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as a shortcoming of the European Union law; but it is also a hint that we are here indeed confronted with the intricacies of transnational law.

the European Court of Justice". See p. 111 of the study.

EDITORIAL

HOW NEUTRAL IS NET NEUTRALITY?

*Stefano Mannoni**

Net Neutrality: there it is the cry of war which has rallied hundreds of thousands of internauts throughout the world.

In the USA, where the debate has started, the Federal Communications Commission (FCC), after being submerged by a flood of complaints, and after being publicly and strongly pressed by president Obama, eventually capitulated. It adopted a regulation with a strict majority: three democrats against two republicans: the Open Internet Order of 2015.

But first of all, what net neutrality is about? It enshrines the principle that all traffic on the web ought to be treated impartially, whatever the contents and irrespective of the sources, without granting to anyone a fast lane. Furthermore, no caps should be imposed on the customers as far as the amount of capacity is concerned. In one sentence, the principle of "best effort" must be held good, as a pillar of internet democracy.

Has the goal been achieved? The answer is a resounding no!

President Trump has committed the FCC to repeal the regulation even before it could be challenged before the courts.

"Committed" is not the proper word for an agency which boasts independence. But reflects the reality where the republican majority have answered to a "wish" of the President.

If it will be so, the Internet Service Providers, to whom the regulation is addressed, will have won the day.

The step is momentous.

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Such an outcome could in the American context jeopardize the competition given the highly concentration of the market which revolves around few giants, unlike in Europe where the success of infrastructure regulation has allowed a lively market of Internet Service Providers.

In USA customers are offered few choices to access internet, reduced either to a cable operator like Comcast, or to one of the few undertakings of telecommunications. It is not rare that in some areas the choice would be between only two competitors. Hence the concerns about the treatment of contents: if the networks are few and powerful, it is reasonable to fight for an equal treatment by the carriers of the contents posted on the web.

If these are the main points of the dispute, it is nonetheless worth to look at what lies behind the curtains.

What is at stake, it is perhaps more than what appears at first sight.

It is needless to recall that the birth and development of internet has been largely anarchical and polycentric.

Now this very feature could be the target of the denial of net neutrality.

Strong is the impression that the biggest players on the market aim at gaining control of this powerful means, concentrating both access and traffic, therefore imposing a hierarchical industrial frame on the galaxy of the web.

To some extent such a development could be foreseeable: the triple play offers tendered by an undertaking like Comcast could hardly be matched by anyone else on the market. Moreover the process to integrate networks and contents in the hands of the same subjects shrinks the field of competition, rewarding the economies of scale at the expense of plurality.

Much of the outcry ignited by the struggle on net neutrality stems from the fear that a means of communication born as the symbol of democracy could slide into industrial oligarchy.

The anxiety aroused by the repeal of the safeguards of net neutrality seems therefore justified.

Very different is the landscape offered by Europe which adopted in 2015 Regulation 2015/2120.

Here the European Parliament has espoused the banner of net neutrality with fervor. The regulation forbids any managing of internet traffic, save for the needs of fixing technical problems.

Ideology and politics have played a not negligible role in the fierce stance adopted by Brussels. Consumers lobbying has been powerful and successful.

But if we ask whether such a regulatory intervention was warranted by a true market failure, the answer should be cautious. Few issues concerning net neutrality, such as the slowing of traffic or capacity caps, had arisen and seldom regulators had to deal with discrimination within the networks. The explanation is easy. The competition between the internet service providers in Europe is such that should an undertaking indulge in discrimination the customer would switch to a competitor. The same holds true if we look at the content providers, such as Netflix, which could had been sensed as a threat by the European telecommunication operators longing to turn themselves into content providers. On the contrary, the opportunity has been caught to host a successful undertaking whose programs could appeal to the public.

In short politics and ideology have largely trumped real concerns in the European debate.

Still, even if politically biased, the regulation could prove useful in the future when the adoption of the internet protocol will become universal, should Europe be tempted to follow the American course toward concentration, a temptation which is looming even if it is still far from becoming a danger.

ARTICLES

THE FRENCH *CODE "DES RELATIONS ENTRE LE PUBLIC ET L'ADMINISTRATION"*. A NEW EUROPEAN ERA FOR ADMINISTRATIVE PROCEDURE?

*Marzia De Donno**

Abstract

The code of administrative procedure, long awaited by users and citizens, public employees and academics, was adopted in France in 2015 after a period of "isolation" within the EU. Although it represents a codification *à droit constant*, the "Code on the relationship between the public and the administration" (CRPA) has introduced some important and innovative principles.

This article enquires to what extent EU administrative law has had an influence on the new French Code. Its assessment of the CRPA proceeds in two steps: following an overview of the main innovations, the article compares the recent Spanish, Portuguese and Italian laws which had entirely or only partly reformed the related legislation in the very same year. This analysis will show that there has been a trend toward Europeanisation in administrative procedure.

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1. Introduction. A new European era for administrative procedure?

New challenges have recently arisen for public administrations in Europe: the modernisation of public agencies, e-government and the digitalisation of administration, the fight against corruption and the re-launching of administrative transparency, a drive toward a better quality of regulation and bureaucratic and administrative simplification, ranging from the simplification of local authorities to liberalisation, and to the reform of local public services and public sector employment. These are the objectives that have lent substance to the recent new series of administrative reforms which, nearly everywhere in Europe, are leading, under the stimulus of Community (as well as international) institutions, towards an alignment of the statutes of public institutions within the European administrative space.

This is not only an institutional, but also a temporal convergence, which may certainly be explained with the transformation of administrative issues into a "matter of common interest" under the Lisbon Treaty, the new competences of the Union in respect of administrative cooperation, and the definitive legal enshrinement of the principle of good administration and citizens' rights under Articles 41, 42 and 43 of the ECHR.

More recently, however, this convergence may also be explained in light of the responses that European institutions themselves have attempted to give to the economic and financial

crisis. As has been observed, in fact, the eruption of the crisis in the past decade has thus far precluded the new European legislative framework from concretely expressing its full potential, as the Union, under the weight of the emergency, has rather focused on new economic and financial instruments that might be able to bring sovereign debts under control and stabilise the markets.

At present, therefore, the influence exerted by European institutions on national administrations may be more frequently seen in acts of soft law, which seek to define a new model of public administration that is "effective", "simple", "transparent", "modern" and "accountable", precisely with the aim of combating the crisis, ensuring social cohesion, the competitiveness of businesses and the recovery of national economies. In this regard, we need only consider the recommendations formulated by the Council and the Commission during the annual cycle of coordination of national economic, social and labour reform policies and, last but not least, those regarding public administration reform, in the so-called European Semester.

Against this backdrop[1], administrative procedure – which is clearly tied to the subject of the relationship between administrations and citizens – undoubtedly becomes crucial once again.

This is attested, moreover, by the recent initiatives which, starting from around 2015, have been undertaken in numerous countries – Italy, but also Spain and Portugal – and which have had an impact on the general rules of administrative action,

[1] On which, without any claim of exhaustiveness and in addition to the doctrine cited further below, see C. Harlow, P. Leino, G. Della Cananea (eds.), *Research Handbook on EU Administrative Law* (2017); P. Craig, *UK, EU and Global Administrative Law. Foundations and Challenges* (2015); E. Chiti, G. Vesperini, *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (2015); S. Piattoni (ed.), *The European Union, Democratic Principles and Institutional Architectures in Times of Crisis* (2015); S. Fabbrini, *Which European Union? Europe after the Euro Crisis* (2015); F. Fabbrini, E. Hirsch Ballin e H. Somsen (eds.), *What form of Government for the European Union in the Eurozone?* (2015); J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen* (2014); C. Harlow, R. Rawlings, *Process and Procedure in EU Administration* (2014); P. Craig, *EU Administrative Law* (2012); H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union* (2011).

sometimes innovating them significantly. Probably, however, the most evident sign is France's adoption of a Code on *procédure administrative non contentieuse*, after a long wait of nearly thirty years.

Moreover, precisely the entry into force of the so-called *Code des relations entre le public et l'administration* (CRPA) in 2015 has also served to overcome one of the main objections to the adoption of European rules of administrative procedure: as is well known, this objection was founded on the observation that some of the major national legal systems – those of France and Britain above all – had no general legislation in this area.

We might therefore be led to wonder whether the proliferation of new legislative texts aimed at introducing or reinforcing rules for administrative action based on principles of good administration, simplification and transparency, legal certainty and the protection of legitimate expectations, as well as the development of digital administration, has inaugurated a new era – completely European – for administrative procedure.

The aim of this paper is thus to examine, first of all, the most innovative provisions of the French Code (para. 3). This analysis will serve as an introduction to two further ones: the first aimed at assessing the degree of influence exerted by European administrative law on the French codification (para. 4); the second aimed at examining how the CRPA fits in with the laws on administrative procedure recently adopted or amended in other EU States (para. 5).

2. The "*Code des relations entre le public et l'administration*": the end of the French exception

In order to "*faciliter le dialogue entre les administrations et les citoyens, fondé sur la simplification des relations, la transparence, et une plus grande réactivité de l'administration*"[2], Article 3 of *loi n° 2013-*

[2] *Exposé des motifs* of the *Projet de loi n° 664 du 13 juin 2013*. For first comments to the CRPA and for an account of the preparatory jobs of the Code see: Dossier 7 AJDA (2014) *La simplification des relations entre l'administration et les citoyens*», and, especially, P. Gonod, *Codification de la procédure administrative. La «fin de l'exception française?»*, 395; M. Guyomar, *Les perspectives de la codification contemporaine*, 400; M. Vialettes, C. Barrois de Sarigny, *Le projet d'un code des relations entre le public et les administrations*, 402; Dossier 43 AJDA (2015) and 44

1005 du 12 novembre 2013 entrusted the French Government with the task of adopting, within two years, a Code laying down general rules of administrative procedure.

The subsequent *ordonnance n° 2015-1341 du 23 octobre 2015*, concerning the legislative provisions of the Code, and *décret n° 2015-1342 du 23 octobre 2015*, which dealt with the related regulatory provisions, thus brought an end, after about thirty years[3], to what had been defined as the "*splendide isolement de la France*"[4] in the European landscape.

AJDA (2015), *La* lex generalis *des relations entre le public et l'administration*», and, especially, M. Vialettes, C. Barrois de Sarigny, *Questions autour d'une codification*, 2421; S. Saunier, *L'association du public aux décisions prises par l'administration*, 2426; J. Petit, *L'entrée en vigueur des actes administratifs dans le code des relations entre le public et l'administration*, 2433; G. Eveillard, *La codification du retrait et de l'abrogation des actes administratifs unilatéraux*, 2474; B. Seiller, *Le règlement des différends avec l'administration*, 2485; F. Melleray, *Les apports du CRPA à la théorie de l'acte administratif unilatéral*, 2491; Dossier 1 RFDA (2016) *Le Code des relations entre le public et l'administration*», and, particularly, D. Labetoulle, *Avant propos*, 1; M. Vialettes, C. Barrois de Sarigny, *La fabrique d'un code*, 4; P. Terneyre, J. Gourdou, *L'originalité du processus d'élaboration du code: le point de vue d'universitaires membres du «cercle des experts» et de la Commission supérieure de la codification*, 8; M.-A. Levêque, C. Verot, *Comment réussir à simplifier? Un témoignage à propos du code*, 12; C.-A. Dubreuil, *Le champ d'application des dispositions du code*, 17; B. Bachini, P. Trouilly, *Les procédures contradictoires dans le code des relations entre le public et l'administration: de la clarté dans la continuité*, 23; P. Bon, *L'association du public aux décisions prises par l'administration*, 27; P. Delvolvé, *La définition des actes administratifs*, 35; G. Eveillard, *L'adoption des actes administratifs unilatéraux - Forme, délais, signature*, 40; P. Delvolvé, *L'entrée en vigueur des actes administratifs*, 50; B. Seiller, *La sortie de vigueur des décisions administratives*, 58; F. Roussel, *Un code également innovant dans sa partie outre-mer*, 69; and then, more recently, D. Custos, *The 2015 French code of administrative procedure: an assessment,* in S. Rose-Ackerman, P. Lindseth (eds.), *Comparative Administrative Law* (2017), 284.

[3] It is not possible here to detail the various attempts to codify the rules of administrative procedure that took place in France between the 19th century and the most recent ones of 1996 and 2004. As is well known, moreover, the broad debate accompanying this long process saw a division between advocates and opponents of codification. The flexibility of case law was prevalently seen as a virtue by the great judges of the *Conseil d'Etat* (R. Odent and E. Laferrière, cited further below) given the vastness and changeability of administrative law and the impossibility of transposing it into written texts, whereas the benefits of codification were broadly recognised mainly among academics. Warranting mention among the latter, without any claim of exhaustiveness, are G. Isaac, *La procédure administrative non contentieuse* (1968); C. Wiener, *Vers une codification de la procédure administrative* (1975); Y. Gaudemet,

As is well known, France, together with Britain, Ireland and, on the continent, Belgium and Romania, represented the group of States within the EU still without a code or a general law on administrative procedure[5].

In France, this legislative gap had always been attributed to a certain resistance on the part of both the French Parliament, reluctant to intervene in regulating the action of the executive branch, and the Government itself, as well as, and above all, the Council of State, which would have seen its historical role in the creation and development of French administrative law considerably reduced[6].

La codification de la procédure administrative non contentieuse en France (1986); P. Gonod, *La codification de la procédure administrative*, in AJDA 489 (2006). See also R. Schwartz, *Le code de l'administration*, in AJDA 1860 (2004).

[4] M. Vialettes, C. Barrois de Sarigny, members of the *Mission de préparation du Code des relations entre le public et l'administration*, in *La fabrique d'un code*, cit. at 2, 4.

