1st Workshop of the project "101101784 - 2022-IT-FRED2" Fraud Repression through EDucation 2

'CAPACITY BUILDING, NETWORK PROGRAMME GUIDELINES AND MAPPING OF CASE STUDIES AND KNOWLEDGE ON THE PROTECTION OF THE EU'S FINANCIAL INTERESTS AND THE FIGHT AGAINST FRAUD'

Rome, 22-24 November 2023 - Sapienza University of Rome

'*Regulatory and monitoring activities in the areas of anti-corruption, transparency, public employees' integrity, whistleblowing and public procurement with the aim to prevent corruption in the public sector and avert the waste of public resources*'.

Abstract: *The public procurement sector and the implementation of the PNA must be monitored with a view to prevention, in order to avoid corruptive phenomena as well as the undermining of the financial interests of the European Union. Through the analysis of the PNA 2022-2025, it is possible to understand the concrete choices made by ANAC, which are aimed at increasing monitoring, transparency and identifying risks and related anti-corruption measures, depending on the specific type of award.*

In intervening with a new type of monitoring model understood as functional, integrated and permanent, covering all areas of the administration's planning, the authority has indicated new simplifications for all administrations/entities with less than 50 employees, without affecting monitoring.

Further measures relate to the specific sector of public contracts: the derogations introduced to the legislation on public contracts and the simplification of specific procedures for awarding these contracts must be accompanied by counterweights on the transparency side. The PNA declined the principle of transparency for all acts of tendering procedures, presenting some innovative profiles within the life cycle of contracts.

Finally, with the update to the PNA 2023, the indications concerning critical issues, risk events and prevention measures already present in the PNA 2022 have been replaced in their entirety, with the appropriate adaptations, amendments and regulatory updates. In fact, the Authority has analysed the possible criticalities both in the entrusting phase and in the executive phase in order to guard against them with ad hoc *corruption prevention measures.*

The public procurement sector and, in particular, the implementation of the National Recovery and Resilience Plans are one of the fertile grounds for fraud and, therefore, it is crucial that they are monitored, especially with a view to prevention, prevention which, also for OLAF, remains the most effective anti-fraud tool.

The huge flow of money available due to the PNRR resources, which is the Italian NRP, on the one hand, and the exceptions to ordinary legislation introduced for the need to speed up the implementation of many interventions, on the other, must therefore determine the strengthening of public integrity and the planning of effective corruption prevention safeguards in order to prevent the results expected from the implementation of the PNRR from being thwarted by corrupt events, without, however, at the same time affecting the effort to simplify and speed up administrative procedures.

Precisely for this reason, the National Anti-Corruption Authority has decided to dedicate a special part of the 2022-2025 National Anti-Corruption Plan to the derogatory discipline on public contracts, a discipline that has been frequently resorted to in order to cope with the pandemic emergency and the urgency of carrying out infrastructural interventions of great interest to the country.

Before examining more closely the activities undertaken by ANAC in order to prevent and combat fraud and abuse of the EU's financial interests implemented through the aforementioned PNA, it is worth highlighting how the Authority has been working for some time on the development and implementation of the National Public Contracts Database (BDNCP), as well as, in accordance with the competences assigned to it by the legislator, on the implementation of the complete digitalisation of the tendering procedures and the qualification of the contracting stations, together with the establishment of the single Transparency Portal. The database is, in fact, an indispensable tool to ensure the monitoring of national and European public expenditure, also aimed at the digitalisation of the processes of declaration and verification of the requirements for participation in public tenders, ensuring transparency and real-time control of administrative action for the proper allocation of public expenditure in works, services and supplies.

Instead, the single transparency portal aims to enable administrations, especially small ones, to manage fewer tasks and, consequently, to enable the central administration to have more useful information at its disposal.

These instruments, therefore, mark an important milestone in the fight against fraud and the waste of public resources, and will allow a greater capillarity of controls aimed at more easily revealing situations symptomatic of the misuse of public money.

In order to understand the concrete choices made by ANAC to also avoid the undue expenditure of public resources, it is now necessary to take a closer look at the National Anti-Corruption Plan

2022-2025, which, as is well known, pursues the task of promoting the adoption of corruption prevention measures, identifying the main corruption risks and the relevant remedies.

