

ITALIAN JOURNAL OF PUBLIC LAW, VOL. 11 ISSUE 1/2019  
TABLE OF CONTENTS

**GUEST EDITORIAL**

IS BREXIT RIPPING UP THE UNWRITTEN CONSTITUTION OF THE UNITED KINGDOM?  
*Justin O. Frosini*.....1

**ARTICLES**

THE CONSTITUTIONAL DIMENSION OF DEMOCRACY WITHIN A DEMOCRATIC SOCIETY  
*Francesco Bilancia*.....8

CONDITIONALITY AND ECONOMIC CONSTITUTIONALISM IN THE EUROZONE  
*Cesare Pinelli*.....22

TRUTH AND DECEPTION ACROSS THE ATLANTIC:  
A ROADMAP OF DISINFORMATION IN THE US AND EUROPE  
*Oreste Pollicino, Elettra Bietti*.....43

LEGAL IMMIGRATION AND LOCAL RESILIENCE IN ITALY:  
THE CASE OF THE INTEGRATION COUNCILS  
*Marco Calabrò*.....86

THE POWER TO TAX WITHOUT DUE PROCESS OF LAW  
*Angela Ferrari Zumbini*.....119

TERRITORIAL REPRESENTATION IN UNITARY STATES.  
REFORMING NATIONAL LEGISLATURES IN ITALY AND IN THE UNITED KINGDOM  
*Barbara Guastaferrò*.....147

NON-CONVICTION BASED CONFISCATION  
*Miriam Allena*.....196

THE PROBLEMS OF RES JUDICATA IN THE ITALIAN ADMINISTRATIVE JUSTICE SYSTEM  
*Stefano Vaccari*.....223

ASSESSMENT OF THE EFFECTIVENESS OF ANTI-CORRUPTION MEASURES  
FOR THE PUBLIC SECTOR AND FOR PRIVATE ENTITIES  
*Nicoletta Parisi, Francesco Clementucci*.....267

RISE OF POPULISM AND THE FIVE STAR MOVEMENT MODEL: AN ITALIAN CASE STUDY  
*Marco Bassini*.....302

LAW ENFORCEMENT AGAINST CORRUPTION IN ITALIAN PUBLIC PROCUREMENT, BETWEEN HETERO-IMPOSED MEASURES AND PROCEDURAL SOLUTIONS <i>Vinicio Brigante</i> .....	334
THE U.S. FREEDOM OF INFORMATION ACT IN LIGHT OF THE 2016 REFORM: SOME THEORETICAL ISSUES <i>Marco Lunardelli</i> .....	359
THE LEGAL REGULATION OF SURROGACY IN RUSSIA <i>Ekaterina Mouliarova</i> .....	393
 <b>COMMENTS</b> 	
THE GRAND CHAMBER ON CONFISCATION WITHOUT CONVICTION: ‘BEYOND CONFISCATION OF PROPERTY, THE WAR OF THE COURTS’, THE INTERPRETATION OF JUDGMENTS, AND THE RIGHTS OF LEGAL PERSONS <i>Tomaso E. Epidendio</i> .....	434
 <b>BOOK REVIEWS</b> 	
MARTA SIMONCINI, ADMINISTRATIVE REGULATION BEYOND THE NON-DELEGATION DOCTRINE: A STUDY ON EU AGENCIES (2018) <i>Claudia Figliolia</i> .....	453

The views and opinions expressed in every article of the Journal are those of the authors and do not reflect the views of Italian Journal of Public Law, its Board of Editors, or any member of the Board.

LAW ENFORCEMENT AGAINST CORRUPTION IN ITALIAN  
PUBLIC PROCUREMENT, BETWEEN HETERO-IMPOSED  
MEASURES AND PROCEDURAL SOLUTIONS

*Vinicio Brigante\**

*Abstract*

This essay aims to analyze the complicated and impenetrable topic of corruption in public procurement into Italian law. Corruption is a multi-faceted phenomenon which has economic, legal and moral consequences. The first obstacle to overcome is to know actual data about corruption, because data based on perceived corruption are not reliable; it is necessary to know the details of the problem, to set up an appropriate system of contrast. The so-called hetero-imposed measures, like administrative transparency, are not enough, because the Italian legislative landscape about this issue it is unclear and it was also demonstrated that we have to act on the process of the administrative decisions. The solutions proposed in this essay concern the graduation of administrative discretion, which oscillates between law and equity. The original system of control did not work and revealed the necessity to combine prevention and repression to guide the choices of the contracting authority during invitation to tender. In this perspective, the legal tool of the collaborative surveillance is extremely appropriate in this debate because it is enhanced the issue of the continuous cooperation between different actors. The appropriate measures to tackle corruption must provide for ethical and moral values, to integrate legal arrangements.

TABLE OF CONTENTS

1. Definition of the subject.....	335
2. Anti-corruption measures and <i>codification à droit constant</i> : looking for a delicate balance.....	340

\* Postdoctoral Researcher, University of Naples "Federico II".

2.1 A well known enemy: administrative discretion in Merloni-law and in decree no. 163/2006.....	342
2.2 Code of 2016 and anti-corruption measures “out of competition” .....	345
3. Multilayer discretion: a procedural solution.....	347
3.1. Instrumental discretion: a variable-geometry structure....	348
3.2. Administrative equity and public ethics: the responsible discretion.....	349
4. Collaborative oversight procedure: relevant data from the annual report of the National Anticorruption Authority..	351
4.1 Procedural aspects and impact on legal disputes.....	353
4.2 The experience of EXPO 2015.....	355
5. Concluding remarks.....	356

### 1. Definition of the subject

The issue of corruption in public procurement – despite being subject to a permanent and scrupulous analysis by academics<sup>1</sup> – shows some fundamental unknown factors, starting with the definition of corruption<sup>2</sup>.

---

With sincere gratitude to professor Aristide Police for advice and guidance.

<sup>1</sup> To mention just the most recent works, see R. Cantone and E. Carloni, *Corruzione e anticorruzione. Dieci Lezioni*, Milano (2018); F. Pinto, *Il mito della corruzione*, Roma (2018).

<sup>2</sup> A. Police, *New instruments of Control over public Corruption: the Italian Reform to restore Transparency and Accountability*, in 2 *Dir. econ.* 190 (2015): “in the Italian legal language, the term corruption has so far been essentially a term of criminal law, with whom he has been referred to specific offences. This restrictive meaning is consistent with the fact that the fight against corruption took place mainly at the level of criminal persecution. There is, however, even in legal language, a broader sense of the term, which is related to the prevention of political malpractice and administrative, to operate with the proper tools of constitutional law and administrative law. In administrative law, in fact, has been elaborated a notion of corruption broader than criminal law that refers to conduct that is source of liability or otherwise not exposed to any sanctions, but they are unwelcome to the legal system: conflict of interest, nepotism, cronyism, partisanship, abuse of public office, wastage”; P. Langseth, *Prevention: an effective tool to reduce corruption*, in *Global Program Against Corruption 1* (1999): “anti-corruption action has produced a mountain of words and hardly a molehill of solid results in terms of positive change, or, reform, in institutional behaviour. Failure in this regard has much to do with the complexity, dynamism and pervasiveness of the corruption. Where corruption is choking development, a few with access systematically distort political and

The term corruption has multiple meanings, ranging into a legal, economic and ethic dimension<sup>3</sup>, but it is undeniable that the matrix of the term belongs to criminal law<sup>4</sup>.

