THEORETICAL AND HISTORICAL PROBLEMS OF LAW AND POLITICS

Raffaele Caroccia
University of Naples Federico II, Italy
Comenius University, Bratislava, Slovakia

SOFT LAW IN THE ITALIAN ADMINISTRATIVE LAW SYSTEM? THE GUIDE LINES BY ANTI-CORRUPTION AUTHORITY CASE

The paper deals with the problem posed by regulatory powers given to a non elective body and their potential contrast with democratic legitimacy. The topic is analyzed taking into consideration the role, recently acknowledged by the Italian law system, to Anti Corruption Authority, which has been entitled with the task of giving details to the legal framework, as far as public tender procedures are concerned. The analysis at first identifies the three changes of paradigm occurred in Italian tender procedures regulation policy, then identifies the characteristics of the so called Independent Authorities and focuses on guide lines by Anti Corruption Authority, generally acknowledged as soft law. In particular, the position of various scholars about them is investigated and there is a final stress about the flaw that this kind of legal source can pose to the legality principle.
Keywords: soft law, guide lines, tertiary rules, Italian Anti-corruption Authority.

1. The recent patterns in Italian legislative reforms about public tender procedures

In the most recent years Italian legislation concerning public tender procedures has undergone a deep reformation process[1]. This has happened mainly as a consequence of the EU influence above this part of the legal environment.

In fact, the whole public tender system has moved from having as its main concern the traditional protection of Public Administration from potentially unreliable counterparts to letting enterprises the maximum freedom of competition between themselves.

It must be added that this new focus, whose birth dates back to the ninth decade of past century, has recently been matched by another legislative concern, whose source is rather international[2] than coming from the EU legal environment: the contrast of maladministration events. The assumption beneath this new paradigm is that public tender procedures are particularly sensitive to crimes such as corruption so that – apart from criminal law, which has a *post factum* role – the set of administrative rules regarding them must have also a pre-emptive scope.

It can be so said that the goal which according to the Italian policy maker public tender procedures – that cover 16% of GNP – should now reach is granting an effective competition in a transparent context.

This should result not only in finding the best counterpart for administrations but also in avoiding the spread of corruption or bribery crimes. Unluckily this aim is far from being reached[3].

As a result, the new legislation of tender procedures – which has been introduced in 2016[4] and has been reformed in 2017[5] – has acknowledged to the Anti Corruption National Authority (ANAC) a broad set of powers, which makes this administrative body the director of the whole sector. Clumsy rules are thought

[1] Carbonara, L. (2018). *La regolazione efficiente dei contratti pubblici. Riv. trim. dir. pubbl.*, *2*, 18, 838-860.
[2] UN Merida Convention against corruption is a relevant source of this second paradigm shift.
[3] Valaguzza, S. (2016). La regolazione strategia dell'Autorità Nazionale Anticorruzione. *Rivista della regolazione dei mercati*, *1*, 16.
[4] About d. lgs. 50/16 at least Contessa C., Crocco D. (2016). *Il nuovo codice degli appalti commentato*, Roma, DEI.
[5] D. lgs. 56/17.

to be a source of corruption[1]; so, the primary role of this Authority is a clarification of the regulatory setting in the above described strategic perspective.

ANAC in fact has regulatory powers, para-jurisdictional powers, adjudication powers, mainly concerning sanctions against enterprises, public bodies and public employees, and can start a trail against acts which violate the public tender procedures' rules.

It is a point of interest to study how the role of ANAC has altered the traditional set and hierarchy of legal sources in the Italian law context.

To do so, we will at first summarize the role of Independent Authorities, then we will focus on soft law concept, finally we will investigate on ANAC guide lines in order to try to find an answer to the question.

2. The Independent Authorities organizational model

The powers acknowledged to ANAC follow the model of Independent Authorities[2], which has spread in the Italian legal system from the ninth decade of the last century. It is not surprising that the same period when administrative legislation faced a radical change can be pointed out as a time during which administrative organization started a reformation process.

