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F.Merusi, M. Passaro, *Autorità indipendenti*, in *Enc. dir.*, VI, Agg., Milano, 2002, 143 ss.;

S. Cassese, *Le basi costituzionali*, in Id. (a cura di), *Trattato di diritto amministrativo, Dir. amm. gen.*, I, Milano, 2003, 273 ss.;

F. Benvenuti, *Disegno dell'amministrazione italiana,* Padova, 1996.

Per le opere collettanee:

Aa.Vv., *Diritto amministrativo,* a cura di L. Mazzarolli, G. Pericu, A. Romano, F.A. Roversi Monaco, F.G. Scoca, Bologna, 1999; oppure

E. Paliero, A. Travi, *La sanzione amministrativa*, Milano, 1989.

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Corte cost., 15 gennaio 1999, n. 12, in *Foro it.*, 1999, I, 267 ss.;

Cass, ss.uu., 12 marzo 1998, n. 128, in *Giur. It.*, 1999, I, 2, 315 ss.;

Per le abbreviazioni degli altri collegi, ovvero delle Riviste e dei periodici, si può fare riferimento, ad es., all'elenco del repertorio generale del Foro italiano o della Giurisprudenza italiana, **sempre secondo criteri di uniformità**.

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Indice n. 100 (3-2019)

ARTICOLI E SAGGI

«Il diritto dell'economia» issn 1123-3036, anno 65, n. 100 (3 2019), pp. 421-443

Articoli e saggi

Critical assessments on the role and on the acts adopted by *ANAC*. The requirement to restore system coherence*

Vinicio Brigante

1. *Useful inputs for a definition of (administrative) corruption*

This investigation aims to offer a legal framework regarding acts issued by the National Anti-Corruption Authority (from here on out, *ANAC*), within a context that has not clearly provided any indications to this effect, in an attempt to find those legality traits that are essential to independent authorities and to the relative protection of citizens

Prior to proceeding with the analysis of specific acts issued by *ANAC*, some useful information is provided on the notion of administrative corruption in Italian law and the reasons that led the legislator to establish a special authority for

* This essay represents an extented, revised and updated draft of the report carried out at the annual conference of IASIA-LAGPA (International Association of Schools and Institutes of Administration – Latin America Group for Public Administration), held in Lima, Peru, in July 2018. Please note that, during the course of the text, the Italian translation of some categories of acts is reported in italics, as the English translation can have different meanings and be misleading. The author would like to express his sincere gratitude to Professor Ferdinando Pinto for the shared and continuous discussions on this theme, which has been discussed and studied in depth together.

the fight against corruption. This introduction can be useful to provide a legislative path in which to frame acts of the authority, the final landing place of the research. The path ideally outlined in this essay tries to provide further guidance to broaden the notion of (administrative, because it is linked to the rise of the phenomenon in the field of public contracts) corruption, to then analyze the legislative context that led to the establishment of the Authority and try to provide useful keys to understanding the issued by the latter, to (try to) bring back legal consistency in the overall system.

The issue of corruption in public procurement represents a fascinating line of research for both academics and authorities; the attention paid to this topic is due to several factors, which have prompted scholars of administrative law to investigate a subject that did not belong to the cultural horizon of this branch of law.

First of all, corruption causes serious harms to economic activities, both private and public, since it inhibits private investments and affects competition rules. Costs of corruption are not precisely measurable, especially when it comes to public contracts where is it not always possible to trace the cash flow[1].

Secondly, the term 'corruption' has multiple meanings, ranging from the legal to the economic and ethic dimensions[2], circumstance that makes it possible to deal with the present issue from different points of view. As has been noted[3], the notion of corruption is governed by categories that are linked to very different types of unlawful conduct whose nature is not of the same theoretical and therefore legal nature. Obviously, administrative corruption is not linked to an offence and is reflected in a series of behaviours which, although not subject to sanctions, are unwelcome by the national legal system[4], even if this assumption may represent a contradiction in terms but is coherent with a system which does not rely only on repression to combat the phenomenon (a task which falls within the competence of the criminal law) but which requires prevention of corruption (a task which falls within the scope of administrative law)[5].

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[1] On the subject of developing a reliable indicator for measuring corruption, see M. Gnaldi, *Indicatori di corruzione e nuovi indicatori di prevenzione della corruzione*, in M. Gnaldi, B. Ponti (eds.), *Misurare la corruzione oggi. Obiettivi, metodi, esperienze*, Milano, 2018, 22 ff.

[2] 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*, Napoli, 1999, 183 ff.; R. Venditi, *(Delitti di) corruzione*, in *Enc. dir.*, Milano, 1962, even in the criminal code the discipline of corruption is fragmented and reveals a factor of disintegration.

[3] S. Belligni, *Corruzione e scienza politica*, in *Teoria politica*, I, 1987, 66 ff.

[4] E. Carloni, *Misurare la corruzione? Indicatori di corruzione e politiche di prevenzione*, in *Pol. dir*., 2017, 447 ff., corruption can occur through conduct that does not constitute a crime but constitutes deviations from standards of conduct, abuse of power for personal gain, violation of the common interest, pathological deviations of legal standards, with a significantly variable extension depending on the criterion chosen

[5] Critically on the development of a concept of administrative corruption see S. Torricelli, *Disciplina degli appalti e strumenti di lotta alla corruzione*, in *Dir. pubbl.*, 2018, 954 ff., the term corruption is too deep-

Thirdly, corruption undermines social cohesion and fundamental rights as it violates the so-called social solidarity bonds together public administration and citizens[6]. Corruption, even its mere perception, undermines values that must govern relations between administrations and citizens such as legitimate and mutual trust between the parties.

It should be clarified that, in this premise, economic theories about the existence of an efficient corruption[7] or about the need to maintain an optimal amount of corruption[8] are not taken into account.

The meaning of corruption assumed in the present work goes beyond the definition provided by the Italian Criminal Code, which takes into account behaviours that can lead to a criminal trial; after the enactment of Law no. 190 of 6 November 2012 there is an administrative notion of corruption, broader than the traditional one, that opens the door to other forms of liability or describes practices that are not sanctioned in any way, but that can alter the principle of sound administration laid down by the article no. 97 of the Constitution.

In view of the above, the notion of corruption used in this paper does not refer to the now overused notion of "maladministration[9]", to avoid reducing all the innumerable problems facing the public administration in the area of corruption[10]. Corruption is one component of the problems affecting the public administration

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ly rooted in the legal conscience to admit twists and has a capacity of resistance in the general perception that makes it not deformable to the extent that it can designate a phenomenon different from that of the crime.

[6] G.M. Racca, *Dall'Autorità sui contratti pubblici all'Autorità Nazionale Anticorruzione: il cambiamento del sistema*, in *Dir. amm.*, 2015, 347, discrimination linked to corrupion is reflected in a breach of loyalty to Republic; in accordance with this statement, see F. Manganaro, *Corruzione e criminalità organizzata*, in C. La Camera (ed.), *L'area grigia della 'ndrangheta*, Roma, 2012, 119, corruption is the crime committed by the infidels.

[7] Please refer to F.T. Lui, *An equilibrium queuing model of bribery*, in *J. Polit. Econ.*, 1985, 93, 760, who proposed a model where customers can decide to pay bribes for buying better positions in a bureaucratic queue; J. Hall, J. Levendis, *The efficient corruption hypothesis and the dinamics between economic freedom, corruption and national income*, in *Working Paper of the West Virginia Collage Business and Economics*, 2017, 17, 4 ff.

[8] R. Klitgaard, *Controlling corruption*, Boston, 1988, the optimal amount of corruption is identified between the costs caused by corruption and costs of the fight against corruption; J.S. Nye, *Corruption and political development: a cost-benefit analysis*, in *The American Political Science Review*, 1967, 2, 416 ff.

