

EDITED BY

Christoph Krönke

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Buying AI

THE LEGAL FRAMEWORK FOR
PUBLIC PROCUREMENT OF
ARTIFICIAL INTELLIGENCE IN THE EU



EUROPEAN PROCUREMENT LAW

Buying AI

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The Legal Framework for Public Procurement of Artificial Intelligence in the EU

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appropriate to approach other administrations (central or territorial) that have deployed a similar AIS¹⁷².

Finally, according to the Council of State, the administration must decide on the degree of outsourcing of the system's design, taking into account the existence of off-the-shelf products, carrying out a "balance of costs," including those of the long term, and, if necessary, ensuring compliance with the rules of public procurement and carefully drafting the clauses of the contract, particularly with regard to the intellectual property of the system, control of the data, and liability in the event of damage to third parties¹⁷³.

10. Country report on Italy

Gabriella M. Racca

1. PUBLIC PROCUREMENT OF AI IN ITALY

The procurement of Artificial Intelligence (AI) and more broadly of Information and Communication Technology (ICT) appears to offer a strategic advantage for Italian public administrations¹ and recently became one of the main objectives of the National Recovery Plan (*Piano Nazionale di Ripresa e Resilienza* – PNRR), which aims to improve digitalisation, innovation, and security in several areas of public administration.² Among these goals, the PNRR required a broad reform of the procurement system that was promptly implemented³ towards the end-to-end digitalisation of the entire procurement

¹ The public purchasing in Italy of ICT (Information and Communication Technology) services, including consulting, software development, and AI tools, from 2009 to 2022 amounted to EUR 20 billion. Out of this total, approximately EUR 10 billion was allocated to software programming and consultancy services. The market for ICT services in Italy is concentrated, with a dominant presence of 10 suppliers, while on the public demand side, the main purchasers of such ICT tools and services are *Consip SpA.*, followed by *Banca D'Italia* and other public companies providing services of general interest, such as gas, postal services, and telecommunications. See data available online at <<https://opentender.eu/start>>, the digital procurement portal developed by the EU Horizon 2020 funded project *Digiwhist* (<<https://digiwhist.eu/>>); both websites accessed 19 April 2024.

² 'Piano Nazionale di Ripresa e Resilienza' (2021) Missione 1: Digitalizzazione, innovazione, competitività, cultura e turismo – Componente 1: Digitalizzazione, innovazione e sicurezza nella PA. See, more than ten years ago, Gabriella M. Racca, 'The Role of IT solutions in the Award and Execution of Public Procurement below Threshold and List B Services: Overcoming E-Barriers' in Roberto Caranta and Dacian Dragos (eds), *Outside the EU Procurement Directives – Inside the Treaty?*, *European Procurement Law Series* vol 4 (Djøf Publishing 2012) 373.

³ On this topic, see, recently, Roberto Cavallo Perin, Marco Lipari, and Gabriella M. Racca (eds), *Contratti pubblici e innovazioni per l'attuazione della legge delega* (Jovene 2022).

¹⁷² Ibid 191.

¹⁷³ Ibid 193.

cycle.⁴ The new Italian Public Contracts Code focusses specifically on the digitalisation of the contract lifecycle and recognises that trust and fairness are the basis for successful digital cooperation between the contracting authority and the economic operators, which is seen as the basis for achieving the desired results efficiently and effectively.⁵ Ensuring traceability and transparency throughout the digital contract lifecycle facilitates the identification and enforcement of sanctions in the event of irregularities or breaches of contract.⁶ Maintaining a digital record of all contract-related activity makes it easier to identify and address any misconduct or breach. This comprehensive approach increases accountability and promotes greater compliance within the contract management process for any procurement procedure.⁷ Moreover, with a highly

⁴ Legislative Decree No. 36 of 31 March 2023 (Public Contracts Code), implementation of Article 1 of Law No. 78 of 21 June 2022. The new Public Contracts Code introduces digital principles and rights (Article 19) to be exercised within the new national digital e-procurement ecosystem (Article 22). For more effective analysis and verification of effectiveness, the data related to the digital lifecycle of public contracts (Article 21) will be collected and published in the National Public Contracts Database (Article 23). In addition, the data of the economic operators will be made available in the new Virtual Company Dossier (Article 24) implementing the EU ESPD model, which will be integrated into and complete the information contained in the Suppliers Register (Article 31). Under the new regulatory framework, there is an emphasis on fostering mutual trust (Article 2) and fairness (Article 5) between the administration and economic operators involved in contractual relationships. These principles are essential in achieving the shared objective (Article 1) of prompt and agile execution of services, works, or supplies. On this topic see: Gabriella M. Racca, 'Digital Transformation for Effective e-Procurement' in Carina Risvig Hamer, Marta Andhov, Erik Bertelsen and Roberto Caranta (eds), *Into the Northern Light – in memory of Steen Treumer* (Ex Tuto Publishing 2022) 215; Anna Corrado, *I nuovi contratti pubblici, intelligenza artificiale e blockchain: le sfide del prossimo futuro* (2023) federalismi.it 128.

⁵ For an analysis of the development of e-procurement platforms and more general issues relating to the digitalisation of public procurement, see Gabriella M. Racca and Christopher R. Yukins (eds), *Public Procurement and Digitalisation*, Collection Droit Administratif – Administrative Law (Bruylant forthcoming).

⁶ Gabriella M. Racca, 'Derogations from standstill period, ineffectiveness and remedies in the new tendering procedures: efficiency gains vs. risks of increasing litigation' in Steen Treumer and François Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJØF Publishing 2011) 95.

⁷ See, recently, Gabriella M. Racca, 'La responsabilità delle organizzazioni pubbliche nella trasformazione digitale e i principi di collaborazione e buona fede' (2022) *Diritto Amministrativo* 601–639; Gabriella M. Racca, 'L'evoluzione del principio di buona fede nella trasformazione digitale dei contratti pubblici' (2022) P.A. 201.

innovative provision within the EU procurement landscape, Article 30(1) of the new Italian Public Contracts Code enables the utilisation of artificial intelligence tools and distributed ledger technologies to enhance the efficiency of procurement procedures and outcomes.⁸ More specifically, the new Code sets stringent standards for automated and AI-based decisions in the procurement sector. These benchmarks include various criteria, such as the principle of transparency and comprehensibility, which guarantees the right of economic operators to be informed of the existence of automated decision-making processes in procurement procedures and to receive a full explanation of the rationale behind them. Equally important is the inclusion of human oversight of algorithmic decisions, which includes not only the evaluation and validation of automated decisions but also the ability to override them if necessary. To address potential algorithmic bias, it is also necessary to adopt appropriate technical and organisational measures to prevent any potential discriminatory effects that could adversely affect economic operators. An important requirement is the obligation for the contracting authority to provide the source code, related information, and other relevant materials necessary to understand the logic behind the technological solutions used. This provision is particularly relevant in relation to AI systems that could assist in comprehending the "motivational path" of AI-based decisions when it cannot be readily inferred from the source code's knowledge.⁹

1.1 Initiatives for the Procurement of ICT and AI Solutions in Public Administration

While the practice of specific AI procurement in the public sector in Italy seems to be rather limited at the moment, there is a wide range of procurement initiatives for the acquisition of comprehensive information technology

⁸ These provisions intend to regulate the upcoming use of learning algorithms in tender processes, considering the current prevalence of non-learning algorithms for bid comparison and the potential for more complex procedures in the future, aligning with principles from European guidelines and administrative case law. Cf. Consiglio di Stato, Relazioni al Codice dei contratti pubblici, 7 December 2022. See on this topic Corrado (n 4). A similar and interesting effort is being made by a group of EU cities, supported by the European Commission's DG Grow, which are cooperating to develop standardised AI procurement clauses based on the successful model of the city of Amsterdam. The draught of the "Standard Clauses for Procurement of Trustworthy Algorithmic Systems" is available at <https://living-in.eu/sites/default/files/files/Draft%20AI%20Clauses_1.pdf> accessed 19 April 2024.

