THE ADMINISTRATIVE JUDGE'S INTERLOCUTORY POWERS IN RELATION TO PUBLIC CONTRACTS

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Abstract

This paper aims at digging deeper the administrative judge's powers in relation to the annulment of the acts of a public tender procedure and in relation to public contracts. The paper will focus on the Italian administrative judge's recent policy to directly intervene on the contract, suspending its effects, during the interlocutory stage of the judicial proceedings.

TABLE OF CONTENTS:

1. Introduction

The relationship between the acts of public tender procedure and the contract agreed between the public administration and the contractor confirms to be one of the most interesting issues of contemporary administrative law, especially in connection to the new and incisive powers of the administrative judge.

As known, after the implementation in Italy of European law on the improvement of public tender procedures, the administrative judge who annuls the adjudication is also entitled to decide on the related contract.

Among the various questions raised by the new provisions, this paper aims at deepening the problem of the (controversial)

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possibility for the administrative judge to use such a power since the interlocutory stage of the process[1].

If, on the one hand, the suspension of the contract's effects allows to maintain the *status quo* till the judgment on the merit, on the other hand, the problematic compatibility between the discretion of the judge who provides for the contract's ineffectiveness and the summary jurisdiction that is typical of the interlocutory stage should be adequately taken into account. In particular, this is true when considering the various interests that are involved, such as that to ensure a high level of competition in the market of the public contracts, the interest of the other participants to the tender to obtain a full and effective judicial review, and the collective interest to a quick execution of the contract and to a safe and fair management of public funds[2].

2. The extent of the administrative judge's assessment on public contracts: the Italian and French cases.

The relationship between the administrative acts of a public tender procedure and the public contract agreed between the economic operator and the public administration is a controversial issue that raised a fascinating debate among the scholars as well as some sophisticated judicial solutions.

The various positions that have been expressed during the past years highlight the change of the public tender procedure's function, where – also due to the influence of European law[3] – the

[1] The problem may not arise in the cases, provided under Articles 11(10) and 11(10-*ter*) of Legislative Decree n. 163 of 12 April 2006 (the so-called "Code of Public Contracts"), where the possibility to conclude the contract is suspended.

[2] On the balancing of the various interests involved, see E. Chiti, *Directive 2007/66 and the difficult search for balance in judicial protection concerning public procurements*, in 1 IJPL (2010).

[3] For an analysis of the evolution of Italian administrative law in connection to the influence of European law see, among the others, D. De Pretis, *Italian Administrative Law Under The Influence Of European Law*, in 1 IJPL (2010).
As regard the procedures for the award of public contracts, see R. Caranta & M.E. Comba, *Award of contracts covered by EU Public Procurement rules in Italy*, in M.E. Comba & S. Treumer (eds.), *Award of Contracts in EU Procurements* (2013). For an analysis of the relationships between domestic law and European law as regard public contracts, please see E. Picozza, *L'appalto pubblico tra diritto comunitario e diritto nazionale. Una difficile convivenza*, in C. Franchini (ed.), *I contratti di appalto pubblico* (2010).

need for public administration's savings has been substituted by the principle of competition in the market of public contracts[4].

The Council of State endorsed the position[5] according to which an annulled adjudication leads to the automatic abrogation ("*caducazione automatica*") of the contract's effects[6]. Due to the close

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On the fundamental contribution that has been traditionally given by European law to the Italian judicial system, please see the studies of S. Cassese, *Il diritto amministrativo: storia e prospettive* (2010); C. Franchini, *Il giudice amministrativo fra tradizione e innovazione*, in 11 giustamm.it (2011); Id., *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, in Vv. Aa., *Il diritto amministrativo oltre i confini* (2008); G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, (2010); A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, in 2 Riv. it. dir. pubbl. comunit. 285 (2009); V. Cerulli Irelli, *Trasformazioni del sistema di tutela giurisdizionale nelle controversie di diritto pubblico per effetto della giurisprudenza europea*, in 2 Riv. it. dir. pubbl. comunit. 433 (2008); E. Picozza, *Il risarcimento in via autonoma contro gli atti della P.A. La tutela giurisdizionale si dimensiona su quella sostanziale e non viceversa*, in 5 Corr. giur. 647 (2009). Please also see the interesting comparative studies of E. Garcia De Enterria, *Le trasformazioni della giustizia amministrativa* (2010), where the Author finds that, in the absence of any coordination, the majority of the Member States adopted, in the same lapse of time, important measures that are substantially similar, leading to deeply re-model their administrative justice systems; see also M. Fromont, *La convergence des systemès de justice administrative en Europe*, in 1 Riv. trim. dir. pubbl. 125 (2001).

