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Legitimate Expectation and Good Faith in Public Contracts

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In this paper I mean to examine the dealing of public powers in public contracts, in the light of the contractual asymmetry profiles that characterise commercial transactions between private subjects and public authorities. Private parties and public powers are linked by an unequal contractual relation; indeed, the (formal and substantive) awe of enterprise, in the system of public contracts, is sufficiently clear if we consider (for example) the fact that a private party, within the terms of law, is bound to its tender without being able to withdraw the contractual proposal; such private party is also unilaterally bound to the contract entered into, until the contract's approval (art. 32, Legislative Decree no. 50/2016, Codice degli Appalti). In this reasoning, the public evidence procedure cannot be reconstructed in terms of negotiating parity (i.e., between equal subjects), being mainly managed by public powers or jure imperii. For this reason, it is required, to investigate which tools may guarantee the company in case of "awe" and, at the same time, the proper functioning of the internal market.

Keywords: *Public contracts; Fair dealing; Good faith; Rules of liability; Weaker party protection; Market functioning*

Introduction

The following pages are aimed at examining Public administration's liability[2], referring (particularly) to public contracts (public evidence contracts) in the light of the contractual asymmetry profiles which characterise commercial transactions between private parties and public administration. These parties show very different contractual positions: indeed, (the formal and substantive) awe in which the enterprise is involved, is clearly shown in the system of public evidence where a private party, within the terms of law is bound to its tender without being able to withdraw it after having allotted the contract; such private party is also unilaterally bound to the contract entered into, until the contract's approval (art. 32, Legislative Decree no. 50/2016, *Codice degli Appalti*). In this reasoning, a public evidence procedure cannot be reconstructed in terms of negotiating parity (i.e., between equal subjects), being mainly managed by authoritative parameters or *jure imperii*.

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[1] I am very grateful to Prof. Rosa Alcaro for the linguistic revision of this paper.

[2] In argument see: Febbrajo (2016); D'amico (2006); D'amico (2014). Castronovo (2007); Benatti (2012). For public administration (precontractual) liability see: Chiarella (2016b); Mele (2006); Racca (2000); Liuzzo(1995); Diana (2000); Ruscica (2011); Afferni (2006a); Mazzuca (2010).

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For this reason, it is required, to investigate which tools may guarantee the company in case of "awe" and, at the same time, the proper functioning of the competitive market[3].

Pre-contractual Liability and Public Contracts

Within Italian law, the duty of behaviour according to good faith was not contained in the Pisanelli Civil Code (of 1865) since the negotiation phase didn't involve such a binding obligation because each party could back out of a contract *ad nutum*, that is, without any consequences at any time.

From the beginning of the XX century, interpreters have started to consider possible liabilities related to unfair behaviours shown during the negotiation phase; in 1925 the Supreme Court established the following principle: a party, withdrawing from the negotiations without any justified reason, must compensate the expenses already met by the other party because a party which agreed to execute a contract, cannot repudiate its liability under the contract before the performance is due without any justified reason[4].

Only with the issuing of the civil code currently in force, the institute of pre-contractual liability starts to be established as a steady set of rules but not well-shaped, yet.

Even if we can find a number of codes dealing with this topic, public administration's liability appeared to be hardly stated until the sixties, as the concept of "*culpa in contrahendo*" involving public administration, was never considered[5].

Fundamentally, such a kind of exclusion was due to the postulate stating that during the drawing up of a contract, a private subject emerges as a legitimate interest towards public powers; anyway, public administration, acting as *iure privatorum*, exercises discretionary powers, and, for this reason, its decisions are considered un-appealable; therefore, public administration appears to be able to determine itself without any binding obligations until the final phase in the making of a contract, that is, the contract's approval. In this perspective, public administration's liability could not exist because its "free" inner assessment due to the administrative discretionary powers involved, tended to exclude such a possibility.

