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“Loyalty” in termination of public contracts in Italy. The case of rate swap contracts according to the Italian Administrative Judges and to the English High Court

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1. Introduction. 2. Different legal models in the classifications of contract performance: a comparative overview. 3. Termination of a public contract in Italy. 4. Self-annulment and consequent damages 5. The Italian interest swap cases according to the Consiglio di Stato and the High Court, Queen’s Bench Division. 6. Concluding remarks.

1. Introduction

This paper tries to outline the issue of “loyalty” in the performance of public contracts (and particularly public procurements contracts) in Italy, with specific reference to the power accorded to Italian public administration to unilaterally terminate public (procurement) contracts during their performance.

The implicit assumption of this paper is that unilateral termination is treated differently in the performance of public contracts and in private contracts, which is what happens in Italian law but also in other European legal systems. I will shortly discuss this issue in paragraph 2, even if it expands a little the title of this paper, because I think it is however a necessary framework to keep in mind.

Paragraph 3 describes the state of the art in Italian law about the unilateral termination of public contracts by initiative of the contracting authority. As we will see, Italian law provides the contracting authority with at least three different legal “tools” for unilaterally terminating an ongoing contract: the civil code, the law on administrative procedure (Law 241 of 1990) and the specific provisions set forth in the code of public procurements. The latter has a position of speciality, with the consequence that the civil code and the law on administrative procedure can be applied by contracting authorities only in cases which are not dealt with by the code of public procurements. According to a recent decision of the Adunanza Plenaria of the Consiglio di Stato (n. 14/14), which confirms an existing case law, self-annulment of the adjudication, regulated in art. 21-nonies

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of the Law on the administrative procedure (L. 241/90), entails the termination of the contract based upon the self-annulled adjudication.

Self-annulment is a crucial issue under the perspective of loyalty, because it requires the contracting authority to allege a flaw, be it formal or substantial, in the administrative procedure which led to the formation of the act. In other words, if the public administration does a mistake in issuing an act and then sign a contract based on this act, it can later, through self-annulment of the act, obtain the nullity of the contract. It is then important to explain what are the strict legal requisites for a public administration to draw upon a self-annulment, because it results to be a powerful weapon in its hands in the managing of public contracts. This is the content of paragraph 4, which also deals with the problem of damages which can be claimed by the private contractor after the public administration has self-annulled a contract.

Paragraph 5 tackles the “swap contract cases”, an interesting case of self-annulment. Public administrations wanting to terminate interest swap contracts subscribed with some banks had the possibility to follow two different legal reasoning: they could allege the violation of the general rules on the subscription of financial contracts, acting as any other private investor, or they could follow the “administrative path”, self-annulling the administrative act upon which the contract was subscribed. We will examine the latter and try to explain the different solutions provided by the Italian Administrative judges who were recently required to decide many cases about the self-annulment of interest swap contracts. Even more interesting is the fact that swap contracts were often provided with a clause conferring the competence in case of litigation to English Courts, with the consequence that in at least one case the same fact was judged both by the Italian Consiglio di Stato and by the UK High Court, because the claimant initially filed its petition with both the Italian and the English judge. This is such a gorgeous case for a comparatist that it cannot be missed and will be tackled in paragraph 5.

2. Different legal models in the classifications of contract performance: a comparative overview

It is possible to find in the legal doctrine at least two different classifications of public procurement contracts in Europe.

According to the first one\(^1\), public contracts in European countries can be classified in three different models. The first model is the French one, where “contrats publics” have a special nature and are consequently subject to a specific legislative discipline, not applicable to private law contracts. This model was developed in

France mainly through case law, as it happens often for administrative law in France, and was introduced in Spain by statutes. The second model, opposite to the French, is the UK one, where the contract concluded by public administrations has the same features as the contract concluded between private parties and consequently the public administration is not provided with specific public powers, nor is subject to special Courts like in the French model. Finally, a third model is detected, developed in Italy, Germany and the Netherlands, where the general rule applies according to which the contract is a private law tool, but is subject to a great variety of special rules when one of the parties is a public administration. The wideness of exceptions can in some cases cast some doubts about the private law nature of the contract, which can become an exception instead of a rule, like e.g. in Italy, but the general definition is opposite to the French one, as well as the jurisdiction, since in this model litigation on contract concluded with a public administration is not in the competence of special Courts.

