

Conferenza annuale della International Bar Association (Iba)

Roma, 9 ottobre 2018

Si è tenuto il 9 ottobre 2018 presso Palazzo dei Congressi di Roma l'incontro promosso dal Consiglio dell'Ordine degli Avvocati di Roma in occasione della Conferenza annuale della International Bar Association (Iba), quest'anno, per la prima volta, organizzata in Italia, con la partecipazione di circa 7.000 avvocati provenienti da tutto il mondo.

L'evento, incentrato sul tema della lotta alla corruzione nell'esperienza italiana, ha approfondito il ruolo rivestito, in tale contesto, dall'Autorità Nazionale Anticorruzione (ANAC), quale autorità indipendente investita di ampi ed effettivi poteri di vigilanza.

Hanno preso parte all'incontro, in qualità di relatori, la Prof.ssa Paola Severino, Vice Presidente della LUISS Guido Carli con delega alla promozione delle Relazioni Internazionali, e la Prof.ssa Nicoletta Parisi, componente del Consiglio dell'Autorità Nazionale Anticorruzione, con la moderazione dell'Avv. Claudio Visco, Presidente della Bar Issue Commission dell'Iba e componente del comitato di accoglienza.

Intervento della Prof.ssa Nicoletta Parisi

Componente del Consiglio dell'Autorità Nazionale Anticorruzione

1. Background information

By way of introduction, allow me to provide some general information about the Italian anticorruption system on a preventive level from a legal point of view.

The Italian Anticorruption Authority (from now on: ANAC) was created on the foundation of the previous Authority (the *Commissione indipendente per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche* or CIVIT), with the aim to

implement article 6 of the United Nations Convention Against Corruption (UNCAC). Law 190 of 2012 had initially limited the mandate of ANAC to the drawing of a preventive strategy against corruption, the supervision of its implementation by each public entity (through the adoption of Three Year Plans for integrity and transparency), the supervision over transparency of public bodies, the integrity of civil servants, as well as the dissemination of a culture of integrity and legality. No powers were (and still are not) granted to ANAC on the prevention of political corruption.

Subsequently, the Decree Law 90 of 2014 introduced new anticorruption measures by anchoring the supervision of public contracts (already performed by the then Authority for the Supervision of Public Contracts – in Italian AVCP) to the system of corruption prevention: this solution is an attempt to control a highly economic and strategic sector, exposed more than others to the risk of illegality and maladministration. Indeed, this legislative framework is the expression of the Legislator's choice to concentrate the whole strategy of corruption prevention in the hands of one single institution., creating a body for both the protection of legality in the public sector and the supervision on public procurement, with the objective to monitor more effectively and holistically the entire domain of corruption prevention. The ANAC is an independent administrative body: it is not in charge with any prosecution, investigative or repressive role. It is governed by a Council (composed by a President and four members, appointed for six years and for one mandate only), and has a staff of 350 persons.

In a nutshell: in an effort to spread the culture of legality, the key of ANAC's activity is the monitoring public administrations and in subsidiaries and state-controlled companies, through preventive and advising instruments, in order to avoid corruption, create a collaborative network within the institutions and public administrations; at the same time, promoting resource efficiency, reducing formal controls, including procedural burdens, which in practice increase the costs of public administration without creating value, neither for the citizenry nor for companies. The Authority pursues its goals through a regulatory activity, an advisory function and a supervisory activity, along with some inspection and (sometimes mild) sanctioning powers.

Due to the task of this meeting, I think that our attention has to be focused:

1. on the ANAC supervisory activities in the framework of public contracts and in every area of the public administration that can potentially develop corruption

phenomena, more in general frauds, and so involving also needs of international judicial cooperation and asset recovery system;

2. on the related interactions of ANAC with Italian judiciary authorities
3. on the international role of ANAC.

2. Functions related to preventing corruption through supervisory powers

It is worth to notice that, in order to effectively perform its functions, ANAC had puts in place practices - sometimes stemming from the necessity to cope with emergencies -, that have often inspired and anticipated future legislation on anticorruption matters.