⁹ Article 30(2) and (3) of the Public Contracts Code (n 4).

solutions involving highly automated and advanced technological solutions in different areas of public administration activities. Recent initiatives in the ICT sector have focused, for example, on purchasing innovative solutions to ensure technological efficiency in the healthcare sector, as well as ensuring IT security and implementing "cloud" solutions for public administrations, and the migration of single databases to cloud systems through the *Polo Strategico Nazionale* (PNS).¹⁰ As part of the strategic procurement foreseen in the Italian digital strategy (*Piano Triennale per l'informatica nella Pubblica Amministrazione*)¹¹, at the national level Consip SpA, the national central purchasing body, has launched three tenders to support the digital transformation of the healthcare sector.¹² Among these procurement initiatives, one is specifically dedicated to "Health Information Systems and Citizen Services," which is in line with the "One Health" approach outlined in the National Recovery Plan. The awarded contract provides application services and support for the digital transformation of public healthcare to the National Health Service administrations,¹³ while other digital health tender initiatives will provide the

¹⁰ See Consip initiatives for the digitalisation of the Public Administrations at <<https://www.consip.it/le-iniziativa-consip-per-la-digitalizzazione-della-pa>> accessed 19 April 2024.

¹¹ AgID, 'Piano Triennale per l'informatica nella Pubblica Amministrazione – Aggiornamento 2024–2026 (December 2023), available at <www.agid.gov.it/sites/default/files/repository_files/piano_triennale_per_linformatica_nella_pa_2024-2026.pdf> accessed 19 April 2024.

¹² On the role of Consip and other central purchasing bodies in national procurement, see Gabriella M. Racca, 'Central purchasing bodies in Italy: reluctance and challenges' in Carina Risvig Hamer and Mario Comba (eds), *Centralising Public Procurement* (Edward Elgar Publishing 2021), 220. The first tender is dedicated to clinical and health information systems and focusses on telemedicine and electronic (*e-health*) records. The Framework Agreement awarded has a total value of EUR 1 billion and is divided into six lots, four of which are dedicated to application services (software development and evolution, application migration, configuration and customisation of software solutions, adaptive and corrective maintenance, application and infrastructure management, etc.) and two of which are dedicated to support services (project management, monitoring support, change management, PMO and demand management, digitalisation of healthcare processes, IT strategy and advisory). Consip's first tender for digital health (Telemedicine and Electronic Medical Records), worth EUR 600 million, was awarded on 5 July 2022. See details at <www.consip.it/media/news-e-comunicati/aggiudicata-la-prima-gara-consip-per-sanit-digitale-telemedicina-e-cartella-clinica-elettronica> accessed 19 April 2024.

¹³ Consip's second tender for digital health, worth EUR 340 million, focusses on application services for *Centri Unici di Prenotazione* (CUP), health data

development of application solutions for integrated services for regional health authorities.¹⁴

On the other hand, Consip has also launched several initiatives to facilitate the acquisition of ICT and AI solutions for public administrations in the Information Security Strategy sector. These initiatives cover areas such as defining strategic choices for information security governance, establishing organisational and technological policies, and determining IT security requirements. One of the most recent procurements in this sector is the *Public Cloud IaaS PaaS Services Framework Agreement*, which has a significant value of more than seven hundred million euros. This FA enables public administrations to seamlessly transition to the cloud by offering "ready-to-use contracts" for purchasing *Infrastructure-as-a-Service* (IaaS) and *Platform-as-a-Service* (PaaS) public cloud services. These services encompass various components such as operating systems, VPN, internet traffic, storage, databases, and application platforms, all sourced by qualified providers approved by the Agency for Digital Italy (AgID). Another noteworthy initiative is the *Framework Agreement for Application Services in a Cloud Perspective*, designed exclusively for the specific requirements of central public administrations. This framework focusses on the development of digital services that prioritise citizen-centricity, simplification, operational efficiency, and technological agility. Its objectives include promoting application reuse, enhancing software quality and standardisation, as well as innovating application portfolio development and management processes. Through this Framework Agreement, central public administrations will have access to 'off-the-shelf' contracts worth nearly EUR 4 billion, covering both application services that support digital transformation and technological innovation (such as cloud-native application development, cloud migration, evolution of existing applications, customisation, and maintenance) and programme management office (PMO) services. The PMO services assist with project planning through project management, demand

interoperability, application platforms, portals, and applications (lots 1–4) and support services (lots 5–6). Details of Consip's second digital health tender can be found at <www.consip.it/bandi-di-gara/gare-e-avvisi/gara-sanit-digitale-sistemi-informativi-sanitari-e-servizi-alcittadino-per-le-pubbliche-amministrazioni-del-snn> accessed 19 April 2024.

¹⁴ Consip's third tender for digital services for health organisations (*Sistemi informativi gestionali per le PA del SSN*), awarded on 28 November 2023 for a value of EUR 900 million, is divided into six lots, four of which are dedicated to application services (two for administrative and accounting procedures and two for data management) and two for support services. See details of Consip's third tender for Digital Health at <www.consip.it/bandi-di-gara/gare-e-avvisi/gara-sanit-digitale-sistemi-informativigestionali> accessed 19 April 2024.

management, change management, as well as contract management support, including monitoring and ensuring customer satisfaction.¹⁵

Recently, the Italian National Agency for Regional Health Services (*Agenzia Nazionale per i Servizi Sanitari Regionali* - AGENAS), with the support of the Italian National Anti-Corruption Authority (*Autorità Nazionale Anticorruzione* – ANAC), launched two tenders for the implementation of the National Telemedicine Platform, under Mission 6 (Health) of the National Recovery Plan. The first tender, through project financing,¹⁶ has been awarded recently, while the second tender is a competitive dialogue for the implementation of a specific AI platform for general practitioners. However, this second tender was suspended in January 2024 following a note from the Italian Data Protection Authority (*Garante per la Protezione dei dati personali*) requesting further information on the legal basis for data processing and on the protection measures for personal and sensitive data.¹⁷

Procurement of AI systems could be further facilitated through the implementation of Pre-Commercial Procurement (PCP) and Public Procurement of Innovation (PPI) approaches. These models allow the government to facilitate the identification of multiple viable configurations of useful AI-based products or services or become an early adopter of innovative solutions and foster the innovation potential of AI in the public sector, e.g., in the smart cities sector or in the domain of security in public transport.¹⁸ By broadening the current

¹⁵ See details on Consip contracts for “Public Cloud IaaS and PaaS” services at <www.consip.it/media/news-e-comunicati/ampliata-l-offerta-consip-per-i-servizi-cloud> accessed 19 April 2024.

¹⁶ AGENAS, Open call for tenders for the award of the concession for the design, implementation, and management of the National Telemedicine Platform - PNRR-Mission 6 component 1 sub-investment 1.2.3. (12 October 2022). See website: <www.agenas.gov.it/bandi-di-gara-e-contratti/avvisi-bandi-e-inviti/gare-in-corso/2148-procedura-aperta-per-l%E2%80%99affidamento-della-concessione-per-la-progettazione-realizzazione-e-gestione-dei-servizi-abilitanti-della-piattaforma-nazionale-di-telemedicina-%E2%80%93-pnrr-missione-6-componente-1-sub-investimento-1-2-3-%E2%80%99telemedicina%E2%80%99D-mediante-progetto-financing-ai-sensi-dell%E2%80%99art-183-comma-15-del-d-lgs-50-2016-e-s-m,-con-diritto-di-prelazione-da-parte-del-promotore> accessed 19 April 2024.