[9] This concept was coined by S. Cassese, *Maladministration e rimedi*, in *Foro it.*, 1992, V, 243; accordingly, see A. Police, *New instruments of Control over public Corruption: the Italian Reform to restore Transparency and Accountability*, in this *Journal,* 2015, 190, «in the Italian legal language, the term corruption has so far been essentially a term 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: confilct of interest, nepotism, cronyism, partisanship, abuse of public office, wastage».

[10] On the need not to overlap the two aspects, please see F. Pinto, *Il mito della corruzione. La realtà della malamministrazione*, Roma, 2018, 14 ff.; M. Ramajoli, M. Delsignore, *La prevenzione della corruzione e l'illusione di un'amministrazione senza macchia*, in *Riv. trim. dir. pubbl.*, 2019, 61 ff.

(which are different and have a variety of aspects) and the risk of matching the two components is that the necessary specific remedies will not be adopted.

If this conceptual overlap between maladministration and corruption is accepted, it should be considered that corruption itself absorbs all the numerous problems of public administration in terms of effectiveness and legality, with dangerous distortion also of law enforcement instruments drawn up by the legislator for this purpose[11].

Corruption, especially in the context of public contracts, seems to take on the guise of the pathological distraction of a conferred power. Corruption cannot include all pathological distractions (such as anti-competitive agreements in which there is the circumvention of the public subject and therefore of power) but must concern the exercise of administrative capacity.

As pointed out by authoritative scholars[12], corruption finds a breeding ground in the public procurement cycle, and from that point of view Italian case is to be considered symbolic.

Isolating reasons of corruption in public contracts appears to be difficult, since they are linked to multiple factors, but in this analysis, it is limited to highlighting two key aspects to understand the role and difficulties faced by public administrations to address the issue investigated.

First of all, the fragmentation of public demand transferred to several contracting authorities makes legal instruments of administrative controls difficult. The legislator rectified this situation with the provisions that determine the aggregation and centralisation of public purchases[13]. Contracting stations thus parcelled out and divided over the territory were particularly exposed to the risk of pressure – not necessarily corruptive – from economic operators[14].

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[11] F. Pinto, *La corruzione, Caporetto e la 'sindrome del generale Cadorna'*, in *www.lexitalia.it*, 2017, 2.

[12] G. Piperata, *Contrattazione pubblica e lotta alla corruzione. Uno sguardo alle recenti riforme amministrative più recenti*, in *www.federalismi.it*, 2015; F. Di Cristina, *La corruzione nei contratti pubblici*, in *Riv. trim. dir. pubbl.*, 2012, 177; on the relations between administrative organization and prevention of corruption, see M. Dugato, *Organizzazione delle amministrazioni aggiudicatrici e contrasto alla corruzione nel settore degli appalti pubblici*, in *Munus,* 2015, 667 ff.; F. Fracchia, *L'impatto delle misure anticorruzione e della trasparenza sull'organizzazione amministrativa*, in this *Journal*, 2015, 483 ff.

[13] On this issue, see L. Fiorentino, *Le centrali di committenza e la qualificazione delle stazioni appaltanti*, in *Giorn. dir. amm.*, 2016, 443 ff.; G. Fidone, F. Mataluni, *L'aggregazione dei soggetti aggiudicatari di contratti pubblici fra ragioni di integrità, specializzazione e riduzione della spesa*, in *Foro. Amm.*, 2014, 2995 ff.; M. Macchia, *La qualificazione delle stazioni appaltanti*, in *Giorn. dir. amm.*, 2017, 50 ff.; L. Castellani, F. Decarolis, G. Rovigatti, *Il processo di centralizzazione degli acquisti pubblici. Tra evoluzione normativa ed evidenza pubblica*, in *Merc. Conc. reg.*, 2017, 583 ff.

[14] May be referenced to the analysis by F. Pinto, V. Brigante, *Centralizzazione delle committenze pubbliche, trasparenza e gruppi di pressione nel sistema regionale campano per la sanità: prime evidenze empiriche*, in *Ist. fed.*, 2018, 723 ff., the fragmentation of contracting entities across the territory made them particularly vulnerable to external pressures that disrupted the regular exercise of public duties. The procedure for the selection of the contractor is a technical function which, in order to preserve its integrity, can be better integrated into technically equipped purpose-built structures.

This aspect highlights the inadequacy of the administrative structure, especially if small-scale, to deal with and isolate itself from external pressures, especially in certain areas where the corrupt pressure can be declined through recourse to underworld organized[15]. This appreciable decision to reduce the number of contracting authorities has a direct impact on the role of protagonists of public procurement, businesses and administrations, but the issue cannot be considered solved because administrations have variable needs among themselves, in relation to the structure's size, availability of resources, and the custom of setting up and managing public tenders.

On the subject of the aggregation of public demand as a deterrent to corruption in itself, there are some doubts, since the administration, however large, appropriate and specialized it may be, is made up of people[16] and for these reasons it would be appropriate to shift the reflection from the themes of the organization to those of the officials status. In this regard, a clear and incisive legislative reform on the subject of rotation duties for employees would be appropriate in order to prevent public positions from becoming privileged positions for a bridge with companies.

The second aspect concerns the so-called "elephantitis regulation[17]", also known as "normative hypertrophy[18]"; 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. It has been highlighted that the great amount while at the same time the inconsistency of existing laws are additive factors that feed corruption. This issue affects the entire Italian legislative context but seems to have particularly significant connotations in terms of the regulation of public contracts, in the mistaken belief that hyper regulation is a deterrent factor for corruption and external pressures.

The seriousness of the phenomenon, the European Union's calls on the State to contrast corruption led our legislator to suppress the Public Procurement Wachtdog (namely *AVCP*) and to set up the new National Anticorruption Authority (*ANAC*), a proper authority, with the clear choice of legislative policy to include

[15] For a specific and cross-cutting analysis of issues of corruption and crime, see A. La Spina, F. Roberti, *Il contrasto alla mafia e alla corruzione: una panoramica sugli sviluppi recenti*, in *Riv. econ. Mezz.*, 2018, 442, corruption implemented through organized crime employs different and particularly advanced tools that require a specific analysis and contrast.

[16] It is allowed to refer to the analysis by M.S. Giannini, *Diritto amministrativo*, Milano, 1970, 59 ff., in whose opinion the authoritative, the public administrations have immense resources and live sparingly, which reveals the conditions of the Italian administration.

[17] On this topic, see M. Clarich, B.G. Mattarella, *Leggi più amichevoli: sei proposte per rilanciare la crescita*, in *Diritto e processo amministrativo,* 2011, 399 ff.

[18] A. Di Mucci, D. Provvidenza Petralia, *Il principio di trasparenza tra ipertrofia regolamentare e debolezze del controllo sociale: il caso degli obblighi pubblicitari nel settore dei contratti pubblici*, in *www.federalismi.it,* 2016, 2.

the term '(anti)corruption' in the label[19], that confers semantic autonomy to the theme of corruption and does not mislead the interpreter in the analysis, since the Authority has transversal tasks that go far beyond the fight against corruption.

The tasks assigned to this authority are so broad and incorporated in general legislative clauses or attributed with a significant degree of indeterminateness as to require a debate about the impact of measures taken on the legislative framework concerning procurement contracts.

This paper analyses several acts adopted by *ANAC* in order to evaluate the change of system and related critical issues. Before analysing various acts adopted, it is useful to state the context which led the legislator to set up such an authority, in order to understand the framework – in terms of attributed and implicit powers – in which acts are set up. Before providing input on the collocation of the acts drawn up by the *ANAC*, it appears appropriate to report on the legislative context that led to its establishment, in order to achieve a more accurate understanding of reasons for critical profiles that can be grasped in the regulatory framework centred on the recognition of a central role for *ANAC* in the regulation and conformation of the public contract sector.