According to a partially different classification\(^2\), only two models can be detected: the French one, characterized by the submission of the contract to public law, and the English-German one, where the contract is only subject to private law. The first model, widespread in Spain, Portugal and Greece, is modified and adapted when introduced in Italy and Belgium where some private law rules are applied, even if the background rules stem from public law. According to this classification, there is no space for an intermediate model between the “public” and the “private” ones, with the consequence that the Italian model is considered as an adaptation of the French, and the German is deemed similar to the English.

Needless to say, the difference between the two classifications is not substantial but can be traced simply in the different appreciation of the intermediate models, like the Italian, which in the first classification are considered as autonomous enough to form a separate category, while in the latter are deemed to be a sub-category of one or the other basic models. But what is important is that the criterion of classification is the degree of applicability of special public legal rules to public procurement contracts. In fact, both the proposed classifications distinguish between legal systems that apply private law to public procurements and legal systems that apply only or mainly special rules, coming from public law.

The basic assumption, shared by the two classifications, is the following. The private law model presumes that the public administration is at the same level as private parties, i.e. that the public administration, as party of the contract, is not entitled with any special power different from those which are normally given to private parties, while the public law model implies, on the contrary, that one party – the public administration - is entitled with special public powers, which cannot be exercised or however are not usually exercised by private parties. It is

then disputable whether there is a third model, placed between the two main models, or if there are only sub-models of the two main ones, which however remain the two reference points.

However, the comparative analysis of public procurements in Europe shows that, beyond the general formulas provided by legislation and by legal doctrine about the application of public law or private law model, it is possible to detect a convergence of operational rules.\(^3\) It is in fact possible to say that, in the execution phase of public contracts, the public administration is always entitled with specific public powers which are not given to private parties\(^4\) and that, accordingly:

“almost all the legal regimes have some rules whereby the public contractor can modify or terminate the contract, although the conceptual nature and foundation of such rules varies as between legal systems”\(^5\)

It is not possible here to deepen the analysis\(^6\). Suffice it to say that if the presence of ‘pouvoirs exhorbitans’ given to the public administration in the execution of public contracts is somehow shared in almost all European legal regimes, while what is different is the legal technique used in order to empower the public administration with these special powers. In countries following the French model, the power of the public administration in the execution of public procurements contracts are defined by law, while in UK and in the other private law model countries they are not set in statutes but in contract clauses, which are devised by government departments and introduced in public contracts. This is for sure an interesting field of comparison which should be explored more accurately.

3. Termination of a public contract in Italy.

According to the classifications explained in the previous paragraph, the Italian system of rules applicable to the performance of public contracts is a mixed system, composed of private and public law rules and this is why it is usually placed between the French one and the English one. In reality, in Italy we have three different sets of legislation potentially applicable to the performance phase of public (procurement) contracts and, in particular, to the termination of such contract:

\(^3\) The meaning of “general formulas” and “operational rules” is drawn from Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)”, America Journal of Comparative Law, 39, p. 378–380.


"Loyalty" in termination of public contracts in Italy

a. the civil code, art. 1641, regulates the termination of the private procurement contract, stating that the buyer can terminate at any time the private procurement contract, provided that he pays to the contractor all the expenses incurred, the work already done and the lost profit;

b. the public procurement code7 (D. Lgs. 163/06), art. 134, regulates the termination of public procurements in the works sectors (and not in services nor supplies), stating that the contracting authority can terminate at any time the public procurement contract, provided that he pays to the contractor all the expenses incurred, the works already done and the lost profit, which is pre-determined in the ten per cent of the works not already performed;

c. the law on administrative procedure (L. 241/90), art. 21-sexies, states that the unilateral termination of public contracts is admitted only when envisaged by the law or by the contract, which is a quite obvious statement. But it also provides for two cases of unilateral termination of the administrative act:

   a. revocation (art. 21-quinquies): is admitted mainly when the public interest has changed or when a material change in the factual situation renders it necessary to reassess the public interest

   b. self-annulment (art. 21-nonies): is admitted when the contracting authority realizes ex post that the administrative act was illegal

Art. 2 of the public procurement code tries to give a framework for the application of those three sets of rules. It says (art. 2.3) that administrative procedures are subject to the law on administrative procedure (Law 241/90) for all what is not expressly provided for in the public procurement code and (art. 2.4) that the contractual activity of contracting authority is subject to the civil code, for all what is not expressly provided for in the public procurement code.

