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TRANSPARENCY AND DIGITAL TECHNOLOGIES IN PUBLIC PROCUREMENT DURING THE PANDEMIC

ABSTRACT. In the fight against the pandemic, the Italian Government adopted strong simplification measures of the Public Procurement system, with the purpose of ensuring the quick delivery of essential goods and services and in the hope of avoiding the stop of many relevant economic activities. These measures simplified the procedure for Public Tenders by eliminating some controls and disclosure obligations. Yet these measures brought out a trade-off between transparency and simplification that damaged the possibility of democratic control over public action. E-procurement 2.0 could make it possible to overcome this trade-off. The article will start with the analysis of the principle of transparency and its difference with inferability, it will then analyze the Italian governance through the pandemic and touch on the new e-procurement systems as a possible solution to the lack of inferability of public action.

CONTENT. 1. Introduction – 2. The transparency discourse – 3. The Italian governance during the pandemic – 4. E-procurement 2.0, a possible solution

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1. *Introduction*

The outbreak of the pandemic caught the Italian administration off guard, highlighting the weakness of the health system and of the entire universe of public procurement. The Government introduced several reforms aimed at addressing the emergency, providing a series of urgent and temporary measures. After two years of state of emergency, the constant uncertainty regarding the evolution of the pandemic has led the Government to provide several extraordinary measures, whose effectiveness has been extended over time. The Government promulgated many law decrees¹ (almost all subsequently converted into laws by the Parliament) enacting exceptions or suspensions of some of the rules set out in the Procurement Code. These had the common goal of simplifying and streamlining public procedures in order to avoid the block of the public procurement system and therefore allow the immediate supply of services and materials necessary to fight the pandemic. The Italian Government chose to achieve these objectives by relying strongly on simplification and urgent legislation which, however, occurred to the detriment of transparency and security².

The weakening of disclosure requirements within tender procedures and the use of emergency procedures, aimed at reducing bureaucracy and procedural delays, constitute a strong obstacle to transparency as a principle of democracy³, not allowing full inferability of the procedures and preventing widespread control by civil society.

The emergency legislation showed a massive trade-off between transparency and simplification: while transparency, as openness and inferability, increases bureaucracy, and thus slows down public administration, simplification speeds up public action removing controls and publication disclosures. However, the relationship between these

¹ As will be explained, Italy can use decrees also for legislative purpose in case of special emergency. The decree is adopted by the Government and must be converted in a law by the Parliament within five days. Law decrees and legislative decrees are two different tools that the Constitution provides to the Government for legislative purposes. While the first can be enacted by the Government and only later approved by the Parliament, in cases of emergency, the second needs a specific law that legitimates the Government to legislate on specific matters under specific principles.

² Cfr. E. CARLONI, *La trasparenza come risposta all'emergenza*, April 26th 2020, in <<https://www.anticorruzione.it/>>.

³ M.A. SANDULLI, *accesso alle notizie e ai documenti amministrativi*, in enciclopedia del diritto, 2000.

two principles is not necessarily one of contradiction or conflict. Transparency and simplification can be reconciled through e-procurement and new ITC technologies, which would allow access to a multitude of large-scale data (big data) already indexed, or processed, thus allowing both a transparent and effective and fast administration, since many of the bureaucratic steps in the tender procedures can be carried out directly by the software.

Moving from the pandemic experience, this article will try to stress two points: what is the relationship between simplification and transparency? If simplification is meant to clarify administrative procedure why it doesn't always lead to a better transparency? and second, how the emergency rules in public procurement had scarified transparency?

In this sense, the drive towards computerization 2.0 pushed for by the recovery plan can be seen as a decisive solution.

2. *The transparency discourse*

Transparency is a principle fostering impartiality and good administration⁴, it is the base of the administration activity and can be defined as a «a real and proper Government fundamental value that expresses the behaviour that Public Administration has to adopt. It is a goal to reach, especially if we think of public administration as a tool to serve the community, expression of the community rather than an expression of a higher power»⁵. In other words, transparency must guarantee inferability of the activity of the Administration to all citizens⁶.