Independent Authorities, which resume a model that is more common in countries such as the United States or the United Kingdom, were introduced in the Italian legal environment in order to create a separation between politics and administrative decisions concerning sensitive goods, either of economic nature – such as interest rate or free market – or with a constitutional status – such as personal data protection, freedom of information – and thus requiring neutral and highly technical choices. In so doing, Independent Authorities should act both as tutors of the juridical good they are called to invigilate on and as protectors of the weaker legal subjects, such as consumers, small investors or PMI.

The model is built upon the following assumption: some decisions are too important to let them at politicians' disposal. It is so necessary to create administrative bodies which are able to make them without being caught by short term worries and are far from the temptation of maximizing popular consensus. At the same time, this organizational configuration should ensure a better quality of administrative action, which should be neutral as well. So from a wholly ministerial model, in which every administrative decision was to be taken by the government and its apparatus, expression of a citizens' majority and depositary of parliamentary confidence, Italian administrative organization has opened up to a technocratic model, in which some decisions are taken by a body which is independent from popular will and finds its legitimacy in a high level of knowledge or expertise. This peculiar experience is the only element that should enable to cover such a role and acts as a guarantee of independency even from economic potentates; due to a lack of constitutional basis, some authors have also suggested that Independent Authorities can be justified thanks to a link between their action field and the EU legislative concerns, whose consequence is the creation of a continental common legal framework[3].

It has to be stressed that this organisational change can create problem to the democratic structure of Italian State, especially because – as said – Independent Authorities have not a constitutional coverage and do not rely on popular representativeness.

Furthermore, it can be added that the contrast between traditional administrative structures and Independent Authorities is made stronger by the following circumstance: Independent Authorities – even though there is not a general statute concerning them in the Italian law system – sum up in themselves powers that are generally split in different bodies, at least in the modern form of State. In fact, regulatory powers are somehow similar to the ones which the Parliament is endowed with, adjudication powers are the less problematic ones, given the fact that they are typical of administrative bodies, and para-jurisdictional powers are dangerously similar to the ones typical of the judiciary order.

These two points arised the criticism of some scholars, who accused Independent Authorities to step out the constitutional configuration of administration; it has to be said that generally this critique has been passed over, either thanks to a legitimacy spreading directly from the EU legal system or to a link with the Parliament, to which Independent Authorities address an annual relation about their doing.

[1] Racca, G.M. (2015). Dall'Autorità sui contratti pubblici all'Autorità Nazionale Anticorruzione: il cambiamento del sistema. *Dir. Amm., 2-3,* 15, 345-365.
[2] Ieva, L. (2001). Autorità Indipendenti, tecnica e neutralità del pubblico potere. *Foro Amm.*, *10-11,* 01, 3071-3090.
[3] This is particularly true in banking sector.

It is to note that more recently the creation of Independent Authorities has also been explained with the assumption that law is no more able to face contemporary world. This is thought to be more complex and faster to let Parliament rule it with an act of legislation, mainly as a consequence of the globalisation process[1] which has led to a deep change in State traditional organisational model. It has been suggested that in this new environment a better regulation can be made by a smaller, faster and with higher technical skills body. This entity is the Independent Authority.

The last point is the most relevant one, at least as this paper is concerned. What happens to democracy, when regulatory powers are given to an entity which is outside the popular legitimacy circuit? The answer to this question is simpler when Independent Authorities are given powers above a small sector, such as stock exchange market, in order to promote deregulation policies. In fact in this case we have a small number of legal subjects that are influenced by the choices made by an Independent Authority, which acts (or at least should do so) in execution of technical/specialist science and according to a political choice. So in this case, an Independent Authority completes with fine technical details a legal pattern, which has been grossly drawn by the Parliament, and its decisions affect a clear cluster of legal subjects.

The things become thorny, when such a regulatory power regards a whole sector of the legal system, as it has happened with public tender procedures. In fact, ANAC has been given the power to regulate all the legal subjects that are part of this legal environment. It means that the following entities must respect rules set by ANAC: all public administrations, all private corporations equated to public administration, all economic subjects that participate to tenders. Furthermore, the rules concerning this kind of procedures do not seem to have a complex or technical background.

