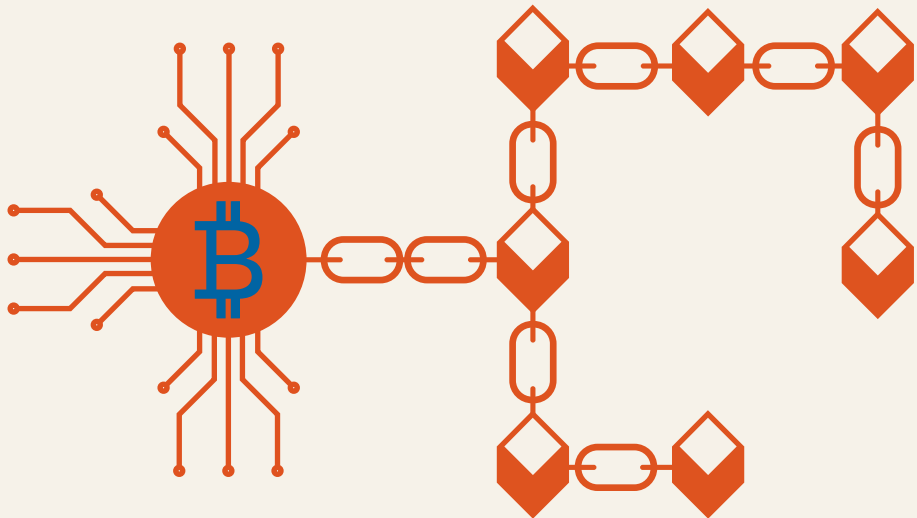


Studi e Ricerche  
del Dottorato di Dinamica dei Sistemi

# ■ THE DARK SIDE OF THE BUSINESS: AN ITALIAN PERSPECTIVE

Selected papers from the the  
38th Symposium on Economic Crime



*Studi e Ricerche del Dottorato di Dinamica dei Sistemi*

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Collana del Dipartimento di Scienze Politiche  
e delle Relazioni Internazionali



# THE DARK SIDE OF THE BUSINESS: AN ITALIAN PERSPECTIVE

SELECTED PAPERS FROM THE 38TH SYMPOSIUM ON ECONOMIC CRIME



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# Public contracts in Italy: the failure of the anti-pandemic investments

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*Abstract Purpose* – This paper describes and analyzes the complexity of the regulation and the stipulation of public contracts in Italy, focusing specifically on the failure of recent anti-pandemic investments. This is of particular interest during a state of emergency when it should be avoided to waste public funds and to speculate. Everything shows how the regulations of public procurement affects the realization of big investments, the use of public funds and the possibility for anyone to pursue criminal purposes.

*Design/methodology/approach* – After an introduction focused on the EU legal framework on public contracts as implemented in the internal legislation, the paper will go deeper in evaluating the public investments made during the hardest moment of the pandemic, showing the extent to which the legislation gives chances to private and public subjects to speculate, to committing crimes or, at least, to realize wrong expenditures.

*Findings* – this paper shows how a broader or tighter legislation could affect the way public funds are used, and highlights the confusion between the ideas of simplification and emergency legislation in the public contracts matter.

*Originality/value* – This work looks to the recent Italian experiences concerning the use of public funds during the pandemic emergency. This paper is addressing the most recent Italian pieces of legislation regarding public tender procedures and has not been submitted elsewhere for publication.

*Summary:* 1. Introduction – The EU legal framework on public contracts and the Italian “code of contracts” (d.lgs. 50/2016). 2. Amendments to the “code of contracts”. 3. The beginning of the pandemic – further amendments to the regulation of public contracts.

4. The beginning of the pandemic – emergency legislation and its influences on public contracts. 5. Anti-pandemic public investments – few lights, many shadows. 6. Coming out of the pandemic: between emergency and simplification. 7. Conclusions.

## 1. Introduction – The EU legal framework on public contracts and the Italian “code of contracts” (d.lgs. 50/2016)

The issues related to public contracts are particularly important but complex at the same time. From a European Union perspective, establishing a unified and harmonized regulatory framework for public contracts in the EU territory could help in ensuring the fairness of public procedures and a higher level of inclusion of bidders coming from different parts of the Union. From this point of view, a legal regulation could help in reducing episodes of corruption or other crimes.