At a European level, due to the lack of legitimacy of the European Institutions, openness has gradually become the 'guiding principle' of the functioning of the EU

⁴ Cfr. A. ALOIA, *Open Government, tra digitalizzazione e trasparenza della PA*. 2014, in <<https://www.diritto.it/open-government-tra-digitalizzazione-e-trasparenza-della-pa/>>.

⁵ SANDULLI, *Codice dell'azione amministrativa*, Giuffrè, Roma, 2010, p.89.

⁶ C. HOOD, *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?*, *West European Politics*, no. 2010, pp. 989-1009.

machinery and a foundation of democracy in the Union⁷. Starting from a few decisions of the Court of Justice, the principle is now enshrined in Article 1 TEU regarding the decision-making process, which has to be taken «as closely as possible to the citizen», and in Article 15 TFEU that states that all the EU's institutions «shall conduct their work as openly as possible».

The principle was initially enshrined by European rules on fair competition, that aim at protecting equality conditions among the bidders on public tenders. These entailed publishing all information related to any stage of the administrative proceeding, demonstrating that under this meaning transparency equates to openness of the proceeding. However, the extension of the principle evolved into an instrument of good governance.

In the Italian legal system, nudged by European law, transparency originated from the principle of good performance and impartiality, thus the principle of openness must be applied not only on the administrative structures, but also on public function and on the exercise of Public Power⁸. Indeed, the two principles reflect two aspects of openness: good performance requires the Public Administration to counteract inertia in adapting to new techniques and tools that can facilitate and improve the efficiency of public action; in this sense, the principle of good performance requires the establishment of an updated and efficient administration; impartiality, on the other hand, refers as openness as inferability of public action.

In the Italian Constitution, transparency is not expressly mentioned. The only reference is in article 97, stating that public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration. The actual principle of transparency is the result of a long and important evolutionary process starting in 2005, when a law⁹ set transparency as a basic principle of public

⁷ A. ALEMANNI, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, European Law Review, HEC Paris Research Paper No. LAW-2013-1003, <<https://ssrn.com/abstract=2303644>>.

⁸ G. CORSO, *Manuale di diritto amministrativo*, Giappichelli, Torino, 2013.

⁹ Law February 11th 2005 no. 15, entitled «Amendments and additions to the law of 7 August 1990, no. 241, concerning general rules on administrative action», explicitly introduces the principle of transparency into the law on the procedure prior to the regulatory intervention, the principle had already been abundantly recognized by

action; in 2007, a decree provided for specific publication requirements on educational offer that university has to follow¹⁰; in 2009, a law modifying the administrative proceeding legislation identified access as a general principle of administrative activity, «in order to encourage participation and ensure impartiality and transparency»¹¹; finally, the same law¹² provided an openness requirement for every group of Public Administration to publish on the website a minimum amount of information related to the structure and functions of the public office¹³.

With a more specific focus on public tenders, the legislation implementing directives 2004/17/EC and 2004/18/EC¹⁴ establishes that public administrations must comply with the principles of «economy, effectiveness, timeliness and correctness; the assignment must also comply with the principles of free competition, equal treatment, non-discrimination, transparency, proportionality, as well as that of advertising in the manner indicated in this code», making the principle mandatory for the contracting authority. The last step in this long journey is the raise of ICT technologies and big data. New legislation adopted in 2013¹⁵ aimed at improving transparency with the use of ICT technologies and at finally achieving a complete transparent administration. The decree led Italy into a new era foreseeing the publication of more and more information on administration web site.

Nevertheless, more information available does not necessarily mean greater

univocal jurisprudence, as there was no specific reference in the Constitution.

¹⁰ Article 2 of the Decree of the Minister of Education, University and Scientific Research of October 31st 2007, n. 544.

¹¹ Article 10 of the Law June 18th 2009, n. 69, modifying art. 22 of law no. 241/1990.

¹² Article 21 of the Law June 18th 2009, n. 69.