The core of this issue was focused on the concept of "administrative discretionary powers" which prevented to evaluate whether public administration acted in a correct way or not; as a consequence, private subjects were not authorised to advocate the principle of reliance comparing the risk of a good outcome of the transaction with the public administration. The criticism to this statement was focused on the principle of administrative discretionary powers interwoven with the duty of behaviour based on correctness and good faith *ex.*

[3] See Chiarella M.L. (2016a).
[4] Cass., 6 February 1925 (*Riv. dir. comm.*, 1925, II, 428).
[5] See Cass., 12 July 1951, n. 1912 (*Giurisprudenza completa della Cassazione civile*, 1951, III, p. 1) and Cass., 20 April 1962, n. 792 (*Foro amm.*, 1962, II, p. 334).

art. 1337 c.c., together with the public administration inability to affect negatively private subjects' sphere of estate and property through acting in bad faith and breaking the basic rules of the system.

Particularly, in this matter, it was not evaluated whether public powers acted correctly or not under the pursuit of public interest profile; indeed, regarding pre-contractual liability issue, public administration's behaviour as a correct contracting party, appeared to be the core issue. Therefore, following such argumentations, starting from the sixties, a pre-contractual liability framework has begun to be shaped: it stated, particularly, that art. 1337 ratified a general directive to be respected even by public powers entering into negotiations, because in case of breach, their liability involve all the duties to be respected by public authorities, too (Cass. 8 May 1963 n. 1142).

Therefore, the most relevant issue is (we are not considering the relevance of a trade union regarding the way public administration acts towards public interest), to assess how much the duty of behaviour is respected according to good faith as a limit to the administrative discretionary powers.

In such a way, the dogma about public administration's immunity, focused on those constitutional principles regulating administrative activity, (even) concerning pre-contractual liability, could be overcome[6]: in this matter the rule referred to art. 28 Constitution becomes relevant: (the principle whose range does not authorise hermeneutic attempt to exclude the liability already mentioned, but is aimed at renewing the actual regulations, is now reaching its highest levels); art. 97 of the Constitution (public administration has the duty to pursue impartiality and good performance involving good faith and correctness as institutional principles at the basis of public authorities' behaviour); as well as art. 113 Cost. (which formalises jurisdictional protection of private subjects against public administration's rules).

The second interference between the two categories (pre-contractual liability *tout court* and public administration "specific" liability) is identified under the qualifying profile related to this case.

Both of them start first from a background involving a tort liability which has progressively developed towards another direction and finally settled on the contractual framework.

The general concept of pre-contractual liability has been linked for a long time to the *genus* of the tort liability ex art. 2043 c.c.[7], to be later connected to that kind of contractual liability related to social contact, or rather breach of a pre-existent binding contract of *fidem praestare*[8]. The same way has been walked by public administration's liability in pre-contractual relations all over its evolution (a kind of liability which, in the present jurisdiction, is linked to the *genus* of contractual liability deriving from qualified social contact).

[6] See Cass., 12 July 1951, n. 1912 (*Giurisprudenza completa della Cassazione civile*, 1951, III, p. 1) and Cass., 20 April 1962, n. 792 (*Foro amm.*, 1962, II, p. 334).
[7] See e.g.: Cass., 29 April 1999, n. 4299 (*Rep. Foro it.*, c. 1999, voce *Contratto in genere*, n. 356) and Cass., 10 June 2005, n. 12313 (*Nuova giur. civ. comm.*, 2006, 4, I, p. 349).
[8] Mengoni (1956).

Good Faith *in Contrahendo* and Public Powers

According to common law rules, pre-contractual liability, implies those kinds of transactions (regarding the execution of a contract) having reached that phase able to justify the entrusting of the contracting party; it also implies the case where a party, interrupting without any justified reason the transactions, escapes the other party's expectations. This party, relying on the execution of the contract without having any fault, was compelled to pay for the useless expenses required by the transaction and had also renounced to execute the contract under more favourable conditions.