It can also be said that ANAC does not find its legitimacy inside EU legal environment; this is a big difference from other administrations of the same kind, which all have a strong bound to super-national law system.

So all the elements, which were used to justify a regulatory power from Independent Authorities, seem to be lacking in this case.

3. Soft law and regulatory powers by Anti Corruption Authority

The above described situation becomes even more complex, given the fact that acts by ANAC (the so called guide lines) have been identified at a legislative level as a source of soft law.

This expression[2] is referred to a broad and not well defined variety of acts – which has come at light at a first time (seventh decade of the last century) in the international legal environment, at a second stage even in the national law context (last ten years) – that have a not binding effect.

Their birth is generally linked to a self-regulation phenomenon and to the awareness that traditional legal sources are no more able to regulate in an effective way contemporary global transactions (e. g. *lex mercatoria*). The subjects of a legal context, whose regulation is loose (e.g. international law system), as a consequence decide to create acts where they consensually set the basic rules about their operation, thus shaping a common and predictable operative framework. This process is voluntary and it relies on self compliance; generally in fact there are not tribunals to whom controversies about such legal texts can be deferred. Another feature of this new kind of regulation is its fastness; soft law can be easily adapted to changes that are found in reality or economy.

In the national legal environment, instead, soft law has became somehow typical of Independent Authorities and its aim could be described as moral suasion; as a consequence, from a theoretical point of view it should not be inserted in the legal sources hierarchy and could only clarify previous legal commands, answer questions posed by a juridical subject or enhance and promote best practices. Soft law

[1] Della Cananea, G. (2003). *I* pubblici poteri nello spazio giuridico globale. *Riv. trim. dir. pubbl.*, *1,* 03, 1-30.

[2] Mostacci, E. (2008). *La soft law nel sistema delle fonti: uno studio comparator*. Padova, CEDAM; Morettini, S. (2011). Il soft law nelle Autorità indipendenti: procedure oscure e assenza di garanzie? *Osservatorio AIR*, *6*, 11; Torchia, L. (2016). *La regolazione del mercato dei contratti pubblici*. *Rivista della regolazione dei mercati*, *2,* 16; Morbidelli, G. (2016). Degli effetti giuridici della soft law. *Rivista della regolazione dei mercati*, *2,* 16; Ramajoli, M. (2017). Soft law e ordinamento amministrativo. *Dir. Amm.*, *1,* 17, 147-167; Deodato, C. (2016). *Le linee guida dell'ANAC: una nuova fonte del diritto?*, *Giustizia Amministrativa*. <https://www.giustizia-amministrativa.it%2Fdocuments%2F20142%2F62321%2Fnsiga_4083067.docx%2F4ef0761e-84e2-0f2a21c98b8967f74036%2Fnsiga_4083067.docx&usg=AOvVaw0eC__aqn7sNQRHVP48oOXC>.

has so a role, which can be described as a compass, which is capable to orientate both enterprises and administrations to the same goal: as for ANAC is concerned, it is clean, effective and workable competition in public tender procedures.

Nevertheless, soft law has a regulatory effect, at least as a tertiary rule; so it has been suggested that it can be adopted only after a notice and comment procedure among stakeholders, especially when its effectiveness refers to a plurality of cases. As a consequence, it is in fact crypto-hard law at a smarter look [1]. This feature is immediately visible in a national legal context – as the Italian one is – where acts of public bodies have a traditional binding effect; so the difference between soft law and the traditional legal sources is made less perspicuous.

In order to justify soft law in administrative law system, two proposals have been made.

The procedure of public consultation before the adoption of a guide line is thought to be an effective tool to get some legitimacy to the regulation act by bodies which do not rely on popular will. Furthermore, there must always be a judicial review on soft law, as a consequence of the general guarantee against all public administration acts.

Let us now investigate about ANAC guide lines.

As for ANAC is concerned, soft law is thought to be a tool to pass over traditional (and dull) governmental regulation, which was used to complete the primary source legal contents with a single secondary source before the reform. The aim of such a change is related to a creation of a number of disciplines, which are at the same time easier to change and written in a more colloquial way, thus more capable of orienting legal subjects.

