Administrative and punitive-administrative measures against corruption: the role of National Anti-Corruption Authority (ANAC)

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The system of prevention of corruption in Italy

- Over the last decades, the **issue of corruption** has become increasingly important on the international scene, a phenomenon felt, even by citizens, in its seriousness for the negative effects it has on the social system and on the competitiveness of the economic system and also capable of undermining the legitimacy of democratic institutions.
- The problem has also been dealt with by the main international organizations (the **UN** and the **Council of Europe**, in particular), which have produced important **multilateral conventional instruments**, with the indication of the need to prepare instruments of contrast. Also as a result of the before mentioned conventions, numerous countries, not only of the European Union, have developed ambitious and very articulated policies of prevention and contrast, even if very diversified among them.
- Among the experiences matured in the matter, the **Italian one** is often taken as reference, first of all, for the role that the **National Anti-Corruption Authority** (ANAC) has progressively assumed in the system.

The system of prevention of corruption in Italy

- The system of prevention of corruption and transparency in the public administration in Italy is a **new branch** of the law that was born on this impulse.
- In the space of a **five-year** period, starting from **November 2012**, in the Italian administrative system, a new **function of prevention and administrative fight against corruption** has been rooted in any case, **alongside the traditional repressive** approach which had characterized the Italian system up to that moment and which had clearly shown its limits. As highlighted at the scientific level and in the public debate, in particular, more than twenty years after the start of **"Mani Pulite"** (an important scandal in Italy of public corruption), the legacy of that season of "replacement" of the criminal judge to the political power has appeared quite controversial.
- Numerous data and indicators, as well as new and no less serious scandals compared to those of the past (Expo, Mose and Mafia Capitale), have shown the only temporary effect and, in the last instance, unsatisfactory, of the mere "repression". Here, then, is a **new strategy and a new administrative function of "prevention" of corruption**.

The system of prevention of corruption in Italy

- The new system has been consolidated over the years through a complex system of laws.
- The most important of these is the **"Severino" Law** n. 190/2012, which establishes the ANAC and represents the milestone of the system.
- With the law n. 190, Parliament has delegated the Government to issue a series of legislative decrees implementing the law. It should be remembered the legislative decree no. **235/2012** on the causes of incandidability and ineligibility; the legislative decree no. **33/2013** on transparency and the legislative decree no. **39/2013**, on inconferability and incompatibility of positions in the Public Administration.

The object of the new system: towards a new concept of administrative corruption?

- Generally, when we talk about corruption in its purely **penalistic conception**.
- It is therefore an **offence against the public administration** of a **bilateral nature** in which a public entity and a private individual agree to grant each other an **exchange of benefits and administrative act**. It's called also "contract-crime", due to this consensual nature.
- This offence is provided for by the Italian Criminal Code in articles 318 and 319 and following.
- The protected legal right is identified in impartiality and in the correct functioning of the administration, two values which find their direct basis in art. 97 of the Constitution. In other words, a public official who accepts a salary, a utility, in exchange for his function, behaves in a way that calls into question the proper functioning of the public administration.
- It should be noted that this approach is now being questioned by those who stress that this crime also affects areas other than those of the administration (economy, competition, efficiency of the administration itself).

The object of the new system: towards a new concept of administrative corruption?

- The idea that the new system for preventing corruption also includes a **new notion of administrative corruption** is a recurring one, more extensive than the "criminal" one and essentially attributable to **maladministration**.
- The new system, precisely because it is **interested in preventing** and not in sanctioning, aims to operate on **what "can happen"** and does not look (only) at what happened, it is aimed at the **organization** and not only at action: **the focus moves away from the pathology of the offence at the presence of risks** and the law enforcement strategy is directed at the conflicts of interest, to avoid, to know, to control, to put in transparency. All in one drawing complex of sector-specific measures and regulations, held together by **two adhesives**: one, organizational, which has as its pivot the **National Anti-Corruption Authority**; the other, procedural and programmatic, which is developed in accordance with the **AntiCorruption Plan (PNA)**.