Therefore, it will be examined, first the relevance of good faith and fairness as parameters in the evaluation on public power's behaviour. Secondarily, it will also be examined, the relevance, concerning the liability judgment, in both fulfilling obligations related to information (ex art. 1338 c.c.) and private subjects' legitimate (correlated) entrusting protection[9].

If we proceed in an organised manner, we need to notice that good faith rule is, as known, a core point of the whole contract system[10]: its role is to soften the individualistic matrix involved in the concept of private autonomy.

Regarding this topic, the interpreters have drafted a theory about good faith as a limit to the freedom of a contract and as an instrument of protection towards the freedom of a contract itself (which would be damaged by unfair, fraudulent or culpable behaviours); the basis of this theory would be recovered in the most general duty of social solidarity.

The constitutional anchorage in the good faith rule is linked to the unbreakable duties of constitutional solidarity shown in art. 2 Cost.[11] and art. 41, comma 2, where, it is laid, specifically, that the economic initiative cannot be performed in contrast with social utility: this rule is referred to *private* economic initiatives, but *a fortiori* it is operative for public economic initiatives, as some general unbreakable principles must be considered within the juridical system, specifically concerning economic activities issues.

The legislator gives good faith relevant functions and it is set among those fonts in which the contract is integrated: from the transactions to the performance and execution, as good faith stands as the parameter of behaviour according to the contracting party must comply with[12].

Technically, it is presented as a general rule whose contents and conditions of accomplishment are not established *ex ante* by the legislator, but are determined and shaped in the concrete set of interests.

On this subject, the law stated that this principle must be intended as a specification of "unbreakable duties of social solidarity" imposed by art. 2 Cost., and its relevance is shown by commanding each party of a binding contract, to act in such a way to preserve the other party's interests, regardless the existence

[9] Febbrajo(2016) p. 311; Antoniazzi (2005); Gigante (2008).
[10] Sassi (2007) at pp. 20 ff.; Falco (2010).
[11] See: Cass., 18 September 2009, n. 20106 (*I Contratti*, n. 1/2010, pp. 5 ff.) and Cass., 15 February 2007, n. 3462 (*Guida al diritto*, 2007, p. 37).
[12] Rodotà (2004).

of specific contractual obligations or single rules under the law. As a consequence, the infringement of such an obligation results to be a real breach and implies the duty to compensate damages to be involved in contractual liability[13].

In this perspective, we went so far to state that the principle of good faith is for the judge, the proper tool to control, even in a corrective sense, the legal transaction statute, to guarantee the correct balance between the opposite interests. Good faith's role is to maintain legal transactions within proper balance and proportions[14].

In case law, judicial control must be allowed in the contract, in order to evaluate how the principle of good faith is respected because it represents the internal limit in every subjective, active or passive legal issue involved in the law of contract which contributes to shape, widen or narrow its apparent outlook». In so doing, the unbreakable duty of solidarity, determining a contract's contents and effects, will not be disregarded[15].

Moreover, good faith rule is strongly widespread all over the European law of contract[16] and it is at the basis of the law of contract recent reforms occurred in France (introduced with the *Ordonnance n. 2016-131du 10 février 2016 portantré forme du droit des contrats, du regime général et de la preuve des obligations*)[17]. Good faith is considered as a tool of public order within all the drawing up of a contract's phases: from the transactions to its final performance: «[*l*]*es contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public*» (art. 1104 *Code civil*).

For all we have already said, we need to find a link between the principle of good faith *in contrahendo* and the discipline of public evidence contracts (which is aimed at protecting the functioning of a competitive market able to provide public resources in the best way)[18]: on this subject, we need to realise that this matter lies outside the breaking of the laws about public evidence because it is involved in a set of rules covered by common law regulations according to artt. 1337 and 1338 c.c. (these regulations ratify the principle of good faith *in contrahendo*, together with its provisions aimed at protecting the correct development of transactions imposing all partners obligations of behaviours in pre-contractual relations which are valid also for the public administration's sector).[19].