2. *From the need for a public body to fight corruption to the present conformation of the National Anticorruption Authority*

After the scandal affecting the whole Italian institutional system in the early 90's known as "*Tangentopoli*" and showing the existence of a complex and rooted intertwining of interests between companies and politician for the illegal partition of lots and contracts, a radical change was necessary and urgent.

The immediate response of the legislator took to the enactment of Law no. 109 of 11 February 1994, also known as *Merloni-Law*, promulgated in a climate of distrust of public authorities; it was clear the willingness of impeding the public procurement system to choose its private contractor.

This Law, based on increased transparency of the procedure (but the issue of transparency, at the time, did not have the impact it has today in terms of reducing the distance between the citizen and the administration) and timeliness of public action, was founded on two wrong assumptions but above all about a renewed focus on the aspects related to corruption in the award of public contracts and the relative perception of the importance of the issue by public opinion.

[19] On this aspect, please refer to S. Torricelli, *Disciplina degli appalti*, quoted, 955 ff.,

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. 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[20].

Furthermore, it was assumed that administrative discretion was itself a source of corruption[21], and that it was therefore necessary to limit the powers of contracting authorities during the award phase[22], in the belief that discretion can provide a shield for concealing illicit events. These assumptions led to a limitation of discretion and the introduction of rules leading to automatic assessments by the administration, which not only did not limit corruption but had a negative impact on quality of choices and thus on the optimal performance of the contract.

Underlying such conceptual polar stars, the Law no. 109 set up a specific Authority for the vigilance over public works to guarantee the compliance of administrative action with principles of efficiency, effectiveness and free competition, having the duty to monitor, through sample surveys, the proper conduct of awards operations[23].

This Authority, which can be considered as the predecessor of texisting *ANAC*, played the role of a safeguard of the system as it held the power of issuing risk warning directly to the control bodies or to the penal court. However, it should be noted that the current role assigned to *ANAC* is not comparable to the previous power structure granted to the preceding authority, in terms of functions and scope[24].

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[20] F.J. Vazquez Matilla, *The modification of public contracts: an obstacle to transparency and efficiency*, in G.M. Racca, C.R. Yukins (eds.), *Integrity and efficiency in sustainable public contracts: balancing corruption concerns in public procurement internationally*, Bruxelles, 2014, 275 ff.; G.M. Racca, R. Cavallo Perin, G.L. Albano, *Competition in the execution phase of public procurement*, in *Public contract law journal*, 2011, 41, 89, usually, corruption in the execution phase manifests itself through the wide category of subcontracts; G.M. Racca, R. Cavallo Perin, *Material amendments of public contracts during their terms: from violations of competitions to syntompts of corruption*, in *European Procurement & Public Private Law Review*, 2013, 8-4, 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 awardered contract that bidders could not have reasonably anticipated at the time of the original award when they joined the competition».

[21] On this issue, G.D. Comporti, *Lo Stato in gara: note sui profili evolutivi di un modello*, in this *Journal*, 2007, 231 ff., a costant finding into Italian law with regard public procurement is the lack of trust in discretionary.

[22] M. Dugato, *Organizzazione delle amministrazioni*, quoted, 670, the rigid procurement process is an obstacle to the investigations, the strict compliance of the formal rules prevented any substantial checks; P. Piras, *Il buon andamento nella pubblica amministrazione tra etica pubblica e corruzione: la novella del nemico immortale*, in *Dir. econ.*, 2015, 1, 35 ff.

[23] M. Corradino, B. Neri, *L'ANAC nella riforma della disciplina dei contratti pubblici*, in R. Cantone, F. Merloni (eds.), *La nuova Autorità Nazionale AntiCorruzione*, Torino, 2015, 176.

[24] On the subject, in a broad sense, see P. Pantalone, *Autorità indipendenti e matrici della legalità*, Napoli, 2018, 221 ff.

Among the most relevant functions, listed by the article no. 4 of Law 109, no inhibitory powers were mentioned and the power to impose sanctions was deemed to be inadequate.

The suppressed Authority held regulatory functions, exercised through adoption of determinations in which the institution could give its own interpretation of legal provisions.

Moreover, the Authority was responsible for drawing up non-binding opinions, as firms could depart from them; three kinds of opinions could be issued by the Authority, namely the opinions on the clauses of the calls, the ones in response to legal questions put by the firms or by the procuring entities and the so-called pre-litigation opinions[25]. All the opinions issued by the Authority were regarded as moral suasions to raise awareness about the operators' conduct.

It is considered appropriate to shed some light on the pre-litigation questions, expression of the so-called para-judicial task, characterized by a quick procedure leading to the final decision. However, the final decision could not be assimilated to the one adopted after the Alternative Dispute Resolution (*ADR*), which instead had binding character[26].

The role of the 'pre-litigation opinion' unveiled the legislative and interpretative uncertainty about the rules governing the public contracts and the necessity to diminish the amount of administrative disputes[27].

The first change dates back to 2009 with the establishment of a specific Commission for the evaluation, the integrity and the transparency in public administration (namely *CIVIT*), by Legislative Decree no. 150. This public body held the power of issuing deliberations to examine civil servants performances[28].

The Law no. 190 of 2012, regulating the prevention and repression of corruption in public administration, identified the Commission as *ANAC*, creating considerable problems of legal certainty because of the coexistence with the Authority for the supervision on public works (*AVCP*).

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[25] On this topic, see M.A. Sandulli, *Natura ed effetti dei pareri dell'AVCP*, in *www.federalismi.it,* 2013, 4.

[26] M. Calabrò, *L'evoluzione della funzione giustiziale nella prospettiva delle alternative dispute resolution*, in *www.federalismi.it,* 2017; M.P. Chiti, *L'effettività della tutela avverso la pubblica amministrazione nel procedimento e nell'amministrazione giustiziale*, in *Scritti in onore di Pietro Virga*, Milano, 1994, 543 ff.; M. Giovannini, *I poteri giustiziali delle autorità indipendenti*, in G. Falcon, B. Marchetti (eds.), *Verso nuovi rimedi amministrativi? Modelli giustiziali a confronto*, Napoli, 2015, 136 ff.

[27] M.A. Sandulli, *Le nuove misure di deflazione del contenzioso amministrativo: prevenzione dell'abuso di processo o diniego di giustizia?,* in *www.federalismi.it*, 2012; Id., *Inefficacia del contratto e sanzioni alternative*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, Milano, 2010, 103 ff.

[28] G. Nicosia, *La valutazione nelle amministrazioni pubbliche oscurità normative nelle prassi applicative*, in *Diritti, Lavori, Mercati,* 2012, 377; R. D'Angiolella, *La nuova disciplina dell'arbitrato e degli altri strumenti alternativi per la soluzione delle controversie in materia di contratti pubblici: luci ed ombre*, in *Rivista dell'arbitrato*, 2018, 345 ss.; P. Mastrogiuseppe, *La pubblica amministrazione tra valutazione interna e valutazione esterna*, in *Il lavoro nelle pubbliche amministrazioni,* 2016, 677 ff.

After only two years, the Decree Law of 24 June 2014, no. 90 at its article no. 19 changed the tasks assigned and organisational set-up of new National Anticorruption Authority, aiming at the creation of a single body, the *ANAC*.

ANAC has a marked degree of independence from the government,; this shall not lead to solitary confinement and disproportionate technification of its tasks, rather it is necessary a coordination with other public administrations[29], to avoid a Tibetan isolation that has no positive effect, neither for the public administration, neither for enterprises.

The Authority holds supervision tasks, both in the fight against corruption and in trying to guarantee administrative transparency. Other specific competences concern the imposition of sanctions and the spread of a culture of legality.