[4] The change of perspective has been analyzed by M. Clarich, *The rules on public contracts in Italy after the Code ok Public Contracts*, in 1 IJPL (2013).

[5] See Council of State's judgement, Section VI, 30 May 2003, n. 2992; Council of State's judgement, Section VI, 14 January 2000, n. 244; Council of State's judgement, Section V, 25 May 1998, n. 677; Council of State's judgement, Section V, 30 March 1993, n. 435. In the absence of the conditions for a regular selection of the contractor, an automatic abrogation of the contract's effects, or a supervened ineffectiveness of the contract takes place. This may be connected to the different prerequisites of the absence of a previous act or of a condition of the contract's effectiveness (see Council of State's judgement, Section V, 12 February 2008, n. 490; Council of State's judgement, Section V, 28 May 2004, n. 3465; Council of State's judgement, Section VI, 5 May 2003, n. 2332) or to the absence of the legitimation to express the contractual will (see Council of State's judgement, Section VI, 27 October 2003, n. 6666; Council of State's judgement, Section VI, 30 May 2003, n. 2992).

[6] As regard the thesis of the automatic abrogation, the scholars' position was not univocal. In favour, please see F. Merusi, *Annullamento dell'atto amministrativo e caducazione del contratto,* in 5 Foro amm. TAR *575* (2004). On the contrary, the position has been challenged by G. Greco, *La Direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti* in 5 Riv. it. dir. pubbl. comunit. 1029 (2008); F.G. Scoca, *Annullamento dell'aggiudicazione e sorte del contratto,* in 1 Giust. amm. 39 (2007), E. Sticchi Damiani, *La caducazione degli atti*

consequentiality between the public tender procedure and the contract, the judicial or administrative annulment leads to the automatic abrogation of the contract's effects on the basis of the functional link between these two acts[7]. Thus, there is a connection between the adjudication and the contract, according to the general rule "*simul stabunt, simul cadent*" ("together they stay, together they fall"), independently from the type of the annulment, judicial or administrative[8].

According to this reasoning, the mere declaratory judgement of the adjudication's unlawfulness was sufficient to determine the contract's abrogation.

Such necessary relationship has been firstly objected after the issuance of Legislative Decree n. 163 of 12 April 2006 (the so-called "Code of Public Contracts"), in relation to the awards of the strategic infrastructures, where the award's suspension or annulment does not lead to the abrogation of the contract that has been already signed, and the possible damage is restored exclusively in kind.

Subsequently, the generalized application of the automatic abrogation theory has been surpassed by the provisions introduced by Legislative Decree n. 53/2010, which have been incorporated in Legislative Decree n. 104/2010 (the so-called "Administrative

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amministrativi per nesso di presupposizione, in 2 Dir. proc. amm. 633 (2003); M. Lipari, *L'annullamento dell'aggiudicazione e la sorte del contratto tra nullità, annullabilità ed inefficacia: la giurisdizione esclusiva amministrativa e la reintegrazione in forma specifica,* in 1 Dir. e form. 259 (2003).

[7] See Council of State's judgement, Section V, 14 January 2011, n. 11; Council of State's judgement, Section V, 20 October 2010, n. 7578. The case-law raised these considerations not only in connection to public works contracts, public service contracts and public supply contracts: see, for example, Council of State's judgement, Section V, 7 September 2011, n. 5032, on swap and derivatives contracts.

[8] On this issue, part of the scholars, starting from the relationship between the adjudication and the contract intended as a connection between the prerequisite act and the subsequent act within the same proceedings, considered the public contract to be an administrative agreement integrating an administrative decision, in connection to the many authoritative and functional powers of the public administration. In this regard, the contract's effects were explained referring to the concept of the abrogating effect of the prerequisite act on the subsequent act (please see E. Sticchi Damiani, *La nozione di appalto pubblico. Riflessioni in tema di privatizzazione dell'azione amministrativa* (1999) and Id., *La caducazione del contratto per annullamento dell'aggiudicazione alla luce del codice degli appalti,* in 5 Foro amm. TAR 3719 (2006).

Process Code"). These provisions have re-shaped the remedies connected to public contracts, providing that the administrative judge – after having annulled the adjudication – may directly decide on the interests regulated by the contract. This solution surely strengthens the protection's effectiveness, focusing the powers of annulling the public tender procedure and its effects on the contract on the same judge. However, the administrative judge has not become the "judge for the contract", because the ordinary judge remains competent for any litigation on the contract[9]. In addition, the public contracts remain subject – also for the substantive law – to civil law, even if with significant exceptions[10].

