



ANAC AND THE ITALIAN MODEL FOR THE PREVENTION OF CORRUPTION IN PUBLIC PROCUREMENT SECTOR

1. Background information on ANAC

The Italian Anticorruption Authority (from now on: ANAC) was created with the aim to implement article 6 of the United Nations Convention against Corruption (UNCAC). The Law 190 of 2012 has initially limited the ANAC mandate to the drawing of a preventive strategy against corruption, the supervision of its implementation by each public entity (through the adoption of Three Year Plans for integrity and transparency), the supervision over transparency of public bodies, the integrity of civil servants, as well as the dissemination of a culture of integrity and legality. No powers are granted to ANAC on the prevention of corruption in political bodies.

Subsequently, the Law 114 of 2014 introduced new anticorruption measures by anchoring the supervision of public contracts to the system of corruption prevention. This legislative framework is the expression of the Legislator's choice to concentrate the whole strategy of corruption prevention in the hands of one single institution. The creation of an independent Authority for both the protection of legality in the public sector and the supervision on public procurement is an attempt to control a highly economic and strategic sector, exposed more than others to the risk of illegality and maladministration. The Authority pursues its goals through a regulatory activity, an advisory function and a supervisory activity, along with some inspection and (sometimes mild) sanctioning powers. These competences are accompanied by an important monitoring activity through the collection of data on public tenders: for this purpose an Observatory for public contracts and a Database on Public Contracts are operational in ANAC. These wide databases are made public through an institutional website, in order to increase the transparency of the market. In addition, ANAC is charged with reporting to the Italian Parliament on its activities as well as exercising an advocacy function through a specific role of impulse and proposal to both Parliament and Government.

2. Practices stemming from the functioning of the Authority in the public procurement sector

In the past few years, ANAC has been very active on many different areas concerning both the implementation of anticorruption measures in the Italian Public Administration and the oversight on public contracts. In order to effectively perform its supervisory and regulatory functions, ANAC puts in place practices often stemming from the necessity to cope with emergencies.

2.1. The “collaborative supervision”

Introducing Article 4 into its 2014 Supervisory Regulation (of December 9th, 2014), ANAC began to use the so-called “collaborative supervision” as a particular form of preventive verification of the tendering processes. The tool is aimed at fostering a profitable collaboration with the contracting authorities and thus guaranteeing the correct functioning of the tender operations and the implementation of the contract, at the same time as preventing attempt of criminal infiltration into the tenders.

Indeed, instead of sanctioning illicit behaviour *ex post* (after the fact occurred), the intervention of ANAC aims at preventing issues *ex ante* (before facts occur) by guiding the (procuring) institution towards better and more transparent choices. Stemming from the positive experience of “EXPO 2015”, the “collaborative supervision” has been systematically introduced in the organization of other major events, initiatives and works of national or strategic interest (such as post-heart quake reconstruction or organization of world university games – *universiadi*, and similar) in order to guarantee the transparency, accuracy and high quality of administrative choices from the very beginning. To this end, several MoUs for the implementation of “collaborative supervision” has been signed up between the ANAC and several contracting authorities. The “collaborative supervision” is enshrined in Article 213.3, lett. h, of the Code of Contracts adopted by the Legislative Decree No. 50/2016; ANAC has also adopted a specific regulation in the matter (June 28th, 2017).

3.2. The “extraordinary and temporary management of contractors” (aka *Commissariamento*)

The same goes for the so-called “extraordinary and temporary management of contractors”. This tool was initially used on the occasion of the “EXPO 2015” event, with the support of the Organization for Economic Co-operation and Development (OECD), on the basis of article 30 of the Law 114 of 2014 and a Memorandum of Understanding signed between the OECD and the ANAC (of October 2014).



Autorità Nazionale Anticorruzione - Il Consigliere

Following that positive experience, this practice has been applied to other situations. According to Art. 32 of the aforementioned Law (No. 114/2014), in the event that illegal behaviour or corruption crimes attributable to a company which has been awarded a contract for the construction of public works, services or supplies occur or are being prosecuted by a judicial authority, the President of ANAC (by his own power) can suggest to the local Prefect, either:

- to order the renewal of the company's corporate bodies; or,
- if the company does not comply with the established terms, to engage in the extraordinary and temporary management of the contracting company limited to the complete implementation of the single contract subject to criminal proceedings; or
- the support and monitoring of the company with the appointment of experts tasked with supporting the company's organizational and management audit activity.

This innovative measure allows for an immediate intervention against corruption phenomena and is a strong deterrent against corruption-oriented behaviours.

