

**THE POWERS OF THE ITALIAN ANTI-CORRUPTION
AUTHORITY IN PUBLIC PROCUREMENT: NEW TOOLS TO
PURSUE GOOD ADMINISTRATION?**

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1. INTRODUCTION

The title of the paper gives three important information about the topics we are going to analyse.

First of all the subject of our analysis will be the Italian Anti-corruption Authority.

Secondly the object of the study will focus on the powers of this Authority in the field of public procurement

Finally there is a question: are those powers efficient and appropriate tools to pursue good administration?

The article will be divided accordingly in three parts: the foundation of principle of good administration and its legal basis at European level will be analysed first. The history so far of the Italian Anti-corruption Authority will follow. A focus on the new powers of the Authority introduced since 2016 in the field of public procurement will conclude the analysis.

2. THE GOOD ADMINISTRATION AS AN OPEN LEGAL CONCEPT

The principle of good administration is an open legal concept which increasingly appeared in the jurisprudence of the European Courts (EU and ECHR).

H.P. Nehl, in the first monograph dedicated to Principles of Administrative Procedure in EC Law, stated that *“The notion “good administration” in the broad sense is nothing but an aid to describing the corpus of the continuously evolving – legally*

*enforceable and unenforceable – procedural and substantive requirements with which a modern administration has to comply*².

In a procedural perspective the term “good administration” embodies some basic features generally underlying procedural constraints on administrative decision-making.

The requirements of individual right to good administration stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency. These fundamental principles provide for procedures to protect the rights and interests of private persons, inform them and enable them to participate in the adoption of administrative decisions³.

At a legislative level the principle of good administration is mainly analysed under the aspect of the attained legal standards (leaving aside discussions about ethics in the public service). However, at least for the analytical purposes of this paper, only the procedural aspect shall be taken into account, excluding the analysis of the role played by the above mentioned principle in the definition of an “administrative culture” by instigating process of conceptual and mind-changing convergence⁴.

² H.P. NEHL, *Principles of Administrative Procedure in EC Law*, Oxford, 1999, 13.

³ It has been noted that dividing line between positive obligations (on public authorities as to how administrative procedures ought to be carried out) and negative obligations (entailing individual guarantees) imposed by the principle of good administration “is fuzzy, with substantive and procedural aspects overlapping. For instance, the duty to provide reasons for decisions that affect individual rights may be understood as fostering the principle of lawfulness on the part of administration as well as offering legal protection for the individual” (U. STELKENS, A. ANDRIJAUSKAITE, *Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and their Impact on the Administrative Law of its Member States*, Speyer, 2017, 24).

⁴ See K.P. SOMMERMANN, *Towards a Common European Administrative Culture?*, in J. ZIEKOW (eds.) *Grundmuster der Verwaltungskultur*, Nomos, 2014, 606, also for more references to doctrine.

The right to good administration, enshrined since 2000 in Article 41 of the Charter of Fundamental Rights of the EU (hereafter CFR), acquired legally binding status thanks to the entry into force of the Treaty of Lisbon. Legal scholars do agree that the catalogue of principle's sub-elements provided by art. 41 CFR is not exhaustive, and that the case law of CJEU still remains a benchmark⁵.

The Italian Constitutional Court use to describe the above mentioned principle as a result from the constitutional traditions common to the Member States, connected to our constitutional principles of equality (art. 3), impartiality and "buon andamento" (provided by art. 97 and considered by many Italian scholars to be a duty of good administration or, literally, best practice in the public administration)⁶.

There is hardly any doubt that an established authoritative catalogue of general principles of EU administrative procedural law does not exist - neither as an instrument of primary or secondary EU law, nor in the jurisprudence of the CJEU, nor is there a minimum consensus in scholarship about such a list⁷.

With considerable effort the Research Network on EU Administrative Law (ReNEUAL) developed on 2014 a set of Model Rules, combining the need to bring

⁵ F. TRIMARCHI BANFI, *Il diritto ad una buona amministrazione*, in M.P. CHITI, G. GRECO (diretto da) *Trattato di diritto amministrativo europeo*, Milano, 2007, 49 ss.; H.P. NEHL, *Good Administration as procedural right and/or general principle?*, in H. HOFMANN, A. TÜRK (eds), *Legal Challenges in EU Administrative*, Cheltenham, 2009, 322 ss.; S. CASSESE, *Il diritto a una buona amministrazione*, in *Studi in onore di Alberto Romano*, Napoli, 2011, 115 ss.; K.P. SOMMERMANN, *Towards a Common European Administrative Culture?*, already quoted, 618; J. PONCE, *The Right to Good Administration and the Role of Administrative Law In Promoting Good Government*, 2016, 7, available at the Website <https://ssrn.com/abstract=2737538> or <http://dx.doi.org/10.2139/ssrn.2737538>.

⁶ See, among most recent decisions, Corte Cost., 4.6.2012, n. 148; Corte Cost. 3.11.2016, n. 231.

