THE NEW PUBLIC PROCUREMENT CODE: A WAY TO SIMPLIFY?

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Abstract
Each Code is a creation of its time, responding to the most pressing needs of the historical moment in which it was adopted. Unlike the previous codifications, the input of the Third Public Procurement Code does not stem from the need to transpose European directives into national law, but rather from the need to adapt the procurement system to the reforms imposed by the EU's Next Generation Plan. The Code is a step towards fulfilling one of the commitments of the NRP, which is to simplify and speed up procurement procedures. This article will focus on these issues to examine how they cut across and inspire the new Code in different ways. Before doing so, it is important to pay attention to what has been presented as the most important innovation of this codification, namely the definition of twelve general principles which are intended to introduce the subject matter and define the foundations of the codification choice at the outset.

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1. The different stages of codification

Codification is not simply a matter of bringing together several laws in a single book in order to unify provisions that were adopted at different times. Codification means creating a stable

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system by organizing the rules into a coherent whole[1]. And a coherent system is essential to achieve the objective of legal certainty. Thus, compared with a single text, codification makes it easier to interpret a rule of conduct because the rules are bound together by a single vision. This phenomenon is part of what is known as the logic of "codification by constant law", which has given rise to a large number of specific administrative codes. These micro-legislations (codes on the environment, cultural heritage, code of expropriation for public utility, digital governance, public procurement, transparency, and so on) stand at the antithesis of the conventional idea of law-making. They are, in fact, a modern response to forms of decodification[2].

In the field of public procurement, it is easy to see that the need to "tidy things up" is all too frequent, to the point where the construction of a stable system seems a chimera, given that in little more than fifteen years there have been as many as three different codes. And this is certainly not well-matched with the objective of legal certainty that the codification programme seeks to achieve.

The creation of three different codes to regulate the phenomenon of public procurement contracts is a sign of excessive regulatory fibrillation, which has a profoundly unstable effect on the activities of contracting authorities and economic operators. But it is also a signal of the importance of this regulation, which moves a significant amount of economic resources, roughly equivalent to more than a tenth of GDP.

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[1] According to G. Tarello, *Codice (teoria generale)*, *Enc. giur.*, *ad vocem*, 1, a code is "a book of legal rules organized according to a system (an order) and characterized by the unity of subject matter corresponding to a sector of the legal organisation, in force for the entire geographical extension of the area of political unity (for the entire state), addressed to all subjects or subjects of the state political authority, desired and published by this authority, abrogating all previous law and not supplementing it with pre-existing material, as well as intended for long duration". On the subject, S. Cassese, *Codices and Codifications: Italia e Francia a confronto*, *Giorn. dir. amm.* 95 (2005); B.G. Mattarella, *Codificazione*, in S. Cassese (ed), *Dizionario di diritto pubblico* (2006), II, 937.

[2] N. Irti, *L'età della decodificazione* (1999). On the subject of codification, particularly in the field of public contracts, B. Marchetti, *I contratti pubblici in Europa: tra uniformità e differenziazione*, in G. Falcon (ed), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione* (2009), 291 ff.; M. Fromont, *L'evolution du droit des contracts de l'administration. Differences theoriques et convergences de fait*, in R. Nougellou, U. Stelkens (eds.), *Droit comparé des Contrats Publics. Comparative Law on Public Contracts* (2010), Part. I, 63 ff.

Indeed, public procurement is one of the main drivers of economic growth, job creation and innovation. And it plays a crucial role in the construction, energy, telecommunications and services sectors[3].

It would be a mistake to think that the three codes are basically the same, because the key words are different and the rules applied are therefore dissimilar. Each code is a creation of its time, responding to the most pressing needs of the historical moment in which it was adopted. For example, European legislation has introduced the philosophy that the application of internal market principles to procurement will ensure a better allocation of economic resources and a more rational use of public funds, and will enable public bodies to obtain products and services of the best available quality at the most advantageous price through tighter conditions of competition. While the periods of harmonization through EU legislation have been inspired by the need to effectively open up the internal market, to frustrate the preference given to national suppliers, to open up competition in certain key industries and to reduce administrative costs, national legislation has also extended regulation to other objectives[4].

The 2006 Code (Legislative Decree No. 163/2006) tried to apply the principle of competition between economic operators in its purest form. The subdivision into lots touches a crucial element

[3] P. Cerqueira Gomes, *EU Public Procurement and Innovation: The Innovation Partnership Procedure and Harmonization Challenges* (2021), highlights as the innovation partnership is the newest procedure added to the EU legislative package for procurement in 2014. This procedure is intended, among other things, to provide more flexibility and, consequently, to facilitate the creation of innovative products, services or works to satisfy a specific public need. Starting from the position that the EU public procurement regime has its legal basis internal market provisions, Cerqueira Gomes shows that the internal market must be seen as a market of values. Translating this into public procurement, he points out that a more balanced approach between economic and non-economic factors is needed and holds that promoting innovation can play a crucial role in "increasing the competitiveness of the European economy in an atmosphere of sustainable, smart and inclusive growth". He concludes that innovation procurement is a key tool in the EU's wider innovation policy.

[4] According to A. Sanchez-Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*, 22 *European Public Law* 377-394, (2016), public procurement reform and best practice could make significant contributions in terms of reducing administrative red tape, supporting innovation and green policies and, more generally, in boosting the competitiveness of EU businesses (particularly, SMEs), which are paramount goals of the Europe 2020 strategy.

in the dynamics of public procurement management, i.e. the delicate balance between the need for cost-effectiveness (pursued through aggregated forms) and the protection of competition and SMEs (pursued instead through fractional forms). The 2006 Code established the rule of the unitary nature of public contracts, while the subdivision into lots was permitted only exceptionally, in the case of special needs, on condition that an administrative advantage was guaranteed, provided that the lots were endowed with an autonomous functionality and in any case after thorough study and precise justification. It is only in 2011 that the perspective is reversed[5]: administrations must, where this is possible and economically advantageous, subdivide contracts into functional lots in order to facilitate access for small and medium-sized enterprises, and the contracting authority must state in the award decision the reasons for not subdividing the contract into lots. It is currently considered that the subdivision of a tender procedure into lots favours the opening up of the market to competition and enables small and medium-sized enterprises (so-called SMEs) to submit tenders, since it allows the contracting authority to require participation conditions which, since they are parameterized to individual lots, are necessarily less burdensome than those which, in terms of economic and performance capacity, would be required for participation in the entire tender procedure, the latter being requirements which only large enterprises have[6].

The 2016 Code[7], on the other hand, is built around other keywords. The idea of giving preference to the most efficient companies in the market, while respecting the rule of equal treatment, remains, but the principle of transparency and the

[5] By Article 44 of Law Decree No. 201 of 6 December 2011. On many aspects of the EU regulatory framework for public contracts, R. Caranta, G. Edelstam, M. Trybus (eds), *EU Public Contract Law: Public Procurement and Beyond* (2013).

[6] The contracting authority may derogate from the rule of division into lots for justified reasons, which must be punctually expressed in the contract notice or in the letter of invitation, as an expression of discretionary choice (see Consiglio di Stato, Sec. V, 16 March 2016, no. 1081), the concrete exercise of which must be functionally consistent with the balanced complex of public and private interests involved in the tender procedure; the power itself remains delimited not only by specific provisions of the Contracts Code, but also by the principles of proportionality and reasonableness (see Consiglio di Stato, IV, 19 June 2023, no. 5992). On this topic, S. Panagopoulos, *Strategic EU public procurement and small and medium size enterprises*, in C. Bovis (ed), *Research Handbook on EU Public Procurement Law* (2016), 268.

[7] Legislative Decree No. 50/2016.

reduction of the risk of fraud and corruption gain in importance. We are entering a new season with the fight against corruption and the risk of potentially corrupting phenomena in public procurement becoming the banner under which many of the contractual rules pass. We are thinking of the strengthening of the ANAC directives, of the activity of guidance and regulation, which is manifested in the adoption of types of notices, specifications, contracts and other tools known as "flexible regulation", with the aim of promoting efficiency, developing quality and supporting the action of the public contracting authorities.

The third code of 2023 arises again in a different context[8]. Contrary to the previous codifications, the input does not stem from the need to transpose European directives into national law, but rather from the need to adapt the contracting system to the reforms imposed by the EU's Next Generation plan. In this respect, the Code is a step towards fulfilling one of the commitments of the NRP, which is to simplify and speed up tendering procedures. The underlying idea is that tenders and concessions can act as an important lever for the country's economic development to achieve the standards of the plan agreed with the European Commission[9]. Simplifying them and

[8] In implementation of Delegated Law No. 78 of 21 June 2022, Legislative Decree No. 36 of 31 March 2023 was adopted, containing the new 'Public Contracts Code' for works, services and supplies.

