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Access to Documents without Request. Consideration on the New (Substantial and Procedural) Italian Discipline on Access to Tender Documents *

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ABSTRACT This article delves into the recent Italian legislative changes concerning access to public contract documents, primarily codified in Articles 35 and 36 of the new code. While Article 35 largely mirrors previous legislation, it introduces noteworthy advancements such as the inclusion of civic access and the transition to mandatory electronic access via digital procurement platforms. However, the crux of the legislative shift is encapsulated in Article 36, which introduces a groundbreaking "access without request" model. This model signifies a move from reactive transparency –dependent on formal requests– to a proactive transparency framework, where tender documents are made available automatically. Despite the intentions to enhance transparency and reduce administrative delays, the new provisions raise several critical concerns. These include potential overexposure of tender documents, which could lead to an increase in frivolous litigation and competitive exploitation, as well as procedural complexities and potential conflicts with EU confidentiality standards. Furthermore, the imposition of new procedural norms and the introduction of sanctions for misuse of blackout requests pose additional challenges. The article concludes that while the reforms are well-intentioned, they require significant adjustments to address the identified substantial and procedural issues effectively.

1. *Introduction*

Following an already established approach in previous public contract codes, the legislator of the new code also deemed it appropriate to introduce a special regulation related to access to documents. The latter is a discipline that unfolds in Articles 35 and 36. Which, as we will see, partly follow guidelines already traced by the (pre)existing legislation and partly develop new ones.

The first of these provisions, namely Article 35, although it contains some important innovations, essentially follows the (pre)current Article 53 of Legislative Decree no. 50/2016.[1] With respect to this provision, in fact, it almost slavishly proposes both the cases in which access must necessarily be deferred and the limitations on access.[2]

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[1] For further details on the discipline outlined in Legislative Decree no. 50/2016, see P. Adami, *L'accesso civico agli atti delle procedure di affidamento e di esecuzione dei contratti pubblici*, in *Rivista amministrativa Repubblica Italiana*, 2018, 242; M. Lucca, *Principi di trasparenza presenti nel d.lgs. n. 50 del 2016*, in *Rivista trimestrale degli appalti*, 2018, 249; L. Minervini, *Accesso agli atti e procedure di affidamento ed esecuzione di contratti pubblici*, in *Foro Amministrativo*, 2019, 949; V. Varano, *È ancora fervido il dibattito in materia di accesso agli atti nelle procedure ad evidenza pubblica*, in *Rivista trimestrale degli appalti*, 2020, 386; P. Rubechini, *Appalti pubblici e diritto di accesso*, in *Giornale di diritto amm*inistrativo, 2020, 232.

[2] The aforementioned Article 35 establishes, in the second paragraph, that "without prejudice to the regulations established by the code for contracts which are classified or whose execution requires special security measures, the exercise of the right of access is deferred: a) in open procedures, in relation to the list of subjects who have submitted offers, until the deadline for submitting them expires; b) in restricted and negotiated procedures and informal tenders, in relation to the list of subjects who have requested invitations or who have expressed their interest, and in relation to the list of subjects who have been invited to submit offers and to the list of subjects who have submitted offers, until the deadline for the submission of the offers themselves has expired; subjects whose invitation request has been rejected are allowed access to the list of subjects who have requested invitations or who have expressed their interest, after official communication from the contracting authorities or granting bodies, the names of the candidates to be invited; c) in relation to the applications for participation and the documents, data and information relating to the participation requirements referred to in Articles 94, 95 and 98 and the minutes relating to the admission phase of candidates and tenderers, up to the award; d) in relation to the offers and the reports relating to their evaluation and the documents, data and information required for this, up to the award; e) in relation to the verification of the anomaly of the offer and the reports referring to the mentioned phase, up to the award". And it provides, in the following fourth paragraph, that "without prejudice to the regulations provided for contracts which are classified or whose execution requires special security measures, and without prejudice to the provisions of paragraph 5, the right of access and any form of disclosure: a) may be excluded in relation to information provided as part of the offer or in justification of the same which constitutes, according

Article 35, however, also contains, as already mentioned, two noteworthy innovations. On the one hand, the provision under discussion expressly recalls the regulations on civic access,[3] appropriately positivizing the outcome reached by the Council of State's Plenary Assembly with decision no. 10/2020.[4] Article 35, in fact, clarifies that even civic access can be (at least theoretically)[5] used to obtain the presentation of documents relating to the award and execution of a public contract. On the other hand, the same article also provides that access to the documents now takes place only electronically and, more precisely, through access to the digital procurement platform[6] used by the contracting authority, in which all the minutes of tender and offers are submitted by competitors.

Undoubtedly, the most innovative aspects of the new discipline are found in the subsequent Article 36. As a matter of fact, this provision, entitled "procedural and procedural rules regarding access", introduces multiple and notable innovations of both a substantial and procedural nature. These innovations will be discussed in detail.