¹⁷ AGENAS, Deliberation no. 5 of 9 January 2024, Subject PNRR M6C1 sub-investment 1.2.2.4 “Artificial Intelligence” Competitive Dialogue Procedure for the implementation of the Artificial Intelligence Platform to support primary healthcare – CIG 94572555B6. See details: <www.agenas.gov.it/images/2024/DELIBERE/delibera_sospensione_IA_09.01.2024.pdf> accessed 19 April 2024.

¹⁸ See, for example, the PCP PREVENT project, a pre-commercial procurement aimed at enhancing security in public transport and public spaces through innovative technology prototypes to be tested in real operational environments in

perspectives of PCP and PPI, public administrations might increase the use and impact of AI through smart procurement strategies. This use of public procurement as a policy tool can accelerate and redirect technological change so that government departments and agencies are at the forefront of adopting innovative AI solutions in driving the progress of the European public sector.¹⁹ To implement PCP and PPI procurement for AI, it is critical to strengthen risk management and monitoring to ensure compliance with the risk-based approach in the EU Regulation on Artificial Intelligence (AI Act).²⁰

France, Spain, Portugal, and Italy. The project, supported by the User Observatory Group (UOG) of stakeholders and practitioners from different relevant sectors, involves a consortium of 24 organisations from eight EU countries, including contracting authorities and public entities. Italy plays a major role in PCP PREVENT as one of the pilot sites and consortium members. See website: <<https://prevent-pcp.eu/>> accessed 19 April 2024.

¹⁹ Francesco Molinari, Colin van Noordt, Lorenzino Vaccari, Francesco Pignatelli, and Luca Tangi, AI Watch. Beyond pilots: sustainable implementation of AI in public services (Publications Office of the European Union 2021); available at <<https://publications.jrc.ec.europa.eu/repository/handle/JRC126665>> accessed 19 April 2024.

²⁰ EU Commission, ‘Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts’ COM (2021) 206 final, also referred to as the “AI Act,” available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0206>> accessed 19 April 2024. For the latest available version of the Regulation, see the amendment submitted by the European Parliament’s Committee on the Internal Market and Consumer Protection of 6 March 2024, A9-0188/808, COM (2021) 0206 – C9-0146/2021 – 2021/0106(COD), available at <www.europarl.europa.eu/doceo/document/A-9-2023-0188-AM-808-808_IT.pdf> accessed 19 April 2024. The regulation follows a risk-based approach, imposing regulatory obligations specifically on AI systems that are likely to pose high risks. For non-high-risk AI systems, minimal transparency requirements are imposed, such as providing information on the use of AI when interacting with humans. However, high-risk AI systems will be subject to stringent requirements regarding data quality, documentation, traceability, transparency, human oversight, accuracy, and robustness in order to mitigate risks to fundamental rights and security. For example, the use of AI systems for real-time remote biometric identification in publicly accessible spaces for law enforcement, which falls under the category of high-risk systems, should generally be prohibited due to its highly invasive nature, except in specific and narrowly defined circumstances where it is strictly necessary for substantial public interest, such as searching for potential crime victims or addressing threats to life or physical safety. See Christoph Krönke, ‘Legal Requirements for the Use of AI in Public Administration,’ in this book.

1.2 Guidelines for the Procurement of ICT and AI Solutions

In Italy, the *National Agency for Digital Italy* (AgID) plays an important role in the procurement of ICT and AI solutions to support national public administrations' digital transformation.²¹ AgID has a fundamental regulatory function, adopting guidelines containing rules, standards, and technical guides, as well as acts of direction, supervision, and control, also through the adoption of general administrative acts on the digital agenda, the digitalisation of public administration, IT security, interoperability, and application cooperation between public IT systems and those of the European Union. AgID plans, coordinates, and monitors the activities of the public administration at central, regional, and local levels in the preparation, implementation, and management of innovation policies and projects and provides advice on contracts and procurement activities in the ICT sector.

While AgID's guidelines are not mandatory, they are intended to ensure that the ICT goods and services purchased by public administrations meet the required security and quality standards. This emphasis on compliance with security standards reflects AgID's commitment to promoting a secure and reliable digital procurement environment in Italy.²² AgID's Guidelines serve different purposes. First, by highlighting potential risks and vulnerabilities, they address the security concerns associated with ICT procurement. Second, by aligning with both industry standards and the specific context of public administration, they provide clear definitions and concepts related to security in ICT procurement. In addition, the Guidelines offer practical solutions and best practices that can be readily implemented. They provide operational tools, practical examples, and specific references to help in the assessment of the current level of security of the procurement processes and to suggest improvements where they are needed.

AgID guidelines are aimed at all those in public administrations who engage in many ways in the acquisition of IT tools: managers, civil servants, public procurement officers, digitalisation managers, and organisation, planning, and security managers. These initiatives contribute to advancing digital transformation, strengthening the capacity of the public administration, and achieving the desired objectives of the Italian Recovery Plan.

²¹ Article 14-bis(2)(a) of Legislative Decree No. 82 of 7 March 2005 (Code of Digital Administration). See: Barbara Marchetti, 'Amministrazione digitale' in *Enciclopedia del Diritto: funzioni amministrative* (Giuffrè 2022) 75.

²² AgID, Resolution No. 220/2020 of 17 May 2020, 'Linee guida – Sicurezza nel Procurement ICT', available at <<https://trasparenza.agid.gov.it/page/9/details/1641/determinazione-n-2202020-del-17-maggio-2020-adozione-delle-linee-guida-la-sicurezza-nel-procurement-ict.html>> accessed 19 April 2024.

2. ORGANISATION

2.1 Cooperative Procurement

Cooperative public procurement is considered a strategic driver to effectively promote ICT and AI procurement in Europe and in Italy too.²³ Joint procurement, both national and cross-border, is needed to meet the increasing demand for innovative and high-quality goods, works, and services, especially in highly technical and sensitive areas such as security and healthcare.²⁴ The recent public health crisis has also reinforced the need for public-private cooperation in the health sector for the effective and efficient procurement of AI and innovative and technological solutions. The organisational model of digital cooperation between CPBs could well promote a new system based on public AI-based algorithms that can operate according to measurable quality criteria based on benchmarks and deliver fast and transparent results to ensure the efficiency, integrity, and sustainability of strategic procurement.²⁵

In Italy, a specific form of institutional cooperation has been established for the purchase of cloud computing services, which are considered strategic in the Italian Cloud Strategy, implemented by the Ministry for Digital Transformation (now by the Department in charge) and the National Cybersecurity Agency (*Agenzia per la cybersicurezza nazionale* - ACN).²⁶ This provides strategic direction for implementing and monitoring cloud solutions in the public

²³ Gabriella M. Racca, 'Aggregate Models of Public Procurements and Secondary Considerations: An Italian Perspective' in Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (Djøf Publishing 2010) 165; Gabriella M. Racca, 'Joint Procurement Challenges in the Future Implementation of the New Directives' in François Lichère, Roberto Caranta and Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 225.

²⁴ Gloria Sdanganelli, 'Centralising procurement in the EU: the case of the new Health Emergency Preparedness and Response Authority (HERA)', in Carina Risvig Hamer, Magdalena Socha and Kirsi-Maria Halonen (eds), *Public Procurement. Centralisation and new trends* (DJØF Publishing 2024), 97 ff.

²⁵ Gabriella M. Racca, 'Digital Transformation in Healthcare Procurement' (2023) 23 *HealthManagement – Medical Device & AI Regulations* 98.

