

RECENT NOVELTIES ABOUT APPEAL TERM IN CONTROVERSIES CONCERNING PUBLIC TENDERS IN ITALIAN LEGAL ENVIRONMENT / Raffaele Caroccia

Dr. Raffaele Caroccia
University of Naples Federico II
Department of Political Sciences
Via Leopoldo Di Rodinò, 22
80133 Naples, Italy.
raffaele.caroccia@libero.it
ORCID: 0000-0002-3383-9772

Abstract: *The aim of this paper is to outline overview of amendments present in the Italian legal environment regarding appeal in public tender controversies. The content analysis will be conducted based on the Court of Justice of the European Union rulings, then referring to Italian administrative case law and finally focused on the Italian new legislative regulation concerning public tenders.*

Key words: *Appeal Term; Public Tenders; EU Law; Administrative Judgements; Italian Legal Environment*

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1. INTRODUCTION

The present paper focuses on analysis of the legal regulation of appeal term in Italian legal environment. The identification of the above-mentioned term has not been made by Italian law until last year. Only in 2023, with the reform of public tender regulations, there has been a clear legal identification. Before this date there was room only for judicial solutions, which were neither clear nor predictable. This was a big and thorny question point as far as rule of law is concerned. The paper focus to answer the question, whether the new legislation satisfies the requirements and the principles of rule of law, as set in EU law.

To elaborate on that, the analysis will be conducted based on the understanding and interpretation of the appeal term as stated in EU directives and the interpretation provided by Court of Justice of the European Union (hereinafter CJ EU). It will be afterwards followed by the analysis of its application on national level – in the Italian law, particularly focused on the recent legislative amendments. The analysis will also essentially rely on main scholarly contributions, which are the framework according to which Italian legislative has recently operated. Therefore, the methodology of this paper is using a content analysis of rulings and legislative acts, through which the *rationale* of these choices is to be identified.

Italy clearly incorporated its legal obligations regarding public procurement procedures in its agreement with the European Commission for the management of Next Generation EU funds (see D'Alterio, 2022). In particular, the need to streamline and speed up procurement procedures was identified. One of the tools envisaged to regain competitiveness is a more adequate telematic management of procedures.

Consequently, specific resources have been allocated to equip Administrations with state-of-the-art IT infrastructures. In addition, a reform of the procurement code was agreed upon, which has been carried out without any new directives being issued. This reform responds to the needs of the so-called national recovery and resilience plan and also aims to overcome some of the objections raised by the EU Commission to Italian legislation. In particular, one element that had to be affected was the time limit for appeal, which – as said before – was not at all clear.

2. APPEAL TIME LIMIT IN THE EU LEGISLATION

To identify the latter, one must start with an analysis of EU law (see Greco, 2008; Barbieri, 2009). It sets the time limit for lodging an appeal from the knowledge of the reasons for the award decision.¹

It could be said, in short, that the principle of effectiveness postulates that the *dies a quo* is triggered by actual knowledge or concrete recognition of the defects of an award decision.

In EU law, in fact, the time limit for appeal as far as public tenders are concerned is clearly identified as a tool necessary to make individual protection effective. This aim is relevant for national regulation of judicial administration and procedure and must be preserved by the national legislatures in order to guarantee the full effect of EU law.² Effective protection in fact is not such if it is not characterized by the full right of access to the judge as its logical antecedent.

So, the first quality of national legislation to be coherent with EU one is a clear identification of the appeal term. Moreover, an unprecedented, detailed regulation of procedural aspects is also the result of the awareness that it is necessary to give concrete meaning to the substantive rules and thus enable the freedom of establishment and the principle of freedom to provide services.

It is no coincidence that, in the awareness that a compensation remedy in equivalent form is not fully satisfactory and that therefore the specific compensation form must be guaranteed, in the so-called appeals directive 2007/66/EC the standstill institute, both substantive and procedural, is linked to the time limit for appeal.²

This consists – as it is well known – of an initial period of 35 days, as provided for by the Italian legislator, calculated from the communication of the award decision complete with a summary report of the reasons that determined it, and a second similar period, which may begin after the appeal has been lodged pending the decision on the

¹ Art. 1, c. 3 Dir. 89/665/EEC, as replaced by Dir. 2007/66/EC: "Member States shall ensure that review procedures are available, under detailed rules which the Member States may establish, to any person having or having had an interest in obtaining the award of a particular contract and who has been or risks being harmed by an alleged infringement". The guarantee of a full contestability of measures concerning the award of a contract is accentuated by recital 122 of Directive 24/2013/EU.