Origin of ANAC: European Union and UN pressures on creation of Authorities in member States.

- Since the **Green Paper** of EU Commission of **1996**, EU suggested to the Member State to entrust the supervision of its contracting entities to an independent Authority, following the model of Sweden.
- 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 body.
- 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.

Origin of ANAC: European Union and UN pressures on creation of Authorities in member States.

- Among the international instruments mentioned, the most important is the **UN Convention**, signed in **2002** in **Merida**. The others are the "Criminal Law Convention on Corruption" of European Counsil (1993), the OCSE Convention (1997) and the GRECO – Group of State Against Corruption activity.
- **Article 6** of the United Nations Convention expressly provides that "each State Party shall ensure, in accordance with the fundamental principles of its legal system, the existence of one or more organs, as necessary, responsible for preventing corruption by (...)".
- Indeed, one of the recommendations contained in the UN Convention against Corruption is that of setting up an **ad hoc body responsible** for measures in the field of corruption: it is understandable that providing for measures without a person/authorities who is concerned with enforcing or implementing them **risks** to weakening the effectiveness of the preventive system.

The ancestor of ANAC in Italy: AVCP and "old" Civit/Anac.

- The two tasks of the directive mentioned before were satisfy (**at least formally**) already in Italy after the establishment of the **Authority for the Supervision of Public Contracts "AVCP"** (instituted in 1994 but in operation from 1999), in charge of monitoring public procurement by fostering compliance with principles of fairness and transparency.
- The Authority had only oversight powers but not the power to sanction infringements. So that authority had no real chance of taking effective action against corruption.

The ancestor of ANAC in Italy: AVCP and "old" Civit/Anac.

- For **this reason**, but also for **economic reasons** and to **avoid the multiplication of independent authorities** - the law no. 190 of 2012 decided not to create another Authority for the prevention of corruption, **attributing the task** of the prevention of corruption to an existing body, holding functions partially in line with those that should have been the tasks of the Anti-Corruption Authority: the **CIVIT**, the Commission for the evaluations of the Public Administration.
- This body, created in 2009, was mainly concerned with the performance of the administration and had some powers in terms of transparency.
- In **2012**, during "Monti" Government, for the relaunch of the country, **CIVIT changed its name**, assuming that of **National Anti-Corruption Authority and for the Transparency of the Public Administration**. With the same decree law were also changed the criteria for the appointment of the governance of the Authority, creating the conditions for it to be counted among the independent authorities.

The ancestor of ANAC in Italy: AVCP and “old” Civit/Anac.

- However, the “old” CIVIT/ANAC has received a further significant amendment by Decree Law No. 90/2014, known as the "**Madia Decree**", which completely modified its organizational structure, also **absorbing the AVCP structure**.
- In addition to losing the expression "for the transparency of the Public Administration" in its name, the Authority has also been invested with the **supervision of public contracts**. This is a particularly important competence, since it also affects both the powers of entrustment and the regulatory powers.
- The law, by this way, unites in a single organization and in a single Authority, independent from hierarchical connections with the Government or Ministries, personnel and function of the CIVIT/Anac and the AVCP: it’s created the **new ANAC**.

The new Italian Anti-Corruption Authority : general profiles.

- The **integration of the functions of the two institutions** and the consequent extension of the powers of ANAC, set the conditions to oversee more effectively the scope of the contracts and public procurement in which nestles a substantial part of the corruption phenomena.
- The new institutional mission of ANAC consists in the **prevention of corruption in public administrations and in subsidiaries and state controlled companies** through the implementation of transparency in all aspects of management; through supervisory activities 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 Italian Anti-Corruption Authority : general profiles.