2. *New aspects of a substantial nature*

Article 36 marks a clear paradigm shift compared to the past. In fact, it goes beyond the traditional approach, followed primarily by Law no. 241/1990, and "following" *ad hoc* disciplines that have gradually followed one another over time, according to which any type of access to documents presupposes, always and in any case, an act of impulse (e.g.,

to the reasoned and proven declaration of the offeror, technical or commercial secrets; b) are excluded in relation to: 1) legal opinions acquired by subjects required to apply the code, for the resolution of potential or ongoing disputes relating to public contracts; 2) the confidential reports of the works director, the execution director and the testing body on the questions and reservations of the person executing the contract; 3) the digital platforms and IT infrastructures used by the contracting authority or the granting body, where covered by intellectual property rights".

[3] On the legal norms related to access to documents in compliance with Legislative Decree no. 50/2016 and no. 33/2013, see G. Ariemma, *Le diverse forme di accesso nell'ordinamento italiano: il rapporto tra accesso ordinario e accesso civico generalizzato in materia di contratti pubblici*, in *Rivista giuridica europea*, 2020, 89.

[4] As it is well known, before the advent of the Council of States's Plenary Assembly no. 10/2020, two antithetical orientations had emerged in caselaw regarding the possibility of accessing to the documents relating to the awarding of a public contract, pursuant to and for the purposes of Legislative Decree no. 33/2013. According to a first approach, "the institution of generalized civic access does not apply [with regard to said acts, pending] the wording used by Article 53, paragraph 1, of the Public Contracts Code referred to in the Legislative Decree no. 50 of 2016" (see also T.A.R. Lazio, Rome, section II, 14 January 2019, no. 425; T.A.R. Emilia-Romagna, Parma, section I, 18 July 2018, no. 197 and T.A.R. Marche, Ancona, 18 October 2018, no. 677, available at *www.giustizia-amministrativa.it*). This approach was opposed, as already mentioned, by another one. According to this approach, "civic access (...) in *subiecta materia* [can be] temporarily prohibited, within the same limits in which this occurs for participants in the competition, and therefore until this is completed, but not definitively excluded" (T.A.R. Lombardy, Milan, section IV, 11 January 2019, no. 45, available at *www.giustizia-amministrativa.it*). As it has already been anticipated, this caselaw conflict was definitively resolved by the Plenary Assembly, which, by adopting the second of the aforementioned approaches, judged that "the regulation of generalized civic access, without prejudice to the temporary and/or absolute prohibitions referred to the Article 53 of Legislative Decree no. 50 of 2016, is also applicable to the documents of tender procedures and, in particular, to the execution of public contracts, without the exception of paragraph 3 of the Article 5-bis of Legislative Decree no. 33 of 2013 in conjunction with Article 53 and with the provisions of Law no. 241 of 1990, which does not fully exempt the subject from generalized civic access, but the verification of the compatibility of access with the relevant exceptions referred to in Article 5-bis, paragraphs 1 and 2, to protect the limited public and private interests envisaged by this provision, in the balance between the value of transparency and that of confidentiality" (see, the Council of State, Plenary Assembly, 2 April 2020, no. 10, available at *www.giustizia-amministrativa.it*). For a comment on this ruling, see A. Corrado, *L'accesso civico generalizzato, diritto fondamentale del cittadino, trova applicazione anche per i contratti pubblici: l'Adunanza plenaria del Consiglio di Stato pone fini ai dubbi interpretativi*, in *federalismi.it*, 2020, 16; M. Ippolito, *La cultura della trasparenza nell'accesso agli atti della fase esecutiva di un procedimento ad evidenza*, in *GiustAmm.it*, no. 7/2020; S. Mastroianni, *L'integrazione tra la disciplina del diritto di accesso ordinario e quella dell'accesso civico generalizzato nel settore degli appalti: l'Adunanza Plenaria dice no a buchi neri nel principio di trasparenza*, in *GiustAmm.it*, no. 4/2020.

[5] In practice, it is very difficult for the request for civic access not to "intercept" some of the exceptions to civic access listed in Article 5-bis of Legislative Decree no. 50/2016. Regarding these exceptions, see E. Furiosi, *L'accesso civico "generalizzato", alla luce delle Linee guida ANAC*, in *GiustAmm.it*, 2017.

[6] The regulations relating to digital procurement platforms can be found in Article 25 of Legislative Decree no. 36/2023. On this point, see D.U. Galetta, *Digitalizzazione, Intelligenza artificiale e Pubbliche Amministrazioni: il nuovo Codice dei contratti pubblici e le sfide che ci attendono*, in *federalismi.it*, 2023; G. Carullo, *Piattaforme digitali e interconnessione informativa nel nuovo Codice dei Contratti Pubblici*, in *federalismi.it*, 2023. More generally on the digitalization of public contracts, see G. Racca, *La digitalizzazione dei contratti pubblici: adeguatezza delle pubbliche amministrazioni e qualificazione delle imprese*, in R. Cavallo Perin and D.U. Galetta (eds.), *Il Diritto dell'Amministrazione Pubblica digitale*, Torino, Giappichelli, 2020, 332.

the presentation of a request) on the part of the subject who demands to show the documents.