⁷ D.-U. GALETTA, H.C.H. HOFMANN, O.M. PUIGPELAT, J. ZILLER, *The General Principles of EU Administrative Procedural Law. An in-depth Analysis*, in *Riv. it. dir. pub. com.*, 5, 2015, 1421 ss.

together in one document existing principles, which are scattered across different laws and regulations and in the case-law of courts, with a innovative-codification approach⁸. Even if the Rules will not mature into a legally binding EU code on administrative procedure, they do represent, without any doubt, a “model” for legal scholars. However, for the purposes of this analysis the scope of Model Rules is too broad and, in the meantime, too specific to represent a paradigm of the content of the principle of good administration to take into account for the analysis of national rules.

An important document to clarify the meaning of principle of good administration is the Recommendation CM/Rec(2007)7 on good administration, enacted by the Council of Europe (hereafter CoE), according to art. 15 of the Statute of the CoE⁹, which drew inspiration from the European Code of Good Administrative Behaviour of 2001¹⁰.

The Recommendation represents the more recent (and probably most interesting) product of the activities of the CoE in administrative matters and it has been described as a promising tool to harmonize the core structures of administrative law of the 47 Member

⁸ See Introduction to the ReNEUAL Model Rules / Book I – General Provisions that can be found on the website of the ReNEUAL: <http://www.reneual.eu>. For a more recent and shorter version of the proposal of codification see D.-U. GALETTA, H.C.H. HOFMANN, O.M. PUIGPELAT, J. ZILLER, Proposal for a Regulation on the Administrative Procedure of the European Union’s institution, bodies, offices and agencies, in europarl.europa.eu/studies, 2015. For the Italian version see G. DELLA CANANEA, D.-U. GALETTA, H.C.H. HOFMANN, J.P. SHNEIDER, J. ZILLER (a cura di), Codice ReNEUAL del procedimento amministrativo dell’Unione Europea, Napoli, 2016.

⁹ Article 15 refers to the recommendations of the Committee of Ministers to the government of its members. These recommendations are not binding on the Member States, However, Member States have to report on their implementation to the Committee of Ministers.

¹⁰ See P. GERBER, Recommendation CM/Rec(2007)7 on good administration – general presentation, in Council of Europe (ed.), *In Pursuit of Good Administration – European Conference Warsaw, 29-30 November 2007*, 2008, 3 ss. For an in-depth analysis see U. STELKENS, A. ANDRIJAUSKAITE, *Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and their Impact on the Administrative Law of its Member States*, Speyer, 2017.

States of the CoE¹¹. The recommendation provides for a model code, intended to bring previously disparate standards of good administration together and to promote the concept of good administration by encouraging Member States to adopt, as appropriate, the standards set out in the “model code” and assuring their effective implementation.

Thanks to its clear formulation and its reasonable length, first and foremost the “model code” enacted by CoE will be considered in this analysis.

3. THE HISTORY SO FAR

Italian Anti-corruption Authority is a public independent body of composite nature which combines the role of effective public procurement policy supervisor and the role of body in charge for fighting against illegality and corruption by ensuring transparency. The process that brought ANAC to be vested with such complex role is the outcome of an interesting evolution that will be briefly examined in the following pages.

It is worth to separate the analysis in two parallel paths: the one related to public procurement system and the one related to the transparency and anti-corruption.

¹¹ U. STELKENS, A. ANDRIJAUSKAITE, *Added Value of the Council of Europe to Administrative Law*, quoted, 34. Founded in the aftermath of the Second World War the main aim of the CoE was to ensure peace on the European continent. This rationale of the CoE is reflected in art. 1 of the Statute of the CoE, where is stated that “The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”.

3.1. Public Procurement Tasks

Since the Green paper of European commission of 1996 about “Public procurement in European Union”¹² EU system suggested to Member States to entrust the supervision of its contracting entities to an independent Authority, following the model of Sweden. The aim of the drafters of the Green paper, is that the very existence of such an Authority should “even prevent behaviour giving rise to complaints, thereby reducing the potential burden on national courts and tribunals as well as on the Community institutions”¹³.

The same suggestion was repeated in a Communication adopted by the Commission in 1998, while the EU Commission also specified that with its previous Communication it was “not proposing that new institutions are set up from scratch, but rather that already existing bodies, such as audit offices or competition authorities, be used for the purpose”¹⁴.

These suggestions has been translated into law on 2004, when the directives 2004/17/EC and 2004/18/EC provided that to ensure their implementation Member States may, among other things, appoint or establish an independent body¹⁵.

¹² Communication adopted by the Commission on 27th November 1996 on the proposal of Mr. Monti.

¹³ “Experience suggests that not only does this authority handle particular complaints, its very existence may even prevent behaviour giving rise to complaints, thereby reducing the potential burden on national courts and tribunals as well as on the Community institutions. With a view to monitoring application of the rules more effectively at national level, it could be worthwhile for other Member States to set up a similar body” (see the quoted Green paper, p. 17).

¹⁴ Communication adopted by the Commission on 11th March 1998 on “Public procurement in the European Union”.

¹⁵ See art. 72 “Monitoring mechanisms”, 2004/17/EC, witch, inter alia, provides that “...Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms. For this purpose they

The legislative instrument chosen by the EU legislator (the directive) allows Member States to decide upon the way of implementation of such provision: giving Authorities the power to oversight the public procurement procedures, also introducing systems to gather information and data about public contracts.