[5] Austria adopted the first law on administrative procedure in Europe in 1925; Poland and Czechoslovakia followed shortly thereafter, in 1928, and Yugoslavia in 1930. The Administrative Procedure Act of the United States was introduced in 1946. The Hungarian law and the first Spanish law came into force in 1957 and 1958, respectively. In 1960 it was Switzerland's turn, in 1976 Germany's and in 1978 Luxembourg's. In the 1990s, the Italian law (1990), the Dutch law (1994) and the Greek law would finally be adopted (1999). For a comparative analysis of the principals legislative models, see: J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative. Comparative Law of Administrative Procedure* (2016); J.-B. Auby (ed.), *Codification of administrative procedure* (2014); M. Fromont, *Droit administratif des Etats européens* (2006); and then the Acts of the Lisbon Meeting on Administrative Procedure, *Functions And Purposes Of The Administrative Procedure: New Problems And New Solutions* (2011).

[6] S. Cassese, *Functions of administrative procedure: introductory remarks*, in *Functions And Purposes Of The Administrative Procedure: New Problems And New Solutions*, cit. at. 5, 10, 11; J.-B. Auby, *General Report*, in Id., *Codification of administrative procedure*, cit. at 5, 27; A. Le Pors, *Chronique d'une mort annoncée: le décret du 28 novembre 1983*, in 6 La Semaine Juridique Administrations et Collectivités Territoriales (2007), 21. In truth, in this country, the subtle balance that came to be created between legislative, executive and judicial powers has always been a major factor explaining the absence of a general law on administrative procedure. The refusal to legislate in this area has indeed always been based on the idea, also advanced by several French Presidents, that administrative procedure was a practical aspect that regarded the behaviour of officials and the internal organisation of administrations: thus a matter to be left up to administrative regulations rather than the law. A counterpoint to this idea was the almost exclusive predominance of the case-law of the *Conseil d'Etat*,

Therefore, after decades of attempts, the codification project was successfully re-launched, this time earning the support not only of the Secretary General of the French Government, the Vice-Chairman of the *Commission supérieure de codification* and the *Comité interministeriel pour la modernisation de l'action publique* (CIMAP), but also of the Vice-President of the *Conseil d'Etat*[7]. Indeed, it might be said that the success of the new French Code largely depended on the Council of State, which not only played a primary role in drafting the text[8], but in previous years had already laid the ground for its preparation[9].

Moreover, although in the mid 1970s, R. Odent, President of the *Section du Contentieux* of the *Conseil d'Etat*, held that the rigidity of written law compared to the flexibility of case-law was in itself a sufficient reason to render the idea of codification "*…contestable, dans son principe même…*"[10], in more recent times concerns tied to the need to ensure the effectiveness of the principles of *securité juridique* and *confiance légitime* made it urgent to adopt a legislative instrument that would guarantee the accessibility and intelligibility of administrative law to citizens.

As stated in a communiqué of the CIMAP dated 18 December 2012: "*Un français sur quatre juge complexe sa relation avec l'administration.* […] *Les règles qui régissent les relations entre l'administration et les citoyens sont éparses. Elles relèvent fréquemment de la jurisprudence. Elles sont donc difficilement accessibles aux usagers mais également aux administrations*". One of the objectives of the

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which, on the one hand, readily accepted these tendencies and, on the other hand, responded to the need to establish rules governing the relations between users and administrations with its own *arrêts*.

[7] M. Vialettes, C. Barrois de Sarigny, *La fabrique d'un code*, cit. at 2, 4. It should be noted, furthermore, that the *loi du 12 novembre 2013* was unanimously adopted in both Chambers of the French Parliament.

[8] The *Mission de préparation du Code des relations entre le public et l'administration*, based at the *Conseil d'Etat*, was supported by a "*cercle des experts*" made up of administrative magistrates, university professors and professionals. The *Commission supérieure de Codification*, finally, also included some Councillors of State among its members.

[9] See, in addition to the annual Reports on *securité juridique* referred to further below, the judgment CE 26 octobre 2001, n° 197018, *Ternon*, which many consider also to be a call for codification by the administrative court, directed at Parliament.

[10] R. Odent, in the foreword to the book of C. Wiener, *Vers une codification de la procédure administrative*, cit. at 3, 7.

new French Code is thus to "*assurer la transparence et l'accessibilité des règles régissant les relations entre les citoyens et l'administration*"[11].

Therefore, the *Code des relations entre le public et l'administration* undoubtedly represents an advance of statutory law challenging the historical primacy of French case-law. However, this is true only in part.

In fact, the Code primarily limits itself to restating existing rules laid down by case-law, with limited, albeit important, innovative contributions[12]. Actually, in this respect the French Code seems very similar to the Italian law on administrative

[11] *Comité interministériel pour la modernisation de l'action publique. Simplifier l'action publique*, 31; available on http://www.modernisation.gouv.fr/le-sgmap/le-cimap/le-cimap-du-18-decembre-2012.

[12] Moreover, these were also the same limits drawn by the legislative delegation, in particular by paras. 2 and 3 of Art. 3, *loi du 12 novembre 2013: "I. — Dans les conditions prévues à l'article 38 de la Constitution, le Gouvernement est autorisé à procéder par ordonnances à l'adoption de la partie législative d'un code relatif aux relations entre le public et les administrations. II. — Ce code regroupe et organise les règles générales relatives aux procédures administratives non contentieuses régissant les relations entre le public et les administrations de l'Etat et des collectivités territoriales, les établissements publics et les organismes chargés d'une mission de service public. Il détermine celles de ces règles qui sont applicables aux relations entre ces administrations et entre ces administrations et leurs agents. Il rassemble les règles générales relatives au régime des actes administratifs. Les règles codifiées sont celles qui sont en vigueur à la date de la publication de l'ordonnance ainsi que, le cas échéant, les règles déjà publiées mais non encore en vigueur à cette date. III. — Le Gouvernement est autorisé à apporter aux règles de procédure administrative non contentieuse les modifications nécessaires pour: 1° Simplifier les démarches auprès des administrations et l'instruction des demandes, en les adaptant aux évolutions technologiques; 2° Simplifier les règles de retrait et d'abrogation des actes administratifs unilatéraux dans un objectif d'harmonisation et de sécurité juridique; 3° Renforcer la participation du public à l'élaboration des actes administratifs; 4° Renforcer les garanties contre les changements de réglementation susceptibles d'affecter des situations ou des projets en cours; 5° Assurer le respect de la hiérarchie des normes et la cohérence rédactionnelle des textes ainsi rassemblés, harmoniser l'état du droit, remédier aux éventuelles erreurs et abroger les dispositions devenues sans objet; 6° Etendre les dispositions de nature législative ainsi codifiées en Nouvelle-Calédonie, en Polynésie française, dans le respect des compétences dévolues à ces collectivités, ainsi qu'aux îles Wallis et Futuna, et adapter, le cas échéant, les dispositions ainsi codifiées en Nouvelle-Calédonie et dans les collectivités d'outre-mer régies par l'article 74 de la Constitution; 7° Rendre applicables à Mayotte les dispositions de nature législative ainsi codifiées issues des lois qui ne lui ont pas été rendues applicables. IV. — Ces ordonnances sont publiées dans un délai de vingt-quatre mois à compter de la promulgation de la présente loi. V. — Un projet de loi de ratification est déposé devant le Parlement dans un délai de trois mois à compter de la publication de chaque ordonnance".*

procedure. Law no. 241/1990, which differs from the analogous German law of 1976[13] in terms of completeness and coherence, elevated some general principles of administrative action established by case-law to a legislative rank, as well as introducing some innovative concepts, parallel to the emergence of a new model of public administration[14].

Similarly, the major work of "*codification administrative*" and "*à droit constant*"[15] undertaken by the experts of the *Mission de préparation du Code* represents a consolidation of only part of French case-law and, simultaneously, an attempt to harmonise a number of existing laws. Besides, limiting the perimeter of the CRPA as much as possible in relation to general principles and the rules established by case-law represented the only feasible approach to avoid the same problems that had caused the failure of the previous attempts.

Therefore, the CRPA does not aspire to be a full-fledged code, at least not in the Napoleonic and legal positivist sense of the word: it is neither exhaustive nor completely innovative.

It is not exhaustive, because it positivises only essential provisions, leaving the rest up to case-law or sectoral laws[16]. The rules concerning the effectiveness and entry into force of

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[13] G. della Cananea, *Due Process of Law Beyond the State* (2016), 24.

[14] See, for all, A. Sandulli, *Toward codification of the discipline of administrative action?*, in M.P. Chiti (ed.), *General principles of administrative action* (2006), 33.

[15] Regarding the meaning of these two expressions, also in comparison with the Italian experience, see S. Cassese, *Codici e codificazioni: Italia e Francia a confronto*, 1 Gior. dir. amm. 95 (2005).

[16] These were in any case prudent, carefully thought-out choices of the *Mission de préparation du Code*. As pointed out by M. Vialettes and C. Barrois de Sarigny in regard to the provisions of the Code dealing with administrative appeals: "*…notamment en matière de recours administratif préalable obligatoire, la difficulté est de savoir où mettre le courser : faut-il codifier toute la jurisprudence ou se limiter aux chaînons essentiels du régime de recours administratifs? C'est cette second option qui est retenue: trop bavard le droit écrit est non seulement peu lisible, mais aussi peu évolutif. Or cette souplesse et cette plasticité, c'est précisément l'avantage du droit jurisprudentiel sur le droit écrit: il convient donc de lui laisser une grande place*" (see M. Vialettes, C. Barrois de Sarigny *La fabrique d'un code*, cit. at 2, 6). As for the continual references to sectoral legislation, these were also justified on the grounds of practical expediency, again in connection with the need for intelligible rules. That is, it did not seem desirable to disrupt the habits of users of sectoral codes and laws by transferring the relevant provisions entirely into the new Code. See C.-A. Dubreuil, *Le champ d'application des dispositions du code*, cit. at 2, 7.

administrative acts (Article L. 211-1 *et seq.*), or those on administrative appeals (Article L. 410- 1 *et seq.*), for example, may be interpreted in this light: the *Mission de préparation du Code* did not in fact endeavour a complete positivisation of the relevant rules; on the contrary, only the fundamental rules were codified. Accordingly, the general principles drawn from the administratve jurisprudence will continue to stand alongside them.

Not innovative because it incorporates, on the one hand, the essential provisions of already existing laws, such as *loi n° 78-753 du 17 juillet 1978*, concerning access to and reuse of administrative documents, *loi n° 79-587 du 11 juillet 1979*, on the obligation to give reasons for administrative decisions, *loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* (so-called *loi DCRA*), and, on the other hand, the case-law.

It was clearly the result of strategic choices and compromise which – it is reasonable to expect – will not significantly reduce the role of the *Conseil d'Etat*. On the contrary, as has already been pointed out in the literature[17] and seems to be confirmed by the first judgments following the introduction of the CRPA[18], the CE will continue to have significant weight both in the interpretation of the general principles of procedure that the legislator has chosen not to codify and in relation to the principles now expressly transposed into the provisions of the Code[19]. Moreover, the principles elaborated by the *Conseil d'Etat* will inevitably

[17] D. Custos, *The 2015 French code of administrative procedure: an assessment,* cit. at 2.

[18] Cf. CE 21 mars 2016, n° 368082, 368083 e 368084, *Société Fairvesta International GMBH*, on the subject of the right of defense, and CE 19 juill. 2017, n° 403928, *Association citoyenne "Pour Occitanie Pays Catalan" et autres*, on the subject of public consultation; here the French court continued to rely on general principles of law, also in relation to areas now covered by the CRPA. An analogous attitude was maintained by the Council of State after the entry into force of the *loi DCRA*; see C. Landais, F. Lenica, *Le Conseil d'Etat et les droits des citoyens dans leurs relations avec l'administration*, AJDA 1926 (2004).

[19] One need only consider, for example, the strategic motivation underlying the decision not to transpose into written law the general principles regarding the invalidity of administrative acts, in particular, the ones relating to non-invalidating formal and procedural defects, which would continue to be based on the rules established by case-law starting from the *Danthony* judgment (CE Ass. 23 déc. 2011, n° 335033).

continue to guide the application even of provisions that completely transpose previous rules deriving from case-law[20].

In this regard, the concerns voiced by E. Laferrière against the codification of administrative law also appear to have been definitively overcome. It seems reasonable to argue, in fact, that even after the introduction of the Code, case-law will continue to "*faire la part entre les principes permanents et les dispositions contingents, établir une hiérarchie entre les textes, remédier à leur silence, à leur obscurité, à leur insuffisance en s'inspirant des principes généraux du droit et de l'équité*"[21]. At the same time, however, the new Code no doubt has the merit of having placed a limit on the participation of administrative courts in the legislative function, which belongs to the Parliament; and of having brought forward a further argument in favour of the principle of *securité juridique* in the context of the *vexata quaestio* regarding the extension of the Court's power in the alternation between interpretation and creation of law. A well-known issue in France, which – not coincidentally - G. Isaac had laid emphasis on when warning of the indispensability of a code of administrative procedure precisely to ensure legal certainty for individuals[22].

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[20] There is vast literature on the formulation of general principles of law by the *Conseil d'Etat*, their significance and their relationship with written law. Here we need only mention the work of B. Jeanneau, *Les principes généraux du droit dans la jurisprudence du Conseil d'Etat (*1954), with a preface by J. Rivero.

[21] E. Laferrière, *Traité de la juridiction administrative et des recours contentieux* (1887-1888), 8.

[22] "*Dans la voie qui conduit à la réglementation de l'activité procédurale de l'administration, la règle interne est le point de départ, la règle jurisprudentielle est souvent un point de passage, mais la sécurité [des administrés] n'est tout à fait garantie que lorsque la règle figure dans un texte écrit, surtout s'il contient une codification complète et cohérente*" (See G. Isaac, *La procédure administrative non contentieuse*, cit. at 3, 679). In France, the debate on the limits of the administrative court's power was recently reopened in concomitance with the last failed attempt to codify administrative procedure in 2006. See, also for more ample references, P. Gonod, O. Jouanjan, *A propos des sources du droit administratif. Brèves notations sur de récentes remarques*, in AJDA 992 (2005), in opposition to F. Melleray, *Le droit administratif doit-il redevenir jurisprudentiel? Remarques sur le déclin paradoxal de son caractère jurisprudentiel*, in AJDA 637 (2005). In actual fact this is an aspect which, after the amendments to the law on administrative procedure introduced by law no. 124/2015, has again raised concerns among Italian legal scholars. See M.A. Sandulli, *"Principi e regole dell'azione amministrativa": riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*, in 23 Federalismi.it 1 (2017); the Author warns of the risks of creative jurisprudence

3. The main new features of the CRPA

Thus few of the provisions of the nearly six hundred articles making up the Code are actually new. Nonetheless, they are undoubtedly important and, in some cases, bear witness precisely to the progress of written law vis-à-vis the rules established by case-law. They are designed with a view to democratising the public administration and enhancing the protection of citizens, referred to earlier.