² The first deadline is provided for in Art. 2a(2) Dir. 89/665/EEC, as replaced by Dir. 2007/66/EC (which requires that the communication be accompanied by a clear and reasoned report): "The conclusion of a contract following the decision to award a contract falling within the scope of Directive 2004/18/EC may not take place before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision was sent to the tenderers and candidates concerned, or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision." The second is laid down in Article 2 of the same directive: "Where a body of first instance, which is independent of the contracting authority, receives an application for review concerning a contract award decision, the Member States shall ensure that the contracting authority may not conclude the contract before the review body has made a decision on the application for interim measures or on the merits of the application."

precautionary application attached to it, during which the conclusion of the contract is prevented.

These two periods of time serve precisely to allow a person who has arrived in a different position from the successful tenderer to fully assess the possibility, costs, and prospects of success of a judicial review. Once he has made up his mind, they then allow him to gather the necessary material for the same and to provide for notification, without the claim to the award of the tender being frustrated by surprise stipulations and as long as an initial examination of his grievances has not been reached.

Therefore, consistent with this *rationale*, the time limit to appeal should only start from the moment when it is possible to clearly consider the possibility of an appeal, so that its accrual can be postponed until all relevant documentation is materially made available to an economic operator.

3. THE INTERPRETATION BY THE COURT OF JUSTICE OF THE EU

It is not surprising that according to the CJ EU interpretation, the exercise of the right to appeal cannot exist without proper reasoning and the precise content of any infringing act; moreover, the simple knowledge is not sufficient as it must be qualified with the characteristics of adequacy, detail, and precision.

Similar characteristics are to be applied also by national regulations, which must unambiguously clarify rights and duties (i.e., the procedural burdens) of economic operators and the respective timeframes for exercising them.

Even in older case law, the importance of the statement of motivation was such that it was a condition of the act's existence.³

More recently and directly regarding the regulation of public tenders, the CJ EU introduced some additional clarifications to this general approach.

First, while noting that the right to appeal may legitimately suffer from time limitations to ensure the certainty of legal relations, it was stated that the time limits introduced by national legislations must respect the criterion of reasonableness. This is necessary in order not to nullify the useful effect of EU provisions.⁴

An extension and clarification of this principle concerned the time limits for contesting clauses of public tender announcements deemed unlawfully detrimental to competition;⁵ if a time limit (then of 60 days) provided for by Italian law and calculated from the date of publication of the announcement to initiate such a judgment is reasonable in abstract, one must also bear in mind that the application of this procedural rule must be dropped in the precise circumstances of the case. Indeed, if the interpretation of the clause has become ambiguous only because of the conduct of the contracting authority and only an enforcement decision has made its meaning clear, it is

³ See CJEEC, judgment of 10 December 1957, *Usines à tubes de la Sarre*, joined cases 1/57 and 14/57, ECLI:EU:C:1957:13; CJEC, judgment of 9 January 1997, *Commission of the European Communities v Sociedade de Curtumes a Sul do Tejo Lda* (Socurte), *Revestimentos de Cortiça Lda* (Quavi) and *Sociedade Transformadora de Carnes Lda* (Stec), C-143/95, ECLI:EU:C:1997:3; CJEC, judgment of 6 December 1990, *Wirtschaftsvereinigung Eisen- und Stahlindustrie v Commission of the European Communities*, C-180/88, ECLI:EU:C:1990:441; CJ, sec. II, judgment of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, T.228/02, ECLI:EU:T:2006:384; CJEU, judgment of 28 January 2010, *Uniplex (UK) Ltd v NHS Business Services Authority*, C-406/08, ECLI:EU:C:2010:45.

⁴ See CJEU, judgment of 12 December 2002, *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH.*, C-470/99, ECLI:EU:C:2002:746.

⁵ See CJEU, judgment of 27 February 2003, *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia*, and *Sca Mölnlycke SpA, Artsana SpA and Fater SpA*, C-327/00, ECLI:EU:C:2003:109.

only from the latter that the time limit for judicial review can legitimately start, without the lapse of the time limit for challenging the announcement being able to explain prejudicial effects that can be avoided by voiding the exclusionary clause.