Those two tasks were (at least formally) already in place in Italy after the establishment of the Authority for the Supervision of Public Contracts “AVCP” (instituted in 1994 but in operation from 1999)¹⁶, in charge of monitoring public procurement by fostering compliance with principles of fairness and transparency; and after the introduction, within the Authority (in the same structure) of the Osservatorio dei contratti pubblici, an office in charge of collecting information on public contracts all over the country (in particular, those related to tenders and contract notices, awarding, participating undertakings, the use of workforce and related safety standards, costs, execution time schedule etc.) and also of updating the software designed to enable all judicial records to be exchanged within a short timeframe¹⁷.

The Authority had only oversight powers but not the power to sanction infringements.

Is important to outline that the Authority never had “quasi-judicial” competence. Overall, in Italy remedies against administrative measures or inaction are, also in the field

may, among other things, appoint or establish an independent body”. The same provision was in art. 81 of directive 2004/18/EC.

¹⁶ About the constitutional compatibility of such Authority regarding to the distribution of legislative powers between regions and central State, see the decision of the Italian Constitutional Court 7.11.2005, n. 428.

¹⁷ For the list of competences of the “Osservatorio” see art. 6, c. 5-8, l. n. 537/1993; art. 4, l. n. 109/1994; art. 13, D.P.R. n. 573/1994.

of public procurement, judicial remedies before administrative courts¹⁸. Public procurement litigations represent a huge part of the workload of administrative courts, even if legislator is constantly introducing measures to reduce it (rising costs and speeding-up procedures).

The Authority's powers were increased in 2006, when Italy implemented the quoted directives of 2004¹⁹, including, inter alia, the power to

- sanction the parties;
- ensure compliance with the legislative and regulatory framework by verifying, also with sample surveys, the fairness of contract award procedures;
- ensure that the performance of the contracts has not resulted in waste of public resources;

¹⁸ In the area of public contracts European lawmakers understood early on that substantive provisions were not enough to safeguard the "effet utile" of what has become EU law. Directive 89/665/EEC first regulated remedies in public procurement cases. Specific remedial rules for the utilities sector were soon enacted in Directive 92/13/EEC (the Utilities Remedies Directive). EU directives allow member states to decide upon the identification of the "bodies responsible for review procedures" (breviter "review bodies") in charge of determining a possible breach of substantive directives and whether such review bodies should or should not be judicial in character. The remedies to be provided under the two original remedies directives correspond to the traditional administrative law remedies in those jurisdictions following the French model: interim relief (suspension), setting aside (annulment) and damages. Directive 2007/66/EC, amending (but neither replacing nor repealing the previous Directives) introduced new remedies to be provided by Member States like standstill period, ineffectiveness of contract signed with egregious breaches of EU public procurement law. See R. CARANTA, Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation, in *Rev. eur. adm. law*, 1, 2015, 75 ss.; M. COMBA, R. CARANTA, Administrative Appeals in the Italian Law: On the Brink of Extinction or Might They Be Saved (ad Are They Worth Saving)? in D.C. DRAGOS, B. NEAMTU (eds.) *Alternative Dispute Resolution in European Administrative Law*, Berlin-Heidelberg 2014, 87.

¹⁹ See. art. 6 Legislative Decree 12.4.2006, n. 163.

- warn the Government and the Parliament, with appropriate communication, of particularly serious non-compliance or distorted application of the rules on public contracts;
- submit to the Government proposals for legislative reforms on public contracts;
- transmit its acts and its findings to the supervisory bodies (also jurisdictional) if any irregularity is found;
- supervise the activity of the Osservatorio;
- give non-binding advices if requested by the bidders or by contracting entities to guide them in the interpretation of rules applicable.

As we will see below, in the latest reform something is changing regarding these advices²⁰.

The Italian lawmakers vested the Authority with new powers in order to attain the dual aim of ensuring the fairness and transparency of the award procedures, as a guarantee for competition between economic operators, and monitoring the quality of contracts ensuring efficient and economic execution of contracts.

Among scholars it was discussed whether those power were sufficient to pursue effectively the tasks assigned to the Authority²¹.

On 2014 the current Anti-corruption Authority absorbed the competences of the Italian Authority for the supervision of public contracts²².

²⁰ See *infra* par. 4.

²¹ C. CELONE, La funzione di vigilanza e regolazione dell'autorità sui contratti pubblici, Milano, 2012; D. DE GRAZIA, La vigilanza e il controllo sull'attività contrattuale delle pubbliche amministrazioni, in D. SORACE (a cura di), Amministrazione pubblica dei contratti, Napoli, 2013, 214.

3.2. Anti-Corruption Tasks

After this brief overview of ANAC's competences in the field of public procurement, it should be analysed the development of its anti-corruption and transparency tasks²³.

Is well known that the need to fight against corruption and bribery is widespread also at an international level.

The Convention adopted by OECD²⁴, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions dates back to 1997. In the same period, EU Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU was enacted²⁵. Many others acts

²² See Decree Law l. 24.6.2014, n. 90, converted into law with amendments by Law 11.8.2014, n. 114.