The rule in question therefore introduces a - hitherto unprecedented – "access without request" which launches, in terms of access to tender documents, the transition from a structured access to documents – as a tool of "user driven transparency" (or "reactive transparency") – to a "proactive transparency" instrument.[7]

It follows, therefore, that in the matter of access to documents we have moved, in the space of fifteen years, from a regime (the traditional one, contained in Law no. 241/1990) in which access required and still requires the presentation of a reasoned request to an access (the civic one, referred to in Legislative Decree no. 33/2013) in which the request must be provided, but not justified; to finally arrive at a regulation, the one now engraved in the new code of public contracts, in which, as mentioned, it is no longer necessary to present any request and, consequently, to provide any motivation in support of the request for access.[8]

Article 36, in particular, making the most of the potential of the already mentioned digital procurement platform, provides that, as a rule, the documents (including candidates' offers) must automatically be made available, together with the communication of the award, through access to the aforementioned platform.

More precisely, this rule provides for two different regimes in this regard, which we will focus on shortly. Regimes whose *trait d'union*, we anticipate, consists, negatively, in the absence of an act of partisan impulse and, in positive terms, in making available relevant documents, precisely through the aforementioned digital platform.

The first of these regimes is fully regulated by the first paragraph of the aforementioned Article 36. As a matter of fact, this article provides that the offer of the successful tenderer (and only him/her) is, together with the communication of the award, automatically available to all (and it is repeated 'to all') candidates other than those definitively excluded.[9]

The second paragraph of the same rule, in regulating the second of these regimes, establishes, in turn, that access to the tender documents is also allowed to the first five classified. To whom mutual offers are made available.

Article 36, on the other hand, says nothing about the methods of accessing the offers of any subjects ranked higher than fifth.

In the non-preventative silence of the law, it seems possible to believe that said subjects can still make use of the (still in force) general regulations referred to in Law no. 241/1990 and, therefore, present a reasoned request for access to the documents.[10]

On the other hand, it does not seem admissible to believe that these competitors are fundamentally barred from accessing the tender documentation. Opining differently, in fact,

[7] On the difference between reactive and proactive transparency, see F. Faini and M. Palmirani, *The Right to Know and Digital Technology: Proactive and Reactive Transparency in the Italian Legal System*, in A. Ko and E. Francesconi (eds.) *Electronic Government and the Information Systems Perspective*, Berlino, Springer, 2018, 164.

[8] With reference to the recent evolution of the issue related to access to documents, see, by way of example, F. Figorilli, *Alcune osservazioni sui profili sostanziali e processuali del diritto di accesso ai documenti amministrativi*, in *Diritto Processuale Amministrativo*, 1994, 262; L.A. Mazzarolli, *L'accesso ai documenti della pubblica amministrazione. Profili sostanziali*, Padova, Cedam, 1998; M.A. Sandulli, *Accesso alle notizie e ai documenti amministrativi*, in *Enciclopedia del Diritto,* Agg. vol. IV, Milan, Giuffrè, 2000, 6; E. Carloni, *Il nuovo diritto di accesso generalizzato e la persistente centralità degli obblighi di pubblicazione*, in *Diritto Amministrativo*, 2016, 579; D.U. Galetta, *Accesso (civico) generalizzato ed esigenze di tutela dei dati personali ad un anno dall'entrata in vigore del Decreto FOIA: la trasparenza delle vite degli altri?*, in *federalismi.it*, no. 10/2018; A. Moliterni, *La natura giuridica dell'accesso civico generalizzato nel sistema di trasparenza nei confronti dei pubblici poteri*, in *Diritto Amministrativo*, 2019, 577; M. Savino, *Il FOIA italiano e i suoi critici: per un dibattito scientifico meno platonico*, in *Diritto Amministrativo*, 2019, 453; S. Foà, *La nuova trasparenza amministrativa*, in *Diritto Amministrativo*, 2017, 65; A. Simonati, *Il trattamento di dati personali e gli accessi amministrativi "generali": le dinamiche frontiere della discrezionalità*, in *Diritto Amministrativo*, 2023, 1.

[9] By "subjects definitively excluded," we should mean the subjects with respect to whom the relative exclusion provision has become unchallengeable or those whose exclusion has been deemed legitimate by a final judgement.

