsic logic, showing how difficult it is to establish one single definition of independence.

Taking into consideration the minority and majority opinions contained final judgement of the Glenister case as rendered by the South African Constitutional Court, the report will now focus on the international standards for these main arguments.

### 3.6.3 International perspectives

The OECD defines independence and its purpose as shielding the ACA “from undue political influence” with a strong emphasis on the importance of “structural and operational autonomy”, together with “a clear legal basis and mandate”. Yet, the OECD makes it clear that “independence should not amount to a lack of accountability” (OECD 2006, 6). De Sousa (2010, 13) makes the same point when stating that “independence does not mean free will or absence of reporting or external control” but merely autonomy to act without political interference.

Moreover, formal independence alone does not make a successful ACA: What is even more important is genuine political will and appropriate resources for the institution. As stated previously, these are factors that cannot be easily measured.<sup>8</sup> The appropriate resources and trained staff in most cases can only be guaranteed with the financial support of the government.

Political will itself is hard to assess accurately or objectively (Brinkerhoff 2010, 1). Nevertheless, it requires three basic conditions: (i) knowledge, (ii) appropriate policy tools, and (iii) willingness to apply the appropriate policy (Woocher 2001, 182). Furthermore, the disaggregation of political will into subcomponents allows for the identification of measurable components. Brinkerhoff (2010, 2), for this purpose, proposes the following seven components: (i) government initiative; (ii) choice of policy based on technically sound, balanced consideration and analysis of options, anticipated outcomes and cost/benefits; (iii) mobilisation of stakeholders; (iv) public commitment and allocation of resources; (v) application of credible sanctions; (vi) continuity of effort; and (vii) learning and adaptation.

It is the state that has the duty to, on the one hand, guarantee that the respective institutions can exercise their functions without undue interference by other actors and, on the other hand, ensure that the state itself does not interfere inappropriately with the operations of the institutions. The OECD calls this requirement “de-politicising” the ACA (OECD 2006, 17). According to the OECD, the risk of the independence is curtailed when law enforcement structures are placed within existing institutions – such as in South Africa’s case. Because of hierarchical structures, it is even more important to ensure clear independence within that institution if it so occurs. As an illustration of the argument that formal independence alone does not make a successful ACA, Meagher (2005, 95) uses the example of the Argentine ACA, which “has no structural safeguards or guarantees of independence.” Yet, it is working effectively and without interference, because of non-partisan staff, its visibility in the media and its solid reputation (Meagher 2005, 95). Meagher (2005, 18) and OECD (2006, 18) therefore summarise that examples like the

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<sup>8</sup> What is possible to measure however, is resourcing. Conclusions can be drawn from the percentage in relation to their GDP that states are willing to spend on an ACA. The higher that spending, the more one can assume that a state is taking the concept and promotion of an ACA seriously.

one of the Argentine ACA “suggest that accountability and formal independence – while desirable in their own right – are overrated in the literature on ACAs.” Although the present report will not go that far, the argument should still be taken into account when discussing the independence of ACAs.

One more point that is highlighted is the fact that the legal basis of the ACA “should be stipulated by law rather than by-laws and presidential decrees” (Meagher 2005, 18; OECD 2006, 18). This is an important element because only the manifestation of legitimacy in law gives an ACA enough weight and also legitimacy to be able to work truly independently, especially on controversial cases possibly involving high-ranking politicians. Presidential decrees and by-laws can be changed too easily.

Independence is also an important topic in the UNCAC, namely, in Article 6 of its Chapter II on preventive measures and in Article 36 dealing with enforcement, as has already been outlined in section 2 above. UNCAC thus requires bodies that are tasked with the prevention of corruption to be guaranteed the necessary independence and resources to be able to work efficiently.

It is important to look at each relevant institution tasked with the prevention of corruption separately, rather than attempting to understand the anti-corruption architecture of a country as whole and trying to analyse it as one homogeneous construct. An institution that is a political body will have to adhere to different criteria of independence than a body led by non-state actors or through a mixture of state and non-state actors, as a political body usually carries a different weight and therefore has to adhere to an even higher standard of democratic legitimacy. Moreover, an ACA will have to “transform policy into action and therefore they share with the political class the onus of success or failure” (De Sousa 2010, 13). As a result, it is important to look at the tasks the respective institutions perform and also the political and legal context in which they operate. U4 suggests a division into organisational, functional and financial independence.

Generally, it has to be kept in mind that when talking about independence, the idea is not to advocate for institutions that are unaccountable, that do not need to have periodic audits and that are generally without any supervision. Rather, a case is being made to ensure the appropriate checks and balances whilst ensuring that the respective institution can work without political interference or pressure. This is also very much in line with the argument of the South African Constitutional Court, described earlier.

In summary, it is crucial, to first define clearly the roles and mandates of the institutions involved. Once it is clear which institution plays what role in the fight against corruption, it can be discussed how anti-corruption efforts can best be streamlined and how the best results can be achieved.

## 4. South African Model

The RSA has adopted a multi-agency approach in its fight against corruption. As a result, a number of institutions, multi-agency fora and commissions have been assigned some responsibility in the South African framework for the prevention, combating and co-ordination of the fight against corruption. The present section will focus on the South African experience in preventing and combating corruption. It will focus on the agencies the RSA has set up over time in response to its anti-corruption needs, as well as their functions and responsibilities. The information contained in the present section will focus on the legal and regulatory framework of the RSA, focusing specially on the 19 institutions and co-ordination mechanisms currently in existence at the national level.

While the area of focus of each of these institutions and mechanisms is not the same, there is a need for a co-ordinated approach amongst them in the fight against corruption so as to ensure a holistic approach. This would also enhance service delivery from the public sector, make the most efficient use of government resources and avoid overlapping of functions and responsibilities. As such, these 19 institutions and co-ordinating mechanisms have been identified and classified in three main subsections: (i) constitutional institutions responsible for strengthening the constitutional democracy of the RSA; (ii) institutions responsible for the administration of justice in the RSA; and (iii) remaining mechanisms for the combating of corruption in the RSA.

Moreover, each of these institutions shall be reviewed in the present chapter taking into consideration the elements below, in order to assess:

- i. The reasons which led to the creation of the institution or mechanism;
- ii. The purpose of the institution or mechanism, with a focus on their role in the anti-corruption architecture of the RSA;
- iii. The functions and institutional framework of the institution, as well as its mandate and statutory (where applicable) and regulatory framework;
- iv. Co-ordination mechanisms between these institutions so to ensure the effectiveness of the process and avoid duplication and overlapping, as well as to identify potential gaps in the anti-corruption architecture of the RSA.
- v. Whether these have been set up as statutory or advisory bodies, whether they perform a preventive or enforcement function, and whether they retain an operational or a co-ordination role.

Additionally, the present section will also review the legislation pertaining to the DSO of the NPA, although it is no longer in existence. The reason for including the DSO in the present report is due to the fact that the present section seeks to overview both a current and historical overview of the anti-corruption efforts of South Africa in order to better understand the parameters and to present consistent recommendations at the end of the study.

## 4.1 Constitutional Institutions

Several institutions responsible for the fight against corruption in the RSA and that are part of the current study have a constitutional status. However, for the purposes of the present report, only three of these have been placed in the current subsection. This is because two such institutions – the AGSA and the Public Protector (PP) – are institutions responsible for strengthening the constitutional democracy of the RSA, and are also known as Chapter 9 institutions. They share the common element that they are to be independent and are subject only to the Constitution and the rule of law, and must exercise their functions without fear, favour and prejudice (Section 181(2) Constitution).

The third institution – the Public Service Commission (PSC) – is to be found in Chapter 10 of the Constitution, which refers to the public administration in the RSA. The PSC is responsible for upholding the constitutional principles of the public administration, and for this reason plays a pivotal role in the fight against corruption in the country, and thus is kept in the current subsection of the report.

Other constitutional bodies, e.g., the NPA, the Independent Police Investigative Directorate (IPID) and the SAPS, will be dealt with in the subsection of this report devoted to the administration of justice in the RSA.

### 4.1.1 Auditor-General (AGSA)

The AGSA is a constitutional and statutory body responsible for auditing and reporting on the accounts, financial statements and financial management of all national and provincial state departments, as well as administrations and all municipalities (Section 188 Constitution). The AGSA is also responsible for auditing any other institution or accounting entity provided for in national or provincial legislation.

The AGSA is, in accordance with both the Constitution and the Public Audit Act (PAA), separate from government and has its own decision-making process, as well as the means to generate revenue. The President of the RSA appoints the AGSA upon recommendation by the National Assembly (Section 6(1) PAA). The AGSA must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice (Section 181(2) Constitution and Section 3(b) PAA).<sup>9</sup> It is accountable only to the National Assembly, having the constitutional requirement of reporting its activities and the performance of its functions to the Assembly at least once a year (Section 181 (5) Constitution and Section 3(d) PAA).

The AGSA is, as a consequence of its constitutional powers, the external auditor of all national and provincial state departments and municipalities of South Africa, and must audit and report on their accounts, financial statements and financial management (Section 4(1) PAA). It must further audit and report on the consolidated financial statements of the national and provincial

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<sup>9</sup> It should be noted that, while the Auditor-General is independent, it is also accountable to the National Assembly, which is responsible for maintaining oversight of the Auditor General (Section 10(3) PAA and Section 55(2)(b)(ii) Constitution).

governments, among others (Section 4(2) PAA and Section 122 MFMA). The AGSA also has the discretion to, in accordance to Section 4(3) of the PAA, audit and report on the accounts, financial statements and financial management of any public entity listed in the Public Finances Management Act 1999 (PFMA), and any other institution funded by the National Revenue Fund of South Africa, a Provincial Revenue Fund or by a Municipality.

As the Supreme Auditing Institution (SAI)<sup>10</sup> of the RSA (Section 3(a) PAA), the AGSA oversees the management of public finances, and must promote public sector transparency and accountability (Answer 2008, 1). Its activities, for this reason, focus more on the prevention of corruption, as it is responsible for scrutinising public financial management, and as such is not expressly charged with detecting or investigating corruption (U4 2008, 2). In that regard, it should be highlighted that The AGSA must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. Furthermore, all reports must be made public (Section 188(3) Constitution).

The importance of SAIs in combating corruption is normally placed in the context of the national integrity system of a country (U4 2008, 2) as it is one of the pillars which ensures the strength of the integrity system of a country. Thus, the several strategies to address economic crime and corruption by the AGSA are premised on the following understanding (Commission 2001, 16):

- The AGSA, as the external auditor of state institutions, is not responsible for the prevention and detection of economic crime and corruption in the public sector, since this is the ultimate responsibility of the accounting officers;
- The AGSA acknowledges the roles played by other institutions in the prevention, detection and investigation of economic crime. Where possible, these institutions are supported by, inter alia, the provision of assistance and co-operation.
- The AGSA plays an active role in supporting existing initiatives and programmes that aim to prevent corruption, such as the National Anti-Corruption Forum (NACF).

The AGSA's Office deals with all government departments. In terms of interaction around corruption-related issues, there is informal co-operation with a number of key agencies including the PSC, the PP, the SAPS and the National Directorate of Public Prosecutions (NDPP). Cases of alleged corruption are referred to the appropriate agency based on the nature of the complaint or of the finding.

The AGSA conducts several different types of audits (Commission 2001, 12-13; van Vuuren 2005, 45), as prescribed in Chapter 3 of the PAA:

<sup>10</sup> As the SAI, the Auditor-General must have four main objectives, taking into account the 1977 INTOSAI Lima Declaration. As such, it must ensure:

- The proper and effective use of public funds;
- The development of sound financial management;
- The proper execution of administrative activities; and
- The communication of information to public authorities and the general public through the publication of objective reports.

- i. **Regularity auditing** – checking that the financial statements are a fair representation of the financial position of the audited body;
- ii. **Performance Auditing** – checking that resources are purchased economically, used properly and that effective management systems and controls are in place;
- iii. **Computer Auditing** – Identifying the strengths and areas of potential misuse of computer systems for data entry and financial transactions;
- iv. **Environmental Auditing** – supporting food environmental protection and management practices through an audit approach to sustainable resource development;
- v. **Forensic Auditing** – to facilitate the prevention, detection and investigation of economic crime.
- vi. **Budget auditing** – the decrease in amount not utilised in comparison with the previous year indicates that it is possible that better planning and budgetary controls are in place.

Regarding the forensic auditing capacity of the AGSA, it was established in 1997 based on the increasing level and negative impact of economic crime and corruption on the public accountability process (Commission 2001, 13). The forensic auditing conducted by the AGSA seeks to support the relevant investigating authorities and the NPA, as the cases are handed over to these institutions, by providing their accounting and auditing skills. It is unclear, however, if the AGSA continues to support these institutions during the investigations and resulting prosecutions, and if there is a follow-up and feedback mechanisms to ensure the effectiveness of the system.

Regarding the effectiveness of the auditing reports provided by the AGSA, however, Van Vuuren (2005, 46) points to the fact that they are partly superficial. Van Vuuren (2005, 46-47) points to two elements in this matter:

- i. The materials provided to the AGSA for auditing purposes are insufficient to conduct a thorough auditing process, which undermines the reports produced by the AGSA, the accountability processes of the audited institutions, and the principle under which these institutions operate and get their funding from the National and Municipal Revenue funds; and
- ii. The human and financial resources available to the AGSA. The AGSA makes use of private forensic auditors, claiming that 70-80% of such auditing is outsourced by the AGSA. Consequently the role of these private auditors and the AGSA is hindered by either constraints in the exact mandate given to the private auditors or the amount of financial resources available to hire them.

Notwithstanding, having auditing capacities, including forensic auditing, is a fundamental aspect in the prevention and the fight against corruption as the ultimate goal of corruption is to enable the corrupt public official or the person offering the bribe to benefit from an undue advantage. It is unclear, however, to what extent the AGSA is in fact able to assist in such cases. The AGSA is constitutionally responsible for conferring the correct and appropriate use of public funds, as prescribed by the PFMA and the MFMA. It may, however, further conduct audits within its functions and submit these reports to the

relevant legislative body and to any other institution with a direct interest on the matter (e.g., the NPA or the SAPS), as prescribed in Sections 5(3) and Section 29 PAA. Thus, while it can directly undertake an auditing of public accounts, financial statements and financial management, it may not be able to do so in the face of a corruption offence if no financial mismanagement of public monies has taken place.

While the AGSA presents several institutional strengths pertaining to its independence and important role in the prevention of corruption, reports seem to indicate that a lack of human resources (partially dealt with through outsourcing to alleviate the pressures) and financial resources have hindered it from fully exploring its legal mandate. Moreover, the apparent low understanding of the auditing process within government, indicated by insufficient materials given to the AGSA, as well as the reactive approach to combating corruption (as seen on the 2010 Minimum Anti-Corruption Capacity Requirements (MACC) audit, further discussed in section 4.3.1 below), further hinders the effectiveness of the work undertaken by the AGSA.

#### 4.1.2 Public Protector (PP)

The PP has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government,<sup>11</sup> that is alleged or suspected to be improper or to result in any impropriety or prejudice (Section 182(1)(a) Constitution). It does not, however, have the power to investigate court decisions (Section 182(3) Constitution). The mandate of the PP is to investigate and make recommendations to state departments on any conduct which may have resulted in prejudice to citizens (Commission 2001, 18), and must be accessible to all persons and communities (van Vuuren 2005, 68).

Thus, the PP is competent to investigate, on its own initiative or on the receipt of a complaint, any alleged activity set out below (section 6(4) PP Act):

- i. Maladministration in connection with the affairs of government at any level;
- ii. Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
- iii. Improper dishonest act, or omission or corruption, with respect to public money;
- iv. Improper or unlawful enrichment, or receipt or any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
- v. Act or omission by a person in the employ of government at any level, or person performing a public function, which results in unlawful or improper prejudice to any other person.

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<sup>11</sup> The PP Act broadens the jurisdiction of the Public Protector to include any institution on which the state is the majority or controlling shareholder or any public entity as defined in the PFMA (e.g., utilities companies).

The PP is further responsible for investigating violations of the Executive Members' Ethics Act, the Executive Ethics Code and the Prevention and Combating of Corrupt Activities Act (PCCA), amongst others.

The PP is neither an advocate for the complainant nor for the public authority concerned: the PP ascertains the facts of the case and reaches an impartial and independent conclusion on the merits of the complaint (Commission 2001, 20). The PP is, for this reason, similar to the figure of an ombudsman. Moreover, the powers of investigation of the PP are limited to complaints brought to the attention of the office no more than two years after the date of the occurrence of the fact which gave rise to the complaint – unless exceptional circumstances are given – and cases where the complainants previously followed the prescribed grievance procedure of the offending institution, as contained in the PP Act (Section 6(3)(a)).

Additional regulation pertaining to the PP can be found in the PP Act (as amended by the Public Protector Amendment Act 1998). This legislation broadens the constitutional jurisdiction of the PP to include any institution in which the state is the majority or controlling shareholder or any public entity as defined in the PFMA (e.g., utilities companies and postal services.)

The findings by the PP are to be made public (Section 8(1) PP Act), and submitted to the National Assembly (Section 8(2) PP Act) as well as to the complainant and any other person implicated (Section 8(3) PP Act). Following such an investigation, the PP has to report on the conduct concerned, and can take appropriate remedial action. For example, recommendations can be made on how the situation in question should be rectified and how recurrence should be prevented (section 6(4)(c)(ii) PP Act).

It should be noted that the PP is responsible for conducting investigations into, among others, the maladministration in government affairs. While the expression 'maladministration'<sup>12</sup> certainly encompasses the definition of corruption – although the former is much broader in scope than the latter – the PP is limited to conducting its investigations within the jurisdictional limitations set by the two-year time-limit and the requirement that obliges other remedial mechanisms to have been taken prior to a complaint being lodged with the PP. While these restrictions are important in ensuring the proper use of appropriate mechanisms, they may serve to undermine effectiveness of the Public Protector because the process is made more difficult and accessibility restricted.

One drawback to the authority of the PP is the fact that it lacks remedial powers, and is therefore unable to enforce the conclusions reached during an investigation, limiting the power of the PP. Rather, the PP is limited to issuing recommendations and sharing its findings with the appropriate authorities which are then responsible for taking the appropriate remedial action. The PP Act is not clear if there is any follow-up mechanism in respect of the affected entities, or monitoring process to which they must be subjected by the PP. Nevertheless, it can be noted from the reports<sup>13</sup> issued by the PP that it does

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<sup>12</sup> It should be noted that there is no legal definition for the term 'maladministration', and as such is to be interpreted broadly to encompass not only corruption, but also other forms of wrongdoing.

<sup>13</sup> Reports are available at:

[http://www.pprotect.org/library/investigation\\_report/investigation\\_report.asp](http://www.pprotect.org/library/investigation_report/investigation_report.asp)

create a monitoring process although no information on the effectiveness of this monitoring process is provided.

### 4.1.3 Public Service Commission (PSC)

The PSC is an oversight body tasked to investigate, monitor and evaluate the organisation and administration of the public services. It plays a key role in the promotion of good governance in the public service (Ramsingh and Dobie 2006, 3), and is responsible for monitoring and evaluating the effectiveness of anti-corruption agencies and suggesting improvements where necessary (Commission 2001, 7). The PSC is responsible for monitoring and evaluating the public sector, and ensuring that the Department of Public Service and Communication (DPSA) implements the constitutional principles for the public service (van Vuuren 2005, 52).

The powers of the PSC do not derive from Chapter 9 of the Constitution of the RSA. Rather, they derive from Chapter 10, which provides that the PSC is independent – no person or organ of the state may interfere with the functioning of the Commission (Section 196(3) in fine Constitution) – and accountable only to the National Assembly (Section 196(5) Constitution). The PSC must exercise its powers without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service (Section 196(2) Constitution).

Furthermore, the PSC is constitutionally mandated to promote the values and principles set out in Section 195 Constitution, which include, among others, a high standard of professional ethics, an efficient, economic and effective use of resources, and the fostering of transparency.

The PSC is comprised of 14 Commissioners (Section 196 (7) Constitution). Five Commissioners are appointed by the National Assembly (Section 196(7)(a) Constitution) and one Commissioner for each South African province (totalling another nine Commissioners), nominated by the Premier of the province (Section 196(7)(b) Constitution), in accordance with the rules contained in Section 196(8)(a) Constitution). Its functions include conducting inspections in departments and other organisational components in the public service (Section 9 PSC Act), and conducting inquiries (Section 10 PSC Act).

The PSC is structured into six performance areas, three of which are relevant to the fight against corruption (van Vuuren 2005, 53):

- i. The Leadership and Management Practices area, responsible for labour relations improvement and leadership reviews;
- ii. The Monitoring and Evaluation area, responsible for governance monitoring and service delivery assessments;
- iii. The Integrity and Anti-corruption area, responsible for promoting professional ethics and investigating the practices of the public administration in the RSA.

The PSC is responsible for managing conflict of interest within the government. Under the RSA, conflict of interest is understood as “any financial or other private interest or undertaking that could directly or

indirectly compromise the performance of a public servant's duties, or the reputation of a public servant's department in its relationship with its stakeholders" (Schedule 1 of Regulation 865 of 2009).

Moreover, the PSC is also responsible for setting the guidelines for the grievance policies of the departments. It should be noted that each department is to create its own grievance policy based on the rules set out by the PSC. It is not clear, however, if the PSC manages all of the grievance policies created by the relevant institutions, or whether it co-ordinates with the Public Protector in order to ascertain transparency and efficiency in the procedures, so as not to hinder the grievance procedures or access to the Public Protector. It should be underscored that no mention is made of Public Protector in the guidelines issued by the PSC, which could be indicative of a lack of co-ordination in this matter.

Finally, attention is given to the fact that the PSC is the Secretariat for the NACF. This will be subject to further analysis and review in section 4.3.11 below.

## **4.2 Institutions Responsible for the Administration of Justice**

The main body responsible for law enforcement in the RSA is the SAPS, while the main body for ensuring the administration of justice by way of prosecutions is the NPA. These institutions are responsible primarily for the enforcement of anti-corruption strategies in the country.