- So, the new Italian Anti-Corruption Authority is a public **independent** body of composite nature. Combines effective power and role of **public procurment supervisor** and the role of body in charge for fighting against corruption and illegality by ensuring **transparency** in Public Administration.
- The main character of the new Anac is therefore **independence**, strengthened in functional and organizational terms. An independence that removes the ANAC from the implementation of a strict government policy, in order to allow it to be authoritative also to propose to Parliament or the Government changes or innovations to the anti-corruption regulatory system.
- The Authority is now composed by a **President** and four members (together they form a collective body, the **Counsil**) and the rules set for their appointment ensures an high level of independence and expertise.

The new Italian Anti-Corruption Authority : the National AntiCorruption Plan (PNA)

- Operating in the direction repeatedly urged by the international bodies of which Italy belongs, with the introduction of the above-mentioned organic system for the prevention of corruption, an articulated process of formulation and implementation of prevention strategies has been developed, implemented **on two levels**.
- At a first level, the "**national**" level, before the Department of Public Administration, today, following the Legislative Decree 90/2014, the National Anti-Corruption Authority implements the **National Anti-Corruption Plan** (PNA): through it, the Authority provides all public administrations required to adopt it at a "decentralised" level with general indications
- At the second level, the '**decentralised**' level, **all public administrations**, including among the recipients of the anti-corruption system, defines its own AntiCorruption Plan every **three years**, (PTPC), which, on the basis of the indications present in the PNA, carries out analysis and assessment of specific risks of corruption and consequently indicates organisational measures to prevent them.

The National Anti-Corruption Plan (PNA): structure and functions

- The Plan is qualified as a "**policy act for public administrations** ... for the adoption of its three-year plans for the prevention of corruption", thus qualifying as a **regulatory act**, through which to provide indications to those administrations that are required to draw up the plan for three years. These last indications, precisely because they are "**acts of address**", will have a character of similar to the "directives" and therefore, as such, will not be binding on the administrations, which, in order to deviate from it, must, however, give reasons in the following ways.
- As for the content, the PNA in particular, "also in relation to the size and different sectors of activity of the entities, **identifies the main risks of corruption** and the related remedies and contains an indication of the objectives, timing and methods of implementation of the measures to combat corruption". It therefore confirms the leading role of the PNA with regard to the administrations, which are required to adopt the PTPCs and which are expected to it is not limited to providing methodological guidance on how to prepare a PTPC but also plays a supporting role in the identification of risks and measures to be taken, without diminishing or limiting the power of individuals administrations, which are responsible for the practical implementation of the measures.
- An indispensable part of this mechanism is the person **responsible for the prevention of corruption** (RPC), present in each administration, usually a manager who, being responsible for the drafting and implementation of the Plan, must also, in the event of episodes of corruption, demonstrate that he has taken the necessary measures to prevent and contain the risk.

The new Italian Anti-Corruption Authority : the regulatory powers

- One of the possible sources of law on the prevention of corruption are the **guidelines**, tools of **soft law**. Can the Authority use **regulatory powers** to prevent corruption, transparency, inconferability and incompatibility? The answer is complex.
- In some specific cases, certainly, as in matters of transparency, the **Authority has a power of regulation expressly provided** by the legislator. In some cases, the guidelines are binding: these can derogate from the rules of law, in these cases, they are binding and their violation can be censored as a violation of the law. Outside of these cases, is there a possibility for a different regulation and **what value has it**?
- Here we must evoke an **implicit power typical of all independent authorities**. The implicit administrative powers are recognized, by doctrine and jurisprudence, to the independent Authorities in connection with the role of regulation that is attributed on specific matters.
- If an Authority is recognized a role in a certain sector, it is evident that that Authority, within that sector, must be recognized to the Authority the possibility of intervening with its own measures of a regulatory nature to allow the supervised administrations to be able to respect the rules provided for. These measures are not necessarily binding and cannot derogate from the legislative system because they do not have the force of law but serve to explain the existing rules and above all to identify precisely the areas of application.

