

THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY ITALY

ARTICLE 9, PARAGRAPH 1 UNCAC

PUBLIC PROCUREMENT

ITALY (SIXTH MEETING)

1.Introductory remarks

The "*Anti-Corruption Law within the Public Administration*" No. 190/2012, and the Law on "*Urgent measures for the simplification and administrative transparency and for the efficiency of the courts*" No. 114/2014 constitute the main reference point for policies aimed at fighting corruption in the Italian legal order on a preventive level.

The Law No. 190/2012 puts into effect a complex institutional and organizational plan referred to models mainly based on prevention, and, in execution of the art. 6 of the United Nations Convention against Corruption, establishes the Italian Anti-Corruption Authority (A.N.AC.). According to this Law, A.N.AC. has competences in the fields of the prevention of corruption within the Public Administration (see para. 2), and on transparency in the same sector (see para. 3).

The Law No. 114/2014 introduces new and impacting measures in the anticorruption system and in the A.N.AC.'s activities. In fact, among the most significant interventions intended to sharply affect the fight against corruption in Italy, it must be counted the legislator's choice of anchoring the supervision on public contracts already performed by the Authority for the Supervision of Public Contracts (A.V.C.P) in the system of corruption prevention outlined by Law No. 190/2012. In fact, according to art. 19 of this Law, the A.V.C.P. is suppressed, and the tasks and functions carried out by this Authority are transferred to the National Anti-Corruption Authority. The integration of the functions of the two institutions and the consequent extension of the powers of A.N.AC., set the conditions to oversee more effectively the scope of the prevention of corruption in the field of the contracts and public procurement, in which nestles a substantial part of the corruption phenomena (see para. 4).

Considering the legislative evolutions, and the complex of the Authority's functions, the new institutional mission of A.N.AC. consists in skills that can be clustered within three "pillars": the prevention of corruption in Public Administrations and in subsidiaries and State controlled companies; the implementation of transparency in all aspects of public management; the supervisory activity in the framework of public contracts, and in every area of the Public Administration that can potentially develop corruption phenomena, as well as through the orientation of the behaviors and activities of public employees by means of advisory and regulatory interventions.

The new institutional mission has required a deep revision of the organization and an intervention on the activities carried out by the Authority, in order to increase its

effectiveness, as well as to obtain a reduction of costs. In this contest the Authority has adopted a “Reorganizational Plan”. This Plan is not called to serve a mere function of "reorganization", but it leads to the establishment of a new Authority that has integrated the functions and the resources of the previous two and, moreover, that has different and additional powers and tasks.

2. The measures in the field of the prevention of corruption

As to the first “pillar” of A.N.AC.’s functions, they consist in: elaborating the National Anti-Corruption Plan; analyzing the causes and factors of corruption and identify measures to prevent it; monitoring the implementation and effectiveness of public administrations’ Anti- Corruption plans and the compliance to transparency rules.

Regarding these functions, the Law assigns to A.N.AC. inspection powers: the power to enquire, to demand the exhibition of documents, to command the adoption of acts as well as the removal of acts and behaviors contrasting with law and with transparency rules. A.N.AC. also gives optional advices to the State bodies and all the Public Administrations on the compliance of public employees with the code of conduct; defines criteria, guidelines and standard models for the code of conduct regarding specific administrative areas as specification and integration of the general code of conduct laid down by the Government; reports annually to the Parliament on the activities against corruption and illegality in the administrations and on the effectiveness of the measures applied; receives reports on illegal conducts within the Public Administration submitted by whistleblowers and defines guidelines for protection them.

The prevention of corruption is based on a model of regulation that provides for planning and control activities

The National Anti-Corruption Plan (hereafter called PNA) is the heart of this planning model, and each Public Administration should adopt a Three-year Plan for the Prevention of Corruption (hereafter called PTCP) using the PNA as the basis to follow with the possibility for local authorities to be supported by the Prefect. These planning tools assume a fundamental importance in the system devised by the legislator, as long as the PNA ensures the coordination of national and international strategies for the prevention of corruption in Public Administration, whereas the PTCP identifies, on the basis of the first, the specific risks of corruption in individual administrations and the measures deemed necessary to prevent them.