I will try to briefly illustrate what I mean with some examples.

2.1. The “collaborative supervision”

The establishment of the so-called “collaborative supervision” is very representative thereof.

Introducing from the very beginning (2014) Article 4 into its Regulation, ANAC began to use this innovative way of supervision as a particular form of preventive verification of the tendering processes: it is aimed at fostering a profitable collaboration with the contracting authorities and thus guaranteeing the correct functioning of the tender operations and the contract execution, at the same time as preventing attempt of criminal infiltration in the tenders.

In fact, instead of sanctioning illicit behaviour *ex post* (after the fact occurred), ANAC’s intervention aims at preventing issues *ex ante* (before facts occur) by guiding the administration towards better and more transparent choices.

Stemming from the positive experience of “EXPO 2015”, the “collaborative supervision” could be systematically introduced in the organization of other major events, initiatives and works of national or strategic interest in order to guarantee the transparency, accuracy and high quality of administrative choices from the very beginning. To this end, several MoUs for the implementation of “collaborative supervision” had been signed up between the ANAC and several contracting authorities.

After two-year practice the “collaborative supervision” is finally enshrined in Article 213, para. 3, lett. h, of the New Code of Contracts adopted by the Legislative Decree No. 50/2016; ANAC has also adopted a specific regulation in the matter.

2.2. The “extraordinary and temporary management of contractors”

The same goes for the so-called “extraordinary and temporary management of contractors”. This tool was initially used on the occasion of the “EXPO 2015” event, with the support of the Organization for Economic Co-operation and Development (OECD), on the basis of article 30 of the Law Decree 90 of 2014 and a Memorandum of Understanding signed between the OECD and the ANAC on 3rd October 2014.

Following that positive experience, this practice has been applied to other instances. According to article 32 of the aforementioned Law Decree, in the event that illegal behaviours or corruption crimes attributable to a company which has been awarded a contract for the construction of public works, services or supplies occur or are being prosecuted by a judicial authority, the President of ANAC can suggest to the local Prefect, either: to order the renewal of the company’s corporate bodies; or, if the company does not abide by the established terms, to engage in the extraordinary and temporary management of the contracting company limited to the complete execution of the single contract subject to criminal proceedings; or the support and monitoring of the company with the appointment of experts tasked with supporting the company’s organizational and management audit activity.

This innovative measure allows for an immediate intervention against corruption phenomena and is also a strong deterrent against corruption-oriented behaviours.

2.3. ANAC active judicial *locus standi* in the interest of law

As a result of his credibility gained on the field, article 211 of the new Public Contract Code gives ANAC a new competence aimed at preserving the integrity of public contracts.

ANAC is entitled to judicially appeal general acts and measures relating to contracts of significant impact, issued by any contracting authority, if it deems that they violate the rules on public contracts relating to works, services and supplies.

In addition, if ANAC considers that a contracting authority has adopted a measure in breach of the new Code, it issues an opinion (within sixty days of the violation), indicating the specific flaws that were found. The opinion is then transmitted to the contracting authority, for compliance; if the contracting authority fails to comply (within sixty days maximum), ANAC may file an action before the administrative judge (within the following thirty days). Moreover, if ANAC identifies the existence

of irregularities, it transmits the documents and its remarks to the contracting authority, demanding the removal of the violating dispositions.

In a way, this new competence of ANAC (established in article 211, co. 1-*bis* and -*ter* of the new Code) appears to be included into a trend that recognizes to the independent administrative authorities the responsibility to act upon the protection of common goods and interests in an objective sense, be it competition (in case of the Antitrust Authority), or the legality of public contracts (for ANAC).

2.4. The pre-litigation competence

Acts of general scope are also the advisory opinions delivered by ANAC in the carrying out of the so called pre-litigation competence: it consists in the right for contracting authorities and bidders to address the Authority asking for an advisory opinion, in order to settle disputes during the tendering procedure. With this Alternative Dispute Resolution system, the Legislator aims at introducing a mechanism to simplify litigations in tender procedures and reducing the number of cases in front of the administrative judge.