The PNA is divided into two parts. In the first part, an attempt has been made to support the Persons in charge of the Prevention of Corruption and Transparency (RPCT) and the administrations in planning measures for the prevention of corruption and transparency in view of the recent regulatory changes introducing the Integrated Activity and Organisation Plan (PIAO)[1] .

In this context, the aim of ANAC's intervention was to reduce the burden on administrations and, at the same time, contribute to improving the results of the administrations' activities in the service of citizens and businesses. This choice was motivated by an awareness of the initial difficulties that administrations may encounter in integrated planning, which should entail a gradual re-engineering of the administrations' operational processes.

Particular attention has been paid to monitoring the implementation of what has been planned to contain corruption risks: the Authority's findings show that the logic of compliance is reflected above all in a lack of attention to verifying the results obtained with the planned measures. Instead, what is needed are few and clear prevention measures, well planned and coordinated with each other, but above all effectively implemented and results verified.

Conversely, the special part of the PNA is devoted to public contracts, an area in which not only does the Authority play a major role but to which the PNA itself devotes crucial reforms. The numerous legislative interventions on the subject of contracts have led to a sort of 'regulatory stratification', due to the introduction of specific provisions of a special and derogatory nature which, in essence, have made the current legislative framework of reference more composite and varied than ever.

Precisely because of the spread of numerous derogatory rules, the Authority has, first and foremost, wished to offer contracting authorities support in the identification of measures for the prevention of corruption and transparency that are agile but, at the same time, useful for avoiding that the urgency of interventions facilitates experiences of maladministration, preparatory to corruptive events and related criminal phenomena.

Having said this, from the examination of the PNA it can be said that the measures adopted to avoid the waste of public resources basically move along three lines: 1) strengthening of monitoring, especially for contracting stations; 2) strengthening of transparency; 3) identification of risks and related anti-corruption measures according to the specific type of award.

Strengthening monitoring

[1] The latter must be adopted annually by the administrations referred to in Article 1(2) of Legislative Decree No. 165/2001 (excluding schools of all levels and educational institutions) and is characterised by the fact that the planning of corruption prevention and transparency is an integral part, together with other planning tools, of a unitary planning document.

Now, with reference to the strengthening of monitoring, as mentioned above, it constitutes a fundamental point for the implementation of the prevention measures and for the functioning of the planning tool (be it the anti-corruption and transparency section of the PIAO or the PTPCT or the supplementary section of the MOG 231). Administrations and bodies are therefore called upon to strengthen their commitment to the actual monitoring of what is planned. Therefore, a new and particular type of monitoring model has been configured, understood as functional, integrated and permanent, which jointly covers all the areas of the administration's programming, where the indications contained in the PNA have focused, specifically, on the monitoring of corruption prevention and transparency measures, on monitoring in relation to the overall review of programming and, finally, on the integrated monitoring of the various sections of the PIAO, with specific reference to the pro-active role that the RPCT can play.

Moreover, a specific section has been devoted to the relations between the RPCT and the Structures/Mission Units identified by the administrations to coordinate, monitor, report and control the management activities of the actions envisaged under the PNRR.

One of the most significant innovations of the PNA is the one concerning simplifications on the planning of measures, where new simplifications are indicated for all administrations and bodies with fewer than 50 employees.

For instance, administrations and entities with fewer than 50 employees may, after the first adoption, confirm for the following two years the planning instrument in force by a specific act of the governing body. This can only be done if no events have occurred in the previous year that require a revision of the planning (e.g. the emergence of corruptive facts, the introduction of significant organisational changes, among other hypotheses). For administrations and bodies with fewer than 50 employees, a number of priorities have been indicated with respect to the processes to be mapped and monitored with specific measures (processes relevant to the implementation of the objectives of the NRP -where the administrations and bodies are responsible for the operational implementation of the actions provided for by the NRP- and of the structural funds; processes directly linked to performance objectives; processes involving the spending of public resources).

Nevertheless, in view of the simplifications introduced, the Authority considered that even administrations/entities with fewer than 50 employees are required to increase monitoring: the strengthening of monitoring does not, in fact, entail an additional burden but, in compensating for the simplifications in the planning of measures, ensures effectiveness and sustainability of the prevention system.

