THE NEW PUBLIC CONTRACTS CODE

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Following the approval by the Italian Council of Ministers of the final text on 28 March 2023, the new Public Contracts Code (Italian Legislative Decree no. 36 of 31 March 2023, hereinafter also "the Code") was published in the Italian Official Gazette on 31 March 2023, in implementation of Article 1 of Italian Law no. 78 of 21 June 2022, by delegating matters of public contracts to the Government, as a reform promoted for the implementation of the National Recovery and Resilience Plan (PNRR).

1 INTRODUCTION

The Code reforms public contracts matters according to four main guidelines, as shown by the Illustrative Report: (i) simplification, achieved by incentivising the discretion of public administrations and facilitating greater adherence, with respect to Italian Legislative Decree no. 50/2016 (hereinafter also "the **Previous Code**"), to the relevant European directives, by removing gold plating (*i.e.,* the overburdening of domestic regulations with respect to EU regulations) wherever possible; (ii) acceleration, *i.e.,* maximum speeding up of procedures; (iii) full digitisation of procedures, and full interoperability of the databases managed by the Public Administrations; (iv) protection of both workers and companies.

In this respect, the structure of the Code is illustrative. The Code consists of five Books: Book I ("*Principles, Digitalisation, Planning, Design*"), Book II ("*Procurement*"), Book III ("*Procurement in Special Sectors*"), Book IV ("*Public-Private Partnerships and Concessions*"), Book V ("*Litigation and the National Anticorruption Authority. Final and transitional provisions*").

Unlike the Previous Code, the new Code, is "self-executing": indeed, there is no provision for referral either to guidelines or to subsequent ministerial decrees. The detailed regulation is left to the specific Annexes to such Code (for which there are as many as 36).

2 THE PRINCIPLES ESTABLISHED IN THE PUBLIC CONTRACTS CODE

The most significant innovation introduced by the new Public Contracts Code is undoubtedly the first part devoted to principles. In particular, the first three principles which are pronounced by the Code expressly establish criteria for interpreting and applying its provisions (Article 4): the principle of the result of awarding the contract and its execution as timely as possible with the best possible relationship between quality and price (Article 1); the principle of trust (Article 2), mutual trust between public officials and economic operators; the principle of market access (Article 3) of economic operators.

The ultimate purpose of these principles is to allow the regulatory framework to adapt to the changes which, over time, inevitably affect the subject matter, without having to constantly amend the Code.

In addition to the first three principles, other principles are also provided for, such as: the principles of good faith and protection of trust (Article 5); the principles of solidarity and horizontal subsidiarity (Article 6); the principle of administrative self-organisation (Article 7); the principle of contractual autonomy and the prohibition of unpaid intellectual work (Article 8); the principle of preservation of contractual balance (Article 9); the principles of mandatory grounds for exclusion and maximum participation (Article 10) and the principle of application of national sector collective bargaining agreements (Article 11).

3 THE MAIN INNOVATIONS

3.1 The principle of preservation of the contractual balance (Article 9) and the performance of the contract

The purpose of this principle was to codify a remedy for extraordinary and unforeseeable events, which could substantially alter the contractual balance, so that the contract could be preserved. A protection that does not only terminate the contract (Article 1467 of the Italian Civil Code), but is aimed at preserving the contract: the disadvantaged party, who has not voluntarily assumed the risk, has the right to re-negotiate the contractual terms in good faith, provided that certain conditions are met. A practical example such principle is the obligation to include price revision clauses in tender documents (see below). The principle in question must also guide the interpretation of the provision devoted to the "*Amendment of contracts during performance*" (Article 120). In relation to the latter provision, it is worth noting, with respect to the former Article 106 of Italian Legislative Decree no. 50/2016 (paragraphs 9 and 10), that the regulation of design error is eliminated.

3.2 Relevant European thresholds and methods for calculating the estimated amount of contracts (Articles 14 and 50 *et seq.*)

Another interesting innovation is the revision of the thresholds above which the tender obligation applies:

- for the direct awarding of services and supplies, including engineering and architectural services and design activities, to amounts below EUR 140,000.00;

- for the direct awarding of works valued at below EUR 150,000.00;

- the negotiated procedure without a call for tenders may apply with respect to works valued from EUR 140,000.00 up to EUR 215,000.00 (750,000.00 for contracts for social services and assimilated services), subject to consultation with at least five economic operators;

- the negotiated procedure without a call for tenders is provided for works valued from EUR 150,000.00 to EUR 1 million, and from EUR 1 million to EUR 5.382 million, with between 5 to 10 operators to be invited respectively.