In the light of this theme, the link between good faith *in contrahendo* and discipline of public evidence can be identified in a moderation among public interests and assurance needs, at which rate the judicial syndicate does not appear as an unwarranted interference in public administration's exercising discretionary powers.

[13] Cass., 12 July 2016, n. 14188 in altalex.com.
[14] Cass., 18 September 2009, n. 20106, cit.
[15] Cass., 24 September 1999, n. 3775, in *DeJure*
[16] Navarretta (2012) pp. 593 ff.
[17] See Dondero (2016);Chantepie (2016);Alpa (2015).
[18] Corte cost. 19 November 2007, n. 401 (in www.cortecostituzionale.it), point 6.7 of its motivation.
[19] Federici (2014), at p. 6.

To confirm this, we can mention, for example, some provisions such as art. 21 - *quinquies* of the law n. 241/1990, involving administrative judges' decisions on compensation disputes in case of "legitimate" repeal of the measure, such as unexpected reasons of public interest.

We also need to know which peculiar contents are involved in public administration's good faith on public evidence issues. In addition to the duties regarding a withdrawal from a contract without justified reason, and the duties of notice, information, custody and secret, public administration is also liable for accomplishing legal transactions in an inefficient way if it does not examine its real capacity in executing a contract creating possible causes of voidness under its control[20].

In addition, the obligations of information are put in evidence with special relevance (*pro parte* referring to art.1338 c.c.) and in general way, included in the European set of *fair dealing*[21].

As concerning this topic, law put in evidence how information obligations are relevant in making contracts with public administration, both in private transactions and in public evidence proceedings in order to protect the entrusting of competitive companies; as a matter of fact: «if the administrative framework must know and apply regulations (of action) in a professional way (i.e. those regulations on the choice proceeding made by a contracting party), it is obliged to inform private subjects about those circumstances which may determine voidness or ineffectiveness or, may affect negatively the capacity of a contract. If administrative framework neglects to do so, it is liable for *culpa in contrahendo*, unless it will be able to really demonstrate that the entrusting of the contracting party is unreasonable, due to specific events and circumstances[22].

In law enforcements, the peculiarity of this matter is reflected particularly in the emerging of a public administration's pre-contractual liability even if a lawful claim withdrawal exists (*rectius* repeal of adjudication, or unsuccessful drawing up of the contract where the authority control body fails to approve it). Pre-contractual liability can be found in the case of a reasonable entrusting infringement by private subjects together with the breach of the duty of information related to all the events in a proceeding and responding to the interests of private subjects. In this way, private subjects will not suffer the prejudices and results (if negative) of the proceeding itself.

In this context, the obligations connected to administrative action effectiveness and information are essentially correlated and commonly shared by the duty of behaviour according to good faith.

The obligations of information aim at neutralising the cognitive asymmetries and the drawing up of contracts made in informative equality conditions; information, in such context, serves as an assumption for private subjects who are interested in creating an efficient organization of economic activity.

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[20] Cass. 26 April 2012, n. 6526 (see *Diritto e giustizia* of 27 April 2012).

[21] Roppo (2004), at p. 757.

[22] Cass. 12 May 2015, n. 9636, see *Nuova Giurisprudenza Civile Commentata*, n. 1/2015, pp. 938 ff., with comment of Scognamiglio (2015). See also: Cass., n. 23393/2008, 3383/1981, Cass. 3008/1968 and Cass., U. S., 17 November 1978, n. 5328.

Legal Nature of Liability and (rules of) Compensation

Public administration's pre-contractual liability takes shape in all the cases where public institutions entering into transactions or relationships with third parties, do actions or omissions opposite to correctness and good faith. Public administration is obliged to respect correctness and faith too, as primary duties guaranteed by legal system[23].