3.3. ANAC active judicial locus standi in the interest of law

As a result of his credibility gained on the field, the Public Contract Code gives ANAC a new competence aimed at preserving the integrity of public contracts. Thus ANAC is entitled to appeal judicially general acts and measures relating to contracts of significant impact, issued by any contracting authority, if it (ANAC) deems that they violate the rules on public contracts relating to works, services and supplies (Art. 211.1bis).

In addition, if ANAC considers that a contracting authority has adopted a measure in breach of the new Code, it issues an opinion (within 60 days of the violation), indicating the specific deficiencies that were found. The opinion is then sent to the contracting authority, for compliance; if the contracting authority fails to comply (within 60 days maximum), ANAC may file an action before the administrative judge (within the following 30 days). Moreover, if ANAC identifies the existence of irregularities, it transmits the documents and its remarks to the contracting authority, demanding the removal of the breaching disposition (Art. 211.1ter). This new competence of ANAC appears to be included into a trend that recognizes to the independent administrative authorities the responsibility to act upon the protection of common goods and interests in an objective sense, be it competition (in case of the Antitrust Authority), or the legality of public contracts (for ANAC).

3.4 The regulatory function

In the past ANAC had often fulfilled its regulatory mandate using instruments of general scope, such as determinations, guidelines, standard tender-notices and advisory opinions. All these instances of soft law proved to be essential not only in the sector of public contracts, but also to provide interpretative guidelines on corruption prevention and the strengthening of integrity in the public sector. Many of these guidelines served the immediate purpose of interpreting and/or integrating the Italian legislation on different topics. In addition, and perhaps most importantly, such regulation laid down the foundation for future legislation on important anticorruption matters. In the area of public procurement, this regulatory function has grown in importance and effectiveness due to requests coming from the awarding administration and from the economic operators in need of a consistent interpretation of the complex legislation. ANAC's guidelines on standard tenders provided an essential support to the tendering organizations, at the same time reducing disputes among the parties. This important practice has been incorporated in the Public Contract Code, according to which ANAC's second-level rules (in particular guidelines) can be also binding (Art. 213, par. 2).

3.5 The pre-litigation competence

Acts of general scope are also the advisory opinions delivered by ANAC in the carrying out of the so-called pre-litigation competence. This tool consists in the right for contracting authorities and bidders to address the ANAC asking for an advisory opinion, in order to settle disputes during the tendering procedure. With this Alternative Dispute Resolution system, the Legislator aims at introducing a mechanism to simplify litigations in tender procedures and reducing the number of cases in front of the administrative judge. It was also used in the past, but the novelty of the new Code (Art. 213. 2) is that this tool can be also binding between agreeing parties. The advantages achieved by using this competence are clear: decrease of legal disputes; clear saving of time, costs, human resources; possibility to obtain an opinion (aimed at removing and/or correcting the possible violations claimed by the parties) at an early stage.



3.6 Standard costs and reference prices

The cost-effectiveness of public contracts and their transparency also provide, through the regulatory activity of ANAC, the guidelines that contain a) standard costs of the works and b) reference prices for goods and services (art. 213.e, lett. H-bis). To this ANAC provides through the wealth of information contained in the National Database of Public Contracts (Article 213.8). These parameters serve multiple purposes: a) costs and reference prices represent a benchmark in the exercise of supervisory power; b) they fit into the spending review government strategy and c) in this way, ANAC also stimulates the centralization of procurement and aggregation of central procuring agencies.

3.7 The measurement of corruption

ANAC has developed, in collaboration with other national bodies (for example the Statistic institution - ISTAT and Ministry of Justice) and international organization (OECD), a project which, through the production of statistical information with a high degree of territorial disaggregation, has the goal of defining and surveying on a territorial basis and with periodic updates a set of measurement tools both for corruption risks and for the effectiveness of prevention actions. The goal is to establish a European methodology for measuring the risk of corruption. ANAC has combined to this project the online platform for collecting the 3y corruption prevention plans.

3.8 Relations with the Court of Auditors

There is an existing MoU between ANAC and Court of Auditors, aimed at fine-tuning the exchange of information in both directions: the one in force (1 February 2017) concerns the mutual exchange of data and information concerning the awarding, stipulation and execution of sensitive contracts (or contracts requiring special security measures). The agreement provides for the exchange of reports, information and complaints concerning the awarding, stipulation and implementation of these specific contracts, as well as the identification of cases of general importance.

The collaboration is therefore two-ways: a) If ANAC ascertains that from the implementation of public contracts derive prejudice to the public treasury, the documents and remarks are also transmitted to the interested subjects and to the General Prosecutor of the Court of Auditors and b) the Court of auditors provides ANAC with data on jurisdictional proceedings.

3.9. Going forward

ANAC is particularly keen in its commitment at the international level (in accordance with article 6.3 UNCAC). Indeed, ANAC is engaged internationally through its participation to different anticorruption and transparency *fora* (such as UNODC, G20, G7, OECD, OSCE, Council of Europe and GRECO, European Union, World Bank as well as Open Government Partnership).

