THE REGULATORY SPACE OF PUBLIC PROCUREMENT

DRAFT

By Laura Zanettini

***Summary**: 1. Object of analysis – 2. Method: the concept of regulatory space... – 3. ... and its application to public procurement – 4. The three main public interests: impartiality, efficiency and competition*

1. Object of analysis

The market for public procurement is a very important part of the European and Italian economic system.

According to a recent research carried out by Confindustria, the Italian organization representing industries, between 1995 and 2003, the demand for works, supplies and services expressed by the Government had an economic value equal to 16% of the European GNP and 12.3% of the Italian GNP (Confindustria, 2006).

This means that the productivity and competitiveness of the European Union and of Italy depend also on an efficient market for public contracts.

In order to ensure efficiency in the public procurement sector, competing firms with solid financial capacities and excellent managing abilities are not sufficient.

As the 1993 Nobel Prize in Economics Douglass C. North states, for a market to function efficiently, there needs to be good institutions as well as good organizations. Institutions identify the set of rules within which firms operate; organizations refer to the entities with whom firms establish legal and economic relationships (North, 1990).

In other words, there needs to exist both a clear regulatory framework capable of balancing the different interests present in the sector; and good practices in the application of that framework by means of the contracting authorities and of the other "regulators".

My doctoral thesis moves from this belief and aims at analyzing the organizations that in different ways and through different powers affect the result of the awarding process.

2. Method: the concept of regulatory space…

Public procurement can be considered a space inhabited by several organizations: not just the contracting authority and the tenderers, but also the judges who ensure remedies in case of infringements of the regulatory framework; the national Parliament who approves laws that give execution to the European directives; the European Council and Parliament who adopt directives on the sector through the codecision procedure and many others.

An analytical device that appears to be useful in order to analyze the organizations operating in the space of public procurement is the so called "regulatory space". The concept has been elaborated upon towards the end of the 1980's by Hancher and Moran (Hancher-Moran, 1989).

They come from the idea that economic regulation cannot be explained any longer using the traditional model, according to which a public authority controls and regulates private interests and activities. This vision has been dominant in both the English and the American literature on economic regulation. The very concept of regulatory capture relies on the assumption of a public sphere that is and must be clearly separated from the private one. Private influence on the regulatory process is synonymous to corruption and must be avoided.

The traditional model, that is to say the traditional vision of the relationship between State and citizens, has long dominated also the regulation of public procurement. In the Italian law on Government's accounting, which contains the first discipline of the sector, the public sphere represented by the contracting authority is and must be separated from the private space occupied by tenderers.

Between contracting authority and tenderers there is no exchange but rather opposition. The first one holds and exercises public power. The second ones are subject to that power (Santi Romano, 1930). A symptom of this kind of relationship is the fact that the only awarding criterion the law contemplates is the lowest price: the only contribution that tenderers are allowed to give to the contract is reduced to the offering of a price. They are takers of regulation, not makers of regulation.

Things have come along since then and the last European directives approved on public procurement show a radical change in perspective. Tenderers can even contribute to the definition of the object of the contract, through the so called competitive dialogue (Arrowsmith, 1999). There is no longer opposition between public entities and private firms. Instead there is interdependence and bargaining.

As Hancher and Moran notes, "*economic regulation under advanced capitalism – its formation as much as its implementation – invariably involves*

interdependence and bargaining between powerful and sophisticated actors against a background of extensive state involvement".

Regulatory power is not concentrated in one entity, the state authority. It is fragmented among state bodies and between state and non-state bodies (Scott, 2001). Therefore to analyze regulation one has to analyze the organizations that take part in the regulatory process, which means: to examine the powers they hold and pay attention to the relationships they establish with one another; to consider the legal framework in which they operate as well as their cultural environment; the resources at their disposal and the prestige they may have accumulated.

According to Hancher and Moran, a regulatory space is composed of a range of regulatory issues subject to public decision. Three main consequences follow from this definition. Firstly because it is a space it can be rationally allocated among several actors, but it is also available for occupation. Secondly, there can be a general concept of regulatory space, in relation to the general economic regulation and there can be specific concepts of regulatory space, referring to specific sectors of regulation. Thirdly, the concept of regulatory space can be and in fact has been expressed using other metaphors. For example one of the prominent Italian Professors of Administrative law, currently member of the Constitutional Court, Cassese, uses the metaphor of the public arena. He defines the public arena as a space within which public and private entities establish relationships that are not of opposition as they once were in the traditional model. Rather they are of coordination, collaboration and they even reflect interchange of roles (Cassese, 2002).

3. … and its application to public procurement: the multilevel regulatory space

In order to apply the concept of regulatory space to public procurement, it is necessary both to identify the most important issues subject to public decision that form part of the space and to detect the organizations that adopt those public decisions.

As to the main issues, they appear to be the ones related to the choices made by the administration when it designs the awarding of a contract. In other words the main issues are connected with the discretion exercised by the contracting entities.