The present subsection of the study will focus on these institutions and their statutory mandate – which also have a constitutional basis. It will also focus on their specific units which deal with combating corruption, e.g., the Asset Forfeiture Unit (AFU) and the DPCI. Furthermore, the functions performed by the DSO (which was housed in the NPA) will also be reviewed in the present study. This is due to the fact that its powers were largely transferred to the DPCI (housed under the SAPS). An analysis of the DSO is also pertinent as its abolishment, as well as the creation of the DPCI, has led to the constitutional challenge on the independence of the latter in the South African effort to prevent and combat corruption (Glenister Case).

### **4.2.1 National Prosecuting Authority (NPA)**

Section 179 of the Constitution establishes the NPA as a single national prosecution authority (Section 179(1) Constitution and Section 2 NPA Act), consisting of:

- A National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority and is appointed by the President (Section 179(1)(a) Constitution and Section 2(a) NPA Act);
- Directors of Public Prosecutions (DPP) and prosecutors (Section 2(b) NPA Act).

The NPA is the only institution with the power to institute criminal proceedings on behalf of the state (Section 179(1) Constitution and Section 20(1)(a) NPA Act), and must carry out any necessary functions incidental to instituting criminal proceedings (Section 179(2) Constitution and Section

20(1)(b) NPA Act). The NPA also has the power to discontinue criminal proceedings (Section 20(1)(c) NPA Act). Its functions must be exercised without fear, favour or prejudice (Section 179(4) Constitution). Final responsibility over the NPA rests with the Minister of Justice (Section 179(6) Constitution).

The NDPP is responsible for the prosecution policy, after consultation with the DPPs and with the concurrence of the Minister of Justice (Section 179(5)(a) Constitution and Sections 21(1) and 22(2)(a) NPA Act).<sup>14</sup> This means that, while the NDPP has the power to ignore the input of the DPPs if he or she disagrees with them, any policy is still subject to the approval by the Minister of Justice, who has the power to veto policy proposals (Commission 2001, 54). The Minister of Justice holds final responsibility over the prosecuting authority (Section 33(1) NPA Act). Thus, the NDPP is required to, at the request of the Minister of Justice, furnish information with regards to any case, matter or subject (Section 33(2)(a) NPA Act) or to provide the Minister with reasons for any decision taken by the NDPP in the exercise of his or her powers (Section 33(2)(b) NPA Act).

The NDPP further has the constitutional powers of (i) intervening in the prosecution process in the event that the prosecution policy directives are not observed in the such process (Section 179(5)(c) Constitution and Section 22(2)(b) NPA Act) and (ii) reviewing a decision to prosecute or not to prosecute, after consultation with the DPPs (Section 179(5)(d) Constitution and Section 22(2)(c) NPA Act). Moreover, the NDPP has the power to delegate the authority to prosecute to either private individuals and/or other public entities. Thus, all investigations of corruption cases, whether investigated by the SAPS or any other agency, have to be referred to the prosecuting authority for criminal prosecution.

Moreover, The DPPs are required to exercise the powers mentioned below, and subject to the control and directions of the NDPP (Sections 20(1) and (2) NPA Act 1998) when:

- i. Instituting and conducting criminal proceedings on behalf of the State;
- ii. Carrying out any necessary functions incidental to instituting and conducting such criminal proceedings;
- iii. Discontinuing criminal proceedings.

Section 7(1A) NPA Act, as amended by the NPA Amendment Act 2008, allows for the President of the RSA, through a proclamation, to establish one or more Investigating Directorates, in respect of such offences or criminal or unlawful activities as set out by the proclamation. Moreover, this Proclamation shall be issued on the recommendation of the Minister of Justice, the Minister of Police and the NDPP (Section 7(2)(a) NPA Act, as amended by the NPA Amendment Act 2008) and submitted to the National Assembly before publication (Section 7(2)(e) NPA Act, as amended by the NPA Amendment Act 2008).

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<sup>14</sup> This prosecution policy as well as its directive (Section 179(5)(b) Constitution) are to be observed in the prosecution process, and are subject to Parliamentary oversight (Section 35(1) NPA Act).

#### 4.2.1.1 Asset Forfeiture Unit (AFU)

The AFU was established in 1999 within the Office of the NDPP, with a view to focussing on the implementation of chapters 5 (Proceeds of unlawful activities) and 6 (civil recovery of property) of the Prevention of Organised Crime Act (POCA). The AFU seeks to ensure the most efficient use of the POCA and that the seizure of proceeds of unlawful activities are used to maximum effect.

Chapters 5 and 6 POCA deals with the process of non-conviction based and conviction-based forfeiture (Section 13(1) POCA), from seizure to confiscation. As both chapters involve civil, and not criminal, proceedings, the applicable rules are the rules of civil procedure (Section 13(2) POCA). While the AFU does not have investigative and arresting<sup>15</sup> powers (Montesh 2007, 52), it provides financial investigative capacity to the relevant stakeholders in the criminal justice system.

While there is apparently an overlap of functions between the AFU and the Special Investigating Unit (SIU) – which will be reviewed in more detail in section 4.3.3 below, reports over the course of the existence of both institutions seem to indicate that there is a close co-operation and co-ordination between them (Commission 2001, 66).

Nevertheless, it should be emphasised that the AFU focuses on the confiscation of proceeds and instrumentalities of offences relating to racketeering and money laundering (and its predicate offences), while the SIU investigates and initiates civil proceedings in respect of any offence determined by Presidential Proclamation. Notwithstanding, attention should be given to the fact that both institutions may end up investigating the same matter but focusing on different legal mechanisms in order to achieve the goal of seizing and confiscating assets originating from criminal offences. The importance of co-operation and co-ordination, as mentioned above, is paramount.

#### 4.2.1.2 Directorate of Special Operations (DSO)

DSO was set up through the NPA Amendment Act 2000. It was based on the premise that the Constitution of the RSA did not provide that the prevention, combating and investigation of top priority crime (specifically defined later in the enabling legislation as offences or criminal or unlawful activities committed in an organised fashion, or offences determined by Presidential Proclamation) was the exclusive function of any single institution in the RSA.

The DSO adopted the troika principle, in which intelligence gathering, investigations and prosecutions to fight national priority crimes (Commission 2001, 58) were housed together, emphasising the importance of harnessing the skills of prosecutors, analysts and investigators along with key support personnel to deal with such crime. The DPCI ultimately replaced the DSO, and will be reviewed in more detail in Subsection 4.2.3 below.

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<sup>15</sup> According to Montesh (2007, 224), the POCA does not give powers of arrest, detain and use of firearms to the AFU, and no other legal provision gives such powers to the AFU.

The DSO was an Investigating Directorate established under Section 7(1)(a) of the NPA Act (as amended by the NPA Amendment Act 2000), with the responsibility to:

- i. Investigate, and to carry out any functions incidental to investigations;
- ii. Gather, keep and analyse information;
- iii. Where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings relating to:
  - a. Offences or any criminal or unlawful activities committed in an organised fashion (Section 7(1)(a)(i)(aa) NPA Act, as amended by the NPA Amendment Act 2000);
  - b. Such other offences or categories of offences as determined by the President by proclamation in the Gazette (Section 7(1)(a)(i)(bb) NPA Act, as amended by the NPA Amendment Act 2000)

The term ‘organised fashion’ was further defined as including the planned, on-going, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics (Section 7(1)(b) NPA Act, as amended by the NPA Amendment Act 2000). It should be underscored that the DSO did not have a specific mandate to investigate and prosecute corruption but crime committed in an ‘organised fashion’. As previously mentioned in this study, corruption seldom occurs in isolation and splitting investigations and prosecutions based on the same set of facts due to jurisdictional considerations would result in a duplication of efforts and a reduction in the overall efficiency of the investigative and prosecutorial processes.

The establishment of the DSO stemmed from the need to curb organised crime which was perceived as a threat to the political and economic integrity of the RSA (Presidency 2006, 6). The founding of the DSO in terms of the NPA Amendment Act 2000 and the POCA sought to confer limited investigative capacity on the DSO in relation to priority crimes, address the issue relating to the role and functioning of the DSO, provide mechanisms for co-ordination and cooperation of the activities of the DSO and other relevant government institutions and further provide the requisite infrastructure and resources to enable it to effectively tackle organised crime (Presidency 2006, 6).

Moreover, the DSO merged the then operational Investigating Directorates of Organised Crime, Serious Economic Offences and Corruption. This was due to the fact that the NPA Act originally foresaw the possibility of having a maximum of three Investigating Directorates under the NPA. This was consequently reflected in the amending legislation, to include the DSO as one Investigating Directorate, and two other Investigating Directorates (Section 7(1A) NPA Act, as amended by the NPA Amendment Act 2000) for criminal offences which were not contained in Sections 7(1)(a)(i)(aa) and (bb) NPA Act, as amended by the NPA Amendment Act 2000.

The DSO also had the powers to appoint, through the NDPP, special investigators (Section 19A NPA Act, as amended by the NPA Amendment Act

2000), who had the powers provided for in the Criminal Procedure Act. While a potential conflict with the powers of investigation allocated to the SAPS could potentially arise, Section 26(2) NPA Act, as amended by the NPA Amendment Act 2000, provided that powers given to the DSO would not derogate from the powers conferred on the SAPS in respect of the investigation of any criminal offences.

Furthermore, seeking to co-ordinate the functions of the DSO, Section 31 of the NPA Act, as amended by the NPA Amendment Act 2000 created a Ministerial Co-ordinating Committee, with the responsibility to determine, amongst others, the co-ordination of activities of the DSO with other relevant government institutions. This Ministerial Co-ordinating Committee was comprised of the Departments for Justice and Constitutional Development, Defence, Intelligence Services, and Safety and Security (currently the Department of Police), as well as any other cabinet member designated from time to time by the President of the RSA (Section 31(2) NPA Act, as amended by the NPA Amendment Act 2000). In that regard, however, the Khampepe Report (Presidency 2006, 10 and 45-46) provided that it did not receive any evidence that this Ministerial Co-ordinating Committee met between 2001 and May 2004, suggesting that this may have resulted in a lack of co-ordination between the agencies responsible for the fight against corruption and serious crime in the RSA.

Whilst other concerns exist within the criminal justice system and the intelligence community of the RSA in respect of the establishment of the DSO, these will not be covered in the present report as they do not pertain directly to its subject matter. Notwithstanding, the decision to dissolve the DSO and to replace it with the DPCI stemmed from the 52<sup>nd</sup> national conference of the African National Congress (ANC), which adopted a resolution<sup>16</sup> calling for a single police service and the dissolution of the DSO (Glenister Case, para 8). This was followed by the proposal of the Minister for Police, speaking in the National Assembly, to dissolve the DSO and create a new unit under the SAPS to strengthen the capacity of the RSA to fight organised crime (Glenister Case, para 9). Regardless of the motivations of the ANC and the government of the RSA to dissolve the DSO, it should be noted that the decision was taken without setting up a cohesive policy framework for the anti-corruption architecture of the RSA. As a result, the decision further fragmented the anti-corruption architecture of the RSA, reducing its overall effectiveness and resulting in constitutional challenges pertaining to the independence of institutions comprising the said anti-corruption architecture.

#### 4.2.2 South Africa Police Service (SAPS)

Section 199(1) of the Constitution establishes that the RSA is to have a single police service, the SAPS, which is to be structured in the national, provincial and local spheres of government (Section 205(1) Constitution). The Constitution further establishes in Section 205(3) that the objects of the SAPS are to prevent, combat and investigate crime, amongst others. The Department of Police (formerly the Department of Safety and Security) is responsible for the SAPS, in accordance with section 205(3) of the Constitution.

<sup>16</sup> The so-called Polokwane Resolution, adopted in December 2007, available at <http://www.anc.org.za/show.php?id=2536>.

Policy for the SAPS is developed by the Department of Police, which is ultimately accountable for the SAPS. The President appoints the National Commissioner of the SAPS. The SA Police Service Act 68 of 1995 (amended by the SAPS Amendment Act 2008) governs the way in which the SAPS operates. In terms of this Act, the SAPS investigates crimes including corruption and bribery.

The present subsection will focus on the DPCI, successor to the DSO (reviewed in section 4.2.1.2 above) and responsible for investigating priority crime, including corruption, as well as the IPID, responsible for investigating, amongst others, corruption within the police.

#### **4.2.2.1 Directorate for Priority Crime Investigation (DPCI)**

The SAPS Amendment Act sought to amend the SAPS Act in order to, amongst others, enhance the capacity of the SAPS to prevent, combat and investigate national priority offences and other offences, by establishing the DPCI. The SAPS Amendment Act 2008 further sought to provide for the transfer of powers, investigations, assets, budget and liabilities of the DSO to the SAPS. The SAPS amendment Act requires the DPCI to implement and ensure a multi-disciplinary and integrated approach in the prevention, combating and investigation of national priority offences and other offences, through the co-operation of all relevant government departments and institutions (Section 17B(b)(i) SAPS Act). As noted earlier and for the same reasons, the DPCI too does not have the sole mandate to combat corruption, but rather ‘national priority offences’.

The DPCI is therefore a statutory body responsible for the prevention, combating and investigation of national priority offences,<sup>17</sup> in particular serious organised crime, serious commercial crime and serious corruption (Section 17B(a) SAPS Act). The DPCI is required to implement a multi-disciplinary approach and an integrated methodology involving the co-operation of all relevant stakeholders (Section 17F(1) SAPS Act), and ensure it has the necessary independence to perform its functions (Section 17B(b)(ii) SAPS Act). It is also to have Parliamentary oversight in respect of its activities

Furthermore, a Ministerial Committee has been set up to (i) determine police guidelines in respect to the functioning of the DPCI; (ii) policy guidelines for the selection of national priority offences; (iii) policy guidelines for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the DPCI; and (iv) procedures to co-ordinate the activities of the Directorate and other relevant Government departments or institutions (Section 17I(2) SAPS Act). The Ministerial Committee, comprised of the Departments of Police, Finance, Intelligence, Justice and Home Affairs (Section 17I(1) SAPS Act) shall be responsible for overseeing the functioning of the DPCI (Section 17I(3)(a) SAPS Act).

The succession of the DSO by the DPCI was subject to review by the Constitutional Court (Glenister case). While the court was split in the ruling, it ultimately determined that the DPCI, while enjoying the oversight of the National Assembly and also the Ministerial Committee, did not have full

<sup>17</sup> The so-called Polokwane Resolution, adopted in December 2007, available at <http://www.anc.org.za/show.php?id=2536>.

independence, as there was “a plain risk of executive and political influence on investigations and on the entity’s functioning”, and creating “the possibility of hands-on management, hands-on supervision, and hands-on interference”. As a result, a new bill (2012 SAPS bill) has been tabled in Parliament in 2012 (but not yet passed), seeking to ensure that the DPCI (i) has operational and structural independence; (ii) provides security of tenure and remuneration to its employees, and (iii) is given accountability and oversight by the Ministerial Committee.

As such, the mandate of the National Head of the DPCI, contained in Chapter 6A SAPS Act are, in accordance to the 2012 SAPS bill, now carried out to the exclusion of any other provision of the SAPS Act (Section 17AA 2012 SAPS bill). This does not mean, however, that other exceptions are or can be provided for in other enabling legislation.

The issue pertaining to the appointment and remunerations of officers working within the DPCI are now explained more thoroughly in Section 17CA of the 2012 SAPS draft bill. The National Head of the DPCI, however, is still appointed by the Minister of Police, with the concurrence of the Cabinet and approval by Parliament, for a non-renewable fixed term of not less than seven years and not more than 10 years. A similar procedure, through which the Minister of Police, in consultation with the National Head of the DPCI and concurrence of the Cabinet, shall appoint the Deputy Head and Provincial Heads of the DPCI. It should be noted here that the Minister of Police does so in consultation with the National Head of the DPCI, but is ultimately not bound by the opinion given by the National Head of the DPCI.

With regards to the definition of national priority offences, the 2012 SAPS bill proposes changing it in the sense that the definition is still the responsibility of the National Head of the DPCI, but subject to policy guidelines determined by the Minister of Police (and no longer the Ministerial Committee) and approved by Parliament. It is not clear if this definition given by the National Head of the DPCI will have to be changed with regards to new policy guidelines set out by the Minister of Police, or rather it will be one as determined by pre-existing policy guidelines. In any event, and in order to avoid any real or supposed political interference, guidelines between the National Head of the DPCI and the Minister of Policy, with objective criteria, should be agreed upon in order to ensure that the provisions of the proposed amendments of Section 17D 2012 SAPS bill are not misused.

Section 17DA 2012 SAPS bill provides for the conditions for removal from office of the National Head of the DPCI. It states that the National Head may only be removed from office if one of the conditions of Section 17DA(2)(a) 2012 SAPS bill are found. However, the National Head of the DPCI may be suspended from his or her functions by the Minister of Police, pending inquiry and final determination of such inquiry (Section 17DA(2)(a) 2012 SAPS bill). This provision may reduce the overall independence and autonomy of the DPCI, due to the fact that the National Head may be suspended pending a final decision, to which the Deputy National Head of the DPCI would assume the functions. However, the Deputy National Head is appointed by the Minister of Police. Thus, attention should be given to this provision to ensure that the appropriate checks and balances are provided for to avoid any form of bypassing the powers conferred to the National Head of the DPCI.

### 4.2.3 Independent Police Investigative Directorate (IPID)

The IPID Act established in 2012 the IPID, which is the enabling legislation for Section 206(6) of the Constitution. It is the successor of the Independent Complaints Directorate (ICD),<sup>18</sup> established under Chapter 10 of the SAPS Act (Section 50 SAPS Act) and which was repealed by the IPID Act. The IPID is a statutory and independent oversight body of the SAPS and the Municipal Police Services (MPS), in accordance with Section 4(1) of the IPID Act, and is financed directly from money that is appropriated by Parliament (Section 3(3) IPID Act).

The IPID is to provide for independent and impartial investigation of certain criminal offences (defined in Section 28 IPID Act), allegedly committed by members of the SAPS and MPS. The IPID must further make disciplinary recommendations – and referrals, as the case may be – in respect of members of the SAPS and the MPS, based on its investigations (Section 2(d) and (e) IPID Act). The IPID further seeks to enhance accountability and transparency by the SAPS and the MPS (Section 2(g) IPID Act).

The IPID is headed by its Executive Director (Section 5 IPID Act), who is appointed by the Minister of Police (Section 6(1) IPID Act). This appointment must be confirmed or rejected by the relevant Parliamentary Committee (Section 6(2) IPID Act). The appointment of the Executive Director is for a term of five years, renewable for one additional term (Section 6(3)(b) IPID Act).

The Executive Director of the IPID is responsible for, amongst others, referring criminal offences revealed as a result of an investigation, to the NPA for criminal prosecution (Section 7(4) IPID Act). The Minister of Police (Section 7(4) in fine IPID Act) must, however, be notified of such referral. In the event that the NPA has an intention to prosecute, it must so inform the Executive Director of IPID of such intention, who must in turn notify the Minister of Police (Section 7(5) IPID Act). If any of the criminal offences referred to the IPID does not fall within its scope of action – as defined by Section 28 IPID Act – the Executive Director of the IPID must transmit it to the appropriate authority for further investigation according to the applicable legislation (Section 7(10) IPID Act). It should be noted here that the efficacy of the actions of the IPID may be hampered as, upon conclusion of the investigation, the Minister of Police must be notified. While it does not seem that the Minister can influence the decision-making process of the IPID, the act of having the Minister notified may potentially lead to conflict of interest situations which should be avoided. In this regard, clear guidelines establishing the interaction of the IPID with the Minister of Police is necessary in order to ensure both the necessary checks and balances of the IPID while maintaining its independence and impartiality.

Moreover, the Executive Director must submit to the Minister of Police a summary of the disciplinary matters and copies thereof, and provide a copy to the Secretary for the Police Service, pursuant to Section 7(7) IPID Act.

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<sup>18</sup> The Independent Complaints Directorate (ICD) was established under Chapter 10 of the SAPS Act 1995. The ICD is established at both the national and provincial levels, and is to function independently from the SAPS (Section 50(2) SAPS Act 1995).

Furthermore, all recommendations that are not criminal or disciplinary in nature must be referred to the Minister of Police and a copy must be handed to the Secretary of the Police Service (Section 7(8) IPID Act).

The IPID has extensive investigative powers, as provided by the Criminal Procedure Act 1977, in relation to, amongst others, the investigation of offences, seizure and disposal of premises, arrests and the execution of warrants (Section 24(2) IPID Act). Although the IPID has the power to investigate corruption matters within the police, as well as systemic corruption involving the police (Section 28(g) and (2) IPID Act), it does not have the power to seize assets relating to the investigations it carries out. It is not clear, however, whether the IPID will co-ordinate its activities and investigations with both the SIU and the AFU, so that parallel action can be taken to ensure the seizure of corruption-related assets.

Interestingly enough, the Station Commander or any member of the SAPS does not have the obligation – under the IPID Act – to immediately notify the IPID of corruption charges, as it is specifically excluded from the offences listed under such obligation in Section 29(1)(a) IPID Act.

Due to the recent creation of the IPID, which overhauled its previous structure, the ICD, it has not been possible to collect further information which may be of interest to the present study.

### 4.3 Remaining Mechanisms

This section of the report focuses on the remaining agencies which are responsible for the prevention and combating of corruption in the RSA in some way or another and which have not been addressed in the previous sections.

#### 4.3.1 Department of Public Service and Administration (DPSA)

The DPSA was established through the Public Service Act (PSA). It is responsible for, amongst others, formulating the national anti-corruption strategy,<sup>19</sup> in accordance with Section 3(1)(h) PSA (DPSA 2011, 108).

The DPSA is responsible for convening the Anti-Corruption Co-ordinating Committee (ACCC), which will be discussed in more detail in section 4.3.8 below. Through the ACCC and the Public Service Anti-Corruption Strategy (PSACS), the MACC was established in 2002 for departments and organisational components<sup>20</sup> (ACCC 2002). For this reason, Government

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<sup>19</sup> The DPSA has been driving the South African anti-corruption programme since 2001, in accordance with the minutes of the meeting held by the National Assembly Committee on Public Service and Administration held on 18 May 2010. Available at: <http://www.pmg.org.za/report/20100519-minister-public-service-and-administration-anti-corruption-and-batho->

<sup>20</sup> In accordance with the MACC, the minimum anti-corruption capacity is to be established in all departments and public entities that fall under the jurisdiction of departments. The term 'department' is to be understood in accordance to the definition of the PSA, and shall mean a national department, a national government component, the Office of the Premier, a provincial department or a provincial government component (Section 1 PSA). In accordance with this definition, it appears that independent institutions (e.g., Chapter 9 institutions), are not required to meet the MACC requirements, although they may do so at their own discretion.

departments and organisational components are required to have some capacity to prevent, detect and resolve corruption (DPSA 2011, 122).