The new provisions expressly qualify the contract's defect subsequent to the annulment of the acts of the public tender procedure in terms of "ineffectiveness". Recalling the principle of ineffectiveness provided under Directive 2007/66/EC[11], Italian law adopted a terminology that is expressly neutral and generic, not requiring a specific definition of the contract's defect. That shows a clear intention to not recognize any effect of the contract concluded with an unlawful contractor, for the system's exigencies[12].

In other words, according to EU law, ineffectiveness is the safest way to restore competition and create new commercial opportunities for the economic operators that have been unlawfully

[9] See Italian Supreme Court's judgement, United Sections, 29 May 2012, n. 8515, in *Urb. e app.*, 11/2012, pages 1148 et seq., with the comment of A. Travi, *La giurisdizione sul contratto fra giurisdizione amministrativa e giurisdizione ordinaria: la disciplina del c.p.a. e i nuovi interrogativi*.

[10] See M. D'Alberti, *Antologia dedicata a Massimo Severo Giannini*, in 3 Giorn. dir. amm. 316 (2011); C. Franchini, *L'appalto di lavori, servizi e forniture stipulato con le pubbliche amministrazioni*, in C. Franchini (ed.), *I contratti di appalto pubblico* (2010).

[11] The new measures introduced by Directive 2007/66/EC have been analyzed by E. Chiti, *Directive 2007/66 and the difficult search for balance in judicial protection concerning public procurements* cit. at 5, 132.

[12] For a criticism of the misuse of the concept of ineffectiveness, see F.G. Scoca, *Alcune recenti tendenze del diritto amministrativo,* in 6 apertacontrada.it (2012). According to E. Sticchi Damiani, *Annullamento dell'aggiudicazione e inefficacia funzionale del contratto*, in 1 Dir. proc. amm. 240 (2011), the ineffectiveness expresses not only the will to not give relevance to the legal-formal status of the contract under a civil-procedural profile, but it also leads to a contrary logical conclusion, i.e. that the contract must not produce effects on the future developments of the judgement and that it must not become an obstacle to the successive judicial decisions, whose contents may be different.

deprived of their possibility to compete[13]. Therefore, the declaration of the contract's ineffectiveness directly aims at ensuring the claimant's succession in the contract's execution. In this regard, considering the public interest of the contracting authorities to preserve the contract's effects, the protection of competition is progressively corresponding to the claimant's interest and to the possibility to succeed in the execution[14].

The new legislation is particularly complex because the consequences on the contract's effects vary on the basis of the defects of the public tender procedure. In this respect, ineffectiveness confirms the polyhedric nature of the decisions that the administrative judge may adopt on the contractual relationship.

Indeed, even if regulating in detail the relationship between the different procedural unlawfulnesses and the contract, the new provisions gave a wide power to the administrative judge in connection to serious infringements (Article 121 and, in relation to the other cases, Article 122 of the Administrative Process Code).

The administrative judge has therefore a widest discretion on the contract and, when he ascertains the ineffectiveness, he shall carefully evaluate, also on the basis of the principle of proportionality, the general interest to the free competition, the interest of the public administration to the contract's stability and the claimant's will. After this assessment, the public interest connected to the contract's execution, prevailing on that to free competition, with the intermediation of the claimant's interest to succeed in the contract, might lead to the preservation of the contract's effects.

The new provisions should have led to the final overcoming of the traditional relationship between the adjudication's annulment

[13] In this sense, see Recital n. 14 of Directive 66/2007/EC. On this issue, see also E. Sticchi Damiani, *Annullamento dell'aggiudicazione e inefficacia funzionale del contratto* cit. at 13, according to which the automatic abrogation of the contract after the adjudication's annulment represents the best protection for the principle of free competition.

[14] For a wider analysis of these aspects, see *ibidem*. On this issue, see also E. Follieri, *La prospettiva amministrativistica sugli appalti pubblici di lavori, servizi e forniture*, in 5 Foro amm. TAR 2757 (2004), which underlines how, for public contracts, the penetrating influence of EU principles and Directives led to a legislative selection of the interests that are involved. Such selection made the public interests directed to the entrepreneurs and to their freedom of economic activity in a market that should ensure the free competition and equal opportunities to all the economic operators, independently from their nationality, in a single European framework.

and the automatic contract's abrogation[15]. Indeed, after having decided on the unlawfulness of the tender procedure's acts, the judge shall decide on the contract balancing the interest to succeed (as expression of the general exigencies to protect competition) and the public interest to the rapid execution of the contractual obligations.

The judge has a wide discretion when deciding on the contract's effects, being called to indicate the date of the ineffectiveness and to ascertain the derogatory cases when the contract may not be deprived of its effects.

As mentioned above, under Italian law, the administrative judge's discretion on the contract is functional to the declaratory judgment of ineffectiveness and it operates exclusively after the adjudication's annulment, without covering the decision on the contract's defects.