²³ See, ex multis, B.G. MATTARELLA, M. PELISSERO (a cura di) *La legge anticorruzione*, Torino, 2013; B.G. MATTARELLA, *La prevenzione della corruzione: i profili amministrativistici*, in A. DEL VECCHIO, P. SEVERINO (a cura di) *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale*, Padova, 2015, 301 ss.; R. CANTONE, *La prevenzione della corruzione e il ruolo dell'ANAC*, in M. D'ALBERTI (a cura di), *Combattere la corruzione*, Soveria Mannelli, 2016, 25 ss.; F. GIUFFRÉ, *Le Autorità indipendenti nel panorama evolutivo dello Stato di diritto: il caso dell'Autorità Nazionale Anticorruzione*, in I. NICOTRA (a cura di), Torino, 2016, 9 ss..

²⁴ See Council of the Organisation for Economic Co-operation and Development (OECD, in Italian language OCSE) on 23 May 1997, C(97)123/FINAL. Followed by the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", adopted by the Negotiating Conference on 21.11.1997.

²⁵ Council Act of 26 May 1997 drawing up the Convention made on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [Official Journal C 195 of 25 June 1997]. The Convention entered into force on 28 September 2005. On the basis of the Convention "each Member State must take the necessary measures to ensure that conduct constituting an act of passive corruption or active corruption by officials is a punishable criminal offence".

have been enacted by OECD to pursue the objectives to combat corruption developing co-operation efforts, also in the field of public procurement²⁶.

It should also be mentioned, in the perspective of criminal law, “The Criminal Law Convention on Corruption”, adopted by the Council of Europe on 1999²⁷. In the preamble the drafters emphasised that “corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society”, that is the reason why the Council enacted an ambitious instrument aiming at the co-ordinated criminalisation of a large number of corrupt practices.

To complete the picture, we must mention the United Nations Convention Against Corruption, adopted by the UN General Assembly on 31.10.2003²⁸.

What are the measures taken in Italy?

Historically combating corruption in Italy was a task of criminal courts and police force. Until recently, the idea to enact internal administrative control was underestimated because of the lack of confidence in the efficiency and effectiveness of the Administration.

²⁶ See the “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions”, adopted by the Council on 26.11.2009 and the Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105] adopted on 2008. Lastly see Recommendation of the Council on Public Procurement adopted by the CoE on 18.2.2015 [C(2015)2].

²⁷ Adopted by the Council on 27.1.1999 and ratified in Italy with Law 29.9.2000 n. 300 (see Monitoring report of Implementation and enforcement of the convention, “Phase 1 report”, that can be found on the website of the OECD: <http://www.oecd.org/daf/anti-bribery/italy-oecdanti-briberyconvention.htm>).

²⁸ Entered into force on 14.12.2005, in accordance with article 68. Ratified in Italy with Law 3.8.2009, n. 116 and currently ratified by 182 Parties. The Convention covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.

It is worthy of mention the Legislative Decree No. 231/2001, which introduced in the Italian legal system the administrative liability of legal entities, companies and associations, in respect to certain criminal offences committed – in the interest or to the benefit of the entity – by individuals who have particular managing or collaborating relationships with the entity itself. The liability was introduced after ratification by Italy of the abovementioned OECD and EU Conventions against bribery and corruption in international trade and fraud in detriment of the EU²⁹.

In 2004 it was introduced the “Expert at the High Commission for combating and preventing corruption and other forms of illegal activities in the Civil Service”³⁰. This body had only monitoring functions on public procurements and outgoings. It had no sanction tools, having only the duty to submit to judicial authority its findings. Because of its low efficacy it was repealed in 2008³¹.

²⁹ The introduction of criminal liability of legal entities represented a significant innovation: its introduction abolished one of the main principles of the Italian legal system (arising from the Roman Law “*societas delinquere non potest*”) pursuant to which corporate bodies could not be considered liable of a crime. The offences in respect of which the Italian law contemplates the administrative liability of the legal entity originally were only those committed against the Public Administration, but the liability has been subsequently extended to other kind of offences. Sanctions applicable to the legal entity held responsible for the above offences, affect both the entity’s assets and its freedom of action, they are of pecuniary nature and of interdictive nature (for example disqualification from the activity; ban from dealing with the Public Administration, including participating to public tenders; exclusion from State financial subsidies, etc). The Decree provides also the confiscation and the publication of the Court decision as accessory sanctions.

³⁰ S. STICCHI DAMIANI, I nuovi poteri dell’Autorità Anticorruzione, in Libro dell’anno del diritto, Roma, 2015; G. SCIULLO, L’Alto Commissario per la prevenzione e il contrasto della corruzione e delle altre forme di illecito nella pubblica amministrazione in L. VANDELLI (a cura di) Etica pubblica e buona amministrazione. Quale ruolo per i controlli? Milano, 2009, 71 ss..

³¹ Cfr. art. 68 Decree Law 25.6.2008, n. 122, converted into law with amendments by Law 6.8.2008, n. 133.

In 2008 it was introduced an Anti-corruption and transparency body into the Department of civil service (Servizio anticorruzione e trasparenza del Dipartimento della funzione pubblica - SAET³²) in charge of analysing and monitoring functions and to make a Report to Parliament every year.