Subsequently, precise indications were given as to how to identify the *dies a quo* for lodging a public procurement appeal in relation to acts other than announcement.⁶ In particular, it was made clear that the time-limit, however fixed by national law, runs not from the moment when the rejection of a tender was communicated, but from the different time at which the tenderer is or should be aware of the reasons why his proposal was not preferred to that of others. In the CJ EU's reasoning there operates – it should be noted – an approximation of the presumption of cognizability of the defects to their actual knowledge. And not only that: the CJ EU also added that, in a necessary balancing act between the principle of effectiveness and the principle of stability of administrative decisions, all time-limits in the matter of trials affecting public contracts must be fixed in a sufficiently clear, precise and comprehensible manner so as to provide citizens and enterprises with a framework on which they can rely and without frustrating their right of defence. Therefore, time limits must be set unambiguously and without leaving any margin of appreciation to the adjudicating body as to whether the limitation period has expired, which would make it unpredictable. On the other hand, national courts are required to interpret national legislation in the sense of voiding it if it conflicts with effectiveness and, therefore, in the sense of extending the time limit for bringing an action by calculating it from the moment of actual knowledge of the reasons for the harm suffered by an economic operator.

Subsequently⁷ – this time in relation to provisions of Italian law and with specific reference to the conditions for the admissibility of the main appeal and the additional grounds of appeal in the tendering procedure – the question was examined as to the manner in which the time limit was to be identified, asking whether it could start to run "*from the time when the person concerned actually became aware or had the possibility of becoming aware, by showing ordinary diligence, of the existence of an infringement, and not from the date of the communication of the decision of final award of the contract*". Unsurprisingly, the CJ EU pointed out that objections formulated on the basis of elements that could not be deduced from the adjudication and arising from facts subsequent to the latter can validly be brought before the court within a time limit calculated from the date of knowledge of the events and certainly not from the date of communication of the decision. The admissibility of additional grounds in a case that is already pending is of no relevance in altering that conclusion; in fact, to reason in such a way would burden an economic operator with the challenge "*in abstracto*" of an administrative measure and the formulation only at a later time of any precise grievances, moreover, not referring to the content of the first administrative measure. The case is different in relation to complaints related to factual or legal aspects preceding the award measure, for which the ordinary method of calculating the time limit applies.

Again in relation to an Italian regulation⁸ – the abrogated hyper-special rite provided for in Article 120, c. 2 *bis*, Code of Administrative Process, which was a special trial concerning admissions/exclusions from a public tender, that was abolished in 2019 and put on participants a duty to contest immediately each other admission to the tender

⁶ CJEU, judgment of 28 January 2010, Uniplex (UK) Ltd v NHS Business Services Authority, C-406/08, ECLI:EU:C:2010:45.

⁷ CJEU, judgment of 8 May 2014, Idrodinamica Spurgo Velox srl and Others v Acquedotto Pugliese SpA, C-161/13, ECLI:EU:C:2014:307.

⁸ CJEU, order of 14 February 2019, Cooperativa Animazione Valdocco S.C.S. Impresa Sociale Onlus v Consorzio Intercomunale Servizi Sociali di Pinerolo and Azienda Sanitaria Locale To3 di Collegno e Pinerolo, C-54/18, ECLI:EU:C:2019:118.

– the CJ EU has affirmed its compatibility with EU law, only if the decisions are accompanied by a report capable of guaranteeing the interested parties knowledge of the logical-legal process followed by the P.A. in their adoption. In the absence of the latter, it is not legitimate to accrue a forfeiture in respect of objections based on acts that are neither known nor knowable.

Similar reasoning was also followed by the CJ EU in a later ruling concerning an appeal against a decision to admit a competitor and in relation to Romanian law.⁹ In particular, the CJ EU reiterated the need – for the purposes of calculating the *dies a quo* – to distinguish between a mere communication of the administrative decision and a document accompanied by a report constituting its motivational content. It is only the receipt of the latter document that triggers the lapse of the appeal term.

