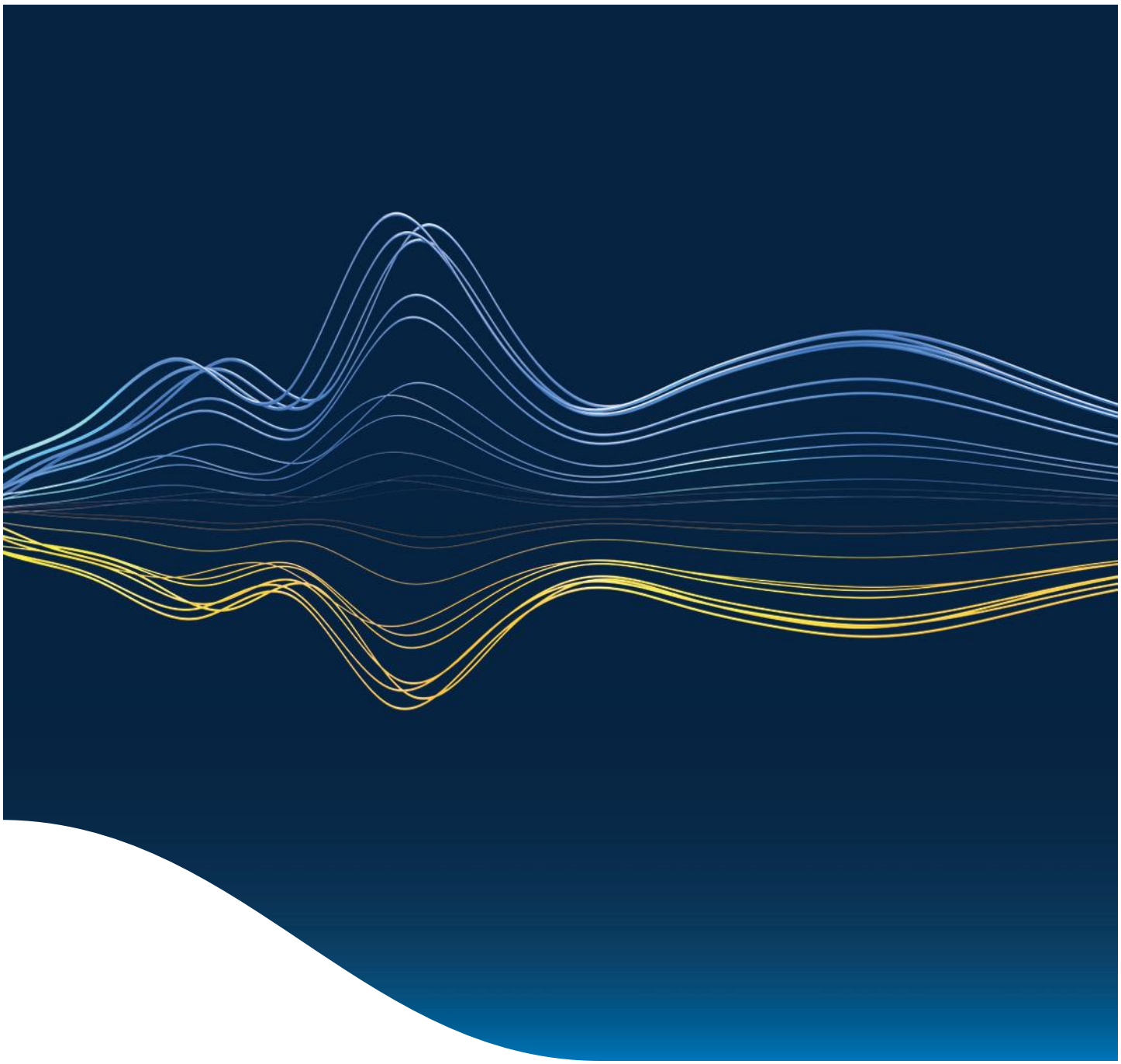

Simplification and shortening of the public procurement timescale - will it really lift the Italian economy?