[10] This reconstruction finds a regulatory basis in the first paragraph of the Article 35 of Legislative Decree no. 36/2023, which provides that "the contracting authorities and the granting bodies shall ensure digital access to the documents of the procedures for the assignment and execution of public contracts, through direct acquisition of the data and information entered into the platforms [also] pursuant to Articles 3-bis and 22 et seq. of Law 7 August 1990, no. 241".
The Administrative Justice Studies and Training Office also reached this conclusion (see, Report on the Effects of the New Public Contracts Code on the Administrative Process, available at *www.giustizia-amministrativa.it*, 22).

given the close correlation that links access to documents to judicial protection (the former is, as it is well known, functional to the latter)[11], we would be in front of a regulation incompatible with Article 113 of the Constitution.

Returning to the two innovative regimes introduced *ex novo* by Article 36, it must be underlined that their rationale seems to be found not only in the intention of making tender procedures as transparent as possible but also (and I would say above all) in that of overcoming the not very commendable practice widespread among administrations of delaying the moment of access as much as possible in order to discourage, in the bud, the filing of appeals. A practice that was indeed dealt a severe blow by Plenary no. 12/2020,[12] which, by anchoring the deadline for challenging the award to the presentation of documents, has significantly limited the lagging and instrumental conduct of the administrations.

Now, while sharing the philosophy that underlies the reform (the wise use of new technologies to make the work of the administrations more transparent and dynamic),[13] it seems to me in all honesty that, as it often happens in our latitudes, we have gone from one excess to another.[14]

With regard to the first regime (e.g., full access by all competitors to the successful tenderer's offer)[15] it seems to me that it determines an excessive (and as such disproportionate)[16] openness, with respect to which I have the same identical concerns that led, as stated in the report accompanying the Code outline, to limit the field of application of the second of the regimes under examination to "only" the first five classified.[17]

It cannot be ruled out, in fact, that full access to the successful tenderer's offer by all competitors, and therefore also by those who have not expressed the intention of making use of the documentation for defensive purposes, ends up encouraging participation in the tenders "for purely exploratory purposes"[18] and, therefore, only to acquire, in view of future tenders, documentation from which to draw useful ideas or, in the worst (and perhaps more realistic) hypothesis, to slavishly copy.

[11] As it has been repeatedly clarified by caselaw of the EU Courts, "consultation of the file falls (…) among the procedural guarantees aimed at protecting the rights of the defense and guaranteeing, in particular, the effective exercise of the right to be heard" (Court of First Instance, 18 December 1992, Cimenteries CBR SA and Others c. Commission, Cases T-10/92 a T-12/92 e T-15/92).

[12] As it is well known, the ruling established the principle of law according to which "the submission of the request for access to the tender documents involves the 'time extension' when the reasons for appeal result from knowledge of the documents that complete the offer of the successful tenderer or of the justifications provided as part of the procedure for verifying the anomaly of the offer" (see Council of State, Plenary Assembly, 2 July 2020, no. 12, available at *www.giustizia-amministrativa.it*). With reference to this ruling, see M.A. Sandulli, *L'Adunanza Plenaria n. 12/2020 esclude i "ricorsi al buio" in materia di contratti pubblici, mentre il legislatore amplia le zone grigie della tutela*, in *Giustiziainsieme.it*, 2020.

[13] I firmly believe, as scolarship has repeatedly highlighted, that the use (and mind you, not the abuse) of new technologies is fundamental to implementing the right to good administration enshrined in Article 41 of the Nice Charter. See, D.U. Galetta, *Transizione digitale e diritto ad una buona amministrazione: fra prospettive aperte per le Pubbliche Amministrazioni dal Piano Nazionale di Ripresa e Resilienza e problemi ancora da affrontare*, in *federalismi.it*, 2022; D.U. Galetta, *Digitalizzazione e diritto ad una buona amministrazione (Il procedimento amministrativo, fra diritto UE e tecnologie TIC)*, in R. Cavallo Perin and D.U. Galetta (eds.), *Il Diritto dell'Amministrazione Pubblica digitale*, 85.

[14] Part of the scholarship has acknowledged this trend, see A. Carapellucci, *L'imbroglio della semplificazione*, Rome, Castelvecchi, 2016, 57-58.

[15] From this perspective, we read in the report accompanying the draft Code approved by the Council of State that "the offer selected at the end of a tender procedure, once identified by the contracting authority, becomes of "public interest" since, with respect to the community, it is the offer that the administration undertakes to make and pay with public money with the possibility of being known by all citizens and, therefore, even more so, by the participants in the tender procedure who are entitled to know the documents of the same and to know how the administration made its choice, also to protect its interests in the proceedings" (see, Council of State, *III Relazione agli articoli e agli allegati*, 7 December 2022, 53, available at *www.giustizia-amministrativa.it*.).

