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The Italian AntiCorruption system

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The presentation will assess three powers conferred to ANAC:

- 1. The power to appeal*
- 2. The pre-litigation*
- 3. The measures for extraordinary and temporary management*



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The power to appeal



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Public Contract Code D.lgs. 50/2016

- Has transposed new UE Directives on public procurement, and has repealed and replaced previous d.lgs. 163/2006 related to previous UE Directives defining competences of A.NA.C. on public procurement: the Authority is responsible for the supervision of public contracts of works, services and supplies. The Authority, according to European principles and directives (2014/24/UE; 2014/25/UE; 2014/26/UE), and Italian law, supervises the entire Public procurement system, both at a state and at a regional level, in order to grant compliance with the principles of rightfulness and transparency in awarding procedures and with effective and convenient execution of contracts, as well as compliance with competitions rules within each single tender. **This involves both ex post and ex ante surveillance on public procurement**



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ART.
211, pa. 2
Public
Contract
Code
D.lgs.
50/2016
Previous
Version

- **ANAC was given the power to issue “mandatory recommendation” to contracting authorities**
- Should the contracting authority fail to comply with the recommendation, ANAC would be entitled to issue a fine against the managing public official ranging from EUR 500 to 25.000.
- No mandatory recommendation was ever taken and the Government repealed the provision in April 2017

Ex malo bonum – The positive consequences of public uproar

- The abolition of the mandatory recommendation brought to the introduction of a new power



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New art. 211, pa. 1 *bis*
and *ter*

- ANAC was conferred the power to lodge an appeal before the administrative tribunal against unlawful invitations to tender and other decisions connected to procurement activities taken by awarding authorities. The power is twofold: direct or indirect action (reasoned opinion)



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Examples of (exceptional) similar powers in the Italian legal system

- The Antitrust Commission
- The Transport Commission
- The Bank of Italy
- The Minister of Economics and Education

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1 - The direct appeal power

In case of contracts of significant impact for the public procurement market ANAC can proceed with the appeal without previous notice to the awarding authority, following the administrative procedure code

- High number of economic operators
- Events of national importance (sport, cultural, religious nature)
- Natural disasters
- Potential consequences on the environment or on the cultural heritage
- Contract value over EUR 15 million for works and 25 for services

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In any other case, in the event of major violation of the public procurement code, ANAC notifies a reasoned opinion to the awarding authority

2: The reasoned opinion

- The awarding authority may decide to comply with the request within the deadline assigned by ANAC
- Should the awarding authority not comply with the request, ANAC can lodge an appeal before the administrative court within 30 days from the expiry of the deadline
- The link between the opinion and the appeal similar to the infringement procedure



WHICH ARE THE CHALLENGES FOR ANAC?

W
H
E
N

- The deadlines assigned to lodge the appeal are mandatory and allow little time for consideration – the pivotal role of the database

W
H
A
T

- The criticalities that are highlighted by ANAC have to stand in court – lawfulness and not merit

W
H
O

- the Oversight Units and the Legal Office need to work in close cooperation in order to achieve the final result.



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The internal regulation

- ANAC has approved guidelines to further regulate the power in order to to define the cases of significant impact of the contract and of major violation of the public procurement code.
- The guidelines assure the highest level of transparency and objectivity in the use of power and were subjected to a public debate and to the opinion of the highest administrative Court
- An MoU was conclude with the State Attorneys as to avoid any risk of conflict of interest

The first court decision

- **The ASMEL Litigation** – A non qualified awarding authority tried to conclude a framework agreement of the value of EUR 800 million dollars. ANAC lodged an appeal and won in the first and the second instance
- The High Administrative Court affirmed that ANAC can stand in court in the interest of the law and that the powers conferred by art. 211 go beyond the mere protection and promotion of competition and include the control over the lawfulness of the impugned decisions at large.

Concluding remarks

Which are the benefits the power to appeal?

- a) ANAC was finally conferred the power to determine the setting aside of an unlawful decision
- b) It is a real instrument of prevention of corruption or illicit agreements
- c) It uses a system of private enforcement to pursue public enforcement
- d) It maintains the balance of powers through judicial control



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The pre-litigation before ANAC on public procurement contracts



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ART.
211, pa. 1
Public
Contract
Code
D.lgs.
50/2016

- **The pre –litigation was already laid down in the previous version of the code of 2006**
- ANAC has more than 14 years of experience in providing these opinions and they have become part of the jurisprudence in public procurement law



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ART. 211, pa. 1
Public Contract
Code D.lgs.
50/2016

- ANAC can issue a legal advice when a dispute arises in the course of a tender procedure and the parties submit an instance to ask for a solution of the matter



The regulation of the power

- ANAC has drafted and approved a Regulation to discipline the pre-litigation procedure. The Regulation draws on the previous experience on the topic, contains the rules of procedure and sets down the internal decision process
- The Regulation was subjected to a public debate and to the opinion of the highest administrative Court.



WHAT

- The questions which are submitted to ANAC relate to the tendering procedure, from the publication of a call for tender until the award of the contract (for example the provisions of the call for tender, such as the requisites or the award criteria). They cannot involve questions arisen during the execution of the contract.



WHO

- The request can be submitted by the contracting authority or by an economic operator (or more than one). The c.a. and the e.o. can also agree to submit a common instance, which will be signed by both. The instance must be signed by the legal representative of the applicant, and this is a condition of admissibility.