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To deal with the economic impact, direct and indirect, related to the COVID-19 emergency, the Italian government has approved the text of the Decree Law no. 76/2020, the so-called Simplification Decree converted into law with Law no. 120 of September 11, 2020, (the Simplification Decree or Decree), which provide measures aimed at encouraging investment in the infrastructure and public services sector.

With reference to the procurement processes, for a long time there has been a discussion about simplification, transparency, digitalization, speed and efficiency on the basis of the so-called Genoa Model. After countless Prime Ministerial Decrees, Decrees Law and Ordinances necessary to deal with the pandemic, further progress has been made towards to "deregulating" Italy, starting with public procurement. Infrastructure and public supply are considered the main instruments to restart our economy and recover lost GDP.

Thus, the government, once again implementing emergency legislation, has tried to respond to the above requirement, making significant changes to the Legislative Decree 50/2016, the so-called Italian Code of Public Contracts (the Code), many of which only apply from the entry into force of the Simplification Decree until December 31, 2021.

Although the key words of the Decree and the explanatory report are *simplification* and *speed*, the question that arises is whether the Simplification Decree really simplifies procedures and whether it is actually the epoch-making turning point for the sector. The Simplification Decree certainly represents an ambitious and courageous reform, which will provide concrete action on the main causes that have prevented or slowed down the construction of infrastructure in Italy. The Decree focuses on the procedures for the awarding of public contracts, public officers' failure to act (*inerzia*) and administrative trials in the field of procurement in order to speed up the settlement of litigation.

The reform has several areas of innovation, including tenders to be launched after the entry into force of the Decree, existing contracts and tenders pending at the time of entry into force of the Decree. The chosen instrument to simplify is the stratification and regulatory recall. In particular, the nine articles of Chapter I of the Decree modify, some temporarily, the Code, the so-called Decree *Sblocca Cantieri* (*Sblocca Cantieri*) and Legislative Decree 104/2010, introducing new provisions and referring to other articles.

Operators in the sector may have difficulty interpreting and applying the Decree as a result of regulatory instability. The Decree requires the public officer to comply with strict deadlines under penalty of fiscal liability (*responsabilità erariale*), as well as under penalty of exclusion from the tender/termination of the contract for the economic operator.

Moreover, it remains to be seen whether this further and radical change (only one year after the *Sblocca Cantieri)*, rather than speeding up the contracts, will lead to a further impasse in the sector and will lead public officers – now more than ever exposed to risks of fiscal liability and called to exercise a wide administrative discretion (especially in entrusting the anti-crisis contracts above the threshold and in derogation of the procurement code) – to slow down the launch of new tenders. Undoubtedly, the chaotic regulatory framework will put a strain on the awarding authorities, which will be committed to understand which rules to apply, from which to derogate and which European constraints to respect.

What are the main changes?

Among the most relevant changes there are the new ways of awarding public service, supply and works contracts with more streamlined procedures (of value both above and below the EU threshold which is equal to EUR5.35 million for works, EUR214,000 for supplies and services and EUR750,000 for social services and others) and, in some cases, even in derogation of the Code, by speeding up the timeframe for tenders, contract signing and litigation.

Tenders below the threshold called in the period between the entry into force of the Decree and December 31, 2021

- It is provided for the direct award of works, for an amount of less than EUR150,000, while of services and supplies including engineering and architectural services and design activities, for an amount less than EUR75,000 and therefore without any prior, even minimal, comparison between market operators.
- In addition, the awarding authority must use the negotiated procedure without call of tender, after consulting at least five operators, for services and supplies including engineering and architectural services and design activities, with a value ≥ EUR75,000 and up to the thresholds provided for in art. 35 of the Code and for works with a value ≥ EUR150,000 and below EUR350,000; at least ten operators for works with a value ≥ EUR350,000 and < EUR1 million; 15 operators for works ≥ EUR1 million and up to the thresholds provided for in the aforementioned art. 35. For the invitation of the operators, the principles of rotation and different territorial location of the invited companies shall be applied.

