2023 Rule of Law Report - Virtual Country visit to Italy – Anti-corruption Agency (ANAC)

1. **Could you please elaborate about the main objectives the new National Anti-Corruption Plan for 2022-2024? What are the novelties and improvements compared to the previous one? Have the three-year Corruption Prevention and Transparency Plans 2023/2025 been approved/adopted?**

ANAC on January 17, 2023 adopted Resolution no. 7 containing the new National Anti-Corruption Plan 2022 (PNA), that will be valid for the next three years.

The PNA has been drafted in light of the recent reforms introduced with the Resilience and Recovery Plan and the regulation on the Integrated Plan of Organization and Activities (PIAO). It is aimed at strengthening public integrity and the planning of effective corruption prevention measures in public administrations, while also simplifying and speeding up administrative procedures.

Comparing to the previous PNA, the **PNA 2022 is divided into two parts**.

The **general part** contains indications for the preparation of the Integrated Plan of Activities and Organisation (IPAO), which was introduced by Law Decree no. 80 of 9 June 2021, the decree issued to implement the National Recovery and Resilience Plan (NRRP) public administrations are called upon to adopt. The IPAO defines 'the tools and steps needed to achieve full transparency of the results of administrative activity and organisation as well as the objectives in the fight against corruption,

The guidelines are aimed at supporting the Integrity Officers in their role as coordinators of the corruption prevention strategy and cornerstones of the link between the prevention of corruption and the other IPAO sections. With reference to the mapping of the risk processes, the PNA provides information on priorities when identifying measures for the prevention of corruption (first of all, those in which NRRPresources and structural funds are involved and those linked to performance objectives); emphasis was placed on the need to focus on the **quality of the anti-corruption measures planned rather than on the quantity**, in view of the fact that in some cases such measures are redundant. Indications were, also, provided for good monitoring of what has been planned, and for the coordination between the Integrity Officer and those within the administrations who manage and control the resources of the NRRP.

The **special part is dedicated to public procurement**, with priority attention to interventions financed with resources from the National Recovery and Resilience Plan (NRRP). The Authority has offered the contracting authorities assistance in identifying mechanisms and tools to anticipate and/or control corruption events.

Given that the prevention of corruption and transparency are tools for the creation and protection of public value, the PNA provides guidelines for linking and coordinating the various planning tools that are now part of the PIAO, focusing on some specific integration profiles.

With reference to the mapping of risk, the PNA provides **information on priorities when identifying measures** for the prevention of corruption (first of all, those in which NRRP resources and structural funds are involved and those linked to performance objectives); emphasis was placed on the need to focus on the quality of the anti-corruption measures planned rather than on the quantity, in view of the fact that in some cases such measures are redundant. Indications were, also, provided for good monitoring of what has been planned, and for the coordination between the Integrity officer and those within the administrations who manage and control the resources of the NRRP.

2. How does the work under the National Plan relate thematically to the three-year Corruption Prevention and Transparency Plans 2023/2025?

In accordance with the provisions of Law No. 190 of 6 November 2012 'Provisions for the prevention and repression of corruption and illegality in the public administration', ANAC adopts National Anti-Corruption Plan (PNA), which provides guidelines and operational addresses to public administrations and other entities required to comply with the legislation on the prevention of corruption, to assist them in drafting their own three-year Corruption Prevention and Transparency Plans.

Each Public administrations has to identify its degree of exposure to the risk of corruption and to indicate the measures aimed at preventing the risk.

3. How would you evaluate the level of ANACs human and financial resources to ensure proper coordination between the National Anti-Corruption Plan and the autonomous anti-corruption strategies of other public bodies?

Q. Human resources: we understood during the country visit that ANAC is expecting an increase in staff of 28 to help it in its tasks under the National Anti-corruption Plan including its tasks under the whistleblower protection law. Can ANAC confirm that we understood correctly and that this is the right figure?