The new Italian Anti-Corruption Authority : the regulatory powers

- The power of regulation, therefore, is recognized to the ANAC under **two aspects**: either because it is explicitly delegated by the legislator and the value is expressly indicated by the rules, or because the power of regulation is not legally binding but suitable to give indications to the administrations that can deviate from it only with adequate motivation.

The new Italian Anti-Corruption Authority : the supervisory powers

- ANAC, in matters relating to the prevention of corruption, transparency and inconferibility and incompatibility, can exercise a **supervisory power**.
- It consists of a control on the public administrations that allows the verification, also through inspection activities, of the respect of the regulations on the prevention of corruption, transparency, inconferibility and incompatibility. Power of control and inspection that can also be exercised through the Guardia di Finanza, which allows the ANAC to verify.
- Another power that the Authority can exercise in matters of vigilance is the **power of order**. This power is expressly provided for by the Law 190. Article 1, paragraph 3, which states: "*for the exercise of the functions referred to in paragraph 2, letter f), the National Anti-Corruption Authority exercises powers of inspection through the request of news, information, acts and documents to the public administrations, and orders the adoption of acts or measures required by the plans referred to in paragraphs 4 and 5 and by the rules on the transparency of administrative activity provided for by the provisions in force, or the removal of conduct or acts contrary to the plans and rules on transparency cited.*"
- In all cases in which the Authority highlights deficiencies in the Plan or violations of the Plan or activities that conflict with the Plan, it may issue an order ordering the administration to behave in a certain way or to remove a previous activity. The value is more symbolic than real because there is no sanction for non-compliance with the order.

The supervisory powers and the so called "collaborative supervision".

- The most significant innovation, also contained in the new Supervisory Regulation, is certainly the new monitoring methodology called "**Collaborative Supervision**", activated upon **request of the contracting authorities themselves**. ANAC introduced "collaborative supervision" as a particular and exceptional **form of verification**, **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 organization 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.
- This tool marks a cultural change: **ANAC no longer intervenes to sanction** and condemn illicit behaviour ex post (after the fact), when damage done is often difficult to remedy, but **to prevent anomalies ex ante** (before they occur) by guiding the administration towards better and more transparent choices and discouraging improper economic operatives from responding to calls to tender.

The new Italian Anti-Corruption Authority : the sanctioning powers

- In the field of anti-corruption the powers of sanctioning of ANAC are essentially **two**:
- **Article 19**, paragraph 5, letter c), of the Madia decree, which provides for a power of sanction in the event of failure to adopt the Plans.
- **Article 47** of Legislative Decree 33/2013, as amended by Legislative Decree 97/2016, confers a sanctioning power (administrative pecuniary sanctions) with reference to certain specific situations of emissions with regard to transparency.
- The sanctioning power is limited to specific situations but can be exercised autonomously.

Administrative-punitive power of Anac: the commissioning of company

- Among the most incisive and important administrative and punitive powers, there is certainly the so-called "**company commissioning**" in accordance with **art. 32** of Legislative Decree no. **90/2014**. A preventive measure that allows the President of ANAC and its Authority to gradually take over the management of the company subject to criminal investigation or prosecution for corruption in relation to a public contract.
- The reason for the rule, in view of the numerous judicial inquiries that have overwhelmed the contracts for works such as the **Mose** in Venice or major events such as **Expo** in Milan, is to **strike a balance** between the interest in the **prompt execution of public works** and the **continuity of services** that cannot be postponed and the **need to stem the pathological dysfunctions** that have arisen during the tendering phase or during the execution of the contract.

Administrative-punitive power of Anac: the commissioning of company

- So, law-decree no. 90 also introduced a new legal institution named "Measures for extraordinary and temporary management" more commonly referred to as "**compulsory external administration of public procurement**" (*commisariamento degli appalti);* it was intended for application where contracts and concessions had been obtained by illicit, corruptive means (subsection/*comma 1)* or obtained by companies disqualified because of mafia infiltrations (subsection/*comma 10)*.
- The intention of the legislator is to **safeguard the times of execution of public orders** by providing for measures to ensure that investigations by the criminal courts into illegal acts do not delay the conclusion of ongoing contracts and that their continuation does not **result in a profit for the economic operator** involved at least until the final determination of criminal responsibility.