Furthermore, the Authority holds regulatory tasks, that is, integrating law with various acts that will be analysed in detail in the following paragraph, through flexible regulation and guidance tools, which give rise to acts and measures that are difficult to place systematically, all sharing the lack of sanctions in the event of non-compliance and the participatory nature of their adoption.

According to an authoritative analysis, *ANAC* is an authority parallel to the whole executive that is designed to point a way forward for good administrative practices and it must be vigilant about phenomena of maladministration and corruption[30].

3. *Procedural flexibility and soft law: linguistic antithesis, precarious balances and further complications*

During the official hearings at the Italian Parliament and opinions issued during the transposition period of the European Directives for the award of public procurement contracts, it was a shared idea that the enactment of a new Public Procurement Code was an opportunity and a challenge for a general re-think of the system, based on flexibility and rigour, simplification and efficiency[31], an historic challenge entrusted to a delicate balance between all the legal arrangements involved.

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[29] P. Pantalone, *Autorità indipendenti*, quoted, 56, the marked independence is revealed more on the functional level than on the structural one. It is worth mentioning the powers of the president of *ANAC*, a sort of entity within the entity, endowed with various functional competences, such as, for example, the high supervision of the public contracts market; S. Sticchi Damiani, *I nuovi poteri dell'Autorità Anticorruzione*, in *Libro dell'Anno del diritto* (in *www.treccani.it*), 2015.

[30] Please refer to F. Merusi, *L' 'imboglio' delle riforme amministrative*, Modena, 2016, 23 ff.

[31] Text of the report performed by the president of *ANAC*, R. Cantone, *Audizione nell'ambito dell'esame del ddl n. 1678/2014*, in *www.anticorruzione.it,* 2015; P. Pantalone, *Autorità indipendenti*, quoted, 238.

However, just as occurred with the term 'transparency' – all are in favour of transparency, but too much acclaim threatens to undermine a word of its meaning[32] – flexibility is a worn-out word, because it does not represent a legal arrangement but it is a general principle and more specifically a peculiar treat of administrative organization[33]; an useful and practical meaning must be recovered[34], especially in relation to the current legal framework for the award of public contracts. Factors which help to limit this analysis are the circumstances in which flexible regulation is easier to amend and non-compliance does not give rise to sanctioning powers on the part of the authority[35], but are not in themselves sufficient.

From this perspective, there was a risk that the whole reform had resulted into a simple implementation of several objectives laid down by the European Union; the replacement of the previous model, based on a single regulation, with a more flexible system does not make disappear historical and structural problems.

And besides, historical though the reform may seem, the legacy of a system based on a formalised and divided into different stages discipline is an immanent and indispensable aspect that must be taken into account[36].

However, it is appropriate to underline that flexibility becomes a relevant factor for the award of so-called complex procurements, because it becomes a crucial tool for the procuring entity to fill cognitive gaps with private companies and conduct. Public administration to an informed decision; in such cases, flexibility means that the public administration may be able to use models which involve

[32] J. Söderman, *The citizen, the Administration and community law*, quoted by D.U. Galetta, *Trasparenza e contrasto alla corruzione nella pubblica amministrazione: verso un moderno panottico di Bentham*, in *Dir. soc.*, 2017, 43; along the same line, see F. Ledda, *Alla ricerca della lingua perduta del diritto*, in *Dir. pubbl.*, 1999, 1 ff., now in *Scritti giuridici*, Milano, 2002, 491 ff., the excessive use of the term transparency is useless and harmful, trasnparency is definitely a beatiful word, but it should be avoided if applied to administrative law.

[33] See F. Liguori, *Flessibilità e modelli organizzativi del S.S.N,* in F. Liguori, L. Zoppoli (eds.), *La sanità flessibile*, Napoli, 2012, 3 ff.

[34] On the issue of the useful meaning of legal terms, please refer to G. Corso, *Il risultato della teoria dell'azione amministrativa*, in M. Immordino, A. Police (eds.), *Principio di legalità e amministrazione di risultato*, Torino, 2004, 100 ff.

[35] M. Ramajoli*, Self regulation, soft regulation e hard regulation nei mercati finanziari*, in *Rivista della Regolazione dei mercati*, 2016, in a different perspective, but consistent with that outlined, the flexible regulation is identified in the development of standards of conduct that are followed voluntarily by the recipients.

[36] See, in a critical way, G.D. Comporti, *La flessibilità nelle negoziazioni pubbliche: questa sconosciuta*, in *Dir. soc.*, 2017, 182 ff.; M. Clarich, B.G. Mattarella, *Efficienza e riduzione della spesa nel sistema pubblico*, in D. Iacovone, R. Paternò, F. Fontana, M. Caroli (eds.), *Problematiche e prospettive nel percorso di riduzione della spesa pubblica*, Bologna, 2014, 96; F. Gambardella, *Le regole del dialogo e la nuova disciplina dell'evidenza pubblica*, Torino, 2016, 29 ff.; R. Dipace, *Il partenenariato pubblico privato nel diritto amministrativo in trasformazione*, in N. Longobardi (ed.), *Il diritto amministrativo in trasformazione*, Torino, 2017, 27 ff.

a constant negotiating comparison with market for the choice of the contractual partner[37].

This means that flexibility is a mechanism that cannot be reduced to an anti-corruption measures but it must increase the efficiency of the administrative action thus mitigating the information asymmetries between public administration and economic operators[38].

Even though historically the legal framework for competitive bidding process was provided for the possibility of forging atypical procedures, praxis gave us a reality in which the templates used have been inclined to the highest restriction of administrative discretion through tender procedures marked by invariability of bids and automatisms in the evaluations[39]; in other words, predilection for strict rules maintains its cultural hegemony.

As mentioned in these few lines, flexibility has a wide variety of meaning, especially if reported to the issue of public contracts, but here it will be investigated the theme of the so-called flexible regulation[40], in an attempt to place the acts issued by *ANAC* in a way compatible with the Italian legal source system.

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[37] See G. Fidone, *L'integrazione degli interessi ambientali nella disciplina dei contratti pubblici*, in G.F Cartei (ed.), *Cambiamento climatico e sviluppo sostenibile*, Torino, 2013, 136 ff.; D. Della Porta, *Lo scambio occulto*, Bologna, 1992, 24, adverse selection in the public procurement cycle can produce a system marked by an high density of corruption; M.Clarich, *La legge Merloni-quater tra instabilità e flessibilità*, in *Corriere giuridico*, 2002, 1400 ff.; see J.C. Cox, R.M. Isaac, P.A. Cech, D. Conn, *Moral hazard and adverse selection in procurement contracting*, in *Games and Economic Behavior*, 1996, 17, 147 ff.

[38] See M. Cafagno, *Flessibilità e negoziazione. Riflessioni sull'affidamento dei contratti complessi*, in *Riv. it. Dir. pubbl. com.* 2013, 991 ff., according to which, free competition represents a place of interaction between the contracting authorities and firms, that allows public administration to reduce the technical shortcomings; L. Prosperetti and M. Merini, *I contratti di lavori, servizi, forniture. Una prospettiva economica*, in M. Clarich (ed.), *Commentario al codice dei contratti pubblici*, Torino, 2010, 27 ss.

[39] Please refer to F. Ledda, *Per una nuova normativa sulla contrattazione pubblica*, in *Scritti in onore di Antonio Amorth*, I, Milano, 1982, 317 ff.