²⁶ AgID, Resolution No 628/2021 of 15 December 2021, 'Regolamento recante I livelli minimi di sicurezza, capacità elaborativa, risparmio energetico e affidabilità delle infrastrutture digitali per la PA e le caratteristiche di qualità, sicurezza, performance e scalabilità, portabilità dei servizi cloud per la pubblica amministrazione, le modalità di migrazione, nonché le modalità di qualificazione dei servizi cloud per la pubblica amministrazione', available at <https://trasparenza.agid.gov.it/moduli/downloadFile.php?file=oggetto_allegati/2134818431400_

administration to simplify the management of IT resources, reduce costs, and introduce new digital technologies.²⁷ This strategy is based on three main pillars. First, the creation of the National Strategic Hub (*Polo Strategico Nazionale* - PSN), with the aim of supporting administrations and the main local administrations, local health authorities, and metropolitan cities in the use of cloud solutions.²⁸ Second, the qualification process of public cloud providers and services to ensure that they meet security requirements, regulatory compliance, and the public interest. Thirdly, the development of a methodology to classify the data and services managed by public administrations, enabling them to migrate to the most appropriate cloud solution.

Cooperative and joint procurement through advanced e-procurement platforms, as required by the recent procurement reform in Italy²⁹, are also seen as a strategic option for small public entities and municipalities to avoid the risk of looking for alternative private market solutions, which are not always clearly regulated.³⁰ It is also worth highlighting that procurement strategies for acquiring AI solutions, especially for smaller government entities such as small municipalities (5,500 in Italy, below 3,000 inhabitants, representing 69% of the total number of municipalities, which are around 8000)³¹, require

_O628+DT+DG+628+-+15+dic+2021+-+Regolamento+servizi+cloud.pdf> accessed 19 April 2024.

²⁷ The Italian Cloud Strategy develops three lines of action that will guide companies in the choices to be made regarding the different cloud migration solutions: (i) Classifying Data and Services; (ii) Qualifying Cloud Services; (iii) The National Strategic Pole (see below). See website: <<https://innovazione.gov.it/dipartimento/focus/strategia-cloud-italia/>> accessed 19 April 2024.

²⁸ On 26 August 2022, the Department for Digital Transformation signed the contract for the creation of the infrastructure with Polo Strategico Nazionale S.p.A., whose shareholders include TIM, Leonardo, Cassa Depositi e Prestiti – CDP (through its subsidiary CDP Equity), and Sogei, following the EU call for tenders issued by the Italian central purchasing agency Difesa Servizi and the Department for Digital Transformation as the contracting authority. See website: <<https://innovazione.gov.it/dipartimento/focus/polo-strategico-nazionale/>> accessed 19 April 2024.

²⁹ Public Contracts Code (n 4).

³⁰ Large-scale supply chains at national and supranational levels, some even initiated by private organisations using digitalised platforms may lead to the risk of replacing the procurement function of public administrations, with all the associated implications for strategy and industrial policy, as in the case with the private “Amazon-like” platforms in the United States. See: Gabriella M. Racca, ‘Digital Transformation for Effective e-Procurement’ (n 4) 215.

³¹ See data published by the National Association of Italian Municipalities (Associazione Nazionale Comuni Italiani – ANCI) at <www.anci.it/atlan-te-dei

careful analysis and anticipation of potential challenges. These challenges include potential conflicts with regional or national policies, risks associated with the transfer of personal and sensitive data, and limitations and difficulties in accessing the source code and algorithms due to intellectual property restrictions.³² Taking all these aspects into account, it is possible to highlight how contracting authorities appear to be organised in a heterogeneous way, using three main approaches: (i) by using Consip’s e-procurement solutions; (ii) by using public-owned regional platforms; (iii) by acquiring IT platforms from the market through dedicated private service contracts. The latter option allows contracting authorities to customise their e-procurement services, but this poses significant challenges in terms of the capacity of such administrations to deal with private operators in the market.³³ In addition, Italian legislation excludes private companies from acting as a central purchasing body unless they are either a body governed by public law or an in house entity.³⁴ A case concerning this matter was referred to the ECJ, which ruled that EU law does not prevent small local authorities in Italy from resorting to central purchasing bodies for the purchase of works, goods, and services provided that they use organisational models that are exclusively public.³⁵

The market for e-procurement platforms has not been definitively regulated, and various solutions have been developed with the critical points mentioned above. More recently, specific guidelines have been published that will require platforms to be certified soon.³⁶

-piccoli-comuni/> accessed 19 April 2024.

³² On these issues see: Gabriella M. Racca, ‘La digitalizzazione necessaria dei contratti pubblici: per un’Amazon pubblica’ (2020) 45 DPCE online 4669. See also Marchetti (n 21) 100ff.

³³ Based on data from AgID’s Cloud Marketplace, it is possible to identify the main services and e-procurement platforms available on the private market at the national level. These are Appalti & Contratti e-Procurement – Maggioli Spa; Acquisti telematici – Digital PA Srl; Traspare – LG Solution Srl; Tuttogare PA; Asmel by StudioAmica srl – CSAmel s.r.l.; Net4market – AF Soluzioni Srl; AFLink Smart PA – Jaggaer SaaS; BravoSolution Italia S.p.A.; Pro-Q – Venicecom srl; E-Procurement (U-BUY) – Cineca; Sap ARIBA – Oracle Corporation; Oracle Fusion Procurement Cloud Service – Oracle Corporation.

³⁴ ANAC, Determinazione n. 5, 6 November 2013, ‘Linee guida su programmazione, progettazione ed esecuzione del contratto nei servizi e nelle forniture’, and nota prot. n. 82205, 21 July 2014.

³⁵ Case C-3/19 *Asmel società consortile a r.l. v A.N.A.C. – Autorità Nazionale Anticorruzione* [2020] ECLI:EU:C:2020:423.

³⁶ The new certification process of digital e-procurement platforms aims to establish a clear and precise baseline of legal, security, functional, and technical requirements that platforms must meet. These technical requirements ensure

With specific regard to the application of Article 12 of PPD for the choice of in-house solutions, the Code of Digital Administration (Article 68) requires carrying out a comparative analysis of available market solutions when acquiring ICT, which may include AI systems.

Public administrations are only allowed to acquire proprietary software through licencing if the demonstration of existing in-house solutions or open-source software does not adequately meet the required needs. The contracting authority must then justify its choice based on the results of the evaluation, using the methods and criteria defined by the competent authority supervising the public procurement procedure. This approach should ensure a fair and transparent procurement environment that balances independence with the objective of product neutrality in the acquisition of AI systems.³⁷

In this context, it is crucial to highlight the European Union regulations and subsequent conditions for AI systems, which require strict conformity assessments for high-risk AI systems prior to marketing or implementation. Government-developed AI systems will also be subject to pre-market controls and continuous post-market monitoring. These impending obligations raise questions about the administration's ability to fulfil them effectively.³⁸

2.2 Involvement of Private Parties in the Procedure and its Preparation

In the procurement of ICT and advanced technologies, including AI, it is common for direct awards to be granted to specialised private operators without undergoing an open tendering process.³⁹ Direct awards are often justified by "technical" reasons and frequently related to the existence of property rights, the products or services to be procured, the excessive cost of changing

reliability, security, uniformity, and increase the quality of the services provided. See: AgID, Resolution No 137/2023 of 1 June 2023, *Requisiti tecnici e modalità di certificazione delle Piattaforme di approvvigionamento digitale*; available at <https://trasparenza.agid.gov.it/moduli/downloadFile.php?file=oggetto_allegati/2315112393200__ORegole+tecniche+v.+1.0+del+01062023.pdf> accessed 19 April 2024.

³⁷ <Article 68 of the Code of Digital Administration (n 21).

³⁸ See in particular Articles 43 (Conformity assessment) and 72 (Post-market monitoring by providers and post-market monitoring plan for high-risk AI systems) of the AI Act (n 20).