[9] For an interventionist approach and instrumental utilization of procurement for the promotion of horizontal policies, S. Arrowsmith, P. Kunzlik (eds), *Public Procurement and Horizontal Policies in EC Law: General Principles*, in *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (2009), 9. See also S. Arrowsmith, *Horizontal Policies in Public Procurement: A Taxonomy*, 10 *J. Pub. Procure.* 149 (2010). Conversely, «it must be stressed that public procurement can only make such a contribution to economic development, including socially responsible and sustainable growth, by promoting the maximum degree of competition and being open to market-led innovation, instead of trying to mandate or 'drive' such innovation, social orientation, or 'greening' of procurement», S.L. Schooner, *Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice*, in *Public Procurement: The Continuing Revolution* (2003), 137. «The 'strategic' use of public procurement as a regulatory tool can well create barriers to the internal market, diminish incentives for business participation, and reduce the overall effectiveness of this essential mechanism for the proper functioning of the public sector. Consequently, only by avoiding distortions of market dynamics can procurement contribute to economic growth. Other policy goals are best left to specific regulatory regimes of general application, such as

making them more up-to-date is therefore an essential means of achieving this objective..

With regard to its genesis, it should be noted that the draft Code was drawn up by a special commission set up by the Consiglio di Stato. This commission included not only members of the Consiglio di Stato and administrative judges, but also economists, lawyers, university professors, statisticians and an "*Accademia della Crusca*" scholar, in order to bring the linguistic style into line with the best practices for drafting regulatory acts[10].

The main consequence of the adoption of this regulatory drafting technique can be seen in the fact that the codified text incorporates many jurisprudential orientations, thereby transforming rules of jurisprudential origin into primary sources. Just think of the distinction between automatic and non-automatic grounds for exclusion, or the discipline of special procedure for remedying formal deficiencies in tender bids in a comprehensive key as it was formed in the case-law of administrative judges. The translation of the choices into technical-regulatory terms can also be seen in the accompanying report, which has been drafted in a timely and precise manner, to the point of taking on the outlines of a real operating manual, which - as the Commission itself states - has a "guiding function", at the same level as the non-binding ANAC guidelines for the previous code.

Before examining the most controversial themes that run through the provisions of the Third Code, it is worth mentioning the qualification of the text as "self-applicable". At first sight, it is not clear what exactly is meant by this expression. It is obvious that correct implementation by contracting authorities and economic operators will always be crucial to the success of the reform. Once this uncertainty has been removed, a "self-implementing" code must be understood as being immediately valid, i.e. requiring no further regulatory intervention, no implementing rules.

The reference is directly to the ANAC Guidelines, which in the Code no. 50/2016, were the implementing acts containing the operational indications for the application of the text of the Code. In the current system, the seventeen guidelines and fifteen

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standardization, labour, environmental or tax legislation», A. Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2015), 101.

[10] L. Carbone, *La genesi del nuovo Codice*, in C. Contessa, P. Del Vecchio (eds), *Codice dei contratti pubblici* (2023), 9 ff.

regulations adopted during the years in which the Code was in force have been replaced by thirty-five annexes included in the Code, which favours the unitary nature of the text. The annexes are of a modifiable nature, or rather of a "yielding" force: in their state, they are primary rules with the same status as the legal document in which they are incorporated, but, being more susceptible to change, they can be amended using the procedure provided for government regulations[11]. The procedure for amending the annexes involves changing their legal nature, from laws to executive regulations, but at the same time does not entail losing their status as "annexes" to the Code. The text reiterates that the regulation replacing the annex, adopted by decree of the President of the Council of Ministers, "replaces it in its entirety, also as an annex to the Code".

To sum up the main lines of Code No. 36/2023 correspond to three new key words. These are: the reduction of the number of contracting entities, simplification and digitalisation. This article intends to focus on these themes in order to examine how they cut across the new Code in various ways and inspire it in several parts. Before doing so, however, it is important to pay attention to what has been presented as the most important innovation of this codification, namely the definition of twelve general principles with which it is intended to introduce the subject matter and define the foundations of the codification choice at the outset.

2. General principles as a form of regulation in the new Code: objectives and functions

General principles are "those statements which express a normative content with a strong core of values, capable of going far beyond the mere, albeit constant, reiteration of the specific normative framework resulting from the summary formulation which is, instead, proper to the general rule. They are also capable of redirecting the application of the rule itself when, according to the applicable criteria of interpretation, it no longer appears adequate to the changed economic and social context, and, in any case, of programmatically directing it towards new objectives" [12]. In contrast to general rules, which are rules whose content is

[11] Article 17 of Law No. 400/1988.
[12] Tar Sardegna, sec. I, 9 May 2018, No. 410.

supported by uniform requirements, principles are rules which, although supported by uniform requirements, do not exhaust their operability in themselves. Instead, unlike the former, they are the basis for other more or less numerous rules[13].

A principle is not simply a very general rule, but a different mode of regulation, which requires different practical attitudes on the part of practitioners. Three different functions can be deduced from this technique: to fill gaps, to provide a guiding parameter to the interpreter, and to regulate the dynamics of the organisation of the community, given the pluralistic or composite nature of the system.

The new Code devotes considerable space to codifying the general principles of public procurement. This is a cultural signal. By not being circumstantial, the principles are stated without hierarchy or precedence. The inclusion of a value content makes it clear how they can conflict with each other. To what extent can sustainable development procurement restrict market access? Under what conditions can subcontracting conflict with trade security? For these reasons, the principles need to be weighed up in their concrete application, with assessments typical of a rationality test, according to a balanced composition of the interests at stake.

The fact that the legislator of the Public Procurement Code has codified the regulatory principles of the system is by no means a novelty. However, Code No. 50 of 2016, in line with previous codifications, only mentioned the "classical" principles identified by the jurisprudence on the subject and derived from the consolidated European rules. These are rules that have grown over time and that have always governed the procurement procedures of public administrations, namely the principles of economy, efficiency, timeliness and fairness for the award and execution phases of works, service, supply and concession contracts; free competition, non-discrimination, transparency, proportionality; and publicity for the award phase only.

On the contrary, the new Code opens with the declination of new principles in the sector, incorporating a value content which is intended to focus on the "overall vision" that must inspire the text of the Code, according to an organic model[14]. Attempting to

[13] Constitutional Court, 15 July 2005, No. 279.

[14] As argued by G. Napolitano, *Il nuovo Codice dei contratti pubblici: i principi generali*, *Giorn. dir. amm.* 287 (2023), legislative decree No. 36/2023 decided to

identify some differences and dissimilarities between the traditional principles and the new ones, the former appear to be the fruit of tradition, derived from jurisprudence, unsubstantiated, with a high degree of generality and affirmed in an absolute manner. The new Code, on the other hand, opens up new frontiers since the principles it codifies generally have the opposite characteristics to the traditional ones. That is to say, they are novel and contain formulations that were previously only occasionally known from case law; they are circumstantial and not general, i.e. accompanied by detailed rules; and they are reaffirmed in a relative manner, indicating the limit beyond which the guarantee ceases or is subject to an exception.

As mentioned above, the new Code contains many new principles that influence the body of law[15]. In the past, the

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open the new Code with the affirmation of principles that cover the entire subject matter of public contracts in keeping with the natural vocation of a code to construct an organic regulatory system. In this way, the principles aim to express the overall 'vision' of the regulation of the subject matter which, as such, guides the interpretation and application of the individual provisions. It may thus well be said that principles express a sort of legal 'surplus value' with respect to individual rules. Recourse to the principles, moreover, fulfils a function of completing the legal system (even though the Code identifies two different sets of rules of reference to fill in the gaps) and of guidance/guarantee for the public and private interests at stake.

[15] According to A. Sanchez-Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*, cit. at 4, 380, «despite the clear intent to reconcile competition and economic efficiency with environmental and social considerations as part of the move towards a social market economy, and even bearing in mind the instrumental importance of procurement in the delivery of the Europe 2020 strategy, such general approach to the design of a pro-competitive procurement setting as a tool to boost efficient public expenditure was also followed in the preparation of the new public procurement rules. The European Commission clearly stressed that 'to increase the efficiency of public spending, it is vital to generate the strongest possible competition for public contracts awarded in the internal market'. Not surprisingly, the resulting Directive 2014/24 24 included competition as one of the general principles of the redesigned EU public procurement system. Following these cues, this article takes the view that the principle of competition is the main tool in the post-2014 procurement toolkit and the moderating factor in the implementation of any horizontal (green, social, innovation) policies under the new rules – that is, that competition remains the main consideration in public procurement and that the pursuit of any horizontal policies, including those aimed at delivering the Europe 2020 strategy, need to respect the requirements of undistorted competitive tendering. To substantiate that claim, the article focuses on the

principles were considered in their own right and were stated in relation to the phases of the award and/or the performance of the contract. Now, on the contrary, the classical principles are cited to explain the 'new' principles or to indicate how they should be implemented. Whereas in the past, the text was limited to stating the principles, the current text is more extensive. It devotes (or almost devotes) a specific article to each principle, made up of several subparagraphs, and declines to explain them. In other words, they are configured as "explained principles" or "preceptive principles".

These novelties deserve to be highlighted because, in the light of them, it is clear how, when placed in parallel with the traditional principles, the new principles appear to be the fruit of a very different vision, to the point of being configured in an unprecedented legal framework.