We have thus a relationship between general rules (civil code and law on the administrative procedure) and specific rules (public procurement code), with the

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7 In 2016 a new Public Procurement Code was enacted in Italy (D. Lgs. n. 50/2016), implementing the so called EU Public Procurement Package (Directives 2014/23, 2014/24 and 2014/25). However, the effective application of the new PP code in its entirety is still now (October 2017) not completed, since it requires the enactment of a very high number of administrative regulations (see M. Comba – S. Richetto, Transposition of the 2014 Public Procurement Package in Italy: meeting the deadline without really doing so, in S. Treumer – M. Comba (eds.), Modernising Public Procurements: The Approach of Member States, Elgar Publishing, forthcoming, 2018. Furthermore, where the termination of public contract is a stake, the “old” code is more often applied, since contracts terminated now were enacted under the “old” code which is still applicable for termination issues. For all these reasons, this paper only refers to the Public Procurement code of 2006 rather than to the new one of 2016.
consequence that the latter are always applicable in case on conflict, while the first are applicable only in cases which are not expressly regulated by the latter.

Considering the termination of public contracts – which is what this paper is about – the difference between the civil code and the public procurement code is not substantial: it only consists in the quantification of the lost profit, which according to the civil code has to be determined by the petitioner while according to the public procurement code is already quantified in ten per cent of the part of the contract not yet performed.

The difference is however material if we consider the revocation or the self-annulment provided for by the law on administrative procedure: in the first case (revocation), art. 21-quinquies of Law 241/90 states that the revocation, when affecting a contractual relationship, only entitles the contractor to the payment of damages but not to the refund of lost profit, while in the latter case (self-annulment) the law does not say anything about indemnity or damages and it is therefore applicable the civil code, which, as we will see later in par. 4, according to art. 1338 only admits the payment of expenses and not of lost profit. Furthermore, in both cases, the contract is terminated as a consequence of revocation or self-annulment of the presupposed administrative act and the contractor must go to Court if he wants to get indemnity or damages.

This is why it happens that contracting authorities, when deciding to terminate a public contract, prefer to use the “administrative path” and particularly the revocation instrument instead of the one provided for by the public procurement code (art. 134), which implies the payment of 10% for lost profit.

This question was tackled by the Consiglio di Stato, Adunanza plenaria, with decision n. 14 of 20 June 2014. The public transportation Company of Rome (ATAC S.p.A.), totally owned by the municipality of Rome, decided to build a new warehouse for buses and launched a public procurement bid, which was finally awarded to the CCC company. The contract was signed in 2006 but the kick off of works was postponed many times and, when works began, they proceeded very slowly. Finally, in 2012, ATAC decided that the public interest for building the new warehouse was not any more existing because ATAC has decided to spin off its estate properties and sell them separately and, in any case, funding for the building of the warehouse was lacking. Consequently ATAC issued a revocation of the adjudication of the contract, according to art. 21-quinquies Law 241/90.

CCC challenged the revocation with the administrative tribunal of Rome and finally the question was brought to the Adunanza plenaria of the Consiglio di Stato, which issued decision n. 14 of 2014. In its decision, the Consiglio di Stato...

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8 Before the enactment of the public procurement code, according to certain scholars the contracting authority was in a position to choice between applying the civil code or the specific rules for public procurements: see Cianflone-Giovannini, L’appalto di opere pubbliche, Milano, Giuffré, IX ed., 2002, p. 610.
acknowledged a contrast between the Consiglio di Stato itself and the Corte di Cassazione. The former, or at least some division of the former, admitted a general power of contracting authorities to revoke the adjudication of a contract, even after the contract was signed and performance had begun; the latter was on the contrary very clear in maintaining that, after the conclusion of the contract, the contracting authority didn’t have any public power left and was to be considered in the same position of a private party.