ANAC has received broad regulatory powers following the public tender legislative reform, which took place in 2016. In particular, the Independent Authority is now capable of creating tools of flexible regulation, as art. 213 d. lgs. 50/16 statues.

So it can be said that in public tender sector flexible regulation should be the Italian translation of soft law. It must be added that the EU legislation does not oblige member State to create an Independent Authority in order to invigilate this law system sector and to regulate it; such a choice has been voluntarily made by Italian Parliament, mostly as a consequence of popular concerns about wide spread corruptive episodes in public tenders.

According to the new statute of public tenders as sketched by the State Council[2], there are three kinds of complementary regulatory source in contemporary Italian law system.

The first one is made by the Transportation Ministry, which follows ANAC legal opinion. This source is binding and it is the more similar one to the traditional features of sub-legislative acts (regulations). The only eccentric element is that this source puts together a political body, as the Ministry is, and a technical one, as ANAC is.

The second one is made by "binding" guide lines[3]; only ANAC is entitled in creating them, as a consequence of a clear legal position. They are atypical legal sources created by ANAC in a regulatory effort and can be described as general administrative acts or as regulatory acts; so they are similar to other acts of the same kind by Independent Authorities. Their goal should be the clarification of a previous legislative command. Administrative bodies could have the chance of not complying with guide lines (comply or explain principle). In this case, they must give a proper explanation. It must be said that this is an hypothetic case, given the fact that Italian administrations are characterized by a deep deference to ANAC suggestions. Anyway, it must be stressed that a binding soft law act is a legal object, which is against the acknowledged nature of soft law itself.

The third one is made by not binding guide lines; they are produced by ANAC and resemble to traditional administrative acts, in which an interpretation of the legal scheme is made or an explanation of praxis held by an Administration is given. This category is concrete and has predefined recipients. Even in this case, it is permitted to make different choices from the solutions suggested in the guide lines.

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[1] Ramajoli, M. (2016). Self regulation, soft regulation e hard regulation nei mercati finanziari. *Rivista della regolazione dei mercati*, *2,* 16.

[2] Opinion n. 855/2016. <https://www.giustizia-amministrativa.it%2Fcdsintra%2Fwcm%2Fidc%2Fgroups%2Fpublic%2Fdocuments%2Fdocument%2Fmday%2Fmjgz%2F~edisp%2Fnsiga_4162238.doc&usg=AOvVaw36u-DQZHBVijIgAVsYYtN0>.

[3] We use the term guide lines as a general reference to a variety of acts, such as recommendations, opinions, rulings, which share the same nature and aim.

It is not simple to identify clearly if a guide line is binding or not and it must be added that the same guide line can be in certain parts binding, while in other ones be not binding. So the legal landscape becomes really complex.

The second category is, however, the most difficult one to interpret. In fact it is something in the middle between law and administrative act, a state of being which cannot be found in the strict list of Italian law system legal sources, which are contained in the premises to the civil code.

Generally, it can be said that guide lines have a guarantee role: in fact, every legal subject who complies with their contents can be safe about the legitimacy of his doings. So, soft law can be described as a coordination technique, which aim is creating safety in the legal system. This role was acknowledged to jurisprudence even before 2016 to acts by other Independent Authorities and now it has been given to ANAC; so that is another new feature of Italian legal system[1].

4. The view on guide lines by scholars

Italian scholars have immediately tried to answer the questions posed by ANAC guide lines; we will now analyze their views.