Among the main new features of the Code, it is certainly worth mentioning the codification of the rules concerning adversary procedure; new rules designed to enhance public participation in the rulemaking of the public administration; the introduction of the tacit decisions; new rules concerning the so-called *sortie de vigeur des actes administratifs* and *retrait* and *abrogation*. We shall now focus our analysis on these aspects.

3.1. Codification of the adversary principle and the right of defence of the interested party

The innovative contributions of the CRPA may be appreciated above all in relation to the exercise of the rights of defence of interested parties within the scope of administrative procedure, now provided for under Title II ("*Le droit de presenter des observations avant l'intervention de certaines decisions*") of Book I ("*Les échanges avec l'administration*").

Prior to the introduction of the Code, the adversary procedure between the public administration and private individuals was based essentially on the general principle defined by the *arrêt Dame Trompier-Gravier* of 1944[23], whereby the persone affected by a negative measure (or rather, one "*présentant un certain degré de gravité et prise en considération de la personne*"[24]) has the right to be informed by the administration concerning the

contra legem in addressing the principles of law formulated during the plenary meeting in relation to the new provisions on self-defence. Regarding the formulation of new general principles through Italian administrative case-law even after the entry into force of Law no. 241/1990, see A. Bartolini, A. Pioggia, *La legalità dei principi di diritto amministrativo e il principio di legalità*, in M. Renna, F. Saitta (eds.), *Studi sui principi del diritto amministrativo* (2012), 83. For a reconstruction from a historical perspective, see also M. Mazzamuto, *I principi costitutivi del diritto amministrativo come autonoma branca de diritto*, *ivi*.

[23] CE, sect., 5 mai 1944, n° 69751.

[24] On the meaning of this expression, see also: CE, sect., 24 juin 1949, *Nègre.*

prejudicial effects resulting from the adoption of the decision, to request access to his or her *dossier* and, accordingly, to submit relevant observations.

Over time this rule was followed by a sole legislative provision, Article 24 of the *loi DCRA*[25]. Moreover, the scope of application of the provision was further reduced, since on the one hand it limited the citizen's right to present observations – both in writing and orally – to negative ("*défavorable*") measures only, for which the administration was required to give reasons pursuant to the *loi du 11 juillet 1979,* and among the latter selected only the measures adopted by the administration on its own initiative, hence with the exclusion of acts issued following an application from a private individual[26].

The new Article L. 121-1 brings together and codifies the two rules: "*Exception faite des cas où il est statué sur une demande, les décisions individuelles qui doivent être motivées en application de l'article L. 211-2, ainsi que les décisions qui, bien que non mentionnées à cet article, sont prises en considération de la personne, sont soumises au respect d'une procédure contradictoire préalable*".

This operation is in itself innovative, firstly in view of the purposes of clarification and simplification being pursued, as it overcomes the previously existing dichotomy; secondly, because it broadens, by legislative means, the scope of the *procédure contradictoire préalable*, which now extends to all *décisions administratives* having a personal and negative character[27].

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[25] The provision extended the rule of adversary procedure, previously applied only to State administrations under the *décret du 28 novembre 1983*, to all public administrations.

[26] In truth, the exclusion of the adversary procedure in the latter case has always been justified in consideration of the fact that private individuals can present their observations at the time of submitting the application.

[27] The subsequent Art. L. 121-2 contains a list of further exceptions to the requirement of initiating an adversary proceeding: in the event of urgency or exceptional situations; for reasons of public law and order or international obligations; and finally, in the case of decisions for which the provisions of sectoral laws have established particular forms of adversarial proceedings and of those related to social security and welfare (with the exception of measures involving sanctions). To these exceptions we must also add a further one established by the case-law of the Council of State, which rules out adversary proceedings in cases involving binding activities of the administration (CE 30 janv. 1991, *Min. de l'Équipement, du Logement, des Transports et de la Mer c/ Sté Route et Ville*, nº 101639), except where they are required to comply with

Certainly, it adds nothing to what was already established through case-law – which indeed represents the very limit of the legislative delegation; however, as some hope, the translation in positive terms of the category of administrative decisions "*prises en considération de la personne*" could in the future lead the French legislator to definitively bury the distinction between measures for which reasons must be given and measures subject to a prior adversary procedure; and, above all, to bring the law into line with the solutions of other European countries by extending the adversary procedure to all individual decisions, including those having a favourable nature and adopted at the request of a private person[28].

Furthermore, the new expression could subsequently also enable a broadening in the scope of the notion of "*personne intéressée*", now normally used to identify solely the person on the receiving end of the measure, and thus lead to an extension of the adversary procedure to other parties, as in other national legal systems; at present, in fact, other parties do not have the right to be heard under French law[29].

3.2. General provisions regarding public participation in the rulemaking process of the public administration

The provisions regarding public participation in rulemaking are now gathered together in Book I, Title III of the Code ("*L'Association du public aux décisions prises par l'administration*")[30].

The particularities of these provisions make some clarifications appropriate.

First of all, the notion of administrative act as interpreted in France (and in Belgium, the Netherlands and Greece) is very broad and embraces not only "*l'acte administratif comme application*

provisions of Community law (CE, sect., 13 mars 2015, *Office de développement de l'économie agricole d'outre-mer*, nº 364612; CE 22 juill. 2015, *Sté Halliburton Manufacturing and Services France*, nº 367567).

[28] B. Bachini, P. Trouilly, *Les procédures contradictoires dans le code des relations entre le public et l'administration: de la clarté dans la continuité*, cit. at 2, 23.

[29] M. Fromont, *Droit administratif des Etats européens*, cit. at 3, 216, 217.

[30] For a detailed analysis of these dispositions, see: S. Saunier, *L'association du public aux décisions prises par l'administration*, cit. at 2, 2426; P. Bon, *L'association du public aux décisions prises par l'administration*, cit. at 2, 27.

de la loi à une situation concrete", but also every act "*subordonné à la loi*". In general, therefore, in this country an *acte administratif* is not defined on the basis of the type of legal relationship it establishes, but rather according to the power exercised by its author. The notion thus includes both *actes individuels* and *actes règlementaires*[31].

Accordingly, whilst participation in individual acts takes on the connotations of the right of defence seen earlier, in the case of *actes réglementaires*, participation – or rather, the "*association*" of private individuals in public decision-making – may take place on different levels, from the simple provision of information to more structured forms of *consultation* and *enquête publique*[32].

The second clarification regards the very term "*association*" used by the Code. This is an emblematic notion for French administrative law, which already appeared in the earliest writings on *démocratie administrative* dating from the 1960s. It is meant to refer precisely to those occasions on which citizens are involved, as a *socius* (ally), in public decision-making[33]. France, moreover, unlike other countries like Italy, has long known and regulated various forms of public involvement in the rulemaking processes of the public administration.

Therefore, in this case as well the new Code defines a regime that is prevalently *à droit constant*. This applies, in particular, for the rules on consultation via online procedures (already provided in *loi n° 2011-525 du 17 mai 2011*) and those regarding the *commissions administratives à caractère consultatif*

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[31] G. Marcou, T. I. Khabrieva, *Les procédures administratives et le contrôle à la lumière de l'expérience européenne en France et en Russie* (2012), 39. Moreover, the CRPA does not provide a single unambiguous definition of *acte administratif*, but rather limits itself to defining one for the limited purposes of application of Book II. See art. L. 200-1, according to which "*on entend par actes les actes administratifs unilatéraux décisoires et non décisoires. Les actes administratifs unilatéraux décisoires comprennent les actes réglementaires, les actes individuels et les autres actes décisoires non réglementaires. Ils peuvent être également désignés sous le terme de décisions, ou selon le cas, sous les expressions de décisions réglementaires, de décisions individuelles et de décisions ni réglementaires ni individuelles*". For a critique of this choice, see: P. Devolvé, *La définition des actes administratifs*, cit. at 2. On this question see also: F. Melleray, *Les apports du CRPA à la théorie de l'acte administratif unilatéral*, cit. at 2.

[32] But see also other principles laid down by *loi n° 2002-276 du 27 février 2002*.

[33] For an exegesis of the term "*association du public*", see: S. Saunier, *L'association du public aux décisions prises par l'administration* cit. at 2 and the doctrine cited therein.

(*décret n° 2006-672 du 8 juin 2006*, as amended by *décrets n° 2009-613 du 4 juin 2009* and *n° 2013-420 du 23 mai 2013*).

The main novelty is to be found instead in Article L. 131-1, which introduces for the first time a regime that applies for all proceedings, including those not specifically envisaged in legislative provisions: it is the definitive enshrinement of the general principle of public participation in the rulemaking of the public administration[34].

This principle, moreover, had already found expression in *loi n° 2013-1005*, which expressly authorised the Government to introduce the necessary changes in order to "*renforcer la participation du public à l'élaboration des actes administratifs*" (Art. 3, para. 3, point 3).

Thus, in response to the incitements originating from case-law, which had long allowed administrations the broadest freedom of initiative in adopting various forms of public consultation[35], with the Code this authorisation has become general also at the level of statutory law. Moreover, the new rules also fulfill a need to harmonise the different practices that had emerged, beyond the individual procedures expressly provided for under sectoral laws; a need that was also recognised by the *Conseil d'Etat* itself in its well-known *Rapport public Consulter autrement. Participer effectivement* of 2011[36].

Article L. 131-1 thus attempts to respond to these incitements by providing that "*Lorsque l'administration décide, en dehors des cas régis par des dispositions législatives ou réglementaires, d'associer le public à la conception d'une réforme ou à l'élaboration d'un projet ou d'un acte, elle rend publiques les modalités de cette procédure,*

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[34] On the absence of this principle in the French system before the entry into force of the CRPA see: J. Richard, V. Kapsali, *La participation à l'élaboration des règlements administratifs en France*, in J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative*, cit. at 5, 317.

[35] For recent jurispudence, see : CE 21 déc. 2012, n° 362347, *Groupe Canal Plus.*

[36] As has been pointed out by the *Rapport au Président de la République concernant l'ordonnance n° 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du nouveau code*: "*le Titre III…comprend, de manière inédite, les principes directeurs qui doivent guider l'association du public aux réformes et opérations projetées par l'administration, y compris lorsque celle-ci agit en dehors des cas régis par des dispositions existantes. Le code traduit ici la prise en compte de recommandations émises par le Conseil d'État dans son rapport public annuel pour 2011 Consulter autrement, participer effectivement*".

met à disposition des personnes concernées les informations utiles, leur assure un délai raisonnable pour y participer et veille à ce que les résultats ou les suites envisagées soient, au moment approprié, rendus publics".

The provision, as can be seen, is formulated in a generic manner. It limits itself to providing some guidelines for assuring publicity, information and reasonable time frames for participation.

In this regard, among the first commentators there were those who expressed a number of reservations against this formulation. According to some, in fact, Article L. 131-1 appears to be a highly laconic provision, especially if one compares the few basic rules it lays down against the needs for regulation manifested by the *Conseil d'Etat* in the above-mentioned *Rapport public* of 2011[37].

On the other hand, however, precisely the use of generic terms like "*réforme*", "*projet*", and "*acte*" is likely to have a positive effect in that any type of proceeding or act may be open to public participation, irrespective of the administration concerned. The provision applies, in fact, to all state administrations, including

[37] In particular, the Report requested the formulation of rules based on six guiding principles: to guarantee the accessibility of information; to ensure that observations may be filed by anyone and favour their publicity; to guarantee the impartiality and good faith of the organiser of the consultation and arrange for the presence, where necessary, of a third guarantor; and, moreover, to ensure a reasonable timeframe for the public participation; to safeguard the presence of minorities during the course of the procedure; to provide adequate information on the outcomes of the decisions adopted within periods of time proportional to their importance. In this regard, see: P. Bon, *L'association du public aux décisions prises par l'administration*, cit. Therefore, it is no coincidence that, given the sparse wording of Art. L. 131-1, in its first judgment on the subject (C.E. 19 juill. 2017, n° 403928, *Association citoyenne "Pour Occitanie Pays Catalan" et autres*) the *Conseil d'Etat* once again completed the relevant rules with a list of general principles on the regularity of consultation, this time referencing its previous case-law (on the rule prohibiting the administration from transferring its competences and on guarantees of access to information, the establishment of a reasonable timeframe for participation and publicity of the results of the consultation); from general principles of equality and impartiality, now enshrined in Art. L. 100-2 of the CRPA, the CE instead derived a general rule of "*sincerité de la consultation*" in relation to the definition of the subject matter and exact delimitation of the public to be involved. For commentary on this judgment, see G. Odinet, S. Roussel, *Consultations ouvertes facultatives : règles du jeu*, in AJDA 1662 (2017).

independent administrative authorities and local authorities, as well as public agencies and public or private entities appointed to provide a public service (Art. L. 100-3)[38].

The same intention of providing general, common guidelines also underlies the new regime of *enquêtes publiques* (Book III, Chapter IV, Art. L. 134-1 *et seq*.). In this case the drafters of the *Code* undertook the major task of harmonising the twenty or so existing special provisions, including those contained in the *Code général des collectivités locales*, *Code de l'urbanisme*, *Code de l'envirennoment* and *Code de l'expropriation*[39].

In actual fact, the provisions now laid down in the CRPA do not supersede the special regimes contained in the latter two Codes – in defining the scope of application, Article L. 134-1 expressly excludes them – whereas they generally cover all the other cases already envisaged in other sectoral sources[40], as well as establishing common rules applicable in the event of atypical public inquiries.