A final element, recently explored by the CJ EU,¹⁰ has to do with how a bidder becomes aware of the proposals of its competitors. The rationale followed by the Court hinges on a premise and a general consideration. Clearly – this is the premise – knowledge of opposing bids cannot be allowed for anti-competitive purposes, i. e. it cannot become a tool with which one can acquire data in order to undermine in future procedures or in the tender itself the chances of success of another competitor or imitate its proposals. This limitation applies, however, only in the case of the existence of an expectation of confidentiality related to technical or commercial secrets. The right of access to a competitor's bid is – this, on the other hand, is the general consideration – a substantial part of the right of defence and it may be necessary to guarantee the same precisely in order to allow for the assessment of the admissibility of an appeal with a real hope of success in accordance also with a canon of good administration. Consequently, there must be a precise motivation of the choices of secrecy and an immediate justiciability of the decisions by which access is denied to a tender or parts of it, even if the latter dispute is not immediately linked to a request for justice contesting the award of the contract to another party. The phase of the decision on ostention and its contestation may therefore also take place prior to the award.

As a result, it can be said that the above-mentioned Remedies Directive – as consistently interpreted by the CJ EU – is clear on this point: the time-limit is triggered only when the injured party knows the reasoning behind the act that has affected him and can thus appreciate its possible unlawfulness in concrete terms.

This is a basic guarantee as far as rule of law is concerned. For a correct framing of the problem, therefore, the central element is the identification of when the P.A. performs the (full) burden of communication.

4. ITALIAN LEGAL FRAMEWORK: JURISPRUDENCE AND NEW LEGISLATIVE REGULATION

Italian legal framework was not clear about the latter element.¹¹ The discipline had so to be built by administrative judges case by case, thus putting in question the predictability and the certainty of legal effects. The most important ruling about this topic was State Council Plenary Assembly no. 12, 2nd July 2020.¹²

⁹ CJEU, judgment of 24 February 2022, *Alstom Transport SA v Compania Nationala de Cai Ferate SA*, C-532/20, ECLI:EU:C:2022:128.

¹⁰ CJEU, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras v UAB*, C-927/19, ECLI:EU:C:2021:700.

¹¹ For an analysis of Italian legislation see Sandulli (2023) and Taglianetti (2019).

¹² About the ruling see Sandulli (2020).

The ruling was pronounced according to the public tender code, which has now been abolished. Its principles anyway are the ones that were followed in the reform; so it is still important a reference to the ruling. The solution given to the problem led to the creation of a complex 'eclectic' jurisprudential rule, according to which the time limit may run from various events, which are complementary to each other. All in the effort – admittedly not easy – to balance certainty and effectiveness.

The first element, to which attention should be paid, is the publication made pursuant to Article 29 of Legislative Decree 50/16, from which a legal presumption of knowledge arises. This introduces a real first burden on operators to be diligent in consulting the sites of contracting stations.

The communications made by the latter and accepted by the participants then give operators the opportunity to acquire information, relating both to new defects and to illegitimacies already emerging from the published acts; they thus provide a way of calculating the time limit for lodging a main appeal or additional grounds with special reference to unpublished documents, relevant - for example - to contest an assessment of non-anomaly. Obviously, if publication has not taken place, the time limit starts only from the moment of receipt of the personal notice.

In the case of access, which can be exercised within 15 days of the communication (the second burden introduced by case law on private individuals and without the law specifying a time limit for this activity), there is also an extension of the time limit for appeal for the same period of 15 days, again only for complaints related to the documents known subsequently.

Finally, an obstructive conduct by the P.A., which allows access beyond the fifteenth day, results in the time limit running afresh in its entirety.

The Constitutional Court issued ruling 204 28th October 2021, confirming the legitimacy of the above exposed solution. The latter had been built by judges in a posthumous way and was not at all clear and unambiguous, as it was built upon at least three exceptions. Anyway, it has been the base of the recent reform of public tender regulation, which has (finally) given it a clear legal basis.

Furthermore, the reform on the calculation of the time limit for appeals in the procurement procedures trials¹³ was constructed according to this criterion: "*if everything is accessible online, there will no longer be any doubt as to the knowledge of the infringing acts*" (Carbone, 2023).

So, the importance of an electronic management of communications between P.A. and enterprises has been stressed in the Italian legal environment; we can note that this second part of the reform has been made possible only thanks to the EU Recovery Plan.