³⁹ See more generally Piotr Bogdanowicz, Roberto Caranta, and Pedro Telles (eds), *Public-Private Partnerships and Concessions in the EU* (Elgar Publishing 2020).

providers, and so on, with the possible risk of "locking-in" with the economic operator.⁴⁰

According to the Italian National Anti-Corruption Authority, in Italy, the ICT sector has the highest incidence of this type of direct procurement of services and supplies considered essential (not easy to change), followed by the healthcare sector. The evidence of this is provided by the National Database of Public Contracts managed by ANAC, which shows that the total value of tenders awarded by negotiated procedure without prior publication of a contract notice is around EUR 15 billion.⁴¹ This also shows that the use of negotiated procedures without prior publication of a contract notice concerns mainly supplies and services, while the share of works contracts is lower.⁴²

To mitigate the risk of misuse of such procedures, the Ministry of Economic Development's ICT Three-Year Plan 2024–2026 includes a comprehensive set of principles to prevent IT lock-in phenomena. These principles include "Cloud First," prioritising cloud technology adoption to minimise vendor lock-in, treating public data as a shared resource to be open and interoperable, emphasising interoperability by design for seamless service integration, and highlighting security and privacy by design to ensure the utmost data protection and privacy compliance in digital service design and delivery.⁴³

To ensure efficient public procurement and mitigate the risk of becoming overly reliant on specific private products or processes, it is crucial for contracting authorities to adopt a well-defined strategy for their procurement needs. This approach serves two important purposes. Firstly, it helps to avoid

⁴⁰ "Lock-in" occurs when the contracting authority cannot easily change the supplier in subsequent award procedures because not all essential information about the system and data are available for an effective take-over by another supplier. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'Against lock-in: building open ICT systems by making better use of standards in public procurement' COM (2013) 0455 final; available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0455>> accessed 19 April 2024.

⁴¹ See data from ANAC's National Database of Public Contracts at <<https://dati.anticorruzione.it/superset/dashboard/appalti/>> accessed 19 April 2024.

⁴² ANAC, Determinazione n. 950, 13 September 2017, 'Linee guida n. 8 – Ricorso a procedure negoziate senza previa pubblicazione di un bando nel caso di forniture e servizi ritenuti infungibili'; see website: <www.anticorruzione.it/documents/91439/120446/Linea+guida8+Determina950.pdf/3fbc9b02-5343-7850-1a15-00e22f14affc?t=1587757145080> accessed 19 April 2024.

⁴³ Ministero dello Sviluppo Economico, Piano Triennale ICT 2024–2026; see website: <<https://docs.italia.it/italia/piano-triennale-ict/pianotriennale-ict-doc/it/2024-2026/index.html>> accessed 19 April 2024.

cases of urgency, which are often used (improperly, as it is not an objective urgency) by administrations as a justification for resorting to negotiated procedures without publishing contract notices. Secondly, it allows resources to be optimised, the various administrative stages to be closely monitored, and the proper performance of contracts to be verified. By carefully planning their needs, contracting authorities can ensure efficient procurement management while reducing the risk of lock-in scenarios.

In Italy, alongside private providers of ICT goods and services, in-house public entities are increasingly pivotal. In-house companies are playing a key role in fostering digital transformation and improving the efficiency and quality of services for citizens and public authorities in Italy. For example, four in-house ICT companies (*Informatica Alto Adige*, *Lepida*, *Pasubio Tecnologia*, and *Trentino Digitale*) recently signed a strategic cooperation agreement to ensure digitalisation and innovation by developing key synergies in the exchange of information, knowledge, expertise, and experience. This collaboration started in July 2021 with the creation of the group “Cerchio ICT in house”. This group is open to public capital companies operating at local or regional levels whose mission is “doing through ICT collaboration,” with an approach based on non-competition and the sharing of actions and strategic initiatives.⁴⁴

2.3 Promotion of the Public Sector’s AI Capability

In both Europe and Italy, there is a growing emphasis on fostering knowledge of AI in procurement, improving the skills of procurement professionals, and enhancing the AI capabilities of the public sector in general. The National Recovery Plan outlines several measures to improve the national public procurement system, with priority given to enhancing the professionalism and capacity of contracting authorities. A key reform objective is the adoption of a professionalisation strategy, supported by the Anti-Corruption Authority and the National School of Administration (*Scuola Nazionale dell’Amministrazione* – SNA).⁴⁵

These initiatives aim to provide qualified training for public administration officials as part of the strategy to professionalise public procurement. Some training activities have already started, e.g., the training programme developed by the National School of Administration, as well as several other master

⁴⁴ See website: <www.cerchioict.it/chi-siamo> accessed 19 April 2024.

⁴⁵ Presidenza del Consiglio dei Ministri, *Strategia professionalizzante e piani di formazione in tema di appalti pubblici* (3 December 2021); available at <https://paf.sna.gov.it/scheda_corso.html?cid=3159> accessed 19 April 2024.

programmes organised by universities.⁴⁶ These reforms are in line with the training strategy outlined in the European Commission’s Recommendation (EU) 2017/1805 of 3 October 2017, which focusses on promoting the professionalisation of public procurement.⁴⁷

3. PROCEDURE

3.1 Procedures with Negotiation Elements: Negotiated Procedure, Competitive Dialogue and Innovation Partnership

The procurement of ICT, including advanced AI technologies, entails complexity, necessitating the implementation of flexible but efficient procurement procedures. This is effectively achieved through the utilisation of specific procurement procedures outlined in the 2014 Procurement Directives.⁴⁸ The Italian legislator has incorporated these procedures into the new Italian Public Contracts Code, specifically into Articles 73 (Competitive Procedure with Negotiation), 74 (Competitive Dialogue), and 75 (Innovation Partnership), but as they require specific capacity, they are not often used.

⁴⁶ Among these training experiences is the University of Turin’s Master in Strategies for Efficiency, Integrity and Innovation in Public Contracts (Master SEIIC), which aims to enhance the professionalism of public sector and supplier procurement officers by providing them with legal and economic skills to improve their ability to manage the entire public procurement cycle and operate in an organised network, taking into account efficiency, integrity, innovation, and sustainability criteria. The Master SEIIC was mentioned in the OECD’s report “Professionalising the Public Procurement Workforce” of January 2023 and also as one of the Italian training courses on innovative procurement by the European Commission in the “Italy Country Profile”; European Commission, ‘The strategic use of public procurement for innovation in the digital economy – Smart 2016/0040’ (2020) 6, and mentioned by European Commission, ‘ProcurCompEU – European Competency Framework for Public Procurement Professionals’ (2020) 91; see website: <www.masterseiic.it/> accessed 19 April 2024.

⁴⁷ Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement — Building an architecture for the professionalisation of public procurement [2017] OJ L 259/28; available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017H1805>> accessed 19 April 2024.

⁴⁸ Including the negotiated procedure (Article 29 of the PPD), the competitive dialogue (Article 30 of the PPD), and the innovation partnership (Article 31 of the PPD).

3.2 Use of the Negotiated Procedure without Prior Publication

In Italy, Article 32(2)(b) of the EU Public Procurement Directive can be used to justify direct awards for AI projects based on specific circumstances, as mentioned. These circumstances include the absence of competition for technical reasons, the need to protect exclusive rights (including intellectual property rights), or the need to avoid incompatibility or disproportionate technical difficulties in operation and maintenance. These conditions are set out in Article 76 of the new Italian Public Contracts Code, which is the basis for direct awards in the procurement of ICTs but requires adequate justification for the absence of competition, the protection of exclusive rights, and the mitigation of technical challenges in the execution and maintenance of the project.

3.3 Modification of Contracts

In Italy, the provisions of Article 72(1)(b) of the EU Public Procurement Directive are implemented by Article 120(1)(b) of the new Italian Public Contracts Code. This allows contract modifications, without a new procurement award, if justified on technical grounds such as the need for interchangeability or interoperability with existing equipment, services, or installations. This could certainly be the case in the context of ICT and AI procurement. The Italian legislation incorporates and aligns with the EU standard, ensuring that contract modifications can be made in compliance with the specified conditions, including the economic or technical impracticability of changing the contractor and the potential inconvenience or significant increase in costs for the contracting authority.