It was practiced also in the past, according to the old Code of Public Contracts (legislative decree 163 of 2006); and it showed all its utility. So the new Public Contracts Code uses this tool more pervasively. The novelty is that, according to the newest Code, this tool can be also binding between agreeing parties.

The advantages achieved by using this competence are clear: decrease of legal disputes; clear saving of time, costs, human resources; possibility to obtain an opinion (aimed at removing and/or correcting the possible violations claimed by the parties) at an early stage.

3. The regulatory function stemmed from practice: from recommendation to “binding soft law”?

In the past ANAC had often fulfilled its regulatory mandate using instruments of general scope, such as determinations, guidelines, standard tender-notices and advisory opinions.¹ All these instances of soft law proved to be essential not only in the sector of public contracts, but also to provide interpretative guidelines on corruption prevention and the strengthening of integrity in the public sector. Many of these guidelines served the immediate purpose of interpreting and/or integrating

¹ For these last ones see specifically *infra*, para. 2.5.

the Italian legislation on different topics. In addition, and perhaps most importantly, such regulation laid down the foundation for future legislation on important anticorruption matters.

Good examples of ANAC's regulatory function are represented by its guidelines on whistleblowing²: firstly, they were useful to integrate Law 190 of 2012, by establishing a more detailed discipline of the whistleblower protection. Finally they have been inspired the contents of Law 179 of 30th November 2017³: some of its rules reproduce the recommendations contained in those guidelines. The same happened, for example, in the matter of SOEs⁴, transparency,⁵ and, as said, "extraordinary and temporary management of contractors".⁶ The adoption of the National Anticorruption Plan is a good example of the exercise of guidance and administrative coordination competences ascribed to ANAC.⁷

In the area of public procurement, this regulatory function has grown in importance and effectiveness due to requests coming from the awarding administration and from the economic operators in need of a consistent interpretation of the complex legislation. ANAC's guidelines on standard tenders provided an essential support to the tendering organizations, at the same time

² Decision No. 6 of 28th April 2015 "*Linee guida in materia di tutela del dipendente pubblico che segnala illeciti (c.d. whistleblower)*".

³ "*Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato*".

⁴ Decision No. 8 of 17th June 2015, "*Linee guida per l'attuazione della normativa in materia di prevenzione della corruzione e trasparenza da parte delle società e degli enti di diritto privato controllati e partecipati dalle pubbliche amministrazioni e degli enti pubblici economici*", updated with Decision No. 1134 of 8th November 2017, "*Nuove linee guida per l'attuazione della normativa in materia di prevenzione della corruzione e trasparenza da parte delle società e degli enti di diritto privato controllati e partecipati dalle pubbliche amministrazioni e degli enti pubblici economici*". About the prevention of corruption in SOEs and the Italian new rules and ANAC guidelines thereof see: R. Cantone, *Prevenzione della corruzione nel sistema delle società pubbliche: dalle linee guida dell'ANAC alle norme del D.lgs. 175/2016*, in F. Auletta (ed.), *I controlli nelle società pubbliche*, Bologna, 2017, p. 17 ff.; A. Massera, *Gli statuti delle società a partecipazione pubblica e l'applicazione delle regole amministrative per la trasparenza e l'integrità*, *ibid.*, p. 45 ff.; M. C. Lenoci, D. Galli, D. Gentile (eds.), *Le società partecipate dopo il correttivo 2017*, Rome (Dike Giuridica Editrice), 2017; M. Lacchini, C. A. Mauro (eds.), *La gestione delle società partecipate pubbliche alla luce del nuovo Testo Unico. Verso un nuovo paradigma pubblico-privato*, Turin, 2017; S. Fortunato, F. Vessia (eds.), *Le "nuove" società partecipate e in house providing*, in *Quaderni di giurisprudenza commerciale*, no. 408, Milan, 2017; V. Sarcone, *L'applicazione delle misure di prevenzione della corruzione e sulla tutela della trasparenza (L. N. 190/2012 e decreti attuativi) alle società pubbliche*, in F. Cerioni (ed.), *Le società pubbliche nel Testo Unico*, Milan, 2017, p. 220 ff.; G. Mattioli, *La nuova disciplina della trasparenza e le società pubbliche. Alcuni spunti di riflessione critica*, in *Il dir. dell'ec.*, 2017, p. 459 ff.