¹³ More specifically the article statue: the annual salaries, curricula vitae, e-mail addresses and telephone numbers for professional use of municipal and provincial managers and secretaries as well as to make public, with the same means, the rates of absence and greater presence of personnel, separated by managerial level offices “as well as to make public” a) an indicator of one’s average payment times relating to purchases of goods, services and supplies, called “timeliness indicator payments”; b) the average times for defining the procedures and providing the services with reference to the previous financial year.

¹⁴ Art. 2 of the legislative decree April 12th 2006, n. 163 Code of public contracts relating to works, services and supplies

¹⁵ Legislative decree March 14th 2003 no. 33, known as «the transparency decree».

transparency¹⁶. The more information we have the less we are able to analyse and understand it; the more information is available the less we will easily select the information we need, the less we will be able to distinguish which notion is important and which notion we need¹⁷. In this sense, openness is different from inferability¹⁸. While the first implies visibility as complete and easy identifiable info¹⁹, the second leads to a deep comprehension of the decisional mechanism of authority power that improves the accountability of public administration and leads to good administration. In other words, openness is a mere factual state of the act, organization, or procedure, while transparency in the sense of inferability is clarity and comprehensibility of the administrative action²⁰ that can be used to draw accurate conclusions.

In too many cases, the legislator has improved transparency as openness, undermining the importance of inferability, which has the advantage of legitimizing public action and allowing a widespread public control of the administrative actions.

In this regard, transparency has different implications: by allowing a widespread control on the administration, it can also be an effective remedy against the crisis of legitimacy, therefore an important instrument to improve participatory democracy²¹.

Hence, transparency is something different from just openness or from the right to free access, because it forces the Public Administration to behave properly notwithstanding formal publishing requirements, it imposes the awareness on that an understandable explanation of power is needed. The risk inherent in the possibility of

¹⁶ On this topic see CARLONI, *Il paradigma della Trasparenza*, Mulino, Bologna, 2022

¹⁷ M. FENSTER, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 2006, <<http://scholarship.law.ufl.edu/faculty-pub/46>>.

¹⁸ G. MICHENER, and K. BERSCH, *Identifying Transparency*, Information Polity, 2013, <<https://ssrn.com/abstract=3290813>>.

¹⁹ D. CURTIN, A. J. MEIJER, *Does transparency Strengthen Legitimacy?*, Information Polity, vol. 11, no. 2, pp. 109-122, 2006.

²⁰ Cfr. R. MARRAMA, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, in *Diritto processuale amministrativo*, 1989, p. 416 ss, but also C. CONTESSA and A. UBALDI, *Manuale dell'Anticorruzione e della Trasparenza*, in *Collana Tribuna Professionisti*, Tribuna, 2021.

²¹ S. CASSESE, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, in «Riv. trim. dir. pubbl.», 2007, 13 ss.; U. ALLEGRETTI, *L'amministrazione dall'attuazione costituzionale alla democrazia partecipativa*, Giuffrè, Milano, 2009.

confusing such principles is that of «making transparency a fictitious principle, devoid of meaning, potentially applicable to everything and not applied to anything in practice, without its precise characterization and often fatally not very technical»²².

According to Fenster, transparency, in terms of mere openness and publication requirements, can lead to opacity, because «[it] forces disclosure and creates a nation that is more susceptible to security breaches and less able to enforce its own laws because evildoers will have greater access to information that could be used to threaten the health and safety of the public. [...] At a more quotidian level, disclosure requirements also undeniably raise the fiscal costs of Government. [...] Transparency also harms Government decision-making by adversely affecting the ability of Government officials to deliberate over policy matters outside of the public eye, and by curbing or skewing the production of informational goods»²³.

It is undeniable that the digital era and the access to big data lead to increased information that we cannot comprehend and risks slowing down public administration; yet it is also undeniable that having access to public information is an essential condition to make power accountable and thus improve democracy.

What emerges is a different concept of transparency that goes beyond the respect of procedural rules and requires inferable information. In this scenario, a key role is played by ICT technologies. These not only allow access to big data, but are able to index information and therefore make the information more understandable.