---

economic decisions which might be made (systematically) with conflict of interest at play”; for a very interesting essay about the evolution of the notion of administrative corruption, see G.E. Caiden and N.J. Caiden, *Administrative Corruption* (1977). Revisited, in 38 *Philippine Journal of Public Administration* 1 (1994); H.R. Taboli, *Administrative corruption: why and how?*, in 1-12 *International Journal of Advanced Studies in Humanities and Social Science* 2568 (2013): “the term administrative corruption used as an antonym of administrative health, has long been under close attention of organizational intellectuals who made their efforts to eliminate it by proposing definitions in accordance to organizational principles, the common factors of which are bribery and occupational abuses for person interest”; P. Mousavi, M. Pourkiani and K. Branch, *Administrative corruption: ways of tackling the problem*, in 3 *European Journal of Natural and Social Sciences* 180 (2013): “Administrative corruption is one of a set of problems organizations experience during a period throughout their life. The problems are mainly rooted outside the organization but they have an impact on the organization. These problems always pose a challenge to managers. The organization has no control over the rootcauses of the problems. As a result, it can hardly handle them. Administrative corruption, to a large extent, is influenced by economic, social, cultural and political systems. For instance, high unemployment rate, the dominance of informal and traditional relationships on ties between people, the maturity of the political system. directly affect the scale of administrative corruption in any society. On the other hand, administrative corruption has a direct, adverse effect on the efficiency of administrative system, the legitimacy of the political system and the quality of sociocultural system of the society. This creates a vicious cycle that finally leads the country towards decline”.

<sup>3</sup> S. Cassese, *Ipotesi sulla storia della corruzione in Italia*, in G. Melis (ed.), *Etica pubblica e amministrazione. Per una storia della corruzione nell'Italia contemporanea* (1999), 183; U. Von Aleman, *The unknown depths for political theory the case for a multidimensional concept of corruption*, in 42 *Crime, Law and Social Change* 26 (2004): “there are five dimension for corruption: social decline, deviant behavior, logic of exchange, system of measurable perceptions and shadow politics”; for an analysis of the relations between economic growth and corruption, see S. Brianzoni, R. Coppier and E. Michetti, *Multiple equilibria in a discrete time growth model with corruption in public procurement*, in 49 *Quality & Quantity* 2387 (2015).

<sup>4</sup> See B. Boschetti, *Pathways of corruption in the global arena*, in 1 *JusOnline* 23 (2018); G. Cocco, *Le recenti riforme in materia di corruzione la necessità di un deciso mutamento di prospettiva nell'alveo dei principi liberali*, in 2 *Responsabilità civile e previdenza* 374 (2018), the fight against corruption seems to have become the fight against its perception, through the use of slogan and further tightening of existing measures; for a search of a common matrix for criminal and administrative law, see C. Cudia, *L'atto amministrativo contrario ai doveri di ufficio*

Obviously, the entire investigation cannot be addressed without reference to the logic intersections between criminal and administrative law, that may be settled given that the principle of legality is unique, even if the sanctions laid down are different. In other words, the exclusion of the criminal relevance does not prevent that the behaviour may lead to civil or administrative responsibility.

An interesting doctrinal approach has defined corruption as an “articulated texture of moral degeneration<sup>5</sup>”, a worrying trend, that appears to be repetitive and cyclical<sup>6</sup>.

In the significant and debated literary production about corruption, some academics tried to point out some positive aspects about corruption, defined as “latents functions” of corruption, namely a balancing of public authorities<sup>7</sup>.

However, it has been demonstrated that the market distortion due to corruption is not part of the not-harmful market

---

*nel reato di corruzione propria: verso una legalità comune al diritto penale e al diritto amministrativo*, in 2 Dir. pubbl. 684 (2017), it is noted that there is an unresolved tension between different categories and needs, that can be resolved by applying the principle of legality; G. Balbi, *I delitti di corruzione. Un'indagine strutturale e sistematica* (2003), 80. The topic of the relations between the criminal judge and public administration is broad, so please refer to L. Mazzarolli, *Attività amministrativa e giudice penale*, in 4 Dir. soc. 663 (1978); M. Nigro, *Giudice ordinario (civile e penale) e pubblica amministrazione*, in 6 Foro amm. 2035 (1983), the invasion of the criminal judge into the administrative action has aggravated the already-existing defects; F. Palazzo, *Le norme penali contro la corruzione tra presupposti criminologici e finalità etico-sociali*, in 10 Cass. pen. 3389 (2015); Id, *Corruzione: per una disciplina 'integrata' ed efficace*, in 10 Diritto penale e processo 1177 (2011); M. Gambardella, *La disapplicazione degli atti amministrativi illegittimi nel sistema penale dopo le recenti riforme del diritto amministrativo*, in 4 Riv. it. Dir. proc. pen. 742 (2013).

<sup>5</sup> The definition was rendered by G. Melis in the intro speech on 25 February 2017, at Università degli Studi di Roma 'La Sapienza', then published as *La lunga storia della corruzione italiana*, in *Nuova Etica Pubblica* 2 (2017).

<sup>6</sup> See B.G. Mattarella, *Le regole dell'onestà. Etica, politica e amministrazione* (2007), 16.

<sup>7</sup> R. Klitgaard, *Controlling corruption*, 1st ed., (1988), 73, claims that there is an optimal amount of corruption to preserve, for a gain in total public expenditure, between cost of corruption and cost allocated to counteract corruption.

failures, that lead to the economic theory of “workable competition”<sup>8</sup>.

Theories about the nature of corruption are built around the notion of legality, collective interests and public opinion; the perspective focused on breach of legality appears to be preferable, because corruption always reveals a betrayal of public tasks<sup>9</sup>.

Bribery in public procurement cycle represents a collective problem that needs to be addressed not just with legal measures, but also with moral ones<sup>10</sup>.

First of all, there is a shortage of reliable data about this subject in Italy, because the research is done in an hidden market; corruption has been defined as a karstic river<sup>11</sup>, that fades in and out, which it is difficult to track the flow.

The figures about corruption provided by Transparency International cannot be used to give us a clear framework, because

---

<sup>8</sup> This theory has been developed by J.M. Clark, *Toward a concept of workable competition*, in 30 *The American economic review* 241 (1940) and is quoted by A. Police, *Tutela della concorrenza e pubblici poteri* (2007), 2.