[40] See M. Ramajoli, *Self regulation, soft regulation e hard regulation*, quoted, «the soft regulation could be defined as 'crypto-hard'. It contains very tight restrictions against regulated parties, with the aggravating circumstance ofthe impossbility of applying the traditional means of judicial protection»; from a compared perspective, see D. Costa, *La normatività graduata in diritto amministrativo francese: le linee direttrici*, in *Annuario AIPDA 2015*, Napoli, 2016, 187 ff.; G. Napolitano, *La scala ottimale della regolazione*, in F. Brescia, L. Torchia, A. Zoppini (eds.), *Metamorfosi del diritto delle società? Seminario per gli ottant'anni di Guido Rossi*, Napoli, 2012, 79 ff.; S. Valaguzza, *Nudging pubblico vs. pubblico: nuovi strumenti per una regolazione flessibile di ANAC*, in *Rivista della Regolazione dei mercati*, 2017, 91 ff., «If it is confirmed that *ANAC*'s flexible regulation is a regulation different from the tradional one, since it is not formed by norms containing imperative orders forumulated according to the assertive language of the typical sourcrs of law, and carries out the principles of transparency and clarity of the regulation, leading but not mandatory, ehich makes room to the administrative discretion».

4. *The difficult legal placement of the acts drawn up by ANAC*

In 2014, when *ANAC* was established, the European Union issued the directives no. 23, 24 and 25 for the award of public contracts and concession agreements, transposed in Italy by the means of the Legislative Decree of 18 April 2016, no. 50, in which the role of *ANAC* becomes particularly relevant[41] and acquires the power of issuing documents that are difficult to place in the legal system since they are not expressly mentioned by the law, as it would be in principle required[42].

The issue under investigation draws attention to soft-law acts and their place into Italian system of legal sources[43] (where such measures have a formal innovative force in the legal system) or to assess whether such acts could be systematically placed in a consistent manner with the role of the Independent Authorities and of *ANAC* in particular.

The fact that the soft law is not included in the list of legal sources does not mean that it cannot make changes to the legal framework. The need to resort the use of flexible legal tools is highly relevant with regard to public procurement, for the speed with which the reforms modify the institutional framework[44].

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[41] M.L. Chimenti, *Il ruolo dell'Autorità Nazionale Anticorruzione nel nuovo Codice dei contratti pubblici*, in I.A. Nicotra (ed.), *L'Autorità Nazionale Anticorruzione*, Torino, 2016, 47 ff, the wide range of tasks assigned to *ANAC* gives it a significant role, starting at the predisposition of the call for tender until the execution phase. By way of example, the articles no 77 and 78 of the current Public Procurement Code provides for the creation of a specific register kept by *ANAC*, recording the potential members of the tender commitees, in order to monitor the perpetual existence of the professional and moral requirements; in a critical way on this issue, see S. Cassese, *Verso un nuovo diritto amministrativo?*, in *Giorn. Dir. Amm.*, 2016, 12 ff.

[42] R. Villata, M. Ramajoli, *Il provvedimento amministrativo*, II edition, Torino, 2017, 35.

[43] On this issue, see E. Chiti, *Administrative proceedings involving European agencies*, in *Law and Contemporary Problems*, 2004, 68, 219; G. Morbidelli, *Degli effetti giuridici della soft law*, in *Rivista della Regolazione dei mercati*, 2016, 1 ff., soft-law may be choice because it can be approved and amended very quickly; M. Chairelli, *La soft regulation e il caso delle nuove linee guida ANAC*, in *www.federalismi.it*, 2019; B. Pastore, *Soft law, gradi di normatività, teoria delle fonti*, in *Lavoro e diritto*, 2003, 5 ff; P. Mantini, *Autorità nazionale anticorruzione e 'soft law' nel sistema delle fonti e dei contratti pubblici*, in *www.giustamm.it*, 2017; B. Marchetti, *Rileggendo Sabino Cassese sul diritto globale*, in *Quad. Cost.*, 2010, 199; B. Boschetti, *Soft law e normatività: un'analisi comparata*, in *Rivista della regolazione dei mercati*, 2016, «the analysis reveals the variety of phenomena that fall into the soft law category and the many roles played by soft law at different levels. This variety and the overall complexity of soft law can only be observed and studied by going beyond the limits of the rulemaking process and embracing the entire (global) regulatory process, one which extends not only to rulemaking and regulatory supervision but also to regulatory enforcement and judicial review. Furthermore, these multiple roles are strengthened and underpinned by legislators, who implement mechanisms that not only permit soft law to accede to the field of normativity, but also encourage compliance with it by increasing the costs of non-compliance by the imposition of duties, such as the duty to report non-compliance, to give reasons for non-compliance, to disclose the names of those who are not in compliance with soft law, thereby ensuring the effectiveness of soft law and, ultimately, the regulatory process itself»; R. Bin, *Soft law, no law*, in A Somma (ed.), *Soft law e hard law nelle società postmoderne*, Torino, 2009, 31 ff., who denies regulatory value to soft law. The issue of administrative acts as sources of law, from another perspective, is not recent as shown by E. Mazzoncini, *Atti amministrativi a contenuto non normativo*, in *Amm. It*, 1983, 1572 ff.

[44] For a critical and authoritative analysis on this issue, see G.D. Comporti, *La flessibilità nelle negoziazioni*, quoted, 177 ff., soft law instruments are able to direct the behaviour of the procuring entities and the

In other words, *ANAC* holds incisive and preventive powers which lead the public administrations to assume informed and licit decisions through a range of 'atypical' administrative measures which require a detailed investigation[45].

4.1. *Guidelines (linee guida) issued by ANAC: an inappropriate uncertainty*

The practice of adopting guidelines by independent Authorities has as its objective the dictation of criteria to be followed, the proposal of method of operation and the determination of goals for public administrations. The guidelines adopted by *ANAC* represent the most widely used instrument for the performance of the institutional tasks of the Authority and have as their object fundamental provisions that in the former discipline of public contracts were regulated by law or by the implementing regulation.

It should be noted that the guidelines are the expression of a general degree of coordination power entrusted to *ANAC*, in order to set up the steering unit of bodies with autonomy, because it entails the power to issue directives that can only be disregarded for reasons that are necessary and plausible by the administration.

The essential feature of these acts is the variety of their content; in fact, guidelines may contain both recommendations and mandatory provisions[46]. The present analysis will investigate only the guidelines imputable in full to *ANAC* and not those prepared by *ANAC* and then approved with a ministerial decree[47].

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firms and to update and adapt the whole administrative action to the so-called best practice. Furthermore, it must be reported the authority to supervise the tender procedures for the implementation of large infrastructure. We are talking about a kind of dynamic vigilance which is set out in requests in order to remove the irregularity recognized by *ANAC*; M. Trimarchi, *Le fonti del diritto nei contratti pubblici*, in *Diritto e processo amministrativo*, 2017, 847.

[45] About this topic, see F. Di Cristina, *L'Autorità nazionale anticorruzione nel diritto pubblico dell'economia*, in this *Journal*, 2016, 501; R. Cantone, C. Bova, *L'Anac alle prese con la vigilanza sui contratti pubblici, un ponte verso il nuovo Codice degli appalti?*, in *Giorn. dir. amm.*, 2016, 169; R. Rolli, D. Sammaro, *Il nuovo Codice dei contratti pubblici: l'ANAC e l'uomo di Vitruvio*, in *www.giustamm.it*, 2016; by authoritative position, S. Cassese, *Che cosa resta dell'amministrazione pubblica?*, in *Riv. trim. dir. pubbl.*, 2019, 6 ff., that expresses a very negative opinion on the role played by *ANAC* and on the guidelines issued.

