Autorità Nazionale Anticorruzione

THE MAIN FUNCTIONS OF THE ITALIAN NATIONAL ANTI-CORRUPTION AUTHORITY IN PREVENTING CORRUPTION IN THE FIELD OF PUBLIC PROCUREMENT

1. Introductory remarks

The Italian legal order takes charge of the achievement of the key objectives of UNCAC with the Law No. 190/2012 on anti-corruption within the Public Administration[1] and the Law No. 114/2014 on urgent measures for the simplification and administrative transparency and for the efficiency of the courts[2]. These laws (and the following ones adopted to fulfil and integrate them[3]) constitute the main reference point for policies aimed at fighting corruption on a preventive level.

Law No. 190/2012 puts into effect a complex institutional and organizational plan which refers to models mainly based on prevention. These models have already been designed mostly in binding

[1] Law 6 November 2012, No. 190, "Disposizioni per la prevenzione e la repressione della corruzione e dell' illegalità nella pubblica amministrazione".

[2] Law 11 August 2014, No. 114, "Conversione in legge, con modificazioni, del decreto-legge 24 giugno 2014, n. 90, recante misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari".

[3] See in particular DPR 16 April 2013, No. 62, "Regolamento recante codice di comportamento dei dipendenti pubblici, a norma dell'articolo 54 del decreto legislativo 30 marzo 2001, n. 165"; D.Lgs. 31 December 2012, No. 235, "Testo unico delle disposizioni in materia di incandidabilità e di divieto di ricoprire cariche elettive e di Governo conseguenti a sentenze definitive di condanna per delitti non colposi"; D.Lgs. 14 March 2013, No. 33, "Riordino della disciplina riguardante gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni"; D.Lgs. 8 April 2013, No. 39, "Disposizioni in materia di inconferibilità e incompatibilità di incarichi presso le pubbliche amministrazioni e presso gli enti privati in controllo pubblico, a norma dell'articolo 1, commi 49 e 50, della legge 6 novembre 2012, n. 190".

Many other laws contribute to complete the current framework, relating to the prevention of corruption and the following A.N.A.C.'s powers. In particular, it is to be mentioned Law 27 May 2015, No. 69, "Disposizioni in materia di delitti contro la pubblica amministrazione, di associazioni di tipo mafioso e di falso in bilancio"; Law 7 August 2015, No. 124, "Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche".

international instruments of which Italy is a contracting party[4], as well as in recommendations expressed inside international institutional contexts in which Italy itself participates[5]. So, the strategy applied by the Italian Legislator consists in the use of two different techniques for contrasting corruption through prevention. First of all, specific constraints and requirements were introduced by means of general rules constrained to private and public bodies which negotiate and stipulate public contracts, such as authorizations to carry out specific activities and to accept public assignments, abstention to avoid even possible conflicts of interest[6], obligations of *disclosure* and transparency[7], planning and programming (with measures based on the so called *risk management*) in order to administer public politics in terms of investments[8], as well as codes of ethics and conduct[9]. This set of measures aims at strengthening integrity in the public sector[10]. The second technique aims at raising the "cost" of corruption practices in particular in the field of public procurement. These sectorial rules are addressed at compressing Public Administration's discretionary powers (for example by limiting the regulation of the subcontracting market, fixing variants during works) and at creating reputational benefits and procurement incentive mechanisms[11]: the latter would specifically meet the need, felt by more parties, to introduce, in the

[4] *UN Convention against Corruption – UNCAC*, the two "European" Convention adopted in the Council of Europe framework on the same matter (Nos. 173 and 174) and the additional Protocol to the first one (No. 191).

[5] The reference is, specifically, to the recommendations adopted inside the Group of States against Corruption – GRECO.

[6] Recourse to these measures has already been suggested by OECD, *Recommendation of the Council on Guidelines for Managing Conflict of Interest* (2003); they are also inserted in the European Union Directives *on the modernization of the EU Public Procurement rules (process)* (see footnote 11). The Italian legal system provides these measures with several rules, such as Art. 35*bis* TUPI ("Testo unico sul pubblico impiego"); also Art. 1, co. 40 (and, on *pantouflage*, co. 42), D.Lgs. No. 235/2012 and D.Lgs. No. 39/2013.