<sup>9</sup> This interpretation dates back to a sentence issued by *Segunda Sala del Tribunal Supremo de España*, on 20 September 1990, under which corruption represents a betrayal of loyalty and probity related to public tasks; M. Borgi, *Droits de l’homme: fondement universel pour une loi anticorruption; le case de la Suisse*, in M. Borgi e P. Meyer-Bisch (eds.), *La corruption. L’envers de droits de l’homme* (1995), 4, corruption is the product of an inverted ethics; S. Rodotà, *Elogio del moralismo* (2011), 32, corruption is the death of public morality; F. Manganaro, *Il contrasto alla corruzione in materia di contratti pubblici*, in 11 *Giustamm.it* (2014), corruption is the crime committed by the heathens; B.G. Mattarella, *The Italian efforts on anti-corruption*, in G.M. Racca and C.R. Yukins (eds.), *Integrity and efficiency in sustainable public contracts: balancing corruption concerns in public procurement internationally* (2014), 61; E. Auriol, *Corruption in procurement and public purchase*, in 24-5 *International Journal of Industrial Organizations* 867 (2006); Z. Hessami, *Political corruption, public procurement, and budget composition: Theory and evidence from OECD countries*, in 34 *European Journal of Political Economy* 372 (2014).

<sup>10</sup> See A. Pajno, *Crisi dell’amministrazione e riforme amministrative*, in 3-4 *Riv. it. Dir. pubbl. com.* 582 (2017), the fight against corruption is extremely important because it intersects the two main issues of administrative law nowadays, that are regulatory simplification and restarting the authority of the administration.

<sup>11</sup> This metaphor is proposed by E. Guastapane, *Per una storia della corruzione nell’Italia contemporanea*, in G. Melis (ed.), *Etica pubblica e amministrazione. Per una storia della corruzione nell’Italia contemporanea*, cit. at 3, 20.

they are ontologically subjected to rapid changes not linked to objective reasons<sup>12</sup>.

Corruption represents an imponderable issue, that is undetectable and intangible like a “fine dust<sup>13</sup>”; data about corruption are marked by a genetic approximation, so it is difficult to have a real perception of this phenomenon<sup>14</sup>.

Recently, however, it has been released an interesting research that breaks down the tender procedure into different stages in order to identify a truthful marker on the basis of an algorithm<sup>15</sup>.

The issue investigated unveils its polisemic character; the present work will analyze the so-called grey corruption, which goes beyond the traditional and criminal notion and corresponds to “*maladministration*<sup>16</sup>”, meaning an improper deflection of the public decision-making process.

Corruption undermines confidence of foreign investors and has a negative impact on free competition<sup>17</sup>. In the field of public procurement, corruption is developed in the so-called agency relationships, that is, the external one, between the public administration and the private company, and the internal one,

---

<sup>12</sup> See P. Piras, *Il buon andamento nella pubblica amministrazione tra etica pubblica e corruzione: la novella del nemico immortale*, in 1 Dir. econ. 36 (2015), values of barometer of corruption are characterized by a wide range of imprecision.

<sup>13</sup> See A. Vannucci, *Il lato oscuro della discrezionalità. Appalti, rendite e corruzione*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello* (2011), 291, bribery is a ductile and polymorphic trend, that shows an impressive adaptability to different legislations.

<sup>14</sup> For a useful overview, see M. Gnes, *Italy*, in *Anticorruption strategies within the competences of the supreme audit institutions in the European Union* (2006), 283.

<sup>15</sup> About this issue, see, G. Arbia, *Aspetti statistico-metodologici nella costruzione di indicatori di corruzione e nella valutazione della loro efficacia*, in B. Ponti and M. Gnaldi (eds.), *Misurare la corruzione oggi. Obiettivi, metodi, esperienze* (2018), 22.

<sup>16</sup> S. Cassese, “*Maladministration*” e rimedi, in 5 Foro it. 243 (1992); F. Merloni, *Controlli sugli enti territoriali e maladministration*, in 5 Le Regioni 847 (2009).

<sup>17</sup> Reference is made to a concept of market made by a dense series of relations, in this regard, see G. Corso, *Riflessioni su amministrazione e mercato*, in 1 Dir. amm. 4 (2016).



between the contracting authority and the public servant who is responsible for the procedure<sup>18</sup>.

Anti-corruption measures can be summarised into two categories: hetero-imposed measures, like administrative transparency<sup>19</sup>, and procedural solutions, aiming at guiding the administrative discretion. The present investigation will focus on the second aspect.

## **2. Anti-corruption measures and *codification à droit constant*: looking for a delicate balance**

Isolating the reasons of corruption appears to be difficult, since they are connected with multiple factors.

---

<sup>18</sup> See M. Clarich, *Considerazioni sui rapporti tra appalti pubblici e concorrenza nel diritto europeo e nazionale*, in 1 *Dir. amm.* (2016), 83; E. Morlino, *Fuga dalla responsabilità: gli appalti delle istituzioni europee tra regole e prassi*, in 2 *Giorn. Dir. amm.* 161 (2018).

<sup>19</sup> See M. Lunardelli, *The reform of legislative decree no. 33/2013 in Italy: a double track for transparency*, in 1 *Italian Journal of Public Law* 143 (2017); E. Carloni, *Fighting corruption through administrative measures. The Italian Anticorruption policies*, in 2 *Italian Journal of Public Law* 282 (2017): “In term of transparency, the Italian experience is certainly of interest: the Italian regulation of “total transparency” creates a condition of widespread disclosure that is consistent with the cognitive dynamics of the internet, and that is notable for its immediacy, standardization, reusability, and easy accessibility, albeit within the limits of only involving information that is subject to a system of compulsory publication. Each administration, with its specific transparency plan, is required to implement these publication requirements: the institutional website of every public administration in Italy therefore features a transparent administration section, which provides information about the organization, its activities, and the use of resources. It deserves attention the fact that, with the most recent legislative changes, this approach of transparency through the institutional websites of each administration, is supported (and partly replaced) by the increasing use of centralized databases accessible by anyone”; A. Simonati, *La ricerca in materia di trasparenza amministrativa: stato dell’arte e prospettive future*, in 2 *Dir. amm.* 311 (2018); I. Georgieva, *Using transparency against corruption in public procurement. A comparative analysis of the transparency rules and their failure to combat corruption* (2017), 259: “transparency emerged in response to society’s need to fight corruption. It reflects the public’s right to have access to a certain level of information on norms, rules, procedures and regimes and the actions of participants, presented in an understandable and clear manner; the information provided should at all times be sufficient for monitoring, verification and assessment”.

First of all, the fragmentation of public demand transferred to several contracting authorities makes the legal instruments of monitoring difficult.

Another cause of corruption is considered to be the so-called “elephantitis regulation<sup>20</sup>”, also known as “normative hypertrophy<sup>21</sup>”; the term is used to describe the great amount of laws dealing with public procurement, with transitional rules becoming definitive and forming a disproportionate number of rules. Infact, it has been highlighted that many rules and the inconsistency of laws feed corruption.

In order to find a remedy to this problem, during the past two decades administrative law has experimented a legislative technique called *codification à droit constant*<sup>22</sup>, inspired by the French law.

This form of law-making - that characterises the current Italian code of public procurement - leads to a temporary balances and carries out legislative microsystems, that are independent and autonomous.

In other words, the guarantee of formalism and the effectiveness of substantialism have both costs and benefits, this is the reason why it is appropriate to find a long-term balance.