It is noteworthy that in other countries, such as, for example, in France, the administrative judge is competent for the litigation on the *contrats administratifs*, both in connection to the public tender procedure and contract's execution[16].

In France, the public contracts' substantive law derogates from civil law and, on procedure, the *Conseil d'Etat* has full jurisdiction on the administrative contracts, both in connection to the public tender procedure and the contractual relationship.

It is also noteworthy that, in France, the administrative judge has wide powers of intervention on the contract. In this regard, the

[15] See Council of State's judgement, Section VI, 12 December 2012, n. 6374; Id., Section V, 5 November 2012, n. 5591; Id., 21 February 2012, n. 932.

[16] On the peculiarities of the French legal system on this issues, please see, among the others, M. Antonioli & F. Cardarelli, *Il recepimento della direttiva 2007/66/CE nell'ordinamento francese*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa* (2010); S. Torricelli, *Tutele differenziate e riti speciali nei processi contro la pubblica amministrazione: qualche notazione comparatistica,* in G. Falcon (ed.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato* (2010); B. Marchetti, *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni: profili di diritto comparato*, in 11 giustamm.it (2009); Id., *Annullamento dell'aggiudicazione e sorte del contratto: esperienze europee a confronto*, in 1 *Dir. proc. amm*. 95 (2008); V. Cerulli Irelli, *Il negozio come strumento di azione amministrativa*, in 9 *giustamm.it* (2001). In general, for an overview of the French system, see M. D'Alberti, *Diritto amministrativo comparato* (1992) and F.G. Scoca, *Recours pour excès de pouvoir o/e ricorso al giudice amministrativo stesse radici, simili problemi, soluzioni diverse*, 1 Dir. proc. amm. 1 (2013).

figures of the *référé precontractuel* and the *référé contractuel* are significant examples, as well as there is some significant case-law, such as the *arrêt Société Tropic Travaux Signalisation* of 16 July 2007.

The remedies that can be used in connection to public contracts have been completed with the introduction of the *référé precontractuel*[17] and of the *référé contractuel*[18], which are now regulated by Articles L551-1 *et seq.* and L551-13 *et seq.*, of the *Code de justice administrative*. The first one, having jurisdiction till the contract's subscription[19], allows to appeal before the administrative judge to obtain an interim suspension of the adjudication procedures for competition and advertising infringements, with the related judicial remedies. The second one, which is alternative and has no jurisdiction towards an appealant before the *référé precontractuel* when the contracting authority complied with the judgement[20], has further powers, including the possibility to directly intervene on the contract. For example, the *référé contractuel* may ascertain the invalidity and the contract's termination, reduce its duration and issue the conservative and interim measures to preserve the *status quo* of the contract's execution, pending the judgement.

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[17] The *référé précontractuel* has been introduced in the French legal system with the implementation of the first so-called Remedies Directives, with laws 92-10 of 4 January 1992 and n. 93-1416 of 29 December 1993. On this new figure, among the French authors, see D. Chabanol, *Marchés publics de travaux. Droit et obligations des signataires*, 2nd ed., Paris 1994, pages 57 and following; P. Martin, *The contractual Référé Procedure under Article L22 of the Administrative Tribunals*, in Publ. Proc. Law Rev., 1994, CS112; R. Vandermeeren, *Le référé administratifprécontractuel*, in *AJDA (numèro special: Actualité des marchés publics)*, 1994, pages 91 *et seq.*; F. Dieu, *L'irrésistible extension des pouvoirs du juge des référé précontractuel*, in *AJDA*, 2007, page 782; E. Geffray, S.J. Lieber, *Référé précontractuel: une bouffé d'oxygene,* in *AJDA*, 2008, page 2161.

[18] The *référé contractuel* has been introduced with the implementation of the Directive 2007/66/EC, with the *ordonnance* n. 2009-515 of 7 May 2009 that, as known, has modified the *partie legislative* of the *Code des marchés publics*, followed by the *décret* n. 2009-1456 of 27 November 2009, in connection to the *partie réglementaire* of the *Code*.

[19] In this regard, see the well-established case-law: traditionally, see the *Conseil d'Etat*'s judgement of 10 February 1997, n. 169694; *Conseil d'Etat's* judgement of 22 January 1997, in *Rev franç. dr. adm.*, 1997, page 421; *Conseil d'État*'s judgement of 3 November 1995, in *AJDA*, 1995, page 945; *Conseil d'Etat*'s judgement of 17 January 1996, *ibidem*, 1996, page 1090; *Conseil d'Etat*'s judgement of 21 June 1996, n. 171155.