[7] There are many international initiatives on this matter, starting from the *Agreement on Government Procurement* (adopted during the Uruguay Round that gave life to the World Trade Organization, 1994), which founded tender procedures on the principle of transparency. World Bank makes the grant of financial on the adoption, by the beneficiary State, of measures to minimize risks of corruption: transparency featured prominently among these. The Organization for Economic Cooperation and Development adopted (on 2009) the *Principles for Integrity in Public Procurement*, specified by *Methodology for Assessing Procurement System* (MAPS-2010, whose fourth pillar consists of indicators useful to assess transparency), and in *Implementing the OECD Principles for the Integrity in Public Procurement*, 2013; see also the Recommendation of the Committee of Ministry of the Council of Europe No. 2, 21 February 2002; on this same topic see the *Principles for promoting Integrity in public procurement*,finalized for their adoption during the G20 Anticorruption Working Group, summit in Washington on 16-17 June 2015. Italian legislation enshrines the principle, for example, in Art. 1, co. 15-36, Law No. 190/2012, clarified with the D.Lgs. No. 33/2013; Art. 19, co. 15, Law No. 114.

[8] OECD, *Recommendation of the Council on the governance of critical risks* (2014). See Art. 1, co. 5 and 60, Law No. 190/2012. As to the Italian legal system see the "Piano Nazionale Anticorruzione (P.N.A.)", adopted by C.I.V.I.T.'s Resolution No. 72/2013, on 11 September 2013, www.funzionepubblica.gov.it/comunicazione/notizie/2013/settembre/11092013-approvato-dalla-civit-il-pna.aspx, para. 3.

[9] OECD, *Making Codes of Corporate Conduct Work: Management Control Systems and Corporate Responsibility*, OECD Working Papers on International Investment, 2001/03; Art. 1, co. 44, Law No. 190/2012 and DPR No. 62/2013.

[10] See, in particular, OECD documents, as: *Recommendations for Enhanced Access and more Effective Use of Public Sector Information* (2008); *Recommendation on Enhancing Integrity in Public Procurement* (2008); *Government at a Glance* (2009).

[11] OECD, *Public Sector Integrity: A Framework for Assessment*, (2005). About the compilation of "white lists" see Art. 1, co. 53, Law No. 190/2012. In *de iure condendo* perspective, it could be mentioned the legal provision on the use of reputational benefits, which are companies's behavioural indicators that can be used on the award of public procurement. This legal tool has been adopted by the draft delegated act adopted by the Senate on 18 June 2015 (and

selection procedures of the contracting party, criteria connected to the respect by economic operators of both basic principles of legality (for instance not cases of corruptive or collusive conduct in the past) and of the contractual conditions in terms of time and costs for the execution of previous public contracts. These regulations, in parallel, meet the need to qualify public buyers by providing for tender procedures according to their effective technical and organisational capacity[12].
From a more strictly institutional point of view, in execution of Art. 6 of the UNCAC, the Law No. 190/2012 establishes an independent body aimed at preventing corruption: the Italian Anti-Corruption Authority (A.N.AC.) substitutes the Independent Commission for Evaluation, Transparency and Integrity of Public Administration (C.I.V.I.T.). So, under this Law the tasks of the A.N.AC. consisted in directing the whole Italian Public Administration towards a program of corruption prevention and transparency, overseeing its implementation.
Law No. 114/2014, however, introduces new and impacting measures in the anticorruption system and in A.N.AC. activities. In fact, among the most significant interventions intended to strongly affect the fight against corruption in Italy, there is 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. Therefore, Art. 19 of this Law settles the suppression of the A.V.C.P. as well as the transfer of its functions and resources to the A.N.AC.
The integration of the functions of the two institutions and the consequent extension of the powers of the A.N.AC. are aimed at setting the conditions to oversee more effectively the scope of corruption prevention in the field of contracts and public procurement. In fact, considered in a synthetic perspective the new institutional mission of the A.N.AC. consists in goals articulated into three pillars: the prevention of corruption in the Italian Public Administration and in subsidiaries and State-controlled companies; the implementation of transparency in all aspects of public affairs and the supervisory activity in the field of public contracts and in every area of the Public Administration that can potentially develop corruption phenomena; the orientation of the behaviour and activities of public officials by means of advisory, also through regulatory and sanctioning powers.
The new mission and the institutional integration of the two Authorities have also required a deep revision of the organization and an intervention on the activities carried out, in order to increase its effectiveness, as well as to obtain a reduction of costs, and to integrate their own functions and resources.