Tenders above the threshold called in the period between the entry into force of the Decree and December 31, 2021

- The awarding of services, supplies and works, as well as engineering and architectural services, must take place through an open, restricted, competitive procedure with negotiation and competitive dialogue applying the reduced deadline provided for reasons of urgency by the Code. In this case, however, the urgency is considered to exist in any case without the need for a particular justification.
- On the other hand, the awarding authority may resort to the negotiated procedure pursuant to art. 63 of Code, following the publication of the notice of call for tender or other equivalent act, to the extent strictly necessary to deal with situations of extreme urgency resulting from the negative

effects of COVID-19 and the consequent suspension of activities, such that it is not even possible to wait for the reduced time limits provided for by the Code.

In this case, and with reference to, inter alia, the school, university, health, prison, infrastructures for scientific research activities, transport, road, railway, airport and port sectors, the Decree provides that the awarding authorities proceed in derogation of any legal provision other than criminal law, subject to compliance with the provisions of the anti-mafia code, compliance with the constraints arising from membership of the Union and directives 2014/24/EU and 2014/25/EU, as well as compliance with EU principles, conflict of interest rules and criteria of energy and environmental sustainability and provisions on subcontracting. This derogation is also provided for in the execution of contracts. In view of the exceptional nature of this procedure, which affects competition, the awarding authority will have to provide precise reasons for its choice and will exercise broad discretion in constructing the tender by implementing EU principles, without the application of the specific provisions of the Code.

New and reduced timescale for tenders launched between the entry into force of the Decree and December 31, 2021

The Decree introduces the drastic reduction of the tender procedures' time-frame that often extends for years and represents a double obstacle for the realization of public works or for the use of services in step with the latest technology. The excessive timing, on the one hand, hinders the signing of contracts and therefore the satisfaction of a public need. On the other hand, it discourages companies from participating in public tenders, and all this to the detriment of the economy.

The government has adapted the timeframe to overcome this situation:

- for contracts below the threshold, the award must take place within two months, increased to four months in certain cases, from the date of adoption of the opening act; and
- for contracts above the threshold, however, the award must take place within six months from the date of adoption of the opening act.

To encourage respect of these timeframes, the regime of liability of the public officer responsible for the tender procedure is emphasized on several occasions and failure to act is heavily sanctioned. On the other hand, where the delay is due to the economic operator, the latter must be excluded from the tender and, if the delay is during the execution of the contract, the awarding authority must terminate the contract.

Deadline for signing the contract and litigation

The reform provides that public contracts must be signed within 60 days. Possible extensions are allowed only if "justified by the interest in the prompt execution of the contract." Also, in this case, the decree expressly emphasizes the repercussions in terms of fiscal liability that the delay in signing the contract may entail for the public officer in charge.

It is clarified that not even the pending appeal to the Regional Administrative Court (TAR) can lead to the failure to sign the contract (unless it is inhibited by the Court); this happens often in practice. It is

common for the contracting stations to wait for the decision of the TAR, the end of the appeal period and, in some cases, even for the second instance.

With reference to litigation, the Decree, before the conversion into law, encouraged the judge's decision at the outcome of the precautionary phase and reduced the time for the decision. The judge who accepted the application would have to justify the impact of the decision on the public interest linked to the execution of the contract.

However, the legislator at the time of conversion has reduced the scope of the regulatory innovation, reflecting the countless objections made by legal operators on the subject of litigation.

It should be noted that the system implemented by the Decree before the conversion, by binding the judge's decision, on the one hand, would force the awarding authority to sign the contract with the illegitimate bidder even when it had been unsuitable and unreliable, or in any case in the presence of a less valid bid. On the other hand, it would deny, in many cases, the legitimate bidder the asset represented by the contract, thus frustrating the effectiveness of judicial protection. Moreover, the innovated procurement trial did not consider the financial exposure of the awarding authority, which, according to the above, would have to pay for the work twice. In addition, the judicial innovations had been adopted without taking into account the existing procurement trial, already very fast, which balanced the public interest in the realization of the work with the protection of legitimate interests by competitors.

The rule, now in force, states that only through the initiative of the parties "requesting to limit the decision to the examination of a single issue" and in addition "in any other case compatible with the defense needs of all parties in relation to the complexity of the case," the judge must rule on the outcome of the precautionary phase. The modified provision reassigns to the administrative judge those margins of discretion that are necessary to be able to avoid early decisions that, in many cases, can be harmful both to the interests of the operators and to those of the awarding authorities.