[20] On these issues, see also M. Antonioli & F. Cardarelli, *Il recepimento della direttiva 2007/66/CE nell'ordinamento francese*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa* (2010)

The fact that the *référé precontractuel* had jurisdiction only before the contract's subscription was a big limit to the effectiveness of such remedy. This led the *Conseil d'Etat*, with the mentioned notorious judgement *Société Tropic Travaux Signalisation* of 16 July 2007, adopted by the Assembly for the Litigation, to introduce a new instrument of protection, recognizing the legitimacy to directly appeal the contract's validity also for the so-called *tiers évincéss*, i.e. the subjects whose patrimonial rights would be harmed by the conclusion of a public contract[21]. Also in this case, the judge has significant powers: he may integrally or partially annul the contract, declare its termination, change some clauses, decide on the prosecution of the execution and restore the damages connected to harmed interests and rights.

3. The anticipation of the restitution in kind through the suspension of the contract's effects: concerns and new horizons

The issue of the suspension of the contract's effects is very recent and constitutes the new horizon of the litigation on public contracts.

As regard the protected interests, the declaratory judgment of ineffectiveness that is functional to the succession in the contract ensures free competition in the market of public contracts. In addition, the permanent contract's effectiveness satisfies the collective interest to the rapid execution of the contractual obligations. Such interest, however, may not always coincide with the subjective interest of the public administration, which is subject to the alternative sanctions when the contract remains effective.

[21] On this issue, see, among Italian scholars, A. Massera, *Lo Stato che contratta e che si accorda* (2011); Id., *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, in 2 Riv. it. dir. pubbl. comunit. 285 (2009); M. Antonioli & F. Cardarelli, *Il recepimento della direttiva 2007/66/CE nell'ordinamento francese*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa* (2010).
As underlined by French scholars, the *arrêt Tropic* is an exception to the general principle of the relativity of the contract's effects that, in the administrative law, leads generally to the rejection of the appeal proposed by a third party against an administrative contract (see P. Idoux & M. Ubaud-Bergeron, *Procedure de recours applicables aux contracts de la commande publique – A propos de l'ordonnance du 7 mai 2009, 36* SJEG 201 (2009).

This is a delicate evaluation involving different public and private interests, such as the compulsory exigencies connected to a general interest, the alternative mechanisms protecting competition in the case of infringements provided under Article 121(1), letters a) and b) of the Administrative Process Code, the effect of the infringement of the procedural standstill period on the possibility for the claimant to obtain the award[22], the defect's entity, the state of the contract's execution, the interests of the public administration and of private parties, and the possibility for the claimant to obtain the adjudication and to succeed in the contractual relationship.

The question is whether the wide judicial discretion connected to the declaratory judgment of the contract's ineffectiveness is compatible with the summary jurisdiction that is typical of the interlocutory procedure. Indeed, once disregarded the relationship between the adjudication's annulment and the contract as automatic abrogation, the interests set by the contract are up to the administrative judge's evaluation, which has exclusive jurisdiction.

According to a literal interpretation of the provisions of the Administrative Process Code's provisions – Article 121(1), reading "*the judge that annuls the final adjudication ascertains the contract's ineffectiveness*", and Article 122, reading "*the judge that annuls the final adjudication decides whether to ascertain the contract's ineffectiveness*" – the administrative judge's jurisdiction on the contract seems to necessarily require a preliminary intervention, annulling the adjudication, to be carried out during the judicial investigation, which is typical of the merit phase.

The contract's conclusion while the appeal is still pending has traditionally represented a strong obstacle to the interlocutory protection[23].

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[22] For an analysis of the particular importance of the standstill period, see E. Chiti, *Directive 2007/66 and the difficult search for balance in judicial protection concerning public procurements*, cit. at 5.

[23] In this respect, the interim measure is considered to be the best instrument to prevent the administration from entering in the contract. The following statement is common among Italian case-law: "*there seem to be the pre-requisites of seriousness and urgency, which may justify the upholding of the interim appeal, because the final adjudication de qua has taken place, but the related contract has not been concluded yet*" ("*appaiono sussistere profili di gravità e urgenza tali da giustificare l'accoglimento dell'appello cautelare, atteso che è stata disposta l'aggiudicazione definitiva della gara* de qua *ma non risulta ancora stipulato il relativo contratto*"). In this regard, among the

Subsequently, excluding the litigation related to the so-called strategic infrastructures – for which the award's suspension or annulment do not include the abrogation of the contract that has been already concluded – this trend has been significantly reconsidered even if, in the majority of the cases, the judicial decision is limited to the suspension of the adjudication's effects or to the generic upholding of the request for interim measures. This has been resulted into a postponement of the decision on the contractual relationship till the judgment on the merit to the phase of active administration[24].