With this in mind, therefore, guidance was provided broken down according to the number of employees (1 to 15 employees; 16 to 30 employees; 31 to 49 employees) and on the basis of two

cumulative criteria used to guide administrations in their monitoring, namely the time frame (periodicity/frequency of monitoring) and the sampling system (how the processes/activities being monitored are identified).

For example, with regard to the frequency, for administrations with up to 15 employees, monitoring is recommended at least once a year, while for those with 16 to 30 employees, and for those with 31 to 49 employees, monitoring is recommended twice a year.

The two further measures within the PNA that are functional in combating corruption and, therefore, in ensuring the proper use of public resources, relate to the specific sector of public contracts. In fact, it is imperative that the derogations to the rules on public contracts and the simplification of specific procedures for awarding such contracts be accompanied by adequate counterweights on the transparency side: the latter must be emphasised as a key measure to ensure an important anti-corruption function, as well as social control over the work and the results obtained by the contracting stations, both in the awarding and in the execution of works, services and supplies. In this way, transparency becomes a safeguard *ex ante, of effective competition for* access to the tender and, *ex post,* of effective control over the work of the successful tenderer.

Enhancing transparency

In this regard, the Authority's intervention was also aimed at clarifying certain aspects that had led to uncertainty in the market.

In particular, starting from the normative datum set forth in Article 29 of Legislative Decree No. 50/2016, it was possible to affirm the necessary publication of all acts of the tender procedures without distinguishing a priori between above- or below-threshold contracts or between sectors, since, if anything, the provision of specific publication obligations for certain contracts had to be found in other rules of the Code. Moreover, both considering the interventions of the 2017 legislator and by virtue of what has been sanctioned by administrative case law (cf. Ad. Plenary Council of State of 2 April 2020, no. 10 on generalised civic access), also the executive phase of a public contract has been made subject to the utmost knowability: for this very reason, it has been explained how said phase must be included among those subject to transparency, so that the progress of the execution of the contract is made visible (times, costs, compliance with the negotiating commitments, etc.), with the limit, indicated in the same para. 1 of Article 29, of reserved (Article 53) or secret (Article 162 of the Code) acts. This assumes significant significance in relation to the procedures relating to public investments financed in whole or in part with the resources provided for by the PNRR and the PNC and by the programmes co-financed by the structural funds of the European Union.

Another fundamental aspect that emerged from the outcome of the consultation was the clarification of the modalities of publication, which must concern each individual contractual

procedure and not be based on the individual stages in general, as was the case in the past, in order to allow for a better understanding of the course of the procedures themselves so as to determine the effective implementation of Article 6 of Legislative Decree No. 33/2013.

It is evident, therefore, how the PNA has declined the principle of transparency for all the acts of the tendering procedures, presenting some innovative profiles in the context of the life cycle of contracts (as mentioned above, with reference to the execution phase or with regard to the full transparency of the composition of the selection committee, the CCT, the *curricula*, and, also, the minutes drawn up during the tendering process).

Identification of risks and related anti-corruption measures according to the specific type of assignment

Following the stratification of regulations created by virtue of the numerous emergency interventions and, further, following the entry into force of the new Public Contracts Code (Legislative Decree No. 36 of 31 March 2023), the update to the PNA 2023 -which is currently in the public consultation phase- fully replaced the indications concerning critical issues, risk events and prevention measures already contained in the PNA 2022, with the appropriate regulatory adjustments, amendments and updates. In fact, the Authority has analysed the possible criticalities both in the entrusting phase and in the executive phase in order to guard against such criticalities with *ad hoc* corruption prevention measures.

In addition to being useful in the monitoring phase, these measures are of an illustrative nature and are intended to support administrations in drawing up their own PTPCT or the anti-corruption and transparency section of the PIAO.

It may be noted that the raising of the thresholds for direct awards and for negotiated procedures[2] if, on the one hand, it aims at favouring the swift execution of public contracts, on the other hand, it is a harbinger of critical issues arising from the increased risk of artificial splitting or of alterations/errors in the calculation of the estimated value of the contract so as not to exceed the threshold provided for by the legislator, especially in the case of direct award. This, moreover, may lead to recurring entrustments to the same economic operator of the same type of CPV with the consequent consolidation of oligopoly or monopoly situations and, therefore, limitation or elimination of competition.