[46] G. Morbidelli, *Linee guida dell'ANAC: comandi o consigli?*, in *Dir. amm.*, 2016, 277, the use of essential criteria of abstractness, generality and repeatability of acts comes up against crisis areas, but the presence of these factors is nevertheless an indicative parameter; F. Marone, *Le linee guida dell'Autorità nazionale Anticorruzione*, in *Riv. trim. dir. pubbl.*, 2017, 743 ff.; C. Filicetti, *L'insostenibile leggerezza delle linee guida ANAC*, in *www.giustamm.it*, 2019; C. Deodato, *Le linee guida dell'Anac: una nuova fonte del diritto?*, in *www.giustamm.it*, 2016, 4; F. Cintioli, *Il sindacato del giudice amministrativo sulle linee guida, sui pareri del c.d. precontenzioso e sulle raccomandazioni ANAC*, in *Dir. proc. amm.*, 2017, 381 ff.; M. Delle Foglie, *Verso un 'nuovo' sistema delle fonti? Il caso delle linee guida ANAC in materia di contratti pubblici*, in *www.giustamm.it*, 2016, 3 ff., the interpretative effort of the administrative judge to reconstruct the system of *ANAC* guidelines in a manner consistent with the traditional system of regulatory sources, and therefore to mitigate or reduce the potentially more disruptive effects, is commendable.

[47] Cons. St., spec. comm., 21 April 2017, no. 916, binding guidelines concerning public contracts should be distinguished from guidelines adopted in other areas of the law.

First of all, it is not clear whether the flexibility referred to above should refer to the discursive wording, the streamlined procedure of formation or the effects produced by the act. In this investigation, it is considered that flexibility should be related to regulation, and specifically to the particular nature of the process of drawing up the acts (guidelines in particular) rather than to the type of effects produced.

The difficulty of locating guidelines into a specific category of acts is due to the heterogeneity of their content, because these refer to policies and directives of a conforming nature that lead to coordination between different parties or between bodies of the same administration.

The Law 28 January 2016, no. 11, delegating the Government to adopt the Legislative Decree no. 50 of 2016, identified as task to be given to the *ANAC* the promotion of efficiency in the public procurement cycle, the support of best practices' development and the facilitation of information exchange between procuring entities[48].

Within these acts, a distinction has to be made between so-called optional guidelines and binding ones, with the premise that a case-by-case analysis is required. Furthermore, the same guideline can contain both binding provisions and mere advice indications.

The first category includes, for example, guidelines indicating the tasks of people responsible for the tendering procedure, to carry out the qualification system for the procuring entities and to draw up call for tender templates. The non-binding guidelines are intended to guide and support contracting authorities in the exercise of their discretion, through the issuing of cognitive and interpretative indications, also in order to reduce administrative litigation.

On the legal nature of non-binding guidelines, the field of interpretation is disputed by two theories.

For a given theoretical reconstruction, these acts are to be considered as general administrative acts, even if this reconstruction seems to be subject to various criticisms, as also emerged when the advice was drawn up by the Council of State itself[49].

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[48] C. Contessa, *Il ruolo dell'ANAC nel nuovo codice dei contratti*, in *Libro dell'Anno del diritto* (in *www.treccani.it*), 2017, in 2016, the legislator, by means of the delegated law, outlined a system in which the sector authority was assigned numerous tasks and prerogatives, some of which, however, are limited to the pure and simple declination of objectives pursued, without the operational instruments aimed at achieving them being punctually indicated.

[49] In this regard, as clarified by Cons. St., spec. comm., 13 April 2018, no 966, in *Foro amm.*, 2018, 643, the advisory functions performed by the Council of State in relation to the regulatory acts adopted by the *ANAC* are no longer limited to individual acts, but also relate to the reform processes, supporting them in all their phases and regardless of the nature of the implementing acts, providing advisory support to parties responsible for implementation activities. When *ANAC* considers that it can count on the advisory contribution of the Council of State (in a positive and desirable spirit of institutional cooperation), this contribution must not

For different, more accredited theory, the non-binding guidelines are comparable to administrative circulars, especially on the basis of the legal consequences of the relative violation[50].

In relation to binding guidelines, most important interpretative difficulties are linked to the placement of binding guidelines, in which a discord between the formal nature and the effects of the act is noted.

As a result of this polymorphic content of guidelines, it is difficult to expound a few unambiguous words about the legal nature of these acts. These acts are general as far as addressees are concerned, but they do not have a normative nature as they are placed outside typical legal sources and issued by a subject (*ANAC*), without normative authority[51].

They are to be considered regulatory acts, although not similar, by extension, to the other acts of the independent authorities, since they are the result of neutral powers of implementation by law.

Generally speaking, these guidelines can be classified as so-called *atti di regolazione*, a category containing various measures, including rules going beyond the executive extent, acts of control, moral suasion activity, consultancy and dispute resolution activity.

For the binding guidelines to be assimilated to the regulation, it is necessary for the law to give this power to the Authority, the act shall contain legal rules and not objectives, as well as incorporate abstract and general legal provisions. This last aspect is decisive because the binding character is typical of any administrative measure, but the general and abstract nature is peculiarity of the legislation.

The debate about the legal nature of the guidelines cannot be solved through the use of formal criteria; the ones mentioned above, even if not free of criticism, are significant benchmarks. Overall, no conclusions can be drawn on whether or not these guidelines have legal nature; rather, it is appropriate to conduct a case-by-case analysis.

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be limited to mere verification of the conformity of the act submitted for opinion with the law, but can (and indeed must) also extend to considerations of a general nature and consistency with the system, albeit in full respect of the respective spheres of institutional competence.

[50] In accordance with this statement, see T.A.R. Lazio, Roma, Sec. III, 3 July 2019, no. 8678, in *www.lamministrativista.it,* 2019, according to which, the non-binding guidelines do not have an immediately damaging effect, fulfilling the purpose, like the interpretative circulars, of supporting the Administration and encouraging homogeneous behaviour and, therefore, cannot be immediately appealed against.

[51] On this point, see the authoritative analysis carried out by G. Serges, *Crisi della rappresentanza parlamentare e moltiplicazione delle fonti*, in *Ossevatorio sulle fonti*, 2017, 12 ff. if their binding nature is taken as a point of reference, it is difficult to deny that they do not end up being normative in nature but, at the same time, are devoid of a certain legislative basis, both because they move completely outside the discipline of art. 17 of Law no. 400 of 1988, and because the delegation and the legislative decree that allows their adoption is expressed in absolutely general terms, with the consequence that the principle of legality itself seems to have been widely violated.

The idea according to which only the Government may issue general regulations can be disregarded because the Italian system of legal sources is blocked only for the so-called primary legal sources[52].

Furthermore, the conferral of this regulation power to *ANAC* is fully coherent with its mission[53].

More, guidelines concerning public contracts aim to give additional and this is why they have technical nature. The possession of technical tasks aiming at the protection of free competition, together with the independence and the impartiality of these Authorities justify the regulatory power[54].

A theory that can be subject to critical review is the one endorsed by the Council of State[55] according to which all guidelines issued by *ANAC* are general administrative acts[56] (*atti amministrativi generali*). General administrative acts exhaust their effectiveness in a single application, while guidelines are issued to be applied through time to different factual situations.

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[52] V. Crisafulli, *Lezioni di diritto costituzionale*, Padova, 1978, 120.

[53] Please refer to N. Parisi, *An international perspective on the main functions of the Italian National Anti-Corruption Authority in the prevention of corruption in public procurement*, in *Diritto del Commercio Internazionale*, 2015, 1053 ff., «the regulation activity is carried out through acts (of different legal status) such as determinations, guidelines, standard tender-notices and advisory opinions. All these acts – although with different functions and roles – represent regulatory references of *soft law*, which in practice turned out to be essential: in fact the regulatory function has grown in importance and incisiveness due to requests coming from the awarded administration and from economic operators, which, from the outset, have perceived the need for a uniform and authoritative interpretation of the complex sectorial legislation contained in the Public Contracts Code and in its Implementing Regulation. This soft regulation activity is carried out not only in the sector of public contracts, but also to provide interpretative guidelines for the general regulations on corruption prevention and on the strengthening of integrity in the public sector. In order to be effective, the regulatory activity should be supported by the possibility to impose sanctions in case of non-compliance with the rules. Nevertheless, due to the strong commitment of the Authority, these rules are able to produce dissuasive effects and, anyway, to direct the conduct of contracting authorities and public stakeholders. The target pursued by the regulation activity, through general acts as the resolutions – sometimes also containing guidelines, – consists in 'putting order' among Legislator's interventions sometimes lacking adequate coordination or being rather programmatic and therefore complex in their specific execution. In particular, the determinations containing guidelines represent a way to assure a uniform interpretation of laws and an application coherent with them».