2. The A.N.AC. and the Italian public procurement system in the perspective of anti-corruption

transmitted to the Chamber of Deputies for its approval on 22 June 2015), in fulfilment of three European Union Directives (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*).
[12] Draft law cit. (footnote 11).

The legislative framework described is the expression of the choice to reorganise the Authority and the supervising system over tenders – settled by the Public Contracts Code[13] and its Implementing Regulation[14] - by concentrating the whole strategy of corruption prevention in one single institution[15].
The creation of a unique safeguard for the protection of legality in public management comes from the need to attempt to control a highly economic and strategic sector, exposed more than any other to the risk of penetration by illegality and bad maladministration.
The Authority achieves its goals by mainly fulfilling a regulatory activity of the sector also including an advisory function in order to prevent disputes and supervising activity, along with some inspection and (still weak) sanctioning powers. These competences are followed by an important monitoring activity through the collection of data on tenders and on the companies operating in the sector: for this purpose an Observatory for public contracts[16] operates. These data are made public through the institutional web site, in order to increase the transparency of the market.
The Authority operates, essentially, at three different levels: a) constant supervising and prompt reporting to the competent authorities of irregularities or illegal situations, through the inspection function, also eventually sanctioning certain behaviours; b) interpretation of the law, also issuing preventive advices (the so-called "pre-litigation") in order to prevent disputes[17]; c) information gathering and continuous monitoring of the awarding and execution of public contracts.

3. The regulatory function

The regulation activity[18] 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 onset, have perceived the need for a consistent 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

[13] Legislative Decree 12 April 2006, No. 163, "Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE".
[14] DPR 5 October 2010, No. 207, "Regolamento di esecuzione ed attuazione del decreto legislativo 12 aprile 2006, n. 163".
[15] It is to be underlined the beneficial effects resulting from the new Italian legal framework concerning prevention of corruption, see: OECD's *Reports* adopted on 18 December 2014 and on 30 March 2015 as well as ANSA's *Report*, available online at http://www.ansa.it/europa/notizie/rubriche/altrenews/2015/06/18/corruzione-consiglio-deuropaitalia-fa-progressiue-delude_86a8b236-4ea5-49d6-b3ed-14f32f772b52.html.
[16] "Osservatorio dei contratti pubblici", provided for in Art. 6 of the Public Contracts Code.
[17] For further information refer to section 3.1.
[18] The regulatory function is established by a Resolution adopted on 8 April 2015 by the A.N.AC., under Art. 8, co. 1 of the Public Contracts Code and of its Implementing Regulation.