⁵ In particular see: Decision No. 1310 of 2016, "*Prime linee guida recanti indicazioni sull'attuazione degli obblighi di pubblicità, trasparenza e diffusione di informazioni contenute nel d.lgs. 33/2013 come modificato dal d.lgs. 97/2016*"; Decision No. 1309 of 28th December 2016, "*Linee guida recanti indicazioni operative ai fini della definizione delle esclusioni e dei limiti all'accesso civico di cui all'art. 5 par. 2 del d.lgs. 33/2013*" - Art. 5-bis, comma 6, del d.lgs. n. 33/2013 recante "*Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni*"; Decision No. 1134 of 8th November 2017, *cit.*

⁶ *Supra*, footnote 5.

⁷ N. Parisi, *Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities*, in *Rule of Law and Anti-Corruption Journal*, 2018:2, para. 4.

reducing disputes among the parties. This important practice has been incorporated in the New Contract Code (Legislative decree No. 50 of 2016), according to which ANAC's second-level rules (in particular guidelines) can be also binding.⁸

As a matter of fact, speaking in a very technical manner, binding guidelines do not fall in the realm of soft law: as the Italian State Council (i.e. the highest administrative Court) has declared in its advisory opinions⁹. The use of guidelines shows a new approach in the implementation of the Code: not throughout a ministerial decree (as in the past) but with second-level acts adopted by specifically dedicated authorities. These rules – when binding – are to be implemented by each public body, which can deviate from them only a) by using residual margins of technical discretion and b) based on solid justifications.¹⁰

4. Advocacy initiatives

ANAC has an important role in the dissemination of information related to illegal behaviours (criminal, administrative or financial illegalities) or legislative gaps or deficiencies.

In order to properly exercise all these powers, the Authority is entrusted to receive information about corruption and misconduct within the public contract area by many subjects (it receives also the whistleblowers information). When a public prosecutor proceeds for corruption or similar crimes he has to inform the Anti-Corruption National Authority (art. 7 law 27 May 2015, n.69).

A similar duty is also upon the administrative judge when they judge on litigations regarding public contracts: they have to inform the Anti-Corruption National Authority about all the facts, emerging from the judgment, about misconducts or violation of transparency rules .

⁸ Art. 213, par. 2.

⁹ No. 855/2016 and 1273/2016, in particular point 4.4. that states: «4.4. The binding nature of the guidelines leaves no evaluative powers in the implementation phase for the contracting authorities and entities, which are obliged to implement them effectively. It is good to point out that *the "binding" nature of the measures in question does not always exhaust the executive "discretion" of the administrations*. It is necessary, in fact, to evaluate from time to time the nature of the precept to determine whether it is *compatible with a further development by the individual contracting authorities of their own evaluation and decision-making activities*» (italic added).

¹⁰ On this novelty see S. Valaguzza, *Nudging pubblico vs. pubblico: nuovi strumenti per una regolazione flessibile di ANAC*, in *Rivista della regolazione dei mercati*, 2017/1; of the same Author, *Governare per contratto*, Naples, 2018, p. 156.

Finally, the Prefetto (Prefect - the government local representatives) has to inform ANAC whenever it adopts anti-mafia interdictive information for the purpose of the “Commissariamento” of the awardee .

The relationship between ANAC and criminal institutions has been set up through a national framework agreement (signed with the national general prosecutor at the Court of Cassation) and, accordingly, twenty-six “regional” MoUs (with local prosecutor offices) were then signed.