The MACC requires each accounting officer in said departments and organisational components to (ACCC 2002) to:

- Analyse corruption risk as part of the risk assessment required under the PFMA (Sections 38(1)(a)(i) and 51(1)(a)(i) PFMA);
- Implement fraud plans required in terms of the PFMA which must specifically address the corruption risk;
- Verify previous employment, qualifications, citizenship and criminal records of all persons before they are employed;
- Establish a system, or systems, that encourages and allows employees and citizens to report corruption, which system or systems must provide for confidentiality of reporting, the recording of all allegations of corruption received through the system or systems and a formal institutional arrangement for acting on such allegations;
- Establish the capacity to: (i) investigate allegations of corruption, (ii) institute and complete disciplinary action for cases of corruption; (iii) detect corruption; and (iv) refer allegations of corruption to a relevant law enforcement agency or other appropriate agencies or bodies in terms of a formal arrangement;
- Establish information systems that: (i) has records of all allegations; (ii) is able to track the progress with the management of each allegation; (iii) reveal systemic weaknesses and recurring risks, and inform managers and employees of systemic weaknesses and risks; (iv) provide feedback to employees on the management of corruption allegations; (v) provide minimum information to designated national departments;
- Establish programmes that: (i) inform employees on an on-going basis on what constitutes corruption; (ii) Promote the departmental and national policies that must be adhered to, including the values and principles of public administration as contained in the Constitution and standards of professional conduct; (iii) Inform employees of corruption risks; (iv) Encourage employees to report corruption; (v) Inform employees on the nature and working of protected disclosures and witness protection; (vi) Inform employees of obligations and rights in terms of the Access to Information and Promotion of Administrative Justice Acts;
- Ensure that the employees responsible for the minimum functions (i) have positive security clearances; and (ii) disclose financial interests to the accounting officer on an annual basis.

Government departments and organisational components were required to adhere to the MACC by 31 July 2004. To that end, the DPSA audited the MACC in 2010. This audit found that, while there are some departments with excellent anti-corruption capacity, the overall MACC compliance rating was at 47% (Ethics Institute of South Africa 2011, 4). Nevertheless, it should be noted that (Ethics Institute of South Africa 2011, 4-5):

- Most departments have given a formal mandate for anti-corruption to one unit, and it is generally attached to the anti-fraud responsibilities. Thus, the anti-corruption mandate often falls within the internal audit or risk management units;
- The responsible units often are passive, putting the relevant policies in place, but doing little to implement them;
- A reactive approach is taken to anti-corruption work. The MACC audit indicates that cases reported might be investigated on an ad hoc basis, but little is done to systematically prevent corruption;
- Managing conflict of interest is one of the most severe risk areas;
- Corruption risk assessments are commonly not conducted;
- Anti-corruption strategies are rarely responsive to risk areas as little thought is given to department-specific corruption risks;
- While departments have anti-corruption policies in place, little management attention is given to how these will be implemented.

The MACC Audit also noted that, amongst others, there was a need to resolve jurisdictional issues, as some departments disburse large amount of funds to provincial departments but do not have an investigation mandate in the event of mismanagement, fraud or corruption (Ethics Institute of South Africa 2011, 9).<sup>21</sup> This is a particularly important gap which needs to be addressed, in particular with the creation of the Special Anti-Corruption Unit (Public Service Special Anti-Corruption Unit or SACU), to be reviewed in section 4.3.2 below. This is due to the fact that while the appropriate mechanisms might have been put in place in the relevant departments to prevent corruption, and to ensure transparency and oversight in the process, jurisdictional issues may lead to lack of accountability.

Moreover, the MACC audit (2011, 9) noted that there is a poor implementation of information management and sharing between the departments. This is another gap which needs to be addressed. Departments are required to produce anti-corruption intelligence, which, on the one hand, allows the identification of risks and trends in corruption so that remedial action can be taken, and a systemic approach to combating corruption adopted. On the other, should this intelligence not be shared between the relevant stakeholders, the efficacy of the system as a whole may be hampered due to lack of necessary knowledge amongst the relevant stakeholders themselves.

Furthermore, steps should be taken to ensure that the intelligence produced is in line with the requirements of the National Intelligence Services Act (NSIA). During the research undertaken to conduct the present study, it was not clear whether this intelligence was being produced, processed and shared in accordance with the rules set out in the NSIA.

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<sup>21</sup> For instance, the National Treasury provides funds under the Municipal Infrastructure Grant (MIG) to municipalities for various projects. The dispensing agency is the Department of Co-operative Governance and Traditional Affairs (COGTA). Hundreds of millions of ZAR get dispersed, but are often misspent or fraudulently re-directed by municipalities, with little oversight or consequence for malfeasance from either Treasury or COGTA.

### 4.3.2 Special Anti-Corruption Unit (SACU)

The DPSA established in November 2010 the SACU. It has been established to support departments with managing corruption cases from investigation to conclusion,<sup>22</sup> and to enhance and consolidate the fight against corruption in the public service (DPSA n.d., 11). The SACU is currently located within the DPSA, and reporting directly to the Minister for Public Service and Administration (DPSA n.d., 11), and a feasibility study is currently being undertaken to determine the organisational structure of the SACU (DPSA 2011, 100). It is a non-statutory body and its exact investigatory powers are unclear.

The AGSA had taken note that there had been inconsistencies in the sanctions imposed for corruption-related cases. In the Medium Term Strategic Framework (2009-2014), the government of the RSA informed that one fundamental innovation in the combating of corruption would be to keep the anti-corruption prevention capacity with the departments, while the enforcement would be strengthened by the creation of the SACU, located within the DPSA (RSA 2010, 14). Its functions would include, among others (DPSA 2011, 122; RSA 2010, 14):

- Providing implementation support to departments;
- Setting up anti-corruption norms and standards and guidelines for sanctions;
- Enforcing compliance to the normative and legislative frameworks;
- Investigating all corruption related misconduct;
- Conducting the necessary disciplinary processes and referring criminal related cases to the relevant law enforcement agencies.

One of the reasons given by the government for setting up the SACU is that it will provide the investigative<sup>23</sup> capacity from the perspective of the employer to ensure a swift and appropriate disciplinary response (RSA 2010, 14). The government further informs that, “[w]here the preliminary investigations indicate that criminal proceedings need to be instituted, this unit will refer these cases to the relevant bodies in the criminal justice system (e.g. the Special Investigation Unit)” (RSA 2010, 14). It is not clear, however, what the extension of the mandate to investigate given to the SACU will be, as it is a non-statutory body, and whether it will further assist and co-ordinate investigations other government agencies, e.g., the AGSA, the SAPS and the SIU.

More importantly, however, is to determine the jurisdiction that the SACU will have. It is not clear, and no information in that regard could be found regarding whether the SACU will limit itself to departments and other organisational components, as determined by the PSA (since it is currently housed in the DPSA and is a non-statutory body), or whether it will have

<sup>22</sup> Launch of the Special Anti-Corruption Unit, Birchwood, Boksburg, press release 25 November 2010. Available at:

<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=14872&tid=25040>

<sup>23</sup> As the SACU is a non-statutory body, it is not clear if it indeed has investigatory powers, or whether cases are referred to it for case strategy planning.

overlapping jurisdiction over corruption-related misconduct with other department structures, such as the IPID. It does not appear, however, that the SACU will have jurisdiction over Chapter 9 institutions. It is also not clear whether the SACU will have jurisdiction over Municipal and Provincial departments.

Finally, special attention should be paid with regard to the effectiveness of the work that can be undertaken by the SACU. As it is housed in the DPSA and reports directly to the Minister, appropriate mechanisms should be put in place to shield the SACU from any political interference, so that it may conduct its processes independently.

### 4.3.3 Special Investigating Unit (SIU)

The SIU was established with a view to focussing on the implementation of the Special Investigating Units and Special Tribunals Act of 1996 (SIU Act).<sup>24</sup> It aims at protecting the interests of the public regarding public moneys and property, and investigates matters from a civil perspective and institutes civil action in the Special Tribunal. It does not investigate crimes, arrest criminals or act through the criminal courts (Camerer 1999, 5). The SIU has ‘extensive powers of investigation including the power to summon and interrogate persons and to conduct searches for evidence that may be relevant to its investigations.’<sup>25</sup> Other powers of the SIU include the ‘power to investigate allegations of corruption, maladministration and unlawful or improper conduct which is damaging to State institutions, or which may cause serious harm to the interests of the public or any category thereof and to take proceedings to recover losses that the state may have suffered in consequence thereof.’<sup>26</sup>

Originally, a judge or acting judge of the Supreme Court of South Africa (Section 3 (1) (a) SIU Act) was to head the SIU. In that regard, Case CCT 27/00 before the Constitutional Court of South Africa raised the issue, in obiter dictum, that the functions of the SIU ‘include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices.’<sup>27</sup> Although ultimately judges may become involved in the litigation, e.g., when presiding over a commission of inquiry, or sanctioning search warrants, ‘that is an unwanted though possibly unavoidable incident of the discharge of what are essentially judicial functions’. The SIU Act, however, ‘provide[s] special measures for the recovery of money lost by the state, and in the case of the head of the SIU therefore, litigation on behalf of the state is an essential part of the job.’<sup>28</sup>

<sup>24</sup> Special Investigating Units and Special Tribunals Act No. 76 of 1996, as updated by the Prevention and Combating of Corrupt Activities Act No. 12 of 2004. Cape Town, 20 November 1996. Available at: <http://www.siu.org.za/legislation/act2005.pdf>

<sup>25</sup> Constitutional Court of South Africa. South African Association of Personal Injury Lawyers vs. Heath, Willem Hendrik et al. (case CCT 27/00), decided on 28 November 2000, p. 8. Available at <http://www.constitutionalcourt.org.za/Archimages/1852.PDF>.

<sup>26</sup> Constitutional Court of South Africa. South African Association of Personal Injury Lawyers vs. Heath, Willem Hendrik et al. (case CCT 27/00), decided on 28 November 2000, p. 8. Available at <http://www.constitutionalcourt.org.za/Archimages/1852.PDF>.

<sup>27</sup> Constitutional Court of South Africa. South African Association of Personal Injury Lawyers vs. Heath, Willem Hendrik et al. (case CCT 27/00), decided on 28 November 2000, p. 8. Available at <http://www.constitutionalcourt.org.za/Archimages/1852.PDF>.

<sup>28</sup> Constitutional Court of South Africa. South African Association of Personal

This discussion pertaining to separation of powers – due to the fact that the investigation was being led by a Judge – and the fact that the head of the SIU was to be a judge, led to the Constitutional Court to conclude that ‘[t]he functions that the head of the SIU is required to perform are far removed from “the central mission of the judiciary,”<sup>29</sup> as they are determined by the President of South Africa. Thus, ‘the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the state, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, [...] the head of the SIU is in my view incompatible with his [or her] judicial office and contrary to the separation of powers required by [the South African] Constitution.’<sup>30</sup>

Thus, the Constitutional Court of South Africa determined that section 3(1) of the Act and the appointment of a judge as head of the SIU were inconsistent with the Constitution as it undermined the independence of the judiciary and the separation of powers required by the Constitution. Section 3 (1) SIU Act was ultimately considered to be inconsistent with the Constitution of South Africa and invalid. Subsequent amendments to the SIU Act (specially through the SIU Amendment Act, 2001)<sup>31</sup> have changed these requirements, and now: (i) any South African citizen can be appointed by the President to of the SIU; and (ii) the President of the SIU may be removed from office at any time by the President and without consultation with the Judicial Service Commission, if there are sound reasons to do so.

The SIU is responsible for conducting investigations upon determination of the President of South Africa, through a Presidential Proclamation. The SIU undertakes these investigations as long as they have been proclaimed in the Government Gazette (Section 2 SIU Act) along with its terms of reference (Section 2 (3) SIU Act), and can be amended by the President at any time (Section 2 (4) SIU Act). The SIU Act also determines which offences can be investigated by the SIU, upon request of the President, which include (Section 2(2) SIU Act):

- i. Serious maladministration in connection with the affairs of any State institution;
- ii. Improper or unlawful conduct by employees of any State institution;
- iii. Unlawful appropriation or expenditure of public money or property;
- iv. Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- v. Intentional or negligent loss of public money or damage to public property;

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Injury Lawyers vs. Heath, Willem Hendrik et al. (case CCT 27/00), decided on 28 November 2000, p. 8. Available at <http://www.constitutionalcourt.org.za/Archimages/1852.PDF>.

<sup>29</sup> Constitutional Court of South Africa. South African Association of Personal Injury Lawyers vs. Heath, Willem Hendrik et al. (case CCT 27/00), decided on 28 November 2000, p. 8. Available at <http://www.constitutionalcourt.org.za/Archimages/1852.PDF>.

<sup>30</sup> Constitutional Court of South Africa. South African Association of Personal Injury Lawyers vs. Heath, Willem Hendrik et al. (case CCT 27/00), decided on 28 November 2000, p. 8. Available at <http://www.constitutionalcourt.org.za/Archimages/1852.PDF>.

<sup>31</sup> Special Investigating Units and Special Tribunals Amendment Act No. 2 of 2001. Cape Town, 20 April 2001, Available at: <http://www.info.gov.za/view/DownloadFileAction?id=68124>

- vi. Corruption-related offences contained in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;<sup>32</sup>
- vii. Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

It should be noted that there are some differences between the SIU and the AFU, mentioned in Subsection 4.2.1.1 above. While the former requires a specific Proclamation by the President of the RSA for it to initiate its investigations, the latter, as part of the NPA, can freely conduct its investigations (through an Investigation Directorate of the NPA, or through an investigation received from another investigating authority such as the SAPS and the SIU itself) and prosecutions. However, the SIU makes use of civil recovery mechanisms based on civil procedures for the offences that it is authorised to investigate under Section 2 of the SIU Act, whilst the AFU also makes use of civil proceedings, as established in Chapters 5 and 6 of the POCA. The SIU also interacts with the Special Tribunal for judgement of its cases, which is not the case for the AFU.

The SIU must also as soon as practicable after it has obtained evidence referred to in subsection (1) (d), inform the relevant prosecuting authority thereof, whereupon such evidence must be dealt with in the manner which best serves the interests of the public (Section 4 (2) SIU Act).

Finally, it should be noted that the SIU does not appear to be autonomous in order to initiate an investigation, as it relies on a Presidential Proclamation to that effect. Nevertheless, it appears that it retains its independence during the investigative process, without government or political interference.

#### 4.3.4 South Africa Revenue Service (SARS)

The South African Revenue Services (SARS) is the collector of taxes of the RSA, in accordance to the South African Revenue Services Act (SARSA). It is responsible for, among others, implementing the tax policies of the government and fostering tax compliance. The SARS is responsible for investigating tax-related corruption and fraud.

Within the SARS, there is a dedicated anti-corruption and security unit. The unit engages in joint operations with other law enforcement and prosecutorial agencies such as the NDPP and the SAPS (Commission 2001, 88) with regards to tax-related corruption and fraud. As of 2009, the SARS established a customs risk management approach to its methodology.<sup>33</sup>

Little information other than the risk-based methodology which the SARS employs was available for research.

<sup>32</sup> Prevention and Combating of Corrupt Activities Act No. 12 of 2004. Cape Town, 28 April 2004.

Available at:

<http://www.dac.gov.za/acts/Prevention%20and%20Combating%20of%20Corrupt%20Activities%20Act.pdf>

<sup>33</sup> Presentation by the SARS on its risk-based methodology is available on:

[https://docs.google.com/viewer?a=v&q=cache:r9G768uWhOIJ:www.sars.gov.za/Tools/Documents/DocumentDownload.asp%3FFileID%3D60946+&hl=en&gl=ch&pid=bl&srcid=ADGEESjDAPf-xLhM8EWnYhmZ-fRMsZybVo-HrhCIIIwuu\\_k8uhimokHM3ctjUXikMLaq8W8NumlL904O3hGZ2kO3c6AzLAUzWM64L6b0VJ88mwxbsnVcux3P2rAEwPN87FALxE7XQOTN&sig=AHIEtbRoxYcHU59cwlhjOkpdsdBT2EyfJg](https://docs.google.com/viewer?a=v&q=cache:r9G768uWhOIJ:www.sars.gov.za/Tools/Documents/DocumentDownload.asp%3FFileID%3D60946+&hl=en&gl=ch&pid=bl&srcid=ADGEESjDAPf-xLhM8EWnYhmZ-fRMsZybVo-HrhCIIIwuu_k8uhimokHM3ctjUXikMLaq8W8NumlL904O3hGZ2kO3c6AzLAUzWM64L6b0VJ88mwxbsnVcux3P2rAEwPN87FALxE7XQOTN&sig=AHIEtbRoxYcHU59cwlhjOkpdsdBT2EyfJg)

### 4.3.5 National Intelligence Agency (NIA)

The National Intelligence Agency (NIA) is a statutory body established in terms of section 3 of the NSIA. The NSIA itself regulates the establishment, organisation and control of the NIA and the South African Secret Service (SASS).

The NSIA mandates the NIA to gather departmental intelligence at the request of any interested department, and, without delay, to evaluate and transmit such intelligence and any other intelligence at the disposal of the Agency and which constitutes departmental intelligence, to the department concerned. Thus, under the NSIA, the NIA is authorised to:

- Gather, correlate, evaluate and use crime intelligence in support of the functions of the SAPS as contemplated in section 215 of the Constitution; and
- Institute counter-intelligence measures within the SAPS, in order to supply crime intelligence relating to national strategic intelligence.

Due to the nature of the work undertaken by the NIA, little information is available on its operations and internal work. Nevertheless, it can be seen that the NIA acts as the central repository of intelligence within the RSA and is responsible for making the connection between the relevant institutions. It is, however, not possible to assess the effectiveness of its work as no information is available in that regard.

### 4.3.6 National Treasury

The PFMA and the MFMA set out comprehensive requirements for the financial management of public funds, including the clear assignment of accountability. Both statutes emphasise the need for prevention and risk management. The PFMA requires government to prescribe measures to ensure transparency and expenditure control in all spheres of government, and to set the operational procedures for borrowing, guarantees, procurement and oversight over the National and Provincial revenue funds.

The PCCA contains in its sections 12 and 13 a list of corruption-related offences which relate to contracting and procuring with the government. Thus, in accordance with section 28 of the PCCA, once the natural or legal person who has committed such offences has been convicted, the National Treasury is responsible for registering such companies – as well as any affiliate that is wholly or partly controlled or owned by the natural or legal person convicted (Section 28(1)(d) PCCA). The National Treasury must further determine the period – of between five to 10 years – for which the natural or legal person must remain in the database and be prohibited from doing business with the government (Section 28(3)(a)(ii) PCCA).

Therefore, due to the PCCA, the National Treasury maintains the National Database with a list of restricted suppliers. In accordance to the Treasury Regulation 16A9.1(c), accounting officers are required to "check the National Treasury's database prior to awarding any contract to ensure that no recommended bidder, nor any of its directors, are listed as companies or

persons prohibited from doing business with the public sector."<sup>34</sup> It is not clear, however, whether the intelligence contained in the National Treasury's database is subject to the rules and regulations contained within the NSIA.

The National Treasury has also informed that it seeks to hire a Chief Procurement Officer, with the responsibility of modernising the State procurement system, of ensuring transparent utilisation of resources for improved service delivery, and to guarantee manage and oversee the government assets and resources. This comes in line with the publishing of the Consolidated General Report of the Audit Outcomes of Local Government, published by the AGSA (2012). The Report concluded that, for the financial year of 2010-2011, 98% of the irregular expenditure in local government – or ZAR 6.7 billion – was the result of contravention to supply chain management (SCM) legislation (AGSA 2012, 63).

Breaches in the SCM in the RSA include: (i) procuring outside transversal term contracts (contracts for commodities necessary for more than one department); (ii) manipulation of the evaluation process; (iii) acceptance of sub-quality products and/or services at inflated prices; (iv) cover quoting, (v) conflicts of interest, (vi) bribery and fronting, (vii) by-passing SCM prescripts (e.g., putting out a tender without following proper processes); and (viii) using expansions and variation of orders that are far in excess of original contract prices (the total cost of these contract prices increased by above 75%).

Special attention is given to item (v) above. Current SCM regulation allows for the awarding of contract to natural or legal persons owned or managed by persons who are close family members (understood as parents, children or spouses) of persons in the service of the state, whether at the institution where the public official works or at any other state institution (SCM Regulation 45). Due to the fact that there has been little disclosure in the financial statements and failure by the officials or the suppliers to declare their interest (AGSA 2012, 65), the AGSA rightly concludes that "[t]he possibility of undue influence cannot be discounted and all instances require investigation". In that regard, the National Treasury has informed that the SCM regulatory framework, which formed part of the regulations of that institution, were in the process of being reviewed.<sup>35</sup>

One of the challenges in curbing corruption in the SCM is the fact that the audited institutions often express the view that the legislation is difficult to understand and onerous to implement (AGSA 2012, 58). As a result, despite some efforts to establish actions plans, there has been little impact on the outcomes (AGSA 2012, 58).

Several steps have been taken to address corruption in the SCM. One of such initiatives has been the creation, by the Ministry of Finance, of the Multi-Agency Working Group (MAWG, which will be reviewed in more detail in section 4.3.11 below). Furthermore, the National Treasury seeks to appoint a Chief Procurement Officer, as mentioned above. These mechanisms will have

<sup>34</sup> Letter from the Supply Chain Management Office of the National Treasury to all accounting officers. Available at: <http://www.treasury.gov.za/legislation/pfma/circulars/Circular%20-%20List%20or%20Restricted%20suppliers.pdf>

<sup>35</sup> State Procurement System review to ensure value for money: National Treasury update; Anti-Corruption Unit: DPSA update. Meeting held on 29 August 2012. Minutes available at: <http://www.pmg.org.za/report/20120829-update-national-treasury-progress-made-regarding-review-state-procure>

to play an important part in the education of public officials on the rules and regulations comprising the SCM of the RSA, as well providing consistency in the sanctioning regime, in order to allow for greater predictability in the system.