These remarks have consequences on the lack of balance between repression and prevention in the anti-corruption

---

<sup>20</sup> On this topic, see M. Clarich and B.G. Mattarella, *Leggi più amichevoli: sei proposte per rilanciare la crescita*, in 2 *Diritto e processo amministrativo* 399 (2011), direct and indirect costs increase because the uncertainty resulting from unstable legal regimes and the excessive number of the law becomes a problem. The sacrifices and the constraints for firms must be reduced to a minimum. Furthermore, there is the problem of the poor quality of legislation, with a large number of transitional, urgent and not directly applicable dispositions. A solution would be the use of the so called ‘sunset law’, that have an automatic expiry date. About this solution, see B. Baugus and F. Bose, *Sunset legislation in the States: balancing the legislature and the executive* (2015), 4.

<sup>21</sup> A. Di Mucci and D. Provvienza Petralia, *Il principio di trasparenza tra ipertrofia regolamentare e debolezze del controllo sociale: il caso degli obblighi pubblicitari nel settore dei contratti pubblici*, in 4 *Federalismi.it* (2016), 2.

<sup>22</sup> See M. Ramajoli, *A proposito della codificazione e modernizzazione del diritto amministrativo*, in 2 *Riv. trim. dir. pubbl.* (2016), 362, the abandonment of the classic form of codification drove the administrative law to use this technique to legislate; G. Napolitano, *Il codice francese e le nuove frontiere della disciplina del procedimento in Europa*, in 1 *Giorn. dir. amm.* (2016), 5.

measures<sup>23</sup>. All the rules amongst the various codes which have been adopted to fight corruption were taken without a long-term vision; on the contrary, they were approved on the emotional tide of judicial reporting.

These considerations impose to analyse the present issue in a chronological order.

### **2.1 A well known enemy: administrative discretion in Merloni-law and in decree no. 163/2006**

As it has been analysed in the previous paragraphs, principles that inspired the proposal for amendments to public procurement law were not marked by uniformity.

The only constant finding in the various laws is the absence of a chapter of the laws entirely dedicated to anti-corruption measures.

In Italy, after the well-known “*Tangentopoli*” scandal, it has been commonly held that it was necessary to restrict administrative discretion and was desirable to use the standardizations of procurement rules<sup>24</sup>.

The Law no. 104 of 11 february 1994, also known as Merloni-law, was promulgated in a climate of distrust of public authorities and there was the will not to leave to the public procurement system the power to choose its private contractor.

This law, based on transparency and timeliness of public action, was founded on two wrong ideas.

First of all it was considered that corruption was more developed at the stage of the award of the public contract, than in other stages; among other things, this conviction was not rooted on any data or long-term studies.

In reality, the most permeable phase to bribery is considered to be the performance of the contract, because is less burdened by the paradigm of transparency<sup>25</sup>.

---

<sup>23</sup> From a historical perspective, see A. Algostino, *Prevenire o reprimere? Un dibattito parlamentare di fine Ottocento*, in 2 Dir. pubbl. (2015), 509.

<sup>24</sup> On this point, see K. Hunsaker, *Ethics in public procurement: buying public trust*, in 9 Journal of Public Procurement (2009), 411.

<sup>25</sup> F.J. Vazquez Matilla, *The modification of public contracts: an obstacle to transparency and efficiency*, in G.M. Racca and C.R. Yukins (eds.), *Integrity and efficiency in sustainable public contracts: balancing corruption concerns in public procurement internationally* (2014), 275; G.M. Racca, R. Cavallo Perin and G.L.

Furthermore, it was assumed that administrative discretion was itself a source of corruption<sup>26</sup>, and therefore, it was necessary to limit the powers of contracting authorities during the award phase<sup>27</sup>.

However, the decision to deprive the public administration of the discretionary power determining, infact, only a noticeable loss of efficiency, without having good results in the fight against corruption<sup>28</sup>.

On the basis of a theory, developed by some economists, called "adverse selection<sup>29</sup>", the replacement of discretionary power with predefined template for the public awards can generate negative effects on the whole administrative action.

---

Albano, *Competition in the execution phase of public procurement*, in 41 Public contract law journal (2011), 89, usually, corruption in the execution phase manifests itself through the wide category of subcontracts; G.M. Racca and R. Cavallo Perin, *Material amendments of public contracts during their terms: from violations of competitions to symptoms of corruption*, in 8-4 European Procurement & Public Private Law Review (2013), 283, "in order to safeguard the principles of non-discrimination, transparency and competition, the European Court of Justice (ECJ) limited the possibility to change the terms of the procurement after the award. The ECJ maintained that material amendments are those modifications beyond the scope of the awarded contract that bidders could not have reasonably anticipated at the time of the original award when they joined the competition".

<sup>26</sup> On this issue, G.D. Comporti, *Lo Stato in gara: note sui profili evolutivi di un modello*, in 2 Dir. econ. (2007), 231, a constant finding into Italian law with regard to public procurement is the lack of trust in discretionary.

<sup>27</sup> M. Dugato, *Organizzazione delle amministrazioni aggiudicatrici e contrasto alla corruzione nel settore dei contratti pubblici*, in 3 Munus (2015), 667, the rigid procurement process is an obstacle to the investigations, the strict compliance of the formal rules prevented any substantial checks.

<sup>28</sup> G. Fidone, *Lotta alla corruzione e perseguimento dell'efficienza*, in 3 Riv. giur. Mezz. (2016), 753 ff.; C. Colosimo, *L'oggetto del contratto, tra tutela della concorrenza e pubblico interesse*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello*, cit. at 13, 65, to prevent discriminatory decisions was adopted a model called "command and control", to track thoroughly the administrative action.

<sup>29</sup> See J.J. Laffont and J. Tirole, *Adverse selection and renegotiation in procurement*, in 4 The review of economic studies (1990), 597.

In the case of particularly complex call for tenders it is necessary to use of flexible procedures to fill the cognitive gap suffered by the contracting authority<sup>30</sup>.

In the law no. 104 of 11 February 1994, the legislator had to balance out flexibility and velocity of the procedure, on the one hand, and rigour and transparency, on the other hand<sup>31</sup>.

Moreover, together with this law it was set up a widespread monitoring system managed by the supervisory independent authority for public procurement.

This regulatory framework caused a protectionist restrictions on the procurement market, cheating on the pro-competitive pressure originating from European Community. Following the adoption of the European Directives no. 17 and 18 of 2004, the legislative decree no. 163 of 12 April 2006, also-known as “Code on public works, service and supply contracts”, failed to transpose the principles of flexibility set out in the European directives and disappointed the high expectations that surrounded its promulgation<sup>32</sup>.

The several amendments that were led an influential expert to define this Code a “perpetually unstable legal framework<sup>33</sup>”.

The spread of the so-called “emergency culture” justified the application of simplified calls for tenders which were not subjected to any control<sup>34</sup>.

The decennial validity of the legislative decree no. 163 of 12 April 2006 was characterized by several interpretative judgements issued by the Court of Justice of the European Communities and by the Italian Council of State that, as a result,

---

<sup>30</sup> R. Burguet and Y.-K. Cee, *Competitive procurement with corruption*, in 1 The RAND Journal of economics (2004), 50, showed that with complete information and no corruption the efficient firm will win the contract for sure.

<sup>31</sup> For a thorough analysis see M. Clarich, *La legge Merloni tra instabilità e flessibilità*, in Corr. giur. (2002), 1400.