ANAC's most recent (2018) and high result is the creation of the Network of Corruption Prevention Agency (www.coe.int/en/web/corruption/ncpa-network). The aim of this Network is to, inter alia: establish models of cooperation and mutual assistance; creating working groups for the development, implementation and monitoring of their functions; elaborate common positions and sectorial standards and propose them to the attention of multilateral institutions, thus actively feeding the advancement of international law; harmonize, deepen and foster domestic rules on corruption prevention by, for example, exchanging domestic practices and information. The Network is now open to welcome "partners", i.e. institutions or networks operating in the prevention of corruption, including but not limited to INTOSAI.

Additionally, another objective pursued by ANAC (with the European Parliament) is the creation - within the European Union - of a "European authority for the prevention of corruption" in a sort of two-tiered (European and national) mechanism, following the well-known mechanism of EU administrative structure (used for establishing bodies in sectors of privacy, electronic communication and antitrust). Establishing a specifically devoted and stable European entity tasked with developing and monitoring the implementation of the EU corruption prevention policy in the EU internal market (as well as in each Member State) would undoubtedly guarantee a greater effectiveness in the EU harmonization process. It is undeniable that the lack of a modelled entity in the field of the prevention of corruption can be very detrimental. Matter of fact, the capacity in fighting corruption of the European Union is currently very limited in that, among other reasons, it established only a partial response; and this even if there is no doubt about the need to combat corruption in a holistic manner to the creation of a European legal and economic area, through both substantive and procedural rules (including coordination among State administrations and between them and the European



Autorità Nazionale Anticorruzione - Il Consigliere

administration), both at the prevention and repression level. In sum, the «comprehensive EU anticorruption policy» set up in 2003 seems somehow lost, and what is left is the initiative to adopt a two-year report on the state of corruption in each Member State of the Union. In fact, only the repressive side has so far been activated (see for example OLAF, EUROJUST, EUROPOL and EPPO). Far more ambitious is the project - of which the Italy could be the promoter - to set up an integrated administrative body, based for example on the model of the European Union's external action Service, counting members from the General Secretariat of the Council, the Commission and the Member States. This is an example of integrated administration between the two levels of administrative governance at stake: that of the Union and those of the States. It is clear that this type of composite institution would more effectively regulate, supervise and organize the fight against European corruption which, by its very nature, requires a multi-levelled response, i.e. one characterized by a combination of different strategies, such as the economic level and the administration of justice.

4. ANAC delegates to CoSP 2019

Ms. Nicoletta Parisi is a Member of the Italian Anti-corruption National Authority Council and former full Professor of International and European Law at the Department of Law, University of Catania. She is member of the International Law Association (ILA); former scientific responsible for the European Documentation Centre, University of Catania; member of the Italian Delegation at the GRECO; legal adviser of the European Union Commission, Transparency International-TI, Twinning Project between the Macedonian Rep. and the Italian Ministry of Justice; member of the Committee of study established at the Italian Ministry of Justice for the implementation of the Statute of the International Criminal Court; scientific director of the online review *I quaderni europei*; member of Referees Committee/Scientific Committee/Editorial Boards of some scientific legal journals (as *Studi sull'integrazione europea*; *European Rights* – www.europeanrights.it; *KorEuropa*; *Diritto comunitario e degli scambi internazionali*; *Consumatori diritti e mercato*; *Diritto del commercio internazionale*; *Ius in itinere*; *Giurisprudenza penale*; *Diritto penale della globalizzazione*). She participated in research projects at the national and international level. She is author of monographs, essays and articles on International Law, International Organization and European Integration Law, Human Rights Law, European and International Criminal Law, with a specific focus on fighting corruption. Info at n.parisi@anticorruzione.it

Mr. Francesco Clementucci is a legal expert specialized in ethics, integrity and public administration reform. He advises for international institutions and national agencies (Italian AC Agency - ANAC) on projects related to fighting corruption. He lectures on risk-assessment (University of Milan – UNICATT), and ethics in international business (Tor Vergata University of Rome). He has authored studies on asset disclosures, corruption-proofing, transparency in licensing sectors, integrity in prison systems, whistleblowing protection and criminal liability of corporations. He is the responsible expert for the development of the Network of Corruption Prevention Agencies (www.coe.int/en/web/corruption/ncpa-network). Mr. Clementucci has first-hand experience in Albania, Armenia, Azerbaijan, Bosnia, Bulgaria, Haiti, Jordan, Kenya, Latvia, Liberia, Lithuania, north-Macedonia, Moldova, Montenegro, Morocco, Russia, Sierra Leone, Tajikistan and Tunisia. Info at f.clementucci@anticorruzione.it