The first twelve articles of Legislative Decree No. 36 of 31 March 2023 are devoted to as many general canons. They express values and evaluation criteria that are immanent to the legal order and integrate "the legal foundation of the discipline in question". They complete the legal order and protect interests that would otherwise not be adequately taken into account in the individual rules. Compared to the specific rules, they seem to be characterized – even according to the Special Commission that drew them up – by a "preponderance of deontological content", and from this point of view they can be assimilated to duties for the operators in the sector, to moral rules of conduct relating to "what it should be"[16].

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interpretation of Article 18(1) of Directive 2014/24, which consolidates the principle of competition, and proposes a strict proportionality test applicable to the promotion of horizontal procurement policies where such 'strategic' or 'smart' use of public procurement can generate market distortions».

[16] According to the Report of the Consiglio di Stato to the *Final Draft of the Public Contracts Code in implementation of Article 1 of Law no. 78 of 21 June* 2022, *concerning "Delegation to the Government in the matter of public contracts"*, 7 December 2022, "the general principles of a sector express, in fact, values and evaluation criteria immanent to the legal order, which have a "memory of the whole" that the single and specific provisions cannot have, even though they are referable to it. The principles are, moreover, characterized by a prevalence of deontological content in comparison with the individual rules, even reconstructed in their system, with the consequence that they, as evaluation criteria that constitute the legal foundation of the discipline considered, also have a genetic ("nomogenetic") function with respect to the individual rules".

It may be that their number is not a coincidence. The assonance with the equal number of fundamental principles of the Constitution, which represent the ideological and political premises that the Constituents transcribed, shows in part how the Special Commission of the Consiglio di Stato, entrusted by the government with the writing of the Code, got a little carried away on this occasion[17]. There is also another assonance that should be emphasised. These principles are not linked to each other, as are the twelve fundamental principles of the Constitution, but are placed next to each other, sometimes against each other, in the knowledge that these values are meant to be balanced and to coexist.

To consider this catalogue as closed and all-inclusive would be a mistake. In fact, the principles listed in the first twelve articles are only those that are explicitly mentioned in Title I, Part I and Book I. However, looking at the Code as a whole, there are many other principles that are translated into legal instruments. To these one should add, from various sources, at least those principles that can be derived by interpretation, those that can be derived from administrative procedural law, those that have their origin in case law, or those that can be derived *ex lege* from other provisions of the Code, such as the principle of once only digitalisation as a rule of simplification or the principle of digitalization by default, according to which administrations, in order to achieve greater efficiency in their activities, act by means of computer and telematic instruments, in internal relations, between the various administrations and between the latter and private individuals[18].

Since it is necessary to strike a balance between coexisting values, the judge cannot be the only guarantor of this balance. The ordering and "*nomophylactic*" function of principles must then be derived from the very structure of the code. However, a potentially inappropriate and repetitive use of general principles, bordering on abuse, risks giving the judge an excessive power of

[17] On this topic, *L'attualità dei principi fondamentali della Costituzione*, M. Della Morte, F.R. De Martino, L. Ronchetti (eds) (2020).

[18] It is no longer constructed, as in the previous version, as an incentive for the use of digital tools, but has become an "obligation that finds constitutional coverage in the principle of good performance, as understood by the Constitutional Court, as a guarantee of the criteria of efficiency, effectiveness and cost-effectiveness", thus in G.M. Racca, *Le responsabilità delle organizzazioni pubbliche nella trasformazione digitale e i principi di collaborazione e buona fede*, *Dir. amm.* 601 (2022).

interpretation and threatens to undermine legal certainty and the predictability of judicial solutions to disputes.

To avoid this risk, the Code has adopted an innovative solution. The legislator decided to specify by law the concrete and precise content of certain principles, expressing their preceptive value, instead of relying on general clauses or on the ambiguity of general formulae as a means of overcoming the impossibility or difficulty of always identifying a precise rule[19]. In other words, the technique of "explained and preceptive principles" is not an arbitrary choice, but it seems to respond to a specific fear, namely that a general clause could be misused by giving the judge excessive interpretative power.

The "new" principles include, first and foremost, the principle of results (Article 1). Together with the principle of trust (Article 2) and access to the market (Article 3), it has a superior position because, according to Article 4 of the Code, these principles are given priority as the explicit criteria for the interpretation and application of the other rules of the Code. The fact that this quality is deliberately assigned only to these principles and not to others does not mean, despite what the lexical appearance may suggest, that the remaining principles cannot be used as hermeneutical standards for the systematic reading of the provisions of the Code itself, but rather that they are to be considered superior to the other eight principles.

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[19] According to the Report of the Consiglio di Stato to the *Final Draft of the Public Contracts Code,* cit., "there was a desire to give concrete and operational content to general clauses that would otherwise be excessively elastic (see, for example, the specification of the concept of good faith, also for the purposes of the reciprocal liability of the contracting authority and the unlawful tenderer), or to use the rule-principle to resolve interpretative uncertainties (e.g, the principles delimiting the scope of application of the code, enumerating the relationships between tenders and free contracts on the one hand and the entrusting of social services to third sector entities on the other) or to transpose jurisprudential guidelines that have now become "living law" (as, for example, in the case of the rule on the peremptory nature of the grounds for exclusion and the correlated regime of atypical exclusionary clauses). More generally, through the codification of principles, the new project aims at fostering greater freedom of initiative and self-responsibility of contracting authorities, enhancing their autonomy and discretion (administrative and technical) in a sector in which the presence of rigid and detailed rules has often created uncertainties, delays and inefficiencies. This is because the law - especially a code - cannot chase the specific discipline of every aspect of reality, because it will always be late, but must instead provide the tools and the general and abstract rules to regulate it".

The purpose of the result rule is to provide a cultural signal of a profound change, a strengthening of the spirit of autonomous initiative and discretion of public administrations. In this perspective, administrations are obliged to pursue the result of the award of the contract and its execution, which must be carried out with the utmost timeliness and the best possible relationship between quality and price, on condition that this is done in compliance with three additional but already established principles, namely those of legality, transparency and competition.

The result principle is an implementation of other principles and, in the field of public procurement, a corollary of the constitutional principle of good performance and the related principles of efficiency, effectiveness and economy. It is not the idea of "results at any cost", nor is it the necessary satisfaction of citizens' demands. It is not to be pursued independently of the context, but rather in the interest of the community and for the achievement of the objectives of the EU.

The principle of result is the overriding criterion for the exercise of discretion and for determining the rule of the case, as well as for: a) assessing the responsibility of staff performing administrative or technical functions in the planning, design, award and execution phases of contracts; b) allocating incentives according to the modalities provided for in collective bargaining.

The logic of the administrative result requires the timely consideration of interests, the rapid weighing of them and the effective protection of them within the conditions and the logic of each area of public activity, according to a business studies definition. The principle of efficiency is the measure of the maximum achievement of user products (output) for a given level of resources.

European objectives are also taken into account: social needs, protection of health, the environment, cultural heritage and the promotion of sustainable development, including energy[20]. From this point of view, competitiveness, transparency, legality and value for money are instrumental goods. In other words, they do not constitute the object of interest in themselves, as is the case with the award of the contract and, above all, its execution (the principle of the result). Instead, they become the functional

[20] M. Comba, S. Treumer (eds), *Modernising Public Procurement: The Approach of EU Member States* (2018).

conditions for the achievement of the administration's interest in the result. In other words, "between the public interest of the administration - better quality of service at the lowest price - and the purely public interest of economic operators - competition in a free market open to all - the directives, in striking a balance between them, pay more attention to the former"[21]. The functionalisation introduced by the national legislator thus seems to be inspired by the latter view, but it goes much further by sanctioning an order in which competition becomes subordinate to the interest of the administration in the result.

The acceptance of the logic of the result also implies a shift of attention towards the phase of the execution of the contract, which for the first time assumes a central role in the publicist's perspective, to the detriment of the traditional phase of the selection of the contractor. The public invitation to tender, on which most of the effort is concentrated, is in fact only a preliminary stage, subordinated to what matters most, that is, the performance of the contractual relationship. This confirms that the notion of the biphasic activity of the administration – differentiated according to different legal rules depending on the moment when the administrative activity takes place – is increasingly losing its relevance in practice. It is no longer the case that, in a first phase, that of the selection of the contractor, the public administration acts according to forms characterised by the observance of rules and principles aimed at protecting the overriding public interest to be achieved. In the next stage, the definition of the contract, the public authority is placed at the same level as the private party, takes off its public face and acts in the exercise of its contractual autonomy.

A consequence of this basic approach is, for example, the principle of maintaining the contractual equilibrium (Article 9)[22],

[21] E. Follieri, *Introduzione*, in *Corso sul codice dei contratti pubblici* (2017), 5 ff.