The first action to mention taken by the EU in the field was to issue Directive 2004/18/EC, to provide a set of harmonized rules that each Member State had to implement within its own legal system. This happened in Italy through the legislative decree n. 163/2006, the so-called “code of public contracts”. It must be stressed that through the abovementioned Directive the European Union has established some value thresholds for investments; once these thresholds are exceeded, the contract is considered to be of Community importance. Therefore, once the value threshold determined by the directive has been surpassed, the contract will be subject to the special discipline established by the internal acts transposing the directives (Lazzini, 2008).

Probably the term “code” of public contracts is strictly inappropriate (the nature of this decree, in fact, is closer to that of a consolidated act). But this act contained more than six hundred articles; the length, alone, testifies its complexity.

The idea of the legislator was to reduce the degree of discretion given of economic operators by offering a complete regulation as to cover every possible aspect of the public contracts procedures (Martines, 2015, p.3). A “redundant regulation”, which also aimed to prevent any form of crime



related to public bargaining – a risk identified in the excessive autonomy of the contracting authorities. However, this resulted in a complex and articulated regulatory framework that did not help in increasing the speed of investments together with the realization of the most urgent public works; a sort of bureaucratic apparatus similar to a labyrinth in which economic operators were forced to enter in order to stipulate agreements with the public administration. Moreover, it took ten years to update the matter, in so allowing the Italian legislator to issue in the meantime further internal rules on the subject, making everything even more complicated.

Clearly, at this point it was considered necessary to update the legislation, in order to simplify procedures and make it easier to enter into public procurement procedures.

The following European acts are currently in force: Directive 2014/24/EU on public contracts in the so-called "ordinary sectors", Directive 2014/25/EU on public contracts in the so-called "special sectors" (water, energy, transport, postal services) and Directive 2014/23/EU on concession contracts.

The basic idea behind the new directives is to give more discretion to the contracting authorities, burdening at the same time them with the related responsibilities (Martines, 2015, p. 2). As it is well known, European Directives always need to be implemented in each member state through domestic legislation; scholars have correctly pointed out that the implementation of the Directives was an excellent opportunity to introduce an internal regulation that does not include the limits established by the previous one, but the objectives were not completely achieved (Martines, 2015, p.5). The European provisions were finally transposed in the legislative decree n. 50/2016 which is, still today, the main piece of legislation to refer to for public procurement in Italy (even if heavily amended).

The term "code" is often erroneously referred to this decree as well. Apparently, the act is shorter than the previous one (it contains 220 articles) and appears to be simpler but, when it is time to take into consideration the included discipline for public contracts, its complexity remains evident. Public contracts are now divided into four different categories, distinguished according to the value of the performance and the type of contract, each

one with its own legal discipline; direct calls, for instance, are allowed only under the limit of 40.000 euro (but only if the contracting authority can adequately motivate the reasons to act like that), while limited or open calls come into play as the values arises. However, the discipline to be applied is still influenced by the thresholds imposed by the EU Directives (Viterbo, 2016).

Another element worthy of mention is the increased role that is entrusted to the National Anti-Corruption Authority (ANAC), which is given not only the traditional power of supervision over public contracts, but also a sort of regulatory activity, through the issuing of guidelines and soft law tools enforcing the provisions contained in the legislative decree (Viterbo, 2016).

Although this act seems to have a more rational structure, it has essentially failed in speeding up procedures and reducing public bargaining times. For this reason, the legislator, as already happened with the old regulation, has issued new rules and new acts over time, in this case mainly driven by the COVID emergency which has amplified the need to reduce the limits related to public contracts.

## 2. Amendments to the “code of contracts”

As already mentioned, after three years from the issue of the decree 50/2016 the need to take some corrective measures was evident – even if, to be more precise, some amendments had already been made in 2017. This was necessary not only to be more efficient in achieving the previously set objectives, but also because the European Commission ordered Italy to comply with the legislation on subcontracting. The Commission, in fact, issued a letter of formal notice no. 2018/2273 of 24 January 2019 and started an infringement procedure against Italy requiring some specific interventions: internal legislation historically placed several limits on the use of subcontracting, while Union rules are based on the principle that subcontracting is one of the ways to achieve an increased participation of small and medium-sized enterprises (SMEs) in public procurement (Iannotti della Valle, 2019, p.37).