#### 4.3.7 Anti-Corruption Co-ordinating Committee (ACCC)

The Cabinet adopted the PSACS in 2002,<sup>36</sup> which comprises nine strategic considerations:

- **Strategic Consideration 1:** Review and Consolidation of Legislative Framework. It was perceived in 2002 that the legislative framework was solid but required review and consolidation to improve its efficiency. It sought to, among others, establish a legal definition of corruption;<sup>37</sup>
- **Strategic Consideration 2:** Increased Institutional Capacity. Focused on the existing institutions, seeking to, among others, improve the functioning of the institutions that have anti-corruption functions by defining clearly the roles, powers and responsibilities of these institutions in order to increase their efficiency.
- **Strategic Consideration 3:** Improved Access to Report Wrongdoing and Protection of Whistleblowers and Witnesses.
- **Strategic Consideration 4:** Prohibition of Corrupt Individuals and Businesses. This strategic consideration sought to establish debarment procedures for a period of five years and establishing a database through the Common Service provider of the National Treasury of prohibited businesses.
- **Strategic Consideration 5:** Improved Management Policies and Practices. This strategic consideration seeks to establish greater accountability of management for the prevention of corruption, as well as to revise the procurement service.
- **Strategic Consideration 6:** Managing Professional Ethics. The establishment of coherent processes and mechanisms to manage professional ethics, through the promotion of the concept and practice of ethics management, among others.
- **Strategic Consideration 7:** Partnerships with stakeholders. Co-ordination with relevant stakeholders, such as the National Anti-Corruption Forum (NACF), as well as partnerships with non-state actors.
- **Strategic Consideration 8:** Social Analysis, Research and Policy Advocacy.
- **Strategic Consideration 9:** Awareness, Training and Education.

<sup>36</sup> The 2002 Public Service Anti-Corruption Strategy is available at: <http://www.home-affairs.gov.za/PDF/Public%20Service%20Anti-corruption%20Strategy-1.pdf>

<sup>37</sup> Executed through the enactment of the Prevention and Combating of Corrupt Activities Act, 2004, and the repealing of the Corruption Act, 1992.

In turn, the Anti-Corruption Co-ordinating Committee (ACCC), an advisory body established in 2003, was created and tasked with the responsibility of implementing the said strategy. It is therefore a policymaking body. Thus, the mandate of the ACCC includes:<sup>38</sup>

- i. Ensuring that the fight against corruption is fully co-ordinated and integrated, with synergies between the elements of prevention, detection, investigation, prosecution and monitoring, as well as synergies between the different spheres of government;
- ii. Advise the government on regional and international co-operation, including co-ordination of representation in the international and inter-governmental forums;
- iii. Establish a system for information collection, co-ordination, dissemination and management; and formulate proposals on a national anti-corruption strategy.

In a presentation held for the Parliamentary Monitoring Group Committee, the DPSA advised on 19 May 2010 that the PSACS had had a comprehensive audit in 2005/2006, and an overall implementation of 96% had been achieved.

As will be seen below in section 4.3.8, there is currently confusion within departments on the role of the ACCC and the Anti-Corruption Inter-Ministerial Committee (ICM). This confusion also seems to stem from the fact that not all of the government institutions comprising the ACCC are also part of other committees or task teams, reducing the overall effectiveness of the co-ordination efforts and duplicating structures. In that regard, efforts should be taken to seek to clarify with the Presidency the course of action which is intended to be taken, and what will the roles of each structure be.

It should be noted that while the ACCC is still mandated by the Cabinet, it appears its members have not convened under this structure in the last two years. Thus, while the ACCC has not been formally disbanded, there is lack of clarity as to what its role will be going forward.

#### 4.3.8 Anti-Corruption Inter-Ministerial Committee (ICM)

A workshop to review the functioning of the ACCC was held in June 2010, with a view to reviewing the mandate of the ACCC and to ensure that it aligns its work to that of the Inter-Ministerial Committee on Corruption (IMC). The government has stated that it has thus established a new Governance and Administration Anti-Corruption Working Group (from departments originating from the Governance and Administration (G&A) and the Justice, Crime Prevention and Security (JCPS) Clusters), which will be incorporated into the ACCC to ensure alignment and synergy (RSA 2010, 69).

Little information on the ICM is available, and its structure appears to be

<sup>38</sup> Briefing Notes for the Portfolio Committee. Available at: [https://docs.google.com/viewer?a=v&q=cache:HShCYc6IjPsJ:d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/mtime:1274450709/files/docs/100519briefingnotes.doc+inter-ministerial+committee+on+anti-corruption+south+africa+action+plan&hl=en&gl=ch&pid=bl&srcid=ADGEEsj29m\\_inThd9oqiX66LyO4nljTX9\\_ON3UchQqdbHozsUfk1-125PPt8dzMs9lBjN4e1pS8L7XmqXBMnhe\\_oBJ6tnnB2F3GRr9eX0OPuepH-sV1sUj02otCZeffB358IWZY395Cr&sig=AHIEtbQZ0eEBP1R6Lh3R0iRn8GU19f2nMw](https://docs.google.com/viewer?a=v&q=cache:HShCYc6IjPsJ:d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/mtime:1274450709/files/docs/100519briefingnotes.doc+inter-ministerial+committee+on+anti-corruption+south+africa+action+plan&hl=en&gl=ch&pid=bl&srcid=ADGEEsj29m_inThd9oqiX66LyO4nljTX9_ON3UchQqdbHozsUfk1-125PPt8dzMs9lBjN4e1pS8L7XmqXBMnhe_oBJ6tnnB2F3GRr9eX0OPuepH-sV1sUj02otCZeffB358IWZY395Cr&sig=AHIEtbQZ0eEBP1R6Lh3R0iRn8GU19f2nMw)

unclear, even within the government. The 2010/2011 annual report of the DPSA (as convener and secretariat of the ACCC) went as far as to advise, on its Ethics and Integrity management programmes that there is “[n]o clarity about the role of the ACCC since the establishment of the Inter-Ministerial Committee on Corruption and other structures such as the working group. The DPSA has written to Departments to nominate officials to serve on the IMC” (DPSA 2011, 90).

#### 4.3.9 Anti-Corruption Task Team (ACTT)

The Anti-Corruption Task Team (ACTT) was established as a sub-committee of the JCPS cluster in July 2011. It is an advisory task team which, it appears, does not have any ordinary powers. Rather, it makes use of the powers of its constituent members in order to undertake its actions. Its members include, but are not limited to the DPCI, the SARS, the NPA, the AFU and the SIU.

The JCPS cluster has the responsibility to ensure that all persons in the RSA feel safe.<sup>39</sup> ACTT forms part of the prevention strategy of the JCPS cluster and works closely with other institutions to fight corruption. Through the Delivery Agreement, JCPS Cluster has undertaken to ensure the prosecution of at least 100 persons by 2014, who have accumulated at least ZAR 5 million through illicit means. It appears that the ACTT is a non-statutory body at the policy level, which does not have any investigatory powers. Rather, it is an advisory body which is responsible for strategic decision-making for specific cases brought for by its constituent members in order to ensure a more effective co-ordination mechanism between them. As such, it relies on the investigatory powers of its members. It is also unclear why the AGSA is not a participating member of the ACTT, as it is an important component in a participatory, integrated and co-ordinate approach to fight corruption.

Although research on the ACTT has been undertaken for the present study, it has not been able to identify the actions it has already undertaken and the level of effectiveness of its actions. Notwithstanding, due to the fact that the departments involved (with the exception of the AGSA) are already part of the anti-corruption architecture of the RSA, it is important to ascertain that current structures are indeed used and their efforts co-ordinated to ensure that there are no duplication of efforts and that these institutions are put to maximum use for the goal set by ACTT.

Moreover, it should be highlighted that the ACTT has been a successful tactic towards the principle of co-operation and alignment of various agencies in the multi-agency model. Thus, the setting of clearly defined targets is showing to be a positive development in focusing the law enforcement and prosecutorial activities in order to achieve more effective results in combating corruption. As mentioned previously, although it is not possible to determine the level of effectiveness of the action of the ACTT, reports indicate that 16 accused

<sup>39</sup> Justice Crime Prevention and Security Cluster post State of the Nation Address (SoNA) briefing notes. Available at [https://docs.google.com/viewer?a=v&q=cache:uc1gPUG8wxgJ:d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/mtime:1298286885/files/docs/110220jefftrans\\_0.doc+&hl=en&gl=ch&pid=bl&srcid=ADGEESiUB6x8yPW2G3H2YWLImzABtrS94TIM361KbGD9n7zJM-u9ZxiF39Rx-UrDn-odr\\_K83Y2pvwR2EBsAjTh2EjIWnC21-maJEbl7kwRXMHT\\_uzwut\\_1pkdWFNVOVF83uO6hJUjpn&sig=AHIEtbTp6donHIzreFoIBggNeEeM2FIt3Q](https://docs.google.com/viewer?a=v&q=cache:uc1gPUG8wxgJ:d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/mtime:1298286885/files/docs/110220jefftrans_0.doc+&hl=en&gl=ch&pid=bl&srcid=ADGEESiUB6x8yPW2G3H2YWLImzABtrS94TIM361KbGD9n7zJM-u9ZxiF39Rx-UrDn-odr_K83Y2pvwR2EBsAjTh2EjIWnC21-maJEbl7kwRXMHT_uzwut_1pkdWFNVOVF83uO6hJUjpn&sig=AHIEtbTp6donHIzreFoIBggNeEeM2FIt3Q).

persons have appeared before courts in relation to 42 cases, totalling ZAR 579 million in assets restrained in total.<sup>40</sup>

#### 4.3.10 National Anti-Corruption Forum (NACF)

Ramsingh and Dobie (2006, 3) note that “the formal fight against corruption has its origins in a Cabinet decision in 1997 that launched the National Anti-Corruption Campaign”. Consequently, an Inter-Departmental Committee on Corruption was appointed in October 1997 with the responsibility of considering proposals for the implementation of an anti-corruption campaign at national and provincial levels (Camerer 1999, 1; Ramsingh and Dobie 2006, 3).

The Inter-Departmental Committee recommended, among others, that “(...) a project team be established to carry out a feasibility study for an anti-corruption agency and the rationalisation of existing bodies” (Camerer 1999, 1). As such, the said Inter-Departmental Committee designated the Public Service Commission<sup>41</sup> (PSC) to set up a meeting to take the lead (Ramsingh and Dobie 2006, 3). The PSC subsequently met with all the relevant state and non-state actors,<sup>42</sup> with the primary objective of organising a summit where measures for the control of corruption would be considered by all the stakeholders (Ramsingh and Dobie 2006, 3). As a result, the National Anti-Corruption Summit was held in 1999, also attended by both state and non-state actors (Ramsingh and Dobie 2006, 4).

The Summit adopted various resolutions aimed at combating and at preventing corruption, building integrity and raising awareness,<sup>43</sup> and paved the way for the formation of the National Anti-Corruption Forum<sup>44</sup> (NACF) in 2001 (Ramsingh and Dobie 2006, 5). Indeed, one of the resolutions adopted during the Summit called for the establishment of “a cross-sectorial task team to look into the establishment of a National Co-ordinating Structure with the authority to effectively lead, co-ordinate and monitor the national Anti-Corruption Programme” (Public Service Commission 1999, 3).

The NACF was launched in June 2001 after the first National Anti-Corruption Summit in 1999, and based on a resolution from the first National Anti-Corruption Summit which stated that ‘the fight against corruption requires a national collaborative effort’ (UNODC 2003, 80). The NACF comprises 30 members, equally divided between government, private sector and civil society (Ramsingh and Dobie 2006, 3). The Public Service Commission acts as the secretariat of the NACF. This approach seeks to ensure equal participation between all levels of the South African society.

<sup>40</sup> South Africa: Justice, Crime Prevention and Security Cluster Media Briefing By the Minister of Justice and Constitutional Development, Mr Jeff Radebe. 6 September 2011, available at: <http://allafrica.com/stories/201109060974.html>.

<sup>41</sup> The functions and responsibilities of the PSC within the anti-corruption architecture of the RSA will be discussed in the appropriate subsection below.

<sup>42</sup> The government recognised the need to build on partnerships with the private sector and civil society in order to combat more effectively corruption (Ramsingh and Dobie 2006, 2).

<sup>43</sup> <http://www.nacf.org.za/government/index.html>.

<sup>44</sup> The functions and responsibilities of the NACF within the anti-corruption architecture of the RSA will be discussed in the appropriate subsection below.

Ramsingh and Dobie (2006, 6) take note that the period during the National Anti-Corruption Summit and the launch of the NACF was used to foster, among others, an intense debate as to how the NACF should be set up. While civil society wished for a statutory body, which would be given specific powers upon which it could act, other representatives discussed that it would be better to have a non-statutory and advisory body that would give the necessary inputs for the management of corruption in the RSA. The idea of setting up a formal public private partnership also surfaced. Finally, the articulation of an acceptable structure was left up to the Public Service Commission, as the secretariat (Ramsingh and Dobie 2006, 6).

The primary objective of the NACF is to contribute towards a national consensus through the co-ordination of sectorial strategies against corruption (Ramsingh and Dobie 2006, 2; UNODC 2003, 80). Furthermore, the role of the NACF, in accordance with its MoU<sup>45</sup> is to:

- Advise government on national initiatives on the implementation of strategies to combat corruption;
- Share information on best practices on sectorial anti-corruption work; and
- Advise sectors on the improvement of sectorial and joint anti-corruption strategies.

The NACF is, therefore, a non-statutory partnership arrangement, whereby the three sectors operate as equal partners. Therefore responsibilities rest on all three sectors to develop and implement sectorial strategies to fight corruption. In that regard, while little information could be found pertaining to the private sector and civil society strategies in preventing and combating corruption (although their efforts were acknowledged in the fourth NACF meeting in 2011), the government established, in 2002, the PSACS and the MACC. The UNODC (2003, 80) reported that insufficient efforts had been undertaken in terms of developing sectorial strategies other than by government.

The NACF has met on four different occasions (2001, 2005, 2008 and 2011). In the fourth NACF meeting, the NACF took note of the worsening of ratings measured by anti-corruption perception indices of South Africa's ethical performance. Moreover, it acknowledged the positive role being played by various for agencies or units established by the government to enhance co-operation and collaborative synergies, e.g., the IMC, the MAWG, the ACTT and the SACU (all described in this study).

The fourth NACF meeting, amongst its resolutions – in particular Resolution 10 – advised that the NACF committed itself to considering options for the implementation of and respect for the Constitutional Court Ruling requiring the establishment of an independent anti-corruption capacity in the RSA (The Glenister Case, analysed above). However, no discernible momentum has been garnered since the 2011 NACF summit.

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<sup>45</sup> The Memorandum of Understanding for the establishment of the NACF can be found as Annex II of the PSACS, available at: <http://www.home-affairs.gov.za/PDF/Public%20Service%20Anti-corruption%20Strategy-1.pdf>.

#### 4.3.11 Multi-Agency Working Group (MAWG)

The Department of Finance established the MAWG on Procurement, in order to review the state procurement system in order to prevent and reduce the instances of corruption in the procurement system. It investigates fraud, corruption and non-compliance with the SCM.<sup>46</sup> It therefore is responsible for reviewing the state of the SCM system and to provide a set of priorities and proposals with appropriate action plans to deliver improvement in the system (SIU 2011, 11). The MAWG includes representatives from National Treasury, the AGSA, SARS, COGTA, SIU, Financial Intelligence Centre (FIC)<sup>47</sup> and the SAPS.

Following the investigation undertaken by the MAWG, it can be referred for criminal investigation, initiation of a civil recovery, initiation of internal disciplinary proceedings and full tax enforcement. It is also a non-statutory advisory body which does not itself have investigatory powers, relying on those of its constituent members.

It should be noted that little information on the findings of the MAWG could be found other than its establishment, not allowing for this reason, an assessment of the work undertaken by it as well as its conclusions and recommendations. Notwithstanding, an example of the work undertaken by the MAWG in the 2010/2011 can be found in the 2010/2011 annual report of the SIU (SIU 2011, 11-12). It is a pilot project for analysis and revision of the SCM of the Eastern Cape Department of Health (ECDOH), focusing on systems improvements and anti-corruption. This pilot project is intended to achieve an improved functioning of the SCM of the ECDOH, in order to ensure effectiveness of its procurement processes.

This pilot project conducted through the MAWG is providing an opportunity for the anti-corruption agencies (SIU, SACU) and systems (ACTT, MAWG) of the RSA to work together with a view to improve the individual services of the ECDOH and collective outcomes for all the involved participants (SIU 2011, 11). Moreover, it creates an opportunity to develop a multi-agency co-operation protocol for institutional reform that may be replicated across other agencies (SIU 2011, 12). Thus, this pilot project undertaken with the ECDOH is another positive example in the anti-corruption architecture of the RSA in order to achieve a participatory approach amongst the relevant stakeholders and a co-ordinated effort in combating corruption.

Nevertheless, based on the information found, a certain overlap of functions between it and the SIU and the AFU may exist. Attention to this matter should be given in order to clearly establish their jurisdiction and co-operation mechanisms to avoid a duplication of efforts. Moreover, it should be noted that most of the participating members (with the exception of the AGSA) of the MAWG retain some level of dependence on cabinet members and, as such,

<sup>46</sup> Written reply by the Presidency to Parliamentary question. Available at <http://www.sabinetlaw.co.za/presidency/articles/presidency-outlines-steps-fight-corruption>.

<sup>47</sup> As the financial intelligence unit of the RSA, the FIC is not directly involved in preventing and combating corruption. It is for this reason that it is not shown as part of the anti-corruption architecture in the present study. Nevertheless, attention should be given to the fact that the FIC is indirectly involved in the prevention and combating of corruption as corruption-related offences are predicate offences to money laundering.

clarification on this issue should be given in order to avoid any form of political interference in the selection of activities, projects and priorities, as well as the investigative process undertaken.

## 5. Comparative Models

The previous section has focused on the anti-corruption architecture of the RSA. In the present section, attention will be given to comparative models to the RSA from different jurisdictions, with special focus on the main elements which have been identified in the South African model, as well as with regards to the international standards presented in section 3 above.

Thus, the present section will focus on the comparative models (Brazil, Kenya, NSW, Tunisia and the UK) and shall review them as standalone elements. A comparative analysis between these and the RSA shall be done in section 6 of the present study.

### 5.1 Brazil

Brazil is a civil law country based on continental European law. It is a federated state divided into the federal government, states and municipalities (article 1st 1988 Constitution). While the 1988 Constitution grants the federal government the power to legislate on criminal law (article 22, I), the states and municipalities retain some residual competence to legislate on these matters but only in so far as the laws do not transgress into, or conflict with, the competence of the federal government (for states) and the competence of the federal and state government (for municipalities). For the purpose of this study, only the structure of the Brazilian federal government shall be reviewed.

Similarly to the RSA, Brazil does not adopt a single-agency approach to combating corruption. The preventive and enforcement functions are interspersed through several different institutions, each exercising a different role with the anti-corruption framework – although duplication and overlap can also be seen. These include, but are not limited to:

- The *Controladoria-Geral da União* (CGU – Office of the Comptroller General);
- The *Ministério da Justiça* (MJ – Ministry of Justice);
- The *Departamento de Polícia Federal* (DPF – Department of the Federal Police)
- The *Ministério Público da União* (MPU – Office of the Prosecutor-General)
- The *Conselho Nacional do Ministério Público* (CNMP – National Council for the Prosecution)
- The *Conselho Nacional de Justiça* (CNJ – National Council of Justice)
- The *Advocacia-Geral da União* (AGU – Office of the Attorney-General)
- The *Tribunal de Contas da União* (TCU – Court of Accounts of the Union)
- The *Comissões Parlamentares de Inquérito* (CPI – Congressional Commissions of Enquiry)

### ***Controladoria-Geral da União (CGU)***

The CGU was established in 2001, with a view to combating at the federal level, corruption and fraud, and defending public assets. The CGU is directly linked to the Presidency and is, therefore, not politically independent (although no Presidential Decree is needed for the CGU to conduct its enquiries. Its functions include (i) auditing and supervising how public monies are being spent, (ii) developing mechanisms for the prevention of corruption; (iii) conducting inspections (*correição*) to identify possible wrongdoings by public servants and the application of appropriate penalties; and (iv) acting as the ombudsman for the federal Executive Branch of power.

With regards to item (iii) above, the CGU is the central inspectorate of the federal Executive Branch of power in Brazil (article 15, I Decree No. 5.683/2006). While it has neither investigative nor prosecutorial powers, it is tasked with conducting preliminary investigations, administrative investigations (*sindicâncias*) and inspections (*correições*), including financial enquiries, as well as disciplinary administrative proceedings (article 15, III Decree 5.683/2006).

Moreover, regarding item (ii) above, Decree No. 5.683/2006 created within the CGU the *Secretaria de Prevenção da Corrupção e Informações Estratégicas* (SPCI – Secretariat for the Prevention of Corruption and Strategic Information), with the responsibility of centralising intelligence-related activity and the prevention of corruption and ensuring greater transparency of the processes undertaken, as it was being then dispersedly implemented within the CGU. The SPCI was also tasked to promote the interchange of intelligence with the relevant stakeholders in order to effectively combat corruption. Also, within the SPCI, there is the *Observatório da Despesa Pública* (Public Expenditure Observatory), which maps the trail of the public expenditures to monitor its appropriate use.

Finally, with regards to item (i) above, CGU is tasked with the following activities:

- Evaluation of the execution of governmental programmes;
- Forensic auditing;
- Monitoring of expenditure with staff in the federal public administration;
- Annual auditing of accounts;
- Auditing of special expenditures (auditoria de tomadas de contas especial);
- Auditing of external resource expenditures;
- External requests (in accordance to powers given to the CGU under Law No. 10.683/2003);

### ***Ministério Público da União (MPU)***

The MPU is essential for the jurisdictional function of the State, and is responsible for, among others, upholding the rule of law and the democratic regime (article 127, §1<sup>st</sup> 1988 Constitution). The MPU has both functional and administrative autonomy (article 127, §2<sup>nd</sup>, 1st figure 1988 Constitution), and

has the power to propose to the Legislative the creation or the extinction of offices and ancillary services, as well as its remuneration policy and career plans (article 127, §2<sup>nd</sup>, *in fine* 1988 Constitution).