[22] Rules on contract modifications were added to the Procurement Directive 2014/24/EU and most of the provisions therein are based on the case law from the CJEU, particularly *Pressetext*. Thus, the EU legislator had found it necessary to clarify the conditions on contract modifications and take into account the case law of the CJEU. It analyses the different types of modifications covered by Directive 2014/24/EU in a semi-structured way by dividing them into permissible versus impermissible modifications. Here, it is possible for the reader to dive into different types of modifications of a contract that could potentially occur. Each topic has references on the case law of the CJEU, which makes it possible to explore the different types of conditions that must be

from which certain institutions have already been positively derived in the past, such as the revision of prices (Article 60). The result in terms of rules is: the simplification and reduction of the design phases for public works (the final design phase disappears: Article 41); the systematic re-introduction (and no longer pro tempore) of the integrated procurement (Article 44); the increase to the entire sub-threshold, also for works, of the amounts below which it is possible to resort to the negotiated procedure (still a public document, but with more rapid characteristics): Article 50, which incorporates the emergency regulation provided for by Decree-Law No. 76/2020, Article 1, paragraph 2, letters a) and b) – as amended by Decree-Law No. 77/2021 – and the consequent possible waiver of the provisional guarantee (Article 53, paragraph 1) for hypotheses other than direct award; the introduction of cascades of sub-contractors as a general rule, waived only by the individual hypotheses expressed in Article 119, paragraph 17, which must be absolutely indicated in the tender documents.

The principle of trust in administrative action is an absolute novelty. In a context of renewed confidence in the activity of the contracting authorities, this principle is intended to highlight and promote the freedom of assessment and the powers of initiative of the contracting authorities in order to prevent the phenomenon of defensive bureaucracy and to guarantee and promote confidence in the legitimate, transparent and correct action of the administration.

The subject of mutual trust is the legitimate, transparent and correct action of the above-mentioned parties. This principle is referred to as the basis for the allocation and exercise of power in the field of public procurement, in a provision that is more programmatic than concrete (para. 1). This provision is more of a declaration of intent than anything else. It gives the principle of fiduciary duty a special function, particularly with regard to public officials. It promotes and strengthens the initiative and decision-making autonomy of the latter, in particular with regard to the evaluation and choice of services to purchase and provide, in accordance with the aforementioned principle of results (para. 2).

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available before a modification can be considered permissible based on both the case law and the text of the provisions of Directive 2014/24/EU.

In order to make the initiative and decision-making autonomy of public officials more effective, the Code precisely defines and restrictively limits the cases of gross negligence that may give rise to the administrative liability of public officials. In the context of the activities of planning, drawing up, awarding and executing contracts, only the violation of the rules of law and administrative self-regulation, the manifest violation of the rules of prudence, expertise and diligence, and the failure to take the precautions, checks and preventive information normally required in administrative activities, to the extent that they are required of the public official by virtue of his specific competences and in relation to the concrete case, constitute gross negligence for the purposes of administrative liability. On the other hand, gross negligence is expressly excluded in the case of an infringement or omission that is the result of a reference to the case law or the opinions of the competent authorities (paragraph 3) [23].

In addition, Article 2 lays down a clear confidence-building measure: contracting authorities shall take measures to insure risks to personnel. To promote confidence in the lawfulness, transparency and regularity of administrative acts, contracting entities shall take measures to insure against personnel risks, to provide for the requalification of staff and to improve and enhance the professional skills of staff, including plans for the training of specialised units.

The purpose of this provision is to exclude from the hypothesis of gross negligence – and thus from the Treasury's liability, which does not apply in the case of slight negligence – any conduct that is not clearly based on non-compliance with the rules or the exercise of ordinary care. This provision leaves considerable room for interpretation as to what constitutes a flagrant breach and what does not. Nevertheless, the Code is

[23] In order to prove administrative liability, Article 21 of Decree-Law No 76 of 16 July 2020 modifies Article 1 of Law No. 20 of 14 January 1994 adding "Proof of wilful misconduct requires the demonstration of intent to cause the harmful event". Limited to acts committed after the date of entry into force of this Decree and until 30 June 2024, the liability of persons subject to the jurisdiction of the Court of Auditors in matters of public accounting for the liability action referred to in Article 1 of Law No 20 of 14 January 1994 shall be limited to cases where the production of the damage resulting from the conduct of the person acting is wilfully intended by him. The limitation of liability provided for in the first sentence shall not apply to damage caused by the omission or inaction of the agent.

intended to send a signal to allay the fears, more or less justified depending on the case, that often obstacle the administrative activities of public officials who are concerned about the possibility of being held liable by the Treasury.

The principle of access to the market requires contracting authorities and awarding bodies to promote access to the market for economic operators in accordance with the procedures set out in the Code, while respecting the principles of competition, impartiality, non-discrimination, publicity and transparency, and proportionality. The name has changed, but it is still the principle of maximum competition. Although it is one of the general principles contained in the first three articles of the Code, it has been subordinated to the principle of results, which was introduced at the beginning of the new Code, and has been placed even higher in the pyramidal logic of the new regulatory structure. The principle in question is a response to the need to guarantee the maintenance and establishment of a competitive market capable of ensuring that economic operators have equal opportunities to participate and thus have access to public procurement procedures.

In addition to the provisions relating to the general principles themselves (result, confidence, access to the market, good faith and protection of confidence, solidarity and horizontal subsidiarity, administrative self-organisation, negotiating autonomy, preservation of the contractual balance, peremptory grounds for exclusion, application of collective agreements), the codification of principles is also expressed in Title II, which sets out the principles common to all the books of the Code, concerning the scope of the rules, the single person responsible for intervention (RUP) and the phases of the procedure for awarding contracts.

3. The reduction and qualification of contracting authorities

During the preparatory work for the 2016 Code, and even more so after it was adopted, the issue that came to the fore most was that of the excessive number of contracting authorities. Faced with a succession of worrying statistics on the fragmentation of public demand, two converging solutions were identified at that time (Articles 37 and 38 of the Code). The first one was that of the

central purchasing bodies[24] and of the aggregations (in particular for the municipalities that are not the capitals of the provinces) and the second one was that of the qualification of the contracting stations. However, neither of these solutions was implemented, as the debate on the number of contracting entities gradually faded over time[25].

The aim of the 2016 reform was in fact to introduce an innovative natural selection mechanism for the development of contracting authorities and central purchasing bodies. This would have a significant impact on the organisational profiles of public administrations and introduce a process of continuous improvement in order to take advantage of the greater operational capacities allocated on the basis of the level of qualification achieved, with the incentive of being able to accumulate further rewarding requirements (also provided for in article 38 of the Code).

The link between the two levels has been established by the third paragraph of Article 37, according to which contractors who did not possess the qualification referred to in Article 38 could only use a central purchasing body or group with one or more

[24] The tasks of central purchasing bodies are set out in Article 37 and consist of: awarding contracts, concluding and executing contracts on behalf of administrations and bodies; concluding framework agreements to which qualified contracting stations may have recourse; managing dynamic purchasing systems and electronic marketplaces. See, R. Caranta, *Public Procurement and award criteria*, in C. Bovis (ed), *Research Handbook on EU Public Procurement Law* (2016), 149. According to C. Risvig Hamer, M. Comba (eds), *Centralising Public Procurement: The Approach of EU Member States* (2021), central purchasing bodies (CPBs) are placed "central" as a technique for aggregated procurement. Their task is to offer, on a permanent basis, central purchasing activities to contracting authorities that have combined their purchasing. Such activities can consist of the actual acquisition of supplies and/or services (i.e. wholesaler model) but can also relate to the award of public contracts or the conclusion of framework agreements (FAs), which contracting authorities can use with out the need to conduct a procurement procedure themselves (i.e. intermediary/agent model). For example, the national police division of a Ministry can conclude FAs through which local police forces make concrete purchases.

[25] The aggregations and centralization rule is among those 'suspended' by the *'Sblocca-cantieri'* decree (Decree-Law No. 32 of 18 April 2019), while the qualification of contracting stations has not been implemented in the absence of the necessary governmental implementing decree.

contracting entities possessing the necessary qualification for the purchase of supplies, services and works[26].

The mechanism for the qualification of contracting authorities and central purchasing bodies is based, according to Article 38, on a public list established by the ANAC; there was no single qualification, but a series of different possibilities, articulated in relation to sectors of activity and territorial basins, as well as to the type and complexity of the contract and to ranges of amounts. This last distinction seems particularly significant and is in line with the general approach of the legislation, which divides the same types of procedures (more or less complex) that can be used precisely according to the value of the contract.

The legislator has intervened on several occasions to rationalise and simplify this reputation system for the evaluation of administrations, in order to make this mechanism operational in practice, with the aim of rewarding contracting authorities that demonstrate their willingness and ability to plan, award and monitor the performance of a contract, as well as their suitability to issue public invitations to tender. However, the repeated legislative changes do not seem sufficient to make this mechanism work by overcoming the backwardness of the Italian administrative system. In essence, they do not appear to be sufficient to transform the discipline of qualifying procurement entities from an undifferentiated administrative task into a «specialised function - a trade, one would say, in the private sector - that requires the possession of specific requirements. These include, first and foremost, the development of a culture that is not only legal but also professional, economic and technical, measured and calibrated according to the size of the tenders and the quality and nature of the goods or services to be acquired or the works to be carried out»[27].