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. 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 acts with general scope 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 consistent interpretation of laws and an application coherent with them.
Among this kind of acts, could be the resolutions in the field of the definition of the participation criteria[19], aggregation of Municipalities for purchases criteria[20], operative indications regarding deposits[21], and afferent to the procedure of composition with creditors[22]. Other very useful guidelines, for economic operators and tendering organisation, are the one regarding postal services[23], engineering and architecture services[24], and real estate maintenance services[25].
As for the more general topic of corruption prevention tools let us consider, for example, the guidelines adopted in the field of *whistleblowing*[26]: these meet the need to establish the basic lines of application of the statute of protection of those who point out illegal facts from inside the workplace, statute which the Law No. 190/2012 dictates to respect[27], however, without indicating principles and criteria of its functioning.
Furthermore, pursuant to para. 4-bis of Art. 64 of the Public Contracts Code, the Authority fulfils the task of standardising tender documents through the adoption of standard tenders, thanks to which the Authority can direct the tendering organisations, so reducing disputes deriving from the provision of disproportionate or discriminatory requirements and exclusion clauses not provided for by law, etc. Pursuant to the legal provisions, the standard tenders are binding to the extent that the tendering organisations can waive them only by indicating the exact reasons in the contracting deliberation or in the tendering documents. The provision of standard tenders has also the (indirect) effect to ensure transparency during tenders, thus to prevent corruption conducts. This will strongly improve transparency and non-discrimination.
It is important to remark that the regulatory acts of the A.N.AC. are assisted by a number of guarantees of participation in favour of the recipients of the acts, recognizing the importance, when operating in a sector in which public procurement powers and market rules do converge, of achieving solutions which are preceded by a broad participation of the stakeholders. This

[19] Resolution No. 3 of 25 February 2015.
[20] Resolution No. 7 of 28 April 2015; Resolution No. 4 of 25 February 2015.
[21] Resolution No. 1 of 29 July 2014; Resolution No. 3 of 23 April 2014.
[22] Resolution No. 2 of 11 February 2015.
[23] Resolution No. 3 of 9 December 2014.
[24] Resolution No. 4 of 25 February 2015.
[25] Resolution No. 7 of 28 April 2015.
[26] Resolution No. 6 of 28 April 2015.
[27] Art. 1, co. 51, Law No. 190/2012.

involvement occurs through modalities and instruments such as hearings, online consultations (notices and comments), technical working groups, being governed by *ad-hoc* Regulations. These procedural guarantees as well as the discussion with the parties concerned in the decisions, represent, in a way, the source of the democratic legitimacy of A.N.AC.'s acts and of its accountability as an independent Authority.
The market regulatory function also includes the definition of reference prices elaborated by the A.N.AC. in waiting for the next general determination of standardised costs[28], useful in order to reduce public spending on goods and services, a task that only the A.N.AC. is able to perform, using its pool of data and information assets gathered by the Observatory.

3.1. Advisory function as a pre-litigation tool

In the same prospective of this interpretative regulatory function played by the Authority, one of the most interesting innovations ever introduced by the Public Contracts Code[29] is the right for contracting authorities and bidders to turn to the Authority to settle disputes during the tendering procedure, the so-called "pre-litigation". It is also governed by the Regulation (A.N.AC.) about the execution of the controversy settlement function[30], lastly modified by the Council deliberation of 27 May 2015[31], which prescribes the procedure in detail. Said regulation assigns to the Authority the function of settlement of litigations arising in the contractor selection-process.
This legal tool can be qualified as an *Alternative Dispute Resolution* (ADR) instrument, a facultative and conciliating tool to compose litigations in a faster and more effective way compared to the judiciary system for disputes between parties. The Italian Legislator has herewith established an advisory function, based on which the Authority, upon the parties' initiative (contracting authorities, economic operators, legal persons representing public or private interests, as well as representatives of shared interests constituted in associations or committees) is called to express a non-binding advice about issues arising during tender procedures. Although this intervention has no binding force, the specific technical qualification and the fact of being a third party to give its point of view turn it into an instrument of great persuasive power, able to represent a valid and effective solution for litigations arising from tendering.
With this legal tool the Legislator intended to introduce a deflating mechanism for litigations deriving from tender procedures, aimed at preventing and essentially reducing recourses to the administrative judge. The fulfilment of such function by the A.N.AC. in fact discourages the recourse to the judge, both if the expressed opinion is favourable to the private party's reasons or to the contrary, since it induces, however, to consider useless to submit to the judge arguments which