3.4 Testing Mechanisms

To address the testing mechanisms in the procurement of IT, including AI systems that require customised adaptations and thorough data training, it is crucial for contracting authorities to implement various measures to ensure effective and accurate completion, such as defining clear and comprehensive delivery requirements for the development of high-quality software and AI procurement. According to AgID, this can be achieved through research and the implementation of project management best practices, standards, methods, processes, techniques, and tools. By adhering to these practices, management can facilitate the successful completion and satisfactory delivery of

ICT procurement projects.⁴⁹ To address these issues in Italy, AgID released guidelines in 2020 aimed at ensuring a precise level of security in ICT procurement processes.⁵⁰ These guidelines provide contracting authorities with a comprehensive set of actions to enhance security, including practical tools and checklists that outline both general and specific measures. By following these guidelines, contracting authorities can improve the overall security of ICT procurement, including the procurement of AI systems, and mitigate potential risks associated with the customisation and data training requirements. Administrations can use this checklist to assess their current level of security preparedness and identify areas for improvement. Some key considerations include having an updated security training plan, planning events to raise awareness of security risks among staff, maintaining a repository of best practices and lessons learnt, formalising roles and responsibilities for security in procurement, maintaining an up-to-date inventory of IT assets and services, conducting risk assessment (RA) and business impact analysis (BIA) studies, defining vendor auditing methodologies, and conducting internal security audits. By following this checklist, administrations can assess their readiness and take the necessary steps to improve their security in ICT procurement.

4. PROCUREMENT INSTRUMENTS

4.1 Technical Specifications

In Italy, the implementation of Articles 42(3) and 45 of PPD in the new Italian Public Contracts Code ensures that contracting authorities have sufficient flexibility when procuring AI and other innovative or advanced technologies. The new Public Contracts Code is also in line with European regulations on technical specifications.⁵¹ These specifications may indicate whether the transfer of intellectual property rights is required. It is important to note that technical specifications must allow equal access for economic operators and must not create unjustified obstacles to competition in public procurement. This provision promotes transparency in the procurement process and aims to serve the public interest. By including these provisions, the Italian Public Contracts

⁴⁹ See Centro Nazionale per l'Informatica nella Pubblica Amministrazione (now AgID), 'Linee guida sulla qualità dei beni e dei servizi ICT per la definizione ed il governo dei contratti della Pubblica Amministrazione' (18 December 2009); see website: <www.agid.gov.it/sites/default/files/repository_files/3_manuale_appaltativo_appalto_pubblico_di_forniture_ict_v3.5_18-12-09_1_0.doc> accessed 19 April 2024.

⁵⁰ AgID, Resolution No. 220/2020 of 17 May 2020 (n 22).

⁵¹ Public Contracts Code (n 4), Annex II.A.

Code allows contracting authorities to define the subject-matter of a public contract by describing the task to be solved and/or allowing variants. This flexibility ensures that contracting authorities can adapt their procurement requirements to the specific needs and advances of AI and other advanced technologies, while still respecting the principles of transparency and fair competition in public procurement.⁵² Moreover, Article 120(1)(c) of the Italian Public Contracts Code allows for the possibility that the public contract may be subject to variants during the execution phase, i.e., changes which become necessary as a result of circumstances unforeseeable by the contracting authority. Such circumstances include new legislative or regulatory provisions or measures taken by authorities or public bodies responsible for protecting the public interest, which could certainly be the case regarding the AI Regulation as currently being implemented at the European level.

4.2 Product Neutrality

The Code of Digital Administration tackles the challenge of balancing autonomy in procurement and product neutrality by mandating that public administrations undertake comparative analyses of market solutions to meet these competing demands, as mentioned. This evaluation process must consider technical and economic factors and apply principles such as cost-effectiveness, efficiency, investment protection, reuse, and technological neutrality. At the same time, suppliers are expected to ensure an adequate and appropriate level of security, compliance with data protection regulations, and service levels.⁵³

The Anti-Corruption Authority emphasises the importance of contracting authorities acquiring and maintaining the ability to accurately identify their requirements and define appropriate tendering strategies, including the establishment of standards and technical specifications, particularly in highly technical procurement areas such as ICT and AI.⁵⁴ To ensure product neutrality, it is essential to assess the standards available in the market, work with the market to develop sustainable solutions, establish technically neutral specifications that do not favour any operator, and regularly review the standards adopted. Monitoring tender notices helps to identify recurring problems and find appropriate solutions. When determining procurement needs, considerations such as interoperability, data use and access, potential changes in product

⁵² See Kirsi-Maria Halonen, Roberto Caranta, and Albert Sanchez-Graells (eds), *Transparency in EU Procurements – Disclosure Within Public Procurement and During Contract Execution* (Elgar Publishing 2019).

⁵³ <Article 68 of the Code of Digital Administration (n 21). See also Marchetti (n 21) 101ff.>

⁵⁴ ANAC, Determinazione n. 950, 13 September 2017 (n 42).

suppliers, the impact of subsequent agreements, and the need to avoid lock-in situations must be considered. These measures aim to ensure fair and competitive procurement practices, avoid de facto product/brand/label mandates, and promote transparency and efficiency in ICT and AI procurement.

4.3 Algorithmic Transparency

The use of AI-based tools and automation in public decision-making has triggered debates and legal challenges in Italy. Since 2005, the Code of Digital Administration requires public entities that own IT solutions and software to disclose the source code under an open licence so that other governmental or authorised entities might use it and adapt it to their specific needs, with some exceptions for public order and security, national defence, and electoral processes.⁵⁵

A case involving the automation of decision-making has sparked extensive public debate and legal scrutiny in Italy, such as the well-known case on the “good school” law algorithm.⁵⁶ In this case, the Italian Ministry of Education implemented automated decision-making using an algorithm to allocate teaching posts and process teacher mobility requests. The algorithm generated rankings based on rules, competition results, and available positions, but the unsatisfactory results of this automated process led to significant litigation. The key issues raised focused on access to the source code of the software and the ability to challenge the decisions made by the algorithm. In its ruling, the Italian Council of State insisted on the importance of bringing automation in line with constitutional principles, while maintaining transparency and respect for the fundamental principles of the legal system.⁵⁷ According to the Court’s reasoning, the principle of transparency, which is linked to the obligation to provide reasons for the final administrative decision, requires full awareness of the existence of any automated decision-making processes and the algorithms used for such purposes. This case therefore highlighted the need for greater transparency. While some argue in favour of access to the source code and others emphasise the necessity for access to algorithms or data lakes, the focus should not solely rest on the outcomes of the machine learning process. Rather, the scrutiny and accountability measures must extend to the very process itself, ensuring the control of the outcome of the automated decision-making.⁵⁸

⁵⁵ Article 69 of the Code of Digital Administration (n 21).

⁵⁶ Law No. 107/2015 on the Reform of the National Education and Training System and the Delegation for the Reorganisation of Existing Legislation.

⁵⁷ Consiglio di Stato, Sezione Sesta, 8 April 2019, n. 2270.

⁵⁸ Mario G. Losano, ‘Prefazione’ in Roberto Cavallo Perin and Diana-Urania Galetta (eds), *Il Diritto dell’Amministrazione Pubblica digitale* (Giappichelli

Following this legal precedent, the provisions of the new Public Contracts Code on the purchase of AI required that contracting authorities must provide economic operators with an explanation of the automated and AI-based solution used, as already mentioned.⁵⁹ Stringent standards have also been set, such as transparency, clarity, human oversight, and addressing algorithmic bias in automated and AI-driven decisions. As a result, source code and related information should permit the explanation of the reasoning behind such decisions.