The extension of the provisions pursuant to art. 125 of Legislative Decree no. 104/2010 remained unchanged during conversion for contracts above the threshold called to deal with a situation of extreme urgency due to the post-COVID-19 crisis: the second bidder in the ranking who wants to challenge the award, if it does not obtain the precautionary suspension, will only be entitled to compensation for equivalent in the case of a well-founded appeal and it will be precluded from taking over the contract, if concluded, and thus obtaining the utility pursued.

Even following the conversion into law, the aforementioned discipline does not apply – and it is not clear why assuming that the jurisdiction lies with the administrative judge – to tender procedures which, in the exceptional cases indicated by the Decree, may even be carried out in derogation from the application of the Code, as already illustrated above.

Technical Advisory Panel

Until December 31, 2021, for contracts aimed at carrying out works for an amount equal to or greater than the thresholds of European relevance, the reform introduces the obligation to set up an advisory panel of experts to resolve issues of any nature that may arise during the execution phase of the

contract. It would seem that this provision also applies to contracts, even other than public, in progress at the entry into force of the Simplification Decree.

Even for the appointment of experts the timeframe is short. In addition, the resolution of issues is a contractual award unless the parties have agreed otherwise. Failure to comply with the decisions of the panel results in fiscal liability and constitutes a serious breach of contractual obligations.

For the remaining contracts, however, the establishment of the advisory panel is optional and it can also be appointed to resolve issues arising during the tender.

Pending tenders at the date of entry into force of the simplification decree and tenders launched after the entry into force of the Decree and until December 31, 2021

Some innovations also concern the tenders in progress at the date of entry into force of the Decree for which:

- the delivery of the works or the start of the execution of the contract is always authorized as a matter of urgency;
- procedural deadlines are shortened, without the need for the awarding authority to justify the reasons;
- tenders can be started even if they have not been included in the planning documents, unless the latter will be updated; and
- for ongoing tenders, for which the deadline for the submission of tenders has expired by February 22, 2020, and for framework agreements already operative at the time of entry into force of the Decree, the award of contracts must be completed by December 31, 2020.

Ongoing works at the date of entry into force of the Decree

- Acceleration for the issuance of Project Status Report (the so-called SAL) by the director of works that must take place within 15 days from the entry into force of the Decree and for payments that must be made within 15 days from the issuance of the certificate of payment.
- Compliance with the pandemic containment measures constitutes force majeure if it prevents the contracts from being completed within the set deadlines and represents a circumstance not imputable to the contractor which may therefore request an extension.
- The higher charges incurred due to the adaptation to the COVID-19 containment rules will be refunded.
- As an exception to the Code, the suspension of work is allowed only for exceptional reasons related to criminal and anti-mafia regulations, serious reasons of public order, technical or public interest, and for the time strictly necessary.

Further innovations

The Decree has introduced some further innovations, including:

- the extension of the validity of some changes introduced with the *Sblocca Cantieri*;
- the opportunity to submit a project finance proposal for a private initiative even in the presence of a work already included in the planning documents; and
- with reference to the appointment of extraordinary commissioners, the Decree updates the rules introduced by the *Sblocca Cantieri*.

In light of the overview of innovations, one wonders whether these changes really can offer the country some relief. It is clear that the core of the reform is not only to encourage the use of simplified procedures (which are not new in our system) but also to speed up the procedures too often weighed down by over-regulation and formalism typical in Italy.

It is certain that the transition from one excess to another could have even more serious repercussions. The practical application of these provisions could increase the risk of rewarding speed at the expense of quality, both at the tendering stage and in the decisions that administrative judges will be called to take on often highly technical and complex issues.

At the same time, some provisions (for example the mandatory appointment of the technical advisory panel) and the stratification of the rules that will apply depending on the period in which the call for tenders will be issued, depending on the type of work, as well as depending on the value, do nothing more than hinder compliance with the tight schedule, as well as in some cases discourage the call for tenders or participation by economic operators.

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