<sup>32</sup> R. De Nictolis, *Il nuovo codice dei contratti pubblici*, in Urb. e app. (2016), 504.

<sup>33</sup> G. Palma, conclusion to the conference ‘*Anticorruzione e trasparenza negli enti locali*’, held in April 2016 in Torre del Greco; M.P. Chiti, *Il sistema delle fonti nella nuova disciplina dei contratti pubblici*, in Giorn. dir. amm. (2016), 436, originally it was a synthetic law, increased after three corrective decrees.

<sup>34</sup> D. della Porta and A. Vannucci, *Corruzione politica e amministrazione pubblica. Risorse, meccanismi, attori* (1994), 66, what constitutes an emergency is a vague concept.

have complicated the legal framework, instead of making it simpler.

In 2012 the law no. 190 was adopted, laying down rules for the prevention and punishment of corruption and illegality in public administration; the law required a total disclosure for the phase of the award of public contracts and enlarged the list of crimes that leading to unilateral termination of contracts by the administration.

Thereafter, the decree law no. 90 of 24 June 2014, then converted into law no. 114 of 11 August 2014, eliminated the supervisory independent authority for public procurement and introduced the new anti-corruption authority.

In this chaotic legal framework, and in order to transpose European Directives no. 23, 24 and 25 of 2014, Italy decided, instead of amending the previous code, to re-write a brand new one.

## **2.2 Code of 2016 and anti-corruption measures “out of competition”**

The promulgation of the legislative decree no. 50 of 18 April 2016 completely changed the system of legal sources for the tendering of public contracts, in a public atmosphere characterized by a shared sense of willingness to contrast corruption.

Firstly, it was recognised how important the execution phase was, because the anti-corruption authority held for the first time a supervisory power over the so-called “variants in progress” of the object of the contract.

In order to tackle the fragmentation of the public demand, it was set an accreditation system for the procuring entities, subject to a positive assessment released by anti-corruption authority.

It is widely felt that the new anti-corruption authority has too many tasks, such as the enactment of guidelines, in addition to the traditional supervision and control tasks.

Infact, this new code provides for a rating of legality for the enterprises that wish to participate to public calls for tenders and upgrades the monitoring system for abnormally low tenders.

The whole legal framework for the award of public contracts is marked by the total disclosure of tender acts, because,

with the decree no. 33 of 14 March 2013, administrative transparency has been subject to a “genetic mutation”<sup>35</sup>.

After the enactment of the legislative decree no. 97 of 25 May 2016, that introduces a corrective to the existing legal framework (the so-called Italian Freedom of Information Act), the issue of the right to administrative information - involving also public transparency - paradoxically appears to be less clear<sup>36</sup>.

The excessively high area dedicated to anti-corruption measures in the new public procurement code makes the other aims appearing as less relevant; the law is inspired by the “culture of widespread mistrust that is the precursor of authoritarianism”<sup>37</sup>.

However, administrative transparency can be categorised as an hetero-imposed measures, that has an impact on the administrative organization too<sup>38</sup>.

The visibility of the award acts is an essential precondition useful to avoid corruption development but it does not have an impact on the decision-making process.

In Italy, anti-corruption instruments constitute a “confused patch-work”<sup>39</sup>, unable to adapt to the variability of occurrences.

A possible solution is a kind of procedural one, consisting of an ideal declination of administrative discretion, in order to guide public choices to best results.

---

<sup>35</sup> F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, in 8 *Federalismi.it* (2013), 3.

<sup>36</sup> See G. Gardini, *Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici*, in *Federalismi.it* (2017).

<sup>37</sup> Interview with S. Cassese, posted in the newspaper ‘Il Foglio’ on 24 January 2017.

<sup>38</sup> On this topic, see F. Fracchia, *L'impatto delle misure anticorruzione e della trasparenza sull'organizzazione amministrativa*, in 3 *Dir. econ.* (2015), 483, the two main action lines are the risk assessment and the administrative transparency; J.C. Bertot, P.T. Jaeger and J.M. Grimes, *Using ITCs to create a culture of transparency: E-government and social media as openness and anti-corruption tools for societies*, in *Government Information Quarterly* (2010), 264; T.T. Lennerfors, *The transformation of transparency on the act on public procurement and the right to appeal in the context of the war of corruption*, in *Journal of Business Ethics* (2007), 381.

<sup>39</sup> G. Sirianni, *Etica pubblica e prevenzione della corruzione: il problema del personale politico*, in *Dir. pubbl.*, (2014), 934.

### 3. Multilayer discretion: a procedural solution

Administrative discretion, defined as “a permanent nagging worry<sup>40</sup>” for legal theorists, must be scrutinized by the parameters of proportionality and appropriateness<sup>41</sup>.

Originally, in the sector of public procurement, discretion power was polarised around the only notions of auction and negotiation because the contracting authority could not select a middle way<sup>42</sup>.

In administrative law, there are areas where competition and discretionary are antithetical concepts, as in the case of the so-called not-discretionary authorizations, but, in the case of public contracts, discretionary represents an incentive to competition<sup>43</sup>.

Administrative discretion represents a multi-faceted power, in which the area of evaluation cannot be separated from the factual aspect<sup>44</sup>.

In order to eliminate the options marked by corruption from the potential decisions, it is necessary to graduate the public power as to reach to a reasonable and balanced weighting between the various interests; this means that discretionary may not turn to be a full delegation with unrestricted powers for the contracting authority.

In view of the consideration made above, in any public decision there is an intangible decision-making core not subjected to any legislative influences<sup>45</sup>.

---

<sup>40</sup> S. Cassese, *Le basi del diritto amministrativo* (2000), 444.

<sup>41</sup> In a broad sense, see A. Orsi Battaglini, *Attività vincolata e situazioni soggettive*, in 1 Riv. trim. dir. proc. civ. (1988), 3, the exercise of administrative power is always supplemented by general clauses.

<sup>42</sup> M. Ricchi, *Negoauction, discrezionalità, dialogo competitivo e il nuovo promotore*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello*, cit. at 13, 145.

<sup>43</sup> F. Trimarchi Banfi, *Il principio di concorrenza: proprietà e fondamento*, in Dir. amm., 15 (2013), in the Italian legal framework, administrative law seems to be guided by the principle of competition.

<sup>44</sup> On this point, see M. Clarich, *Contratti pubblici e concorrenza*, in Astridonline.it (2015); S. Civitarese Matteucci, *Funzione, potere amministrativo e discrezionalità in un ordinamento liberal-democratico*, in 3 Dir pubbl. (2009), 769, administrative discretion shall be composed of freedom, vagueness of law and a power conferred by an authority.

<sup>45</sup> This theory was drawn up by A. Orsi Battaglini, *Alla ricerca dello Stato di diritto*, (2005) 124, discretionary is always suspended between legality and



### 3.1 Instrumental discretion: a variable-geometry structure

Between the good side and the bad side of discretionary there are several actions that are not crimes but that can be measured by the benchmark of administrative corruption, that is the diversion of public power for private gain.

The full extent of administrative power in public procurement is in the phase of choice of private contractor and decreases during the execution phase.

During the public tender, the contracting authority can increase or restrict the interpretation of the subjective requirement or of the award criteria; this power is called instrumental discretion<sup>46</sup>.