[16] In this regard, in my opinion, the same concerns advanced in scolarship with reference to the regulation of civic access apply, with respect to which it has been observed that we must be wary of "excesses consisting in considering "maximum transparency" as optimal, without worrying to apply the principle of proportionality to the relevant regulatory provisions and to seek a fair balance between "costs and benefits" (see, D.U. Galetta, *La trasparenza, per un nuovo rapporto tra cittadino e pubblica amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, in *Rivista italiana di diritto pubblico comunitario*, 2016, 1035). In other words, it must not be forgotten that "the right of "everyone to see everything" implies a sort of widespread voyeurism, which brings negative consequences both on a cultural and practical level" (see, G. Tropea, *Forme di tutela giurisdizionale dei diritti d'accesso: bulimia dei regimi, riduzione delle garanzie?*, in *Il Processo*, 2019, 71).

[17] See, Council of State, *III Relazione agli articoli e agli allegati*, 53.

[18] Ibidem.

From this perspective, access to the tender documents, as a preparatory tool for protecting the competitor's legal position in court, is transformed into a sort of oxymoronic, generalized right of access reserved only for competitors. Which, unlike true generalized access, is not, however, counterbalanced by all the multiple limitations that access pursuant to Legislative Decree no. 33/2013 meets.[19]

The second regime also presents, in my humble opinion, some critical aspects.

It seems to me, first of all, that by allowing the top five classified to have cross access to their respective offers, we run the serious risk of encouraging the filing of appeals that would never have been proposed on the basis of the (pre)current (and more rigorous) regulations.

In light of the legislation in force up to now, in fact, even the most interventionist and biting of lawyers tends to discourage the fifth and fourth ranked from undertaking any initiative and, above all, from submitting a request for access.

Moreover, successfully applying for access from fourth or fifth place to the offer of competitors classified in the first three or four positions, although not physically impossible, is, in practice, complicated, if I may use a metaphor, like climbing Nanga Parbat in winter and without supplemental oxygen.

Which, inevitably, has a deflationary effect on litigation. It is very difficult, in fact, to come across rulings resulting from appeals presented by competitors ranked higher than third.

But the situation obviously changes if the offers of the first three or four classified are made available on a "silver platter" to the fourth or fifth. In this case, they are incentivized to study the offers of other competitors and to present appeals that, in the current regulatory context they would probably never have even thought of proposing.

From this last point of view, the new regulation seems to me to be a harbinger of litigation and is in antithesis to all the reforms that have taken place in recent years, which (sometimes, it must be said, in an abnormal way) have, on the other hand, attempted to discourage the filing of appeals.[20]

Taking a step back, it should be underlined that the new regulation, in imposing, in both regimes analyzed, a substantial automatism in the display of documents, even seems to be in conflict with the relevant caselaw of the Court of Justice, which held that "the Article 18(1) and Article 21(1) in conjunction with Article 50(4) and Article 55(3) of Directive 2014/24 must be interpreted as precluding to national legislation the award of public contracts which

[19] It is possible to refer to the aforementioned exceptions to civic access referred to in Article 5-bis of Legislative Decree no. 33/2013.

[20] As scholarship has observed, "for some years (and especially since 2014), the legislator has sought (...) artificial tools of "deflation" of administrative litigation, particularly incisive in the subject matter, identifiable: - in the unacceptable increase of unified contribution to be paid for disputes with the greatest economic impact (...); - in the obligation to settle appeals on the awarding of public contracts in extremely short timescales and with a sentence ordinarily drawn up "in a simplified form" (difficultly compatible with the objective complexity of the matter) and the generally recognized preference for this instrument (difficult to be reconciled with the conforming role of administrative activity that the constitutional system wanted to confer on the administrative judge and with the mentioned "regulatory" role attributed to him, albeit improperly, by the legislator); - in the imposition of dimensional limits on the defense writings and of specific rules for drafting the latter (limits which, if combined with the introduction of the mandatory electronic trial and the necessarily limited times of the oral discussion, make it increasingly difficult objectively to demonstrate the validity of the complaints and exceptions formulated); - in the imposition of further limits on the judicial power to suspend provisions relating to procedures for the awarding of public contracts: Article 120, paragraph 8-ter, a.p.c., on the one hand, subjects the precautionary power to the same rules and the same limits of impact on the contract foreseen by Articles 121 and 122, for the decision on the merits and, for the other, (evidently not considering the mere, traditional balancing of the different interests sufficient, already somehow unbalanced in favor of the public one by Article 119, paragraphs 3 and 5) requires the Board to evaluate the precautionary request taking into account the alleged "imperative needs connected to a general interest in the execution of the contract" (where the only general interest in the subject matter is evidently that, also underlined by the 2007 Directive/66/EC, that violations of substantive rules do not produce their effects); - in the imposition of even more incisive limits on the power of the precautionary judgments relating to the planning and implementation of the so-called "strategic infrastructures" (which must take into account "the probable consequences of the measure for all the interests that may be damaged, as well as the pre-eminent national interest in the prompt realization of the work" (pre-eminence established a priori by law, therefore), and evaluate the [effective] "irreparability of the damage for the appellant", to be compared in any case "with that of the awarding body to the speedy continuation of the procedures" and, in even more serious terms, in the provision of the non-incidence of the annulment and/or suspension assumed in such proceedings for defects other than those (more serious) identified by Article 121 on any contracts already stipulated (Article 125 a.p.c.)" (see, M.A. Sandulli, *L'Adunanza Plenaria n. 12/2020 esclude i "ricorsi al buio" in materia di contratti pubblici, mentre il legislatore amplia le zone grigie della tutela*, 8-9).