The new regime, based on a total of five legislative provisions and twenty-nine regulatory provisions, essentially concerns the way in which an *enquête publique* is conducted: initiation and the authority responsible for opening the proceeding; designation and compensation of the *Commissair enquêteur* and members of the *Commission d'enquête*; preparation of

[38] A view held by S. Saunier, in *L'association du public aux décisions prises par l'administration*, cit. at 2, who likewise criticised the laconic character of the provision, as its exact interpretation will only be possible in the event of litigation, with an evident violation of the principle of legal certainty. In this regard, see also the considerations of D. Custos, *The 2015 French code of administrative procedure: an assessment*, cit. at 2.

[39] *Loi 2010-788 du 12 juillet 2010*, the so-called *Loi Grenelle II,* had already achieved a first important rationalisation of the legislation. Another important attempt at reorganising the rules on the *enquête publique* was made fairly recently also with the new *Code de l'expropriation* of 2015 (*ordonnance n° 2014-1345 du 6 novembre 2014* and *décret n° 2014-1635 du 26 décembre 2014*), which introduced, alongside provisions regarding *enquêtes publiques préalables à une déclaration d'utilité publique*, a complex set of rules dedicated to *enquêtes publiques de droit commun*, not tied to operations of forced expropriation.

[40] Art. 5 of *ordonnance n° 2015-1341 du 23 octobre 2015* identifies the inquiries that will be subject to the new provisions as of the entry in force of the CRPA. They are essentially the ones envisaged by the *Code des collectivitès territoriales*, the *Code de l'Urbanisme*, the *Code de la voirie routière* and the *Code rural et de la pêche maritime.*

the *dossier* to be used as the basis of the inquiry and presentation of citizens' observations; closure of the inquiry with a concluding report drafted by the Commission and in which it states its reasons; publication and filing of the report.

Notwithstanding the consideration that a large part of the provisions of the CRPA faithfully adhere to the model contained in *Code de l'expropriation*, taking into account the new legislation as a whole, the first commentators highlighted that it afforded fewer protections of rights as regarded the procedure for both the *enquêtes publiques* provided for in forced expropriation proceedings and (above all) in those envisaged by the *Code de l'environnement*. This is most likely due to the peculiarity of the latter two proceedings and related to the importance of the rights and interests involved, including public ones. The differences in the new model regard, in particular, the smaller degree of publicity and shorter duration of the procedure, as well as the less robust powers of the *Commissair enquêteur* and his or her position of less impartiality and greater dependence on the public administration.

3.3. The new principle of tacit consent and the regime of *décisions implicites*

The introduction of the principle that "*silence de l'administration vaut acceptation*" is one of the most important novelties of the Code. Not only does it represent a radical change in perspective for French administrative law, but also and above all, as we shall see, its introduction precisely demonstrates the influence that European administrative law had on the formulation of the Code.

The principle of tacit consent and the mechanism of the positive *décision implicite*, practically unknown in France up to now[41], constitute exactly a logical inversion of the general rule of "*silence vaut rejet*".

[41] In actual fact, in 1994 the *Rapport* Picq, *Pour une plus grande efficacité de l'administration* had already proposed the adoption of the rule of tacit consent for all authorisations of a non-financial character. This report was followed, in 1996, by a circular of the Prime Minister which called on the individual ministers to catalogue all the cases in which tacit consent could be applied. Finally, already at the time of the *loi du 12 avril 2000*, its introduction was a subject of discussion in Parliament. In this regard, D. Ribes, *Le nouveau principe*

In actual fact, the regime of tacit consent had already been provided for in the *loi du 12 novembre 2013*, which in turn amended Articles 21 and 22 of the *loi du 12 avril 2000*, but the subject was addressed in its entirety in Book II ("*Les actes unilatéraux pris par l'administration*"), Title III ("*Les décisions implicites*") of the Code.

Article 21 of the *loi DCRA* had established, precisely, the general rule of *silence vaut rejet*. The subsequent Article 22 provided for the possibility of identifying cases of *décision implicite d'acceptation* based on a secondary source and where certain conditions were met. However, this option was strongly circumscribed by administrative and constitutional case-law[42].

The effect achieved by the CRPA was thus to invert the relationship between rule and exception. The rule, as now set forth in Article L. 231-1, is that "*Le silence gardé pendant deux mois par l'administration sur une demande vaut décision d'acceptation*". However, the two-month period, which starts from the time the application is received by the public administration, may be derogated from on grounds of urgency or complexity of the procedure (Art. L. 231-6). The list of proceedings for which the tacit consent principle now applies is published on the Government Internet site; it also contains a specification of the competent authority and effective time limit for the adoption of a tacit decision.

As far as procedural guarantees are concerned, Article L. 232-2 introduces, as a protection for third parties, an obligation to publicise applications submitted by a private individual and, where appropriate, send an individual notification, also by electronic means, containing an express specification of the date on which the application will be regarded as accepted in the absence of an express decision to reject it. Article L. 232-3 instead recognises the interested party's right to obtain a written certification of the tacit assent upon request.

«silence de l'administration vaut acceptation», in AJDA 389 (2014); C. Broyelle, *Le traitement du silence et de l'inertie de l'administration en droit français*, in J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative*, cit. at 5, 675.

[42] Cons. const. 18 janv. 1995; CE, sect., 1995, *Tchijakoff*, nº 127763; CE 21 mars 2003, *Synd. intercom. de la périphérie de Paris pour l'électricité et les réseaux,* nº 189191; and, more recently, CE 30 décembre 2015, *Cie nationale des conseils en propriété industrielle CNCPI*, nº 386805 and n° 386807.

Notwithstanding the innovative character of these provisions, the effectiveness of this principle has been greatly limited by the truly sensational extent of the exceptions. In addition to those initially provided for in the Code itself – i.e. cases in which the application is aimed at obtaining the repeal or amendment of regulations or calls into question decisions already taken; has the nature of a complaint or an administrative appeal; is of a financial nature; also, in cases where tacit consent would be incompatible with the fulfilment of international and European commitments, the protection of national security and public law and order, the protection of freedom and the fundamental principles enshrined in the Constitution; and, finally, in relations between the public administration and its employees (Art. L. 231-4) – we must now add the countless derogations contained in the more than thirty decrees adopted in the past year for "motifs *de bonne administration"*, on the basis of the express authorisation provided under Article L. 231-5.

Almost paradoxically, therefore, the scope of application of what was supposed to be a general rule has been narrowed, in reality, to a very limited number of cases[43].

3.4. The new provisions regarding the *retrait* and *abrogation* of unilateral administrative acts

The *corpus* of the thirteen articles dealing with the "*Sortie de vigeur des actes administratifs*", contained in Book II, Title IV of the Code ("*Actes unilatéraux pris par l'administration*"), adopted on the basis of the express mandate to "*simplifier les règles de retrait et d'abrogation des actes unilatéraux de l'administration dans un objectif d'harmonisation et de sécurité juridique*" (Art. 3, para. 3, point 2), has brought an end to the redundancy resulting from the combination of two legislative provisions and at least four different orientations manifested in the case-law on this subject.

The reference here is to Articles 16-1 ("*Abrogation des actes réglementaires*") and 24 ("*Retrait des décisions implicites*

[43] A critical view of the new principle was expressed, at the time of its introduction in the law of 2013, by B. Seiller, *Quand les exceptions infirment (heureusement) la règle: le sens du silence de l'administration*, in RFDA 35 (2014). See also: H. Pauliat, *Le silence gardé par l'administration vaut acceptation: un principe en trompe-l'œil?*, in JCP Adm. actu. 737 (2013); R. Noguellou, *Sur le silence de l'administration*, in Dr. Adm. alèrte 1 (2014).

d'acceptation") of the *loi DCRA*; and the judgments in the cases: *Ternon* (CE, ass., 26 Oct. 2001, no. 197018, on the *retrait des décisions individuelles explicites créatrices de droits*); *Mme Cachet* (CE, 3 Nov. 1922, no. 74010, on the *retrait des décisions implicites de refus créatrices de droits*); *Société Graciet* (CE, ass., 21 Oct. 1966, no. 61851, regarding the *retrait des actes réglementaires*); *Coulibaly* (CE, sect., 6 Mar. 2009, no. 306084, on the *abrogation des décisions individuelles créatrices de droits*)[44].

The new legislation, welcomed with a certain degree of favour by French legal scholars, hinged upon the Code's distinction between *décisions créatrices de droits* and *actes non créateurs de droits* (in turn divided into *actes réglementaires* and *actes non réglementaires)*. The rules regarding *abrogation* and *retrait* – the reasons justifying the voiding of an administrative act, as well as the period in which its elimination may take place – work differently depending on whether or not an administrative decision creates rights for the party concerned.

In the opening part of the Title in question, the Code also provides a definition of *retrait* and *abrogation*, in order to clarify the temporal effectiveness of the two measures, which exclusively target illegittimate administrative acts – *ex tunc*, in the former case, *ex nunc*, in the latter – thus overcoming the existing inconsistencies in both legislation and case-law[45].

The new legislation is substantially based on a generalisation of the rules defined by the *arrêt Ternon:* the withdrawal and repeal of a unilateral act are possible, in principle, on condition that the act is illegitimate and the measure is implemented within four months of its adoption.

The Code extends such criteria above all to explicit or implicit illegitimate *décisions créatrices de droits*, irrespective of whether the withdrawal or repeal was undertaken by an authority

[44] B. Seiller, *La sortie de vigueur des actes administratifs*, cit. at 2, 58; G. Eveillard, *La codification des règles de retrait et d'abrogation des actes administratifs unilatéraux*, cit. at 2, 2474.

[45] Art. L. 240-1: "*Au sens du présent titre, on entend par: 1° Abrogation d'un acte: sa disparition juridique pour l'avenir; 2° Retrait d'un acte: sa disparition juridique pour l'avenir comme pour le passé*".

on its own initiative or at the request of a third party[46]; or in response to an application of the party directly concerned[47].

The same rule is again proposed for the withdrawal of illegitimate *actes non créateurs de droits* (*réglementaires* and *non-réglementaires*)[48].

Outside of these cases, the *retrait* and *abrogation* of *actes créateurs de droits* may take place without any time limit, as in the case of the revocation of a subsidy where eligibility requirements are not met or, more in general, the revocation of a *décision créatrice de droits* if the conditions it was subject to are not met[49], and, finally, when the withdrawal or repeal has been requested by the individual concerned in the place of a more favourable decision, provided that this does not prejudice the rights of other parties[50].

To this second rule the Code further ascribes the repeal of *actes reglementaires* and *actes non réglementaires non créateurs de droits*[51] and the withdrawal of sanctions[52].

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[46] Art. L. 242-1: "*L'administration ne peut abroger ou retirer une décision créatrice de droits de sa propre initiative ou sur la demande d'un tiers que si elle est illégale et si l'abrogation ou le retrait intervient dans le délai de quatre mois suivant la prise de cette décision*".

[47] Art. L. 242-3: "*Sur demande du bénéficiaire de la décision, l'administration est tenue de procéder, selon le cas, à l'abrogation ou au retrait d'une décision créatrice de droits si elle est illégale et si l'abrogation ou le retrait peut intervenir dans le délai de quatre mois suivant l'édiction de la décision*".

[48] Art. L. 243-3: "*L'administration ne peut retirer un acte réglementaire ou un acte non réglementaire non créateur de droits que s'il est illégal et si le retrait intervient dans le délai de quatre mois suivant son édiction*".

[49] Art. L. 242-2: "*Par dérogation à l'article L. 242-1, l'administration peut, sans condition de délai: 1° Abroger une décision créatrice de droits dont le maintien est subordonné à une condition qui n'est plus remplie; 2° Retirer une décision attribuant une subvention lorsque les conditions mises à son octroi n'ont pas été respectées*".

[50] Art. L. 242-4: "*Sur demande du bénéficiaire de la décision, l'administration peut, selon le cas et sans condition de délai, abroger ou retirer une décision créatrice de droits, même légale, si son retrait ou son abrogation n'est pas susceptible de porter atteinte aux droits des tiers et s'il s'agit de la remplacer par une décision plus favorable au bénéficiaire*".

[51] Art. L. 243-1: "*Un acte réglementaire ou un acte non réglementaire non créateur de droits peut, pour tout motif et sans condition de délai, être modifié ou abrogé sous réserve, le cas échéant, de l'édiction de mesures transitoires dans les conditions prévues à l'article L. 221-6*" and Art. L. 243-2: "*L'administration est tenue d'abroger expressément un acte réglementaire illégal ou dépourvu d'objet, que cette situation existe depuis son édiction ou qu'elle résulte de circonstances de droit ou de fait postérieures, sauf à ce que l'illégalité ait cessé. L'administration est tenue d'abroger expressément un acte non réglementaire non créateur de droits devenu illégal ou sans*

As may be seen from actual cases, the exact modulation of the regime applicable to the two categories of acts also depends on two further circumstances: in the case of *actes créateurs de droits*, the origin of the initiative is decisive; in the case of the second group of acts, the type of measure to be put in place.

In relation above all to the latter category, the needs underlying the principle of *securité juridique* have proved to be decisive: they have imposed, on the one hand, the extension of the strictest conditions deriving from the *arrêt Ternon* to the case of the *retrait* of *actes administratifs non créateurs de droits*, and, on the other hand the need to implement transitory measures in the event that such acts are withdrawn or repealed.

It follows, above all, that the illegitimacy of a regulatory act must justify more frequently repeal (with *ex nunc* effects) than withdrawal (with *ex tunc* effects), the latter being possible only within four months of its adoption. Secondly, the requirements of legal certainty oblige a public authority to adopt transitory measures, at the time of reasserting its regulatory power, in order to enable private individuals or entities to adapt to subsequent changes in the regulations governing their activity[53].

4. The influence of European administrative law on the CRPA

When looking at the "*procédure administrative extranationale*", both that of other national legal systems and that of European or international origin, the first impression manifested by some French commentators was that "*cela ne change guère au regard de ce que nous connaissons déjà en droit interne*"[54].