Instrumental discretion, from administration point of view, represents a self-imposed set of rules and it is defined as a “regulatory and decreasing power<sup>47</sup>”.

The flexibility held by the contracting authority on the drafting of the invitation to tender may also be addressed for the identification of anti-corruption measures, additional to the legislative ones.

The graduation of the administrative decisions has to be ensured through a continuous flow of information between the administration and the firms; the upgrading of the cooperation between the public and the private sector can reveal risks of corruption in advance and more efficiently.

An interesting solution, adopted by legislative decree 50 of 18 April 2016 and just planned for public-private partnership, is the so-called strategic discretion, that enables the administration to amend the requirements for tender in accordance to what the market offers.

It is not entirely illogical to use this flexibility to fight corruption and, more generally, market distortions.

---

substance, because there is always a mutual exclusion between power and consensus.

<sup>46</sup> See P. Portaluri, *La discrezionalità strumentale della stazione appaltante e il modello organizzativo ex d.lgs. 231/01*, in 2 Riv. giur. edil. (2012), 91, it is necessary to ensure an optimal inspection over the economic processes.

<sup>47</sup> S. Vinti, *I procedimenti amministrativi di valutazione comparativa concorrenziale: la diversificazione delle regole e la tutela dei principi* (2002), 1195.

### 3.2. Administrative equity and public ethics: the responsible discretion

The failures of the legislative measures impose to move the field of research on an extra-legal one, that involves topics like public ethics and equity<sup>48</sup>, an issue consistently ostracized by administrative law<sup>49</sup>.

Discretionary can be a possible source of corruption or, alternatively, a virtuous instrument for honorable administrations, through the promotion of ethical and moral values.

In the Italian legal framework, the discussion about equity in administrative law was affected by an original perspective drawn up by Cammeo<sup>50</sup>, according to whom “equity can regulate administrative discretion<sup>51”</sup>.

In the present work the issue of collective ethics is analysed; this issue has been declined as administrative ethics or ethics in government<sup>52</sup>.

---

<sup>48</sup> M.S. Giannini, *L'equità*, in *Archivio giuridico Serafini* (1941), 39, administrative equity can be interpreted as bonhomie, clemency, moderating the legal obligations or referral to ethics and moral values.

<sup>49</sup> L.R. Perfetti, *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, in 3 *Dir. amm.* (2013), 374.

<sup>50</sup> F. Cammeo, *L'equità nel diritto amministrativo*, in *Annuario della Regia Università di Bologna* (1924) 16; F. Merusi, *Sull'equità della pubblica amministrazione e del giudice amministrativo*, in 3 *Riv. trim. dir. pubbl.* (1974), 359, equity can integrate the legal framework; for a complete analysis, see. F. Merusi, *L'equità nel diritto amministrativo secondo Cammeo, alla ricerca dei fondamenti primi della legalità sostanziale*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno* (1993), 413; K.G. Dehnhardt, *The ethics of public service: resolving moral dilemmas in public organizations* (1988), 3, “not only does a theoretical framework for administrative ethics need to be developed, but there is also a need to outline the practical purposes and resulting research can be put. Four such purposes can be identified: to emphasize the need for ethical deliberation in all administrative decisions, to provide procedural and normative guidance for administrators in making those decisions, to foster organizational environments, to aid the process of holding administrators and public administration accountable”; D. Rendleman, *The triumph of equity revisited: the stages of equitable discretion*, in 15 *Nevada Law Journal* (2015), 1397, “equitable discretion shifted from discretion to arbitrariness and corruption”.

<sup>51</sup> For a critical analysis, see A.R. Leys, *Ethics and administrative discretion*, in 1 *Public Administration Review* (1943), 10.

<sup>52</sup> J.S. Bowman, *Ethics in government: a national survey of public administrators*, in 3 *Public Administration Review* (1990), 345; J.S. Bowman and R.L. Williams, *Ethics in government: from a winter of despair to a spring of hope*, in 6 *Public Administration Review* (1997), 517; the first studies on public ethics were

Administrative equity serves as a bridge that connects collectively determined rules and the reality of a particular case. It refers to the substantive principles and norms that may justify individual exceptions to rules of general applicability<sup>53</sup>.

The term equity refers to ethical and moral values assuming tasks that the law is unable to fulfil<sup>54</sup>; the notion of equity can synthesize prevention and suppression of corruption into just one measure, that is to raise the moral standards for public tenders.

The issue of public ethics is closely linked to the notion, drawn up by the German doctrine, of *regulierte selbstregulierung*<sup>55</sup>, which includes codes of conduct for public employees and the adoption of best practices by public administration.

There are two different models of public ethics: a democratic *ethos*, which includes loyalty and political neutrality and a bureaucratic *ethos*, which includes the value of social equity<sup>56</sup>. The last model can be used by contracting authorities to prevent corruption during the entire stage of invitation to tender.

In other words, public ethics shall supervise the grey area between corruption and legality<sup>57</sup>, through the so-called “moral suasion<sup>58</sup>”.

---

conducted in Great Britain, in 1880s, for all, see D.B. Eaton, *Civil service in Great Britain: a history of abuses and reforms and their bearing upon American politics* (1880); R. Cavallo Perin, *L'etica pubblica come contenuto di un diritto degli amministratori alla correttezza dei funzionari*, in F. Merloni and R. Cavallo Perin (eds.), *Al servizio della nazione: etica e statuto dei funzionari pubblici* (2009), 159; H.G. Frederickson and J.D. Walling, *Research and knowledge in administrative ethics*, 2nd edition, in T. Cooper (ed.), *Handbook of Administrative Ethics* (2001), 53, “what we need to know about administrative ethics is traeted in four categories: knowledge of values, standards, context and behavior”.

<sup>53</sup> A.C. Aman JR, *Administrative equity: an analysis of exceptions to administrative rules*, in 277 *Duke Law Journal* (1982), 276, “the inability of judicial review of administrative action to provide individualized relief is attributable to established constitutional and administrative law doctrines. The use of a rational-basis test almost ensures that the statute will be upheld”.

<sup>54</sup> See M. Golden e L. Picci, *Corruption and the management of public works in Italy*, in S. Rose-Ackerman (ed.), *International Handbook of economic corruption*, 1st ed. (2006), the good regulation is not enough in order to prevent the spread of corruption.

<sup>55</sup> H. Stockaus, *Regulierte Selbstregulierung im europäischen* (2015).

<sup>56</sup> This theory was drawn up by J.A. Rohr, *Ethical issues in french public administration: a comparative study*, in 4 *Public Administration Review* (1991), 283.

<sup>57</sup> See N. Pasini, *Etica e pubblica amministrazione: analisi critica di alcune esperienze straniere* (1996), 31, public ethics can minimise the risks of corruption,

In the sector of public contracts, the adoption of this compliance and ethics program must be oriented to a responsible and aware decision by public administration.

The only structural limit of this solution is represented by the difficulty of using this equitable discretion outside the award phase, like, for example, in the phase of execution where the space for discretion is extremely limited.