HOW

- The request is submitted by way of a certified e-mail. The applicant has to fill in the template which can be found on ANAC website
- The pre-litigation procedure, since its aim is to avoid a judicial controversy, shall involve all the interested parties. That is why the applicant must send the request to all the counterparts and must produce proof of the communication to the office



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WHEN

- The deadline for the application is the same as in courts (30 days from the issue of the impugned decision), but an advice can be asked even before a measure is taken, as soon as a dispute arises during the procedure
- The request must be precisely described and the applicant must give proof of his interest in the solution of the question
- If the request is admissible the Office notifies with a formal letter the beginning of the procedure and asks if the parties have other documents to submit within 5 days



Binding VS non-binding opinion

- If the advice is requested by one party alone, it will not be binding. The law provides that if the parties have previously declared to bind themselves to the decision, the advice will be binding for those parties. Parties can also communicate afterwards that they want to bind themselves to the advice requested by another party. However, the advice can always be challenged before an administrative Court
-
- If the appeal lodged against the binding opinion is dismissed, the Judge evaluates the behavior of the appellant party pursuant to and for the purposes of Article 26 of the Code of Administrative Process (frivolous complaints' damage award)



Binding VS non-binding opinion - follows

- The non-binding opinion has a moral suasion effect. The contracting authority may anyway decide to follow ANAC's advice
- The parties are obliged to inform ANAC on the outcome of the dispute, otherwise they might be sanctioned
- If ANAC's decision is not complied with and the contracting authority suffers damages as a direct consequence, the responsible public official may face disciplinary proceedings and economic liability (Court of Auditors)

The internal decision process

- There is an order of priority: the questions requested with a common instance; questions posed by contracting authorities (which in that case often suspend the tender procedure to wait for ANAC advice); relevant questions (from an economical point of view but also if they pose new and important legal issues)
- In the ordinary procedure, the President appoints a Member of the Board to refer on the questions as soon as the office has delivered a draft and made its proposal
- With the recent Regulation, ANAC has introduced the possibility of advice issued by the Head of the Office, when a solution can be given by reference to precedents or sentences which have already solved the same questions



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Some DATA

- During 2019 ANAC received 482 requests of opinion
- 258 opinions were issued, 30 of which of a binding nature
- In 2019, the rate of voluntary compliance with the decisions issued by ANAC was **81%**

Most common legal issues

- Selection criteria (disproportionate; non reasonable)
- Technical specifications
- Awarding criteria (the most economically advantageous offer; lowest price)
- Abnormally low tenders
- Concession contracts
- Temporary associations of economic operators



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Concluding remarks

Which are the benefits the pre-litigation before ANAC

- a) It offers an effective ADR system that limits the access to courts - There is no need to be represented by a lawyer
- b) It is a cheaper and faster way to find a solution, sometimes before the issue arises formally
- c) It is strictly connected the other competencies and powers of ANAC in the field of Public Procurement



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*The measures for extraordinary
and temporary management of
economic operators*



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ART. 32,
decree-
law
90/2014
of June
2014

- Provision of an innovative and disruptive measure, aimed at assuring the complete execution of public contracts in case of criminal proceedings for corruption or organized crime, without necessarily interfering with unaffected branches of the relevant company.



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Historical background

- Introduced by the Decree-law that created ANAC by merging two pre-existing entities
- The sitting Government took a strong commitment to fight corruption
- The coming to light of criminal dealings was putting at risk the EXPO of Milan 2015



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WHEN / In which circumstances

- When the public prosecutors initiate criminal proceedings for certain crimes (active and passive corruption, trading of influences or organized crime) or in presence of detected anomalous situations that could be a symptom of illegal conducts or criminal events attributable to a company awarded a contract for the construction of public works, services or supplies



WHO

- The measure is jointly adopted by ANAC and the Prefect – Local representative of the Minister of Interiors
- The impact of the measure on the relevant company requires the presence of two different actors, independent from each other



The 3 possible measures

A

- To provide for **appropriate support** of monitoring of the contracting company through the appointment of consultants that would monitor the self-cleaning process

B

- To order the **renewal of the corporate bodies** by replacing the person involved

C

- To engage in **the extraordinary and temporary management** of the contracting company subject to criminal proceedings, in all aspects concerning the complete execution of the contract, through managing trustee/s

The extraordinary and temporary management

- The relevant branches of the company are ring-fenced by the trustees that ensure the timely execution of the contract
- Payments from the contracting authority are directed to a special account managed by the trustees
- The trustees are paid with funds from the special account and are subject to the control and supervision of ANAC the Prefect



Nature of the measure

- These are administrative – extraordinary-temporary measures that cease in case of acquittal or when a stronger judiciary measure is taken
- The principle of proportionality fully applies as well the adversarial principle
- The measures are subjected to judicial review before the administrative courts



The regulation of the power

- ANAC has drafted and approved six guidelines to discipline the process and the following management of the contract
- The guidelines were approved in close cooperation with the Minister of interiors and cover multiple aspects: the links to the anti-mafia special decrees, the remuneration of the trustees, the scope of application of the measures, the management of the profits



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Applicati
on of the
measures

—

Relevant
examples

- The measures are applied in all kinds of procurement contracts: works, services, utilities (public transports), including pharmaceutical and healthcare sector
- EXPO Milan – 2015
- MOSE – Venice
- CARA di Mineo

Concluding remarks

Which are the benefits the temporary and extraordinary measure?

- a) They balance the public and private interests that are at stake: full execution of the contract VS economic liberties of the economic operators
- b) Public contracts always faced massive delays and disruption in case of judicial investigations
- c) In case of subsequent acquittal the company could avoid bankruptcy as the earnings are put in a special account
- d) In the event of conviction the earning can be easily seized and confiscated



FINAL REMARKS

- The three powers show the ability of ANAC to intervene in all stages of the procurement process
- The powers allow ANAC to effectively prevent and contrast corruption
- They were conferred in different moments of ANAC's history, but now they work and are applied as a system
- It is fundamental the role of the ANAC in self-regulating the processes based on previous experience



*Thank
you!*

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