The AP of Consiglio di Stato begins its decision confirming, in general terms, the position of the Corte di Cassazione, but noting that, even if after the conclusion of the contract the public administration loses almost all of its public power, some of them remain, according to specific statute provisions. For example, the contracting authority is bound to terminate the contract without any prior notice if the contractor results to be connected with mafia crimes, even if committed after the conclusion of the contract, or in case of public works concession with project finance the contracting authority is entitled with the specific power revoke the contract. According to the AP of CdS, thus, during the performance of the contract the public administration is on a foot of parity with the private contractor, but this parity is only tendential because it admits exceptions.

Among the exceptions to the parity principle is the regulation of termination of the contract, because the public procurement code expressly regulates it in art. 134, which constitutes an exception to art. 1641 civil code.

Since a specific rule is provided by the public procurement code for the termination of public works procurement, the principle of speciality provided for in art. 2 of the public procurement code is triggered and thus the law on administrative procedure is not applicable to the specific case. If a public administration wants to terminate a public work procurement it has to follow the specific rule provided for by the public procurement code (art. 134) and it cannot follow the civil code nor use the revocation of art. 21-quinquies Law 241/90.

But the specific rule (art. 134) is only applicable to public procurements of works: it is therefore possible to use revocation or self-annulment for other cases like concessions of works, because they are not public procurements, or for public procurements of services and supplies. In particular, the AP of the CdS recognizes (point 3.5.2 of the decision) that self-annulment of an administrative act awarding a public contract of services or supply is admitted also after the signature of the contract and during the performance of the contract. Such an annulment produces the consequence to annul the contract (in Italian “caducazione del contratto”), given the strict consequential relationship between the awarding of the public procurement and the conclusion of the contract.

The result of this decision can be odd, considering that the existence of a special statutory rule applicable for public works procurement (art. 134), instead of increasing the power of the public administration in this specific case, has the
result to reduce and limit it, because it prevents the administration from using other instruments, like revocation or self-annulment, which would give it a much powerful position.

In any case, according to the AP of the CdS, public procurements of supply and services is a field where a contracting authority can use self-annulment. We will therefore examine in the following paragraph what are the conditions required by the law for a Public administration to self-annul an administrative act.

4. Self-annulment and consequent damages.

Art. 21-nonies of Law 241/90, as recently modified (by Law n. 124 of 7 August 2015) regulates the self-annulment of administrative acts, requiring four conditions for the exercise of the power of self-annulment from the public administration. This article is perhaps one of the most controversial of the entire law on administrative procedure and in fact it was modified many times and has produced a great number of judicial decisions. It is crucial for the issue of this paper because it incorporates the tension between the need of the public administration to pursue the public interest without being bound by contractual liens and the need to protect the good faith of the private party who trusts the contract signed with the public administration. The conditions required by art. 21-nonies for the public administration to self-annul its own administrative act are the result of the effort made by the Legislator to appease these two contrasting needs.

The first condition is the illegality of the act to be self-annulled. According to art. 21-octies of the same Law 241/90, an administrative act is illegal when it is contrary to law, or when it is flawed with “eccesso di potere” (détournement de pouvoir/ultra vires) or finally when it is issued by a public administration lacking jurisdiction. In practice, the first motivation (contrast with law) is for sure the most used by lawyers because it is easier to be proved and accordingly it is the most common cited in administrative tribunals decisions. For sake of simplicity (but losing in accuracy), let’s assume that the first requirement for an administrative act to be self-annulled is to be contrary to law.