The architecture of the NRRP includes among the enabling reforms the simplification of the regulatory framework for public procurement as an essential objective for the efficient implementation of infrastructures and the revitalisation of

[26] According to Article 37, non-qualified contracting stations could still proceed directly and autonomously with the acquisition of supplies and services below EUR 40,000 and of works below EUR 150,000, as well as through orders from purchasing instruments made available by central purchasing bodies.

[27] Thus in L. Torchia, *Il nuovo Codice dei contratti pubblici: regole, procedimento, processo*, *Giorn. dir. amm.* 608 (2016).

construction activity. Urgent measures include the need to set a maximum time limit for the award of contracts, to reduce the time between the publication of the notice and the award of the contract, as well as measures to limit the time required for the execution of the contract. In order to achieve these objectives, one of the instruments mentioned is precisely the "reduction in the number and qualification of contracting entities", as a reputational criterion, comparable to that introduced for companies, which assesses professionalism and ability to perform correctly, but this time applied to public administrations.

In this way, the original idea of the 2016 Public Contracts Code is taken up again. The qualification system seems to function – or at least to be closely linked – to the objective of reducing the number of contracting authorities (which is estimated at more than thirty thousand). It also seems to allow the management of more complex contracts. In this way, the scope within which each administration can perform the functions of a contracting authority is subjectively limited, which imposes additional burdens on administrations, such as the need to obtain a qualification, and limits the contracts that can be awarded by non-qualified administrations to small economic amounts.

The 2023 reform aims to fine-tune and implement the selection mechanism for the development of contracting authorities and central purchasing bodies. It will have a significant impact on the organisational profiles of public administrations and introduce a process of continuous improvement in order to take advantage of the increased operational capacity allocated according to the level of qualification achieved.

It is well known that the poor technical equipment of administrations, the lack of specialised cultures and the deficit in the organisational and managerial activity of public apparatuses are some of the elements that today act as an obstacle, i.e. a barrier, to the awarding and execution of public procurements[28].

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[28] As S. Cassese, *Amministrazione pubblica e progresso civile, Riv. trim. dir. pubbl.* 141 (2020), notes "The administration has, directly or indirectly, governed the country's infrastructure endowment for at least fifty years (just think of the railway network in the period from 1861 to 1905, the date of the redemption of concessions). It later provided, again directly or indirectly, for other infrastructures (think only of those in the Mezzogiorno, through the special Cassa, set up in 1950, or of the motorway network - Autosole, built in eight years). In recent decades, however, an infrastructure deficit has emerged. The average level of Italy's infrastructure is five points below the average of the five

For this reason, the legislator, in accordance with the objectives of the NRRP, pays particular attention to the issue of the quality of contracting authorities when delegating powers to rewrite the rules governing public procurement. It is enough to note that the latter is placed almost at the beginning, in letter c) of Article 1, among the many guiding principles and criteria of the delegation.

There are two equations that inspire this guiding criterion. On the one hand, the strengthening of the qualification system of administrations goes hand in hand with (or rather serves to achieve) their numerical reduction, i.e. their unification and consequent reorganisation. In short, in the eyes of the legislator, qualification serves to reduce the number of administrations and to impose the transfer of the relevant planning, awarding and execution competences on those administrations that do not pass the examination. In other words, it is the same (unrealised) objective that the executive had in 2016.

On the other hand, the public qualification system needs to be improved by introducing incentives for the use of central purchasing and auxiliary contracting authorities for the execution of public tenders. This implies the establishment of effective administrative cooperation systems to overcome the traditional system, whereby each administration issues a tender to meet its own needs.

Their reduction in number, merging and reorganisation require the strengthening of administrative structures in the direction of greater professionalism, the strengthening of the

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most developed countries in Europe. Between 2007 and 2016, the construction sector contracted by about 37 per cent. The average construction time has increased: 15 years for a major work, 8 of which for administrative time. According to ISTAT, public investments in recent years have decreased by 5 per cent. Payments for infrastructure construction have halved since 2004. It is significant to note that, while public contracts for works have decreased, those for supplies and administrative services have increased: the administration buys instead of having them made. Of the 37.5 billion of the Development and Cohesion Fund allocated for 2014-2020, in 2019 just under 12 per cent was committed and just under 3 per cent spent. A reflection of this stagnation of the contracting or tendering administration can be seen in the growth of the foreign turnover of Italian construction companies. That of the largest 43 construction companies increased fivefold after 2004. That of the top 4 groups is clearly higher than the foreign turnover of companies in other countries with similar turnover figures. In short, like Italian university graduates, so too do Italian construction companies go abroad to look for work". On this subject see also B.G. Mattarella, *La centralizzazione delle committenze*, *Giorn. dir. amm.* 613 (2016).

qualification and specialisation of the staff working in the contracting units, through the provision of specific training courses, in particular with regard to the central purchasing units working on behalf of the local authorities.

However, the qualification does not always apply. There is an important exemption based on value, which, for the sake of simplicity, takes into account the procurement activities with low economic impact that all contracting authorities can carry out, since the low economic relevance of these contracts does not justify the application of the qualification system. For supplies and services, the threshold is set at 140,000 euros, and for works at 500,000 euros, through the autonomous use of the telematic negotiation tools provided by the central purchasing bodies qualified in accordance with the regulations in force. The configuration of the powers of the non-qualified entities is designed to ensure a "hard core" of competence sufficient to deal with most of the tasks entrusted to the administrations, also in anticipation of the loss of qualification for higher value contracts.

For contracts above these thresholds, it is necessary to be qualified, otherwise ANAC will not issue the Tender Identification Code (CIG)[29]. There is a specific list of qualified entities, of which central purchasing entities, including aggregating entities, are included in a specific section.

The qualification covers three areas: planning, contracting and execution. The qualification for project planning and contracting is divided into three levels of amounts: a) *basic* or first level qualification, for services and supplies up to the threshold of 750,000 euro and for works up to 1 million euro; b) *intermediate* or second level qualification, for services and supplies up to 5 million euro and for works up to the threshold referred to in Article 14; c) *advanced* or third level qualification, with no limit on the amount.

[29] Under Article 62, all contracting authorities may proceed directly and autonomously with the purchase of supplies and services below the thresholds laid down for direct awards and with the award of works contracts below EUR 500 000, as well as with the award of contracts using purchasing tools made available by qualified purchasing centres and aggregating entities, without prejudice to the obligations to use purchasing and negotiation tools provided for in the current provisions on expenditure restraint. A list of qualified contracting entities will be drawn up by ANAC, which will ensure its management and publicity, and will include central purchasing entities, including aggregators, in a specific section.

Non-qualified contracting authorities procure supplies, services and works through a qualified central purchasing body or use qualified central purchasing bodies and qualified contracting authorities for auxiliary purchasing activities. Auxiliary purchasing activities include the management of procurement procedures in the name and on behalf of non-qualified contracting authorities. Central purchasing bodies and contracting authorities carrying out auxiliary purchasing activities are directly responsible for central purchasing activities carried out on behalf of other contracting authorities. They appoint a RUP who is responsible for the necessary links with the contracting entity receiving the intervention, which in turn appoints a person in charge of the procedure for its own activities[30].

Finally, it is interesting to note that the reputational mechanism of qualification opens the way to a situation of equality between the administration and private individuals. In the same way that economic operators are able to make statements that do not correspond to reality, the same thing could happen to the administration. In short, any automatic presumption of the legality of administrative action is lost. It's not allowed to use tricks to prove that you meet the requirements to qualify. It is for this reason that are sanctioned any declarations fraudulently intended to demonstrate possession of non-existent qualification requirements, including in particular: a) for central purchasing bodies, the declared existence of a stable organisation in which personnel continue to work de facto for the administration of origin; b) for contracting stations and central purchasing bodies, the declared existence of personnel assigned to the stable organisational structure who are de facto engaged in other activities; c) failure to inform ANAC of the loss of the requirements.

Qualification seems necessary, even essential. There can be no qualitative leap in the procurement market without control in

[30] In particular, the role and responsibilities of the central purchasing bodies should be taken into account; a procurement "malfunction" attributable to a central body may in fact also have a "systemic" effect, influencing the decisions of other administrations that have relied, for example, on a convention or framework agreement. And the reliability of the procurement system itself may be affected. Conversely, an unsuccessful tender by one contracting authority will only have a negative impact on that authority (except in the case of joint procurement).

the access phase, not only on the part of the private operators, but also - and above all - on the part of the public authority, which is responsible for ensuring that the expenditure is correct and useful. From this point of view, the role of the ANAC should be strengthened as an arbiter in the control of access to the sector before the start of the bidding process. Aiming for this role could also allow greater autonomy for the contracting bodies (more professional, efficient, reliable) to manage the procurement process in the way they consider most appropriate to public needs. The ANAC should therefore have adequate powers of information control over the subjects, to be exercised upstream.