At the moment, the information mechanism is based on a network of horizontal and vertical, each bi-directional, communication channels. Firstly, should ANAC considers there are infringements of criminal relevance, it must transmit the documents and its remarks to the competent public prosecutor's office; similarly, each public prosecutor must inform ANAC's President on the initiation of prosecution related to corruption. Furthermore, with the objective to ensure a wide and complete cognitive framework of the criminal judge, the President of the Authority has suggested that, in very technical matters such as public contracts, the members of ANAC (either Council members or high-rank officials) may be considered *«testi esperti»* (expert witnesses) within a criminal procedure. The said agreement set up also the transmission of information where a whistleblowing situation is involved. Finally, one cannot forget the aforementioned relationship established by article 32 of the legislative decree 90 of 2014.

As to the administrative level of compliance, ANAC has signed an agreement with the Court of Auditors to settle mutual relationship in the matter of illegality in public finance. If ANAC concludes that the implementation of a single public contract produces a detriment to the public finance, the relevant documents and remarks are transmitted to the interested parties and to the general office of the Court of Auditors. Conversely, each administrative judge must inform ANAC of on-going proceedings in which the principle of transparency is involved and at risk. According to law 114 of 2014, the National Anti-corruption Authority receives news and reports from each lawyer of the State who becomes aware of violations of provisions of law or regulation or of other anomalies or irregularities related to contracts that fall under the Code.

It is clear that these efforts are put in place in order to create an accurate and thorough wealth of information, within a framework of mutual inter-institutional collaboration, which is crucial as to deal with illegal situations from all possible perspectives,

Additionally, we must remember that on several occasions ANAC has used its power to submit to the Government and Parliament issues that concern criticalities from the point of view of the interpretation and implementation of the discipline concerning the whole matter of prevention of corruption.

5. Interaction at the international level

A particular attitude inspires the Italian action for the prevention of corruption, i.e. the firm belief that the fight against this kind of conducts cannot be performed in isolation. In other words, in order to be able to tackle this transnational phenomenon, anti-corruption bodies do need coordinated and harmonized legislation, at the international and European level; this is clearly confirmed by several international conventions that, with use of different wording, suggest or demand Countries to be internationally pro-active.¹¹

To this end, ANAC has taken very seriously this commitment at the international level, in accordance with article 6, par. 3, of the United Nations Convention against corruption. Pursuant to art. 6, co. 3, of the UNCAC, from 2014 the ANAC has been accredited in the Directory of the United Nations Office on Drugs and Crime (UNODC) as an independent national authority for the prevention of corruption.

Indeed, ANAC is engaged internationally through its participation to different anticorruption and transparency *fora*, such as UNODC, G20, G7, OECD, OSCE, Council of Europe (and GRECO), European Union, World Bank as well as Open Government Partnership: it participates – as a technical body – inside many of the diplomatic governmental delegations working into these international organizations committed to fighting corruption; and it also has an intense bilateral activity (with States and other peer foreign authorities).

ANAC participates to the review process of the implementation by Italy of Chapter II (articles 5-14) of the United Nations Convention against Corruption for the review cycle 2016-2021; and is a component of the Italian delegation in GRECO. It participates also in G20 and G7 meetings.

The Authority develops bilateral and multilateral relations. In this area, it is worth noticing the collaboration with the Organization for Economic Co-operation and

¹¹ About the outcome of an international model to fight corruption and the international inspiration of the Italian practice see, please, N. Parisi, *Verso l'emersione di un modello internazionale di prevenzione della corruzione*, in *federalism.it, Focus, America latina*, I, 22nd December 2017; and (of the same author) *Il contrasto alla corruzione e la lezione derivata dal diritto internazionale: non solo repressione, ma soprattutto prevenzione*, in *Diritto com. scambi int.*, 2016, p. 185 ff.

Development (OECD) concerning the repression of specific forms of corruption, including relevant best practices,

Memoranda and bilateral agreements have been signed with the Public Function Office of the State of Mexico and with the State Secretariat for Justice and Home Affairs of the Republic of San Marino; with OLAF and BEI.