The Italian legislator has always opposed the use of subcontracting, which is basically considered a source of bribery and other crimes. He tried, however, to follow the European guidelines by increasing the threshold of subcontracting works from 30 to 40 percent of the total amount (Bacchini, 2019); this happened through the decree n. 32/2019, so-called “*sblocca cantieri*” (“*unlocking construction sites*”). This act significantly modifies the “code of contracts” of 2016 – which finally means that the goal of simplification and speed has not been reached. In particular, many of the provisions of decree 50/2016 were suspended for one year, to verify whether the changes made (which often regarded a smaller number of control procedures) were functional to the objectives of speed. The scholars pointed out that yet another good opportunity to put some order in the matter has been thrown away (Iannotti della Valle, 2019 p. 36).

Ever since the pandemic hit, economic operators were put to the test; the need to encourage investment became even more urgent and further changes were needed to face the situation. The first point of concern was the extension of the suspension of the rules of the decree n. 50/2016 established by the “*sblocca cantieri*” decree.

### 3. The beginning of the pandemic – further amendments to the regulation of public contracts

Like the previous one, also the subsequent decree n. 76/2020, so-called “*decreto semplificazioni*” (“*simplification decree*”), issued in the summer of 2020, established an exemption regime with respect to that of 2016. With the first two articles, in particular, a derogation regime is established for procedures both above and below the European limits, with the declared purpose of “*encouraging public investments in the infrastructure and public services sector and coping with the negative economic effects resulting from the containment measures and the global health emergency of COVID-19*” (Coiante, 2020).

One of the main objectives of this decree, therefore, is to quickly react to the negative consequences driven by the pandemic. The purpose, basically,

is to complete the tender procedures for the awarding and execution of public contracts as fast as possible. On the one hand, the need to be ready to handle the wounds inflicted by the pandemic and, on the other hand, the awareness of the delays affecting the public procurement sector forced the government to push on the accelerator (Cintioli, 2021, p. 81).

This new law, enacted during the pandemic, thus seeks to avoid a paralysis of the system, increasing the exceptions to the ordinary discipline and making use of the figure of the Extraordinary Commissioner, a body already provided for by previous regulations and massively implemented in the emergency phase (Cusano, 2021, p. 66). Italy has already known, in fact, several different types of emergencies (earthquakes, floods, landings of immigrants and so on), all managed by managerial figures specifically appointed by the political bodies to deal with them. According to some, it is clear that the new position hides the inability of politics and public administration to manage ordinary matters. In this sense, it should be emphasized that through the “*decreto semplificazioni*” 47 extraordinary commissioners were appointed, each one to manage and realize a specific public investment (Fattorini, 2020)

Following the *ratio* of the European Directives, scholars correctly pointed out that a fundamental element to simplify the regulation of public contracts could be found in a greater discretion and flexibility of the contracting authorities: “*the claim to solve every problem through the law generates two problems. The first is that every law, every article, every paragraph and period of it is subject to interpretation ... Many words, many doubts*”; the second is that too much norms and detailed rules reduce contractual freedom while, on the contrary, a synthetic law, a guideline, a principle would be needed, leaving room to the administration for a true evaluation to make a decision (Cintioli, 2020, p. 21-22).

This situation, however, seems comparable to that of an out-of-control pendulum, swinging between the need to conclude public investments faster preventing, at the same time, criminal acts from being committed – all while avoiding any waste of public money.

#### 4. The beginning of the pandemic – emergency legislation and its influences on public contracts

Although, as we have seen, the existence of too many rules was bad considered, today many laws are overlapping in the same field. In fact, there is even more to say and to add to the discussion.

It can be affirmed, indeed, that the legislation on public contracts and the one related to the pandemic emergency are intertwined, to the extent that the well-known Italian scholar Sabino Cassese was able to state that "*emergency interventions have been confused with simplification*" (Biscella, 2020).

The legislative production increased exponentially since the Italian authorities decided to declare the state of emergency (January 31, 2020), which occurred the day after the World Health Organization announced the beginning of the international emergency: 5 Decree-Law, 7 Decrees of the President of the Council of Ministers (DPCM), several executive orders and minor acts of the Ministry of Health, a decree issued by the Minister of Economy through which some terms of tax collection were suspended, other soft law tools coming from the Civil Protection Office, and so on. Everything was issued in a very short period of time (Frangipane, 2020, p. 3).