What is the main purpose of the qualification scheme? The reduction of the number of contracting stations or, instead, the enhancement of their efficiency and the logic of the prevalence of the result according to a form of legitimation called output? The question seems pertinent, since the objectives stated in the legislative documents are different. Perhaps the truth lies somewhere in between, in the sense that qualification should not be understood as an absolute tool to reduce, but rather to improve, purchasing and executing capacities. The ultimate goal is therefore not to be able to count on one hand how many public bodies are able to tender, but how many are able to do so well.

In conclusion, there is no doubt that experimenting with a system that aims to measure confidence in the work of administrations in the logic of the prevalence of the result remains a difficult but at the same time compelling challenge. No one would want this to lead to an excessive mortification of the administrative and technical discretion of individual administrations. The qualification system can therefore be truly effective if it is articulated on the basis of two fundamental principles: trust in the contracting authorities (in line with the strengthening and digitalisation of public administration) and administrative and technical discretion (as the keystone of efficient procedures and good public spending). The reaffirmation of these principles in the new Code has the merit of reducing, also for the future, the risks of centralisation and formalistic rigidity and of privileging the objective of the procurement result in terms of quality and timeframe.

4. Results and discretion: the way to simpleness

Another basic idea that inspires the new Code is the simplification of certain procurement procedures. The drive for greater flexibility in procurement procedures is a response to the over-regulation of procurement procedures and the imposition of obligations, formalities and compliance requirements which, in addition to not (necessarily) falling within the scope of EU law, are slowing down the award and implementation of works and services.

The imposition by law of certain time-limits for the conclusion of tenders and contracts, the obligation to exercise substitute powers, the introduction of measures to speed up the award procedure are functional measures to counteract the "fear of signing", which is the expression of the "defensive bureaucracy" that often characterises the work of contracting authorities and generates a lack of confidence on the part of economic operators in the activities they carry out.

Simplification does not only have the function of speeding up or simplifying procedures, but it must also be combined with the recognition of a margin of discretion for the contracting authorities. In other words, in order to speed up the achievement of the result, the regulatory provisions entrust public officials with a wider power of choice, which corresponds to an invitation to take responsibility. The greater discretion conferred on contracting authorities by the new reform must be able to be expressed in all the phases of the articulated process leading to the concrete realisation of the realisable interest of which they are the bearers: from the preparatory and preparatory phase to the start of the award procedure, to the phase following the call for tenders, to the phase of performance of the contract.

The provision of general principles to guide the exercise of discretion also goes hand in hand with the granting of a greater degree of discretion. This is all the more true in view of the fact that, in accordance with the enabling act, the reformer's task was to rationalise, reorganise and simplify (all) public procurement rules.

Several examples could be given. Three will be chosen. The first relates to the methods for assessing the anomaly of the bid, i.e. the assessment of the congruence, seriousness, sustainability and feasibility of the best bid that appears to be abnormally low,

contained in Article 110 of the new Public Procurement Code[31]. An abnormally low bid could be the result of desperate competition by the more unscrupulous contractors to the detriment of the more reliable ones. An abnormal bid therefore raises the suspicion of lack of seriousness since, by appearing unsuitable to guarantee the economic operator a reasonable profit, it could conceal the risk of poor performance of the entrusted service. From the point of view of the contracting authority, therefore, the examination is characterised by the need to reconcile two requirements: to make it possible to identify the best contractor by facilitating and encouraging the widest possible participation of economic operators, and at the same time to avoid accepting tenders which would be detrimental to the public interest in the performance of the contract.

In particular, the RUP verifies the completeness and conformity of the administrative documents submitted by the tenderers and, if necessary, starts the preliminary investigation procedure; it verifies compliance with the conditions of participation and decides on any exclusion measures; where the award criterion is the lowest price, it may proceed directly to the evaluation of the economic tenders and, in any event, it shall verify the conformity of the tenders; where the award criterion is the economically most advantageous tender, it shall carry out all activities which do not involve the exercise of powers of evaluation with regard to the quality of the tenders and shall verify the anomaly of the tender.

This activity does not involve an evaluation of the quality of the tenders, let alone a comparative evaluation, but focuses on the technical and economic offer and, more precisely, on one or more price elements that are considered to be out of line with market

[31] In accordance with Article 110, contracting authorities shall evaluate the relevance, seriousness, sustainability and viability of the best tender which appears to be abnormally low on the basis of specific elements, including the costs declared in accordance with Article 108(9). The contract notice or the tender notice shall indicate the specific elements to be used for the evaluation. On the "sustainable procurement" when environmental and social considerations become increasingly important components of the procurement process in Europe, see B. Sjafjell, A. Wiesbrock (eds), *Sustainable Public Procurement Under EU Law. New Perspectives on the State as Stakeholder* (2016).

Where a tender appears to be abnormally low, the contracting authority shall request the economic operator in writing to explain the price or cost proposed and shall allow him a maximum of 15 days to do so.

values or, in any case, with reasonably sustainable prices; the assessment of the congruence or non-congruence of an economic offer is therefore formulated in absolute terms, in relation to each individual offer, on the basis of its credibility in terms of market values[32]. This is a complex activity requiring multidisciplinary skills and a specific technical sensitivity in the field of contracts. For this reason, it is expressly provided that the Commission, "at the request of the RUP", may play a supporting role in the verification of the anomaly of the tender (Article 93, par. 1).

As is well known, three methods for calculating the anomaly threshold have been established. This leaves it up to the administration to choose the most appropriate method in each case. In fact, the previous discipline provided for the *ex lege* determination of the anomaly thresholds, above which the review became mandatory, and of the minimum number of bids for the purpose of initiating the sub-procedure, which is also mandatory in this case. However, as things stand at present, the choice of whether or not to initiate the anomaly check is entirely left to the contracting authority. It is carried out each time the tender submitted appears to be abnormally low, on the basis of the "specific elements" contained in the contract notice or the tender documents. The discretionary power therefore concerns the an and quomodo of the anomaly check, and is carried out in accordance with predetermined forms of procedural cross-examination which are appropriately borrowed from the previous discipline. Only in the case of contracts below the European thresholds, which are awarded on the basis of the lowest price criterion, are there forms of automatic exclusion of tenders considered to be anomalous. From this point of view, the anomaly check is highly innovative, as it is the most tangible expression of the "discretionary revolution" [33].

As for the second example, a good contract is only possible in the presence of good projects. These projects must be able to be completed quickly and must not impede the speedy execution of works and services. This is the spirit in which many of the new Code's innovations should be seen: in particular, the reduction in the number of planning stages for public works from three to two; the generalisation of the "integrated contract" (award of works on

[32] See Consiglio di Stato, ad. plen., 29 November 2012, No. 36.
[33] See, in this sense, A. Cancrini, F. Vagnucci, *Le procedure di scelta del contraente e la selezione delle offerte*, *Giorn. dir. amm.* 325 (2023).

the basis of the feasibility study alone, with the contractor responsible for execution, *appalto integrato*); the increase in the thresholds for direct award and for simplified procedures below the thresholds. These provisions undoubtedly meet the need for speed and efficiency in the administration. Works, services and supplies may be awarded directly up to an amount of less than EUR 150,000.00 for the former and up to an amount of less than EUR 140,000.00 for the latter. In this hypothesis, the contract is awarded "even without consulting several economic operators", without any necessary opening up of the market. As a counterweight to direct awarding, there is the principle of rotating awarding[34]. This perspective aims to strengthen the role of administrative discretion. However, this does not always make it easier for contracting authorities to draw up tender documents or for economic operators to make a truly complete and informed offer. This is because of the risk of proliferation of administrative disputes associated with such a wide margin of administrative discretion.

A final demonstration of the relevance of discretion can be found in the current regulation on subcontracting[35]. Subject to adequate justification in the award decision, contracting authorities must specify in the tender documents the services or works covered by the contract to be performed by the successful tenderer. In order to avoid the possibility of hidden subcontracting, the national legislator has chosen to leave it to the contracting authority to set a reasonable limit.

The current regulation on subcontracting provides a final demonstration of the importance of discretion. Subject to adequate justification in the award decision, contracting authorities must specify in the tender dossier the services or works covered by the contract to be performed by the winning tenderer. In order to avoid the possibility of hidden subcontracting, the national legislator has chosen to leave it to the contracting authority's discretion to set a reasonable limit in relation to the predominant execution of the works. However, the justification must relate to the specific characteristics of the contract, i.e. the need to strengthen the control of the activities on site and, more generally, of the workplaces, in view of the nature or complexity of the

[34] Today codified in Article 49 of the new Public Procurement Code.
[35] See the Article 119.

services or works to be provided, or to ensure better protection of the working conditions and the health and safety of workers, or to prevent the risk of criminal infiltration.

Persons entrusted with contracts under the Code may subcontract the works or parts of works, services or supplies included in the contract, subject to the authorisation of the contracting authority, provided that: a) the subcontractor is qualified for the works or services to be performed; b) there are no grounds for excluding him; c) the works or parts of works, services and supplies to be subcontracted have been indicated at the time of the tender.