The three measerues of art. 32 d.l. n.90/2014

- **Article 32** provides for three alternatives to each other.
- - the order to **renew** the corporate bodies, by replacing the person involved in the presumed offences
- - **extraordinary and temporary** management of the company, limited to the execution of the contract or the concession in its entirety
- - the measure of **support and monitoring** of the enterprise.

The first measure: comma 1, lett. a) of art. 32.

- The first measure is aimed at removing from corporate governance those involved in unlawful acts. The provision allows the company a short period of thirty days to act on the replacement order.

The second measure: comma 1, lett. b of art. 32.

- The second measure, that can be activated in the event of non-compliance with the aforementioned order for renewal or in the most serious cases on the direct initiative of the President of the ANAC, provides for the **commissioning of the contract for anti-corruption purposes**. This intervention is as invasive as it is delimited from an application point of view, since it is limited to a single polluted contract and from a temporal point of view, since its duration must be established in the prefectural decree on the basis of the needs functional to the realisation of the work.
- It is intended to provide a legal framework for the **sole activity involved in the execution of the specific contract**, resulting in an ideal separation between the ordinary and extraordinary management of the company.
- The **prefectural decree**, at the same time of the commissioning, must provide for the appointment of more than three administrators who replace in all the management bodies present and are required to set aside the presumed profit in a special fund, according to the interventions that could be ordered during the criminal investigation (confiscation, compensation).

The third measure: comma 8 of art. 32

- The **third measure** defined as **support and monitoring** has a softer impact on the governance of the company and is applied in less serious cases where the interference in corrupt acts is of lesser intensity and the level of compromise in the offences is not such as to make it necessary to take decisive measures.
- It provides for a sort of **forced consultancy** that takes the form of the support of corporate bodies by experts appointed by the Prefect's Office with powers to **stimulate the company** and charged with leading the company towards a management and organizational review on the basis of models of transparency.

Extraordinary measures to prevent corruption: the procedure for adoption

- The legislator has provided for a **double evaluation** of the conditions for the application of the extraordinary measures, through the articulation of the procedure in two autonomous phases, even if functionally integrated, ascribed to **two different administrative** subjects.
- **The President of the ANAC** is given the power of impulse and proposal with regard to the measure considered most suitable to sterilize the polluted contract.
- The **competent Prefect by territory** has the power to decide on the measure to be disposed of in relation to the economic operator.
- The proposal of the highest organ of the Authority has **no binding effect** with regard to the Prefect, who is endowed with autonomous powers of investigation.

Extraordinary measures to prevent corruption: the procedure for adoption

- The legislator has designated a procedure with progressive formation in which the motivated proposal of the President of the ANAC is followed by a new and autonomous procedure within the competence of the Prefect, who can avail himself of further in-depth analysis.
- It should be noted that the President, however, **has exclusive power** to initiate the procedure so that, if he, as a result of the internal evaluation procedure, considers that the conditions for the formulation of the proposal do not exist, **the prefect has no power to initiate autonomously**.

Extraordinary measures to prevent corruption: the evaluation phase.

- Article 32 provides for the **applicability of extraordinary measures** in the event that, with reference to a contract or concession of a public nature, the **judicial authority proceeds with one of the types of corrupt** offence expressly provided for by the law or **"anomalous situations and in any case symptomatic of unlawful conduct** or criminal events" attributable to the company that awarded the public contract are detected.
- The first phase of the evaluation concerns the assessment of the **existence of a public contract** in the course of its execution and its eligibility for the categories typified by the legislator: **public procurment or concession**.
- Subsequently, the President of ANAC is required to make an **initial assessment** of the existence of *fumus boni iuris*, i.e. the presence of concrete elements regarding the fact that the contract is connected to an illegal activity.