3. *The Italian governance during the pandemic*

In the immediacy of the emergency, Italy had to implement extraordinary measures that prevented the administration from stalling and allowed the Country, as far as possible, to tackle the pandemic first and then restart. These emergency measures aimed at streamlining the administrative procedure, seriously reduced and undermined

²² F. MANGANARO, *l'Evoluzione del principio di trasparenza amministrativa*, in Astrid Rassegna, 2009, p. 8.

²³ FENSTER, *the Opacity of Transparency*, cit.

the criteria of transparency²⁴, limiting the possibility of democratic control over public action.

During the emergency, the Government copiously used decree laws, which are the only legislative available instrument for a quick response to the emergency since they do not need prior approval by the Parliament.

According to the Constitution²⁵, in extraordinary cases of necessity and urgency, the Government can issue decrees having the force of law, under its own responsibility with the obligation to submit the decree to the Parliament on the same day of the publication, in order for the decree to be converted into parliamentary legislation within 60 days from its publication.

Starting from the 1980s the use of decrees increased considerably, so much that «extraordinary cases of necessity and urgency» became loose requirements. This is a true pathological behavior of Italian institutions, a symbol of the immobility of the system of perfect bicameralism, entangled in excessive constitutional guarantees and practices. In this context, the outbreak of the pandemic prompted the Government to rely heavily on decree laws, well beyond the regular practice, enough to cast doubt on its legality; nevertheless, these concerns were dismissed by the Constitutional Court which recently²⁶ ruled in favor of the extraordinary nature of the event, now more necessary than ever.

The first and perhaps most innovative decree is the so called «Cura Italia» (Heal Italy), which mainly introduces three exceptions: it suspends the terms relating to the

²⁴ More over derogation is not always simplification, see L.R. PERFETTI, *Derogare non è semplificare. Riflessioni sulle norme introdotte dai decreti semplificazioni ed in ragione del PNRR nella disciplina dei contratti pubblici*, in *Urbanistica e Appalti*, vol. 4, July 1st 2022, p. 441.

²⁵ Art. 77 of the Constitution «The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure».

²⁶ In this regard, the Constitutional Court also expressed itself in favor of the DPCM (Decree of the President of the Council) which in Italy have materially ordered, at least for 2020, the measures to combat the pandemic, defining them as «necessary administrative acts» with a generic content, C. Cost. 27.10.2021 n. 198 rel. Petites.

activities of the offices of the tax authorities; it introduces a separate reporting transparency obligation for donations to support and fight the emergency, which must be published at the end of the state of emergency; and finally, it suspends the administrative deadlines of the expiring proceedings and administrative acts.

This decree allowed a rapid supply of the essential tools to fight pandemic, such as masks, medicines and medical material and a cloud service necessary for remote work, which will be authorized through a negotiated procedure without prior publication of the notice. These are interventions that affect both the content and the provisions of public contracts, as well as the procedural rules to ensure the streamlining and acceleration of procedures.

More specifically, the legislation provided a suspension of the ex-ante emergency state evaluation that is needed to justify the exercise of a simplified procedure²⁷, by excluding the prior publication of the notice, and exempted the contracting authority from having to justify this decision.

Further exceptions concern the stipulation of the contract: the contracting authority can stipulate the contract based on the self-certification relating to the possession of the general, financial, and technical requirements, and to the absence of exclusion grounds. In addition, the limit to the amount of donation to the purchase of supply that can be directly accepted and did not need a specific proceeding, was erased from a maximum of 40,000.00 euros²⁸ to the threshold of European relevance.

In May 2020 a second decree was published²⁹ with specific requirements on public procurement. The percentage of the contractor payment to be given in advance rose from 20% to 30% for public tender proceedings initiated before June 30th 2021, this deadline being afterwards postponed to December 31st. Other exceptions were then introduced to facilitate payments for the purpose of economic recovery; the payment

²⁷ This is the procedure referred to in art. 63, paragraph 6 of the legislative decree April 18th 2016 no. 50 (Public Procurement Code). According to this legislation, it is possible to resort to the negotiated procedure without prior publication of the notice regardless of the existence of urgent assessments, providing for the comparison of four and not five operators to be consulted, provided that one of them is an innovative start-up or a small and innovative medium-sized enterprise, registered in the appropriate special section (Art. 63 comma 2 lett. c d.l. 18/2020.).