3.3 The importance of the Single Project Manager (Article 15)

The New Code introduces the single project manager (*Responsabile Unico del Procedimento* - "RUP") for the planning, design, award and execution phases of each procedure subject to the code. It is envisaged that he may be appointed, also on a temporary basis, from among the employees of the contracting authority or the awarding body. The regulation of the activities entrusted to the RUP is contained in Annex I.2 of the New Code, which incorporates the ANAC Guidelines no. 3/2016. Alongside the RUP, so-called phase managers may be identified, who may be appointed for the planning, design and execution phases and for the awarding phase. However, the RUP shall remain liable for the obligations – and the relevant responsibilities – for the supervision, coordination and direction save for those tasks and responsibilities relating to the individual phases for which the so-called phase managers are responsible (Article 15(4)).

Lastly, the role of training is developed, in accordance with the programme for the procurement of goods and services and the programme for public works, by requiring contracting authorities to adopt the specialised training plan for their staff who perform functions relating to procurement procedures (Article 15(7)).

3.4 The simplification of the design (Article 41)

Another example of its simplification can be found in the structuring of the design. Under the New Code, with respect to the design of works, the previous three levels are reduced to two: the technical-economic feasibility project and the executive project.

It is also planned to set up a special committee at the Higher Council of Public Works in order to specifically examine these projects and a mechanism to overcome qualified dissent in the services conference through the approval by a decree of the President of the Italian Council of Ministers.

3.5 Integrated procurement (Article 44)

Again with regard to works design, the so-called integrated contract is deregulated. This was previously prohibited by Article 59 of Italian Legislative Decree no. 50/2016, albeit with the exceptions provided for by the various emergency decrees.

Moreover, under the new Code, with the exception of the awarding of contracts for ordinary maintenance works, it is possible for the contracting authority or the qualified awarding body to stipulate that the subject matter of the contract shall concern the executive design and execution of the

works on the basis of an approved technical-economic feasibility project that is submitted as the basis for the tender.

3.6 Price Review (Article 60)

Article 60 of the New Public Contracts Code deals with the regulation of price review, providing for the mandatory inclusion of price review clauses in the initial tender documents for award procedures. In particular, these clauses (i) must not make changes that alter the general nature of the contract or framework agreement; (ii) are triggered upon the occurrence of special objective conditions, which lead to an increase or decrease in the cost of the work, supply or service of more than 5% of the overall amount; (iii) operate up to 80% of the cost change, in relation to the services to be performed. In order to determine the change in costs and prices, synthetic indices of price changes elaborated by the Italian National Institute of Statistics (ISTAT) are used.

3.7 Subcontracting (Article 119)

With reference to subcontracting, the quantitative limits have been eliminated, as well as acknowledging the observations made by the Court of Justice of the European Union and the European Commission with reference to the so-called cascading subcontracting (*i.e.* the prohibition of any limitation on the theoretical use of this instrument, irrespective of assessing the capacities of any subcontractors and without any reference to the essential nature of the tasks). Indeed, Article 119(17) of the Code provides that administrations are obliged to indicate in the tender documents the services or works covered by the contract which, although subcontracted, cannot be subject to further subcontracting, due to the specific nature of the contract and the need, taking into account the nature or complexity of the services or works, to strengthen the control of the worksite activities or to prevent the risk of criminal infiltration.

3.8 Procurement in the special sectors (Articles 141-158)

In general, the approach of the new Code tends to grant the special sectors (gas and thermal energy; electricity; water; transport services; ports and airports; postal services; gas extraction and exploration or mining of coal or other solid fuels) even greater autonomy.

The Legislator, in implementing EU-based obligations and in incorporating case law guidance: (i) establishes that public undertakings and individuals holding special or exclusive rights are to apply the provisions of Book III with the restriction that they must be instrumental to one of the activities provided for by Articles 146 – 152 of the Code; the instrumental nature, moreover, is to be understood to be strictly functional (Article 141(2)), in line with case law guidance and (ii) removes the obligation to apply the provisions of Book III to public undertakings and individuals holding special or exclusive rights (Article 141(5)).

Moreover, Article 141(3), provides for an analytical identification of the provisions of the Code that are to be applied; the intention, as is clearly explained by the Illustrative Report (pages 188 *et seq*.), is to overcome the critical issues pertaining to the reference "as far as compatible" that had characterised Article 114 of the Previous Code.

In addition, it is provided that public enterprises and individuals holding special or exclusive rights are entitled to: a) set up and manage qualification systems for economic operators, b) provide for rules for adapting the functions of the RUP to their own organisation, c) specify the concept of changes underway

on the basis of the specific requirements of the market in question and the characteristics of each sector, in accordance with the principles and rules of EU law.

3.9 The public-private partnership (Article 174 *et seq.*)

One of the most relevant aspects of the reform of the Contracts Code is the treatment reserved for the public-private partnership (PPP) in Book IV, understood as a category within which concessions, leasing, availability based-contracts and similar agreements are accommodated.

The regulation of PPPs undergoes a fundamental change: the search for a complex definition of a contract regulated by statute is abandoned, and PPPs are generically defined as "economic transactions"; the latter term encompasses both contractual public-private partnerships and institutional public-private partnerships.