The above-mentioned "*decreto semplificazioni*", in fact, only came in June 2020. Italy entered in a strict lockdown from March to the end of May of the same year. During this period of time, the emergency provisions contained in decree 50/2016 have been widely used (in particular those rules, such as art. 63, which allow the choice of the contractors through negotiated procedures, without being forced to issue a public tender notice). But, especially in the field of medical devices, the so-called "Cura Italia" decree has become the fundamental law. However, first of all, it is important to underline that, although the emergency rules are exceptions to the general principles of publicity and competition typical of public bargaining, the ANAC strongly keeps its control and supervision powers. This is, in fact, really important, as we will see later on talking about some specific public

investments.

The exceptional rules for any kind of emergency contained in the decree 50/2016 are affected by the provisions of the "*Cura Italia*" decree n. 18/2020, issued on March 17, 2020. The decree expressly authorizes the use of the direct assignment procedures provided by the art. 63 and 163 of the decree 50/2016 – if the investment is below the community threshold provided by the "code of public contracts" – in the field of IT services, maintenance of prisons and donations of supplies. Most of all, the CEO of the National Agency for Investment Attraction and Business Development S.p.A. (so-called "*Invitalia*") was appointed as Extraordinary Commissioner for the COVID-19 pandemic emergency thanks to art. 122 of the "*Cura Italia*" decree, allowing him to realize some prefixed goals concerning the supply of medical protective devices. We will come back later on "*Invitalia*", just to clear the nature of this public office. It is now sufficient to say that important exceptions have been introduced regarding the procurement of protective medical devices (surgical masks): for instance, contracting authorities were allowed to purchase surgical mask and to pay in advance without having to previously consult the economic operators and without being forced to issue a public tender (Frangipane, 2020, p. 12-13).

It is at least curious that the Extraordinary Commissioner for the COVID emergency, appointed in March 2020, is also part of those 47 Extraordinary Commissioners established by the subsequent simplification decree, specifically as Extraordinary Commissioner for the reopening of schools (moreover, the same was also appointed as Extraordinary Commissioner for the management of problems of the ILVA of Taranto - the most important steel plant in Italy).

## 5. Anti-pandemic public investments – few lights, many shadows

As stated, in a very difficult moment for the country – when the strict lockdown had just begun – the "*Cura Italia*" decree came as a tool to make it possible to delegate for emergency reasons tasks traditionally entrusted to the ordinary administration bodies. Since the CEO of "*Invitalia*" was

appointed as Extraordinary Commissioner for the pandemic emergency, he was able to manage the most urgent and valuable public tender procedures (basically those related to medical devices).

The National Agency for Investment Attraction and Business Development S.p.A. (so-called “*Invitalia*”) is a sort of hybrid private-public body, because of its form of a joint stock company entirely controlled by the Minister of Economic Development. Since the end of the last century, in fact, a trend towards privatization of public bodies has emerged in Italy, which happened after a period of uncontrolled proliferation of public bodies. In several cases, however, such as the one under discussion, the process stopped in a “cold” phase, as the company’s assets were entirely owned by the State. This has led to the creation of organizational formulas placed more and more on the border between “public” and “private” (Cimini, 2015, p. 3). The mere fact of being in front of a body of an indeterminate nature has consequences: private entities are generally subject to the private regime, which means that they can escape from more restrictive rules specifically established for pure public law bodies (Cimini, 2015, p. 19).

So, once it became clear that the first weapon to fight against the COVID-19 would have been the surgical mask, the Commissioner tried to enter into agreements for their supply. Consequently the Commissioner structure authorized the purchase of masks for a value of 1.2 billion euros, imported directly from three Chinese companies. However, the agreements were not concluded directly by the public body: it emerged, thanks to several journalistic inquiries, that the contracting authority relied on the intermediation of some Italian private companies. Thus, official investigations followed and, at the time of writing, are in progress: it seems, at the moment, that Italian intermediary companies, in an bid to speculate on the pandemic, have received commissions for tens of millions not paid by the Commissioner’s structure but by the Chinese companies themselves. The public prosecutor writes in his proceedings: “*It is therefore clear that the private sector in question has a certain influence on the commissioner structure, which does not appear interested in establishing its own relationship with Chinese suppliers or evaluating an autonomous organizational path for certifications and transport, preferring rely on improvised freelancers who want to speculate*”

*on the epidemic” (Il Fatto Quotidiano, 2021).*

Furthermore, it emerged that the first supply contract was signed by the Chinese companies on March 26, 2020, when the Commissioner was not yet officially appointed. This situation clarifies how the fact that the negotiations for the agreements started at the beginning of March (before Italy officially entered into lockdown) when it was yet not possible to derogate in any way from the provisions of the code of public contracts (Olivo, 2021).