The Prosecutor-General is nominated by the President from among members of the MPU, after the adoption of the person's name by the Senate. The term for the Prosecutor-General is two years, and he or she may be reappointed (article 128, §1st 1988 Constitution).<sup>48</sup> It should be underscored that the MPU is not part of any cabinet Ministry. It is thus a fully independent and autonomous institution (both functionally and financially, as it has its own separate budget) separate from both the Judiciary and the Ministry of Justice.

Within the MPU is the *Ministério Público Federal* (MPF – Office of the Public Prosecutor). The functions of the MPF which are relevant to the present study include (article 129 1988 Constitution):

- To exclusively promote the criminal prosecution;
- To promote the civil investigation and the public civil action to protect the public and the social patrimony, of the environment and of other diffuse and collective interests.
- To issue notifications in administrative proceedings under its jurisdiction, requesting information and documents, in accordance to the law;
- To exercise external control over police activities, in the form of supplemental law mentioned in the preceding article;
- To request investigation and prosecution of police investigations, indicating the legal grounds of its procedural acts;
- To perform other functions conferred upon it, consistent with its purpose, with the prohibition of judicial representation and legal consultancy for public entities.

### ***Conselho Nacional do Ministério Público (CNMP)***

The CNMP was introduced through the Constitutional Amendment No. 45/2004. It is responsible for providing checks and balances for the actions undertaken by the MPU as well as the State Prosecutor's Offices. The CNMP is comprised of 14 members (article 130-A 1988 Constitution): the Prosecutor-General, four prosecutors from the MPU; three prosecutors from the State Prosecutor's Offices; two lawyers; two judges and two citizens.

As such, it is competent (i) to assess the legality of administrative acts from the MPU, State Prosecutor's Offices and its staff, and States may deconstruct them, revise them or fix deadlines for the adoption of necessary measures for the proper enforcement of the law without prejudice to the jurisdiction of the federal, state and municipal courts of accounts; (ii) to receive and hear complaints against the MPU, State Prosecutor's Offices, its staff and prosecutors, order the removal, the retirement with full or proportional subsidies and to apply other administrative sanctions, ensuring due process; and (iii) to review disciplinary procedures of prosecutors of the MPU or the

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<sup>48</sup> The prosecutors proceed to an internal election and three names are given to the President, who then chooses one of the names to become the Prosecutor-General.

State Prosecutor's Offices that have been finalised within one year of the request for revision.

As can be seen, the CNMP attempts to ensure that, while retaining autonomy for the Institution, an appropriate mechanism, similar to the CGU in the Executive Branch, is put in place to ensure accountability and transparency. It also ensures that there is an appropriate mechanism to prevent and combat corruption from within the MPU. However, the fragmentation of the process may hinder the appropriate sharing of information between the institutions, which may reduce the overall effectiveness of the system.

### ***Conselho Nacional de Justiça (CNJ)***

Similarly to the CNMP, the CNJ was introduced through the Constitutional Amendment No. 45/2004 and the Constitutional Amendment No. 61/2009. It comprises 15 representatives: the President of the Supreme Court, one Justice from the Superior Court of Justice; one Justice from the Supreme Labour Court; one Judge from the State Court of Appeals; one Judge from the Federal Regional Court of Appeals; one Judge from the Regional Labour Court; one Federal Judge; one Labour Court Judge; one Federal Prosecutor; one State Prosecutor, two lawyers and two citizens (article 103-B 1988 Constitution).

The CNJ is responsible for the control of the administrative and the financial activities of the Judiciary Branch of power and the functional performance of judges. Similarly to the CNMP, the CNJ also is competent to assess the legality of administrative acts from the Judiciary Branch of Power at the Federal and State levels and its staff, and States may deconstruct them, revise them or fix deadlines for the adoption of necessary measures for the proper enforcement of the law without prejudice to the jurisdiction of the federal, state and municipal courts of accounts. The CNJ is also responsible for presenting facts to the MPU if a crime against the public administration is uncovered.

### ***Advocacia-Geral da União (AGU)***

The AGU is responsible for representing the Union judicially and extra-judicially, as well as undertaking the activities of legal consultancy and assistance to the executive branch of power (article 131 1988 Constitution). The AGU reports directly to the Presidency of the Republic. Therefore, the AGU is responsible for initiating any action in which the Union has suffered any loss. While the MPU will often initiate a criminal proceeding or a proceeding for administrative improbity of the corrupt public official, the AGU may initiate parallel civil proceedings to ensure punitive damages in favour of the Government for the damages incurred, or will participate in the prosecution conducted by the MPU as an assistant to the prosecution (*assistente de acusação*).<sup>49</sup>

<sup>49</sup> The *assistente de acusação* or the *assistente do Ministério Público* is foreseen in the Criminal Procedure Code of Brazil, and assists the prosecution in all phases of the criminal proceeding. The *assistente de acusação* is not mandatory (as the MPU is exclusively responsible for promoting criminal prosecutions) and is the victim (or close relatives in the event of death of the victim) of the crime which is being prosecuted. By allowing the victim to participate in the criminal proceedings, the Criminal Procedure Code of Brazil allows for the said person to take a more active role in the criminal proceedings.

### ***Ministério da Justiça (MJ) and Departamento de Polícia Federal (DPF)***

The MJ is responsible for, among others, defending the legal order of the Federal Government, the political rights and the constitutional guarantees (article 27, XIV, a) Law 10.683/2003), and the assets of the Federal Government and of the entities comprising the indirect federal public administration<sup>50</sup> (article 27, XIV, l) Law 10.683/2003). Within the MJ, two departments are of special importance to the present study: the DPF and the *Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional* (DRCI – Department of Assets Recovery and International Legal Co-operation).

The DPF retains exclusivity as the investigative police of the Federal Government (article 144, §1st, IV 1988 Constitution), and is responsible for, among others, investigating criminal offences against the political and social order or to the detriment of goods, services and interests of the Union or of its autonomous government entities and public companies, as well as other offences with interstate or international effects and requiring uniform repression (Article 144, §1<sup>st</sup>, I 1988 Constitution). The Minister of Justice is ultimately accountable for the actions carried out by the DPF.

DRCI is responsible for articulating, integrating and proposing the actions of the government in aspects related to the combating of money laundering, transnational organised crime, asset recovery and mutual legal assistance, and promoting the dissemination of information on asset recovery and mutual legal assistance, prevention and combating of money laundering and transnational organised crime in the country (article 11, I and VII, Decree 6.061/2007).

DRCI is also the secretariat for the *Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro* (ENCCLA – National Strategy for the Combating of Corruption and Money Laundering), in existence since 2003. The strategy began focusing only on money laundering but expanded to include corruption in 2006. It is an advisory body including the main federal and state agencies responsible for combating both corruption and money laundering effectively. Non-state actors are often invited to participate in the annual meetings as well. The agencies meet periodically to assess the execution and implementation of projects, and senior management and senior political figures convene once a year to agree on the new projects which are added to the pipeline.<sup>51</sup> At the time of its inception, the reasoning for establishing the ENCCLA was to bring together all the relevant stakeholders to discuss common challenges and the workflow in order to make the system more effective and accountable.

### ***Tribunal de Contas da União (TCU)***

The TCU is the Supreme Audit Institution of Brazil. Unlike the RSA, however, it is not an independent body – it is constitutionally part of the Legislative Branch. The external audit of accounts is the responsibility of the

<sup>50</sup> That is, all public entities which are not part of the central government, e.g., public foundations, public companies, etc.

<sup>51</sup> The annual reports and projects can be found on: <http://portal.mj.gov.br/data/Pages/MJ7AE041E8ITEMID3239224CC51F4A299E5174AC98153FD1PTBRNN.htm> (in Portuguese).

National Congress, which does it through the TCU (article 71 1988 Constitution).<sup>52</sup>

The TCU is required constitutionally (article 71 1988 Constitution):

- To examine the accounts rendered annually by the President, upon prior opinion to be prepared within sixty days of receiving the accounts;
- To evaluate the accounts of administrators and others responsible persons for monies, goods and public values of the direct and indirect administration, including foundations and companies instituted or maintained by the federal government, and the accounts of those who have caused the loss, misplacement or other irregularity resulting in losses to public funds;
- To assess, for registration purposes, the legality of acts of admission of personnel in any capacity, in the direct and indirect administration, including foundations instituted and maintained by the Government, as well as the grants of pensions;
- To conduct, in their own initiative, or of the Chamber of Deputies, the Senate, a technical committee or a committee of inquiry, inspections and audits of an accounting, financial, budgetary, operational and patrimonial nature, in administrative units of the Legislative, Executive and Judiciary branches, as well as other entities (e.g., entities of the direct and indirect administration, including foundations and companies instituted or maintained by the federal government);
- To control the national accounts of supranational companies in which capital from the Union is held, directly or indirectly, under the constituent treaty;
- To monitor the application of any funds transferred by the Union under a contract, agreement, arrangement or other similar instrument, to the State, the Federal District or a municipality;
- To provide the information requested by Congress, by any of their houses, or any of its committees, on the accounting, financial, budgetary, operational and patrimonial and the results of audits and inspections made;
- To apply to those responsible in the event of illegal expenses or irregular accounts, the sanctions provided by law, and to establish, among other penalties, a fine proportional to the damage caused to the exchequer;
- To define a period for the agency or entity to take the action necessary for the proper enforcement of the law, if illegality is found;
- To suspend, if not met, the execution of the contested act, advising the decision to both houses of the National Congress;

<sup>52</sup> In accordance to article 70 Constitution: “the accounting, financial, budgetary, operational and patrimonial monitoring of the Union and the entities of the direct and indirect administration, in regards to the legality, legitimacy, savings, implementation of grants and waiver of revenue shall be exercised by Congress, through external controls, and through the internal control system of each Power.”

- To inform to the responsible branch of power on the irregularities or abuses found.

### ***Comissões Parlamentares de Inquérito (CPI)***

The CPIs play an important role in the combating of corruption in Brazil since the return of civilian government. They are foreseen in article 58, §3<sup>rd</sup> 1988 Constitution. Either house can initiate the CPIs, although they can also be done with representatives of both houses. Constitutionally, CPIs have the same powers of investigation as judges, as well as others which may be foreseen in the internal regulation of the National Congress.

In order to initiate a CPI, a specific fact must be cited (article 1st, Law No. 1578/1952), and a one-third approval in either house of the National Congress (article 1st, sole paragraph Law No. 1578/1952). Once the Parliamentary investigation is concluded, the final report is taken to vote and upon approval, it is submitted, along with the evidence collected, to the appropriate authorities for action (e.g., DPF for further investigation of criminal acts, and the MPU for criminal prosecution).

### **Conclusion**

The Brazilian system is quite approximate in many ways to the anti-corruption model of the RSA. While Brazil also has a comprehensive system and legislation to combat and prevent corruption, it still faces many practical hurdles in order to more effectively tackle the problem. These include, but are not limited to, the slow criminal and civil procedural system with which the country is faced, along with an overburdened judiciary, which make the prosecutorial efforts less effective, as well as deficient workflow processes between the several agencies in order to more effectively co-ordinate their efforts to achieve the desired results. In that regard, the DRCI has been focusing, since 2003, in more effective workflow processes through the ENCCLA with the relevant Federal and State stakeholders which are responsible for preventing and combating corruption, money laundering and serious crimes. This is done at the policy level with specific goals which are to be reached annually. Over the years, countries neighbouring Brazil have requested, and have been invited to participate as observers in the such a co-ordination mechanism.

At the operational level, the sharing of intelligence between the institutions is also not streamlined, despite the fact that most of the institutions discussed above are part of the intelligence cluster – the *Sistema Brasileiro de Inteligência* (Brazilian Intelligence System or SISBIN) – of the government. Several government agencies are still reluctant in allowing the sharing of the information and intelligence each of them possess with one another, primarily due to privacy concerns. Furthermore, several challenges arise due to the federated system of government, which further fragment the overall anti-corruption corruption system. As an example, ID cards in the country are the competence of the states and not the federal government. As the databases are not centralised, it becomes cumbersome to identify persons which may be subject to investigations and prosecutions.<sup>53</sup>

<sup>53</sup> The federal government has two documents which it can rely for the identification of persons: the Cadastro de Pessoas Físicas (CPF or the tax identification number), and the título de eleitor (voting

The Brazilian example demonstrates some of the challenges that can be found in a multi-agency model for the prevention and combatting of corruption. While specialisation is needed in different fields, e.g., prevention, enforcement, financial investigation and audit, a lack of co-ordination between the responsible agencies and of a coherent policy framework aligning their activities detracts their effectiveness.

## 5.2 Kenya

Kenya's anti-corruption efforts began in 1956 with the Prevention of Corruption Act (Cap. 65), which remained in place from 1956 to 2003. The Prevention of Corruption Act (Cap. 65) was amended in 1997 to provide for the establishment of the Kenyan Anti-Corruption Authority (KACA), which was one of the first attempts to institutionalise anti-corruption mechanisms and agencies into the legislative framework. However, political opposition and particularly decisions by the High Court undermined the power of the KACA. In 2000 the High Court further held that the statutory provisions establishing the KACA were in conflict with the Constitution, which essentially ended the existence of the KACA.<sup>54</sup>

In 2004 new efforts were initiated by the newly elected National Rainbow Coalition (NARC) government under the leadership of President Kibaki. His political campaign promised to fight corruption, and once in power his administration introduced two key pieces of legislation. In May 2003, the Anti-Corruption and Economic Crimes Act (ACECA) and the Public Officers Ethics Act became operational and repealed the former anti-corruption legislation.

The ACECA provided for the creation of the Kenya Anti-Corruption Commission (KACC). The establishment of the KACC was part of Kibaki's commitment to eradicate corruption, improve good governance and foster transparency in all sectors. Furthermore, by placing John Githongo, the former director of Kenya's Transparency International National Chapter, as head of its institution, the Kenyan government reinforced their initial political will (Otieno, 2005).

After these developments, the KACC began its work but realised that political as well as judicial opposition remained strong and hindered its efforts to investigate and prosecute bribery cases. Thus, after two years of continuous struggles against opposing groups within Kenya's public and private spheres, Githongo resigned. Without a constitutional mandate and powers to prosecute, the KACC faced increasing criticism and could not provide a success story in prosecuting its major cases that had been under investigation. Both major corruption scandals, the Anglo-Leasing schemes and the multi-billion Goldenberg corruption scandal, are examples where the KACC found itself incapable of successfully investigating and holding the key players responsible. Moreover, the Anglo-Leasing schemes continued to operate

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title). These documents, however, do not contain photographs of the persons, and thus require the state-issued identification in order to identify the persons.

<sup>54</sup> A Constitutional Court held that KACA's existence was a violation of the constitutional separation of powers and consequently found that it was unconstitutional. See the Ruling in *Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic of Kenya* in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000.

within the new administration of Kibaki, which expressed its commitment to fighting corruption in all sectors. Scandal began before Kibaki took office, and it continued seamlessly from the first day of his administration.<sup>55</sup>

Due to the ratification of the new constitution in 2010, the KACC was replaced by the Ethics and Anti-Corruption Commission (EACC) which is in contrast to the KACC now constitutionally entrenched (Gathii, 2010). Within 10 years, Kenya's Anti Corruption Agency underwent major institutional changes regarding its ACA's. Kenya's experience may therefore serve as a valuable case study in identifying what the challenges were and what lessons can be learned from the country's fight against corruption. The focus in the following sections will be the legislative and institutional framework before moving forward onto the organisational characteristics of the KACC in order to determine lessons from the KACC.

### **Kenya's Anti-corruption legislative and institutional framework**

The enactment of ACECA and the Public Officers Ethics Act in 2003, as well as a large number of new laws, set the groundwork for the newly elected NARC government to address corruption.

In addition, Kenya has ratified the UNCAC, and signed the African Convention on Preventing and Combating Corruption and the African Union Anti-Corruption Convention.

The ACECA provides the KACC with the mandate to investigate corruption and economic crimes and conduct public education on corruption, which also applies to the new body EACC (ACECA, 2003). The Public Officer Ethics Act addresses, on the other hand, provisions on conflict of interest, codes of conduct for all public officers and requirements of all officers to declare their wealth including that of their spouses and dependent children (Public Officers Ethics Act, 2003).<sup>56</sup>

This legislative reform was accompanied by various agencies that have been introduced. Besides the KACC as the lead agency, other agencies such as the Steering Committee on Corruption, the Ministry of Justice and Constitutional Affairs, the office of the Auditor General, and the office of Permanent Secretary for Governance and Ethics were in place.

The KACC Advisory Board was, for instance, also established under the ACECA and subsequently removed in 2010 as part of the reconstitution. It consisted of twelve members and the Director of the Commission. The members of the Board were drawn from civic, religious, professional and business organisations and associations. The purpose of the Advisory Board was to advise the KACC generally on the exercise of its powers and the performance of its functions. The principal functions of the Board included: "to recommend the appointment of a person as the Director or Assistant Director of the KACC to the National Assembly; to recommend the termination of the appointment of a person as Director or Assistant Director to the President for being adjudged bankrupt or upon conviction for an offence

<sup>55</sup> The Anglo Leasing involved a series of dubious international financial transfers relating to government security contracts through several intertwined local and international firms. See for more information: <http://www.issafrica.org/pgcontent.php?UID=15642>.

<sup>56</sup> [http://www.sida.se/PageFiles/39460/Failure%20Anti\\_Corruption%20policy%20%282%29.pdf](http://www.sida.se/PageFiles/39460/Failure%20Anti_Corruption%20policy%20%282%29.pdf): 7

under the Criminal Code or Penal Code or the ACECA; to recommend to the Chief Justice the establishment of a Tribunal for the purpose of considering the removal of a person as Director or Assistant Director for inability to perform his functions or for involvement in corruption” (EAAACA 2009, 2).

The DPP within the Attorney General’s Office is responsible for prosecuting criminal cases. The Department, headed by the DPP has a team of State Counsels and a number of Special Prosecutors who prosecute corruption cases (EAAACA 2009, 2).

The National Anti-Corruption Steering Committee established under the Ministry of Justice National Cohesion and Constitutional Affairs spearheads the public awareness campaign against corruption. It draws its members from among the various stakeholders including the Government, religious organisations, civil society, media, universities, women’s organizations and the private sector (EAAACA 2009, 3). The Ministry of Justice and Constitutional Affairs is charged with the responsibility of developing anti-corruption strategies, co-ordinating and facilitating the fight against corruption (Ibid). Although there are a several institutions and agencies in the fight against corruption, the KACC was the lead anti-corruption agency.

### **The Kenya Anti-Corruption Commission (KACC)**

The structure of the KACC followed a three-pronged approach, based on investigation, public education/advisory and civil recovery/restitution. According to Mwige, “the application of the anti-corruption strategy in Kenya has been borrowed heavily from the Malaysian model.” (2006, 57). Both the Malaysian and the KACC have no powers of prosecution. The former Kenyan Anti-Corruption Commission, KACA, was equipped with power to prosecute; however, that agency existed for two years only.

The newly established KACC had four key responsibilities, which were given by the ACECA:

- **Investigative function:** The KACC shall investigate any matter that constitutes corruption or economic crime and the conduct of any person that is conducive to corruption and economic crime.
- **Advisory function:** At the request of any person, the KACC shall advise and assist the person or any public body on ways in which the person or body may eliminate corrupt practices.
- **Educative function:** The provisions mandate the KACC to educate the public on the dangers of corruption and economic crimes and to enlist their support in combating corruption in the country.
- **Restitutionary function:** The KACC has the mandate to investigate the extent of liability for the loss or damage to any public property, and to institute civil proceedings against any person for the recovery of such property or for compensation; and to restore such property to the public even if the property is outside Kenya (ACECA, article 7).

In order to fulfil these various functions the KACC has four directorates that specialise in the delivery of each mandate:

- Directorate of Investigation and Asset Tracing
- Directorate of Legal Services and Asset Recovery

- Directorate of Research, Education, Policy and Preventive Services
- Directorate of Finance and Administration.

KACC was able to receive oral and written complaints from members of the public and other institutions. It also extracted relevant cases of corruption from media, audit and Parliamentary reports, and generally from other investigative or administrative agencies.

Under the ACECA Act, the KACC had the power to initiate an investigation into corruption and economic crime but could only recommend prosecution to the Attorney General.

The legislative framework provides also for the independence of the KACC. The ACECA states in Articles 10 and 12: “Independence of Commission and Director: In the performance of their functions, the Commission and the Director shall not be subject to the direction or control of any other person or authority, and shall be accountable only to Parliament”.

A further key aspect is that the KACC had the mandate to cooperate with other institutions to facilitate exchange of information. Article 12 of the ACECA states in this regard: “The Commission may in the performance of its functions work in co-operation with any other persons or bodies it may think appropriate, and it shall be the duty of any such person or body to afford the Commission every co-operation”.

Besides the institutional and structural set up of the KACC, it is worthy to take note of its capacity. According to the KACC Annual Report in 2010, the Commission had sufficient staff and continued to maintain highly skilled staff by training them in various specialised fields and recruiting others to fill vacant positions (EAAC 2010, 51).

Despite an adequate legislative framework and institutional capacity, the KACC was unable to achieve success in its fight against corruption, and was subsequently replaced by the EAAC. The following deficiencies analysed under the next heading may provide valuable lessons.

### **Limitations and shortcomings of the KACC**

According to the assessed literature, the KACC had institutional as well as political limitations that hampered its efforts to prevent corruption.

One of the key aspects in the Kenyan example was the lack of the KACC’s mandate to prosecute. Even though the KACC had the capability to investigate and was equipped with forensic expertise, the inability to prosecute weakened its overall efforts in anti-corruption. Critics suggested that right from the creation of the KACC onwards, the agency should have had the power to prosecute. One of the reasons why the KACC was not granted the power to prosecute was a former decision by the Kenyan Constitutional Court, which held that these anti-corruption bodies established through acts of Parliament did not have the explicit power to prosecute anti-corruption crimes under the Constitution of Kenya (Gathii 2010, 55). The ACECA, introduced by Parliament, however, “[...] did not even suggest that the KACC would have the ability to prosecute, probably because Parliament still comprised of individuals who had benefitted immensely from corruption in the past” (Gathii 2010, 36).