For the purpose of strengthening the institutional tasks of ANAC, in particular with reference to the provisions of the NRRP concerning the digitalisation of the procedures for awarding public works, services and supply contracts, the Authority has been authorised to hire permanent staff, with a corresponding amendment of the existing staff complement, up to a

maximum of twenty-eight units, (twenty-five officials and three clerks, to be classified at the initial level of the reference position).
With the transposition of the whistleblower directive, an equal number of recruitments are envisaged (28 in total).

Although ANAC receives funds from the State budget and it is bound to financial restrictions and audit, the Authority obtains most of its resources through self-financing. In Italy, in order to participate to most of public procurement procedures, both the contracting party and the contractors must purchase a "tender identification code" that goes to ANAC. This mechanism covers most of the Authority's expenses (almost 90% of its budget), through market-based source.

4. **Are there any plans or debates on extending ANACs competence to other relevant anti-corruption prevention areas (beyond public procurement), such as, for instance. political party finance, the infiltration of organised crime into the licit economy, high-level corruption?**

ANAC has been called upon to play a fundamental role in the implementation of the process digitalization and simplification of public contracts, to be achieved through the implementation of the National database of public contracts, the implementation of the virtual file of economic operators, the qualification of contracting authorities in terms of procurement capacity and the monitoring of expenditure public expenditure, as well as the implementation of a strengthening of anti-corruption and transparency, through the establishment of the Single Transparency Portal.
It should be also emphasized that the Italian National Anti-Corruption Plan is drawn up by the Anti-Corruption Authority in close collaboration with the competent Ministries, the main stakeholders, the other state and local administrations competent in the various sectors and areas affected by the Plan as well as the CSOs.
Moreover, ANAC made great efforts to have the European whistleblowing directive transposed into Italian law and cooperated with the Ministry of Justice to draft the transposition text.

5. **In view of the recommendations in the 2022 Rule of Law report concerning conflict of interests rules, lobbying and political party financing, could you elaborate on developments in this regard and outline any challenges in the prevention of corruption that persist or became apparent in 2022-23, including on:**
    a. Conflict of interests;
    b. Revolving doors, including on the outcomes of your call on the government to improve legislation;
    c. Asset declarations and verifications;
    d. Whistleblower reporting/protection;
    e. Public procurement
    f. Political party and campaign finance.

Conflict of interests

The general rules on conflicts of interest are of particular relevance to the prevention of corruption. The Italian legislator has intervened by means of provisions within both the law on Code of Conduct for public employees, and in the Administrative Procedure Act in which the obligation for the employee/proceedings manager to communicate the conflict situation and to abstain (Artt. 6, 7 and 14, Presidential Decree no. 62/2013; art. 6-bis, Law. no. 241/1990; PNA 2019, Part III, § 1.4).

The second part of the PNA devotes particular attention to the regulation of conflict of interest in the area of public contracts (Article 42 of Legislative Decree 50/2016), a sector particularly exposed to risks of corruption. In addition to clarifications on the subjective and objective scope of the law provisions, concrete measures to be taken in anti-corruption planning in the field of contracts are provided together with a template declaration to identify possible conflict of interest scenarios in advance.

ANAC has deemed it appropriate to provide a list of data and information useful for each administration's drafting of its own self-declaration model. The template is to be considered an example and not exhaustive, as it does not take into account the specificities of the administration, the reference sector and the type of procedure. Therefore, it is recommended that administrations supplement it or modify it according to their own particularities. In order to draw up the model, four macro-areas were identified for attention: 1. Past professional and work activity 2. Financial interests 3. Personal relations and relationships 4. Others.

As to the validity of the self-declaration, for the Project Manager and tender Commissioners, this is intended for the duration of the individual tender procedure and until the conclusion of the contract, being necessary to produce and acquire a new declaration in the event of a new tender. The declaration has to be updated for each tender and by all subjects taking part in the procedure in case it implies the use of PNRR resources and structural funds.