[28] See Art. 9, co. 7 and Art. 10, co. 3, D.L. 24 April 2014, No. 66, "Misure urgenti per la competitività e la giustizia sociale", and Deliberation No. CP- 22 of 26 November 2014.
[29] Art. 6, para. 7, lett. n).
[30] "Regolamento sull'esercizio della funzione di componimento delle controversie di cui all'art. 6, comma 7, lettera n) del decreto legislativo 12 aprile 2006, No. 163".
[31] Available online at http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/Delibere/2015/Del.Reg.Precontenzioso.27.05.15.pdf

have not passed the Authority's examination. From the analysis of the practice results in fact that, in case of litigations already presented to the Authority and also passed on to the administrative judge, the latter has in most cases shared the point of view expressed by the Authority.
The advantages presented by the legal tool are evident: further to the aforementioned deflation of the legal controversies, a containment is achieved with respect to the juridical recourse in terms of time and costs, structures and human resources, as well as the possibility to obtain an opinion aimed at removing and/or correcting the infringements claimed by the parties at a stage when these can still be efficiently amended without paying any fee.
This activity is also useful to detect different sorts of malfunctions in the sphere of public tenders, contributing to make supervising activity over the sector more effective through an *ex-ante* intervention. In this regard, an emblematic example could be mentioned: in a pre-litigation advice, the Authority faced some issues related to the tender procedures for awarding the management of the Centre for asylum seekers in Mineo and identified some illegal acts; the awarding was then subject to a serious criminal investigation conducted by the criminal court and the President of the A.N.AC. proposed to the competent Prefect to start the extraordinary and temporary management of the contracting company limited to the complete execution of the contract subject to criminal proceedings, pursuant to Art. 32 of D.L. No. 90/2014[32].

4. The supervisory function

The supervisory activity – conferred to the A.N.AC. by the Public Contracts Code, and specified by an A.N.AC. Resolution[33] - aims at ensuring the fairness and transparency of procurement procedures and at guaranteeing the protection of small and medium-sized enterprises, the efficient execution of contracts, and the compliance with the rules of competition in single tendering procedures. It is articulated into powers of verification, also through inspections[34] and sanctions[35].
The supervision also affects the system of qualification of economic operators participating in public procurement contracts. The Qualification Bodies (so called SOA)[36] are supervised entities which issue the qualification certificate to the economic operators (whose composition and activity is supervised by the Authority); also these acts are checked to verify their authenticity. This area is particularly exposed to corruption phenomena and the role of the Authority is crucial in terms of prevention with punitive measures, which include, among others, suspension and cancellation of certificates, suspension and loss of the authorization for the SOA activity.
The introduction of the so called "collaborative supervision"[37] is very representative of the ongoing cultural change. The legal tool was introduced as a particular and exceptional form of verification,

[32] *Infra*, para. 4.
[33] Arts. 2, 6 and 8, co. 3, Public Contracts Code; "Regolamento in materia di attività di vigilanza e di accertamenti ispettivi", adopted by A.N.AC. on 9 December 2014.
[34] Art. 6, co. 9, lett. a) e b), Public Contracts Code.
[35] Art. 19, co. 5, D.L. 90/2014.
[36] "Società Organismo di Attestazione".
[37] Art. 4 of the Regulation (A.N.AC.) about the execution of the controversy settlement function, adopted on 27 May 2015.

above all preventive, aimed at fostering a profitable control collaboration with the contracting authorities and thus guaranteeing the correct functioning of the tender operations and the contract execution, also preventing attempts of criminal infiltration in the tenders. Coming from the positive experience made at "EXPO 2015", the "collaborative supervision" could be systematically introduced in the organisation of great events, initiatives and works of national or strategic interest in order to guarantee the transparency, correctness and quality of administrative choices from the very beginning.

Special attention must be paid to the extraordinary and temporary management of the contracting company limited to the complete execution of the contract subject to criminal proceedings. According to Art. 32 of Law No. 114/2014, the use of this procedure is determined by two alternative assumptions: the event that the judicial authority processes certain crimes against the Public Administration; or, the presence of detected anomalous situations and nevertheless symptomatic of illegal conducts or criminal events attributable to a company which has been awarded a contract for the construction of public works, services or supplies. Therefore, 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 established terms, to provide for the extraordinary and temporary management of the contractor only for the full implementation of the contract covered by the criminal proceedings; or, 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, which allows immediately intervening in situations in which corruption phenomena have arisen to contrast them and, in prospect, it can also be a strong deterrent against corruption-oriented behaviours, performing from this point of view also a preventive function.