Extraordinary measures to prevent corruption: the evaluation phase.

- In the first phase, the President acquires a sort of *notitia criminis*, constituted either by the pending of a criminal proceeding for one of the crimes identified by the regulations or consequent to the inspection or surveillance activities carried out by the ANAC within the ambit of its institutional powers.
- In a second phase, the President is required to verify the level of assessment of the facts to be used as a basis for the proposal.
- Article 32 on this point does not give **exhaustive indications**, limiting itself to providing that the two alternative factual situations identified may lead to the adoption of measures where the facts are "serious and verified".
- In this sense, the practice of application has taken on the criteria generally applicable to the **precautionary measures** provided for by article 273 of the Criminal Procedural Code to guarantee the **least possible discretion** and constitutionally oriented procedures.

Extraordinary measures to prevent corruption: the evaluation phase.

- The evaluation phase closes with the **graduation of the gravity** of the ascertained facts: the President of the Authority and the Prefect are required to calibrate the gravity of the factual elements acquired on the basis of the **principle of proportionality** and to modulate it on the three different measures provided for by art. 32.
- They must take into **consideration various elements** such as the role and the overall behaviour of the perpetrator of the offence, the pervasiveness of the corrupt system, the involvement of the corporate structure in the management of the contract or the permanence in the ownership structure of subjects with a considerable capacity to influence the choices of the company.
- At the end of this graduation, the measure most in keeping with the concrete circumstances is identified.

Extraordinary measures to prevent corruption: the evaluation phase.

- Finally, priority is given to **the order of renewal** of the corporate bodies when the mere removal of the administrator involved in the offences is considered sufficient.
- **Commissioning** is preferred when elements of exceptional gravity emerge or in cases where the level of compromise is such that changes in corporate governance are not suitable to avoid the risk of further illicit conditioning in the execution of the current contract.
- **Support and monitoring** are chosen in the most minor cases where persons other than directors or legal representatives of the company are directly involved in the offence, but who are nevertheless capable of influencing the work for the position and role held.

Considerations and criticisms about the institute of the company commissioning.

- The new measures of art. 32 have been subjected on several fronts to a **considerable critical** examination, above all from the point of view of consistency with the constitutional principles of law.
- First of all, there is no doubt that the law is **extremely synthetic and incomplete**.
- And it is also clear that the measures allow **incisive interventions towards the economic operators**, against a **freedom of enterprise** constitutionally guaranteed and in the absence of the classic guarantees of fair trial like the **right of defence** and of the contradictory that the art. 6 of the European Convention of Human Rights and the art. 24 and 11 Italian Constitution ascribes among the **inescapable** personal and procedural **guarantee**s from which it's illegal prescind in the application of measures of a **substantially afflictive nature**.

Considerations and criticisms about the institute of the company commissioning.

- It should also be noted that the continuation of an illicitly acquired contract does not always produce benefits, neither in terms of efficiency nor in terms of good performance of the public machine, nor in terms of the interest of the community in the completion of the work.
- The measures analyzed are of an administrative nature, precautionary with a strong temporal and applicative delimitation when it is considered that the divestment of the managing powers remains confined to the single procurement or contract and limited to the time necessary for the completion of the work.
- Moreover, the criticisms do not take into consideration the fact that the same instrument that determines the commissioning of the company, limiting the freedom of the entity, is also designed to allow in some cases the maximum protection, leading the economic operator towards the return "in bonis" also through the actions of dissociation and revision promoted in constancy of the measure.

Final consideration.

- Finally, it should be pointed out that the continuation of contracts through the establishment of commissioners as **guardians of legality** in companies has allowed the protection of interests with equal constitutional dignity, protecting employment and avoiding the risk of exposing a considerable number of workers to dismissal.

Thanks for your attention and time!