requires that, with the sole exception of commercial secrets, information transmitted by tenderers to contracting authorities be published in full or communicated to other tenderers".[21]

In particular, the Court of Justice came to affirm this principle after highlighting that "economic operators (...) must be able to communicate to contracting authorities any useful information in the context of a procedure (...) without fearing that they will reveal to third party elements of information the disclosure of which could cause harm to such operators"[22] and could be used "to distort competition both in an ongoing award procedure and in subsequent award procedures".[23]

Hence the need, which emerges from said caselaw, is that access be, from time to time, arranged following a balance between the "principle of protection of confidential information" and "the requirements of effectiveness of judicial protection".[24] A balance that the new regulation completely precludes by always imposing ostension even in favor of subjects who have not expressed, through a request, the desire to contest the results of the tender.

There are two further aspects of the discipline in question that give me pause.

Automatic access to the offers, in fact, imposes on the Administration *a facere* (e.g., the evaluation of the requests for obscuration of some information formulated by the competitors during the tender)[25] which the Administration is currently required to take on only occasionally and, more precisely, only if there are instances of access.

In all honesty, therefore, it does not seem to me that we can, in practice, believe that this discipline, as stated in the report accompanying the Code outline, "optimizes time".[26] In fact, it always entails a burden for the administration.in

Consider then that, in the absence of an application, it is very complicated to make that assessment of the strict indispensability of defensive access, which allows, as is known, to "overcome" the needs of confidentiality.[27]

In fact, caselaw is now consistent in holding that "in order to exercise the right of access regarding information containing any technical or commercial secrets, it is essential to demonstrate [in the request] not just a generic interest in the protection of one's legally relevant interests but the concrete need (to be considered, restrictively, in terms of strict indispensability) of using the documentation in a specific judgment".[28]

It follows that, once the request fails and with it the explanation of the reasons why the applicant requests access to the documents, there is a serious risk that the administration, which is required to choose quickly in order to avoid aggravating the slowdown mentioned above, is induced to evaluate as confidential all the information that the competitor declares to be confidential in its offer.

This would, however, be an approach that is not only irreconcilable with the aforementioned caselaw of the Court of Justice, which deemed it not compliant with EU law "the practice of contracting authorities consisting in systematically accepting requests for confidential treatment motivated by commercial secrets",[29] but which would also determine (and this would be paradoxical considering the intentions of the legislator) a retreat compared to the state of the art.

Finally (but not least), there is a further novelty of a substantial nature on which it seems appropriate to focus.

Article 36 introduces, *ex novo*, in the sixth paragraph, a pecuniary administrative sanction

[21] See CJEU, section IV, 17 November 2022, C-54/21, ECLI:EU:C:2022:888, § 68, available at *www.curia.europa.eu.*
[22] *Ibidem* § 49.
[23] *Ibidem* § 49.
[24] *Ibidem* § 50.
[25] On this point, we read in the aforementioned Report accompanying the draft Code drawn up by the Council of State that "The contracting authority already in the procedural phase of evaluating the offers has (...) the opportunity to consider the existence and relevance of the reasons for secrecy declared by the participants due to the presence of technical or commercial secrets; precisely to optimize times, therefore, already in that phase it will be evaluated whether the offer, in the event that it is selected, can be shown to all participants, in its entirety or the indicated parts will be kept covered, because they are considered secret" (see, Council of State, *III Relazione agli articoli e agli allegati*, 53).
[26] See, Council of State, *III Relazione agli articoli e agli allegati*, 53.
[27] As scolarship has recalled, "The right to access documents, exercised for defensive purposes, prevails (...) over any confidentiality needs of information of industrial or commercial importance of the companies opposed by the other interested parties" (see, F. Manganaro, *Evoluzione ed involuzione delle discipline normative sull'accesso a dati, informazioni ed atti delle pubbliche amministrazioni*, in *Diritto Amministrativo,* 2019, 750).
[28] See, Council of State, section. III, 13 July 2021, no. 5290, available at *www.giustizia-amminitrativa.it.*
[29] See, CJEU, section IV, 17 November 2022, C-54/21, ECLI:EU:C:2022:888, available at *www.curia.europa.eu.*

aimed at punishing those who abuse the blackout requests. This rule, in fact, provides that "if there are repeated rejections of the blackout request", the economic operator is liable to be sanctioned by the ANAC, whose acts follow specific reports from the contracting authorities.

