

## **THE PRINCIPLE OF RESULT: A CONNOTATION OF TRANSVERSALITY**

The Council of State, with sentence of 26 March 2024 no. 4996, takes up its recent rulings on the principle of result, in the context of a judgment concerning a procedure for the attribution of economic compensatory measures. The principle was introduced into our legal system for the first time with Legislative Decree of 31 March 2023 no. 36, the so-called New code of public contracts, where it is designated as a priority criterion for the exercise of discretionary power and for identifying the rule of the specific case.

### **The particular case**

The Ministerial Decree of 23 January 2012 provided for the attribution of compensatory measures aimed at the voluntary release of portions of spectrum functional to the liberation of the frequencies of the 790-862 MHz band. In the analyzed case, an economic operator contested the denial attribution of the mentioned measures, despite the attachment of an agreement stipulated with the other transmitter based in the Piedmont Region, as required by the regulatory rule in the case of multiple transmitters. Specifically, however, the band in question was in use, among others, also by a transmitter holding the right of use for the province of Novara but based in Lombardy. The Ministry, in the absence of the stipulation of the agreement also by the latter transmitter, excludes the claimant, considering the regulatory requirement unsatisfied. Therefore, the controversy fundamentally concerned the interpretation of the aforementioned requirement, i.e. whether the latter took into consideration only transmitters from the same region or also from different regions.

### **The principle of law**

The Council of State recalls the principle of result, underlining how its jurisprudence has established the prevalence of substantial aspects, compared to purely formal ones, in the context of public procedures, even before the New Procurement Code. The principle requires the interpreter to exclude the neutralization of the administrative activity, and to take not account, on the contrary, the substantial aspects to achieve the effective and timely achievement of the purposes of the public action.

Therefore, starting from the aforementioned principle and harmonizing it with the principle of legality (since these two principles cannot be placed in conflict, as established by the Council of State, ruling no. 2866 of 26 March 2024), the administrative exclusion provision is considered legitimate. In fact, the Council affirms that *"the decree expressly refers to network operators in possession of the right to use the «regional, multi-provincial, provincial» frequency and to the management of a system but having regard not to the location of the systems but to their transmission capacity"*. In particular, *"the principle of result, as just mentioned, in this case means that the administration is required to consider all the assigned frequencies, and not just parts of them, otherwise it would still have to compensate*

*for the partial release, but not obtaining the final result, i.e. the complete liberation of the frequencies necessary for the technological transition”.*

## Conclusions

In light of this and previous rulings, it clearly emerges that the principle of the result *“represents the interpretative criterion to be used to resolve cases of conflict between the “formal data” of exact compliance with the notice and the “substantial data” of suitability of the economic operator’s participation (and therefore of the administration’s substantial interest in the prompt realization of the public interest)”*. This ruling, therefore, is a further confirmation of the centrality of this principle - even outside the strict application of the new code - which must guide not only the action of the administration, but also and in particular the action of the operators who deal with the latter.

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