While the administrative judge was first diffident to directly intervene on the contract during the interlocutory stage[25], he recently granted interim measures whereby, also with the single judge[26], he decided on the contract's effects, providing for its express suspension.

EU law does not provide for specific guidelines on this issue, leaving the choice of the judicial remedies to the Member States, even if in line with the principle of effective protection[27].

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various judicial decisions, see the Council of State's order, Section V, 30 November 2011, n. 5207, in *Urb. e app*., 4/2012, pages 479 *et seq*.).

[24] See Council of State's order, Section IV, 8 May 2013, n. 1680; Id., Section VI, order of 20 December 2010, n. 5815.

[25] Among the first interim decisions of the administrative judge suspending the contract's effects, see: Council of State's order, Section V, 24 October 2011, n. 4677, , with the comment of S. Fantini, *L'inefficacia "cautelare" del contratto*, in 6 Urb. e app. 703 (2012). Implicitly, the possibility to directly intervene on the contract already in the interlocutory stage of the judgement, was admitted by the Administrative Court of Lombardia, Section I, 14 October 2010, n. 1097. Among the scholars, the issue has been analyzed, *inter alia*, by E. Follieri, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n.53 e negli artt. 120-124 del codice del processo amministrativo,* in 4 Dir. proc. amm., 1067 (2010), according to which, being the interim measure shaped on the basis of the decision-making powers, the administrative judge, whereas believes that the claimant's interest to the execution of the contract prevails in the balancing of interests, could suspend the effects of the adjudication and of the contract, being this measure instrumental to the judgement on the merit that annuls the adjudication and declares the contract to be ineffective.

[26] See, for example, Council of State's decree, Section IV, 2 May 2013, n. 1590.

[27] Pursuant to Article 2(1), letter a, of Directive 2007/66/EC, Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned,

In Italy, the administrative judge's power to suspend the contract's effects is substantially based on the atypicalness of the interim measures, which is a corollary of the fundamental principle of the protection's effectiveness[28], and on Article 125(3) of the Administrative Process Code, according to which, beyond the cases provided under Articles 121 and 122 of the Administrative Process Code, the suspension or the annulment of the award does not imply the abrogation of the contract that has been already concluded[29].

As known, the Administrative Process Code has provided for the progressive increase of the judicial power in the interlocutory stage, being the judge entitled – according to Article 55 – to adopt the measures that are "*most suitable to provisionally ensure the effects of the final judgement*". After all, this is in line with the increase of the decisional power of the administrative judge, according to the judicial interpretation of the Administrative Process Code's provisions.

Consequently, an interim measure that – finding the adjudication's unlawfulness – suspends the contract's effects, allows to preserve the *status quo* till the judgment on the merit. Whereas this

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including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. In addition, pursuant to Article 2(5), Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

[28] For a general overview on this issue, please see M. D'Alberti, *L'effettività e il diritto amministrativo* (2011), where the Author underlines the fundamental role of EU and International law for the effectiveness of the judicial remedies against the public administration. On the effectiveness of the appeals against public contracts, see B. Raganelli, *Efficacia della giustizia amministrativa e pienezza della tutela* (2012).

[29] According to the mentioned Council of State's order, Section V, 24 October 2011, n. 4677, the power to decide on the contract's effectiveness may be used by the administrative judge also in the interlocutory stage, being the interim measures under Article 55(1) of the Administrative Procedure Code not typical, and being the interim measures generally directed to provisionally anticipate the measurers that can be adopted with the final judgement. This is also confirmed by the fact that Article 125(4) of the Administrative Procedure Code, provides for, as a way of exception, that the adjudication's suspension for strategic infrastructures does not imply the automatic abrogation of the contract that has been already concluded. This is without prejudice for the general principle, according to which the adjudication's suspension may influence the effects of the contract that has been concluded.

confirms the contents of the order, it might provide for the claimant's succession in the contractual relationship, being the declaratory judgment of ineffectiveness functional to such succession, as stated above. The interim measure would confirm to be typically temporary and instrumental to the judgment on the merit[30]. In this regard, it is noteworthy that part of the scholars recognizes the wideness of the interlocutory power in this matter, and states that the judge may, with a solid *fumus boni iuris*, also provisionally assign the adjudication and the contract to the claimant, suspending the effects of the subscribed contract. The judge is entitled to operate this way because the contents of the interim measures that are instrumental to the merit may determine, even if provisionally, the same effects of the final judgments[31].

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[30] The reference is to the so-called "instrumentality internal to the process", intended as instrumentality of the interim decision to the final judgement. See P. Calamandrei, *Introduzione allo studio sistematico dei provvedimenti cautelari* (1936).