The *Code*, as said earlier, is the result of a codification prevalently *à droit constant*, which brings few innovations to the body of legal and administrative provisions elaborated over time

objet en raison de circonstances de droit ou de fait postérieures à son édiction, sauf à ce que l'illégalité ait cessé".

[52] Art. L. 243-4: "*Par dérogation à l'article L. 243-3, une mesure à caractère de sanction infligée par l'administration peut toujours être retirée*".

[53] Art. ex art. L. 221-5, which incorporates the principles of case-law, CE, ass., 24 mars 2006, n° 288460, *Société KPMG, Société Ernst & Young Audit*.

[54] M. Gautier, *Perspectives internationale et européenne*, in Aa.Vv., *Les procédures administratives* (2015), 69.

by the *Conseil d'Etat*. Thus, in response to question as to whether the new French Code of administrative procedure has been contaminated to some degree by European administrative law, it would be simple to answer in the negative.

Moreover, one might add by way of argument, French administrative law is an original model that has often played a role in the opposite direction, serving as a foundation for European law[55]. It suffices to consider the large influence exerted by the principles of *service public* and by the *contrat administratif* on EU law, at least at the initial stage.

Nor, on the other hand, can we forget the reciprocal tensions between the French and European legal systems, which are increasingly evident when the French legal identity is called into question[56]. Here, too, it would be sufficient to recall the long standoff between the Court of Justice of the European Union and France over the *conventions d'aménagement* and their subjection to the competition rules requested by the EU: it began in 2001 and ended eight years later after repeated legislative interventions and an equal number of rulings of the *Conseil d'Etat* and of the CJEU itself[57].

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[55] See, for example, J. Rivero, *Le problème de l'influence des droits internes sur la Cour de Justice de la C.E.C.A.*, 4 Annuaire Français de Droit International (1958), 295, where the Author highlights, among other things, the influence exerted by the French administrative procedural system on the initial functioning of the Court of Justice. In general, regarding the French origins of the European administrative system, see, e.g., C. Harlow, R. Rawlings, *Process and Procedure in EU Administration*, cit. at 1, 13, and, in the Italian legal literature, M. D'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia* (1992); S. Cassese, *La costruzione del diritto amministrativo: Francia e Regno Unito*, in Id., *Trattato di diritto amministrativo* (2003), 1; G. della Cananea, *Administrative law in Europe: a historical and comparative perspective*, in 1 Italian Journal of Public Law (2009), 162.

[56] In the words of D. Costa, in her intervention at the 3rd International Congress of the *Red Internacional de Derecho europeo* (RIDE), *Diritto amministrativo europeo e diritti nazionali: influenze, tensioni dialettiche e prospettive*, Università degli studi di Roma Tre, 2 December 2016.

[57] C. Devès, *Le Conseil d'Etat met fin au débat sur l'inconventionnalité des conventions et concessions d'aménagement conclues avant 2005 sans mesure de publicité et de mise en concurrence*, in 6 La Semaine Juridique Administrations et Collectivités territoriales 2054 (2012).

If one wanted to continue reading the relationship between France and the European Union in this light, the fact that the French Council of State affirmed that the EU and the national legal orders constitute an "*ordre juridique integré*"[58] only in 2011 would come as no surprise, although the fiftieth anniversary of the *Costa* judgment fell just recently[59].

However, this does not seem to be the most correct interpretation.

On the contrary, it seems reasonable to argue, for reasons that will be explained below, that the Code and the very idea of codifying the rules underlying the relations between the public and the administration, conceived in terms not of opposition or conflict but of exchanges and dialogue[60], is in itself an expression of a modern, European idea of codification, based on the Community principle, by now interiorised, of good administration[61].

The French Code is therefore a modern text not so much, or rather, not only because of the provisions it contains[62], but precisely because – and unlike the laws and codes on administrative procedure of other European States – it was born in

[58] C.E. Ass., 23 décembre 2011, *M. Kandyrine de Brito Paiva,* n° 303, 678. In general, on the relationship between the French administrative jurisprudence, the CJEU and the European law, see the *Dossier thématique* of the *Conseil d'Etat*, *Le juge administratif et le droit de l'Union européenne* (2015); and also C. Otero, *Le Conseil d'Etat et la CJUE: de se battre le juge administratif s'est-il arrêté ?*, in Revue de l'Union européenne 182 (2013).

[59] On the celebration of this anniversary by the French doctrine, see: *Les 50 ans de l'arrêt Costa: de la primauté absolue au dialogue des juges?*, in 593 *Revue de l'Union européenne*, (2015).

[60] On the choice to employ the terms "*public*", "*administrations*", "*dialogue*" e "*relations*", and on their meaning, see: P. Terneyre, J. Gourdou, *L'originalité du processus d'élaboration du code*, cit. at 2; C.-A. Dubreuil, *Le champ d'application des dispositions du code*, cit. at 2; M. Vialettes, C. Barrois de Sarigny, *Le projet d'un code des relations entre le public et les administrations*, cit. at 2.

[61] D. Custos, *The 2015 French code of administrative procedure*, cit. at 2.

[62] The modern and "new generation" character of the contents of the French Code is recognised also by G. Napolitano in *Il Codice francese e le nuove frontiere della disciplina del procedimento in Europa*, in 1 Gior. dir. amm. 5, 7 (2016).

a wholly new legal and, if we like, cultural *milieu*, namely, that of European administrative law[63].

In this latter perspective, it is worth considering first of all an aspect of a temporal character that is certainly peculiar. While on the one hand it is undoubtedly true that France arrived at the process of codifying the rules governing administrative procedure later than other European countries, on the other hand precisely French administrative law and European administrative law are experiencing, at present, a significant temporal coincidence.

In fact, it was exactly in 2013 that both the French Parliament and the European Parliament[64] were jointly advocating an initiative aimed at the codification of the rules on administrative procedure. In addition, the drafting of the *Code* itself proceeded hand in hand with the drafting, on the part of an eminent group of scholars, of the well-known Code ReNEUAL on the administrative procedure of the European Union, and the preparatory work on the two Codes saw the involvement, in a continuous exchange, of experts engaged in the development of both texts[65]. Moreover, precisely France's choice to codify the rules on administrative procedure and the end, therefore, of the French exception in the landscape of continental administrative law could have a beneficial effect also in relation to the final adoption of European rules in this area, a process that is presently at an inexplicable standstill.

However, leaving aside hermeneutic criteria of a historical character, the influence of European administrative law on the French Code can also be perceived in other respects.

Although it is true that the European system rests upon the principle of the institutional and procedural autonomy of Member

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[63] Also P. Gonod (in *Codification de la procédure administrative. La fin de «l'exception français»?*, cit. at 3, 398.) speaks of "*moyenne européenne*" in reference to the Code.

[64] Cf. the European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union. Regarding the draft code submitted by the ReNEUAL group of experts, see G. della Cananea, D.-U. Galetta, H.C.H. Hofmann, J.-P. Schneider, J. Ziller (eds.), *Codice ReNEUAL del procedimento amministrativo dell'Unione europea* (2016).

[65] J.-B. Auby, *Introduction. Historique de l'ouvrage*, in J.-B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative,* cit. at 5, 1, 2; M. Vialettes, C. Barrois de Sarigny *Question autour d'une codification*, cit. at 2, 2422.

Countries, it is common knowledge in the legal community that European administrative law by now exerts a strong influence on national administrative law, including French law[66]. This is not the right place to examine the legal mechanisms arising from the principles of *primauté*, effectiveness and equivalence both in the application, by the States, of Community law and, due to a spill-over effect, outside its narrow areas of relevance. Here it is sufficient to point out an essential circumstance that enables us to argue what was affirmed a little earlier, namely, that the *Code* has been permeated by a European legal culture which is wholly different compared to the first national experiences of the last century and has been, in all likelihood, determinant also for French intellectual change.

We are referring, in particular, to the very justification of the Code, which, according to its authors, rests exactly on two general principles of European Union law, legal certainty and the protection of the legitimate expectations of private individuals. Moreover, the transposition of these two principles into the French legal system was precisely the result of a fruitful dialogue between the two systems and, in particular, between the CJEU, which had already recognised them as early as 1962[67], and the *Conseil d'Etat*, which had formerly circumscribed the scope of their application to disputes regarding European law and, later, starting from 2006, with the *arrêt Ternon* concerning the *retrait* of acts of the public administration, it confirmed their general applicability also in relationships governed by internal law[68].

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[66] About the influence of the European law on the French administrative law, cfr. J. Sirinelli, *Les transformations du droit administratifs par le droit de l'Union européenne* (2009); J.-B. Auby, *L'influence du droit européen sur les catégories de droit public* (2010); J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen*, cit. at 1, and especially the Parte VI dedicated to the *Incidences du droit de l'Union dans les droits administratifs nationaux (analyse dans le cas français)*, 1057.

[67] CJEU of 6 April 1962, *Bosch* – Case 13/61; CJEU of 14 July 1972, *Azienda Colori Nazionali* – Case 57/69. On the principles of legal certainty and of protection of legitimate expectations in the European law, vd. D. Dero-Bugny, *Les principes de sécurité juridique et de protection de la confiance légitime*, in J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen*, cit. at 66, 651.

[68] See: CE 19 juin 1992 n° 65432, *FDSEA des Côtes du Nord*; CE 9 mai 2001 n° 210944, *Entreprise personnelle de transports Freymuth*; CE, ass., 24 mars 2006, n° 288460, *Société KPMG*, *Société Ernst & Young Audit*; Cons. const. 29 déc. 2012, n° 2012-662 DC. For some references on the doctrinal debate of those years, see: B. Pacteau, *La sécurité juridique, un principe qui nous manque?*, in AJDA 151 (1995);

Furthermore, in 1991 and then again in 2006, the *Conseil d'Etat* published two Reports on these topics, thus definitively enshrining the two principles in the French legal system as well[69]. The *Code relatif aux relations entre le public et l'administration* now stands as the natural outcome of this process, as the exact positive precipitate of those same principles.

It seems, moreover, that the immanence of the principles of *sécurité juridique* and *confiance lègitime* in the CRPA cannot be denied merely because they are not explicitly stated within the Code, as occurs, for example, in Italian law on administrative procedure through its formal referencing of the principles of Community law (see Art. 1, law no. 241/1990)[70].

According to what we have been able to learn from the comments on the preparatory work, the fact that they are not expressly mentioned in the *Dispositions préliminaires* does not mean, in fact, that the authors did not want to take them into account[71]. They preferred rather to provide a list that was neither exhaustive nor strict, and above all not declaratory, a characteristic typical of other French Codes, and which upheld the idea of an agile, practical instrument at the disposal of citizens and users, not just of jurists and the administrations themselves.

Finally, for our purposes here, it is worth again drawing attention precisely to the relationship between citizens (between "public") and administrations. It seems in fact appropriate to focus on some reflected or indirectly influencing effects deriving from the process of European integration and the mere fact of France's membership in the Union.

C. Landais, *Sécurité juridique: la consécration*, in AJDA 1028 (2006); and more recently, S. Braconnier, *France*, in J.-B. Auby (ed.), *Codification of Administrative Procedure*, cit. at 5, 198; D. Dero-Bugny, *Les principes de sécurité juridique et de protection de la confiance légitime*, cit. at 67, 652, 653.

[69] See: *Conseil d'État, Rapport public annuel 1991, De la sécurité juridique* and *Conseil d'État, Rapport public annuel 2006, Sécurité juridique et complexité du droit.*

[70] In this regard, see: G. della Cananea, *Il rinvio ai princìpi dell'ordinamento comunitario*, in M.A. Sandulli, *Codice dell'azione amministrativa* (2017), 133.

[71] See, in particular, Art. L. 100-2: "*L'administration agit dans l'intérêt général et respecte le principe de légalité. Elle est tenue à l'obligation de neutralité et au respect du principe de laïcité. Elle se conforme au principe d'égalité et garantit à chacun un traitement impartial*". For an exegesis of the provision, see: M. Vialettes, C. Barrois de Sarigny, *La fabrique d'un code*, cit. at 2.

The recent emphasis laid on simplification policies in the EU's evaluations of national reform programmes, including France's[72], may represent, if we look closely, a further key to understanding the entry into force of general rules on administrative procedure in this country as well.

The *choc de simplification* launched by François Hollande for the three-year period 2013-2015 resulted in the adoption of over two hundred measures regarding citizens, businesses and public administration[73]. Among them, as we can read in the chapter headed *Simplifier les règles administratives, fiscales et comptables des entreprises* of the French national programmes for 2015 and 2016, in addition to various legislative initiatives relating to transparency and the prevention of corruption[74], there are amendments to the rules for the *enquête publique*, aimed at streamlining the formalities and favouring broad public participation, also through online consultation; more in general, digital administration and the possibility for citizens and businesses to communicate with public authorities via electronic means; the introduction of the rule of tacit consent and the new rules governing the repeal of administrative acts; finally, the reduction of the period for the issuance of construction permits and other authorisations. These measures, as will be noted, are largely contained in the CRPA itself.

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[72] See, for the years 2015 and 2016, respectively, the *Recommandation du Conseil du 14 juillet 2015* and *du 12 juillet 2016, concernant le programme national de réforme de la France et portant avis du Conseil sur le programme de stabilité de la France* (2015/C 272/14 and 2016/C 299/27); and the *Document de travail des services de la Commission, Rapport 2016 pour la France contenant un bilan approfondi sur la prévention et la correction des déséquilibres macroéconomiques* (SWD(2016) 79 final).

[73] As stated in the communiqué of the CIMPA mentioned previously: "*Les simplifications administratives répondent ainsi à une forte attente des usagers et constituent l'un des principaux leviers d'amélioration de la qualité de service et d'accroissement de la satisfaction des usagers*". A constant updating on the realization of the objectives contained in the Program "*Moderniser l'Etat. Le choc de simplification*" is available on http://www.gouvernement.fr/action/le-choc-de-simplification.

[74] Reference is being made in particular to the so-called *Loi Sapin II*, *loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, which, after several legislative interventions in 2013, established provisions in this area. More specifically, the law introduced the *Agence française anticorruption*, with the express aim of bringing French legislation into line with European and international standards.