Well, beyond the singularity in the "era of privacy"[30] of a sanction aimed at punishing excessive confidentiality, it must be observed that the rule in question does not clarify what is meant by "repeated rejections", appearing, from this perspective indeterminate. Which, considering the punitive nature of the sanction in question, makes its constitutional legitimacy questionable.[31]

Consider, then, that the wording of the provision in question does not appear to be appropriate in the part in which it describes the reporting by the contracting authority to the Anti-corruption Authority (ANAC) (first) and the imposition of the sanction by the ANAC (then) in terms of possibility and not of duty. The law, in fact, provides that the "contracting authority may" forward the report to the ANAC and that the latter "may" impose the sanction in the event of repeated violations, thus providing, at least on paper, a margin of discretion for contracting authorities and for the ANAC, which is difficult to reconcile with the punitive and deterrent nature inherent in every sanction.

3. *New aspects of procedural nature*

As anticipated, Article 36 also contains provisions of a procedural nature.[32] Which, in particular, are allocated in the fourth and in the seventh paragraph of this provision.

The fourth paragraph establishes, first of all, that the decisions taken by the administration regarding the acceptance or otherwise of the requests to obscure certain information formulated during the offer by the competitors and made public at the time of communication of the award, can be challenged through appeal pursuant to Article 116 a.p.c.

So far, *nihil sub sole novi*. What is innovative is not, in fact, the subjection of such appeals to the chamber of commerce procedure referred to in the aforementioned Article 116 a.p.c., as well as the deadline within which this appeal must be presented, the deadline within which the intimate parties can appear in court, and, finally, the deadline within which the relevant council chamber must be held.

The rule in question provides first of all that the appeal in question must be notified and filed within ten days and that, within ten days of the notification being finalized, the parties involved may appear in court. It also provides that the appeal must be decided in chambers to be set within the terms equal to half of those provided for by Article 55 a.p.c. and, therefore, within ten days of notification of the appeal.

It follows, therefore, that the legislator has introduced a super-accelerated procedure that, at first reading, seems to present several problematic aspects.

First of all, it should be noted that in the enabling law from which the new code arose, frankly, there does not appear to be any directive criterion that would allow the delegated legislator to introduce provisions of a procedural nature, which therefore could be considered such as to integrate an excess of delegation.

Leaving aside this non-secondary aspect, and coming to the content of the said novel, first of all, the choice in itself of introducing a deadline for contesting decisions regarding such greatly reduced access seems to me to be unacceptable. The deadline of just ten days, although compliant with the provisions of Directive 66/2007,[33] clearly appears excessively short and, as such, of dubious compliance with the principle of effectiveness of protec-

[30] For a careful examination of the relationship that links (and must link) the right of access to documents and the right to confidentiality see, A. Simonati, *Il trattamento di dati personali e gli accessi amministrativi "generali": le dinamiche frontiere della discrezionalità*.

[31] Moreover, "it is known that the normative case of the criminal offense (and thus of the administrative one, if it is comparable to it) must present the characteristics of specificity, accessibility and predictability" (see, G. Greco, *Discrezionalità tecnica, margini di opinabilità delle valutazioni e sanzioni amministrative*, available at *www.aipda.it*, 2022, 2; M. Allena, *La sanzione amministrativa tra garanzie costituzionali e principi CEDU: il problema della tassatività-determinatezza e prevedibilità*, in *Federalismi.it*, 2007).

[32] See, M. A. Sandulli, *Procedure di affidamento e tutele giurisdizionali: il contenzioso sui contratti pubblici nel nuovo Codice*, in *federalismi.it,* 2023, 26.

[33] Article 2-quater of Directive 66/2007 provides, as is known, that "any appeal against a decision taken by a contracting authority in the framework of or in relation to a procedure for the award of a contract governed by Directive 2004/18/EC must be presented before the expiry of a specific deadline, the latter being at least ten calendar days".

tion.

In this regard, consider that, due to a sort of heterogeneity of purposes, such a stringent deadline risks increasing litigation and not decreasing it. The little time available to meditate on whether or not to appeal inevitably leads to the submission of challenges that, *re melius perpensa*, would not have been proposed. After all, haste is, as known, a bad advisor.

But there is more. As it is currently formulated, the regulation in question does not allow written cross-examination. Faced with a council meeting to be set within ten days of notification of the appeal, it is not, in fact, physically possible to calculate backwards the halved terms referred to in Article 73 a.p.c. for the filing of the first brief and the reply.