[31] See E. Follieri, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n.53 e negli artt. 120-124 del codice del processo amministrativo*, cit. at 26, according to which these elements of the interim measure, among the others, characterize the speciality of the process on public contracts. In this regard, perhaps, it would be possible to pass from the so-called "internal instrumentality" to the "external instrumentality".

As known, the Italian Supreme Court stated that the word "instrumentality" may have at least two different meanings. First, the interim measure's instrumentality to the judgement on the merit, which is internal to the final judgement. Second, the interim measure's instrumentality has a function also outside the process, being a balancing element between the public power and the private claim (see Italian Supreme Court's judgement, United Sections, 24 June 2004, n. 11750). Under this second meaning, the interim measures, in particular when they relate to interests that are aimed at securing a gain ("*interessi pretensivi*"), would be instrumental to the "essential good" ("*bene della vita*") in question and, therefore, not in connection to the judgement, but to the administrative action following the judicial annulment. In this regard, the interim measure might intervene in a irreversible way on the merit, making the continuation of the process on the merit useless. See E. Follieri, *Giudizio cautelare amministrativo e interessi tutelati*, (1981); Id., *Sentenza di merito "strumentale" all'ordinanza di sospensione di atto negativo*, in 1 Dir. proc. amm. 137 (1986). According to these positions, the instrumentality would operate externally to the process as a "primary factor balancing the public power" (as stated by A. Travi, *Sospensione del provvedimento impugnato*, in 14 Dig. disc. pubbl. 384 (1999), critizing such position, according to which "on the basis of this interpretation, the interim measure's instrumentality is verified not in connection to the judgement, but in connection to the administrative action concerning the execution of the judgement").

The suspension of the contract's effects, ensuring a remunerative succession in the execution, would satisfy not only the claimant's interest to obtain a full and effective protection of his harmed position[32], but also the general public interest to competition in the market of the public contracts, in line with the new EU provisions[33].

The fact that the declaratory judgment of ineffectiveness is functional to the decision of succession is also relevant under a different double profile.

First, also in the interlocutory stage, the judicial assessment on the impact of the adjudication's suspension on the contract's effectiveness must be carried out on the basis of the requirements provided under Articles 121 and 122 of the Administrative Process Code[34]. Otherwise, the same principle of effective protection would be infringed, due to the asymmetry of criteria between the interlocutory and the merit stages[35].

Secondly, the contract – and perhaps also the adjudication, whereas the contract has been already concluded – can not be suspended if, being the tender procedure appealed, the claimant's position can be protected only restarting the tender procedure. If this is the case, indeed, interim measures would provide a higher degree of protection than the judgment on the merit[36].

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[32] On this issues, the recent Council of State's judgement, Section V, 18 February 2013, n. 966, must be recalled; according to this judgement, the restitution in kind is a primary objective, and the restitution in value is instead a residual measure that is generally subordinated to the partial or the total impossibility to correct the public power, as shown by the judicial and legislative regime on the declaration of ineffectiveness of the public contract.

[33] In general, on the EU principles, see, among the others, M.P. Chiti (ed.), *Diritto amministrativo europeo* (2013); G. Della Cananea & C. Franchini, *I principi dell'amministrazione europea* (2013); A. Massera, *I principi generali*, in M.P. Chiti & G. Greco (eds.), *Trattato di diritto amministrativo europeo* (2007); G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (2009); A. Massera, *I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario,* in 4 Dir. amm. 707 (2005); J. Schwarze, *Rules and General Principles of European Administrative Law*, in 4 Riv. it. dir. pubbl. comunit. 1219 (2004).

[34] See Council of State's order, Section V, 24 October 2011, n. 4677.

[35] S. Fantini, *L'inefficacia "cautelare" del contratto*, cit. at 26

[36] Indeed, an interim measure might not ensure to the claimant a result (a new start of the public tender procedure) that might be achieved only in the case of an annulment of the concluded public tender procedure. In other words, the interim measure itself, intended as a provisional measure that is instrumental to the final

In order to ensure the certainty of the law and to limit the responsibility of the contracting authority, an interim measure that – being the contract already concluded – not only ascertains the unlawfulness of the acts of the procedure, but that also rules on the interests deriving from the contract, should be welcomed. In the absence of such a decision, there would be a situation of uncertainty in relation to the decision's effects, in particular whereas the judge considers that the prejudice of the claimant can be protected only with a rapid fixing of the hearing on the merit without issuing specific interim measures[37]. Indeed, in these cases, an autonomous decision of the public administration on the successive contract's effects not only is possibly in contrast with Articles 158 and 159 of Presidential Decree n. 207/2010 (the so-called "Regulation implementing the Code of the Public Contracts"), which provide for some compulsory cases of suspension, but it would also expose the contracting authority to a double risk of claims for damages (i) in the case of contract's suspension, by the original contractor, due to the unjustified locking up of means and resources, and (ii) in the case of a positive result of the judgment on the merit, and in the absence of the suspension, by the claimant, due to the missing profit caused by the omitted execution of the contractual obligations[38].