The PNA allows for a unified and strategic planning of the activities to prevent and combat corruption in the public sector and has been calibrated for the pursuit of measurable objectives and for the identification of specific responsibilities. The PNA is structured as a programmatic document, subject to an annual update with the inclusion of indicators and targets in order to make the strategic objectives measurable and to ensure the monitoring of the possible divergences from these targets arising from the implementation of the PNA. In order to be effective, the PTPC must contain appropriate targets and adequate measuring indicators, and should be coordinated with other

programming tools: the budget, ensuring the financial sustainability of the interventions needed; the Plan of Performance, which should bring the strategic and operational objectives chosen by each administration, including the measures to implement the PTPC; the Three-year Program for Transparency and Integrity and the training Plan.

Appropriate forms of coordination with respect to the other documents required by law are also necessary, first among all of the Three-year Program for Transparency and Integrity and the Codes of conduct to be observed by public employees.

The PTPC also has to include the description of the specific compulsory measures provided by the law and by the PNA concerning the rotation of the assignments to managers and officials in the areas most exposed to the corruption risk, the risk analysis in the areas most exposed to corruption, and the protection of whistleblowers.

Regarding to this last topic, A.N.AC. has the competence to receive reports of wrongdoings from public officials (art. 1, para. 51, of the Law No. 190/2012 and art. 19, para. 5, of Law No. 114/2014). From October 22, 2014 these regulations have been implemented, through the activation of a privileged channel in favor of the employees who choose to apply to the Authority rather than to the internal channels established by the public administration of belonging. Therefore, a reserved register of the Authority has been established, to ensure the necessary protection of the public employee: the confidentiality on the identity of the informant and the performance of a supervisory activity are assured, in order to contribute to the verification of factual circumstances and to the identification of the authors of the illegal conduct. This activity allows the Authority to evaluate the consistency of the systems established by each Public Administration with respect to the reports of the employee with the guidelines established in the PNA and to avoid, in coordination with the Department of Public Administration, the entrenched of discriminatory practices in case of eventual disciplinary procedures (A.N.AC. Resolution No. 6/2015).

3. Anti-corruption through transparency

As to the secondo “pillar” of A.N.AC.’s competences, the valorization of the principle of transparency of the administrative action, considered instrumental to integrity, was established by Legislative Decree No. 150/2009. Law No. 190/2012 has integrated this system, stressing the importance of transparency as a tool for the prevention of corruption, widening the scope of both the subjective and objective scope, and providing for a code of reorganization of a number of provisions related to transparency.

In the implementation of the mandate contained in Law No. 190/2012, the Government adopted the Legislative Decree No. 33/2013 that has reorganized the main publication requirements, not only focusing on the recognition and coordination of measures already adopted, but also introducing new requirements and further compliances in addition to the numerous ones already existing. It has also extended the substantive scope of the provisions related to transparency and designed a system of checks and sanctions regarding the implementation of the mandatory publication.

In addition, the possibilities of a widespread control of the operations of Public Administrations have been broadened, with the recognition of the right of “civic access” to be activated by anyone for the publication of mandatory information and data in case of lack or lateness in compliance by Public Administrations.

A measure, therefore, that fits within the framework of the maximum diffusion of the transparency of administrative action as an instrument that, by acting as an effective deterrent of the phenomena of mismanagement of public resources, ultimately benefits the widespread control and accountability of public administration.

The strategy set by the Authority regarding the immediacy of the approval of the law was to emphasize, in the guidelines, the necessary coordination between the measures of prevention of corruption and those regarding transparency.

In this perspective, the Authority adopted Resolution No. 50/2013 "Guidelines for updating the Three-year Program for Transparency and Integrity of 2014-2016" in which the close connections among the Three-year Program for Transparency, the Three-year Plan for the Prevention of Corruption and the Plan of Performance were underlined. In addition, in order to support public administrations in the planning of actions to be performed, some technical annexes on publication requirements in force and the quality of data to be published were also provided.