In 2009 it was introduced an Independent commission to evaluate transparency and integrity of public Administrations (Civit - Commissione indipendente per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche³³), merged into the current Anti-corruption Authority in 2012³⁴.

The 2012 is the key-year for combating corruption in Italy.

With Law No. 190/2012 Italy has introduced a system of norms to fight corruption which is similar to prevention-based models already in practice in other countries. Law n. 190/2012 was adopted not only to align the Italian legal system with guidelines in international conventions of which Italy is a signatory, but also to respond to popular demand as a result of instances of corruption that continue to come to light. Among other measures, Law n. 190/2012 modified in part the Criminal Code and introduced tools aimed at preventing corruption that complement existing measures in the field of transparency and integrity. This choice was strictly related to the forthcoming EXPO exhibition, expected in Milan in 2015.

³² See D.P.C.M. (Ministerial Regulation) 5.8.2008.

³³ See Legislative Decree 27.10.2009, n. 150.

³⁴ See Legislative Decree 6.11.2012, n. 190 and Law 30.10.2013, n. 125.

As mentioned above, in 2014 ANAC absorbed also the competences of the Italian Authority on public procurement³⁵.

3.3. The History in a Nutshell: the “Super Powers” of ANAC

If any guidance is to be drawn by the evolution described, it points in the direction to concentrate powers in the hand of one “super-enforcement authority”³⁶.

The Authority is now composed by a President and four members (together they form a collective body) and the rules set forth for their appointment ensures an high level of independence and expertise³⁷.

³⁵ Is well known that the same year, while the construction works of the EXPO had barely started, the judiciary and police forces shed light on corrupt acts that had tarnished the procurement procedures. Thanks to the strong commitment by the Italian Government, new strict regulations in the sector, controls by ANAC and by the other institutions involved made it possible to open the Universal Exposition on 1st May 2015. This specific cooperation between ANAC and the OECD led to the adoption of a more general control template for institutional cooperation on the supervision of public contracting procedures and of their subsequent performance: the “High-level principles for integrity, transparency and effective control of major events and related infrastructures” enacted in 2016 as a model of co-operation procedure that can be applied to other large infrastructures projects (that can be found on the website of OCSE: http://www.oecd.org/governance/ethics/High-Level_Principles_Integrity_Transparency_Control_Events_Infrastructures.pdf). In the document is stated that “Taking stock of the immediate outcomes and results of the project, this report presents the consolidated “legacies” of the experience and a model that can be applied to many other large infrastructure projects that face the same challenges of balancing the need for integrity in processes and tight deadlines” (p. 3).

³⁶ The expression is the same used by the Commission in the quoted Communication of 1998 describing what Commission would like to avoid to become (“Without trying to evade its responsibilities as the guardian of Community law, the Commission takes the view that it cannot set itself up as a kind of “super enforcement authority” for settling all disputes in the public procurement field”). See G.M. RACCA, Dall'Autorità sui contratti pubblici all'Autorità Nazionale Anticorruzione: il cambiamento del sistema, Dir. amm., 2015, 345 ss.

³⁷ See Decree Law 31.8.2013, n. 101 converted into law with amendments by Law 30.10.2013, n. 125 (art. 5 c. 3).

The Authority has now the power to rule, to oversight and to punish in the field of transparency, anti-bribery and public procurement and, as we will see a bit more in detail, in the public procurement field it has also the power to judge³⁸.

Thus this question arises: is it an improvement of good administration?

On the one hand, to concentrate all competences in the end of one specialized Authority could be a great tool to pursue good administration. It ensures the coherence of the policy in each sector and, if it is well organised, it avoids functional overlap and wastes. The legislators' choice to merge the supervision of public contracts in the system of corruption prevention outlined by Law n. 190/2012, can be seen as a significant intervention intended to sharply help the fight against corruption in Italy. The integration of functions and the consequent extension of the powers of ANAC, could establish the conditions for a more effective oversight of the scope of contracts and public procurement, where a substantial portion of corruption originates.

On the other hand, it may undermine the principle of separation of power, especially because, due to its independence, the Authority is not subject to Government and not even to political responsibility³⁹. Among scholars is also criticized that mixing competences weakens the main aim of the Authority in each sector: is supervising public

³⁸ E. D'ALTERIO, *Regolare, vigilare, punire, giudicare: l'Anac nella nuova disciplina dei contratti pubblici*, *Giorn. dir. amm.*, 4, 2016, 499 ss..

³⁹ The issue is well known in Germany. In the famous case CJEU 9.3.2010, C-518/07 the Court of Justice made clear that Germany was under obligation to provide institutional arrangements to pursue independence of the regulatory Authority on data protection. Germany claimed that this functional independence could not be understood as excluding each external influence invoking the democratic principle of accountability of the executive power before Parliament (imposing on a parliamentary accountable member of the government to supervise the functionally independent authority). The CJEU dismissed this argument.

contracts a tool to fight against corruption or is fighting against corruption a tool to ensure competition and transparency in public procurement?⁴⁰.