Public administration's behaviour evaluation is not aimed to assess if it has acted in favour of public interest, but rather if it has operated as a correct contracting party during the transactions and the drawing up of a contract since all the phases of a public evidence procedure serve as a tool for the progressive formation of the consent[24]. The legal nature involved in such a kind of theme is what is now going to be examined.

As a first orientation, an hypothesis of extra-contractual liability is taking shape, since in the phases involving transactions, no contractual binding obligation is yet arisen, and then, the parties are not compelled to respect any obligations[25]; according to a different orientation there would be a contractual liability deriving from "qualified social contact"[26] (as a suitable fact able to produce obligations): in such a different perspective, the parties involved in transactions would be connected by a kind of relationship similar to a contractual one, coming from the type of relationship established among them. Therefore, even if the contract is not yet executed, the rules referred to "contractual relationship", particularly those ones connected to liability, would be applied[27].

Within the orientation selected, opposing rules dealing with the burden of proof, default, limitation and damages to be compensated, will clearly exist.

In the case about pre-contractual liability *tout court*, the refundable damages is, as known, the negative interest, as a property direct reduction consequent to the behaviour of that party which going against the obligation of correctness, excludes any possibility in the resumption of the positive interest connected to the whole discharge of the contract (refundable in case of aquilian tort).

Lately, the Court of Cassation, after having claimed for a long time about the aquilian nature of public administration's pre-contractual liability (*ex plurimis*: Cass. 9157/1995; Cass. 15172/2003; Cass. 15040/2004; Cass. 16735/2011; Cass. 15260/2014) spoke in favour of "contractual liability from qualified social contact" (qualified as characterised by a "scope" through which, the parties intend to pursue)[28].

[23] Cass. 10 December 1987, n. 9129 (in *Settimana giuridica*, 1988, II, p. 866).
[24] Cass. 12 May 2015, n. 9636, cit.
[25] Cass. 18 June 2005, n. 13164, in *DeJure*, and Cass., 10 January 2013, n. 477, *ibidem.*
[26] Cass. 12 July 2016, n. 14188, cit.
[27] Carbone (2012) at p. 686.
[28] Cass. 21 November 2011, n. 24438 (*Rep. Foro it.*, 2011, voce *Contratti pubblici*, n. 454); Cass., 20 December 2011, n. 27648 [*ivi*, 2011, voce *Contratto in generale*, n. 439 and in *Europa e dir. privato*, n. 4/2012, pp. 1227 ff. with comment of Castronovo (2007) and, finally, Cass., 12 July 2016, n. 14188.

The legitimacy judges, in their latest decision on this matter[29], after examining a wide historical and comparative *excursus,* set this issue in the frame as "*quasi-contract"* (intended as an event involving obligations whose legal collocation is found in article 1173 c.c.) on the borderline between a contract and a tort. As this issue appears to be rooted in a "social contact" enhancing a mutual entrusting among the contracting parties, it is "qualified" by the duty of "good faith" involving the correlated "duty of information and protection" positively established by the art. 1175 and 1375.

In this way, it is taking shape a kind of contract as follows: a binding relationship not characterised by duties rooted in a contract, but by protection duties, equally referable, even if a transactional document does not exist, to a kind of liability far from the aquilian one but close to a contractual one. Such protection duties arise from those facts and rules causing their existence and stand as the third source of duties mentioned by art. 1173 c.c.

For these reasons, supported also by wide arguments on this matter, the qualifying element of the liability *de qua*, is highlighted. It is identified no longer within the fault, but in the infringement of the duty of behaviour according to good faith, which on the basis of the entrusting, provide mutual protection duties among the parties. As a consequence, the liability for damages caused by either parties during the course of transactions, involves the breach of specific duties (good faith, protection, information), all existing before than those ones that will take shape in the drawing up of contract (if and when, it will be executed, and not in the generic duty *neminem laedere*). Therefore, such a kind of liability can only be identified as a pre-contractual liability, with all its legal consequences.