Even if, at first, no liability was recognized on behalf of the Extraordinary Commissioner, more recently the investigation has been extended. The alleged crimes, in the very end, were fraud, fencing stolen goods, money laundering, trafficking in illicit influences – among others; moreover, we cannot fail to mention embezzlement and abuse of office, of which the Commissioner himself was recently accused. And, that’s the last straw, it turned out that the masks imported from China were not usable because they did not comply with European and domestic safety regulations (Ossino, 2021).

We are certainly in front of an example of mismanagement of public money during an emergency phase, which is something already quite serious and significant. Unfortunately, the chances of failure have not diminished over time.

As already explained, the “*Invitalia*” CEO was also entrusted (thanks to the “*simplification decree*”) with the task of reopening schools safely after the end of the lockdown (*Il Fatto Quotidiano*, 2020). To do so, it was decided to hold a tender to supply more than two million single seat school desks and others classroom furnishings. The value of this public contract was very high, as it was worth 45 million of euros (Giorgi, 2020), but a lot of problems arose in his execution phase. First, the public call issued at the end of July 2020 had to be reopened due to a lack of participating companies; second, due to delays in procedures, school desks were not available at the beginning of the school year, and basically the courses started thanks to the old desks – which questions the real need of the single seat desk to fight against the pandemic (Zunino, 2020). Last but not least, the Anticorruption Authority, using



its supervisory powers, sent the Court of Auditors (which is the judicial body that approves the budgets and public spending in Italy) the report on the investigation conducted on the aforementioned investment: even if no specific crimes were hypothesized, there was an increasing difference between the estimated cost of the furnishings and the actual cost (the desks should have cost 75 euros, rather than 90 actually paid) (*La Repubblica*, 2021).

These examples show that the system created to satisfy the need for simplification of public tender procedures, together with that to deal with the emergency, does not work efficiently and, moreover, is subject to the risk of criminal infiltration. There have been many failed investments, but one of the most important is related to the Italian-made anti-COVID vaccine.

Since the beginning of the pandemic, in fact, the development of a vaccine to be produced within the national borders has been considered the best strategy to avoid being dependent on private pharmaceutical companies. Thus, by the beginning of 2021, "*Invitalia*" enters into an agreement with the company Reithera ltd. - an Italian private pharmaceutical company that had already successfully worked on a vector adenovirus – to finance the 3 experimental phases necessary to put the new drug in commerce. For the sum of about 80 million euros the Italian State should have acquired, through "*Invitalia*", 30% of the company Reithera, in so giving a final boost for the stage 3 of experimentation, but things did not go exactly as expected. Not to mention that, at that particular moment, the vaccination campaign with AstraZeneca, Pfizer and Moderna was about to start, making the Italian action already late (Valesini, 2021).

As previously stated, due to the simplification of the code of public contracts – or for reasons of urgency – neither ANAC or the Court of Audits lost any of their prerogatives in terms of supervisory powers. In the Reithera vaccine case, the Court of Audits blocked the above-mentioned purchase. The Court, in fact, acknowledged that the investment was not aimed at improving just a single branch of the production line of the company; rather, the financing would have strengthened the entire company's asset, in so realizing an undue enrichment of a private entity. The Court's website reports an excerpt of the reasons for the deny: "*The Judicial Section*

*considered the proposed investment project irreconcilable with the condition set by art. 15, paragraph 1, of the Ministerial Decree of 9 December 2014, according to which the expenses are eligible "to the extent necessary for the purposes of the project for which the subsidies are requested" and not, as shown by the project presented, for general production or research purposes, also on behalf of third parties pursued by ReiThera, nor for the even more general purposes of strengthening the equity consistency of the company."* (Corte dei Conti, 2021).

As a result, Italy cannot rely on his own vaccine, and many public funds have been basically wasted. Dealing with an emergency is not the only concern; besides, we use our money in the wrong way. However, the action of the Court of Auditors is certainly an excellent tool to prevent other crimes from being committed or other public funds to be wasted.