However “simple” illegality is not sufficient. The second requirement is that the illegal administrative act be also contrary to public interest because the simple restoration of legality is not considered enough for self-annulment of an administrative act. Case law stated that an illegal act is always contrary to public interest when, among other cases, it entails an expenditure of public money and thus through the self-annulment the public administration recovers money which was already spent or was about to be spent (Consiglio di Stato, decision 24 September 2003, n. 5444). It follows than when a public contract is involved, the required condition of violation of public interest is almost always existent, because a public contract entails the expenditure of public money.
The third condition required by art. 12-nonies is that self-annulment be issued only in a “reasonable deadline”, in order to protect good faith of the private party which can be damaged by the self-annulment. The definition of when a deadline is reasonable has brought an enormous quantity of litigation in front of administrative tribunals, so that law 124 of 7 August 2015 has modified art. 21-nonies stating that, when the act implies economic advantages, the deadline for its self-annulment cannot be more than 18 months. This was in fact a try to limit excessive litigation and, at the same time, to protect the good faith of the private party who trusted the contract signed with the public administration.

However, it is still to be determined whether the line drawn by Law of 7 August 2015, which introduces the deadline of 18 months for self-annulment, is abiding by European law with reference to art. 73 Directive 2014/24/EU which introduces, in the field of public procurement, the obligation for member states to ensure that contracting authorities can terminate public contracts concluded in violation of certain requirements of the directive itself, without setting any time limit. It is true that art. 73 specifies that this termination shall be conducted under the conditions admitted by the applicable national law, but is to be verified if the deadline of 18 months, set forth by Italian law, cannot be considered as limiting the application of art. 73. In other words, it seems that European law with art. 73 Directive 2014/24/EU has introduced a case self-annulment for public contracts where the tension between the need to terminate public contracts in violation of the directive seems to prevail against the need to protect the private party’s good faith and trust in the contract. In particular, par.c) of art. 73 requires Member state to ensure that contracting authorities have the possibility to terminate public contracts where the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Directive, that has been declared by the Court of Justice of the European Union in a procedure pursuant to Article 258 TFEU. Obviously, the procedure ex art. 258 TFEU and the following decision of the CJEU will not in any case be terminated within the 18 months deadline set in art 21-nonies of the Italian law 241/90: hence the possible contrast between EU law and the Italian provision introducing a time limit of 18 months for the Public administration to annul its acts. This contrast was recently acknowledged by art. Legislative Decree 56/2017 which, amending art. 108 of Public Procurement code of 2016, stated

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Furthermore, directive 2007/66/CE states that, in order to combat illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement, a contract resulting from illegal direct award should be considered ineffective (whereas n. 13-14). In this case, of course, ineffectiveness is ascertained by a Court or an independent review body and is not the result of self-annulment, but it can be considered a hint of the preference given by EU law to the termination of illegal contracts in the balance with the trust of private party.
that the 18 months limitation is not applicable when a Contracting Authority has to annul a contract according to art. 73 Directive 2014/24/EU.

Furthermore, art. 21-nonies explicitly states that the public administration, before self-annulling an act, must take into consideration the private interests involved and balance them with the public interest. This fourth condition is actually the core of the whole question because the private interest to be considered by the public administration is, accordingly to case law (CdS, sez. IV, 20 February 2014, n. 781) the trust of the private party into the administrative act (and the consequent contract) which the public administration wants to self-annul.

Since the practical application of this statutory rule is not easy, Italian Administrative Courts have tried to find some easy indicators of the private’s trust. The most common is the quantity of time passed from when the administrative act was issued, because the more time has passed, the stronger can be deemed to be the trust of the private party, which means that the more time has passed, the stronger has to be the public interest in order to overcome the trust of the private (see CdS, sez. IV, 20 February 2014, n. 781). Actually, this means that this condition in fact incorporates the third condition (“reasonable deadline”), but since the latter was recently defined by law in 18 months, we would now see how case law will react. Since, according to the new law, no self-annulment (for acts implying economic advantages) is admitted after 18 months from the issuance of the self-annulled act, does that mean that before that deadline any self-annulment is admitted because trust of the private party is presumed too feeble to be protected? Or, on the contrary, it is still possible to distinguish, inside the time period of 18 months, what is the time length which can generate the trust of the private and what is not?