One of the first scholars[2] to deal with the problem of atypical legal sources – such as the guide lines are – in the Italian administrative law sector has stressed that to tackle it effectively there is a need to get out of the common shared idea, according to which there cannot be any modifications to the legal sources number and hierarchy in different legal environment of the same system. Instead, it would be better to build in each part of the law system a different sources catalogue and to acknowledge that even in the administrative law system there can be a variety of unnamed sources. According to this suggestion, an act can be a legal sources simply if the legal system admits it, even if it does not comply with broad and general classifications. So there is no real evidence of atypical sources; it would so be better to speak about an open plurality of acts and facts, that can create legal obligations. According to this point of view, it is sufficient that a law gives an administrative body a discretionary power to let the entity create a regulation on how use its power. So there is no space for a dispute about the name of this kind of acts, because the relevant factor is the use of a regulatory power, no matter how the act is named. This is even more relevant at a tertiary level, where guide lines can be set. Nevertheless, it is important to investigate about legal sources, because they have a precious role of guarantee in favour of everyone who gets in touch with an administration. The correct qualification of a legal source, from this point of view, is relevant because a legal subject can identify what rules will be followed by an administrative body and can be able to predict its behaviour according to the role and to the relationships of each act involved in regulating the event. In particular as far as a tertiary rule is concerned, there would be always granted to the Administration the chance to justify the non compliance with one of its internal acts, that in so being acquires an external validity; from this point of view, guide lines – interpreted as a form of soft law – have only a conditioned effectiveness. The Author stresses that the category of soft law is difficult to find inside the administrative sector, both because its sources are obligatory and not voluntary and because as far as public bodies action is concerned there must always be granted a judicial review. As a consequence of these two reasons, soft law becomes hard law.

Another scholar[3], whose writings are particularly influential, has underlined that the Italian law system has become familiar with guide line phenomenon even before public tenders procedure reformation. Guide lines could be described as discursive legal texts, where suggestions from an administrative body to general subjects are collected. More recently, though, they have acquired a binding effect. This change justifies the interest in them. Guide lines – it is suggested – can be thought as a generic label on different legal products; in particular, the starting point to investigate the ones by ANAC is a legal environment review. D. lgs. 50/16, in fact, describes some of them as binding, while it gives the Authority a general regulatory power, in accordance to which there can be only not binding acts. Furthermore, it can be noted that binding guide lines can contain suggestions, so in these parts they are not binding. Thus the mentioned classification suggested by State Council as regulatory act is not fulfilling. It would be more correct to speculate that binding guide lines are regulations, given the fact that they can innovate the legal environment, clarify a primary source command and apply to all the legal subjects. A relevant hint to

[1] This is stressed particularly by Cintioli, F. (2017). Il sindacato del giudice amministrativo sulle line guida, sui pareri del c.d. precontenzioso e sulle raccomandazioni di ANAC. *Dir. Proc. Amm.*, 2, 17, 381-420.
[2] Mazzamuto, M. (2015). L'atipicità delle fonti nel diritto amministrativo. *Dir. Amm.*, *4,* 15, 683-725.
[3] Morbidelli, G. (2016). Linee guida dell'ANAC: comandi o consigli? *Dir. Amm.*, 3, 16, 273-295.

support this thesis is the fact that this kind of guide lines takes the place of a previous governmental regulation. It would not be important the fact that ANAC is not linked to popular will; its rule-making power is in fact covered by an act, which was voted by Parliament. This doctrine is also against the chance of identifying guide lines as general administrative acts, because they are not addressed to previously defined subjects. Instead not binding guide lines are not regulations, given the fact that their aim is not to complete a legal command, but only to give suggestions about best practises or to propose an interpretation. It is refused their qualification as soft law, because this category is not defined in the Italian law system and it can be better to identify them as directives. They can be adjusted in a continuous tuning process, to which all the interested subjects can take part. Their distinctive element should be the quality of giving *ex ante* assurances to enterprises or administrations, which are involved in public tenders. In order to get this results, guide lines as a broad category should be described as commands rather than suggestions.

To sum up: Italian scholars have a not uniform view about guide lines by ANAC, though there is a widespread uneasiness about them; in particular the binding ones are often described not as regulatory acts (as suggested by the State Council), but as regulations *tout court*. This means that they have a secondary role in legal sources hierarchy and they are general, abstract and capable of creating new legal rules. It has been said – to justify this hypothesis – that Parliament can identify new secondary law sources, which can be made even by subjects different by the Government if they are chosen by a primary act[1].