This kind of competence was also applied to public procurements occurred in "EXPO 2015"[38]. Moreover, it should be underlined that, in this case, the supervising was exercised also with the support of the Organization for Economic Co-operation and Development (OECD), on the basis of a Memorandum of Understanding signed between the OECD and the A.N.A.C. on 3 October 2014[39]: the OECD codified the supervising approach and methodology as an international good practice[40].

Furthermore, the Authority has a stimulating role on the national Legislator, also with the aim to make fulfil international norms and practices, through proposals and suggestions for the amendment of the national legislation, both within the scope of public contracts and, more generally, in the field of prevention of corruption in public procurement.

Closely related to the supervisory function, 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 special annotations related to the companies in a Company Data Base[41]: in

[38] Art. 30, Law No. 114/2014.

[39] Available on http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/pdf/protocolli/ProtANAC_OCSE_031014.pdf

[40] Reports citt. *supra*, footnote 15.

[41] "Casellario informatico", set up within the "Osservatorio dei contratti pubblici".

cases of misrepresentation on the requirements and conditions of participation in the tender and failure of proof of technical and economic requirements, the A.N.AC. shall suspend the economic operators from participating in public tenders for a certain period of time[42]. These sanctions are published in the Company Data Base and the contracting authorities must consult it during awarding procedures.

5. **The stimulation of regulatory activities of the Parliament and the Government**

In cases where the lack of coordination among regulations turns out to be insurmountable by its interpretation activity, the A.N.AC. has the legitimacy to intervene in the institutional debate at a legislative level, also issuing opinions addressed to the Government and the Parliament.
The contribute that, for example, the A.N.AC. is currently giving to the debate concerning the fulfilment of the European Union directives on public procurement is very significant thereof. A study commission has been established (chaired by a member of A.N.AC.'s Board), aimed at contributing to this task, even through the formulation of proposals to the Government and the Parliament.
A.N.AC.'s President also participates in several parliamentary hearings[43] in the contest of the adoption of the bill authorizing the Government to implement the new European directives on public procurement and concessions.
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 Italian Government Department of European Affairs (body of the Council Presidency). It provides for the joint management of activities related to the Italian Presidency of the P.P.N. (Public Procurement Network), which is the European Network for Public Contracts, set up to promote informal cooperation between national authorities responsible for the exchange of information and best practices. It also provides for cooperation in the examination of the EU draft legislative acts and in the process of transposition into national law of the same ones.

6. The interconnection between the powers and their reciprocal synergy: an original model of independent Authority

Despite its considerable complexity, the landscape that we have attempted to summarize brings about the fact that the A.N.AC. is an independent Authority with an original model, if compared to

[42] Art. 6, co. 11, Public Contracts Code.
[43] During the informal hearings before the VIII Permanent Italian Commission at the Chamber of Deputies on 18 June 2014 and at the Chamber of Senate on 8 January 2015; before the VIII Permanent Italian Commission for Public Works of the Republic Senate on 18 February 2015; before the VIII Permanent Italian Commission at the Chamber of Deputies on 15 July 2015.

those ones that characterize the national and international experience of the other independent Authorities operating in the field of regulation[44].

First of all, in terms of regulated parties, the A.N.A.C. is not called to regulate relationships between companies and between these and their clients, but the ones among public Bodies, in their mutual relations and in the same ones with companies, being citizens only indirect recipients of its activities.

Secondly, over time there has been a progressive broadening of the regulatory powers: the Authority has taken a role not so much (or not only) focused on the control and supervising function but rather able to offer a proactive support to the operators of the sector, both in the phase of awarding and in that of public contracts execution, even through recommendations or binding remarks aimed at removing irregularities and at adopting corrective actions.