It should also be noted that further specific requirements will need to be considered, as introduced in the AI Act, setting out practices for good data management, including design decisions, data collection, pre-processing, and data quality assessment. These provisions reflect the evolving understanding that individuals should understand the AI algorithms or their outcomes, especially when they are used in administrative actions, and promote a more transparent and accountable AI ecosystem within public authorities.⁶⁰

These concerns have garnered significant attention in Italy, stimulating a lively academic and public debate on the importance of freedom of information and the need for algorithmic transparency in systems used by public authorities. The principle of algorithmic transparency should recognise the right of citizens to access information on the functioning of algorithms, including the source code, which should be open when used by public administration.⁶¹ This principle emphasises not only accessibility but also comprehensibility for citizens and private organisations. In this context, the Italian Council of State has clarified that the technical formula representing the algorithm should be accompanied by explanations that make it readable and understandable as a legal rule. This aims to ensure that those to whom administrative decisions are addressed can reconstruct the logical process and that judicial review is possible.⁶² In this context, intellectual property rights, such as copyright and confidentiality, are recognised but should not impede access to and understanding

2020), XVII.

⁵⁹ See: Article 30 of the Public Contracts Code (n 4).

⁶⁰ See specifically Article 10 (Data and data governance) of the AI Act (n 20).

⁶¹ See Enrico Carloni, 'I principi della legalità algoritmica. Le decisioni automatizzate di fronte al giudice amministrativo' (2020) *Diritto amministrativo* 273; Stefano Civitarese Matteucci, 'Umano troppo umano. Decisioni amministrative automatizzate e principio di legalità' (2019) *Diritto pubblico* 5.

⁶² Consiglio di Stato, Sezione Sesta, 13 December 2019, n. 8472. See also, recently: Consiglio di Stato, Sezione Terza, 25 November 2021, n. 7891, for which see also answer n. 20. On this topic: Diana-Urania Galetta, 'Algoritmi, procedimento amministrativo e garanzie: brevi riflessioni, anche alla luce degli ultimi arresti giurisprudenziali in materia' in *Scritti per Franco Gaetano Scoca*, vol. 1 (Editoriale Scientifica 2020) 2205.

of the algorithm's source code by interested parties. Companies providing IT technologies to public administrations must, therefore, accept the necessary transparency requirements. This approach ensures the protection of intellectual property rights, while also providing transparency regarding the functioning of the algorithm and permitting verification and challenge of the outcome.

In Italy, some administrations are already experimenting with algorithmic transparency concerns and data-orientated decisions. For example, ARIA Spa, the central purchasing body for the Lombardy Region, has implemented AI and algorithmic approaches to improve health and population-based solutions, including machine learning, to analyse and predict chronic conditions among citizens.⁶³ However, these AI-based approaches have come under the scrutiny of the Italian Data Protection Authority. In a recent development, the Data Protection Authority has sanctioned several regions and health authorities for their improper use of AI-based health risk prediction methods, stating that the use of population data to create predictive models and clusters must strictly adhere to the core principles of legality, fairness, transparency, and purpose limitation.⁶⁴

⁶³ See: Regione Lombardia, Regional Government Resolution No. X/6164 of January 30, 2017, on the care management of chronic patients in Lombardy, including through innovative solutions and the use of algorithms. Another AI-based tool implemented by ARIA Spa is "Dario," an advanced digital assistant using artificial intelligence techniques, developed in 2021 as part of the Lombardy Region's innovation programme to support public administration. Specifically designed as a "citizen relationship management" tool, integrated into the "Piattaforma Bandi Online," it aims to improve support for users searching for public funding opportunities and submitting applications. In 2022, this AI tool successfully managed 121,000 interactions, with chat accounting for around 90% and phone calls for the remaining 10%, demonstrating its effectiveness. The data collected from a year of using the AI tool shows that it competently responds to user and citizen requests, reducing the workload of public officials and providing solutions that are seamlessly integrated with the region's other systems. The future role of this AI tool includes the ability to address citizen requests 24/7 via chat or phone, further simplifying broader citizen needs. See: Regione Lombardia, Regional Government Resolution No. XI / 4471 of 29 March 2021, 'Semplificazioni dei bandi: Evoluzione funzionalità di Bandi online,' available at: <www.regione.lombardia.it/wps/wcm/connect/199283d4-a3df-457a-baaa-c62dca28766f/DGR+nr.+4471_29.03.2021_Evoluzione+Bandi+online.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-199283d4-a3df-457a-baaa-c62dca28766f-nyRQppy> accessed 19 April 2024.

⁶⁴ Garante per la Protezione dei dati personali, Measures of 24 February 2022, nos. 63, 64, 65, 66, 67, 68, 69, and 70 and Measures of 15 December 2022, nos. 415, 416, 417.

With specific reference to procurement, one notable initiative from Consip is the integration of AI-driven machine learning into its e-procurement system to improve data usage and transparency. Consip has developed a prototype application, “MePAwatch,” to monitor and identify risky behaviours of both economic operators and contracting authorities using the “MePA” e-marketplace for public contracts below the EU thresholds. The overall aim is to make MePA more transparent and efficient in procurement processes. In addition, a pilot project called “Catalogue Discovery” was conducted by Consip to evaluate the use of a cognitive analysis tool (Watson Explorer) to continuously improve the quality of the catalogue of goods and services and price analysis used to define datasheets. The pilot was initially applied to the items “Printers,” “Notebooks,” and “Personal Computers”.⁶⁵

4.4 Awarding Contracts in the Form of Separate Lots

In Italy, the new Public Contracts Code requires public contracts to be divided into separate lots, according to Article 58 (Division into lots). This approach is intended to promote fair competition and ease the participation of micro, small, and medium-sized enterprises (SMEs). It could thus promote the participation of economic operators in the procurement of ICT and AI solutions. By dividing contracts into lots, SMEs could participate in specific components of the procurement of AI solutions according to their capabilities and resources. In addition, the Code requires that transparent criteria be established for the selection of lots, allowing for a fair allocation. As a result, this requirement for lot splitting in the Italian procurement process opens up opportunities for SMEs, potentially extending to the procurement of ICT and AI solutions. Nonetheless, as recalled, dedicated support for joint procurement has been recently provided.

4.5 Selection Criteria

The new Public Contracts Code is based on the EU rules on the certification of quality and environmental management systems. According to Article 105 of the new Public Contracts Code (test reports, certifications, test media, online certificate register, and lifecycle costs), the contracting authorities may require the submission of certificates issued by independent bodies to prove that the quality and environmental standards have been followed. These certificates

⁶⁵ See: Corrado (n 4) 141ff. See also: Consip, Bilancio 2022, especially p. 69, available at: <www.consip.it/sites/consip.it/files/CONSIP_Bilancio2022-versione%20sito.pdf> accessed 19 April 2024.

should be based on European standards and issued by accredited organisations, or they may supply alternative evidence of equivalent quality or environmental measures. This flexibility allows for adaptation to the development and introduction of information technology solutions. It should be noted that specific criteria related to technological aspects, such as accreditation of AI trustworthiness or codes of conduct, are not explicitly mentioned in this provision, but it leaves the door open for their possible inclusion.

4.6 Award Criteria

The evaluation of digital ICT and AI solutions, products, and services, particularly AI systems, in procurement procedures has become an important and recent issue in Italy. A significant case involving the procurement of advanced technology and AI-based pacemakers and defibrillators has highlighted this issue and provided valuable lessons. The Italian State Council dealt with the dispute raised by the second-placed bidder, who challenged the evaluation criteria and the interpretation of “automated” medical solutions. The administrative judge confirmed that algorithmic solutions can indeed include intelligent and predictive features typically associated with AI systems. However, it emphasised the discretionary power of the contracting authority in assessing the characteristics of the product and the degree of automation.⁶⁶ This decision highlights the implications of the potential use of AI systems in the procurement of digital products and services, including medical devices. It underscores the importance of evaluating the intelligent and predictive capabilities of algorithmic solutions, even if these do not explicitly employ AI technology. In addition, it emphasises the flexibility afforded to the contracting authority in assessing the characteristics of the product and the degree of automation.