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judgement on the merit and that aims at preserving or anticipating the judgement's effects, appears to be incompatible with the interest to appeal a tender procedure to obtain the chance of a new adjudication. In this regard, and on the concept of the so-called instrumental interest, please see E. Sticchi Damiani, *I limiti della tutela dell'interesse strumentale nel processo amministrativo,* in 2 Dir. e proc. amm. 533 (2013).

[37] The reference regards Articles 55(10) and 119(3) of the Administrative Process Code, where the judge gets any protection exigency over through the anticipation and the acceleration of the subsequent judgement.

[38] On this point, the Council of State's judgement, Section V, 7 July 2011, n. 4089, has been innovative: according to this judgement, the annulment of the public tender procedure and the declaratory judgement of the contract's ineffectiveness may lead to the recovery of the funds paid to the unlawful contractor. In this regard, see also Italian Supreme Court's judgement, United Sections, 8 August 2012, n. 14260, , with the comment of S. Fantini, *La giurisdizione esclusiva del G.G. sulla sorte del contratto in caso di annullamento in autotutela dell'aggiudicazione*, in 1 Urb. e app. 24 (2013). In this regard, see also the Recital 21 of the Directive 2007/66/EC, reading "*the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law*".

4. Conclusions

The power of the administrative judge to suspend the contract is a big step in the evolution of public contracts and, more in general, of administrative law[39], aiming at ensuring the implementation of the principle of free competition among economic operators[40] as well as a full and effective protection of the legal situations of the citizens.

After all, the empirical experience confirms that, also in the interlocutory stage of the judgment, it is not always possible to ensure an effective protection whereas, pending the judgment, the contracting authority enters into the contract, vanishing the expectations of the winning claimant to enter into the same contract.

However, despite the big potential of this judicial remedy, some perplexities could remain in connection to its compatibility with the traditional two-phases characteristic of the public contract, with the exigencies that the contract is inviolable, and with the need to ensure a rapid execution of the contractual obligations.

In order to provide for the interim suspension of the contract, after having positively ascertained the existence of the *fumus boni iuris*, the judge will have to carry out a complex assessment on the existence of the serious and irreparable prejudice. In this regard, the judge shall take into account the claimant's interest to succeed in the contract, which is mainly protected by the provision being functional to the general interest to competition, as well as the interest to the rapid execution of the public work. If this last one is recessive, then the contract's effects may be suspended[41].

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[39] In general, on the evolution of the Italian system of administrative justice and on the new measures introduced by the Administrative Procedure Code, see F.G. Scoca, *Administrative justice in Italy: origins and evolution,* in 2 IJPL (2009).

[40] On the role of the amministrative judge as a "judge of the market", see P. de Lise, *Relazione sull'attività della Giustizia amministrativa*, in 1 giustamm.it (2011).
In general, for an analysis of the relationship between the principle of competition and the administrative law, see M. D'Alberti, *Libera concorrenza e diritto amministrativo*, in 2 Riv. trim. dir. pubbl. 347 (2004); Id., *Il diritto amministrativo fra imperativi economici e interessi pubblici*, in 1 Dir. amm. 51 (2008).
On the connection between the market, the globalization and the evolution of the administrative law, see the introduction to the study of A. Massera, *Lo Stato che contratta e che si accorda* (2011).

[41] According to the mentioned scholars, these interests would be anyway satisfied because the judge might, when finding a significant *fumus boni iuris*, also provisionally award the claimant with the adjudication and the contract, suspending the effectiveness of the contract that has been already concluded (see E. Follieri, *I poteri del giudice amministrativo*, cit. at 26, 1067.

In other words, even if with the summary investigation that is typical of the interlocutory stage, all the various interests involved must be taken into account, such as that to ensure free competition in the market of public contracts, that of the participants to the tender procedure to have a full and effective judicial review, that of the community to the rapid execution of the contract and to a safe and fair management of public funds, and that of the specific contracting authority to maintain the contract.

Finally, it is noteworthy that in a contract where the interest of one of the parties is manifestly recessive, this same interest finds an adequate protection if the judge provides for the succession, only as a vehicle to satisfy the general interest to the free competition[42].

[42] In this regard, see also the study of E. Sticchi Damiani, *Annullamento dell'aggiudicazione e inefficacia funzionale del contratto*, cit. at 13, with the question whether "*which contract has its destiny decided on the basis of a conflict between two public interests, and where the private party has not any remedy*".