The main contractor and the subcontractor shall be jointly and severally liable to the contracting authority for the services covered by the subcontract. The contracting authorities shall indicate in the tender documents the services or works covered by the contract which, although subcontracted, may not be further subcontracted. In other words, there is a change from a prohibition to an ordinary rule (from which derogations can only be made with adequate justification) for cascades of sub-contractors. This is a reception of the Union's provisions, as interpreted by a first letter of formal notice of 24 January 2019 from the EU Commission in the framework of the infringement procedure against Italy no. 2018/2273, followed by a second letter of 6 April 2022. In conclusion, even in the possibility of using subcontracting, one can read a legislative openness towards flexible procedures, which is moreover confirmed by the strengthening of the principle of trust in article 2 of the new Code. This represents a change compared to the discredited discretionary choices made by the administrations under the previous regime. A trust that should lead us not to read with automatic suspicion the establishment of moments of contact, dialogue and negotiation with bidders, but one that values "managing", understood as choosing responsibly, using the flexibility necessary to realise the public interest in different contexts[36].

[36] S. Valaguzza, *Governare per contratto. Come creare valore attraverso i contratti pubblici* (2018).

5. The digital transformation of public procurement

The digitisation of the procurement lifecycle - from planning, to tendering, to full implementation - is the infrastructural cornerstone of the new Code. In fact, the need and urgency to digitise public procurement processes already emerged from the NRP, making it a necessary tool to achieve the conditional objectives of European funding.

It has three objectives. To prevent corruption by ensuring greater transparency, traceability, participation and control of activities. To reduce the time needed for tendering procedures through a comprehensive simplification. Finally, to implement the objectives of the NRP by improving procedures and relations between public administrations and economic operators.

Digitalisation is only one solution for reducing the time taken for award procedures and the various formalities involved in public procurement. But it is an obligatory, non-negotiable solution. The new technological and IT infrastructure (the National Digital Procurement Ecosystem) is not only the indispensable tool for streamlining public procurement procedures and managing all the administrative formalities that affect the different phases of public procurement. It is also the only place where administrative powers can be exercised and where economic operators can submit bids.

Innovations that could have a significant impact on the market and administrations include the implementation of the National Database of Public Contracts (BDNCP) and the Virtual Profile of the Economic Operator, with the creation of a digital infrastructure on which all compliance must be managed, and the provision for the use of automated procedures. Under the new regulatory framework, all administrative activities and processes related to the life cycle of public contracts must be carried out digitally through the digital infrastructure platforms and services of the contracting authorities. The National Digital Procurement Ecosystem represents the essential infrastructure and architecture to enable the respect and implementation of digital principles and rights, as an indispensable tool to ensure the effective implementation of the digital transition of public contracts.

Through the National Database of Public Contracts and telematic platforms, contracting entities must manage the operations related to the three-year planning and scheduling of purchases, the initiation and publication of tender documents, the

award procedure, the conclusion of the contract and the administrative and accounting operations necessary for its execution, up to the conclusion and acceptance of contracts.

Among the principles and digital rights set out - or referred to, through reference to the Code of Digital Administration, Legislative Decree No. 82/2005 - in the Code are: technological neutrality[37]; transparency[38]; the protection of personal data; IT security; single sending and unique place of publication[39]; accessibility of data[40] and information; interoperability and interconnection of databases and public platforms; and the availability of tools used by contracting stations. According to the *once-only* principle, economic operators are required to transmit their data only once to public administrations.

Finally, of particular relevance is the provision according to which, in order to improve efficiency, contracting authorities shall, where possible in relation to the type of procurement procedure, automate their activities by recourse to technological solutions, including artificial intelligence and distributed ledger technologies, in compliance with the specific provisions on this subject. Automation which, in the light of the express provision, may also concern the evaluation of tenders.

However, the provision seems susceptible to a restrictive interpretation of so-called weak artificial intelligence, in which the system is capable of managing a narrow range of parameters and situations, without exceeding the insurmountable limit, identified

[37] According to which, on the one hand, the costs associated with the operation of platforms may not be charged to competitors or the successful bidder, and on the other hand, it is forbidden to impose technologies or software with discriminatory effects or, in any case, excessively restrictive of competition.
[38] Regulated by Articles 20 and 28 of Legislative Decree No. 36/2023 in accordance with Legislative Decree No. 33/2013. The importance of which is evidenced by the obligation imposed by AGID in its Determination No. 132/2023 of 1 June 2023, which requires telematic platforms to preserve the information in the registry for at least two years.
[39] Under which economic operators are required to transmit their data only once to public authorities. Application of the *once-only principle* that will also have to be guaranteed at cross-border level, given the obligation of contracting authorities to adapt their systems to the technical and operational specifications imposed by Commission Implementing Regulation 2022/1463 for the automated cross-border exchange of evidence by 2023.
[40] Guaranteed through the compulsory use of open formats, with the consequent application of AGID's Guidelines for the *Exploitation of Public Information Assets*.

by the judges of Palazzo Spada, of performing mere arithmetic functions, however complex[41].

Moreover, the use of so-called strong artificial intelligence seems to be in contradiction with the obligation, provided for in Article 30 of Legislative Decree no. 36/2023, to guarantee both the knowability and the comprehensibility of the decision taken, according to which every economic operator has the right to be aware of the existence of automated decision-making processes concerning him and to receive significant information on the logic applied, and with the principle of non-exclusivity of the algorithmic decision, according to which a human contribution, capable of verifying, validating or refuting the automated decision, must in any case remain in the decision-making process.

6. Final remarks

The reform of public procurement law is one of the main objectives of the NRRP. Italy has committed itself to this reform, not because it is required to do so by European law, but because it has chosen to make a specific commitment to the EU. In fact, it is a "horizontal reform": that is, it is a precondition for revitalising the productive fabric, improving services to citizens and strengthening public investment.

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[41] Differently, G.R. Conforti, *Digitisation in the New Public Contracts Code,* in 2 *Internet Law* 399 (2023), considers that the new Code '*provides for the use of automated procedures in the evaluation of tenders through the introduction of learning algorithms*'. In the sense that the use of machine learning systems would be incompatible with the exercise of discretionary powers M. Simoncini, *L'agire provvedimentale dell'amministrazione e le sfide dell'innovazione tecnologica*, *Riv. trim. dir. pubbl.* 529 ff. (2021). On the other hand, absolute preclusions are not considered to exist A. Cassatella, *La discrezionalità amministrativa nell'età digitale*, in *Scritti per Franco Gaetano Scoca* (2020), Vol. I, 675 ff.; L. Parona, *Poteri tecnico-discrezionale e machine learning: verso nuovi paradigmi dell'azione amministrativa*, in A. Pajno, F. Donati and A. Perrucci (eds.), *Intelligenza artificiale e diritto: una rivoluzione?* (2022), 131 ff. According to S. Bogojević, X. Groussot & J. Hettne, *The 'Age of Discretion': Understanding the Scope and Limits of Discretion in EU Public Procurement Law*, in S. Bogojević, X. Groussot & J. Hettne (eds), *Discretion in EU Public Procurement Law* (2018), discretion is less a matter of what a Member State may or may not do and more dependent on the legal tests that the court develops and applies in relation to discretion. This shows the significance of law in debating discretion, and the need for mapping the many varieties of discretion in EU public procurement law.

In other words, the European order is no longer an external constraint, but rather an external driving force on a voluntary basis, in the sense that it does not confine itself to setting limits and/or obligations that the national legislator must implement, but rather stimulates and urges the new reform of the discipline of public procurement. All this with a view to overcoming the limitations. Neither the numerous corrective measures nor the derogations have been able to resolve these limitations.

As the Consiglio di Stato has pointed out, the new layout of the legislative text «has attempted to write a Code that tells the story of the tendering procedures, accompanying the administrations and the economic operators, step by step, from the initial planning and design phase to the award and execution of the contract»[42]. The Code's index tells this story: it starts with principles, continues with the book dedicated to the contract in all its phases and ends with remedies and self-enforcement.

The choice of codification has the value of reducing legal uncertainty, bringing order to the extravagant rules contained in the most disparate sources, and systematising a multitude of rules characterised by a high degree of detail in order to reduce the vagueness of conduct[43]. In particular, Code No. 36/2023 seeks to avoid contradictions, logical leaps, unjustified deviations and complications which often make it impossible to identify the rationale of a rule or an entire institution.

To achieve this, the new Code does not make use of what is known as the code reserve, i.e. the provision that all the rules must be gathered and systematised exclusively in the codified text. The opposite choice was made in the previous text. Article 218 of Legislative Decree No. 50/2016 provided that "any regulatory intervention affecting this Code or the matters governed by it shall be implemented by explicit modification, integration, derogation or suspension of the specific provisions contained therein". This was tantamount to an argument that there could be no regulatory provisions in the public procurement sector outside the code, with

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[42] *Explanatory Report*, 7 December 2022, 9 and 10.