With reference to this latest aspect, it is useful to remember the probation system provided for, together with the discharge of the informative duties, from the French *Code civil*, which at art. 1112-1, al. 4, states: «*Il incombe à celui qui pretend qu'une information lui était due de prouver que l'autre partie la lui devait, à charge pour cette autre partie de prouver qu'elle l'a fournie*».

This provision responds to a contractual liability system and confirms the correct theory stating that during transactions, pre-contractual liability is separated from the aquilian model, but it is set closer to the breach of duties *ex lege* one.

With reference to the matter we are examining, even if considering the necessity to differentiate the contents of information with its relative duties and placing these ones on public administration as a party professionally more qualified, the enterprise joining the procedure results to be protected since it is not always able to (fully) know law matters characterised by a high grade of technicality (as that one about public contracts)[30].

[29] Cass. 12 July 2016, n. 14188.
[30] Agnello (2016).

Public Administration's Liability into Practice

In general, pre-contractual liability occurs in hypothesis of private transactions where public subjects (authorities) act as private ones if there are no obstacles to enforce arts. 1337 and 1338 c.c.

As concerning the public evidence phase, pre-contractual liability can also be found whether before or after the adjudication of a contract, because private subjects (involved in the proceeding) serve as parties in a pre-contractual relationship with private administration. They also serve as receivers of information susceptible of legitimate entrustment.

In law, however, a pre-contractual liability shaping by public subjects before adjudication has been denied[31], because, in this phase, private subjects have been recognised having only the unique legitimate interest for the correct development of the procedure. Pre-contractual liability begins to exists from the adjudication phase until the approval of the contract phase, while pre-contractual liability stands as – *condicio iuris,* delay of the contract effectiveness together with the conclusion of this case, since only in this phase, private subjects have the subjective right in drawing up the contract[32].

Concerning the procedure about public evidence, this orientation has been overcome by those statements putting in evidence the profile of the progressive drawing up of a contract where the administration system establishes multiple or parallel transactions which contribute to constitute juridical relationships from the time the tenders can be presented. In each of these relationships, public administration must respect the general principles of behaviour imposed by law in order to protect the interest of the parties in contact each other. As a consequence, if these principles are not respected, even before the adjudication phase, public administration's pre-contractual liability will stand, independently from the proof of a possible right of adjudication by the parties involved[33].

The branch of the law covering *culpa in contraendo,* does not need, indeed, a "personalised relationship" between public administration and private subjects because it would find its only source in the adjudication measure, but it has to protect the legitimate entrusting in the correctness of the adverse party which arise from the beginning of the proceedings.

A kind of behaviour that cannot be split because it looks as unitary must be evaluated in its overall complexity. For this reason, the public evidence phase is not set apart from transactions, but it constitutes its integral part, as has been pointed out[34].

This interpretation must be preferred to safeguard the enterprises' interests and the correct functioning of the market, because, within an European

[31] Cons. Stato, 15 April 2016, n. 1532, in *De Jure*; Cass., 10 January 2013, n. 477, in www.neldirit to.it; Cass., 10 June 2005, n. 12313, in www.altalex.it; Cass., S.U., 26 May 1997, 4673, in www.an tiorruzione.it.

[32] Cons. Stato, 11 November 2008, n. 5633 (*Giornale di diritto amministrativo*, 2009, pp. 499 ff. with comment of E. Brugnoli).

[33] Cass, 3 July 2014, n. 15260, in *De Jure.*

[34] *Ibidem.*

perspective, they take priority compared with the pursue of public institutions' interest and objectives[35].

The Withdrawal from Negotiations

With reference to the analysis of a pre-contractual liability hypothesis, the specific case of withdrawal (annulment) of administrative measures (i.e. decisions in drawing up a contract, notification or adjudication) from a public evidence procedure often occurs. Such withdrawal generates a betrayal of the private subjects' entrusting which, following the inactivity of the measure, is no longer effective; for this reason, even if this measure is legitimate, interpreters believe that public administration's liability lies in giving offences to the other juridical position during the pre-contractual phase.