4. THE NEW POWERS OF ANAC IN THE FIELD OF PUBLIC PROCUREMENT

Even if no provision about Authorities nor about remedies was expressly provided in the directives of 2014, while implementing them, Italian lawmakers delegated the government to assign to ANAC “the more extensive functions of promoting efficiency, supporting the development of best practices, facilitating the exchange of information between contracting entity and supervisory organs in the field of public procurement and concession contracts, including control powers, recommendation, interim measures, deterrent and sanctioning measures, as well as the adoption guidelines, standard call for tender, standard contracts and other flexible regulatory instruments, binding or not, always ensuring to challenge all binding decisions and acts taken by ANAC before the competent administrative courts”⁴¹.

Legislative Decree n. 50/2016 (hereafter also “Code”) gave to ANAC, inter alia, two new competences. ANAC is actually in charge of issuing Guidelines, to support contracting entities and improve the quality of procurement procedures and can also issue

⁴⁰ See L. TORCHIA, Il nuovo codice dei contratti pubblici: regole, procedimento, processo, in *Giorn. dir. amm.* 5, 2016, 605 ss..

⁴¹ Is an almost literal translation of the Law of delegation: see art. 1, c. 1, lett. t “attribuzione all’ANAC di più ampie funzioni di promozione dell’efficienza, di sostegno allo sviluppo delle migliori pratiche, di facilitazione allo scambio di informazioni tra stazioni appaltanti e di vigilanza nel settore degli appalti pubblici e dei contratti di concessione, comprendenti anche poteri di controllo, raccomandazione, intervento cautelare, di deterrenza e sanzionatorio, nonché di adozione di atti di indirizzo quali linee guida, bandi-tipo, contratti-tipo ed altri strumenti di regolamentazione flessibile, anche dotati di efficacia vincolante e fatta salva l’impugnabilità di tutte le decisioni e gli atti assunti dall’ANAC innanzi ai competenti organi di giustizia amministrativa” and Articles 211 and 213 Legislative Decree 18.4.2016, n. 50.

binding pre-litigation advices, in addition to the traditional judicial remedies, as an optional and ancillary non-judicial remedy.

Guidelines are flexible regulatory instruments provided in addition to ordinary regulatory powers of the Authority. The nature of these legally binding non-legislative acts of general application is presently under scholar's debate in Italy, because of its unclear position among the sources of law⁴². The rational is to progressively replace the regulation that we use to have in the field of public procurement with binding Guidelines enacted by ANAC⁴³.

Living aside the (well-founded) scepticism of scholars, it is fair to say that ANAC is strengthening its legitimacy with a "bottom-up legitimacy" process.

Do to the fact that the code of administrative procedure (enacted in 1990⁴⁴) is not applicable for rule making (but only to single-case decision-making procedures)⁴⁵, the Code requires ANAC to ensure a systematic consultation and participation of stakeholders, civil society and the general public⁴⁶.

⁴² See the advice given by the special Commission established within the Council of State on the draft of the new Code on public procurement 855/2016. See also G. MORBIDELLI, Linee guida dell'ANAC: comandi o consigli?, in Atti del Convegno di Scienze dell'Amministrazione di Varenna, 2016; M.P. CHITI, Il sistema delle fonti nella nuova disciplina dei contratti pubblici, in Giorn. dir. amm., 4, 2016, 436 ss. F. CINTIOLI, Il sindacato del giudice amministrativo sulle linee guida, sui pareri del c.d. precontenzioso e sulle raccomandazioni di ANAC, in Dir. proc. amm., 2, 2017, 381 ss.

⁴³ The previous regulation (which is still partially in force) was an act of about 300 articles, enacted following the ordinary procedure provided for government Regulation (the source which is at a lower level compared to law).

⁴⁴ l. 7.8.1990, n. 241.

⁴⁵ See art. 13 of the mentioned l. n. 241/1990.

⁴⁶ See art. 213 of the mentioned d.lg. n. 50/2016.

The draft act of each Guideline is published on the ANAC website for consultation and it is accompanied by an open invitation to any person to electronically submit comments. It contains information about the adoption procedure, including the deadline for submissions. ANAC also developed the practice to voluntarily submit Guidelines to the advice of Council of State to ensure the maximum level of compliance (Council of State do so in a special composition in charge of giving advices). The Authority also analyses the impact assessment and periodically verifies the impact of its regulation. Guidelines are explicitly submitted to judicial review so their constitutional compliance is safeguarded.

Others important (and controversial) tools to be taken in to account are the new pre-litigation advices provided by art. 211.

Art. 211, entitled “pre-litigation advices” is in the Part II dedicated to “Alternative Dispute Resolution Remedies”.

The first paragraph states that, if requested by the contracting entity or one or more other parties, ANAC gives its advice within thirty days about issues raised during the tendering procedure. The advice is binding for the parties who have agreed to submit to ANAC the issue. The binding advice is challengeable before administrative court of first instance and the appeal will follow a speed procedure. In case of rejection of the appeal, the court shall assess the conduct of the claimant in determining the awarding of costs (pursuant to and for the purposes of Article 26 of the Code of Administrative Process).

The second paragraph of article 211 has had a quite troubled evolution.

The text in force until April 2017 stated that if ANAC while exercising its powers, discovers the unlawfulness of an act, it shall invite the contracting entity to withdrawal it and to remove its harmful effects. If the contracting entity does not follow the “binding recommendation” it is submitted to a financial penalty to be paid by the responsible officer. Binding recommendations were explicitly submitted to judicial review.