The decision whether a case ought to be further investigated and/or prosecuted was also dependent on the Attorney General, who has the exclusive mandate to conduct criminal proceedings. In several cases, the Attorney General returned files received from the Kenyan Anti-corruption agencies for further investigation, refusing to prosecute anyone on the basis of the evidence presented (Lawson 2009).

In addition court decisions have even questioned the KACC's powers in the exercise of its investigatory mandate, and stopped the KACC investigative work in cases such as the Anglo-Leasing contracts (Gathii 2010, 54-55). Moreover, Kenyan courts have been unwilling to cooperate with KACC, which is indicated by sudden missing files at the courts, delays in handling cases and questionable rulings (Gathii 2010, 55). The KACC proved to be ineffective without autonomy and the cooperation of the judicial branch and the Attorney General, who even went so far as to block the efforts by the KACC (EAAACA, 2009, 36). As a result the KACC was limited to responding to reports received, and initiating investigations without the prospect of actually prosecuting its cases (Lawson 2009). The KACC acknowledged its own problems in their annual reports, which refer to challenges from the judicial branch, the inability to perform lifestyle audits and no guaranteed protection to investigate (EACC 2011, xiii).

In light of these problems, Khemani argues for prosecutors and investigators to work in partnership under one body. This "ensures the specialisation and the streamlining of functions required to efficiently handle anti-corruption cases from beginning to end. It also allows for relationships and rapports to develop between investigators and prosecutors, which does not often happen when the two branches are separated." (Khemani 2009, 23). Khemani further argues that the lack of specialised knowledge in corruption cases in the Attorney General's Office or regular law enforcement requires a designated anti-corruption commission with an in-house prosecution unit. Therefore, it would have been advisable to designate one body with both investigative and prosecution power (Khemani 2009, 17).

### **Conclusion**

In the case of Kenya, where investigation and prosecution bodies are separated, inter-agency cooperation is crucial for an effective and efficient handling of corruption cases, particularly, where public sector institutions are not as developed, and rivalry and over-protection of information are predominant features (Khemani 2009, 28). These institutional limitations and further obstacles imposed by the judicial branch led to a decrease in public confidence in the KACC, which weakened its bargaining position against politicians and other groups opposing the work of the KACC.

Consequently, the weakening of the KACC was not simply due to its structural and legislative shortcomings but also due to political opposition and powerful groups within Kenyan society. According to Lawson, the struggle between political interests and the KACC was won by the politicians, in which President Kibaki and his inner circle marginalised the KACC, while the KACC leadership did little to improve its bargaining position. The KACC was therefore unable to build a network of international financial, investigative and/or moral support (Lawson 2009). Similarly Mwige argued, in reference to the former agency KACA, that failure was attributed to the fact that "the

authority became a focal point of suspicion and resentment by the political and economic elite” (2006, 57).

The Kenyan example demonstrates the challenges in sustaining political will in preventing and combating corruption. As mentioned in section 3.6.3 above, political will is dependent on knowledge, appropriate policy tools and the willingness to make use of such tools. While the KACC had the appropriate policy tools and the willingness to utilise them, difficulty in aligning such tools with the Attorney-General and the Judiciary played a toll in the overall effectiveness of the system. The anti-corruption architecture of the RSA should look at the Kenyan example with a view to assessing these challenges in sustaining political will by assessing its continuity of efforts in the preventing and combating corruption and by making the necessary adaptations in its own system in order to prevent facing the same challenges.

### 5.3 The New South Wales Independent Commission against Corruption (ICAC)

The NSW Government established the ICAC in 1989. It was created to ensure the integrity of public administration in NSW. At the time of creation of the ICAC, there were cases of corruption “among government ministers, within the judiciary and at senior levels of the police force” (ICAC 2012). As a result, the ICAC was created with the idea of installing an institution with powers similar to the ones of a Royal Commission.<sup>57</sup> Its legal basis is the Independent Commission Against Corruption Act 1988. This act has been amended a few times in the meantime; reference on important amendments will be made in the course of this subsection.

The powers of the ICAC can be summarised as follows:

- To investigate and expose corrupt conduct in the NSW public sector;
- To actively prevent corruption through advice and assistance; and
- To educate the NSW community and public sector about corruption and its effects.

The Commission has jurisdiction over all NSW public sector agencies (ICAC 2012). A separate institution, the Police Integrity Commission (PIC), which will be described separately in this subsection, deals with police corruption.

The powers of the ICAC are mainly preventive and investigative as it is active in such areas as investigating, reporting and educating on corruption. According to Heilbrunn’s different types of ACA models, the ICAC would follow the *parliamentary model* (U4 2007, 2).<sup>58</sup> The ICAC receives, analyses and assesses complaints and reports of alleged corruption, and conducts investigations, compulsory examinations and public inquiries into serious and systemic corruption (ICAC 2012). Those responsibilities are only curtailed by the extension of the mandate of the ICAC: complaints have to relate “to corruption involving or affecting the NSW public sector”. If there is no

<sup>57</sup> A Royal Commission in Commonwealth Countries usually is a commission established to inquire into ne specific cause. The Royal Commission into the New South Wales Police Service of 1994 for example, was established “to investigate the existence and extent of corruption in the NSW Police Service, and other related matters.” (New South Wales Government 2012).

<sup>58</sup> This is based on the fact that the Commission is overseen by a Parliamentary Committee, as will be described in the paragraphs dealing with the independence of the Commission.

connection to the NSW public sector or NSW public officials, the ICAC cannot become active. Moreover, the ICAC can also get involved if the NSW government refers a matter to it. Once the ICAC concludes a first assessment, it forwards all matters to an Assessment Panel for a decision about how each matter should be dealt with further. If the ICAC, based on the advice of the Panel, decides to start investigations – this being the case if the respective matter relates to serious and systemic corruption – it can “conduct public inquiries to obtain evidence of corruption” (ICAC 2012). The ICAC, however, cannot start prosecutions itself. It can only recommend the DPP who start a prosecution, and consequently assist the DPP in the preparation of the case (ICAC 2012).

On the educational side, the ICAC commissions studies pertaining to the risk areas of corruption in the public sector, and it also offers training and advice for public institutions, enhancing their capacity to prevent corruption. When making recommendations to public organs in its report, those reports are made public by the Presiding Officers of Parliament. Once such studies have been published and recommendations have been made, the ICAC ensures sustainability by monitoring the implementation of those recommendations.

Turning to evaluating the independence of the ICAC, it seems that a satisfactory balance has been struck between ensuring that there is no political interference and, at the same time, providing for appropriate oversight. The ICAC is “not subject to the direction of politicians, bureaucrats, any political party, or the government” (ICAC 2012). It does not have to account for its actions to any Government Minister. However, oversight is guaranteed by the following mechanisms that have been put in place: Firstly, there is the NSW Parliamentary Committee on the ICAC, which monitors the Commission’s performance and its reports. This Committee consists of 13 members of both houses of Parliament (Parliament of New South Wales 2012). Secondly, there is also the Inspector of the ICAC, which “oversees the ICAC’s use of investigative powers, investigates complaints against ICAC employees and monitors compliance with the law. The Inspector also monitors delays in investigations and any unreasonable invasions of privacy” (The Parliament of New South Wales 2012). The inspector was only established in 2005 with the Independent Commission Against Corruption Amendment Act 2005. The Act came about as a result of requests for greater accountability in relation to the extensive powers of the ICAC. Thirdly, there is also an eight-headed internal committee which oversees investigations and the use of the powers conferred on the ICAC (Heilbrunn 2004, 8).

Further to the guarantees of accountability, the ICAC, as soon as it starts an investigation at the demand of one of the two Parliament houses, or if it has conducted a public inquiry, has to report promptly to the NSW Parliament. To further enhance this accountability and ensure transparency of its operations, the ICAC has to publish an annual report including “statistics on investigations and report on educational and advisory activities” (ICAC 2012).

Lastly, a Code of Conduct for all members of the ICAC applies to ensure an internal mechanism of checks and balances. This Code sets “standards of ethical behaviour and decision-making expected of all ICAC employees and contractors” (ICAC 2012).

As for the structure of the ICAC, the Commissioner of the ICAC is appointed for a term of five years and must be qualified for appointment to the NSW Supreme Court (ICAC 2012). The suitable candidate must essentially be a former or potential judge of the Supreme, Federal or High Court (Ross, Merner & Delacorn 2011, 18). He or she cannot be re-elected and, according to public sources, earns “almost AUD 600,000 a year” (Millar and Fyfe 2012). Apart from the Commissioner, there is also an Assistant Commissioner, and directors of four operational units (Heilbrunn 2004, 8). The ICAC is accountable to NSW Treasury in relation to funding and expenditure (ICAC 2011, 54).

After studying the institutional set-up of the ICAC and its powers, legal basis and independence, it is deemed appropriate to commence an evaluation of the respective system, and identification of possible strengths and shortcomings. According to Heilbrunn (2004, 1), a dysfunctional ACA can be identified by a lack of independence from the executive, non-existing budgetary support from the legislature to investigate corrupt officials and a lack of procedures for forwarding cases for prosecution. Looking at the example of the ICAC, none of these points apply. Heilbrunn attributes to the ICAC a strong stance on prevention and success in that area (2004, 9). As far as corruption investigation is concerned, Heilbrunn sees its record as rather mixed, though (2004, 9). However, in order to evaluate the Commission’s success, it has to be taken into account that the ICAC is not a prosecuting authority. Its primary task is to investigate corruption and conduct educational activities. As a result, measuring the ICAC’s success by looking at the numbers of successful cases in which the Courts instituted corruption charges is short sighted. Since the Commission can merely assist in investigations, if the respective Prosecutor requires that assistance, a success or failure of a court case cannot per se be lead back to a failure of the workings of the ICAC.

The activities of the ICAC are transparent and made public through its annual reports in which it also lists statistics relating to “corruption exposure activities”, “corruption prevention activities”, “accountability activities”, “activities relating to our organization” and a financial overview. The fact that such statistics are readily available is an indicator of the integrity of the ICAC. Moreover, another strength of the Commission is the fact that its independence is sufficiently guaranteed with it being a statutory independent body while still having checks and balances in place with three different structures being responsible for its monitoring (Parliamentary Commission, Inspector of the ICAC and the internal committee). Also, the NSW Treasury audits the ICAC, which is also an important point when looking at integrity. Judging from the Commission’s annual reports, it appears that it has adequate financial means at its disposal since it was able to carry out a fair amount of activities. This is another point that is important to ensure political independence. Moreover, there were no reports to be found that indicated that the Commission had in the past been hindered or curtailed in executing its functions appropriately. The co-ordination with the prosecutor would appear to work in practice as well. According to the ICAC annual report 2010/2011, there were 18 persons prosecuted as a consequence of investigations of the ICAC (ICAC 2011).

As to potential weaknesses of the ICAC, one point of criticism could be the fact that its mandate is only and exclusively confined to public sector agencies. While this mandate in the context of public sector corruption at the time of its

creation is logical and understandable, initiating a debate regarding the potential extension of this mandate to the private sector could be worthwhile thinking about nevertheless.

### **The Police Integrity Commission (PIC)**

In addition to the ICAC, there is one more institution responsible for anti corruption in NSW. The PIC is responsible for detecting, investigating and preventing police misconduct. It essentially fulfils the functions that the ICAC fulfils in relation to the public sector with a specific focus on the NSW police (Police Integrity Commission 2012). Its legal basis is the Police Integrity Commission Act 1996.

The Royal Commission into the New South Wales Police Service was set up in 1994 to “to investigate the existence and extent of corruption in the NSW Police Service, and other related matters” (Police Integrity Commission 2012). The same commission recommended setting up a permanent commission to investigate serious police misconduct. As a result of this recommendation, the PIC fully came into effect in 1997. It is separate from and completely independent of the NSW Police Force (Police Integrity Commission 2012), and oversight is ensured by a Parliamentary Joint Committee. The Royal Commission was abandoned since it was substituted by the PIC, which is a permanent commission, in June 1997. The reason why oversight of the police was removed from the mandate of the ICAC and handed over to a separate institution was, according to Ross, Merner & Delacorn, the fact that the “Wood Royal Commission found corruption in the NSW police force that the ICAC had not detected” (2011, 18).

The responsibilities of the PIC are:

- Preventing, detecting or investigating serious police misconduct;
- Managing or overseeing other agencies in the detection and investigation of serious police misconduct and other police misconduct; and
- Managing matters not completed by the Royal Commission into the New South Wales Police Service (Police Integrity Commission Act 1996).

Important to note is that the two Commissions (ICAC and PIC) are completely independent from each other; however, the ICAC “lends its expertise on prevention and public outreach.” (Heilbrunn 2004).

### **Conclusions**

New South Wales is well equipped with two working agencies that are both active in corruption investigation and prevention, and sufficiently independent. Different examples of best practices from this country study could potentially be transferred to the example of South Africa. While the anti-corruption efforts in NSW are dealt through a single agency approach, both the ICAC and the PIC do not have prosecutorial powers. Thus, close co-operation and co-ordination between these two agencies and the DPP is necessary in order to sustain efficiency of the system.

Furthermore, the independence of the ICAC is balanced with several different oversight mechanisms. These are both external – the Parliamentary Committee

on the ICAC, responsible for monitoring its performance, and the Treasure, responsible for overseeing expenditure and funding – and internal – through the Inspector of the ICAC, responsible for investigating the conduct of the employees and the ICAC's compliance with the law. These oversight mechanisms have proven, for the NSW example, as a positive way of ensuring the independence of the ICAC and that it is free from political interference, while ensuring oversight of its activities.

The shortcoming of the example of the NSW is the fact that the ICAC does not have the authority to probe into private sector investigation. In accordance to its mandate, the ICAC can only investigate corruption involving or affecting the public sector.

## 5.4 Tunisia

### 5.4.1 The Anti-Corruption institutional framework before the Arab Spring

Tunisia has a comprehensive anti-corruption law to combat corruption.<sup>59</sup> With regard to the anti-corruption institutional framework, there was no central and independent anti-corruption agency under the former regime but a series of mandated departments embedded in other government agencies or in the court system.<sup>60</sup> The National Court of Accounts (*La Cour des Comptes*) and the Court of Suppression of Fraud (*La Cour de Discipline Financière*) are the two public institutions that have been centrally involved in the enforcement of anti-corruption laws.<sup>61</sup>

#### The Court of Accounts (CA)

The Court of Accounts was created by virtue of the Tunisian Constitution dated 1959. The mission of the CA is to audit the accounts and the management of the State and local authorities, administrative and non-administrative public institutions, public enterprises, and all entities of whatever nature in whose capital the State or the regional councils or the municipalities participate. It exercises its prerogatives in the form of a jurisdictional and administrative audit. Its activities also include auditing the accounts of political parties, and it receives asset declarations from certain officials upon their appointment and their discharge.<sup>62</sup>

The CA is the SAI in Tunisia. It conducts, independently, an ex-post facto external audit in accordance with relevant procedures and generally accepted audit standards. It sees to the proper management of public monies, and thus contributes to ensuring observance of the requirements of accountability, transparency and principles of good governance. The CA pronounces on the accounts of public accountants, and examines the financial statements of public entities and companies. It examines the conformity and quality of

<sup>59</sup> The Global Integrity 2008 evaluated the anti-corruption law of Tunisia as 'very strong'. The Tunisia Penal Code (Decree of 09/07/1913 and its followed revisions) contained specific provisions Corruption and related offences. The country ratified the United Nations Convention against Corruption (UNCAC) in February 2008.

<sup>60</sup> There was no real independent anti-corruption commission or agency in Tunisia. Generally officials appointed to these internal anti-corruption departments have close connections within the government, just like most government positions. There was no legal protection against political interference.

<sup>61</sup> <http://www.freedomhouse.org/report/countries-crossroads-2007/tunisia?page=140&edition=8&ccrpage=37&ccrcountry=172>

<sup>62</sup> <http://www.track.unodc.org/LegalLibrary/Pages/home.aspx>

management of public entities under the purview of its audit, and evaluates state strategies, programmes and financial contributions. It reports annually to the President of the Republic and the legislature on the results of its work. Its reports are accompanied by recommendations.

In terms of independence, the CA is established as a jurisdiction in its own right and, composed of magistrates, takes up accounts for examination, pronounces on them with full sovereignty, freely identifies the topics of its work, their scope and the results obtained as a result thereof.

However, in practice and specifically during the former regime, the CA was under the Council of State, which was headed by the President.<sup>63</sup> As a consequence, it was subject to significant political interference. According to Global Integrity 2008, the previous government under Ben Ali did not always act on the audit's findings. It has likely become ineffective due to patronage-based privatisation in the country and the involvement of the former President's family and high government officials in much of the malfeasance.

### **The Court of Suppression of Fraud (CSF)<sup>64</sup>**

Alongside the Court of Accounts, the Court of Suppression of Fraud (CSF) is a jurisdictional repressive entity of a financial character entrusted with suppressing management offences against the State, public administrative institutions, local Government and public companies.<sup>65</sup> However, although the CSF has a repressive nature, it does not belong to the criminal courts.<sup>66</sup>

Albeit the regulations determining the criminal, civil or disciplinary liability of public civil servants, financial legislation has stipulated a dedicated liability system under the purview of the CSF towards the offenders of mismanagement.

The CSF has cut itself a niche among the institutions entrusted with ensuring observance of budgetary regulations and proper use of public monies, alongside the CA which is analogous to it in this field.<sup>67</sup>

The jurisdiction of the CSF has been defined taking into account the capacity of the capacity of the party incurring the tort and the capacity of the party subject to its jurisdiction. Persons who commit management offences towards public entities which are subject to the rules of public accounting, as well as public entities that have come to fall under the term 'public companies' are subject to the CSF's jurisdiction.

In view of the above, any civil servant or employee of the State, administrative public institutions and local Government, as well as any manager, executive or staff of public companies found to have committed a management offence or

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<sup>63</sup> The State Council is composed of the Administrative Court and the Audit Office. The organization of the State Council and its two bodies are set by law, as are the jurisdiction of these bodies and the procedures applicable before them (Art. 69, Constitution of Tunisia).

<sup>64</sup> <http://www.courdescomptes.nat.tn>

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> Though the CSF is related to the CA, it nevertheless constitutes a separate financial jurisdiction and independent.

several offences, as stipulated in Articles 1 and 2 of Act No 74 of 1985, is subject to the jurisdiction of the CSF.<sup>68</sup>

The definition of “party subject to the jurisdiction of the CSF” belongs under a comprehensive formulation that encompasses all public employees. It is important to point out, though, that the CSF has no mandate except for such matters referred to it at the behest of the authorities eligible to engage legal proceedings.

Although intended to be applicable to all public officials, the mandate of the Court does not include persons holding certain political functions. Thus, the Speaker of the Parliament, the President of the Senate, the Prime Minister, the Ministers and the State Secretaries, in their capacity as principals (executives authorising disbursement of State expenditure), as well as the members of municipal councils not appointed by decree, are not subject to the jurisdiction of the CSF (new Article 8 of the Public Accounting Code). The interpretation given is that the management of these persons belongs to political liability and, therefore, does not belong within the scope of this Court’s jurisdiction.

As for deputy principals (assistant executives authorising disbursement of State expenditure), principals authorising expenditure of public entities and Local Government (other than municipalities), as well as mayors appointed by decree, they are subject to prosecution — in the event they commit management offences or contraventions in the exercise of their duties — by the CSF, regardless of other disciplinary or criminal action which may be applicable as the case may be.

There is a further exception related to hierarchy. Article 5 of Act No 74 of 1985 stipulates that any person committing a management offence shall not be sentenced as long as this person could produce written authorisation prior to the incriminated act, and in the existence of a dedicated report on the case issued by the Minister, State Secretary or authority to which this person is accountable. This written authorisation is effectively a transfer of liability to the administrative superior if the latter is subject to the jurisdiction of the Court. As can be seen, this is a gap identified in the anti-corruption system of Tunisia as such transfer of liability could potentially lead to a lack of oversight and application of the law, as the person producing the written authorisation could enjoy immunity from prosecution and not be subject to the CSF.

The CSF has the organisational structure of a Court of Justice with parity of representation between members of the CA and members of the Administrative Tribunal, whose appointment is based on a proposal by the Prime Minister and a submission by the First President of each of these two constitutional institutions which form the State Council. The members of the CSF are appointed by decree for a term of 5 years and they must be in active service.

The CSF has, by law, both the power to investigate and discretionary power in setting the amount of the fine. Conviction and fining decisions delivered by the CSF court are enforceable and not liable to review or appeal.

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<sup>68</sup> As a general rule, is considered a management offence against the State, public administrative institutions and Local Government any management act committed in violation of the laws, ordinances and regulations applying in the execution of the receipts and expenditures of the State, public administrative institutions and Local Government.

The CSF started its activities in 1987 when it took up the first cases referred to it, and delivered its first decision in January 1988. Since then, and until December 2005, the CSF delivered 261 decisions, including review appeal decisions and stay decisions, involving 360 civil servants who were the subject of legal proceedings. The CSF also drafted, as of 2005, 17 annual reports published in the Official Gazette (Journal Officiel) of the Republic of Tunisia, in which it presented a summary of its activities and an abstract of the decisions it delivered, especially those related to convictions and fines.

In addition to the above two bodies, i.e., the CA and the CSF, another public oversight body is the Institute of Security Forces and Customs, which is tasked with a number of duties including reducing corruption.<sup>69</sup> However, there were no public reports of the organisation's subsequent activities.<sup>70</sup>

#### **5.4.2 Transitional Anti-Corruption institutions established post Arab Spring**

The new interim government, which was formed after the fall of former President Ben Ali's 23-year regime, has taken a few positive steps towards combating corruption, which are discussed in more detail below.