Article 1, paragraph 2 of Legislative Decree No. 39 of 8 April 2013 provides some important definitions such as:

- letter g): '***Non-conferrable status*** ' is the permanent or temporary preclusion from holding the offices provided for in this decree for those who have been convicted of criminal offences provided for in Chapter I of Title II of Book II of the Penal Code, for those who have held offices or positions in private law entities regulated or financed by public administrations or have carried out professional activities in favour of the latter, and for those who have been members of political bodies;
- letter h): **"*Incompatibility*** " is the obligation for the person to whom the office is conferred to choose, under penalty of forfeiture, within the peremptory term of fifteen days, between remaining in office and taking up or holding offices and positions in private law entities regulated or financed by the public administration that confers the office, or carrying out professional activities or becoming a member of political bodies.

'Non-conferrable status and incompatibility both aim at guaranteeing the impartiality of public officials, avoiding any improper influences that may come from the political sphere and the private sector.

A bill containing provisions on conflicts of interest of holders of state, regional or local government offices, as well as the president and members of independent guarantee, supervisory and regulatory authorities (A.C 304, presented on October, 13, 2022) is under discussion at the Parliament. The bill provides a delegation to the Government to adapt the regulations on local government office holders and members of independent guarantee, supervisory and regulatory authorities, as well as provisions concerning the prohibition of foreign payments by holders of public office.

Lobbying

On lobbying, no legislative developments have been introduced since the last edition of the rule of law report.

With regard to the transparency of political party financing, the definition of a regulation aimed at greater transparency of political parties has been the subject of parliamentary debate for several parliamentary terms.

Law No. 3 of 9 January 2019 introduced measures for the transparency of political parties and movements and foundations, with particular reference to their funding. Subsequently, Decree-Law 34/2019 intervened on the matter, mainly to redefine the transparency obligations placed on political foundations.

Pantouflage

is disciplined by paragraph 16-ter of Article 53 of Legislative Decree No. 165/200144 which applies to cases of **transfer from the public sector to the private** sector following termination of service. In the PNA an in-depth study was carried out on the prohibition of pantouflage, a hypothesis of conflict of interest to be framed as a subsequent incompatibility, pursuant to Article 53, para. 16-ter, Legislative Decree No. 165/2001.

In order to ensure compliance with the provision on pantouflage, the PNA recommends that administrations take appropriate measures to prevent this phenomenon that could be included both in the PIAO's anticorruption and transparency section or in the Anticorruption and transparency Plans and in the Codes of Conduct. Consideration could be given to proposing the inclusion within the Code of Conduct of a duty for the employee to sign a declaration within a certain period deemed appropriate by the administration (e.g. three years before leaving the from the service), by which the employee acknowledges the rules on pantouflage and undertakes to respect this prohibition. In the opinion of the Council of State, ANAC as the body responsible for ensuring compliance with the measures of prevention of corruption and transparency, shall ascertain the nullity of the contracts signed by the parties and impose the consequent measures. Lately, the Court of Cassation, in its recent decision of 25 November 2021 has confirmed ANAC's supervisory and sanctioning powers on the subject of pantouflage.

ANAC is going to adopt guidelines on pantouflage.

Whistleblowing

In Italy the European directive was recently transposed by legislative decree no. 24 dated 10 March 2023. The new legislation has a wider and more general scope and will be applied to all legal entities with at least 50 employees in the private sector, irrespective of the nature of their activities (by 2023). The legislative decree, in line with Article 2, paragraph 2 of the Directive, extends the reporting power to the violations of national law in addition to the violations of EU law in certain sectors.

In terms of protected individuals, the new regulation applies not only to whistleblowers covering the position of employees, self-employed workers, shareholders and board members, but it applies also to volunteers and trainees and all the individuals connected to the whistleblower, such as colleagues, relatives and any legal entity associated with the whistleblower. In addition, reports can be submitted: a) when the working relationship has not yet begun, if the information on violations have been acquired during the selection process or in other pre-contractual phases; b) during the trial period and, c) after the termination of the employment relationship, if information about the violations were acquired during the employment relationship.