²⁸ Provided for by art. 36, paragraph 2, lett. a) of the Procurement Code.

²⁹ Law decree May 19th 2020 no. 34, known as «decreto rilancio».

of the state of progress of works (SAL) has in fact been established, for school building works, also in derogation from the provisions of the Code of public contracts.

The exceptions provided by the third decree, the so called «Simplification decree», streamline all stages of tender procedures from the notice publication to the conclusion of the contract, up to the potential dispute phase. With regard to below-threshold contracts, for the purpose of encouraging public investments, direct assignment or negotiated procedure can be adopted after simple consultation with at least five operators existing on the market, even in aggregate form. Besides that, the simplification on anti-mafia regulation is particularly relevant; accordingly, until June 30, 2023, the state of emergency is considered persistent and, taking due account of the statutory exceptions, the public procurement proceeding can continue even in the absence of the anti-mafia information³⁰. On over-threshold proceedings, the rule provided a suspension of the scheduled proceedings and a temporary discipline for the ones already started³¹.

In May 2021, another decree was published³² aiming at overcoming the exceptional price increase of certain products, such as those related to construction materials, in order to fight speculations. Therefore, it provided a list with the materials whose price grew more than 8% to be subjected to a compensation mechanism. Furthermore, notwithstanding the provisions of the procurement code³³, it provided a fund for the adjustment of prices with a budget of 100 million euros for the year 2021.

The rules adopted with the simplification decree were further modified with

³⁰ Cfr. artt. 1-bis and 13 of the Decree Law April 8th 2020, no. 23, converted with modifications, by law June 5th, 2020, no. 40, and artt. 25, 26 e 27 del Legislative Decree May 19th, 2020, no. 34 The exception is planned for proceeding regarding economic benefits however denominated, disbursements, contributions, grants, loans, loans, concessions, and payments from public administrations, if the release of the documentation is not immediately following the consultation of the single national database for the purpose of issuing the anti-mafia documentation

³¹ Artt. No. 5,6, and 8 Decree Law of July 16th 2020, no. 76, This regulation imposed a serious sacrifice of transparency and lawfulness, especially after the sentence of the Criminal Supreme Court of January 27th 2022 no. 7264 that excluded the application of bid rigging in direct award..

³² The so called <decreto sostegni-bis> Law Decree May 25 2021 converted in Law with modifications by Law July 23rd 2021 no. 106

³³ See art. 115 of Public Procurement Code

the so-called decree simplification-bis³⁴ in order to comply with the goals of the Italian Recovery Plan (Piano Nazionale Ripresa e Resilienza - P.N.R.R.) especially with regard to public procurement, due to the fact that simplification and rationalization of the rules on public contracts represent the main tenets of first phase of the reforms envisaged by the PNRR until 2023.

Further simplification measures are envisaged relating to the use of resources allocated by the PNRR and the PNC (Complementary National Plan). The use of the negotiated procedure is allowed, under certain conditions, without prior publication of the call for tenders and the assignment of a reward score, if the use of innovative technologies in the design is planned. Another important innovation is the institution of the Higher Council of Public Works, envisaged exclusively on technical and economic feasibility projects (PFTE) of public works under the competence of the State, or in any case financed for at least 50% by the State, of an amount equal to or higher than 100 million euros³⁵.

The decree raises³⁶ from 40% to 50% of the total amount of the contract the maximum quota of works that can be carried out with subcontracting³⁷.

Among the most important aspects of the decree is the temporal extension of the state of emergency to June 30, 2023, in relation to the possibility of stipulating the contract even in the absence of anti-mafia documentation, as well as the possibility of direct assignment for works of less than 150,000 euros and for services and supplies, including engineering services architecture and design activities, for an amount of less than 139,000 euros³⁸. The suspension of the obligation to inform the contracting

³⁴ Law decree May, 31 2021 n. 77 converted by law July 29 2021 no. 108, in application of PNRR provisions *«Piano Nazionale Ripresa e Resilienza»*.