Ultimately, we can say that the very idea of the Code, and hence the consequent efforts to gather together and intelligibly reformulate legal rules, along with many of the principles present therein, and which have been discussed in the previous pages, are justified precisely in light of the general European principles of good administration, legal certainty and the protection of legitimate expectations, as well as precise objectives of administrative, legislative and regulatory simplification and, more in general, the modernisation of public administration, objectives also pursued by the European Union itself[75].

As the Vice President of the *Conseil d'Etat* affirmed, when greeting the Code's entry into force, "*la simplification n'est pas un objectif en soi. Elle est le moyen d'atteindre des objectifs plus larges […]: la sécurité juridique, la cohésion sociale, la compétitivité des entreprises, la capacité à mener à bien des projets. S'agissant de l'action publique, les réformateurs parlent plus volontiers de modernisation ou de performance de l'action administrative. Il est vrai que ce qui est le plus souvent recherché est l'efficacité, plutôt que la simplicité en tant que telle. Mais, l'une ne peut aller sans l'autre. Car l'efficacité et la modernisation de l'action publique passent par la sélectivité et la clarté des objectifs, mais aussi par l'efficience des moyens mis en œuvre et donc la simplification des dispositifs*"[76]. In this sense, therefore, according to some, despite adhering to European principles and common values, France continues to maintain its own character of undeniable originality (and distinctiveness) in the European landscape. Indeed, as has been argued, the concept of simplification underlying the French codification differs from the way it has been understood based on a certain economic analysis of law of Anglosaxon origin, often adopted precisely by international organisations, the European Union, and some Member States like Germany. The notion of

[75] That the Code is the result of legislative and administrative simplification is moreover demonstrated by the fact that the legislative delegation to the Government was included, at a later time, in a draft law on simplification already in the process of being defined, which in turn fits into the *choc de simplification* mentioned previously. In this regard, see: M.-A. Levêque, C. Verot, *Comment réussir à simplifier? Un témoignage à propos du code*, cit. at 2, 15.

[76] J. Sauvé, *La simplification du droit et de l'action administrative, Introduction au Colloque organisé par le Conseil d'Etat et la Cour des comptes, Vendredi 16 décembre 2016*, 6. For an analysis of the approach of the French jurisprudence to the politics of simplifying legislation, see: C. Touboul, «*Simplifier n'est pas juger». Le juge et la simplification du droit*, in RFDA 105 (2017).

simplification as a legislative retrogression, as a mere reaction to the financial cost of laws and a reduction in the regulatory burden on businesses is viewed with distrust by France, as the *le cheval de Troie d'une entreprise libérale de déregulation*»[77].

Thus, though this legal system has become progressively more open to the idea of codifying the rules governing administrative action, the aim is certainly not to "*empêcher la volonté politique de s'exprimer*", but rather, on the contrary, to ensure that, by expressing these rules in a consistent, certain manner, it can "*produire les résultas tangibile espérés et ainsi restaurer l'efficacité de l'action publique*"[78]. A legislative simplification *à la française*, therefore, that goes in the direction not of *deregulation*[79], but rather of quality, effectiveness and hence legal certainty in a rediscovered *ésprit des lois* deriving from the most noble tradition of this country, and is aimed precisely at finding a balance between public and private interests, between written law and case-law, and among the consistency, accessibility and intelligibility of rules within the uneliminable legal and administrative complexity typical of our times.

5. Recent changes to administrative procedure in Spain, Portugal and Italy: some points of comparison

In Europe, likewise in 2015, at least three other major countries intervened in their own legislation governing administrative action. In actual fact, as in France's case, the adoption of the Portuguese code of administrative procedure, the approval of a new Spanish law on the common proceeding of public administrations and the amendments introduced to the corresponding Italian law seem to owe more to a vertical influence coming directly from the European Union than to a horizontal

[77] M.-A. Levêque, C. Verot, *Comment réussir à simplifier? Un témoignage à propos du code*, cit. at 2, 13.
[78] *Ibidem*.
[79] A.-J. Kerhuel, B. Fauvarque-Cosson, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, in 57 Am. J. Comp. L. 811 (2009).

circulation among the different legal frameworks of the various States[80].

In Spain, the former *Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (LRJPAC) was replaced in full by the new *Ley 39/2015 de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas* (LPACAP), to which we may add several provisions of the new *Ley 40/2015 de 1 de octubre, de Régimen Jurídico del Sector Público* (LRJSP).

As we learn from the *Preámbulo* of *Ley 39/2015*, the new law seeks precisely to pursue the objectives of transformation and modernisation of Spanish public administration, as expressed in the *Informe* issued by the CORA in June 2013 and subsequently presented to the EU with the *Programa nacional de reformas de España para 2014*[81]. Thus, in response to European Union recommendations, as well as the Report of the OECD "*Spain: From*

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[80] These aspects are inevitably tied to the broader subject of cross-fertilizations and legal transplants in European systems; here we can mention only a few fundamental contributions: J. Bell, *Mechanism of Cross-Fertilizations of Administrative Law in Europe*, in J. Beatson, T. Tridimas (eds.), *New Directions in European Public Law* (1998); Id., *Convergences and divergences in European Administrative Law*, in Riv. it. dir. pubbl. com. (1992), 23; J. Schwarze, *European Administrative Law* (1992); Id., *The role of general principles of administrative law in the process of Europeanization of National law*, in L. Ortega Alvarez (ed.), *Studies on European Public Law* (2005), 24; P. Craig, *European Administrative Law* (2006); A. Watson, *Legal Transplants. An Approach to Comparative Law* (1993); S. Cassese, *Le problème de la convergence des droit administratifs: vers un modèle administratif européen?*, in *L'Etat de droit, Mél. en l'honneur de Guy Braibant* (1996), 47; Id., *Diritto amministrativo comunitario e diritti amministrativi nazionali*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo, Parte Generale* (2007), 1; N. Garupa, A. Ogus, *A Strategic Interpretation of Legal Transplants*, in 35 Journal of Legal Studies (2006), 339; M.P. Chiti, *Les droits administratifs nationaux entre harmonisation et pluralisme eurocompatible*, in J.-B. Auby, J. Dutheil de la Rochère, *Traité de droit administratif européen,* cit. at 66, 867 ; G. della Cananea, *La comparazione dei diritti amministrativi nazionali nell'Unione Europea tra omogeneizzazione e diversità culturali*, in G. Falcon (ed.), *Il diritto amministrativo dei Paesi Europei tra omogeneizzazione e diversità culturali* (2005), 409; Id., *Transnational public law in Europe. Beyond the* lex alius loci, in M. Maduro, K. Tuori, S. Sankari, *Transnational Law. Rethinking European Law and Legal Thinking* (2014), 321.

[81] A. Boto Alvaréz, *La reordinación de las estructuras administrativas como mecanismo de reducción del gasto público: tendencias globales*, in A. Ezquerra Huerva, *Crisis Económica y Derecho Administrativo. Una visión general y sectorial de las reformas implantadas con ocasión de la crisis económica* (2016), 143.

Administrative Reform to Continuous Improvement" expressly referenced in the Preamble of the law, the Spanish legislator, citing the principles of "*regulación inteligente*" and "*seguirdad jurídica*", justified the new rules by citing the need to "*dinamizar la actividad económica, simplificar procesos y reducir cargas administrativas*" and to "*garantizar de modo adecuado la audiencia y participación de los ciudadanos en la elaboración de las normas y lograr la predictibilidad y evaluación pública del ordenamiento*".

These objectives are reflected precisely in the largest innovations of *Ley 39/2015*: the overhaul of legislation concerning the time limits for the conclusion of a proceeding, based on a calculation also expressed in hours; introduction of the conclusion of a proceeding in simplified form, in cases where the procedure is not particularly complex or for reasons of public interest, with a thirty day time limit; the inclusion, within the same law, of rules on digital administration and express sanctioning of the right of citizens to interact with public authorities using electronic means; some limited additions to the rules for the repeal of *actos de gravamen* and *actos desfavorables,* the possibility of which is now restricted to an unspecified limitation period; finally, the introduction of new provisions regarding administrative rulemaking, which opens the door to broad citizen participation[82].

Again in 2015, Portugal also adopted, with *Decreto-Lei n.º 4/2015, de 7 de janeiro*, a new *Código do Procedimento Administrativo*, which, unlike the Spanish law, significantly amended the previous CPA of 1991 by introducing major innovations.

As stated in the Portuguese decree, once again in the Preamble, the formulation of a new text was imposed not only by the need to update some precepts and adapt to developments in case-law and legal doctrine, but also in view of comparative law and the legislation of the European Union itself, along with the exhortations coming from some international organisations. Also in this case, the pursued objective is to "*...Transformar profundamente o modo de funcionamento da Administração Pública nas suas relações com os cidadãos*".

[82] On the LPACAP see 2 (2016) *Actualidad administrativa*, entirely dedicated to the *Ley 39/2015.* About the influence of European law on the Spanish public administration see, *inter alia*, RAP 200 (2016), *El Derecho administrativo a los 30 años de nuestro ingreso en la Unión Europea.*

In a "*visão mais moderna do direito administrativo*", the new Portuguese provisions outline the features of an open, transparent, participatory, rapid and efficient, simple and impartial administration.

In the case of the new Portuguese code, one can perceive the European influence to a much greater degree, but also the influence – as expressly stated in the part setting forth the reasons for the decree – of the experiences of other legal systems, in particular the German, Italian and Spanish ones.

Therefore, the reader will not fail to notice the express mention, in the general provisions, of the principles of good administration, proportionality, reasonableness and impartiality, good faith and collaboration with private individuals and entities, and the principle of loyal cooperation with the European Union, among others.

As in the case of the Spanish law and the French Code, moreover, there are numerous provisions regarding the digitalisation of administrative procedure. From the Italian experience, the new CPA borrows rules such as those on the designation of a person responsible for each proceeding, the *Conferenza di servizi* (a procedural format designed to enable coordination among different authorities), in the dual form of the *conferência de coordenação* and the *conferência deliberativa*, and administrative agreements (*acordos endoprocedimentais*). The new provisions on the so-called *auxílio administrativo*, on the other hand, are expressly drawn from corresponding German legislation regarding collaboration and assistence among public administrations (*Amtshilfe*).

The Code also features new rules on administrative transparency, including, in particular, the recognition of the right of citizens to be informed; precise rules regarding the time limits for the conclusion of proceedings; additionally, clarification of the powers of administrative self-correction, with a more effective distinction between the two specific cases of *revogação*, in the strict sense, and *anulação administrativa,* the application of which is now subject in this country as well to a precise time limit. The list of novelties, similarly to what has occurred with the French Code and the Spanish law, is completed by a new Title entirely dedicated to the rulemaking procedure of the public administration, which has been enriched with numerous

provisions on public participation and some options for negotiation with private parties[83].

Unlike Spain and Portugal, Italy has not undertaken a general overhaul of the legislation on administrative procedure. The *l. 7 agosto 1990, n. 241*, amended a considerable number of times since its introduction over 25 years, was recently again amended by an enabling law – *l. 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche* (so-called *Legge Madia*) – and the associated implementing decrees and regulations[84].

According to the minister who proposed it, the public administration reform fits into the framework of general structural reforms «*per consolidare la crescita*» and «*per una ripresa duratura e di qualità*». The reform «*applica la logica della semplicità in quattro grandi aree: l'uso delle nuove tecnologie; la certezza e la velocità dei sì o dei no da parte delle amministrazioni; l'organizzazione più snella ed efficiente delle amministrazioni stesse; una normativa più chiara in alcune materie di particolare importanza*»[85].

In our own country as well therefore, the changes introduced through *l. 124/2015* (amending the administrative procedure law) were aimed at speeding up the conclusion of proceedings, which justified implementing the principle of tacit consent also among public authorities; simplifying and concentrating administrative action, through the new rules governing coordination among public authorities and the provision contained therein regarding the sole representative of state administrations; circumscribing self-correction powers in relation to private activities, so as to ensure a certain degree of

[83] For an analysis of the new dispositions of the CPA, see: C. Amado Gomes, A. Fernanda Neves, T. Serrão, *Comentários ao Novo Código de Procedimento Administrativo* (2016).

[84] See, particularly: *d.lgs. 30 giugno 2016, n. 126*; *d.lgs. 25 novembre 2016, n. 222*; *d.lgs. 30 giugno 2016, n. 127* and *d.p.r 12 settembre 2016, n. 194*. For a punctual examination of the modifications to the *l. 241/1990*, see: M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (2017).

[85] M. Madia, *Prefazione*, in F. Mastragostino, G. Piperata, C. Tubertini (eds.), *L'amministrazione che cambia. Fonti, regole e percorsi di una nuova stagione di riforme* (2015), 11, 12. See, in this respect, the *Raccomandazione sul Programma Nazionale di Riforma 2015* COM(2015) 262 final, with which the Council exhorted the Italian Government to adopt the law of modernization of the public administration, that then was still in discussion in Parliament.

stability in measures attributing economic advantages; streamlining preliminary verifications and authorisation procedures, which has resulted in new changes in respect of notification to the authorities of the start-up of construction work or a new business (SCIA) and tacit consent.

However, *l. 241/1990* does not include any provisions concerning digital administration[86], administrative transparency and civic access, which is modelled after the American FOIA[87]. Finally, unlike their French, Spanish and Portuguese counterparts, Italian lawmakers have preferred not to reform the rules for the participation of citizens in rulemaking processes of the public administration, which remain irremediably anchored to the by now outdated provisions of Article 13 of the administrative procedure law. This is a sign that, as recognised by a number of legal scholars[88], Italian law by now really needs a complete restyling.

What emerges from this brief overview of the main innovations and most important changes introduced in Spain, Portugal and Italy is a progressive convergence in the rules governing administrative action in these countries. In all three, legislative interventions have been justified in the light of the general principles of legal certainty and regulatory simplification;

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[86] Such provisions remain within the Digital Administration Code, most recently amended by *d.lgs. 179 del 26 agosto 2016* on the basis of powers delegated under Art. 1 of *l. 124/2015*, which confirms, among other things, the so-called principle of *digital first.* In this case as well, Art. 3 of the legislative decree expressly sanctions every person's right to use electronic means in relations with the public administration. On the recent developments of the digital administration in Italy, see: E. Carloni, *Tendenze recenti e nuovi principi della digitalizzazione pubblica*, in 2 Gior. dir. amm. 148 (2015); B. Carotti, *L'amministrazione digitale: le fide culturali e politiche del nuovo codice*, in 1 Gior. dir. amm. 7 (2017).