Furthermore, the legislative seems to have (partially) accepted the suggestion by Scholars, who had pointed out that in order to overcome the problem on which the Council of State and the Constitutional Court had intervened, it was necessary to make a connection between: i) the P.A.'s communication duties; ii) the expiry of the appeal term; iii) the period of inhibition from entering into the contract; iv) the effectiveness of the award following the verification of the requirements. It was thus confirmed that the issue at hand had to be clarified by an amendment of a substantive – rather than a procedural – nature.

In the new legislative regulation, the expiry of the time limit is so linked to the notification of the results of the tender pursuant to Article 90. Together with this fulfilment, the provision of the information identified in detail by another provision of the

¹³ Made by legislative decree n. 36 2023 and in force since July of the same year.

legislative decree, Art. 36, should be made available electronically. This disclosure in any case must take place no later than 5 days after the adoption of the award. A reciprocal provision of the same data and offers is planned for the first five operators.

It is precisely the notification of the award measure that unequivocally triggers the term for appeals; the award decision can now only be taken when the requirements of the operator proposed as the winner had been verified by the tender commission.

Finally, the entire system of access to documents is no longer based on the request of the parties, but on a specific burden on the public authorities.

The latter is required to make a prior decision on the secrecy of certain parts of the bids, which can be challenged through a trial concerning only the righteousness of disclosure decisions. In any case, non-disclosure decision does not block the time limit for filing an appeal.

This feature of the new legislative text unfortunately leads one to believe that there will be generalized and reciprocal trials regarding non-disclosure decisions. This confirms that the legislator believes that in this area the efficiency of a short timeframe for settling disputes is more important than the guarantee of effective protection.

Anyway, this solution must be interpreted in coherence with CJ EU ruling in C-927/19 as mentioned above.

5. CONCLUSION

A few final remarks can be made before assessing if the new regulation is coherent with rule of law principle. The reference for the calculation of the *dies a quo* to the publication, without the experiment of individual notice, no longer seems usable.

Similarly, there seems to be an exclusion of an alternative criterion, linked to actual knowledge without notification, for the computation of the running of the time limit. Therefore, making available of documents without prior notice cannot be considered sufficient for the calculation of the *dies a quo*.

Consequently, prior to the fulfilment of the individual duty to notify, an interest in appeal cannot be traced; the commencement of the appeal term could however be postponed by the making available of the documents pursuant to Article 36 of Legislative Decree 36/2023, if not contemporaneous with the notification, in order for the system to be in line with the coordinates deriving from EU law.

An exclusion of the extension of the time limit calculated from the fulfilment of the latter burden would, in fact, conflict with the indications of European case law, although such a reading may be erroneously inferred from the literal wording of the provision.

In truth – for a correct exegesis of the legal framework – the principle that one cannot appeal against what one does not know must be respected. This is a clear move toward a solution more coherent with rule of law. In fact, law finally recognizes – overcoming the jurisprudential elaboration referred to above – that for the purposes of calculating the procedural term, the private individual cannot be charged with a duty of continuous vigilance in the absence of individual notification. This conclusion is also the only one capable of cutting off the space for opportunistic behaviour.

However, it seems that the bet has been placed mostly on purely technical tracks: it is assumed that a massive use of information technology could unravel a legal problem. The use of technology is, in fact, a choice on which the legislator has placed a non-substitutable bet. But we must not forget that cases of malfunctioning of platforms and computer systems during tenders are not uncommon, so much so that *ad hoc* case law has been formed on them. These rulings have made it possible to identify the liability

regime in the case of so-called cyber risk,¹⁴ which occurs when a platform does not work properly.

Therefore, a technological problem is enough to jeopardize the delicate mechanism put in place by the reform (this is assuming that all contracting stations immediately equip themselves with state-of-the-art computer systems, a rather optimistic possibility). So, we can say on the other hand that rule of law standards have not been fulfilled.

Latest legislative efforts - to make administrative action more knowable - to burden public authorities with special electronic communication obligations had unfortunately not been successful. On the contrary, the (even malicious) omissions of the Administrations - welded to (almost constant) jurisprudential rigidity - had given rise to a real 'toxic mixture' to the detriment of private individuals, who were burdened with the necessity of bringing the aforementioned appeals *in abstracto*. So, the answer to the question is that rule of law is still at stake, even with the new legislative framework.

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¹⁴ Italian State Council, sec. III, N. 08760/2019REG.PROV.COLL., N. 04570/2019 REG.RIC. (judgment of 24 December 2019).

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