Furthermore, the identification of the same deadline (ten days from notification) both for the appearance in court of the intimate parties and for the setting of the council chamber is singular. The identification of this single term abstractly could, in certain cases, lead to the defenses of the intimate parties being filed "in terms" on the same day on which the council meeting is held. Which could inevitably impact and undermine the appellant's ability to reply, at least orally, to said defenses.

To complete the picture, I highlight, finally, that on the basis of the aforementioned seventh paragraph of Article 36, the decision must be filed within five days of the hearing and that it can also consist "in a mere recall of the arguments contained in the writings of the parties that the judge intended to accept and make his/her own".[34]

This form of motivation *per relationem* is not, as it is well known, an absolute novelty. In fact, it is already provided for by Article 129 a.p.c. regarding electoral appeals.[35]

From this aspect, it seems appropriate to highlight that judges, in application of this rule, certainly cannot limit theirselves to merely making a reference to the party's acts that he considers decisive without slavishly repeating their content in the sentence.

This *modus operandi*, in fact, while allowing the parties involved to understand the reasons for the decision, would fundamentally preclude it for all those who, not being parties to the case, do not have access to the defense writings. This certainly cannot be accepted.

The motivation of the ruling, moreover, is an "instrument of legitimation and rationalization" of the judicial power[36] and, as such, constitutes a constitutionally imposed fulfillment aimed at making intelligible for all (and therefore not only for the parties involved) the manner in which the judicial power was exercised, which, it should be remembered, is exercised in the name of the Italian people.

[34] Although this rule has not yet entered into force, it has already been referred to in the caselaw. We refer to the ruling of the Council of State, section IV, 2 May 2023, no. 442, available at *www.giustizia-amministrativa.it*, which states that "in the administrative process code not only is there no prohibition on reporting the contents of party writings, but the opposite principle is expressly stated, susceptible to application in all cases in which the need for particular speed of judgment prevails (...) This method of drafting the judgment has recently been confirmed by the new code of public contracts, confirming a legislative trend aimed at ensuring maximum speed of judgment, through the appeal to simplification tools. (...) From the foregoing we can therefore deduce the tendency towards consolidation of a principle of general scope according to which in the balance between the needs of guarantee and those of the smooth running of the trial, understood as a necessary form of judgment and therefore of judicial assessment, the needs of speed and those of the so-called administration of result, justify the admissibility of motivational techniques aimed at simplifying the phase of drafting the motivation - often characterized by particular complexity and therefore likely to significantly extend the time required for filing the sentence and therefore for defining the trial, thus nullifying the very usefulness of the decision - even by simply referring to the arguments of the parties that judges, sharing them, deem to make theirs own, adopting them in order to highlight the logical legal process that led to the decision". In this ruling, it is also highlighted that "the only limit to this possibility is represented by the need that the motivation, thus prepared with the direct aid of the reconstructive and interpretative contribution of the parties, is not an apparent motivation but truly suitable to give account of the legal reasons for the decision; such reasons, although formally elaborated by the parties in the dynamics of the cross-examination, can well be made their own by the judge and thus assumed at the objective will of the legal system in the procedure of subsumption of the facts in the abstract scheme of the normatively predetermined cases and of the legal qualification that follows. This is not an uncritical reception of other people's arguments but a mere simplification of the process of formal justification of the judicial decision taken, which presupposes, in any case, a careful critical examination and an accurate selection of the legal arguments to be composed in a clear argumentative discourse, exhaustive, with respect to all the questions posed and dealt with by the parties, and, above all, logical, in the connection of the established facts and the legal reasons put forward".

[35] The sixth paragraph of Article 129 of the Administrative Process Code**,** in fact, provides that "the judgment is decided at the outcome of the hearing with a simplified sentence, to be published on the same day. The related motivation may also consist of a mere recall of the arguments contained in the writings of the parties that the judge intended to accept and make his own".

[36] See, M. Ramajoli, *Il declino della decisione motivata*, in *Diritto Processuale Amministrativo*, 2017, 834.

Always, with reference to Article 36, it should finally be highlighted that it very appropriately provides in the fifth paragraph that, where requests for blackouts are rejected, the administration cannot allow access on the part of the subject whose request was rejected before the ten-day deadline for appealing the relevant decision has passed.

This hitherto unpublished *standstill* hypothesis seems to me to be welcomed because it avoids what, conversely, happens nowadays in practice, meaning that the administration, by allowing access at the same time as the decision on the request for access, precludes the subject, who, in response to this request, had opposed taking legal action to obtain a ruling, even if only precautionary, before it is too late and, therefore, before the documentation is given to the applicant.

4. *Conclusion*

In light of what has been said, while appreciating the intentions that led the legislator to reform the regulations on access to documents and while considering some of the innovations introduced worthy of appreciation, I quietly believe that, both from a substantial and a procedural point of view, the new regulation presents many critical aspects that deserve to be corrected as soon as possible.