As pointed out by the United Sections, compensation in these cases does not solicit the unlawful exercise of power, but «the fault characterising a behaviour providing favourable acts, later withdrawn because of judicial decision or self-protection; such legal acts encouraged entrusting due to their legitimate framework leading to a practical conduct to be stopped later[36].

Obviously, the documents' withdrawal in public evidence procedure may occur because of various reasons (unlawfulness of the procedure, lack of financial resources, unexpected uselessness of the performance for the administration authorities, unexpected uncorrespondence of the contract towards public interest), so it can be lawful or unlawful.

On the basis of *discrimen* of lawfulness or not, public administration's liability can be considered as a pre-contractual or rather aquilian one, with its correlated differences referring to operative ways and damages to be compensated[37].

As a matter of fact, as law states, pre-contractual liability is a kind of liability deriving from behaviours and not measures, presupposing lawfulness in tender's agreements[38].

Whenever the measure is lawful, but, however, public administration's conduct appears to be censurable, as well as good faith *ex* art. 1337 c.c., pre-contractual liability stands (as "typical" or in a narrow sense), because we are talking about an offence towards the lawful entrusting of private subjects.

As a consequence, public administration will have to compensate damages[39].

Anyway, every time public subjects withdraw tender proceedings or do not conclude legal procedures showing non-compliance of correctness duties, pre-contractual liability exist[40].

On the contrary, where public administration's behaviours are not censurable, in case of offence of the entrustment, a compensation for the emerging damages

[35] Racca (2000) pp. 333 ff.
[36] Cass. U. S., 23 March 2011, n. 6594, in *Giust. civ.*, 2011, I, p. 1209.
[37] Santoro (2012).
[38] Cons. Stato, 20 February 2014, n. 790, in *DeJure.*
[39] Cass/ 19 September 2013, n. 21454, in *DeJure.*
[40] Trimarchi Banfi (2015).

will be provided. (arg. *ex* art. 32, comma 8, Codice degli appalti; art. 21 – *quinquies*, comma 1 e 1 *bis*, legge 241/1990)[41].

If the withdrawal results to be unlawful (because the exclusion measure of the contracting party occurred according to presuppositions which became later inexistent, or with the scope to support another contracting party, or where the annulment of the bid occurred for aims not corresponding to the public interest's ones, i.e. allowing a party excluded to join the new bid), liability is identified as extra-contractual, and its aim will be to compensate the positive interest of the contracting party (art. 30 Administrative Procedure Code, providing for a compensation of the damage).

Private subjects, in this case will be compensated with a restoration (reward) in a specific form (art. 30, comma 2, Administrative Procedure Code): for example, the competitor unlawfully excluded will be readmitted to the bid, or rather, the bid unlawfully annulled will be repeated at the right time. In case this is not possible, a compensation for equivalent will be provided for. It will be distinguished if the competitor had had the certainty in winning the bid or rather only the possibility to win it[42].

The *discrimen*, therefore, exists, if the public administration's measure causing damages is lawful or not: in the case in which the measure is unlawful, extra-contractual liability will exist. If the measure is lawful (but public administration broke rules of correctness) pre-contractual liability stands and a compensation will be provided for the negative interest of the contracting party resulting from the expenses met and the missed income (due to the renunciation of other contractual opportunities) caused by the entrusting generated following the future execution of the contract.

The situation changes where public administration is guilty. For example, if public administration cancels a call for tenders because it broke the rules or the call for tenders was against the rules, in this case, compensation covers the expenses met by all participants in the call, where there will be clearly excluded those losses/expenses the participants would have avoided if they had used ordinary care (art. 1227 c.c.). At the same time, damages will not be compensated to private subjects providing public administration good reasons to make it refuse to draw up a contract because the contract itself did not meet the qualifications required[43].