Thirdly, the supervising activity has never been an end in itself, but, over time, it has increasingly taken the characteristics of a functional supervision, in order to ensure the achievement of the objectives set by the law as the primary goal for the sector: quality, economy, effectiveness and transparency[45].

The functions of the Authority are thus intended to protect the values of competition, fairness and transparency of public operators, including supervision and regulation, where the hendiadys "supervision - regulation" expresses a sum of activities aimed at a synthesis.

As a matter of facts, the regulatory activity is no more than a supervising power, concretely carried out through the imposition of preventive behavioural rules, non-binding rules, in order to guarantee in advance the good functioning of the market and providing conforming and corrective contents. Moreover, also the supervising function is of composite nature and is executed in rather diversified ways, using multiple powers of control, direction and inspection, as well as support.

7. And finally, let's look to the future

The national Legislator - completing the procedure of approving the mandate to the Government for carrying out the EU Directives - provides for an extension of A.N.AC.'s competences, in order to facilitate the flexibility and adequacy of the contracting authorities' choices. The draft delegated act on public procurement explicitly gives the Authority the competence to adopt so called second level rules, this is to say acts such as guidelines, standard tenders, standard contracts and other instruments of flexible regulation, also provided with binding effectiveness[46], which, limiting discretionary powers and arbitrary conducts in the management of public funds, allow to preserve the general principle of non-derogability of the primary norm and to avoid the continuous "regulatory incursions" to which the current Public Contracts Code was subject in the past. At the

[44] There are many international studies, specifically on the several models of National anti-corruption Authorities. *Ex multis*, see: *Specialised Anti-Corruption Institutions. Review of Models*, OECD, 2008; *Methodology for Assessing the Capacities of Anti-Corruption Agencies to Perform Preventive Functions*, UNDP Bratislava Regional Center, 2009; *Guide des praticiens, Évaluation de la capacité des agences anti-corruption*, PNUD, 2011; *Mandates of anti-corruption body or bodies in respect of prevention*, CAC/COSP/WG.4/2014/2.

[45] These principles are mentioned in the Preamble of the *Model Law on Public Procurement*, UNCITRAL (cit. footnote 7); *Principles for promoting Integrity in Public Procurement*, G20 (2015).

[46] Art. 1, lett. o), draft delegated act (cit. footnote 11) states that the A.N.AC. adopts: "atti di indirizzo quali line guida, bandi tipo, contratti tipo e altri strumenti di regolamentazione flessibile, anche dotati di efficacia vincolante".

same time, a reinforcement of the control power, of precautionary intervention on the tendering procedures acts and contract execution have been proposed, in order to avoid serious and irreparable damages in urgent cases, as well as the *sanctioning* power of the Authority[47].

Furthermore, this would entail the recourse to sanctioning powers in case of not adapting to the Authority's recommendations, analogously to those attributed to the Competition Authority (A.G.C.M.); it would also entail the recourse to the legislative power to act in court to remove illegalities found in the awarding procedure or in the execution of tender contracts, again analogously to the aforementioned regarding the latter Authority. This is an important regulatory acknowledgement of the strong and necessary connection between the supervising and regulatory activities, which could allow the A.N.AC. to fulfil its function of preventing and contrasting corruption in the public tender sector more effectively.

Also the proposal to reinforce the pre-litigation activity is significant, facilitating the Authority's incipient evolution towards a form of Alternative Dispute Resolution (ADR) of a conciliatory typology[48].

The whole of the powers assigned to the A.N.AC. contributes to qualifying the Authority as the suitable institutional subject to fulfil the functions of governance of the public procurement sector, as pursuant to Art. 83 of the EU directive 2014/24, also from the perspective of corruption prevention.

Rome, 24 August 2015 Nicoletta Parisi[49]

[47] Art. ult. cit.

[48] Art. 1, lett. z, oo), doc. ult. cit.

[49] Member of A.N.AC.'s Board. The Author would like to express her appreciation for the generous and intelligent assistance of some members of A.N.AC.'s staff: Ms Lorenza Ponzone, Mr Giuseppe Abbatino, Ms Michela D'Ascanio and Ms Martina Torre.