In particular, despite the fact that it is for services, supplies or works, the awarding of a public contract requires the administration to exercise its discretion in reference to at least four different decisions. First it has to define

the object, drawing up the technical specifications. Then it has to select the procedure to apply, either open, restricted or negotiated. The third decision regards the criteria to use for assessing the general suitability of tenders, their economic standing and professional knowledge. The last choice concerns the criterion on which the contracting authority will base the selection of the best tender and consequently the award of the contract.

There are several organizations that take public decisions on the mentioned issues. In so doing they end up directly or indirectly affecting the choices made by the contracting authority in each awarding procedure. Eventually the public decisions will either widen the administrative discretion, allowing for more flexibility and a wider range of choices to be made on a case by case basis. Or they will impose more rigidity and therefore reduce the options available to the contracting entity.

Some organizations define the framework of legal rules within which contracting entities operate. Among this type of organizations, a basic distinction can be drawn between those who take part in the elaboration of the European regulation and those who outline the national regulation.

Other organizations do not exactly create sources of the law, but are nevertheless capable of affecting the awarding procedure in different ways. This is the case of the Italian administrative judge. He can for example remove the discriminatory technical specifications drawn up in the invitation to tender and he can even avoid the awarding decision taken unlawfully by the contracting authority.

The regulatory space of public procurement immediately presents itself as a multilevel space. At the highest level we find European organizations such as the Commission, the Parliament, the Council and the Court of Justice - but one should also take into account the growing importance of the Economic and social Committee and of the Committee of the Regions, as well as the role played by lobbies -. Their public decisions not only contribute in the creation of the European regulatory framework on public procurement - what North would call the European institutions -. They also influence the other levels of the space and the activities of the other organizations.

The lower level is the national one - actually there are several national levels, as many as the member States -. It indicates the national regulation on public procurement. The discretion left to member States in shaping the national level varies from issue to issue, but it can never lead to discriminations in favor of national undertakings and to the detriment of the common market. Examples of organizations that shape the Italian level are: the Parliament, who adopts laws and sometimes delegates to the Government the adoption of laws in the field; the Government, who enacts regulations for the enforcement of the

laws; the Regions, who according to the Italian Constitution hold legislative power in specific matters related to public procurement; the Constitutional Court, which can declare the illegitimacy of laws not complying with the Constitution and repeal them with retroactive effects.

The lowest level is dominated by the contracting entity and consists in the single awarding procedure. The contracting authority has to make choices in line with both the European and the national level. It interacts with the firms taking part in the procedure and, as the studies on game theory point out, it has to make optimal use of the so called first mover advantage. That is to say, it has to design the entire process so to exploit competition among tenderers to the advantage of public convenience.

The mentioned levels are not separated one from the other, nor are they restricted to a purely hierarchical distribution. In fact the organizations of the regulatory space are not fixed, rather they move from one level to the other, for example assisting in the elaboration of the European level despite the fact that they belong to the national level. This is the case of the Italian administrative judge, who contributes to the creation of the European level when it requests the Court of Justice to give a preliminary ruling on the interpretation of the directives on public procurement (see for instance Consiglio di Stato, order n. 448/2006).

An other example of organization who moves from one level to another is offered by the European Commission. It can affect the result of the single awarding procedure by opening an infringement procedure against a member State for the conduct of one of the national contracting authorities.

4. The three main public interests: impartiality, efficiency and competition

Three coordinates are used to examine the actors within the regulatory space and to define the most relevant features of the public decisions they adopt. They represent the three public interests always present in every public procurement regulation: impartiality, efficiency and competition (De Brun, 1898; Kovacic 1995).

The public contract is not simply an instrument used by the Government to obtain services, supplies and works required to carry out its activities. From the point of view of tenderers, the public contract is itself a good that the contracting entity is entitled to allocate. Therefore it is essential that the entire awarding procedure reflects impartiality, avoiding any kind of discrimination and/or abuse.

Competition is usually considered an instrument for achieving more efficiency. According to the liberal vision as described by Adam Smith, the best way to satisfy the public interest is to let private citizens act freely to pursue their own individual interests. Competition among tenderers determined to be awarded the public contract allows the Government to select the most efficient operator.

Competition can however enter into conflict with efficiency, because, for instance it usually increases the administrative costs of evaluating multiple tenders – i.e. the variable costs of award procedures -. And also because, instead of competing one against the other, tenderers might decide to collude and agree for coordinating their offers.

Beside competition and impartiality have opposite effects on administrative discretion: one requires more flexibility, the other can be achieved only by means of rigid procedures.

The tensions among the actors of the regulatory space reflect the tensions among the mentioned interests.

***

Through the new model of regulatory space, my thesis tries to offer a dynamic and global vision of a sector that is often presented as static and is frequently studied on the perspective of the acts rather than on the one of the actors.