The reactions to this hybrid remedy were immediate.

Following are only some of the shortcomings of the new instrument: it made it compulsory for the contracting entity to revoke its own act without any reference to legitimate expectations (undermining the rights and interests of private persons) and it was self-contradicting in character, combining the recommendation, a *per se* non-binding act, with binding effects.

The criticism increased when ANAC adopted the related regulation, stating that the power to issue “binding regulation” might be activated /solicited by private requests.

Also the Council of State, in the special composition in charge of giving advices on regulatory drafts, outlined critical issues about the “binding recommendation”⁴⁷.

As provided by the Law of delegation, one year after the Legislative Decree n. 50/2016 entered into force, it was amended by a “corrective” Legislative Decree⁴⁸.

Even if in the bill of law nothing was provided about the binding recommendation, a last minute amendment cancelled the second paragraph of article 211 and in the final text the binding recommendations “disappeared”.

Mass media and politics immediately reacted, implying that the “invisible hand” who modified the draft had the intent to reduce the “super powers” of the Authority.

The echo on the media was huge (Council of State was requested to issue an official statement about its position) but the very central issue was probably the ineffectiveness of the “hybrid” tool of “binding recommendation” and not the dissatisfaction with ANAC’s powers.

⁴⁷ See the quoted advice of the Council of State n. 855/2016.

⁴⁸ Legislative Decree 19.4.2017, n. 56.

Four days later, the Decree Law about budgetary manoeuvre embodied a new regulation of the ANAC repealed power⁴⁹.

As suggested since the very beginning by the Council of State, the new power is now designed as an extraordinary standing of the ANAC to act before the administrative courts, which is very similar to the extraordinary standing recognised to Antitrust Authority since 2011⁵⁰.

According to new paragraph 1-*bis* of article 211, ANAC can challenge call for tenders, other acts of general scope and individual decisions related to contract of “relevant impact” if issued in breach of the legislation on public procurement.

When contracts of “relevant impact” are not involved, ANAC has standing to challenge acts only in case of “serious violations” of the legislation on public procurement. In this case, before filing the appeal, the Authority has to address an advice to the contracting entity, underlying the unlawfulness discovered. Only if the contracting entity does not implement the suggested remedies within 60 days, ANAC can file the claim before administrative court within the following thirty days⁵¹.

⁴⁹ See art. 52-ter of the Decree Law 24.4.2017, n. 50, converted into law with amendments by Law 21.6.2017, n. 96.

⁵⁰ See art. 21-bis, Law 10.10.1990, n. 287, as amended by Decree Law n. 201/2011, converted into law with amendments by Law 22.12.2011, n. 214. About the amendment see M.A. SANDULLI, Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell’AGCM nell’art. 21 bis L. n. 287/90, pubblicato in *federalismi.it*, n. 12/2012; F. CINTIOLI, Osservazioni sul ricorso giurisdizionale dell’Autorità Garante della Concorrenza e del Mercato sulla legittimazione a ricorrere delle autorità indipendenti, in *federalismi.it*, n. 12/2012.

⁵¹ See art. 211, co. 1-ter Legislative Decree n. 50/2016 as amended on 2017.

5. AN OUTLOOK RATHER THAN A CONCLUSION

According to the fact that “good administration is an aspect of good governance [...] and must preclude all forms of corruption”⁵², the Italian Anti-corruption Authority could represent, as a whole, a tool to pursue good administration. Moreover the strict connection between a fair and transparent regulation of public procurement and fighting against corruption was clearly reaffirmed by OECD on 2015⁵³.

We can add that the above described evolution of the Italian system can be seen as a way to foster the fight against corruption as a secondary-policy objective. In this perspective public procurement in Italy is a way to support the “common societal goal”⁵⁴ to combat corruption, which is a national priority. To find the balance between main and secondary objective will be the main issue to solve.

Regarding the single measures analysed above, is possible to make more specific remarks.

First of all, Italy follows its own technique implementing EU directives. It is nothing comparable with the “one to one” approach used in Germany but it is not a real “gold plating” approach. We can say that in Italy we use the implementation of EU

⁵² See the Preamble of CM/Rec(2007)7 on good administration, quoted supra, par. 2.

⁵³ See the quoted Recommendation of the Council on Public Procurement adopted by the CoE on 18.2.2015 [C(2015)2], which recognises that “public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption” and that “efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of taxpayer’s money” and that “Competitive procedures should be the standard method for conducting procurement as a means of driving efficiencies, fighting corruption, obtaining fair and reasonable pricing and ensuring competitive outcomes” (see IV “Recommends”, pt. iii).

⁵⁴ See regard n. 2 of directive 2014/24/UE.

directives as an occasion to reform our system under the slogan that “Bruxelles is asking us to do it”⁵⁵. Often, like in the examples mentioned below, there is rather no connection between the measures enacted and the implemented EU law⁵⁶.