[87] Provisions contained in the so-called *Testo Unico Trasparenza (d.lgs. 33/2013)*, likewise recently amended by *d.lgs. 25 maggio 2016, n. 97* on the basis of powers delegated under Art. 7 of *l. 124/2015*. On the new dispositions see: G. Gardini, *Il paradosso della trasparenza in Italia: l'arte di rendere oscure le cose semplici*, in Federalismi.it 1 (2017); B. Ponti (a cura di), *Nuova trasparenza amministrativa e accesso alle informazioni* (2016).

[88] In these terms, recently, G. Napolitano, *La legge n. 241 del 1990 è ancora attuale?*, in 2 Giorn. Dir. Amm. 145 (2017), and M. Ramajoli, *A proposito di codificazione e modernizzazione del diritto amministrativo*, in 2 Riv. Trim. Dir. Pubbl. 346 (2016).

in all three they were prompted and justified by the same perceived need to modernise the public administration; in all three the underlying legal-political need, reflecting an evident European influence, is the recovery of national economies.

Although the solutions vary, the laws analysed here pursue these objectives by replicating the same approaches: from the emphasis laid on the principles of administrative simplification to the clarification of the limits of the *ius poenitendi* of the administration, from the reinforcement of the participation of citizens, especially in regulatory procedures, to the implementation of transparency and digital administration.

In short, what we are witnessing is a process of European harmonisation. A process that clearly goes beyond the limits of the procedural autonomy of the Member States, and in which the various national administrations appear increasingly like common entities in their functions and action, the integral part of a system that transcends state borders.

6. Conclusion

Overall, therefore, the CRPA may likewise be considered an expression of the same process of Europeanisation of national administrative laws, which consists in a general adaptation of the domestic legal order to common European legal values: a process of harmonisation that by now goes beyond purely the strict implementation of Community law.

It is a phenomenon that has also recently been furthered by the insturments employed by the European Union in order to deal with the crisis, which, given the inevitably binding nature they end up having at least when it comes to budget policies, by now constitute a primary channel of Europeanisation itself.

Certainly, therefore, the recommendations adopted by the Council and Commission within the framework of the European Semester for the coordination of Member States' economic policies and structural reforms by now serve as an unparalleled factor of progressive convergence between the national administrative law of the different States, though the particularities and problems of each will continue to be felt.

In France, not by coincidence, administrative simplification, an objective of the administrative reforms of the last forty years,

gathered pace with the *choc de la simplification* at the centre of the policies of *Modernisation de l'action publique* launched in 2012-2013. And though it is true that principles such as tacit consent, the simplification of authorisations and digital administration were already envisaged in the "Services Directive" of 2006, which already reflected the liberal rigour of European law aimed at maximising the well-known principles of the single market, their effective introduction into the CRPA, as we have seen, is presently justified in light of the measures recommended by the EU to counter the crisis.

In actual fact, this is what has occurred not only in France, but also in the other countries analysed here.

As was noted earlier, the competitiveness of the market has by now become the new parameter of reference for measuring the relationship between public and private, between the authorities and citizens[89]. And the recent amendments to the rules of administrative procedure adopted in Spain, Portugal and Italy, briefly outlined in these pages, point in the same direction, as we have seen. Another recurring *leit motiv* in these three laws is the simplification of administrative authorisation procedures, narrower time limits for the issuance of authorisations, limitations to the exercise of *ius poenitendi* by the public administration, and reinforcement of the principle of transparency and digital administration, all introduced under exactly the same Community influence.

At the same time, the French Code can also be considered the child of another current of European administrative law, aimed at the defence of civil rights, which culminated with EU adherence to the ECHR, first of all, and later with the Treaty of Lisbon[90].

The definitive enshrinement, in 2009, of the right to good administration has transformed the rules of procedure and guarantees – the right to be heard, access to documents, the giving of reasons for the measures taken, tort liability – in a legal statute of the European citizen before a public administration (regardless of which one) which can no longer be disregarded.

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[89] P. Urbani, *Brevissime note sulle modifiche al TU Edilizia dopo lo "Sblocca cantieri"*, in 6 Riv. giur. ed. 123 (2014).

[90] M. Savino, *I caratteri del diritto amministrativo europeo*, in L. De Lucia, B. Marchetti, *L'amministrazione europea e le sue regole* (2015), 232.

It is no coincidence, moreover, that in a context of general distrust towards public authorities (national or otherwise), the principle of/right to good administration is one of the factors of strength that European institutions as well are focusing on, a rediscovered instrument of democratic legitimation and accountability of public powers to citizens[91].

Therefore, the very idea of codifying rules that underpin the relations between the public and administrations, no longer understood in terms of subordination and opposition, but in terms of exchange and dialogue, expresses a modern and European idea of codification, which diverges, at least in part, from the logics on which the first laws on administrative procedure of the last century were based.

Accordingly, in France, first of all, it is also thanks to the European influence that the concept of *procédure administrative*, understood not only as an instrument of guarantee, but also as a means of assuring legitimacy and the accountability of public authorities for their actions, has been progressively extended from the procedural realm and made its entry into substantive law. And, secondly, it is by virtue of these same processes that the reinforcement of the legality of administrative action has also seen the strengthening of the subjective dimension of the relations between the public administration and private individuals, particularly through growing recognition of the adversarial principle and the procedural rights of the parties concerned[92]. On the other hand, as has also been observed[93], in France the absence of any general law on administrative procedure until 2015 was possible and justified also in view of the increasing influence of European law in general and the European Charter of Fundamental Rights in particular. This, at least in part, enabled French administrative law to advance; similar progress was made elsewhere – in Italy for example – thanks to the adoption of general laws on administrative procedure.

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[91] See European governance - A white paper. COM (2001) 428 of 12 October 2001, but also the recent White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025. COM(2017) 2025 of 1 March 2017.

[92] D. Custos, *The 2015 French code of administrative procedure: an assessment*, cit. at 2, 285-286.

[93] J.-B. Auby, *General Report*, cit. at 6, 27.

Therefore, independently of the need to achieve a renewed balance between written law and case-law, between new legislative provisions and general principles, the CRPA undoubtedly represents a step forward in terms of protection and guarantees for citizens, if only because of the new recognised areas of application in respect of the right of defence and above all public participation in regulatory procedures. Analogous provisions – it seems worth again highlighting – have been introduced also in Spain and Portugal. A novelty in comparison to which Article 13 of the Italian law and the formal prohibition it contains definitely appear outmoded.

In conclusion, the fact of having established, in France, the necessary logical and legal preconditions for the codification of administrative procedure, of being a vehicle, in the Member States, of a differentiated set of values, rules and principles of good administration, demonstrates to what degree European administrative law might serve as a stimulus (or at least a prod) for improving the treatment of citizens by administrative actors. After all, the fact that major crises have always generated transformations and even upheavals in institutions and in the rules by which they operate is something we know from common experience. Yet the changes that have taken place, particularly at this stage, require administrations to confront the challenges for change, which should be seen as an opportunity for improvement, especially if they have an impact on the relationship with citizens, with an eye to providing them with real guarantees.

FIGHTING CORRUPTION THROUGH ADMINISTRATIVE MEASURES. THE ITALIAN ANTI-CORRUPTION POLICIES

*Enrico Carloni**

Abstract

There is a widely shared perception that corruption in Italy is a pervasive and systemic phenomenon which affects society as a whole: corruption contributes to undermining confidence in public institutions, distorts competition in the economic sphere (in particular, with regard to public contracts), causes an enormous increase in average costs (and delays) for the provision of infrastructure, favours the poor quality of public works, and constitutes an untenable economic weight for a country that has been in economic crisis for more than five years.

In response to this problem, since 2012, Italy has launched a policy to combat corruption, centered not on a purely repressive approach, but on a perspective of prevention, and containment of the risk of corruption.

The following article provides an overview of recent reforms and their different approaches and measures to prevent corruption in Italy, beginning with administrative anti-corruption policies, the tasks of the National Anti-Corruption Authority and anti-corruption prevention plans, ongoing with measures for risk-avoidance and codes of conduct until approaches to combat corruption by transparency and the Italian "freedom of information act". There are many unresolved issues and uncertainties in the Italian anti-corruption policies: even within these limitations, and considering the "work in progress", the "administrative" fight against corruption remains one of the most important innovations in the Italian administrative system in the decade.

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1. Introduction

Starting from 2012 Italy has developed a new approach for the fight against corruption, based on an administrative prevention system: a complex and articulated system that is an interesting reference in the comparative scenario where we recently witness the proliferation of reforms oriented towards prevention and contrast of corruption.

The following article provides an overview of recent reforms and of the new approach centered on the prevention of corruption risk. In this framework, the objective is to illustrate both the organizational structure and the specific tools that characterize the Italian system of corruption prevention.

The essay will specifically address a number of central aspects in the new legislative framework: the tasks of the National Anti-Corruption Authority, the system of anti-corruption prevention plans, the specific measures enforcing integrity and impartiality, the new approaches to combat corruption by transparency.

The concluding remarks are dedicated to the discussion of shortcomings, unresolved issues and uncertainties in the Italian anti-corruption policies.

2. The context of reforms

Corruption in Italy is a major problem, that traditionally characterized the political and administrative system[1].

Rankings of Transparency International are exemplary in this regard[2]: Italy is sixty-first in an international ranking of 168 countries in which the other countries of Western Europe are usually among the first twenty positions and often in leading positions[3]. The Eurobarometer[4] shows the image of a country with major problems in terms of legality and ethics public, although with very considerable regional differences[5], as well as a critical situation in specific areas of the country (especially in the South)[6].

This problem contributes to undermining confidence in public institutions, distorts competition in the economic sphere (in particular, with regard to public contracts), causes an enormous increase in average costs (and delays) for the provision of infrastructure, determines a poor quality of public works[7], and constitutes an untenable economic weight for a country that has been in economic crisis for more almost a decade.

The activity of public prosecutors, often frustrated by the problematic statute of limitations (the risk that prosecutions for corruption fail because they are time-barred: the calculating of time only ends with the final ruling, and therefore, generally the third level of judgment), and the excessive length of legal proceedings, often results in ineffective penal intervention, which

[1] J.L. Newell, M.J. Bull, *Political Corruption in Italy*, in J.L. Newell, M.J. Bull, *Corruption in Contemporary Politics* (2003) 37-49.

[2] Transparency International, *Corruption perception Index – 2016* (2016) http://cpi/transparency.org/cpi2016/results.

[3] Eg Denmark is first followed by the Scandinavian countries, the Netherlands fifth, Great Britain and Germany are in tenth position: cf. Corruption perception index – 2016, cit. at 2.

[4] European Commission. *Eurobarometer 76.1, Corruption*, February 2012, TNS, Opinion & Social (2012) 374. http://ec.europe.eu/public_opinion/archives/ebs/ebs_374_en.pdf.

[5] Quality of Government Institute, *Measuring the Quality of Government and Sub-national variations a dataset* (2010) http://www.qog.pol.gu.se/data/euproject.

[6] Cf. A. Vannucci, *La corruzione in Italia: cause, dimensioni, effetti*, in B.G. Mattarella, M. Pelissero (eds), *La legge anticorruzione* (2013) 25-58.

[7] Cf. D. Della Porta, A. Vannucci, *The Moral (and Immoral) Costs of Corruption*, in U. Von Alemann (ed.), *Dimensionen politischer Korruption* (2005) 109-134;

in any case is not sufficient to contain or repress the widespread phenomena of corruption[8].

The social and administrative system consists of various experiences, including on the one hand public services that are placed on excellent international standard (such as the national health service in terms of the ratio between cost and performance especially in the center-north of the country) and regions with standards of efficiency and impartiality that differ greatly[9]. This system should not be banalised, considering it simplistically as "corrupt".

However, a series of data and indicators confirm the existence of a rooted and widespread problem: the trend of the main indicators of perception of corruption; the warnings stemming from the monitoring activities of international bodies (such as GRECO – Group d'Etats contre la corruption); the allegations made by those involved in the fight against corruption; the overall analysis of experts in the field of social phenomena, who speak in terms of "systemic corruption"[10] as a dynamic present in the Italian political-administrative context.

The data that can be drawn from the GRECO report, which featured a major in-depth study of the Italian situation[11], other European studies[12], Transparency International reports[13], and the

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[8] In this sense, eg A. Vannucci, *Atlante della corruzione* (2012); D. Della Porta, A. Vannucci, *The controversial legacy of "mani pulite": a critical analisys of italian corruption and anti-corruption policies*, in 1 Bullettin of Italian Politics (2009) 233-263; Transparency International, *Timed out: statutes of limitations and prosecuting corruption in EU countries* (2010) www.transparency.ee/cm/files/statutes_of_limitations_web.pdf.

[9] According with the analisys of R. Putnam, R. Leonardi, R.Y. Nanetti, *Making Democracy Work* (1993).

[10] D. Della Porta, A. Vannucci, *Mani impunite. Vecchia e nuova corruzione in Italia* (2007); cf. G.E. Caiden, N.J. Caiden, *Administrative Corruption*, in 2 Public administration review (1977) 306.

[11] GRECO – Group of States against corruption, *Evaluation report on Italy*. Strasbourg: Council of Europe (2008).