³⁵ This prevision was subject to other modification by Decree Law of September 10th 2021 no. 121 and by Decree Law November 6th 2021 no. 152.

³⁶ In reform of art. 1, paragraph 18, of the Decree Law of April 18th 2019 no. 32, in application until June 30th 2023

³⁷ The provision was issued in response to the infringement procedure 2018/2273 opened by the European Commission which considered the affixing of a quantitative limit to the percentage of subcontracted work in contrast with EU legislation.

³⁸ Relating to the application of these measurement many “scandals” are emerging thank to the work of Public Prosecutors, an example is the 18 millions bidden for new hospitals in Caserta Naples and Salerno in which twenty-tree

authority about the three subcontractors is envisaged, with the consequent lack of knowledge of the identity of the subjects who will work in subcontracting. Lastly, it is stated that the purchases of IT goods and services, necessary for the realization of the PNRR, can be made through direct assignment, whereas under certain conditions it is not possible to resort to assignment with the ordinary procedure³⁹.

More recently, other changes to the legislation on public contracts introduced with by legislative decree (so-called «infrastructure decree»), as well as by the 2022 financial law, both focused on increasing transparency in the payment system, including the budget law that amplifies the fund for price adjustments to one hundred million euros.

Finally, the provisions introduced by the legislative decree are also noteworthy. The legislative decree of November 2021⁴⁰ entitled «urgent provisions for the implementation of the PNRR and for the prevention of mafia infiltration» provides measures to promote the greatest participation in tenders concerning PNRR funds. In particular, the procedures for assigning the design required by the aforementioned calls can be carried out even in the absence of a specific provision in the planning documents provided for by the Code.

4. *E-procurement 2.0, a possible solution*

A solution to the crisis of the principle of transparency triggered by the outbreak of the pandemic could lie in new technologies, and e-procurement notably. New technologies may reconcile speed, simplification, and transparency, allowing complete intelligibility of data relating to the various stages of the tender and, at the same time, facilitating the cataloguing and analysing the data. To tell the truth, e-procurement was

people are suspected for fraud and bid rigging, see <<https://tg24.sky.it/napoli/2022/05/18/appalti-asl-campania>> or maxi Fraud that led to the arrest of eleven people in Rome and Prato for 43 million euros, <<https://www.lanazione.it/prato/cronaca/frodi-truffe-appalti-1.7856521>>.

³⁹ Art. no. 53 Law decree May 31st 2021 n. 77.

⁴⁰ Law decree of November 6th, 2021, n. 152 converted with modifications by Law December 29th 2021 no. 233

an important objective already in the EU Directives of 2014⁴¹, as a tool capable of simultaneously implementing simplification and transparency, as well as implementing the value for money of the service offered⁴².

Certainly, the transition to e-procurement is still tortuous, especially due to the fact that the legislation on public procedures is constantly changing, so much so that the reform of the Procurement Code is being carried out even before the complete implementation of the already existing rules. In addition, another major element of difficulty is represented by the practical application of ICT technologies in public administration in general, especially regarding the 36,000 contracting authorities, with over 100,000 shopping centres⁴³, many of which are small and unable to use ICT technologies. The transition to e-procurement would have been easier if at least the contracting stations had been reduced as it was provided for in art. 38 of the CCP, the application of which has been postponed several times.

A turning point towards the complete informatization of the procurement system could come unexpectedly from the pandemic, and specifically from the PNRR. In fact, last January, perhaps following the difficult relationship with smart working, the Minister for Public Administration announced the Strategic Plan for the enhancement and development of the human capital of the Public Administration, an extraordinary training plan (the largest ever carried out) that will involve 3.2 million public employees.

Furthermore, to allow the achievement of the objectives of the PNRR, the Government has issued several legislative innovations termed e-procurement 2.0 by the doctrine.

The main changes concern the following areas. First, a Ministerial Decree⁴⁴ specified the characteristics and functions of the telematic purchasing systems. Then,

⁴¹ see Directives 2014/24/UE, 2014/25/UE, 2014/23/UE.