Guidelines respect, in principle, the requirements of a right to good administration. They, for example, can fill gaps in formal regulation, structure the interaction between administrations and inform individuals about the potential future decision-making of the Authority. Also the principle of participation is respected, fostering transparent and effective stakeholder participation⁵⁷. Even if a standard process when formulating Guidelines is developed and followed it still remains the concern that the excessive

⁵⁵ See D.-U. GALETTA, *Obblighi di rispetto del diritto UE e convergenze fra diritti amministrativi nazionali*, in C. FRAENKEL-HAEBERLE, D.-U. GALETTA, K.-P. SOMMERMANN (eds.) *Europäisierung und Internationalisierung der nationalen Verwaltungen im Vergleich. Deutsch-italienische Analysen*, Berlin, 2017, 167.

⁵⁶ A really weak connection between the above mentioned “binding recommendation” of ANAC and EU directives can be found in the regard n. 122 of directive 2014/24/UE and n. 128 of directive 2014/25/UE, which states that “Directive 89/665/EEC provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. Those review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Directive 89/665/EEC do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive 89/665/EEC and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities”.

⁵⁷ See art. 8 of CM/Rec(2007)7. It has to be stressed that according to the definition of “administrative decisions” given by art. 11 (““administrative decisions’ shall mean regulatory or non-regulatory decisions taken by public authorities when exercising the prerogatives of public power”) the principles stated in Section I are, in principle, applicable also to administrative rule-making. See also U. STELKENS, A. ANDRIJAUSKAITE, *Added Value of the Council of Europe to Administrative Law*, already quoted, 43.

flexibility of such a tool could undermine the legal certainty⁵⁸. It should be provided a coherent and stable regulatory framework to facilitate access to procurement opportunities.

About pre-litigation advices, first of all it is clear that in the same provision (Art. 211) are regulated two very different instruments. This legislative technique is an obstacle to the pursuit of the principle of good administration which provides for comprehensive and clear rules⁵⁹.

On the one hand, the pre-litigation advice set forth in paragraph one, is a remedy that, if provided with binding effects, can compete with traditional judicial remedies, as an optional and ancillary non-judicial remedy improving good administration. On the other hand, the new ANAC extraordinary standing is more coherent with the above mentioned principle rather than the “binding recommendation”.

Regarding the first tool, an important strength of the new remedy is that it is free of charge. Costs of judicial review and legal expenses are quite a relevant issue in Italy, affecting the effectiveness of judicial remedy, therefore introducing an alternative way to solve disputes could be an improvement. The rule providing for penalties in case actions brought against ANAC decisions are rejected could be an effective incentive not to challenge them.

The weaknesses of the remedy is that its binding effect depends on the agreement of both parties, it does not have the power to enact interim measures with suspensive effect (it is up to the contracting entity to avoid adversely affecting behaviours) and the time-

⁵⁸ See the Preamble of CM/Rec(2007)7, where states that “good administration must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible”.

⁵⁹ An unclear legislative framework in an obstacle for the pursuit of the principle of lawfulness, see Art. 2 Rec(2007)7. See also J. PONCE, *The Right to Good Administration and the Role of Administrative Law In Promoting Good Government*, already quoted, that states that “good regulations are a result of (good) administration and allow themselves future good administration, avoiding corruption” (22).

limit gave to ANAC to give its advice (binding or not) overlaps with the time-limit to file an appeal before administrative court.

The pre-litigation advice could represent an important tool to pursue good administration, combining speed, lower costs, and expertise without undermining the primacy of judicial review⁶⁰.

Overall, the effectiveness of the remedy is strictly linked to the capacity of ANAC to give well-founded and well reasoned decisions in a short term, otherwise parties will be obliged to file a claim before the judge.

Regarding the tool provided by the following paragraphs of art. 211, first of all, in the amended version the non-compliance with ANAC's advice is not sanctioned. The power of the contracting entity to withdraw its own act or to adopt any other measure is now designed as a discretionary power. It avoids the breach of the legitimate expectation of parties involved (because their interest still has to be balanced by the contracting entity following the ordinary rules⁶¹).

The choice to enact two different regimes for the contracts of "relevant impact" and for others remains unclear. As anticipated, only for the latter is provided the procedure

⁶⁰ See art. 22 of CM/Rec(2007)7 which regulate "Appeals against administrative decisions". See also D.C. DRAGOS, D. MARRANI, *Administrative Appeals in Comparative European Administrative Law: What Effectiveness?*, in D.C. DRAGOS, B. NEAMTU (eds.) *Alternative Dispute Resolution in European Administrative Law*, Berlin-Heidelberg, 2014, 556, where is stated that "An effective administrative Tribunal addresses in the same time the shortcomings of administrative appeal procedure (lack of independence) and those of court proceedings (length, associated costs, and, in some cases, lack of specialization), providing for independent review and quick redress".

⁶¹ According to art. 21 of CM/Rec(2007)7, which provides that amending or withdrawing individual administrative decisions public authorities "should have regard to the rights and interests of private persons".

of prior ANAC advice. The rationale is probably to speed-up the procedure when contracts of “relevant impact” are involved.

In conclusion, the mentioned reforms are addressed to improve the public procurement system and its institutional frameworks in the light of the principle of good administration. To really pursue this aim it remains necessary to ensure that several tasks gave to ANAC are coordinated, sufficiently resourced and integrated.

In order to assess their effectiveness, only future applications will give an answer.

This should be an important challenge for Italian legal system.