## 6. Coming out of the pandemic: between emergency and simplification

After the above, it could be probably argued that the acceleration of public procurement procedures confers too many powers or freedoms to the bargaining bodies. Furthermore, the lack of guarantees offered by the existence of a code of public contracts contributes to exponentially increase the risk of crime. In a delicate moment in which Italy and the European States are asking the Union for help, the waste of public funds becomes even more serious.

However, from a legislative point of view, it is easy to understand how the simplification of the regulatory framework for public procurement today goes hand in hand with the pandemic emergency, and all that follows.

This is even more evident, considering that the EU has established a huge funding plan to help member States overcome the resulting economic crisis. The “*Recovery and Resilience Facility*” plan is included in the Next Generation EU program for 2021-2027 and represents the largest incentive package ever financed by the European Union. Member States can only access the funds if they submit a National Recovery and Resilience plan

based on the EU guidelines for the authorization (World Economic Congress Italia, 2021, p.4).

The plan presented by Italy obtained the authorization of the European Commission on June 22, 2021. Although the Recovery Plan represents the greatest opportunity – from decades – in terms of development and modernization of the country, there are still many doubts about investments and public spending choices, about the projects presented and the related implementation tools. That’s why the Italian Government, despite the possible risks just highlighted above, has taken steps to enforce it by working, once again, on the legislation on public investments following the path already opened with the aforementioned “*decreto semplificazioni*” of 2020 (Coiante and Tranquilli, 2021).

The new decree n.77/2021, so called “*Decreto Semplificazioni bis*” (“*Simplification Decree bis*”) is actually in force in Italy, and represents a sort of translation into the public contracts legislation of the principles that emerged during the pandemic, in order to make a worthy use of the European funds. Articles 47 to 56 of the law concern public contracts. First of all, the dispute with the EU regarding subcontracts is resolved, making it possible to stipulate them without any limit starting from 1 November 2021; secondly, many of the provisions of the first simplification decree are extended, especially the ones concerning thresholds for direct calls and negotiated procedures – which are slightly increased (Agliata, 2021).

To be more precise, the legislative action clearly aims at an almost total replacement of the 2016 code of public contracts, and this is because, if we take a closer look, we understand that the need for simplification existed before the pandemic emergency. However, it seems that the legislator wants to simplify by reducing competition, the participation of economic operators and the use of open and transparent procedures as well, all elements identified as a slowdown in public investments. (Coiante and Tranquilli, 2021).

Some scholars, however, had already pointed out the risks and issues carried out by the new regulation: first of all, acts and norms multiply, making the already complex framework even more difficult to understand.

Secondly, a continuous series of amendments testifies the lack of an overall vision, which is reflecting in a regulatory framework that is basically not very rational. Finally, decreasing competition and transparency of procedures could provide greater opportunities for speculation and the commission of crimes for economic operators acting in predatory mode (Agliata, 2021).

## 7. Conclusions

The pendulum swings between one extreme and another: if the original idea was not to give an excessive space to the contracting authorities in order to prevent the public bargaining process from undergoing criminal influences or generating losses, today the need to get out from the crisis quickly – amplified by the eruption of COVID – leads to less guaranteed regulation. Furthermore, the huge funds provided by the EU must not be wasted or maliciously distracted.

All this explains well the position chosen by the Italian legislator in the field of public procurement and investments. It seems, at first glance, that it has not fully understood the lesson coming from the recent past. However, the particular historical moment probably puts us in the position of having to take some risks. The only thing that can certainly be affirmed is that the subject we are dealing with will hardly find a stable equilibrium, being so dependent on the contingent situation.

We must be aware that, in order to really obtain the desired structural amendments, a radical cultural change should be carried out, with a profound impact on norms, bodies, structures, working methods, vision of public affairs and so on.

In this tangled and complex scenario, the hope is that the investment opportunities that will certainly widely increase for the country will not turn into occasions of public crimes and fraud to the detriment of the entire Italian and European society. The role of the supervisory authorities, in this sense, must be absolutely strengthened, because it is still the only tool that helps to avoid malicious uses of public funds. Surely, the Court of Auditors and ANAC will still play a fundamental role in Italy, especially in that phase

of negotiation that takes place before the agreements are concluded.

In the end, here is what happened in Italy at the beginning of the Summer 2021: the new Prime Minister, appointed in July, quickly replaced the CEO of “*Invitalia*”, and called as the new Extraordinary Commissioner for the pandemic emergency an Italian Army General, a body who offers more guarantees than any other, which is significant.

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