5. POST AWARD PHASE

5.1 Instruments Related to the Post Award Phase

The procurement of ICT and AI in public administration can be shaped and controlled through post-award solutions, such as the specification of terms and conditions for contract performance. These conditions address the risks associated with AI, particularly in terms of IT security and integrity. Italy’s new Public Contracts Code, in particular Article 21, emphasises the importance of ensuring quality performance throughout the digital life cycle of public contracts. This cycle includes the planning, design, publication, award, and

⁶⁶ Consiglio di Stato, Sezione Terza, 25 November 2021, n. 7891.

execution phases. By incorporating these measures, Italy aims to procure AI solutions that can run securely and maintain integrity throughout the procurement process. Digital technology is transforming how we define and shape public needs and is particularly powerful in transforming the procurement of public services, especially by integrating them into collaborative contracts. This can be achieved through Building Information Modelling or BIM tools.⁶⁷ These tools use interoperable platforms through non-proprietary open formats so as not to limit competition between technology providers and the inclusion of specific designs. The application of BIM in public procurement requires the definition of a new synergy based on transparency and knowledge of data based on smart contracts. Success in the use of these new methods requires the capacity of the contracting authority – which may not be the same as the recipient of the work, especially in the case of small municipalities – and of the economic operators, who can also bring together SMEs according to innovative cooperation models (collaborative agreements). Advanced digital and technological tools allow more correct information to be collected and processed, increasing the effectiveness and rationality of public administrations' response to the collective needs of their communities. They could also reduce the amount of information that generates uncertainties and problems of interpretation, problems that often affect the completion of buildings designed using traditional techniques. The ability to exchange information is the key to ensuring the transparency, efficiency, and integrity of the procurement process, from the definition of public demand to the award and management of the contract, thus ensuring control and rationalisation of public expenditure.⁶⁸

5.2 Effective Control over Decisions Prepared/Executed by AI

In the context of the Italian procurement system, contracting authorities can ensure effective control over the decisions prepared and executed by AI in the post-award phase by incorporating specific contractual requirements and clauses. These measures aim to address compliance risks and maintain control.

⁶⁷ Gabriella M. Racca and Christopher R. Yukins (eds), *Public Procurement and Digitalisation* (Bruylant forthcoming).

⁶⁸ Giuseppe M. Di Giuda and Gabriella M. Racca, 'From Works Contracts to Collaborative Contracts: The Challenges of Building Information Modeling (BIM) in public procurement' in Gabriella M. Racca and Christopher R. Yukins (eds), *Joint Public Procurement and Innovation: Lessons Across Borders* (Bruylant 2019) 223; Gabriella M. Racca, 'I contratti pubblici collaborativi e le prospettive innovative della modellazione digitale (il Building Information Modeling)' in Giuseppe Franco Ferrari (ed), *La prossima città* (Smart cities 2), (2nd edn, Mimesis 2020) 581.

Contractual provisions can be included to impose compliance requirements on AI suppliers/providers to ensure adherence to legal and ethical standards such as transparency, fairness, and non-discrimination. In addition, back-to-back liability clauses can be included to hold suppliers/providers accountable and indemnify the public purchaser in case of compliance failures or legal issues related to the use of AI systems.

To enhance greater control and transparency, contracting authorities can use digitalisation by integrating data across platforms and databases. This allows for better monitoring and oversight throughout the procurement process. Interoperability measures can be implemented to automatically check exclusion grounds and qualification requirements, allowing non-compliant suppliers to be excluded from procurement processes. Monitoring and evaluation play a vital role in maintaining effective control over AI decisions. Tools such as the National Database of Public Contracts can be used to identify and address any deviations or anomalies in AI procurement procedures. This allows contracting authorities to take corrective action and ensure compliance.⁶⁹ By incorporating these contractual requirements and clauses, Italian contracting authorities can establish effective control over AI decisions in the post-award phase and mitigate compliance risks.

Italy's new Public Contracts Code focusses on data quality and digitalisation, aimed at streamlining and increasing the transparency and efficiency of the entire public procurement process. More specifically, the acquisition of data and the creation of native digital documents using digital platforms are the objectives of the provisions set out in Part II of Book I of the Code. This will allow interaction with existing databases and the addition of new data generated through individual processes.

The goal is the extension of digitalisation throughout the entire life cycle of public contracts, from the planning stage to the conclusion and execution of the contract. This will contribute to efficient public spending by providing high-quality data for analysis and evaluation. One major change is the move away from using PDF documents. Instead, data is captured directly from existing databases via machine-to-machine interfaces. To achieve this, it is crucial to establish the interconnection and interoperability between telematic systems using Application Programming Interfaces (APIs). This approach not only saves time, but also allows for the implementation of the once-only principle, where data and information related to a specific contract are known, allowing for traceability and transparency. By prioritising data quality, interconnection,

⁶⁹ On this topic, see, recently, Roberto Cavallo Perin, Marco Lipari, and Gabriella M. Racca (eds), *Contratti pubblici e innovazioni nel nuovo Codice* (Jovene 2024).

interoperability, and AI systems as well as reducing the manual handling of documents, the new Public Contracts Code in Italy aims to increase the efficiency, transparency, and effective control of the procurement process. These measures contribute to the overall goal of digitalising public procurement through the efficient buying of ICT and AI solutions.

11. Governance of AI procurement in the UK

Albert Sanchez-Graells

1. INTRODUCTION

The United Kingdom (UK) is taking a principled light-touch approach to artificial intelligence (AI) regulation,¹ and is clearly seeking to deviate from EU regulatory standards (i.e., lower them). A primary example is the contrast between the UK's laissez-faire “pro-innovation” approach and the EU AI Act.² However, given the limited effectiveness of the latter in the field of digital procurement governance,³ the EU and UK approaches converge in this area.⁴ Counterintuitively, the UK may seem more advanced than the EU in formulating voluntary standards, as it has given procurement a primary regulatory goal for the adoption of AI across the public sector,⁵ it has developed guidance for

¹ Department for Digital, Culture, Media and Sport, ‘Establishing a pro-innovation approach to regulating AI. An overview of the UK’s emerging approach’ (CP 728, 2022). Department for Science, Innovation & Technology, ‘A pro-innovation approach to AI regulation. Government response to consultation’ (CP 1019, 2024). For criticism, see Andrew Charlesworth et al., ‘Response to the UK’s March 2023 White Paper “A pro-innovation approach to AI regulation”’ (2023) <<https://dx.doi.org/10.2139/ssrn.4477368>> accessed 26 April 2024.

² Joël Reland, ‘UK-EU Regulatory Divergence Tracker’ (5th edn, October 2022) 2–3 <<https://ukandeu.ac.uk/wp-content/uploads/2022/10/Divergence-Tracker-5.pdf>> accessed 8 November 2022.

³ Albert Sanchez-Graells, ‘Public Procurement of Artificial Intelligence: recent developments and remaining challenges in EU law’ (2024) 2/24 LTZ forthcoming.

⁴ Albert Sanchez-Graells, *Digital Technologies and Public Procurement. Gatekeeping and experimentation in digital public governance* (OUP 2024) 223–246.

⁵ Albert Sanchez-Graells, ‘Responsibly Buying Artificial Intelligence: A “Regulatory Hallucination”’ (2024) Current Legal Problems, cuae003 <<https://doi.org/10.1093/clp/cuae003>> accessed 26 April 2024.