However, what is sure is that, according to case law (and to logic), if the private party is in bad faith, because he knew or he should have known that the administrative act was illegal, his trust in the administrative act cannot be legally protected and the public administration can self-annul it. In this case no other condition is required for self-annulment other than the illegality of the administrative act: no further public interest (second condition), nor reasonable deadline (third condition) nor, even more so, no taking into consideration of the private interest involved (fourth condition). The Consiglio di Stato confirmed that principle in a recent decision (20 February 2014, n. 781). The case was the following. In 2004 the Italian Treasury Department, office of Salerno, rented out a large facility to a local entrepreneur, Mr. Falcone, for the organization of the annual Pizza Festival and for the management of other food related activity. The contract was concluded without any public procedure because, according to the Treasury Department, no other economic operator could be interested to the facility. One month later the signature of the contract, a criminal charge was passed, alleging that Mr. Falcone had bribed the Treasury officials in order to
have the contract but, in 2009, Mr. Falcone was discharged because, even if the contract was illegal, the judge decided there was not fraud. In 2011 the Treasury Department issued a self-annulment of the contract and Mr. Falcone challenged it in the local Administrative Tribunal and then, when the recourse was rejected, appealed to the Consiglio di Stato. The decision states that (i) the contract is for sure illegal, because according to Italian law it should have been awarded following a public procedure and (ii) Mr. Falcone could not ignore the illegality, because a criminal charge was passed only one month after the signature of the contract. Thus, given the bad faith of Mr. Falcone, no legal protection can be granted to his position, with the consequence that the self-annulment was upheld by the Consiglio di Stato.

Another relevant issue connected to self-annulment is that of damages. If the public administration self-annul an administrative act and, as a consequence, a public contract, then the private party challenges the self-annulment in the Administrative Courts and get it annulled, what kind of damages can he get?

The first question to be tackled, in the Italian legal system, is what is je judge to be addressed: the same administrative Judge who annulled the self-annulment act, or the civil judge? The Italian Corte di Cassazione opts for the civil judge (Cass. Civ., SS.UU., ord. 4 September 2015, n. 17586).

The second and more important question is about the quantification of damages. Since art. 21-nonies Law 241/90 is silent on this issue, the civil code is applicable and, in particular, art. 1338 according to which if a party knew a cause of illegality of a contract and didn't warned the other party, he is bound to pay damages for the other party’s trust in the contract, provided that the other party is in good faith. Only two comments on this provisions, due to lack of space:

(i) if the damaged party was in bad faith, it is not entitled to any damage and bad faith is when the damaged party knew or was supposed to know the cause of illegality of the contract. According to the Corte di Cassazione (sez. I, sent. 12 may 2015, n. 9693) the damaged party is not supposed to know the illegality of the public contract in any case in which a law was violated, but only when it was possible to know this illegality using the normal diligence, with a case by case check. For example, case law recognized the bad faith in the damaged party when a public contract was awarded without a public procedure (Cass. Civ. N. 11135/2009) or when it was awarded to an economic operator lacking the admission requisites (Cass. 7481/07). It should be further investigated if case law in fact provides for a different rule when the contract is between the Public administration and a private, or if the rule is the same in both cases.

(ii) In any case, art. 1338 civil code only awards damages for subject expenses and not for lost profit.
As a provisional conclusion of this paragraph, subject to further investigation and only for the purposes of discussion, it could be considered that when a public contract is self-annulled by a contracting authority, no protection has to be awarded to the private party because he is considered to be in bad faith, due to the fact that this cause on illegality of the public contract is supposed to be known. Of course, in this case no damages can be claimed by the private party whose contract was annulled. This provisional conclusion can be in line with European law, namely art. 73 of public procurement Directive of 2014 and with Directive 2007/66/CE, as well as with the recent modification of article 108 Public Procurement code, stating that the 18 months limitation is not applicable against art 73 Directive.

5. The Italian swap contract cases according to the Consiglio di Stato and the High Court, Queen’s Bench Division

After the financial crisis of 2008, several investigations of the Italian Corte dei Conti and of the Guardia di Finanza\(^{10}\) highlighted the existence of a huge amount of interest rate swap contract and, more generally, of derivative financial products concluded by Italian public bodies with national and international banks. In order to limit the losses produced by these contracts, some Italian public administrations tried to terminate them and, from a legal point of view, they were given two possible ways: the first was to allege the violation of Italian laws on financial products, like any other private investor; the latter was to resort to self-annulment. We will examine in this paragraphs some cases belonging to the latter and, in particular, the cases of Regione Piemonte, of the Municipality of Omegna (Piemonte) and of the Provincia of Pisa.

a. The case of Regione Piemonte.