Internal reporting is encouraged as the first line of reporting. ANAC has been indicated as the competent Authority for external reports, already envisaged by law no. 2179/2017, also for the private sector. External reporting and public disclosure are allowed under certain conditions, for the whistleblower to benefit from the protection provided for by the decree: when a previous internal and external reporting has been made and adequate follow-up was not given within the terms provided therein; or when the report has not been made because the whistleblower had reasonable grounds to believe that the violation may represent an imminent or obvious danger to the public interest (for example: emergency situation or risk of irreversible damage); or, again, when the reporting person has reasonable grounds to believe that internal or external reporting may involve a risk of retaliation or may be ineffective given the circumstances of the case (for example, the risk that evidence may be concealed or destroyed; that an authority is colluding with the infringer or involved in the infringement).

It is also established, as a general principle, that information on infringements cannot be used or disclosed, except to follow up on them, where necessary and the identity of the whistleblower cannot be revealed or divulged without her/his express consent to persons other than those competent to receive or follow up on the report.

The legislative decree acknowledges the importance of the Italian NGOs that provide legal and psychological support of whistleblowers. ANAC will sign MoUs with those entities in an effort to coordinate their work with ANAC's activities towards provide information to whistleblowers and training to public and private sector employees.

In terms of protection from retaliation, the legislative decree re-affirms the principle of the reversal of the burden of proof: the employer shall give evidence that the alleged retaliatory actions or omissions have no casual connections with the reporting activity.

In line with the powers already exercised, ANAC shall apply administrative sanctions when it ascertains that:

1) retaliation has occurred;

2) the reporting activity has been obstructed or an attempt has been made to obstruct it;

3) the obligation of confidentiality has been violated;

4) reporting channels have not been established, or reporting procedures have not been adopted or that the adoption of such procedures does not comply with those referred to in the legislation;

5) the verification and analysis of the reports received has not been carried out.

The Italian Council of Ministers has approved the legislative decree transposing EU Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law and laying down provisions concerning the protection of persons who report breaches of national laws.

The whistleblowers protection has been extended to who report violations of national and European regulations to the authority: the protection of whistleblowers in addition to civil servants will also cover collaborators, consultants, volunteers or trainees, as well as work colleagues of the reporting person who have a regular relationship with him/her. Not only that. The boundary of what is considered retaliation against the whistleblower is extended.

Public procurement

On 1 April 2023, Legislative Decree 31 March 2023, No. 36 entered into force in Italy as the new Public Procurement Code (the Code) which will apply to new public tenders from 1 July 2023 onwards.

The **new Code** moves from **two cardinal principles**, established in the first two articles:

1. the "**principle of the result**", understood as the primary public interest of the Code itself, which pertains to the assignment of the contract and its execution with the utmost timeliness and the best relationship between quality and price in compliance with the principles of legality, transparency and competition;
2. the "**principle of trust**" in the legitimate, transparent and correct action of the Public Administration, its officials and economic operators.

Among the main innovations introduced:

- ✓ **Digitalization becomes the "engine" to modernize the entire system of public contracts** and the life cycle of the contract. A "national digital procurement ecosystem" is defined, the pillars of which are identified in the National Public Contracts Database (BDNCP), in the virtual file of the economic operator, just made

operational by the ANAC, in the digital procurement platforms, in the use of automated procedures in the life cycle of public contracts;