##### **The National Fact-Finding Committee on Corruption and Embezzlement**

The National Fact-Finding Committee on Corruption and Embezzlement (*Commission chargée des affaires de corruption et de malversations*) was established in 2011 (by the Décret-Loi No 7 of 2011). The Committee is non-governmental, independent, apolitical and non-profit and has as a main objective to investigate the alleged cases of corruption and malfeasance that supposedly characterised the regime of President Ben Ali.<sup>71</sup>

In addition the Committee is tasked to ensure the application of the existing anti-corruption legislation and to make proposals for codification in the area which is not yet covered; to investigate cases of corruption and embezzlement and process requests from citizens and legal persons and other victims of such; to issue an opinion on any corruption case; to ensure that the State takes necessary measures to counter corruption acts in the national and international commercial transactions. The Committee may also take any action to combat or prevent corruption and malfeasance.<sup>72</sup>

The Committee analyses the complaints received and then forwards them to the competent judicial authorities.

Nevertheless, there have been concerns regarding the fact that the Commission was established without adequate consultation, and that it lacks strong enforcement and investigative mechanisms, e.g., subpoena power.<sup>73</sup>

<sup>69</sup> Global Integrity Report, 2008, Tunisia, viewed 30 May 2012,

<http://report.globalintegrity.org/Tunisia/2008/scorecard/88>

<sup>70</sup> *ibid.*

<sup>71</sup> La Commission Nationale d'Investigation Sur les Affaires de Corruption et de Malversation, viewed 30 May 2012,

[http://www.cnicmtunisie.tn/index.php?option=com\\_content&view=article&id=21&Itemid=27](http://www.cnicmtunisie.tn/index.php?option=com_content&view=article&id=21&Itemid=27)

<sup>72</sup> *ibid.*

[http://www.cnicmtunisie.tn/index.php?option=com\\_content&view=article&id=21&Itemid=27](http://www.cnicmtunisie.tn/index.php?option=com_content&view=article&id=21&Itemid=27)

<sup>73</sup> International Center for Transitional Justice, Conference Report, April 2011.

### Other recent anti-corruption initiatives in Tunisia

As recent as last April, the government of Tunisia took measures to focus more on transparency, good governance and the fight against corruption. Through a circular the government decided to:

- Create a good governance Unit within public structures. This Unit will be the sole contact point for governance and anti-corruption related issues,
- Handover to the ministry of governance and anti-corruption of all corruption cases files, progress reports as well as the decisions taken and those not already entered in force,
- Allow direct access or via website to public information, data, statistics, decisions, expenses, programmes as well as annual reports of the concerned public entity. All this should comply with legislation in force,
- Urge the public entities which do not yet have a website to launch ones in accordance with the regulations.

### Conclusions

In view of the above elements, it was not an easy task to make a clear statement on the effectiveness and efficiency of the Tunisian anti-corruption institutional framework. The traditional mission of the CA is to act as the external auditor of the public accounts. The mismanagement and corruption shared the same harm, which was the diversion of the resources of the State. Thus, the establishment of an independent CA (as a Supreme Audit Institution) with effective investigative powers should help fight corruption and embezzlement of public funds in Tunisia. As it has been previously stated, the two public institutions that have been centrally involved in the enforcement of anti-corruption laws in Tunisia were ineffective or weakened due to the interference of former President, Ben Ali's family and senior government officials.

It can be seen that Tunisia, during the Ben Ali regime, had several tools in place which in should have allowed for the prevention and the combating of corruption. However, patronage networks and exceptions in the law rendered those tools ineffective, as there was no willingness to apply these tools to prevent and combat corruption. To that end, the new government is taking positive measures and a series of initiatives to foster the anti-corruption institutional framework of Tunisia. However the effectiveness of these steps taken in the context of the transitional period can only be assessed in the long-term.

The Tunisian example demonstrates the damages which can be caused by undue political interference in the prevention and the combating of corruption. Thus, RSA should strive to shield the agencies with its anti-corruption architecture from any political interference and from patronage networks (e.g., through its SCM), which will not only undermine the public trust in state institutions, but also hamper the willingness in engaging in anti-corruption efforts.

## 5.5 United Kingdom

The anti-corruption system of the UK also takes a multi-agency approach. The anti-corruption architecture of the UK is comprised of at least 12 agencies or government departments with partial responsibility for corruption, and an additional 40 police forces (Krishnan and Barrington 2011, 14). Moreover, there is also the Independent Police Complaints Commission (IPCC). These agencies include the following (Krishnan and Barrington 2011, 14):

- Law enforcement agencies (including Ministry of Defence Police; HM Revenue and Customs; UK Border Agency);
- Law enforcement agencies with an explicit remit to tackle corruption (particularly the Serious Fraud Office (SFO), the Overseas Anti-Corruption Unit (OACU, which is based in the City of London Police Economic Crime Directorate) and Serious Organised crime Agency (SOCA);
- Government departments with internal investigative capacity (Department of Works and Pensions; National Health Service; HM Prison Service);
- Other non-departmental public bodies (Charity Commission; Standards for England);
- Organisations such as the Audit Commission;
- More than 40 police forces in the UK.

For the purposes of the present study, and due to the plethora of agencies in the UK, attention will be given to the agencies and Departments below, whose functions correlated to those found in the RSA:

- The Crown Prosecution Service (CPS);
- The Serious Fraud Office (SFO);
- The Overseas Anti-Corruption Unit of the City of London Police (OACU);
- The Serious Organised Crime Agency (SOCA);
- The Independent Police Complaints Commission.

It should be underscored that the UK does not have a single prosecution service as found in the RSA. Prosecution is done through the CPS, the SFO (who also has investigative powers) and the Revenue and Customs Prosecution Office (RCPO). All of these agencies are under the responsibility of the Attorney-General's Office (AGO). The AGO is the Chief Legal Adviser to the Crown and is a Cabinet Minister with the responsibility for supervising the prosecuting departments.

In order to ensure independence from political interference while ensuring appropriate checks and balances, as well as the impartiality of the prosecution services within the UK, the prosecutions services and the AGO signed a Protocol<sup>74</sup> in July 2009. The Protocol sets guidelines for the relations of the

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<sup>74</sup> The Protocol is available at <http://www.sfo.gov.uk/media/14950/protocol%20between%20the%20attorney%20general%20and%20the%20prosecuting%20departments.pdf>.

Prosecuting Departments with one another and the AGO, and states, among others, that:

- The AGO will not be consulted unless a decision is required from the Attorney General by law (Paragraph 4(c) Protocol between the Attorney General and the Prosecuting Departments);
- The AGO will not be consulted in: (i) prosecution decisions relating to Members of Parliament (including peers) or Ministers; (ii) prosecution decisions in cases relating to political parties or the conduct of elections; and (iii) any case in which the relevant Law Officer considers that the Attorney General has a personal or professional conflict of interest in accordance with the relevant professional codes (Paragraph 4(c) Protocol between the Attorney General and the Prosecuting Departments);
- The AGO may additionally ask for information about an individual case in order to perform another of its functions, such as considering potential contempt of court, making references on a point of law, or deciding whether to defer an unduly lenient sentence. This does not involve consultation on any prosecution decision by the Director (Paragraph 4(d)5 Protocol between the Attorney General and the Prosecuting Departments).

### **Crown Prosecution Service (CPS)**

The CPS is a government department responsible for prosecuting criminal cases investigated by the police in England and Wales, and was created by the Prosecution of Offences Act, 1985 (POA). The head of the CPS is the DPP who is, as stated earlier, accountable to the AGO, who in turn is accountable to Parliament for actions of the CPS. It is an independent body responsible for:

- Advising the police on cases for possible prosecution;
- Reviewing cases submitted by the police;
- Preparing for and presenting cases in court.

The CPS does the majority of prosecutions in the UK. The DPP is responsible for issuing the Code for Crown Prosecutors<sup>75</sup> (Section 10 POA), which gives guidance to prosecutors on the general principles to be applied when making decisions about prosecutions. Generally, a Crown Prosecutor (or the SFO when undertaking prosecutions) applies a two stage test (Nicholls et al 2006 p. 103):

- On the evidence, in respect of each potential defendant: is there a realistic prospect of securing a conviction?
- If so: does the public interest require a public prosecution?

The Code for Crown Prosecutors indicates that “if the suspect was in a position of authority or trust and he or she took advantage of it,” it is considered to be common interest factors tending in favour of the prosecution (Rule 4.16).

<sup>75</sup> The Code for Crown Prosecutors is available at <http://www.cps.gov.uk/publications/docs/code2010english.pdf>.

### The Serious Fraud Office (SFO)

The SFO was created through the Criminal Justice Act 1987 (CJA), and is responsible for investigating and prosecuting serious and complex fraud (Sections 1(3) and (4) and 2(1) CJA).<sup>76</sup> The SFO may initiate proceedings which appear to relate to fraud (Section 1(5)(a) CJA) or take over the conduct of any such proceedings at any stage (Section 1(5)(b) CJA). Similarly to the DPP, the Director of the SFO is accountable to the AGO, who, in turn, is responsible to Parliament for the SFO (Section 1(2) CJA).

Furthermore, the SFO may conduct any investigation in conjunction either with the police or with any other person (Section 1(4) CJA). The powers of investigation may be exercised by the SFO in any case in which it appears that there is good reason to do so for the purpose of investigating the affairs of any person (Section 2(1) CJA).

It should be noted, however, that the SFO does not prosecute every single case of fraud and corruption. Prior to taking a case (whether for investigation or prosecution), the SFO considers the following key factors (Section 2(1) CJA):<sup>77</sup>

- Does the value of the alleged fraud exceed GBP 1 million?
- Is there a significant international dimension?
- Is the case likely to be of widespread public concern?
- Does the case require highly specialised knowledge?
- Is there a need to use the SFO's special powers, such as Section 2 of the Criminal Justice Act?
- Whether the case involves or linked to organised crime;
- Whether the fraud will impact the integrity of the financial market;
- Whether there is a wider group than shareholders or creditors who have lost money as a result of the alleged fraud
- Whether the case involves multiple countries
- Whether the evidence to be obtained during the course of the investigation will be found in multiple locations;
- Whether the case involves multiple and complex financial transactions;
- Whether the investigation will need to involve a large accountancy analysis.

With regards to the UK Bribery Act 2010, the Director of the SFO (or of the CPS, if the bribery does not have an element of serious or complex fraud) must personally give his or her consent for the initiation for proceedings under said Act (Section 10(1)(b) UK Bribery Act 2010).

<sup>76</sup> A corruption investigation under the CJA is possible provided there is the element of serious or complex fraud (Nicholls et al 2006, 102).

<sup>77</sup> available at <http://www.sfo.gov.uk/about-us/our-policies-and-publications/does-the-fraud-fit-sfo-criteria.aspx>

### **Overseas Anti-Corruption Unit of the City of London Police (OACU)**

The OACU is primarily responsible for investigating allegations of corruption and bribery by UK companies or nationals engaged overseas. The City of London Police and the SFO have a MoU through which there is a responsibility of maintaining a register of all allegations of bribery or corruption of overseas officials by British persons and companies (Macaulay and Hickey 2011, 19). The OACU and the SFO will assess the allegations and allocate the cases to the investigative agency best equipped to deal with the investigation (Macaulay and Hickey 2011, 19).

### **Serious Organised Crime Agency (SOCA)**

SOCA is an independent executive body under the Home Office established under the Serious Organised Crime Agency Act 2005 (SOCA Act), which has the responsibility of preventing and detecting serious organised crime (Section 2(1)(a) SOCA Act), and contributing to the reduction of such crime in other ways and mitigation of its consequences (Section 2(1)(b) SOCA Act). SOCA has the power to investigate an offence of cheating the public revenue if the offence involved or would have involved a loss, or potential loss, to the public revenue of an amount not less than GBP 5,000.00 (Section 61(2) SOCA Act).

SOCA is responsible for gathering, storing, analysing and disseminating information relevant to the prevention, detection, investigation or prosecution of offences (Section 3(1)(a) SOCA Act), and is authorised to disseminate such information to police forces established in Section 3(3) SOCA Act, any law enforcement agency, any special police forces<sup>78</sup> and other persons as it considers appropriate, in connection to matters mentioned in Section 3(1) SOCA Act (Sections 3(2)(a) through (d) SOCA Act). SOCA further has the power to institute criminal proceedings and support any activities of the authorities mentioned in Section 3(2) SOCA Act as well as enter into arrangements for co-operation with bodies or persons which it considers appropriate, in the UK or elsewhere (Section 5(2) SOCA Act), with the exception of requests for mutual legal assistance or requests to which SOCA does not have functions under the SOCA Act (Section 5(6) SOCA Act).

With regards to serious or complex fraud, SOCA is authorised to conduct the investigation after the SFO has agreed to it (Section 2(3) SOCA Act), and the function exercised by SOCA thereupon may not be raised in any criminal proceedings (Section 2(6) SOCA Act).

### **Independent Police Complaints Commission (IPCC)**

The IPCC was created by the Police Reform Act 2002 (PRA). It is overseen by a Chair (appointed by the Crown on the recommendation of the Home Secretary), 10 operational Commissioners and two non-executive Commissioners (which are appointed by the Home Secretary), which must not have a police background (Section 9 PRA). Its functions include, but are not limited to securing that public confidence is established and maintained in the existence of suitable arrangements with respect to those matters and with the operation of the arrangements that are in fact maintained with respect to those

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<sup>78</sup> Special police forces are understood as the Ministry of Defence Police, the British Transport Police Force, the Civil Nuclear Police Constabulary and the Scottish Drug Enforcement Agency (Section 5(5) SOCA Act).

matters (Section 10(1)(d) PRA). The term ‘those matters’ is to be understood as (Section 10(2) PRA):

- The handling of complaints made about the conduct of persons serving with the police;
- The recording of matters from which it appears that there may have been conduct by such persons which constitutes or involves the commission of a criminal offence or behaviour justifying disciplinary proceedings (Section 10(2)(b) PRA);
- The manner in which any such complaints or any such matters as are mentioned in Section 10(2)(b) PRA are investigated or otherwise handled and dealt with.

Not all complaints or conduct have to be referred to the IPCC. It is a requirement, nevertheless, to refer, among others, complaints alleging serious corruption (Schedule 3 paras 4(1) and 13(1) (Nicholls et al 2006, 108).

### Conclusions

The UK anti-corruption system in many respects can be closely linked with the experience in the RSA. The principle under which the intelligence gathering, investigation and prosecution of cases is housed under the same institution, as is the case of the SFO, seems to have been a clear inspiration to early efforts of the anti-corruption architecture of the RSA, through the creation of the DSO.

However, under the BAE investigation,<sup>79</sup> the UK anti-corruption system was put to the test and several vulnerabilities – especially those relating to autonomy of investigation and prosecution and political interference. As a response, however, the prosecution services and the AGO responded by signing a Protocol to ensure clarity in the relation between the prosecution services and the Cabinet Minister accountable for them. This in turn ensured greater transparency and accountability.

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<sup>79</sup> The BAE investigation was conducted by the SFO into an alleged GBP 20 million slush fund in connection with an arms deal between BAE and Saudi Arabia (known as the Al-Yamamah arms deal). The investigation followed a story from British press concerning the slush fund in 2003. The SFO investigation was curtailed in December 2006 following political intervention from the Prime Minister, who urged the Attorney-General to close the investigation citing “real and imminent damage to the UK’s national and international security and would endanger the lives of UK citizens and service personnel.” A Judicial Review of this decision was granted in 2007, and the High Court ruled that the SFO had acted unlawfully by dropping its investigation. This decision was overturned by the House of Lords, which stated that the decision to discontinue the investigation was lawful.

## 6. Comparative Analysis Between Selected Models and South Africa

Most of the anti-corruption models selected (with the exception of the ICAC), as with to the RSA, follow the multi-agency approach to preventing and combating corruption. As can be seen, the approach requires close co-operation and co-ordination between the relevant stakeholders to ensure an effective system in the prevention and combating of corruption.

While on the one hand anti-corruption architecture of the RSA has highly specialised institutions ready to prevent and combat specific aspects of corruption (e.g., tax-related corruption, corruption in the police services), it also has, on the other hand, all-encompassing institutions which have a more general role in preventing and combating corruption (e.g., the NPA responsible for prosecuting corruption and the DPSA and the PSC responsible for setting guidelines and minimum requirements to prevent corruption). It further has co-ordination fora which seek to bring the relevant stakeholders together to discuss ways forward in the fight against corruption. These fora also include non-state actors (as is the case with the NACF), which are an essential component in the fight against corruption. With regards to the inclusion of non-state actors in the anti-corruption architecture – a requirement under article 13 UNCAC – most of the reviewed countries appear not to have taken such an approach.

However, many of the institutions and fora created for the prevention and combating of corruption in the RSA are non-statutory. While it is in fact not necessary to ensure that all of these institutions are based in law, not having such a foundation may reduce their overall impartiality, as they are not subject to the checks and balances of the multiple branches of power and may be disbanded by the respective power that created them. The non-statutory nature of such bodies may also raise issues around their mandate, authority and accountability.

In that regard, it should be noted that, out of the selected models that have been reviewed, Brazil has also set up a number of anti-corruption institutions through bylaws (*Decretos*). These bylaws, while subject to the discretion of the President of the Republic, are in fact explanatory decrees of anti-corruption requirements which have been set up in law. Thus, while the SPCI was created under Decree No. 5.683/2006, said Decree in fact is based on the set-up of the CGU based on article 17, §1st of Law No. 10.683/2003. On the other hand, the RSA experience indicates that many, if not all, of these non-statutory bodies have been created based on the Presidential Proclamations or on government policy decisions which in turn may not have been based on appropriate statutes, or which may not have adequately taken into consideration the existing legal framework.

As a consequence, and due to the fact that the co-ordinating fora do not appear to effectively co-ordinate the actions undertaken by the institutions responsible for preventing and combating corruption, overlapping structures have been created without taking into consideration the anti-corruption architecture of the RSA and several co-ordination structures were created over time without formally disbanding previous ones (as is the case between the ACCC and the

ICM). The role each of the existing institutions in the RSA has to play in the prevention and combating of corruption is greatly strengthened with the integration and co-ordination of their activities, which need to be done both at the policy and operational levels through a sound decision making process respecting the legal mechanisms made available to that effect.

Moreover, the anti-corruption framework of the RSA has to ensure that the legal mechanisms that have created the bodies also enjoy appropriate checks and balances between the branches of power. This is to ensure that, on the one hand, these bodies enjoy autonomy while discharging their duties without the risk of having actual or perceived political interference. On the other hand, an appropriate level of oversight and accountability must be retained so as to ensure that these do not overstep in their authority. To that end, the ICAC demonstrates an interesting example for comprehensive mechanisms for accountability, having three independent bodies overseeing its actions: the NSW Parliamentary Committee on the ICAC (responsible for monitoring the performance of the ICAC and its reports); the Inspector of the ICAC (responsible for overseeing the use by ICAC of its investigative powers); and the internal committee of the ICAC (responsible for overseeing the investigations). In such an example, while the ICAC is still accountable to Parliament, it has mechanisms to ensure that it retains its independence and integrity within.

Another important element in the comparative analysis is the case of Tunisia. While Tunisia fared better than the RSA in Transparency International's Corruption Perception Index (CPI) and also had an anti-corruption system in place, it is possible to see that the system itself was fraught with exceptions which allowed patronage networks to overtake it and essentially render it useless. It is not within the scope of this study to discuss elements of state capture through corruption and patronage networks, but it is evident that, even with checks and balances in place, the system was ineffective due to the immunity clauses it contained. To that end, the RSA must protect its anti-corruption architecture from any mechanisms which may render the overall process redundant, as was seen in the case of pre-Arab Spring Tunisia.

Similarly, in Kenya, the KACC retained autonomy for investigating corruption. However, it was ultimately dependent on the Attorney-General for prosecution, responsible for the prosecution. This interdependence reduced the efficiency of the Kenyan anti-corruption system and allowed for political interference through the Attorney-General (who could choose not to prosecute).

With regards to the current situation of the anti-corruption architecture of the RSA, it is possible to see an increase in the number of institutions that have been revised, created or extinguished in the last four years. It is important that, prior to any process seeking to alter existing institutions or establishing new ones, that the current architecture be reviewed and understood in terms of its shortcomings and gaps. An example of such a new institution is the ICM. While it was created in 2010, it is still unclear to government departments what its role is and how it is to interact with existing structures such as the ACCC.<sup>80</sup> More importantly, these changes to the anti-corruption architecture

<sup>80</sup> As mentioned in Section 4.3.7 above, it is not clear whether the ACCC is still operational, as it seems to not have convened in the last two years. Nevertheless, it is still a formal structure which has

of the RSA appear to be done so without any clear strategy or overarching framework. Without a sound mapping of the structures in place, as well as their functions and roles within the anti-corruption architecture, the actions taken to prevent and combat corruption seem disjointed and allow for overlaps and duplication of efforts.

In this regard, a lack of cohesive effort at both the policy and operational level led to the creation of the ENCCLA in Brazil. A group of Ministries and State institutions informally convened with the purpose of mapping the challenges each of them faced in combating corruption and money laundering. This led to a group effort to change the policies in place and to create the necessary momentum for legal and regulatory changes which enabled further co-ordination amongst them at the operational level. While there is a risk of dissolution of the ENCCLA due to the fact that it has never been formally created through a law or bylaw, creating it in such a way also empowered the convening members which felt greater ownership and accountability in the process and its outputs. In this sense, the example can be considered positive, as in ENCCLA 2012 64 institutions (at the federal, state and municipal levels, as well as non-state actors), up from 28 institutions in ENCCLA 2004.

At the operational level, the RSA has a multitude of institutions responsible for, whether directly or indirectly, combating corruption through specific mechanisms conferred to them. However, as can be seen in the case of the AFU and the SIU, it is possible that these different institutions may duplicate their efforts without necessarily overlapping their functions. To the extent possible, as especially because the SIU, for example, is dependent on Presidential Proclamations to initiate its activities, the mandates of the institutions responsible for combating and preventing corruption should be as clear as possible.

Another point to be raised is ensuring the effective impartiality of investigations and prosecutions. Most of the institutions are independent, although a Cabinet Minister is ultimately accountable to them before the National Assembly. The UK was also faced with this dilemma in the BAE case, when the AGO – a Cabinet Minister – decided to close the investigations due to national interests.<sup>81</sup> As a result, and to ensure both the powers granted to the AGO and the impartiality of the prosecutions services within the UK, a protocol was signed between the relevant parties establishing the criteria and rules to ensure all the necessary elements for a proper prosecution. As such, the RSA should seek to do the same with the relevant institutions which, although independent, are accountable to a Cabinet Minister. This would also further satisfy the requirements set out by the Constitutional Court in the Glenister case. This example can be furthered in connection to the relationship between the President and the SIU, ensuring that the interdependence relates to the powers conferred to the president to empower the SIU to conduct certain investigations, but not to interfere in them in any way.