During the year 2005 the Regione Piemonte had carried out an informal competition among a dozen of national and international banks for selecting an arranger to be charged with the emission of bonds. The contract was awarded to Dexia and OPI who finally arranged the emission of bonds for about 1.856 millions Euros. At the same time, Regione Piemonte decided to “cover” the emission of bonds with derivative contracts (amortising swaps, interest rate swaps and credit default swaps) which were signed in 2007, with clauses containing English Law and English choice of jurisdiction.

In January 2012, Regione Piemont issued a self-annulment of the swap contracts alleging several faults in the contracts.

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\(^{10}\) Guardia di Finanza is the Italian military fiscal police.
The banks challenged the self-annulment both in front of the local Administrative Tribunal of Piemonte and of the High Court of London. In the first judgment, the Administrative Tribunal rejected the banks’ petition and declared itself without jurisdiction on the following grounds. First of all, in order to issue a self-annulment of an administrative act, it is necessary the existence of the administrative act to be annulled. In the specific case, the self-annulment was “impossible” because it was in fact alleging faults of the contract and not of the administrative acts prerequisites of the contract. Since the question was only concerning contracts and not administrative acts, it was not in the jurisdiction of the administrative judge but in the jurisdiction of the civil judge (juge judiciare) and particularly of the English judge.

According to the Administrative Tribunal of Piemonte, there wasn’t any administrative act to be self-annulled, because Regione Piemonte officers simply signed the swap contracts with banks, without any previous administrative procedure resulting into a final decision to sign the swap contracts and thus the self-annulment was radically impossible, due to the absence of any administrative act to self-annul. Again, this consideration leads to the conclusion that the administrative judge has no jurisdiction, since it is not a question of an administrative act (of the exercise of a public power), but only of a private activity performed by regional officers.

The decision was confirmed by the Consiglio di Stato-Adunanza plenaria of 5 May 2014, n. 13, which insisted on the fact that Regione Piemonte did not issue any administrative act before the conclusion of the contract and thus the case was to be assigned to the jurisdiction of the English judge.

The High Court of Justice, Queen’s Bench division, Commercial Court issued its decision on 12 July 2013. In the High Court decision only two paragraphs (par. 46 and 47) out of 59 are dedicated to the issue of self-annulment, which is however classified under another legal qualification. In fact the English judge tackles the problem of the legality of the internal administrative procedure under the angle of “capacity” of the Regione Piemonte to sign the contract. He admits that, in spite of the choice of the English law made by the contract, the capacity of Regione Piemonte falls under the Italian law. However, the grounds alleged by Regione Piemonte for lack of capacity were not deemed by Justice Eder enough to justify it, but were considered only as “internal management corporate powers”. It is not possible to accurately assess this judgment, since we don’t have the petition filed by Regione Piemonte. However it is interesting to note that Justice Eder applies to Regione Piemonte the same standards applicable to private corporate entities in order to assess the existence of capacity while, according to Italian law, self-annulment is only attributable to public administrations. It is however likely that the decision of the High Court be influenced by the fact that Regione Piemonte only alleged...
flaws of the contract and not of the administrative act, as observed also by he Italian Administrative judges.

The case of Municipality of Omegna.
In 2003, 2004 and 2006 the Municipality of Omegna signed three interest rate swap contracts with Unicredit bank. In 2012 the Municipality self-annulled the administrative acts who approved these contracts, alleging that they (i) violated public procurement law because lacked a public bid and (ii) violated the local government law because approved by the municipal government and not by the municipal council. In addition, the Municipality of Omegna noted that the self-annulment was motivated by a relevant public interest consisting in the recovery of public money and that the bank was not entitled to a protection because it was in bad faith, having behaved in conflict of interest.