In a recent book[2] dedicated to the topic of this article, it has been instead observed that guide lines are the typical legal source in our time, due to an unique characteristic: they are capable of a fast and flexible regulation. They should have a tertiary role, are born to react and regulate phenomena that traditional sources could not face in an effective way; so they are a source whose birth is rather material than formal[3]. Their goal is not giving an order, but showing and pointing out some ways to reach an aim. The interpreter should be free to choose between different and contemporary options, which guide lines should give; so regulation becomes an open texture rather than a sum of clear and well-defined prescriptions. This model – which implies a substantive turn-around from the traditional legal sources status – applies to a variety of subjects and can be used either by traditional administrations or by Independent Authorities. However, guide lines are subject to a law, which should identify the aim of tertiary regulation. Their effectiveness is not limited to some subjects of the legal context and they have a real binding value, though they can be classified as soft law. As a consequence, judicial review must be granted.

Another scholar[4] has stressed that regulatory powers given to Independent Authorities have an ambiguous nature. They can result either in legislative acts or in administrative acts. However, the regulation activity is continuous and should have a clear legislative coverage and finds its legitimacy in a notice and comment procedure. It has been again suggested that in these circumstances it should be granted a deep judicial review, whose key point should be the proportionality test, even if it would have been better if a regulation by Government had been kept.

A different critical view[5] concentrates on the following themes: i. the change from the law/regulation approach to the flexible sources of regulation approach is a way of making the legal context simpler only at a first and careless glance; ii. soft law cannot be found in a legal environment where there is a binding effectiveness; iii. there is a flaw in the legality principle as a consequence of wide spread guide lines by an Authority which has no link with people will; iv. there is a rising risk of uncertainty. Only judicial review could reduce it.

5. Democratic legitimacy and judicial review

Guide lines by ANAC have not still found a clear classification, as seen above.

There are anyway some key points, which are common among scholars.

The first one: guide lines have a not doubtful regulatory content, no matter what kind of legal sources they are resembled to.

[1] Cintioli, F. (2017). *Il* sindacato del giudice amministrativo sulle line guida, sui pareri del c.d. precontenzioso e sulle raccomandazioni di ANAC. *Dir. Proc. Amm.*, 2, 17, 381-420.

[2] See Italia, V. (2016). *Le linee guida e le leggi*. Milano: Giuffrè.

[3] There would be a coming back to the Middle Age saying: *Ex facto oritur ius* (law is made by fact).

[4] Morrone, A. (2018). *Fonti normative*. Bologna, Il Mulino, 208-216 and Morrone, A. (2017). Le Linee Guida dell'Autorità Nazionale Anticorruzione nel sistema della fonti. *Riv. trim. dir. pubbl.*, *3*, 17, 743-768.

[5] Giuffrè, G.A. (2017). Le "nuove" dimensioni del regolamento. Il caso delle Linee guida ANAC. *Federalismi*, *november*.

The second one: they are set by an Authority, which does not rely on a direct popular legitimacy. Nevertheless, it can pose on legal subjects limitations and burdens.

In order to cure the flaw created by these two features, it has been unanimously suggested that a deep judicial review can make this kind of legal source more compliant with the traditional configuration of a modern democracy.

The review by judges, in fact, can help to pass over a lack of link with popular will and grant a control, even it is only *post factum*. It can also create a barrier to the phenomenon of soft regulation, whose unwilled result can be a supremacy of economy or technical power above political authorities. In this way, the right to start a trial can be used by legal subjects to give the whole system equilibrium; if it is true, it must be added that on the other hand there is not a clear standard upon which guide lines can be judged.

This solution, anyway, seems to be problematic: it is based on a formal logic of legitimacy[1]. In it, in fact, there is a persistent lack of popular legitimacy, given the fact that judges are a neutral power.

The suggestion seems to suffer by the same flaws of the notice and comment procedure, which has been identified by State Council as a way to improve guide lines legitimacy.

These two solutions do not seem enough to fill a gap of popular legitimacy, because the reliance simply on an authority response (*argumentum ex auctoritate*) can cause a dramatic fall of the democratic level. So it would be better to avoid, at least in the administrative law sector, the notion of soft law and to come back to a more familiar regulation by regulations.

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[1] See Romano Tassone, A. (2002). Situazioni giuridiche soggettive e decisioni delle Amministrazioni indipendenti. *Dir. Amm.*, *2/02*.