After the entry into force of the new text of art. 11 of Legislative Decree No. 33/2013 (as amended by art. 24-bis of the Law No. 114/2014 that definitely clarifies the substantive scope of the provisions of the entire Decree), there was the necessity to solve some practical issues related to specific public administrations. Therefore, on October 20, 2014, Resolution No. 144 of 2014 has been adopted with the aim of defining the substantive scope of the provisions of the Legislative Decree No. 33/2013 with reference to public administrations. The Resolution, after the specification that the substantive scope of application includes every public institution, economic and non-economic clarifies several aspects including the distinction between obligations relating to the organization and obligations relating to the activities of the public entities which are subject to its provisions and the data and information to be published.

The Authority has, therefore, set up a continuous supervision on the level and quality of the implementation of transparency not only with an accompanying perspective, but also to set up *ad hoc* measures for adapting the new institutional sites to the new provisions and to identify, in case of significant deficiencies, internal responsibilities in each agency.

Specifically in the field of public procurement the Law No. 190/2012 attribute to A.N.AC. competences related to the collection and publication of the construction unitary costs of public works and of production of services provided to citizens.

4. The Italian Public Procurement system in the perspective of the anti-corruption

As to the third “pillar”, the Italian current legal framework for public procurement is provided by the Legislative Decree No. 163/2006 and by the DRP No. 207/2010: this legislation will be repealed by the provisions implementing the European Union’s Directives on public procurement (see paras 4.6 and 4.7).

The current legislation on public procurement was modified by the Laws Nos. 190/2012 and 114/2014. So, the new functions attributed to A.N.AC. in this field can be synthetized as follows.

4.1. The activity of supervision and sanctions

Activity of supervision and sanctions on public contracts by central and peripheral administrations and on those of regional interest; supervision on the compliance of procurement procedures with legislation and regulation, the cost of execution of public contracts, on the execution of contracts to verify that it does not result in injury to the revenue. The supervisory activity aims to ensure the fairness and transparency of procurement procedures, to guarantee the protection of small and medium-sized enterprises, the efficient execution of contracts and compliance with the rules of competition in the single tendering procedures. The supervision also affects the system of qualification of competitors participating in public procurement contracts. Supervised entities are the Companies Certificate Organisms (SOA), which issue certificates of qualification to the companies (of which the Authority supervises the composition and activity); also these acts are checked to verify their authenticity. This is a particularly exposed area to corruption phenomena, in which the role of the Authority is crucial in terms of prevention and repression with strong punitive measures, which include, among others, suspension and cancellation of certificates, suspension and the loss of the authorization for the SOA activity. Closely related to the supervisory powers, there are the sanctioning powers exercised, not only through the financial penalties applied in case of information and/or documentation not transmitted, but even through the records of the companies in the Computer Registry of the Authority. Such records cause the exclusion of the companies in the sector from calls for tenders, in cases of misrepresentation on the requirements and conditions of participation in the tender and of misrepresentation and failure of proof of technical and economic requirements in the tender.

(Legislative Decree 12 April, 2006, No. 163).

4.2. The "commissariamento" of single public procurement

According to art. 32, in the event that the judicial authority processes certain crimes against the public administration, that is, in presence of detected anomalous situations and nevertheless symptomatic of illegal conducts or criminal events attributable to a company awarded a contract for the construction of public works, services or supplies, the President of A.N.AC. proposes to the competent Prefect, either: to order the renewal of the corporate bodies by replacing the person involved and, if the company does not abide by the terms established, to provide for the extraordinary and temporary management of the contractor only for the full implementation of the contract covered by the criminal proceedings; to engage in the extraordinary and temporary management of

the contracting company limited to the complete execution of the contract subject to criminal proceedings. This is an innovative and disruptive measure, able to immediately intervene in situations in which corruption phenomena have arisen to contrast them, and in perspective it can also be a strong deterrent against behaviors corruption-oriented, performing from this point of view also a preventive function.