#### **4. Collaborative oversight procedure: relevant data from the annual report of the National Anticorruption Authority**

In June 2018, the National Anticorruption Authority (namely, ANAC) submitted to the Italian Republic Senate the annual report for 2017 as provided by the article no. 213, subparagraph 3, letter e) of the current public procurement code.

The entire document presents and describes the several activities provided by the Authority and it is subdivided into fourteen chapters; the chapter no. 8 of the report is dedicated to the tasks related to the special and the collaborative supervision<sup>59</sup>.

---

because the complexity of public contracts impose to give more autonomy to the contracting authorities.

<sup>58</sup> R.W. Cox, S. Buck and B. Morgan, *Public administration in theory and in practice* (2015), 23.

<sup>59</sup> About this issue, see the document published by the European Commission, *Voluntary oversight on procurement procedures*, in [www.ec.europa.eu](http://www.ec.europa.eu), 2017, 3, “the precise scope of oversight generally includes the legality, transparency and efficiency of procurement. Although the main objective of oversight mechanism is ultimately to prevent and deter corrupt practises in procurment, it can bring a much wider range of benefits, such as increased transparency and accountability, enhanced trust in authorities and government contracting, contributing to a good reputation among contracting authorities, saving costs and improving competition. In principle, it can be used for any type of public procurement; however, from a cost-effectiveness point of view, it is often used for high-risk or complex procurement, major risk project, or projects with high national or regional public interest and sensivity, where an addiotional layer of control is needed to ensure that public funds are handled correctly”. With regard to Italy, this document points out that “the ANAC oversight an be imposed by law or may be requested by the contracting authority for a specific case. Typically requests are made for priority procurement procedures, such as major events or large-scale infrastructure projects. This marks a cultural shift, as collaborative suoervision is focused on preventive action in reducing risks in the integrity ofthe procurement process,

This part of the investigation is not dedicated to an overall analysis of the supervisory tasks held by ANAC in the area of the award of public works contracts but it aims to analyze a new operational mode that favours a constant cooperation between the procuring entities and ANAC. Furthermore, the legal arrangement under investigation in this subsection confirms the interpretative tendency, according to which the overall activity carried out by ANAC is marked by the principle of loyal cooperation, that is one of the leading principle under Italian administrative law<sup>60</sup>.

After the entry into force of the Code of 2016, the legal arrangement of the collaborative oversight is regulated by the article no. 213, subparagraph 3, letter h) of the legislative decree no. 50 of 2016; this rule provides that the Authority shall carry out supervisory activities through the conclusion of agreement protocols (memoranda of understanding) with the contracting authority for contracts of specific concern. In addition, on 28 June 2017, ANAC adopted a specific settlement act<sup>61</sup>, published on the Italian Official Journal no. 178, that restricts the options of applying this kind of supervision.

In particular, the article no. 4 of this act enumerates the preconditions for the activation of the collaborative oversight procedure, among which it is worth mentioning the tender procedures in the context of extraordinary programmes at the occasion of major events, in the occasion of natural hazards and for the implementation of large-scale infrastructure. However, save in the cases provided for the abovementioned article no. 4, ANAC may dispose a supervision procedure, in front of high-level corruption index or during abnormal situations that could affect the smooth conduct of the tendering procedure.

Unlike the traditional forms of cooperation, this collaborative oversight allows the Authority to deter and prevent

---

instead of sanctioning illicit behaviour *ex post*. Indeed, to underline the collaborative element of this supervision, no sanctioning by ANAC is foreseen during the process unless formalised procurement documentation exhibits illegal elements”.

<sup>60</sup> About this issue, F. Giuffrè, *Le autorità indipendenti nel panorama evolutivo dello stato di diritto: il caso dell’Autorità nazionale anticorruzione*, in I. Nicotra (ed.), *L’Autorità nazionale anticorruzione. Tra prevenzione e attività regolatoria* (2016), 9.

<sup>61</sup> The entire document is available on the website [www.anticorruzione.it](http://www.anticorruzione.it).

unlawful activities *ex ante*, through the assessment of specific indicators.

The collaborative oversight procedure shall be conducted since the publication of the invitation to tender until the signature of the contract and it starts after the dispatch of the tendering procedure records on the part of the procuring entity; the Authority shall make its observations that have non-binding effectiveness, because the administration can disregard them through the adoption of a well-founded act. Nevertheless, if the Authority takes the view that the failure to make the adjustment by the contracting authority is particularly serious can unilaterally terminate the agreement.

It seems appropriate to refer briefly on the procedural aspects and the first data provided by ANAC, in relation to administrative dispute deflation too, and then to look at the experience of EXPO 2015.

#### **4.1 Procedural aspects and impact on legal disputes**

The entire framework of the collaborative oversight system is based on a kind on a reticular and continuous cooperation between the Authority and the entity subjected to this monitoring system.

A first interesting profile concerns the phase of the initiative, where the same procedure is activated in accordance with an application drafted by the contracting authority. The template set out seems to correspond to a *sub condicione* action, because for the completion of the application it is necessary an internal act by the board of ANAC.

The need to submit the initiative act to the board of ANAC seems to correspond to an eligibility check, in order to ensure that the application (and the relative tendering procedure) complies with the conditions laid down for using the legal instrument under investigation (mentioned in the preceding subparagraph). However, because of the extremely vague statement of the current Regulation, it is unclear what are the parameters that shall be evaluated by ANAC in order to allow or to deny the access to collaborative oversight system and, therefore, it is uncertain the margin of discretion held by the board of ANAC in this instance. The circumstance that the conclusion of a Memorandum of Understanding (MoU) should be regarded as a prerequisite for the

implementation of this kind of supervision does not remove uncertainty factors<sup>62</sup>.

The cooperative instrument studied at this point is reflected in consultative activities which concern both general situations and specific acts; the collaborative oversight, in such a way, turns into a preliminary and essential evaluation activity.

After the transmission of the tendering procedure acts (in particular, a draft version of the act) at the hands of the contracting authority, ANAC shall deliver an opinion in the event that there are some irregularities or if the acts transmitted do not comply with the Public Procurement Code provisions; after the view put forward by ANAC there are two alternate options.

In the event that the procuring entity will accept the observations made by ANAC, the tender acts need to be aligned with the advice; otherwise it starts an information exchange between ANAC and the contracting authority which does not slow down the tender procedure; this regulatory option is fully compatible with the voluntary structure of the legal tool. If the procuring entity intends to deviate from this recommendations shall submit several well-founded observations before the adoption of the further tendering procedure acts.

The monitoring system defined in this way complements a traditional ‘command and control’ approach<sup>63</sup> with an integrated template for action on grounds of an ongoing relationship and an

---

<sup>62</sup> In this regard, see E. Frediani, *Vigilanza collaborativa e funzione “pedagogica” dell’ANAC*, in 23 *Federalismi.it* (2017), 6.