[54] See P. Bilancia, *Riflessi del potere normativo delle autorità indipendenti sul sistema delle fonti*, in *Dir. soc.*, 1999, 251 ff.

[55] Cons. St., spec. comm., 1 April 2016, no. 464, in *Foro amm.*, 2016, 824.

[56] The border between these two categories is very uncertain, like it is noted by several studies, including G.U. Rescigno, *L'atto normativo*, Bologna, 1998; G. Della Cananea, *Gli atti amministrativi generali*, Padova, 2000, 21 ff.; D. Jacovelli, *I regolamenti nel disordine delle fonti*, in *Jus*, 2004, 1 ff.; M. Ramajoli, B. Tonoletti, *Qualificazione e regime giuridico degli atti amministrativi generali*, in *Dir. amm.*, 2013, 53 ff., by the legal classification of an act depends the legal regime applicable.

As it was said in previous paragraphs, guidelines contain both recommendations and mandatory rules[57][58].

However, unlike other provisions (*e.g.* general urban development plan) in which the distinction between rules and recommendations are clearly laid down by the law, similar generalizations cannot work for the guidelines which require a case-by-case analysis.

The word-for-word study may be useful in order to make a distinction between rules and recommendations but the articulated drafting technique adopted does not help to solve the doubts.

In conclusion, having regard to interpretative fluctuations, it is advisable to provide a key to interpretation consistent with general principles of law.

The guidelines issued by *ANAC* should not be able to innovate the legislation, reason why they can be considered as interpretative acts of the public procurement code or of general provisions.

With regard to guidelines the no. 4 concerning the award procedures for the so-called public contracts under the European threshold, or the no. 7 referred to the conditions for the inclusion in the register for the tender boards, they can be qualified as anticipated monitoring activity. In other words, the guidelines issued by *ANAC* pre-empt the content of the inspection measure, a typical activity of the Independent Authorities[59]. The solution outlined above, which is assumed to be preferable in this analysis, considers the guidelines as acts that anticipate the subsequent control activity by the authority.

If the reference is taken from guidelines no. 6[60], indicating the significant means of proof for the demonstration of causes of exclusion from a public tender, and, in particular, the so-called self-cleaning measures, the theory just described seems to be coherent.

Self-cleaning measures are means of proof that the economic operator must provide in order to demonstrate integrity and reliability. The contracting authority makes decision on such measures after an adversarial procedure. This provision in a guideline does not innovate the previous legislative framework but clarifies the

[57] See S. Valaguzza, *La regolazione strategica dell'Autorità nazionale anticorruzione*, in *Rivista della regolazione dei mercati,* 2016, 42 ff., the role of *ANAC* is to introduce, where necessary, flexible elements for further regulation within a market which is already regulated by law and in detail; in doing so, *ANAC* proceeds with a multidisciplinary and technical approach, aimed at guiding and, where necessary, correcting public or private actions and behaviour with the aim of eradicating corruption and bringing clarity to a sector whose complexity is often a source of conflict and penalises the natural virtuous circle of competition.

[58] A. Pizzorusso, *Le fonti del diritto*, II edition, Roma, 2011, 688.

[59] See F. Patroni Griffi, *Gli strumenti di prevenzione nel contrasto alla corruzione*, in *www.federalismi.it*, 2014, it is necessary to institute a system of control that do not paralyze administrative management.

[60] Full text available on the website *www.anticorruzione.it*.

role of operator and contracting station with regard to a provision already in force, on the application of which *ANAC* may intervene, during the monitoring phase.

This interpretative solution makes it possible to trace back these acts to an activity of which *ANAC* shall be responsible for, overcoming problems related to their difficult placement into the legal system. This interpretation seems to be consistent both with the role of *ANAC* and with the way in which the guidelines are drafted, and allows systematic consistency to be restored.

4.2. *Anticorruption National plans*

The anticorruption national plan represents one of the most important legal tools for the prevention of corruption, introduced by Law no. 190 of 2012, because, in absolute terms, they represent a shining example of measures aimed at shifting the fight against corruption into a non-repressive phase. Still, probably because of non-binding scope of the act, the National Anti-Corruption Plan (but also the three-year plans adopted by various administrations) have not been the subject of in-depth investigations by Scholars[61].

This act is of great importance for the administrative organization, even if its first application caused several critical findings such as, for example, the fact that the obligations imposed by the national plan are laid down indistinguishably towards private and public bodies[62].

A recent judgment issued by the Council of State[63] has defined anti-corruption plans as being both general and preventive.

Firstly, there are no independent authorities into the Italian legal framework with programming tasks, function that needs to be distinguished from the regulatory one[64].

Secondly, the national plan constitutes an act of administrative coordination because every administration is obliged to draw up a three-year plan for the prevention of corruption starting from recommendations of the national plan[65].

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[61] Recently, some ideas for reflection have been found on an analysis of another topic, F. Argirò, *Accesso abusivo a sistema informatico e sviamento di potere: una sentenza delle Sezioni Unite tra ontologismi antichi e moderni*, in *Riv. it. dir. proc. pen.*, 2018, 2256 ff., in which there is an interesting parallel between the Anti-Corruption Plan and codes of conduct, in terms of the preventive conception of the function.

[62] About the first critical balance on the Italian anticorruption measures, see F. Di Mascio, *Il primo anno di attuazione delle politiche anticorruzione*, in *Riv. trim. dir. pubbl.*, 2014, 273 ff.

[63] Cons. St., Sec. V, 14 May 2018, no. 2853, in *Foro amm.*, 2018, 827.

[64] Please refer to M. Clarich, *Manuale di diritto amministrativo*, Bologna, 2013, 347; S. Amorosino, *Leggi e programmazioni amministrative: diversità funzionale e riserva di amministrazione*, in Id. (ed.), *Regolazioni pubbliche, mercati, imprese*, Torino, 2008, 19 ff.

[65] S. Amorosino, *Il piano nazionale anticorruzione come atto di indirizzo e coordinamento amministrativo*, in *Nuove Autonomie*, 2014, 21 ff.

The anticorruption national plan is a document indicating relevant actors involved in effort to prevent corruption; it identifies the most vulnerable phases in public procurement cycle, it specifies the measures to be adopted by public administrations and the provisions in order to monitor the implementation of these measures.

On 3 August 2016, with the decision no. 831, *ANAC* drawn up the national plan for the three-year period 2017-2019[66] to which each administration will have to adapt in the drafting of various planes for prevention of corruption.

This whole plan is adjusted on transparency obligations laid down by the Legislative Decree no. 97 of 2016 which has introduced into the Italian legal framework the so-called *FOIA* model[67], which requires special treatment, for which reference should be made to the bibliography in the footnotes.

In the first section of the national plan there is a statement of the findings highlighted on the basis of the observations operated by *ANAC*, including the need to adjust the various plans to the reforms introduced, such as the one that strengthens the protection of whistle-blowers.

The national plan is divided in two parts: a general part addressed at all administrations and a special section dedicated to particular authorities, such as, for example, health and educational institutions.

The whole document was produced in accordance with the indications given by the international bodies, including *ONU* and *OCSE*. In particular, the national plan makes an explicit reference to *High Level Principles on Integrity in Procurement*, a set of rules in order to facilitate the use of electronic procurement and to increase the level of integrity in tendering procedures.