- ✓ Significant impetus is being given to the **planning of priority infrastructures**. The list of priority works is expected to be included in the Economic and Financial Document (DEF), following a comparison between the Regions and the Government; reduction of design deadlines; the establishment by the Superior Council of Public Works of a special committee specifically dedicated to examining these projects; a mechanism for overcoming qualified dissent in the conference of services through the approval by decree of the President of the Council of Ministers; the parallel evaluation of the archaeological interest;
- ✓ I**ntegrated contract** becomes possible without the prohibitions foreseen by the old Code. The contract may therefore have as its object the executive design and execution of the works on the basis of an approved technical-economic feasibility project. Contracts for ordinary maintenance works are excluded;
- ✓ **Procedures below the European threshold** are adopted on a permanent basis, envisaged for direct assignment and for negotiated procedures in the so-called "COVID-19 simplifications" decree (legislative decree n. 76/2020). Exceptions are envisaged, with the application of the ordinary procedures envisaged for the above-threshold, for the award of contracts that present **certain cross-border interest**. The **principle of rotation** is established according to which, in the hypothesis of a negotiated procedure, it is forbidden to proceed directly with the award of a contract to the outgoing contractor. ANAC has expressed its opposition to raising thresholds that do not oblige the contracting authority to carry out a competitive comparison of operators.
- ✓ **General contractor** is reintroduced;
- ✓ In the **public-private partnership** the regulatory framework is simplified, to make it easier for institutional investors to participate in tenders for the assignment of projects. Additional guarantees are envisaged in favor of the lenders of the contracts and **the right of first refusal** for the promoter is confirmed;
- ✓ **Cascade subcontracting** is introduced by adapting it to European legislation and jurisprudence through the provision of discretionary evaluation criteria by the contracting authority, to be exercised case by case;
- ✓ For **concessionaires chosen without a tender**, the obligation is established to subcontract between 50 and 60 per cent of the works, services and supplies to third parties, however this obligation does not apply to special sectors (railways, airports, gas , light);
- ✓ For the **execution phase**, the contractor has the right to request, before the conclusion of the contract, the replacement of the deposit or surety with withholding guarantees on the progress. In the event of judicial liquidation of the economic operator after the award, there will not automatically be forfeiture but the contract can be stipulated with the curator authorized to run the business, with the prior authorization of the delegated judge;
- ✓ The strengthening of the **supervisory powers of the ANAC** is foreseen.

Q. The National Anti-corruption Plan (2023-2025) recognises the nexus between anti-corruption and anti-money laundering measures in that there is an obligation for public bodies to identify the beneficial owners of companies participating in tenders for contracts and a declaration of absence of conflict of interest. ANAC manages the National Database of Public Contracts (BDNCP) which can collect and keep up to date the information on beneficial owners for economic operators. An Ultimate Beneficial Ownership Register was set up in June 2022 which we understand was done in the context of the implementation of the anti-money laundering legislation.

- **In that regard, what is the relationship between the BDNCP and the Ultimate Beneficial Ownership Register?**
- **How are they the same/different?**
- **Are they technically interconnected?**
- **Who can access these two databases and for what purposes?**
- **Does ANAC have any other information to share in general concerning the interconnection of registries that hold financial and other related information (in reference to the recommendation in the 2022 Rule of Law Report concerning the interconnection of registries to help improve the fight against corruption)?**

In Italy, in public procurement, the problem of controls on the beneficial owner of the companies participating in the tenders has always arisen. The register of beneficial owners is kept by the Chambers of Commerce.

The NRRP provides precise obligations regarding the beneficial owner and the Ministry of the Interior with the decree of 22 November 2022 has made the implementing bodies aware of the methods that must be used to identify the beneficial owner. At the moment, although established, the register does not seem to be effectively implemented.

The new Code does not provide for the obligation, for the economic operator participating in the tender, to declare the beneficial owner; consequently this omission does not fall within the meaning of art. 94 of the new Code, among the causes of automatic exclusion.

Once the beneficial owner information is available, it can be quickly acquired in the BDNCP through the interconnection system. Access could be provided to contracting authorities and SOAs for the purpose of verifying the requirements for economic operators.

As far as the interoperability of the database with other databases is concerned, the main ones are the criminal records (individuals and companies), tax and social security databases for tax and contribution regularity, income data, balance sheets, etc. all with the aim of feeding the so called “Virtual company dossier” that is a powerful tool to guarantee the once-only principle of data release for the participation to public tenders. In addition, it is possible to have the access to electronic invoicing data and other information at the Ragioneria Generale dello Stato.