⁴² referring to point n. 63 of Directive 2014/24/EU.

⁴³ <www.anticorruzione.it>.

⁴⁴ Ministerial Decree no. 148 of 2021 called "Regulation laying down procedures for the digitization of public contract procedures", in implementation of art. 44 of the Code of public contracts.

legislative decree 77/2021⁴⁵ provided the establishment of the electronic file of the economic operator (FVOE, FOE in Italian), containing data and documents necessary for the purpose of verifying the possession of the general and special requirements, entered by the operator and usable for the various tenders, which will be kept in the national database of public contracts (BDNCP) and managed by The Italian Anti-Corruption Authority (ANAC). Finally, the new digital prototype⁴⁶, which updated the previous version of 2017, provided the individual contracting stations with a tender disciplinary scheme for the completion of an «Electronic open procedure for the award of public service and supply contracts in the ordinary sectors above Community threshold with the criterion of the most economically advantageous offer based on the best quality/price ratio».

Basically, the Government is expecting a system able to better manage the entire life cycle of public procurement, supporting contracting authorities and economic operators for the entire duration of the tender procedure.

For example, the e-procurement platforms will be able to support numerous functions, such as: drafting and publication of the announcement and tender documents; compilation and presentation of offers; carrying out the activities of the selection board, with the possibility for the commissioners to consult the offers; conducting public sessions electronically; calculation of technical and economic scores, as well as anomaly thresholds; drafting, acquisition and notification of the measures for the exclusion of competitors; verification of participation requirements through interaction with the national database of public contracts (BDNCP); formation of the final ranking, acquisition of the award provision and fulfilment of post-information obligations; drafting and acquisition of the contract.

E-procurement will therefore be able to put an end to the eternal rivalry between simplification and security, between simplification and transparency. The words of ANAC President Giuseppe Busia are significant in this regard: «The elimination of formal obligations for contracting stations and economic operators is crucial to reduce times

⁴⁵ That modify art. 81 of Legislative Decree. No. 50/2016.

⁴⁶ published in the G.U. (official Gazettes) of December 24th 2021.

and costs and to accelerate the tender procedures»⁴⁷. He then adds: «The digital file that we are implementing will allow the contracting authorities to use the assessments already carried out by another contracting authority to admit the economic operator to the tender, speeding up the verification of the general requirements (white list)».

In conclusion, the relationship between simplification and transparency is not directly proportional; at the increase in the level of the first one does not necessarily lead to an increase in the level of transparency, in the meaning of inferability. Certainly, at an early stage, when bureaucracy level is too high the implementation of simplification does lead to better transparency, but when some procedural obligation, that are meant to ensure the lawfulness of the procedure, are eliminated the transparency of the entire proceeding fails. This is particularly evident in public procurement, in which many of the information obligation that has been removed were applied to ensure the lawfulness of the procedure and of the bidder.

Therefore, administrative simplification necessarily leads to a streamlining of the costs of the tender procedure, and therefore also of the guarantees established to protect public action. In this regard, the extension of the transparency obligation, in the sense of the publication disclosures of the documentation of the public tender, cannot be considered as a possible solution to the reduction of security checks on the participants in the tender. In fact, the increase in documentation available to citizens does not always constitute an improvement in the level of knowledge and transparency of public action. The transparency of the administration represents a form of democratic control over its action only where citizens can understand public action. In other words, if citizens are invested by a multitude of documents that they cannot understand and decipher then this cannot be a step forward towards a transparent administration. Rather, this represents a step backwards towards an obscure administration. In these terms, e-procurement can help the citizen, and the Administration itself, to find their way in the multitude of documents and procedures, effectively and quickly, and therefore to overcome the trade-off between speed, simplification, correctness and transparency.

⁴⁷ Press Release of ANAC, Al via il Fascicolo Virtuale dell'Operatore Economico, October 27th 2022, in <<https://www.anticorruzione.it/-/al-via-il-fascicolo-virtuale-dell-operatore-economico-operativo-dal-25-ottobre-obbligatorio-dal-2022>>.