To make an example, the National Plan provides for necessary measures to be adopted in order to prevent situations of conflict of interests within the public-sector purchases operated by health facilities. The national plan proposes as possible measure the predisposition of modules to declare the absence of situations of conflict of interests and the continuous monitoring on the updating of these declarations.

From a structural point of view, both the national and the particular plans are acts impacting on the organization of public bodies, free from binding force, with

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[66] The full document is available on the website *www.anticorruzione.it*.

[67] On this issue, without claiming to be exhaustive, in a critical way, see G. Gardini, *Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici*, in *www.federalismi.it,* 2017, and its update, Id., *La nuova trasparenza amministrativa: un bilancio a due anni dal 'FOIA Italia'*, in *www.federalismi.it,* 2018, 4 ff., the legislator in introducing the so called 'FOIA' model failed to make a clear choice that makes the legislative framework not trasparent, by establishing an absurd paradox; M. Savino, *Il FOIA italiano. Il fine della trasparenza di Bertoldo*, in *Giorn. dir. amm.*, 2016, 593 ff.; D.U. Galetta, *Trasparenza e contrasto della corruzione nella pubblica amministrazione: verso un moderno panottico di Bentham?*, in *Dir. e soc.*, 2017, 43 ff.; A. Moliterni, *La via italiana al 'FOIA': bilancio e prospettive*, in *Giorn. dir. amm.*, 2019, 23 ff.

heterogeneous functions, which however are aimed at highlighting critical issues that allow administrations to prepare adequate measures and interventions.

4.3. *Recommendations and the power of dynamic supervision on the public procurement cycle*

Competence to issue recommendations is an expression of the broader supervisory power, expressed also through the imposition of sanctions[68].

Recommendations can contain proposed measures to increase efficiency, or actions to facilitate the exchange of information between the procuring entities, and are drawn up to assist the action of a specific administration in a given historical and temporal context, and are therefore acts that cannot be repeated over time.

As a general rule, recommendations issued by *ANAC* are marked by a sanctioning approach for public administrations involved in the procedure leading to the choice of the private contractual partner[69].

Through recommendations procuring entities are obliged to activate a self-defence action to comply with indications provided by *ANAC*, circumstance that inspired the term 'collaborative supervision'[70], in order to highlight the necessity of cooperation between different procuring entities and *ANAC*.

This power needs to be compatible with the discretionary nature of the self-defence power into Italian administrative law, that instead, in these cases, looks like a necessary power. In this regard, it can be argued that the adjustment to the content of recommendation represent a 'driven discretion', since any decision departing from the recommendations must be justified by exceptional circumstances.

In the event of non-compliance with the recommendation, *ANAC* shall initiate a penalty procedure but law does not specify what happens in the event of partial compliance.

Even though these acts can lead to a penalty procedure, it is still not clear how coercive these acts are and in how the procuring entity may avoid the penalty without complying with the recommendation considering that it is an administrative measure and not a law.

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[68] See S. Tuccillo, *Le raccomandazioni vincolanti dell'ANAC tra ambivalenze sistematiche e criticità applicative*, in *www.federalismi.it*, 2017, 5 ff.; E. D'Alterio, *Regolare, vigilare, punire, giudicare: l'ANAC nella nuova disciplina dei contratti pubblici*, in *Giorn. dir. amm.*, 2016, 500 ff.

[69] On the sanctioning powers of the indipendent authorities, see M. Trimarchi, *Funzione di regolazione e potere sanzionatorio*, in *www.giustamm.it*, 2013; S. Cimini, *Il potere sanzionatorio delle amministrazioni pubbliche. Uno studio critico*, Napoli, 2017.

[70] On this specific aspect, see R. Calzoni, *ANAC e funzione di vigilanza collaborativa*, in *www.federalismi.it*, 2017; E. Frediani, *Vigilanza collaborativa e funzione 'pedagogica' dell'ANAC*, in *www.federalismi.it,* 2018, 3 ff.

5. *Concluding remarks*

The path briefly outlined in this survey has tried to provide a contribution of collocation with respect to the role and acts of an Authority that has been a protagonist of the institutional scene in Italy in recent years.

The first concluding reflection, necessarily of a semantic nature, shows that the current structure of powers held by *ANAC* goes beyond the fight against corruption, as suggested by the label of the Authority. The original intention to set up a dedicated authority with specific tasks related to corruption prevention led to a regulatory entity with cross-cutting responsibilities.

This consideration has no detrimental connotation, since it was advisable to see the rise of a subject who could carry out such qualified tasks – such as, for example, supporting contracting authorities – but perhaps it would be appropriate to think about a change of name, which would make the role of such a central subject in the institutional panorama immediately perceptible.

The second consideration, on which Scholars and Courts seem to converge, reveals a generalised disapproval on the part of administrations and economic operators with respect to objectives of administrative simplification that have been feared and only partly achieved (for example, in the case of the reduction in the number of central purchasing bodies); the complexity is in itself a cause of corruption and the task (not of *ANAC* but of the legislator) is to clarify the scope and competence of the players involved, in order to avoid the phenomena of regulatory inflation, which are harmful to the entire administrative structure.

The remarks made about the acts of *ANAC* do not allow to help the search for a systematic location of the same authority but try to provide a contribution to their placement and to overcome the hybrid locations that are not functional to legal certainty, a value of absolute importance in the field of public contracts, but more generally if referred to the context of Italian public administrations.

Nevertheless, the disproportionate allocation of tasks to *ANAC* distorts the traditional structure of independent authorities and, ultimately the constitutional principles governing the administrative action.

However, as it has been said[71], *ANAC* may well become a flagship of protection not just from corruption but can lead the fight against the majority of practises undermining the good performances of the administrations. As has been stated several times during the investigation, however, a distinction should be made between plans for corruption and maladministration, including on the part of the *ANAC*, since this overlap is in itself dangerous.

[71] F. Giuffrè, *Le autorità indipendenti nel panorama evolutivo dello Stato di diritto: il caso dell'Autorità Nazionale Anticorruzione*, in *www.federalismi.it*, 2017, 18 ff.

ANAC has the duty to monitor, regulate, punish and judge but in order to prevent a deficiency with regard to the protection of citizens from the authority there are mechanisms allowing the participation of citizens as well as a dialogue between the authority and legal entities subject to the corresponding powers.

With regard to regulatory acts such as the guidelines, it is significant the provision of an obligation to submit the temporary draft of the act to a consultation by the parties concerned, which may participate to the production of the definitive act.

Furthermore, at a subsequent stage stakeholders can participate to the amendment and integration of the acts already issued.

In conclusion, the significant position held by *ANAC* in the public procurement legal framework is characterised by the heterogeneous nature of the assigned tasks. A dialogue with other administrations and stakeholders is necessary, in accordance with the essential principle of loyal cooperation, in order to avoid that acts issued by *ANAC* lead to an increase of administrative litigation rather than reducing it.

Vinicio Brigante - Abstract

Valutazioni critiche sul ruolo e sugli atti adottati dall'ANAC. La necessità di ristabilire una coerenza di sistema.

Il tema della precisa collocazione degli atti adottati dall'ANAC rappresenta un problema ampiamente dibattuto dalla dottrina, al quale, tuttavia, non si riesce a trovare una collocazione coerente con il sistema delle fonti. Il saggio si propone di spostare l'obiettivo della ricerca, dalle fonti del diritto al tema dei controlli e della regolazione flessibile, in una visione coerente con il ruolo delle autorità amministrative indipendenti.

Critical assessments on the role and on the acts adopted by ANAC. *The requirement to restore system coherence*

The issue of the specific placement of acts issued by the *ANAC* represents a problem widely debated by Italian scholars for which, nevertheless, it is difficult to find a position compatible with the system of legal sources. The present work shifts the focus of the research from the system of legal sources to the issue of administrative checks and flexible regulation, in a view coherent with the key role of the independent administrative authorities.

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