This kind of competence is also provided for relating to the public procurements occurred in EXPO 2015”.

4.3. The traceability of financial flows

In addition, to ensure the traceability of financial flows aimed at preventing criminal infiltration in all public procurement, the Authority issues an identification tender code (CIG) that must be shown for each payment throughout the contract (art. 3, Law 13 August, 2010, No. 136).

4.4. The regulation activity

Among the tasks transferred to A.N.AC., the regulation activity carried out through Determinations and Guidelines and especially through the preparation of standard Tender Notices (art. 64, para. 4-bis of Legislative Decree 12 April, 2006, No. 163) is particularly relevant to ensure the transparency during tenders thus to prevent corruption phenomena. Contracting authorities are required to adopt the Tender-Notices prepared by the Authority, unless adequate reasons for their non-use are provided.

4.5. The management of the National Database of contracts for public works, services and supplies (BDNCP)

The BDNCP contains a series of information strategic to the detection of distortion phenomena in the context of the public procurement market, in addition to allowing the collection and publication of a series of relevant data on subjects active in the sector as well as on contracts and assignments implemented.

4.6. The implementation of the new EU Directives on public procurement

In accordance with the fundamental principles of its legal system, art. 9 of the UNCAC and the recent EU Directives on public procurement, Italy is taking the necessary steps to improve

its systems of public procurement, based on transparency, clarity, simplicity, objectiveness, and competition criteria, also in the view of preventing corruption.

The mentioned current legal framework for public procurement is under revision in order to implement EU Directives in this field (2014/23/EU on the award of concession contracts, 2014/24/EU on public procurement and 2014/25/EU on procurement by entities operating in the water, energy, transports and postal services sectors). A draft law that delegates the implementation of these Directives and that provides an extension of A.N.AC.'s competences particularly in the regulation area, has been submitted to the Italian Senate and, with some amendments, is in an advanced stage of approval.

4.7. The initiative power in the normative field

Pursuant the Law No. 114/2014, A.N.AC. is able to issue opinions on legislation and has the legitimacy to intervene in the institutional debate at a legislative level: for example A.N.AC. is now involving in the parliamentary and governmental debate concerning the fulfillment of the EU directives on public procurement. In this perspective a study commission has been established (chaired by a member of the A.N.AC. board, aimed at contributing to the implementation of the European directives on procurements in the Italian system, even through the formulation of proposals to the Government and Parliament). The A.N.AC.'s President of also participates in several parliamentary hearings in the contest of the examination of the bill that authorizes the Government to implement the new European directives on public procurement.

In this context and for the same reasons, a Memorandum of Understanding to establish cooperation in the field of public procurement has been renewed with the Department of European Affairs. It provides for the joint management of activities related to the Italian Presidency of the PPN (Public Procurement Network), the European Network for Public Contracts set up to facilitate informal cooperation between national authorities responsible for the exchange of information and best practices. It also provides for cooperation in the examination of the draft of legislative acts of the European Union and in the process of transposition into national law of the same, with particular reference to the implementation of the new directives on public procurement and concessions. In particular, the Authority takes part in two working groups established at the Department and supported by the European Commission. The first is aimed at identifying the weaknesses in the current Italian legislation on public procurement and then proposing possible solutions to be taken into account in the process of transposition of the new European Directives on Public Procurement. The second is aimed at examining and studying the provisions of the new European Directives on Public Procurement. In each meeting, specific provisions articulated in thematic groups (e.g. utilities, award criteria, etc.) are examined and the considerations and requests of interpretation emerged from the administrations and stakeholders involved are presented by the Department at the European Commission for interpretative clarifications.

The Authority has also continued to participate in the activities of specific commission established at the Ministry of Infrastructures and Transports, chaired by the Deputy Minister of Infrastructures, whose activities are focused on the elaboration of the new Public Procurement Code.