With regard to the specific measures proposed in the 2023 update, it was suggested to provide for specific anomaly indicators, also in the form of automatic *alerts* within the IT systems used by the

[2] With legislative decree no. 36 of 2023, for works up to 150,000 euro it is possible to proceed with direct awarding, from 150,000 euro and up to less than 1 million euro with the negotiated procedure, without publication of the notice, after consulting at least 5 economic operators, for amounts between 1 million euro up to the thresholds of European relevance with the negotiated procedure, without publication of the notice, after consulting at least 10 economic operators. For services and supplies up to EUR 140,000, direct awarding can be used while for amounts between EUR 140,000 and the thresholds of European relevance the negotiated procedure, without publication of a call for competition, after consulting at least 5 economic operators.

administrations. With this in mind, in order to identify the anomaly indicators, it could be useful to analyse all the assignments whose amount is just below the minimum threshold above which direct awarding could no longer be resorted to, but also the economic operators, in order to check those who in a given time period are the most recurrent awarders, as well as to carry out an analysis by CPV. It is then essential to monitor the principle of rotation of the awarding of contracts, for example, by means of the verification by the *auditing* structure or by another person specifically identified within the authority as to the proper implementation of this principle.

Further risky events concern, for example:

- the integrated contract (Art. 44 of the new code) where the risks are connected both to the preparation by the S.A, of a feasibility project that is deficient or for which an accurate verification is not carried out, relying on the subsequent levels of design by the contracting company to correct any errors and/or make up for shortcomings, also by means of variants during the course of the work, and to design deficiencies that lead to modifications and/or variants and extensions, both when the executive project is being drawn up and in the subsequent implementation phase, with consequent higher implementation costs. In this regard, in addition to the provision of specific anomaly indicators, also in the form of *alerts* based on the monitoring of variants that determine a contractual increase of around or above 50% of the initial amount or suspensions that determine an increase in deadlines of more than 25% of those initially envisaged or on the basis of modifications and/or variations of a substantial nature, it has been suggested that the RUP notify the tender office and the *auditing* structure in charge of the approval of the project drafted by the company that presents an increase in cost and time compared to that envisaged in the project put out to tender;
- subcontracting (Article 119 of the new code), because of the risk of increased influence on the overall performance of the contract related to the lack of limits on subcontracting, but also because of the increased risk of possible collusive agreements between the companies participating in a tender aimed at manipulating the results, using the mechanism of subcontracting, both "first level" and "second level" where permitted by the contracting authority (so-called "cascade" subcontracting), as a way of distributing the benefits of the agreement to other participants in the same tender. To this end, it was noted that it was necessary to raise the awareness of the persons in charge in order to avoid undue conditioning, as well as to suggest a careful assessment by the S.A. of the activities/performances most at risk of criminal infiltration for which, pursuant to paragraph 17 of Article 119, cascade subcontracting would be discouraged.

Moreover, the PNA notes how the entire executive phase is susceptible to presenting critical issues where corrupt conduct could be observed by resorting to contract amendments and variants in order to achieve greater gains, to the detriment also of the quality of the services rendered, in the absence of the controls provided for by the new code and of the constraints imposed by the sector regulations. A further risk is connected with the omission of controls during execution by the RUP, the DL or the DEC on the proper performance of contractual services in order to favour the contractor.

Lastly, the 2023 update lists some possible risk events with related anti-corruption measures in relation to the awarding of PNRR resources.

From the analysis carried out, therefore, it emerges how the choices made by ANAC pursue the objective of safeguarding the proper allocation of public resources with suitable prevention measures by strengthening the monitoring and transparency measures. Precisely for this reason, for the awarding of PNRR works, certain measures have been strengthened, in line with the provisions of EU Regulation 241/2021 and other internal implementing acts, such as the MEF Guidelines, RGS Department, Central Service for the PNRR, annexed to Circular No. 30/2022 of 11 August 2022, in order to ensure the transparency of data relating to the beneficial owner of the entities participating in tenders for the awarding of public contracts and to prevent conflicts of interest.