<sup>63</sup> S. Cassese, *The rise of the Administrative State in Europe*, in 4 *Riv. trim. dir. pubbl.* (2010), 1007, “the three paradigms of the administrative States have changed: the command and control paradigm, the unity paradigm and the paradigm of the administration as a higher body”; S.W. Schill, *Transnational legal approaches to administrative law: conceptualizing public contracts in globalization*, in 1 *Riv. trim. dir. pubbl.* (2014), 7, “Globalization, privatization, and new instrument of governance are bringing about fundamental structural and institutional shifts in respect of the traditional ordering paradigms of administrative law, that is, hierarchy (or command-and-control) as a principle of administrative law-relations and a method of governance, on the one hand, and the intrinsic connection between administrative action and domestic law, on the other. In that context, globalization leads to the dissolution of the most fundamental categorizations used to structure and define fields of law or even entire legal orders, namely the dichotomies of national and international law, on the one hand, and public and private law, on the other”.

uninterrupted flow of informations bewtween ANAC and the procuring entities.

As a result, the aim of this legal tool is to ensure the proper conduct of the competitive procurement operations through the overcoming of the classic monitoring paradigm to change the perspective resulting in an almost educational role<sup>64</sup> of ANAC.

This approach is entirely consistent with the search for procedural solutions through the enhancement of new paradigms of public action, in which the ANAC measures play an ancillary role throughout the whole tendering procedure.

In the first quarter of 2018, the Anticorruption Authority analysed the legal disputes related to the tendering procedures subject to collaborative oversight procedures. These data from ANAC have shown an over reduction of the legal disputes but above all the bulk of the administrative litigations ended with a judgment in favour of the public administration<sup>65</sup>.

These data - even if they are not very indicative because they refer to a limited amount of time - reveal the potential deflectionary effects of this legal tool in any dispute related to the award of public contracts.

#### **4.2 The experience of EXPO 2015**

The Decree Law no. 90 of 2014 assigned to the president of ANAC special supervisory powers in order to ensure the maximum transparency of the activities linked to the achievement of the public works for the EXPO held in Milan in 2015; this experience represented the first practical application of the collaborative surveillance.

In particular, the society EXPO *PLLCs* (the publicly owned corporation that hosted the event) was obliged to trasmit the tender procedure acts to a task force unit established within ANAC. It is widely felt that this burdensome procedure did not slow down the execution time of the works for the EXPO<sup>66</sup>.

---

<sup>64</sup> E. Frediani, *Vigilanza collaborativa*, cit. at 62, 10.

<sup>65</sup> These data are contained in the annual report developed by ANAC, available on the website [www.anticorruzione.it](http://www.anticorruzione.it), 156 ff.

<sup>66</sup> On this issue, see S. Buseti and B. Dente, *La vigilanza collaborativa a EXPO Milano 2015, ovvero i vantaggi della complicazione*, in 1 Riv. ital. Pol. Pubbl. (2017), 19; J. Buggea, *Corruzione e grandi eventi*, in Special Issue of the Review 87 Dir. econ. (2015), 151. More generally, on the issue of major events, see R. Cavallo



These repeated interactions has ensured a strong degree of interdependence<sup>67</sup> among all the actors concerned which has encouraged the success of this template.

Furthermore, the lack of coerciveness of the acts has led to a shift in perspective of the classical paradigm of the administrative control system that gets reconsidered through the abandonment of the traditional surveillance pattern.

However, it is important to underline that the judgements about the event under investigation have not unanimously been positive, because some scholar asserted that the acceleration and simplification of the procedures relating to the EXPO held in Milan have caused several damages in terms of administrative effectiveness and, above all, have not led to tangible results as regards the fight against corruption<sup>68</sup>. From this perspective - and this point is entirely acceptable - administrative simplification and fight against corruption are joint objectives.

After this first experience, this legal tool was applied to other major events, but will be required most meaningful data flows in order to make a balanced assessment about the real impacts of the collaborative surveillance.

## 5. Concluding remarks

Corruption in public procurement is a significative and strategic issue, that must be fought on many fronts and with multi-faceted measures. The uncertainty of data about corruption

---

Perin and B. Gagliardi, *La disciplina giuridica dei grandi eventi e le olimpiadi invernali "Torino 2006"*, in 2 *Dir. amm.* (2012); G. Locatelli, G. Mariani, T. Sainati and M. Greco, *Corruption in public projects and megaprojects: there is an elephant in the room*, in 35 *International Journal of Project Management* (2017), 252, "The megaproject is a particular class of projects that shares most of the aforementioned characteristics. Megaprojects are very large investment projects that tend to be massive, indivisible, and long-term artefacts, with investments taking place in waves"; A. Benedetti, *L'eredità di "Expo" Milano 2015 e la disciplina dei grandi eventi*, in 1 *Amministrare* (2016), 7.

<sup>67</sup> See R. Axelrod and W.D. Hamilton, *The evolution of cooperation*, in 211 *Science* (1981), 1390.

<sup>68</sup> C. Taccola, *L'attività amministrativa in occasione di grandi eventi: istituti di semplificazione e accelerazione amministrativa*, in *Special Issue of the Review* 87 *Dir. econ.* (2015), 47.

makes it hard to set up appropriate law enforcement measures and data based on the perceived corruption are not reliable.

The total disclosure of the award acts is not enough because the law enforcement action must be conducted in respect of administrative discretion.

A result of the research showed that there is no more a systematic corruption but, instead, we are dealing with an individual trend.

The risk of corruption affects not only the contracting authority but also private entities holders of public tasks, like attestation entity, the so-called *S.O.A.*, *Società organismo di attestazione*.

The prevention of corruption implies a multi-faceted strategy, based on public access to documents; this renewed perspective is due to the failure of the previously in force control framework, maybe the most despised legal arrangement of Italian law.

Administrative transparency can be a tool for a great change, but in the execution phase is not as good as in the award one and cannot be a solution for every troubles of corruption. The best solution seems to be the use of administrative equity, by which the public decision-making process can become more clear and harder to be involved in risks of corruption, without undermining the administrative action efficiency.

The current anti-corruption plan into Italian law seems to be adequate - even if the reform that have occurred have undermined part of the original rigour - with a clear political choice preceded by studies and analyses, such as rarely happened before.

The cornerstone of the entire framework is the notion of prevention that is entrusted not only to *ANAC*, but every public administration must have an office dedicated to this task; in this context a key role is performed by the anti-corruption plans, that every administration has to draw up, after having performed a risk maps<sup>69</sup>.

---

<sup>69</sup> Please refer to R. Bartoli, *I piani e i modelli organizzativi anticorruzione nei settori pubblico e privato*, in 11 *Diritto penale e processo* (2016), 1507; C. Tubertini, *Piani di prevenzione della corruzione e organizzazione amministrativa*, in 3 *JusOnline* (2016), 135; G. D'Onza, V. Zarone and F. Brotini, *Le determinanti della "risk*

In order to limit the conclusion to the field of public contracts, it is appropriate to limit the recourse of emergency at the very most, trying to implement the already-existing legal tools.

In other words, the epocal change that has occurred in recent years gave us a comprehensive and appropriate template, with a significant reduction in the number of the procuring entities and many already-existing legal tools that need to be applied in a specific way, by reducing exceptions to a minimum.

The allocation of regulation and supervision tasks to ANAC provides to widen the scope of the discussion, in order to read the complex issue of corruption through an overall strategy gained, once in a while, in a mature and informed legal framework.

---

*disclosure" nei piani anticorruzione: uno studio sulle amministrazioni pubbliche italiane*, in 1 Azienda Pubblica (2015), 10.