The practical characteristics that the economic transaction must actually have in order to qualify as a public-private partnership were highlighted: the establishment of a long-term contractual relationship; the coverage of financial requirements relating to the realisation of the project must largely stem from financial resources provided by the private party; the private party, due to the (necessary) undertaking of the operational risk, is responsible for implementing and managing the project, while the public party is responsible for setting targets and verifying their implementation.

One of the main new features, with reference to the planning tools, is the adoption of a three-year programme of public needs capable of being met through forms of public-private partnership; with reference to the system of controls and monitoring, the latter is entrusted to the Presidency of the Italian Council of Ministers, which exercises it through access to the portal on the monitoring of public-private partnership contracts set up at the Italian State General Accounting Department.

3.10 Rules governing the takeover of the concessionaire and the revision of the concession agreement (Article 192)

The new Code reforms not only the public-private partnership, but also concessions, the provisions of which, contained in Part II, Book IV, faithfully reflect the content of the relevant EU directive (2014/23/EU).

The procedures for the awarding of concession contracts by concession awarders are regulated, as well as the execution phase (Article 176(1)). It is also specified that the provisions of this part also apply to concessions of services of general economic interest (SGEI).

This is without prejudice to the fact that the legal framework of the Code only partially regulates the issue of public services: with respect to matters pertaining to economic regulation, for example, the Consolidated Law on Local Public Services of Economic Significance (Italian Legislative Decree no. 201/2022), a complementary regulation to that of the Code, will apply.

It should also be noted that EU regulations enables special accounting benefits for partnership transactions: Member States, under certain conditions, may opt not to classify the relevant costs as public debt.

More specifically, the public administrations are entitled to record the assets covered by the transactions in question as off-balance sheet accounts, provided that there is a substantial transfer of the risk borne

by the private party; in this regard, under the EU law approach, the feasibility of the option envisaged is subject to certain qualitative, and not quantitative, requirements being met (with respect to the - necessary - economic balance).

Article 165(2) of the Previous Code, on the other hand, provided for a strict quantitative limits in order to achieve the aforementioned balance: the Public Administration could also set a price, the value of which could not exceed 49% of the cost of the overall investment.

The Code abandons this approach.

Reference is clearly made, for public accounting purposes, to the contents of the Eurostat decisions. Any acknowledgement of a public contribution that exceeds the percentages specified in the decisions does not allow for off-balance sheet accounting (Article 177(7) of the Code), it being understood that, if the conditions for the contractual case are met, the economic transaction may be qualified as a concession for the purposes of applying the relevant regulations.

3.11 Project finance (Article 193)

The new Code deals with project financing in Part II of Book IV on concession agreements. Unlike the legal framework under the Previous Code, only the private initiative procedure is provided for in the Code, thereby eliminating the legal framework of public initiative project financing.

First of all, it is worth noting that, unlike the Previous Code where there was the option of setting up a project company, the Code provides that, for the awarding of concessions above the European threshold through project financing, the tender notice must stipulate that the successful bidder must incorporate a special purpose company in the form of a joint-stock company or limited liability company, including a consortium (Article 194(1).

Secondly, in order to encourage the participation of institutional investors in public-private partnership transactions, the previous obligation for institutional investors to associate themselves with qualified planners already at the presentation phase of the project is eliminated, and it is provided that the institutional investors, if they do not meet the requirements of the call for tenders, may associate or consort with operators that meet the requirements in the subsequent phase of the tender.

Lastly, the references to recreational boating were removed, as well as the clarification that economic operators could submit proposals even if they were included in the planning documents approved by the contracting authority on the basis of the applicable regulations, without prejudice to their ability to submit proposals both with reference to initiatives which are not included in the planning documents, and with reference to initiatives which are included in the planning documents, but which propose different implementation methods.

3.12 What are the rules regarding the National Recovery and Resilience Plan (PNRR)?

Article 225(8) of the new Code provides that the provisions of Italian Decree-Law no. 77 of 31 May 2021, converted, with amendments, by Italian Law no. 108 of 2021, as well as the specific legislative provisions aimed at simplifying and facilitating the achievement of the objectives set forth in the National Recovery and Resilience Plan (PNRR) and National Plan for Complementary Investments (PNC), shall apply to the awarding and contracting of PNC and PNR projects and the related supporting infrastructures, also after 1 July 2023.

4 THE TRANSITIONAL REGIME

The Code entered into force, with its annexes, on 1 April this year, but the provisions shall take effect on 1 July (Article 229).

As from 1 July, the provisions of Italian Legislative Decree no. 50/2016 shall apply to ongoing proceedings, as defined in Article 226(2) of the Code.

Conversely, part of the provisions on digitisation shall take effect as from 1 January 2024, in order to enable administrations to adapt themselves to the new procedures.

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