The Municipality of Omegna was therefore perhaps wiser than that of Regione Piemonte, because it only drew upon flaws of the administrative act and not of the contract, with the result to keep the jurisdiction of the administrative judge.

The bank challenged the self-annulment act alleging that it was issued in violation of art. 21-nonies Law 241/90, but the administrative judge (decision n. 343/13) rejected the petition, confirming that the violation of the public procurement law and of the local government law were enough to justify it. In addition, the judge also stated that in case of legitimate self-annulment of the administrative act authorising the Municipality to sign a contract, also the contract was to be terminated (caducato) as an automatic consequence of the self-annulment of the administrative act (and that principle was later confirmed by Consiglio di Stato, Adunaza plenaria n. 14/14).

The banks appealed in front of the Consiglio di Stato, which issued decision n. 3174 of 2107, overturning the decision of the Administrative Tribunal of Piemonte and stating that the Municipality was not entitled with the power to self-annul a contract directly awarded, without any prior administrative procedure.

b. The case of the Provincia of Pisa
In 2007 Provincia of Pisa signed some swap contracts for the total amount of about 100 million Euro, after a competitive procedure for the selection of the best offer. In 2009 Provincia of Pisa issued a self-annulment act grounded on the violation of a couple of Italian laws which allowed public administrations to subscribe swap contracts but only under certain conditions, like the absence of implied costs and the non-speculative nature of the contract.

The self-annulment was challenged by the banks, alleging violation of art. 21-nonies Law 241/90 and holding that the self-annulment of the admin-
istrative act authorising the signature of the contract cannot imply also the annulment of the contract. The local Administrative Tribunal rejected the first motivation of the banks’ petition, but accepted the latter and thus declared that, even if the self-annulment was legitimate, the contract could not be annulled by the Provincia because only a civil judge could do so.

Both parties filed an appeal with the Consiglio di Stato which (decision 5032/11) first of all reaffirmed that the public administration has the power to terminate a public contract through the self-annulment of the administrative act authorising the signature of the contract. This is also because there is no difference between the annulment of the administrative judge and the self-annulment of the public administration: in both cases the annulment of the administrative act entails the termination of the contract which is based upon that act. As for the existence of a further public interest, as required by art. 21-novies Law 241/90, the Consiglio di Stato observes that the recovery of public money is a sufficient reason for justifying the self-annulment.

Having solved these legal questions, the CdS did not issue a final decision because it appointed a financial expert in order to examine the swap contracts and verify if in fact they entailed hidden costs for the Provincia of Pisa. With a following decision (n. 5962/12), the Consiglio di Stato, having heard the expert report, accepted the appeal of the banks and annulled the self-annulment of Provincia of Pisa.


The only possible provisional conclusion is that a lot of comparative work still has to be done in relation to the termination of public contracts and, in particular, to the termination of public procurement contracts. The Italian situation, albeit multifaceted and at times contradictory, however takes into account the public interest to terminate a public contract which was illegally awarded, according to EU law and, particularly, to art. 73 Directive 2014/24/UE, whose application in the several Member States is for sure a point which deserves a further and more accurate investigation. Indeed, in order to guarantee effectiveness in the application of EU public procurement law, special remedies are provided in case a contract is concluded and also partially performed on the basis of an illegal awarding: these remedies can be judicial remedies (Directive 2007/66/EC) but should also include the possibility for the Contracting Authority to self-annul the award and the contract when it acknowledges that it was unlawful.

On the other hand, the UK model seems to perceive the difference between a public and a private contract: the High Court of Justice, in the case mentioned in point 5.a, applies the “capacity” doctrine also to Contracting authorities, comparing the administrative procedure required to award a public contract to
Mario E. Comba

“internal management corporate powers” where the protection of third parties trust is maximum and that of public interest is minimum.

One possible suggestion could perhaps be to focus the analysis on the issue of good faith: if the private party was in position not to ignore the illegality of the award procedure, then his trust does not deserve protection, even under a common law approach. It follows that if the public contract was awarded directly, in total violation of EU rules on public procurement, it is difficult for the private party to demonstrate his good faith and, consequently, it could be perhaps easier to reconcile the protection of public interest and of private parties’ trust.