All this considered, the (just described) state of art seems odd, because it implies an irrational different situation: the competitor, obtaining (lawfully) the adjudication, is damaged (he is entitled to compensation of the negative interest only) compared to the competitor that has been denied the chance to obtain the adjudication because of unlawful proceedings (such a competitor is even entitled to a positive interest).

Such inequality appears to be irrational since it does not consider the equal interests involved in the two events (even different) due to the need to protect

[41] See Afferni (2008b), at pp. 641 ff.
[42] Afferni (2006a), at p. 354 ff.
[43] Afferni (2006b), at p. 360.

the enterprise from the losses suffered because the transaction has been useless[44].

Even if concrete cases and the double structure (administrative and contractual) of public evidence proceedings are characterised by a great number of different aspects, a unitary framework of the interests to be protected cannot be denied. As a consequence, the necessity to create a unitary approach to investigate liability issues arises.

Therefore, (if we would draw some previous conclusions), we can notice that along public administration's pre-contractual liabilities enforcements, a common line with delayed payment predictions in commercial transaction, can be identified. Such predictions embody the duty of behaviour according to good faith and correctness occurring when contracts are drawn up (art. 1375 c.c.). If such duty of behaviour is contravened, enterprises will be damaged, economic activity will be paralysed and wealth in common market will be limited.

Final Remarks

Summarising what discussed in this paper, even if a small quantity of rules, only artt. 1337 e 1338 c.c. exists, public administration's pre-contractual liability shows all its intense peculiarity highlighting especially the general rule of good faith and duties of effectiveness and information as asymmetry (between private subjects and public administration) plays a crucial role in terms of liability, related to the *status* and the great amount of technical and administrative information the bid is involved with.

As a matter of fact, as highlighted, where *public administration* stays silent and carries out proceedings until the drawing up of a contract, later dropped, or rather, if *p.a.* requires the contract to be immediately performed, it will infringe the reasonable and lawful entrusting of private subjects in the drawing up of a contract, as well as in legal administrative action[45]. As concerning such concept, public administration must comply with protection duties deriving from its professional *status* correlated with the relationship between private subjects and public powers due to the physiologic inequality existing both in the pre-contractual phase and in the drawing up of a contract and subsequent execution of it.

The relevance of *status* as a source of the adverse contracting party protection duties considered on the juridical and property side, is focused on, in this case, in the reasonable entrusting of private subjects on the correct and careful behaviours of public powers which hold a specific warranty position with those subjects embarking a relationship with them[46]. The possibility to consider pre-contractual liability as a kind of liability linked to a breach of contract shows its value especially concerning protection aims in the asymmetrical relationship established.

[44] Trimarchi Banfi (2015).
[45] Cass. 12 May 2015, n. 9636.
[46] Scognamiglio (2015), at p. 991.

Such value is also shown regarding the discipline of prescription mainly to the probation system in which public administration has been taken all the blame upon itself to prove it had carefully fulfilled the effectiveness and proper information duties within its overall action.

This issue, as specular, as the enterprise and public administration delayed payment issue[47], is connected to a wider matter on the regulation of asymmetric relationship in enterprises whose aim is to protect determined categories (providers, contractors, clients, investors, tourists, passengers, weak contracting parties *tout court* etc.). Such categories are *outsiders* (not skilled in technical and administrative matters, while public administration should be skilled with), within that system they wish to enter into – which is characterised by a particular *status of protection* showing general value[48] - .

This topic, placed within that kind of unbalanced professional (*B2b)* relationships, justifies the limits concerning private autonomy and the limits to its correspondent liabilities as a tangible answer to law of contract justice requirements- within (domestic, European, and international) regulations - aimed at neutralising threats to the effectiveness and good functioning of the market framework.

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[47] Nonne (2013); Sciannaca (2015).

[48] Alpa (1993); Alpa & Chiné (1997).

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