[43] As M. Ramajoli, A *proposito di codificazione e modernizzazione del diritto amministrativo*, *Riv. trim. dir. pubbl.* 347 (2016), notes the modern idea of codification is a reaction to legal particularism: before the codification phenomenon, the law of Romanist countries was characterized by overabundance and fragmentation of sources and powers.

the aim of limiting as much as possible the instability due to the proliferation of regulatory sources.

This choice may also be due to an apparent recognition of the uselessness of Article 218 and, more generally, of provisions of this type, given that, in the case in point, the amendments and suspensions of the previous code discipline, especially those that occurred during the emergency phase, were so frequent that one could doubt that a "real code" still existed[44].

After leaving aside the criterion of code reservation, the legislator, in Decree-Law No. 36/2023, relies on the definition of general principles as a means of imposing from above a global vision of "how" relations between the recipient administration and the business world should be oriented. Principles can make the system simple, clear and rational because they allow any regulatory gaps to be filled by means of the hermeneutic method.

However, the desire for this type of legislative technique, which consists of recourse to general clauses, has more than one drawback when applied to the field of public contracts. It fundamentally alters the mode of jurisprudential intervention and it is the judge, operating within the elastic spaces offered by general clauses, who "directly identifies the principle, which, moreover, can almost never be traced back to an explicit and textual formulation, but must be derived from a series of indices, in a difficult balancing act with other principles, potentially

[44] C. Contessa, *Le novità del "Decreto semplificazioni", ovvero: nel settore dei contratti pubblici esiste ancora un "codice"*, *Urb. app*. 757 (2020). According to P. Bogdanowicz, *Contract Modifications in EU Procurement Law* (2021), the need for flexibility in public contracts has certainly been crucial these last years with different types of crises across the world; Covid-19, the war in Europe, and increased prices in the market, etc. In times of crisis, the need to make modifications in already established public contracts becomes more relevant than ever and thus, the topic of the contract modifications touches upon an important and highly relevant topic for public purchases. In most contractual relationships, making adjustments is necessary, but certain modifications in a public contract can lead to an obligation for the contracting authority to create a new competition for the contract and thus not all types of modifications to an existing contract are allowed. It discusses the possibilities in the EU legal regime that allow for creating modifications in existing public contracts. Thus, the focus of the book is purely on contract modification from a public procurement law perspective and does not take into account other rules that potentially could be relevant for contract modifications such as contract law.

conflicting and theoretically destined to prevail in a different factual context” [45].

It should be added that the latter, being not absolute but relative, require constant balancing and tempering with other potentially divergent principles. The comparison between outcome and access to the market, between self-organisation and competition, is compelling, as shown by the limits to reasonableness encountered when pursuing the principle of competitiveness[46]. Even those principles that are reinforced and have a fundamental value - such as result, trust and market access - must always be balanced within a broader regulatory framework. This is evidenced, for example, by the fact that the pursuit of the result must respect the principles of legality, transparency and competition.

In this perspective, the role of the judge is re-evaluated as “the guarantor of a new balance between legal regulation and the reconstruction of reality”[47]. Well, such a legislative technique, when combined with what has been called the fear of

[45] This reflection is due to N. Lipari, *Il diritto civile dalle fonti ai principî*, *Riv. trim. dir. proc. civ.* 5 (2018).

[46] Corresponds to A. Sanchez-Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*, cit. at 4, 381, «according to the most elaborated construction of the principle of competition in the procurement setting so far – developed by Advocate General Stix-Hackl in her Opinion in the *Sintesi* case – the competition principle embedded in the EU public procurement directives might seem to be multi-faceted and could potentially fulfil at least three protective purposes. First, it would be aimed at relations between undertakings themselves and would require that there exists parallel competition between them when they participate in the tendering for public contracts. Second, it would be concerned with the relationship between the contracting authorities and the tendering undertakings, in particular in order to avoid abuses of a dominant position – both by undertakings against the contracting authorities (i.e., through the exercise of market or ‘selling’ power) and, reversely, by contracting authorities against public contractors (through the exercise of buying power). Third, the principle of competition would be designed to protect competition as an institution. Finally, as a complement to the previous functions or as an expression of the competition principle, EU public procurement directives set particular rules that operationalize the competition principle in different phases of the public procurement process such as transparency rules, rules on technical specifications, provisions on the selection of undertakings and on the criteria for the award of contracts, information disclosure rules, etc.».

[47] All quotations are contained in S. Rodotà, *Ideologies and Techniques of Civil Law Reform, Riv. dir. comm.* 83 (1967).

administration - where the official is uncertain because he or she wavers between contradictory normative and jurisprudential indications - certainly does not seem capable of facilitating the good performance of the administration, but rather of slowing it down. In short, it would seem that elastic regulatory systems are not always suitable for meeting the challenge of organising an efficient expenditure apparatus, as is necessary in a country facing the NRP.

In any case, the principles must be read in the light of the Code's primary objective, which is to define a (relatively) slim text, without excessive regulatory detail, which is self-executing and which, by establishing a set of general principles, provides criteria of interpretation and general guidelines to be followed in contractual activity within a framework of trust in the ability of administrations to exercise choice. The principles allow the introduction of a core of inalienable values[48] (specific and inherent to the system). They symbolically encourage and strengthen the contracting authorities to have recourse to technical discretion and discretionary powers, leaving behind a mentality that is obedient only to formal legality[49].

Principles are used not only to justify a right that one has, but also to give relevance to a right that one would like to have. From this point of view, they offer "good reasons to support its legitimacy and to convince as many people as possible, especially those who have the direct or indirect power to produce valid rules in that system, to recognise it" [50]. The idea is that they should have a message-principle content, with the aim of symbolically encouraging and strengthening the contracting authorities to use discretion and technical scope for evaluation, leaving behind a mentality obedient only to formal legality.

From this point of view, the definition of a set of general principles can help to provide operators with criteria for

[48] According to the report, the principles have an "ordering and nomophylactic function", express "values and evaluation criteria that are immanent to the legal order" and "constitute "the legal foundation of the discipline under consideration"; they are characterised by a prevalence of deontological content in comparison with the individual rules, as well as of completeness of the legal system and guarantee of the protection of interests that would otherwise not find adequate accommodation in the individual provisions".
[49] M. Ramajoli, *I principi generali*, in C. Contessa, P. Del Vecchio (eds), *Codice dei Contratti Pubblici* (2023), 45 ff.
[50] Così in N. Bobbio, *L'età dei diritti* (1990), 5.

interpretation and general guidelines to follow in their contractual activities, within a framework of confidence in the ability of administrations to choose, even though we are in the context of a code that is "not short", but rather detailed and characterised by over-regulation.

Since it is obvious that principles have no performative value, if the proclamation of principles appears to be the result of a cultural operation, the discourse can shift to the level of effectiveness. Trust cannot be created simply because the legislator declares it. The effectiveness of such a technique can then be debated, bearing in mind, moreover, that it is essentially lacking in a sanctioning apparatus. It can certainly be argued that it is not sufficient, since past experience shows how deeply rooted mistrust of those who administer is, as much administrative regulation proves. It is also clear that other means would have to be used to achieve a system that produces results or to overcome the fear of signing. It is also true that the reference to values could be resolved in general formulae that could lead to conflicts in their application.

In conclusion, the main novelty of this administrative regulation lies in the cultural significance of the general principles. It is not a culture of doubt, as was the case with the anti-corruption regulations, but a culture of trust. "It is obvious that the more a regulation is perceived as fair and efficient, the more effective it will be, i.e. it will be able to count on the compliant behaviour of its citizens. This means that, in this way, the fiduciary element can also circulate more in legal relations, since the effectiveness triggered by legitimacy can only generate expectations of a general conformity of behaviour" [51]. Any delegation of power presupposes the confidence of the system in the subject to whom it is conferred, in order to promote the sense of belonging of the administration to the community of the State, to prevent paralysis, to increase capacity and to encourage respect for substantive legality.

In this way, the administration is empowered to refine the art of interpreting the rules by developing pragmatism and a spirit of innovation within a framework of general legal principles[52]. In addition to simplifying the procedure for selecting the contractor,

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[51] T. Greco, *La legge della fiducia. Alle radici del diritto* (2021), 104 ff.

[52] M. Ramajoli, *I principi generali*, cit. at 42, 50.

it is also necessary to simplify the phase of implementing the contract, which involves monitoring, supervising and coordinating in order to ensure that it is carried out in full, correctly and respectfully.

In short, the regulation proposed in the new Code acts as an architect of choice, deciding on a certain number of alternatives to present to the administrations, nudging them, giving them a gentle push. It leaves room for choice, it balances between several criteria, it requires more professionalism through qualification, preventing inexperienced decision-makers from being dangerous, it imposes the use of decision-supporting technologies to combine preferences with minimum effort. If this is the case, the challenge is to change the behaviour of contracting authorities in a predictable way, without prohibiting the choice of other options, but relying on mere nudging to improve the welfare of the public procurement market by orienting decisions towards efficiency objectives while respecting social needs, protection of health, environment, cultural heritage and promotion of sustainable development (including energy).