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not been disbanded by government and, for this matter, could still formally convene at any moment or be used as a mechanism of opposition to the ICM itself through political manoeuvring.

<sup>81</sup> <http://www.independent.co.uk/news/business/news/campaigners-win-judicial-review-of-bae-arms-case-399798.html>

## 7. Conclusions and Recommendations

### 7.1 Conclusions

The RSA contains a comprehensive set of measures and institutions dedicated to the prevention and the combating of corruption. Such measures and institutions seek to address the four points mentioned above. Over the last 12 years, the RSA has set up a comprehensive number of institutions and co-ordination mechanisms – either through law or regulation – to better respond to its corruption challenges. Some have faced constitutional challenges, while others have been eliminated, or perfected over time to meet and tackle new challenges faced.

Thus, the anti-corruption architecture of the RSA currently has 14 different agencies (including its sub-units) as well as five different co-ordination mechanisms to prevent and combat corruption. These have been reviewed in section 4 above, and are the following:

1. Agencies responsible for preventing and combating corruption:
  - a. Department of Public Service and Administration (DPSA): responsible for public service management and systems. It is further responsible for the MACC.
  - b. Independent Police Investigative Directorate (IPID): responsible for providing an independent and impartial investigation of certain criminal offences allegedly committed by members of the SAPS and MPS.
  - c. National Intelligence Agency (NIA): responsible for providing intelligence support to investigating units.
  - d. National Prosecuting Authority (NPA): responsible for instituting and conducting criminal proceedings on behalf of the RSA.
    - i. Asset Forfeiture Unit (AFU): responsible for the freezing and seizing of assets through Chapters 5 and 6 of the POCA.
  - e. National Treasury: responsible for policy on financial management, including risk assessment and SCM. It also maintains a register of natural and legal persons debarred from public tenders and contracts.
  - f. Public Protector (PP): responsible for investigating and making reports to the State on any conduct which may have resulted in prejudice to citizens.
  - g. Public Service Commission (PSC): responsible for investigating, monitoring and evaluating public service systems, policies, controls and practices.
  - h. South Africa Police Service (SAPS): responsible to investigate all criminal allegations, including corruption.

- i. Directorate for Priority Crime Investigation (DPCI): responsible for the prevention, combating and investigation of national priority offences.
  - i. South Africa Revenue Service (SARS): responsible for investigating tax-related corruption.
  - j. Special Anti-Corruption Unit (SACU): responsible for supporting departments with managing corruption cases from investigation to conclusion, and enhancing and consolidating the fight against corruption in the public service.
  - k. Special Investigating Unit (SIU): responsible for investigating unlawful expenditure, serious maladministration, loss of public goods and corruption in public organisations through civil recovery.
  - l. The Auditor-General (AGSA): responsible for conducting compliance, forensic and performance audits and reports on accounts, financial statement of all institutions funded through State funds.
2. Co-ordination Mechanisms
  - a. Anti-Corruption Co-ordinating Committee (ACCC): tasked with the responsibility of implementing the said PSACS.
  - b. Anti-Corruption Inter-Ministerial Committee (ICM): created with a view to reviewing the mandate of the ACCC. Its structure appears to be unclear, even within the government.
  - c. Anti-Corruption Task Team (ACTT): responsible for ensuring the prosecution of at least 100 persons by 2014, who have accumulated at least ZAR 5 million through illicit means.
  - d. Multi-Agency Working Group (MAWG): responsible for reviewing the state procurement system in order to prevent and reduce the instances of corruption in the procurement system. It investigates fraud, corruption and non-compliance with the SCM.
  - e. National Anti-Corruption Forum (NACF): a non-statutory partnership arrangement, whereby the three sectors operate as equal partners, in order to participate in a shared vision of an integrated, proactive approach to fighting corruption.

The ACTT and the MAWG provide for a fora seeking to enable the co-operation and operational co-ordination among its constituent members. These fora are not established in law, but rather are the product of distinct policymaking processes. The ICM is intended to be a replacement of the ACCC (the latter has apparently not convened in the last two years), although there structure of the former is unclear. These are intended to be policymaking bodies for the prevention and combating of corruption, although they do not encompass the entire spectrum of the anti-corruption architecture of the RSA. Finally, the NACF seeks to bring the private sector and civil society into the fight against corruption in the RSA. It has met four times since its inception in 2001, with little results pertaining to its activities. There is, however, no one

institution within those comprising the anti-corruption architecture of the RSA which has taken the responsibility, or given the task, to co-ordinate all institutions at both the policy and the operational levels.

Moreover, the changes made to the anti-corruption architecture in the RSA during the last 12 years have been targeted (pertaining to specific institutions) and disjointed (with regards to the overall structure). It should be noted that these changes have focused on the prevention and the combating of corruption without giving due attention to education both of the people and the public officials. Furthermore, out of the institutions and agencies reviewed, none have a lead role in devising and implementing an educational programme targeted at the prevention of corruption, and the identification of corrupt practices.

Little attention has been given in the creation and the monitoring of a structured and overarching policy towards preventing and combating corruption, as well as providing education on prevention of corruption. This is partly the result of the fact that no institution has the responsibility of co-ordinating all other institutions at the policy level. As a result, there currently are overlaps in functions and duplication of structures at both the operational and policymaking levels. These, in turn, greatly reduce the overall effectiveness of the system, making it less transparent and accountable.

While there are a myriad of policy tools available in the RSA, the institutions have been acting disjointedly, reducing the overall effectiveness of their application. As a direct consequence, there is also loss of knowledge retention and sharing, thus reducing the efficiency of the overall system. It is through a cohesive policy framework – focusing on short, medium and long-term strategies for the anti-corruption system as a whole – as well as its periodic monitoring, that it will be possible to continuously reassess the current structures and their functions to both identify gaps and challenges, and to devoid the system from duplications and overlaps. Through a cohesive policy framework, it becomes easier for the institutions responsible for the anti-corruption architecture in the RSA to take appropriate actions at individual and group levels to ensure the effectiveness at the operational level.

While the anti-corruption architecture of the RSA lacks a cohesive and overarching policy in preventing and combating corruption, as well as providing anti-corruption education, it should be noted that the RSA has adopted, at the preventive level, the MACC in 2002. The greatest asset of the MACC is that it creates minimum standards while giving the government institutions the flexibility they need to set up the necessary mechanisms taking into consideration each structure. However, while through the MACC the DPSA is able to establish cohesive and co-ordinated policies for the prevention of corruption in all government departments (albeit not an overarching anti-corruption policy), the 2010 MACC audit has shown there has been little implementation of these standards, as the institutions have taken a reactive approach the prevention of corruption.

As a result of this reactive approach, there has been limited management and sharing of the information collected, which ultimately hamper the analysis of risks and trends of corruption in the system. This lack of information management limits the possibility of having it fed back into the system, increasing the awareness and reducing overall levels of corruption. As a response to this scenario, the DPSA has created the SACU, which will be

responsible for, on the one hand, assisting these institutions in implementing the MACC, while on the other hand, creating guidelines for the sanctioning regime in order to ensure greater harmonisation and predictability in the system. Furthermore, the 2010 MACC audit informs that, as a general rule, the institutions have attached these anti-corruption responsibilities to their anti-fraud units. While the information gathered has been deemed insufficient for the prevention of corruption, it has also been insufficient from the auditing perspective. The effectiveness of an auditing, especially a forensic auditing carried out by the AGSA, requires that all information and data available must be made available in order to a sound auditing. As a result, the operational level of combating corruption through forensic auditing is also limited to the quality of information provided to the AGSA.

With the creation of a Chief Procurement Officer and the revision of the SCM regulation – an area particularly sensible to corruption, in accordance to the AGSA – by the National Treasury, a close co-operation and co-ordination between these four institutions (the National Treasury, the AGSA, the SACU and the DPSA) as well as with the MAWG will be essential to reach out to all government structures at all levels in order to ensure effective prevention and detection systems for corruption in the SCM management. The harmonisation of the sanctioning regime will also ensure greater predictability of the sanctions imposed, making the improving the efficiency of the system.

Looking at the operational level of the different institutions of the corruption architecture of the RSA, it should be underscored that they possess a wide range of capacities and legal tools which make them better equipped to prevent and combat corruption, e.g., the several legal tools to ensure effective seizure and confiscation of proceeds and instrumentalities of corruption-related proceeds of crime. However, there is a need to ensure that these tools are adequately used to the maximum effect in preventing and combating corruption. The multi-agency approach chosen in the RSA requires a collective and proactive effort from all institutions involved to ensure that the best results are achieved.

It should be underscored that the RSA has shifted some of its capacities to combat corruption in the last 12 years. Through the approach of combating corruption using the troika principle – by means of the DSO – it has shifted to having the investigative capacities (DPCI) separated from prosecution (including but not limited to the NPA and the AFU). In order to ensure a more comprehensive approach to combating corruption amongst these different actors in the anti-corruption architecture, the RSA has established the ACTT – a project-oriented task team committed, through specific targets, to achieve the goal of prosecuting at least 100 persons by 2014 who have accumulated ZAR 5 million or more through illicit means. Although ACTT itself does not focus solely on corruption, it demonstrates the willingness of achieve maximum results through the concerted efforts of the each of the involved institutions to maximise their potentials through a common goal. As stated previously, reports indicate that at least 16 persons have been accused and at least ZAR 579 million has been restrained.

Nevertheless, adequate training and recycling courses must be made available to all those involved in the prevention and combating of corruption. This is so that, on the one hand, persons handling corruption-related cases are up-to-date with the current trends of corruption and enforcement capabilities. On the

other hand, it gives them the capacity to understand their role in the anti-corruption architecture of the RSA, as well as the system as a whole, by allowing the cross-training by the different institutions.

Many challenges still remain. From the research undertaken to prepare this study, it is clear that one of the main challenges faced by the RSA pertain to more efficient use of human resources. Numerous government reports have highlighted this. As shown above, a comprehensive framework is in place. However, more awareness raising and training needs to be undertaken with government staff in order for it to respond to corruption more systematically and pro-actively – empowering them with willingness to apply the tools already available. Furthermore, in some institutions such as the AGSA, there is the need to outsource the large majority of the work that needs to be undertaken due to insufficient staff. This high dependency of private actors to undertake the work reduces the amount of knowledge retained in institutions, which are less likely to be able to more effectively combat corruption.

The co-ordination of the anti-corruption efforts in the RSA is also another challenge. The government from the beginning of its efforts to prevent and combat corruption has brought both the private sector and civil society together. While, however, it is possible to find several programmes developed by the government to prevent and combat corruption, the same unfortunately cannot be said of the non-state actors. The NACF requires an integrated approach by all levels of society to combat and prevent corruption, and it is important to publicise the work undertaken by the non-state actors, as well as to benchmark the results to ensure efficiency in the process.

The co-ordination effort within the government itself, however, is disjointed. While the government had set up the NACF, along with non-state actors, it also established the ACCC, which, in turn, liaised with each other to avoid overlapping. Over the course of the last years, however, the government of the RSA has set up a plethora of co-ordination fora, to the extent that the main stakeholders (e.g., the DPSA) have had difficulties in keeping up with the pace and understanding the roles of each of these fora. It is important to rectify this situation and clarify the roles of the ICM and the ACCC, e.g., to avoid any duplication and overlapping of efforts. As both human and financial resources are finite, the most comprehensive use of both will ensure the most effective results in the combating and prevention of corruption in the RSA.

With regards to the criminal justice system, it should be underscored that the RSA has always had multiple agencies responsible for the suppression of corruption – through administrative, civil and criminal means. While most of these institutions retain constitutional independence, others, e.g., the SAPS, the SIU and the NPA retain some independence, although a Cabinet Minister or the President is ultimately responsible for them. Special attention should be given to this fact to ensure that a minimum standard of independence is given to these institutions so that they are able to properly function without any potential undue interference in their work – in particular when dealing with politically exposed persons and high-ranking corruption – while retaining the appropriate accountability through mechanisms for checks and balances. This independence, moreover, must also be in line with the interpretation given by the Constitutional Court to the issue of independence, in particular through the *Glenister Case*. All officers responsible for the fight against corruption must be shielded from political, economic or personal pressures. In particular, the

operational independence of an agency – within its specific parameters – must be guaranteed (Camerer 1999, 3).

## 7.2 Recommendations

The following recommendations arise from the findings contained in the present report and pertain to the current anti-corruption architecture of the RSA. Gaps and shortcomings have been identified, as well as best practices arising from the architecture itself. These are:

1. The establishment of a cohesive policy at the short, medium and long terms for the anti-corruption architecture of the RSA;
2. The importance of clear and unambiguous set of rules, regulations and laws;
3. The resolution of jurisdictional issues which reduce the effectiveness and efficiency of the anti-corruption system in the RSA;
4. Revision of the information management policies, as well as its sharing and retention, at a system-wide level;
5. Increasing the active sharing of information between the relevant anti-corruption authorities;
6. Ensuring the independence and impartiality of the institutions comprising the anti-corruption architecture of the RSA;
7. Revision of the functions and responsibilities of the co-ordination bodies currently available in order to eliminate duplications in the system and allow for a more comprehensive approach;
8. Increasing the co-ordination capacity of the institutions comprising the anti-corruption architecture of the RSA, at both the preventive and enforcement levels.

## Bibliography

- ACCC. 2002. "Minimum Anti-Corruption Requirements." [https://bvc.cgu.gov.br/bitstream/123456789/3053/1/mimumum\\_anti\\_corruption\\_capacity\\_departments.pdf](https://bvc.cgu.gov.br/bitstream/123456789/3053/1/mimumum_anti_corruption_capacity_departments.pdf)
- AGSA. 2012. General Report on the Audit Outcomes of Local Governments. <http://www.info.gov.za/view/DownloadFileAction?id=170924>
- BIAC Anti-Bribery Resource Guide 2012 : [http://www.biac.org/pubs/anti-bribery\\_resource/section\\_1.htm#oecd](http://www.biac.org/pubs/anti-bribery_resource/section_1.htm#oecd)
- Business anti-corruption portal: Tunisia Country Profile: <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/tunisia-version-1/snapshot/>
- Camerer, Lala. 1999. "Tackling in multi-headed dragon."
- Catriona Ross, Bronwen Merner and Adam Delacorn. 2011. Independent Broad-based Anti-corruption Commission Bill 2011. <http://www.parliament.vic.gov.au/publications/research-papers/2243-independent-broad-based-anti-corruption-commission-bill-2011/download>
- Derick W. Brinkerhoff. 2010. Unpacking the Concept of Political Will to Confront Corruption. <http://www.cmi.no/publications/file/3699-unpacking-the-concept-of-political-will-to.pdf>
- DPSA. "Annual Report 2010/11." 2011. <http://www.info.gov.za/view/DownloadFileAction?id=161615>
- EAAACA. 2009. Kenya Anti-Corruption Commission Country Report on the Fight Against Corruption : Presented to EAAACA Annual General Meeting in October 2009. [http://www.eaaca.org/docs/EAAACA\\_COUNTRY%20REPORT%20ON%20THE%20FIGHT%20AGAINST%20CORRUPTION%20IN%20KENYA\\_KACC\\_3rd%20AGM.pdf](http://www.eaaca.org/docs/EAAACA_COUNTRY%20REPORT%20ON%20THE%20FIGHT%20AGAINST%20CORRUPTION%20IN%20KENYA_KACC_3rd%20AGM.pdf)
- EACC. 2010. The Kenya Anti-Corruption Commission: Annual Report 2009/2010. <http://www.eacc.go.ke/Docs/Annual-Report09-10.pdf>.
- EACC. 2011. Ethics and Anti-Corruption Commission: Annual Report 2010/2011. <http://www.eacc.go.ke/docs/KACC-ANNUAL-REPORT%202010-2011.pdf>
- Ethics Institute of South Africa. 2011. "Minimum Anti-corruption Capacity Requirements Audit 2009/10."
- Freedom House Countries Report Tunisia 2007 <http://www.freedomhouse.org/report/countries-crossroads-2007/anticorruption-and-transparency-25>
- Gladwell Otieno. 2005. The NARC'S Anti-Corruption Drive in Kenya : Somewhere over the rainbow? African Security Review Vol 14 No 4, 2005. <http://www.iss.co.za/pgcontent.php?UID=20450>
- Global Integrity Report 2008 on Tunisia: <http://report.globalintegrity.org/Tunisia/2008/scorecard/88>
- Hechler et al. 2009. Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention

- against Corruption Article 6. <http://www.cmi.no/publications/file/3343-institutional-arrangements-for-corruption.pdf>
- ICAC. 2011. Annual Report 2010/2011. [http://www.icac.nsw.gov.au/annual-reports?option=com\\_pubsearch&view=search&task=doSearch&Itemid=4270#results](http://www.icac.nsw.gov.au/annual-reports?option=com_pubsearch&view=search&task=doSearch&Itemid=4270#results).
- ICAC. 2012. <http://www.icac.nsw.gov.au/about-the-icac/overview/history>
- James T. Gathii. 2009. Kenya's Long Anti-Corruption Agenda – 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution. Albany Law School, Legal Studies Research Paper Series No. 35 of 2010-2011. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718620](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718620).
- John R. Heilbrunn. 2004. Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption? <http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf>
- Ken Mwige. 2006. Commonwealth Secretariat & Chatham House. Anti-Corruption Conference the Un Convention Against Corruption Implementation & Enforcement: Meeting the Challenges. [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/7445086A-752B-45B8-8536-1C15B50A9B40\\_A-Creportfinalversion.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/7445086A-752B-45B8-8536-1C15B50A9B40_A-Creportfinalversion.pdf)
- Krishnan, Chandrashekhar, and Robert Barrington. 2011. Corruption in the UK. Transparency International UK.
- La Commission Nationale d'Investigation Sur les Affaires de Corruption et de Malversation: <http://www.cnicmtunisie.tn>
- Lawrence Woocher. 2001. Deconstructing "Political Will": Explaining the Failure to Prevent Deadly Conflict and Mass Atrocities. *Journal of Public and International Affairs*, Princeton University. <https://www.princeton.edu/jpia/past-issues-1/2001/10.pdf>
- Letitia Lawson. 2009. The Politics of Anti-Corruption Reform in Africa. *Journal of Modern African Studies*, 47(1).
- Luis De Sousa, Anti-corruption agencies: between empowerment and irrelevance, *Crime Law Soc Change*, 2010, p. 13.
- Macaulay, Michael, and Gary Hickey. 2011. National Integrity System Assessment United Kingdom. Transparency International UK.
- Melissa Khemani. 2009. Anti-corruption Commissions in the African State: Burying the Problem or Addressing the Issue? [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1334286](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334286).
- Montesh, Moses. 2007. A Critical Analysis of Crime Investigative System Within the South African Criminal Justice System: a Comparative Study.
- Nicholls, Colin; Daniel, Tim; Polaine, Martin; Hatchard, John. 2006. *Corruption and Misuse of Public Office*.
- OECD, 2008. *Specialised Anti Corruption Bodies: Review of Models*.
- OECD. 2012. *Fighting Bribery and Corruption: Frequently asked questions* : [http://www.oecd.org/document/18/0,3746,en\\_2649\\_34859\\_35430226\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3746,en_2649_34859_35430226_1_1_1_1,00.html)

Offices of the Public Service Commission. 2001. "A Review of South Africa's National Anti-Corruption Agencies."

Patrick Meagher, Anti-corruption agencies: Rhetoric Versus reality, *The Journal of Policy Reform*, 8:1, 69-103.

Presidency. 2006. "Khampepe Commission of Inquiry Report."

Public Service Commission. 1999. *Fighting Corruption, Towards a National Integrity Strategy*.

Ramsingh, Odette, and Kris Dobie. 2006. "Case Study on the South African National Anti- Corruption Forum."

RSA. 2010. "Delivery Agreement for Outcome 12."  
<http://www.info.gov.za/view/DownloadFileAction?id=135370>.

SIU. 2011. *Annual Report 2010/2011*.  
[http://www.siu.org.za/docs/reports/SIU\\_Annual\\_Report\\_FRI17AUG.pdf](http://www.siu.org.za/docs/reports/SIU_Annual_Report_FRI17AUG.pdf).

Stephenson et al. 2011. *Barriers to Asset Recovery : An Analysis of the Key Barriers and Recommendations for Action*.  
[http://www1.worldbank.org/finance/star\\_site/documents/barriers/barriers\\_to\\_asset\\_recovery.pdf](http://www1.worldbank.org/finance/star_site/documents/barriers/barriers_to_asset_recovery.pdf)

The Court of Accounts of Tunisia:  
<http://www.courdescomptes.nat.tn/template.php?code=29>

The Parliament of New South Wales. 2012.  
<http://www.parliament.nsw.gov.au/icac>.

TI. 2012. *TI Progress Report on OECD Enforcement*:  
[http://archive.transparency.org/global\\_priorities/international\\_conventions/projects\\_conventions/oecd\\_convention](http://archive.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention)

TRACK: <http://www.track.unodc.org>

U4 expert Answer. 2009. *Overview of Corruption in Tanzania*. Available at:  
<http://www.u4.no/publications/overview-of-corruption-in-tanzania/>

U4. 2007. *U4 Expert Answer: Local Anti-Corruption Agencies: Pros and Cons*. <http://www.u4.no/publications/local-anti-corruption-agencies-pros-and-cons/downloadasset/353>.

U4. 2008. "The Role of Supreme Audit Institutions in Combating Corruption."  
<http://www.u4.no/publications/the-role-of-supreme-audit-institutions-in-combating-corruption/>

U4. *Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention against Corruption Article 6*, p.9.

UNODC. 2003. "Country Corruption Assessment Report South Africa."  
<http://www.info.gov.za/otherdocs/2003/corruption.pdf> (Accessed April 29, 2012).

USAID, *Anti-Corruption Agencies*, 2006, p. 22.

van Vuuren, Hennie. 2005. "Transparency International Country Study Report South Africa 2005."