[12] Cf. European Commission, *Eurobarometer 76.1, Corruption* cit. at 4; Quality of Government Institute, *Measuring the Quality of Government and Sub-national variations a dataset*, cit. at 5; speak of "snowball effect" to explain the dynamics of corruption that characterize, in a particularly "dense", some institutional realities D. Della Porta. A. Vannucci, *Mani impunite. Vecchia e nuova corruzione in Italia*, cit. at 10, 22-24; cf. O. Cadot, *Corruption as a gamble*, 33 Journal of Public Economics (1987) 223-244.

conclusions of the Italian Court of Auditors[14], all converge in outlining a worrying scenario of widespread corruption and mismanagement, with constant signs of deterioration over the last twenty years, which appears to confirm the limited impact that the effects of the Tangentopoli investigations have had over time.[15]

3. Fighting corruption: repressive and preventive approach

If we take reference to the approach taken twenty years ago, the new wave of reforms that has developed over recent years appears to display a greater degree of pervasiveness and incisiveness.

This is evidence of an organic approach being taken to preventing and combating administrative corruption for the first time. This primarily regards the Law No. 190 of 2012, which was approved during the Monti administration[16], and also developed through successive decrees approved towards the end of his technical government[17].

The comparative influence, and the equal importance of international demands (among other things, law No. 190/2012 implements two international anti-corruption conventions signed by Italy)[18], can not be overlooked with regard to institutions and

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[13] Transparency International, *Corruption perception Index – 2015*, cit at 2.

[14] Corte dei Conti, *Giudizio sul rendiconto generale dello Stato 2008, Memoria del Procuratore generale* (2009) 237. The problem of corruption remains current and perceived as "devastating" for the Court of Auditors also in the most recent report relating to 2016: Corte dei conti, *Giudizio sul rendiconto generale dello Stato 2016, Memoria del Procuratore generale* (2017).

[15] D. Della Porta, A. Vannucci, *Mani impunite. Vecchia e nuova corruzione in Italia*, cit. at 10, 82-85; D. Della Porta, A. Vannucci, *Corruption and Anti-Corruption: The Political Defeat of 'Clean Hands' in Italy*, 4 West European Politics (2007) 830-853.

[16] The law, promoted by the Ministers for Justice (Paola Severino) and the Public Administration (Filippo Patroni Griffi) is known as the law "Severino" for the tendency to entrust the fight against corruption to judicial intervention.

[17] Legislative Decree No. 33 of 2013, concerning transparency; Legislative Decree No. 39, on ineligibility and incompatibility; Legislative Decree No. 235 of 2012, concerning the ineligibility and disqualification of politicians convicted for crimes against the public administration.

[18] The Criminal Law Convention on Corruption (ETS 173) was officially ratified by Italy on 13 June 2013 and entered into force on 1 October 2013, making Italy the 45th Member to ratify it. In general terms, see S. Bonfigli, *L'Italia e le politiche*

more specific types of offence, such as crimes of corruption involving private parties, and the trade in illicit influences which, while covered by the Law No. 190, had traditionally been absent in the Italian scenario. The decision to limit the scope of application of the crime of induced bribery (a specific offence in situations in which a civil servant "expects" a bribe) in favour of an extension of the hypotheses of corruption, and the provision of aggravating and mitigating circumstances with respect to the common crime of bribery, meets the need to reduce the Italian "specificity", by adapting the legislation to meet international standards[19].

The 2012 law (which is not easy to read, as it consists of a single article comprising 83 subsections) is developed along two fronts: the traditional, in terms of penal sanctions, and the innovative, in terms of administrative prevention[20].

In terms of the reinforcement of repressive mechanisms, the law constitutes an important, though not entirely satisfactory, step: penalties for corruption offenses are strengthened by the legislation, while new offenses are provided for (including that of traffic of unlawful influences)[21]. However, while the limited reinforcement of judicial measures in Law No. 190 is recognized, robust criticism of the overall evolution of the legislation on criminal matters remains among leading representatives of the judiciary: Judge Davigo (a leading figure in the Tangentopoli era, who recently held the role of president of ANM, the Association of Magistrates), argues that, despite this law, the last 20 years in Italy

internazionali di lotta alla corruzione, in F. Merloni, L. Vandelli, (eds.) *La corruzione amministrativa. Cause, prevenzione e rimedi* (2010) 109-127; see also N. Parisi, *An international perspective on the main functions of the Italian National Anti-corruption Authority in the prevention of corruption in public procurement*, 4 Il Diritto del commercio internazionale (2015), 1053-1065.

[19] C.F. Grosso, *Novità, omissioni e timidezze della legge anticorruzione in tema di modifiche al codice penale*, in B.G. Mattarella, M. Pelissero (eds), *La legge anticorruzione*, cit. at 6, 1-13; A. Di Martino, *Le sollecitazioni extranazionali alla riforma dei delitti di corruzione*, in B.G. Mattarella, M. Pelissero (eds), *La legge anticorruzione*, cit. at 6, 355-380.

[20] M. Pelissero, *La nuova disciplina della corruzione tra prevenzione e repressione*, in B.G. Mattarella, M. Pelissero (eds), *La legge anticorruzione*, cit. at 6, 347-354; M. Clarich, B.G. Mattarella, *La prevenzione della corruzione*, in B.G. Mattarella, M. Pelissero (eds.), *La legge anticorruzione* cit. at 6, 59-69.

[21] V. Maiello, *Il reato di traffico di influenze illecite*, in B.G. Mattarella, M. Pelissero (eds), La *legge anticorruzione*, cit. at 6, 419-433.

have been spent "not in the fight against corruption, but in corruption trials"[22].

The most interesting and innovative aspect of the law does not, however, regard the amendments to criminal legislation, but rather the development of a comprehensive administrative approach to preventing corruption[23]: the phenomenon of corruption is redefined in administrative terms, as a set of behaviours that are the expression of maladministration, which are more extensive than those relevant from the perspective of their criminal sanction.

4. The new administrative anti-corruption policies

From the poin of view of the use of preventive (administrative) measures, rather than the repressive mechanisms of criminal prosecution alone, the Law No. 190 of 2012 provides a range of instruments, both general and sectoral, which have a "systemic" (involving the entire administration) or circumscribed impact: for example, the requirement of the rotation of managers, the protection of whistle-blowers, post-employment limits, etc.

The Law No. 190 of 2012, together with the regulatory provisions and other measures that have developed and articulated it, constitutes an organic and wide ranging attempt to provide the administrative system with a number of "auxiliary precautions"[24] for the prevention, containment, and uncovering of corrupt behaviour and, more generally, the phenomena of maladministration.

Although the perspective remains that of prevention of corruption in the proper sense, the logic of prevention determines a widening of the relevant phenomena from the point of view of

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[22] Corriere della Sera, april 22, 2016.

[23] M. Clarich, B.G. Mattarella, *La prevenzione della corruzione*, cit. at 20, 59-69; cf. F. Merloni, *L'applicazione della legislazione anticorruzione nelle Regioni e negli enti locali tra discipline unitarie e autonomia organizzativa*, in 2 Istituzioni del federalismo (2013), 349-375.

[24] In reference to famous James Madison's thesis: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of *auxiliary precautions*" (*Federalist Papers*, No. 51, 1788).

risk prevention[25]: until the new idea of "administrative corruption" coincides with that of maladministration[26].

In comparison with other eras[27], over the last three years the widespread perception of the phenomenon of corruption, albeit including uncertainties and, above all, second thoughts and contradictory attitudes at the level of policy and legislative guidelines, has involved the definition of a system for preventing and combating the phenomenon through administrative measures.

The difficulty with these policies lies to an important extent in their implementation by the individual administrations, and in the guidance guaranteed by the government and central enforcement structures (in particular, the National Anti-Corruption Authority – ANAC), as well as the necessary on-going support, and their continuous development, without impediment: from this point of view, the most recent developments in legislative policy appear less promising, as will be discussed later.

By the early 1990s the work of a study committee had already proposed a series of "administrative" measures to avoid the emergence of pathological phenomena, such as those uncovered by the "Clean Hands" (mani pulite) investigations, and indeed a number of these measures were introduced in the laws of the time[28]. While the system involving these measures proved to be fragmented and incomplete, some important solutions were still attempted at the legislative level in the period immediately following the Tangentopoli scandals, and in subsequent years.[29]

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[25] See R. Cantone, E. Carloni, *La prevenzione della corruzione e la sua Autorità*, 3 Diritto pubblico (2017), 903-943.

[26] See eg M. Clarich, B.G. Mattarella, *La prevenzione della corruzione*, cit. at 20, 59-61.

[27] In a book some years ago, a keen observer of national and comparative processes in the fight against corruption noted that the history of corruption in Italy has been, unlike similar experiences abroad, the "history of cures that were not looked for, and remedies that were not found": R. Brancoli, *Il ministero dell'onestà* (1993).

[28] Camera dei Deputati. Comitato di studio sulla prevenzione della corruzione, *Rapporto al Presidente della Camera*, 23 ottobre 1996. In *La lotta alla corruzione*, (1998).

[29] An overall overview of the theme in B.G. Mattarella, *Le regole dell'onestà* (2007); F. Merloni, R. Cavallo Perin (eds.), *Al servizio della Nazione* (2008). The Italian system that precedes the reforms of 2012 is reconstructed overall in the report that anticipates the reform: Ministro della funzione pubblica.

This is the sense in which certain choices should be interpreted, such as the decision to clearly distinguish between the functions of politicians and bureaucratic staff (a distinction between politics and administration), the attempt to strengthen public management and its decision-making autonomy[30], and the tightening (later found to be excessive) of procedures for the selection of contractors with the public administration, through a reduction in discretionary power[31].

Therefore, while the early 1990s saw the introduction of a series of measures consistent with the need to reduce the number of episodes of corruption, the recent legislation is the first broad-spectrum policy overtly aimed at combating and preventing the emergence of corruption at the administrative level[32]. These policies, and these legislative provisions, on which we focus, are a response to criticism from GRECO to Italy, in its 2008 report: "Italy does not have a specifically coordinated anti-corruption programme"[33].

On closer inspection, the new regulation introduces a new public function of corruption prevention, which is entrusted to specific offices and apparatuses: the "rooting" of these policies and anti-corruption measures in the offices of designated authorities (at both the national level and in each individual administration) is perhaps the most obvious sign of the change of approach, and the newfound awareness of the need to prevent the phenomena of in a more effective and attentive manner.

Commissione per lo studio di misure per la trasparenza e la prevenzione della corruzione, *La prevenzione della corruzione: per una politica di prevenzione* (2011), in http://www.governo.it/GovernoInforma/documenti/20121022/rapporto_corruzioneDEF.pdf.

[30] The specificities of the Italian system of the distinction of roles between public managers and political leaders is well described by F. Merloni, *Dirigenza pubblica e amministrazione imparziale* (2006); on the problem of the independence of managers see B. Ponti, *Indipendenza del dirigente e funzione amministrativa* (2012).

[31] A. Vannucci, *Il lato oscuro della discrezionalità. Appalti, rendite e corruzione*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello* (2011), 265-296; G. Fidone, *La corruzione e la discrezionalità amministrativa: il caso dei contratti pubblici*, in Gior. Dir. Amm. (2015), 325- 344.

[32] M. Clarich, B.G. Mattarella, *La prevenzione della corruzione*, cit. at 20, 59-61.

[33] And this, despite "there was a widely shared perception […] that corruption in Italy is a pervasive and systemic phenomenon which affects society as a whole" (GRECO, 2008, p. 6).

A policy of prevention that focuses on the administrative organizations and the bureaucratic staff. The prevention and administrative enforcement measures are aimed primarily at civil servants and not at elective or politically appointed officials.

5. Role and function of the National Anti-Corruption Authority

At the heart of the corruption prevention system we find ANAC, the National Anti-Corruption Authority, which was founded in 2009[34] to coordinate public performance evaluation policies, while also involved in issues of transparency and integrity[35]. The law No. 190/2012 entrusted this body with responsibilities involving the prevention of administrative corruption, classifying it as a national anti-corruption authority, in line with the international conventions that stipulate that each party country identify an internal figure responsible for implementing anti-corruption policies[36]. More recently, the Decree Law for the reorganization of the public administration (Decree No. 90 of 2014, known as the "Madia" decree) has clarified the division of responsibilities between national structures, entrusting the Department of Public Administration, and its Minister, with responsibility for the evaluation of personnel and performance, and ANAC, which more clearly assumes the traits of an

[34] The Authority was established as the Committee on the integrity and transparency in public administration (CIVIT), and subsequently acquires the functions in the field of anti-corruption (by Law 190 of 2012) and then in 2014 its current name and structure. In particular, the Authority has progressively absorbed also the functions and staff of the Authority on public contracts (AVCP).

[35] G. Sciullo, *L'organizzazione amministrativa della prevenzione della corruzione*, in *La legge anticorruzione*, cit. at 6, 71-89; R. Cantone, F. Merloni (eds.), *La nuova Autorità anticorruzione* (2015). N. Parisi, *An international perspective on the main functions of the Italian National Anti-corruption Authority in the prevention of corruption in public procurement*, cit. at 18, 1053-1058.

[36] The Anti-Corruption Law, Law No. 190/2012, in execution of the Article 6 of the United Nations Convention against Corruption, designed an anti-corruption system based on prevention and introduced in Italy the National Anti-Corruption Authority that is the central actor of the system.

independent administrative authority, with responsibility for anti-corruption and transparency measures[37].

In 2014-2015 the system has been completed with the integration of the supervision on public contracts in the organization of corruption prevention, according to the law decree No. 90/2014[38], and with an enforcement of the powers of the Authority[39].

This steering committe, composed of five members appointed by the decree of the Prime Minister, acting on a proposal by the Minister for the Public Administration with a procedure which imposes the requirement of a binding opinion (with a qualified majority) of the parliamentary committees, is now also an authority responsible for regulation and supervision of the system of public contracts (previously conferred to a separate supervisory authority). The integration of regulatory and supervisory functions on public contracts with anti-corruption functions is a fact that, as a result of sometimes chaotic legislative development, appears to be very interesting and is today one of the qualifying aspects of the italian experience.

ANAC is competent for the preparation of the national anti-corruption plan, the definition of guidelines for codes of conduct, and the supervision of the adoption and the effective implementation of anti-corruption instruments, beginning with the monitoring of compliance with transparency obligations, and the supervision of public tenders.

The representatives of ANAC within individual administrations are dedicated anti-corruption compliance officers, usually administrative executives: they are employed by their administrations but operating in close functional connection with

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[37] M. De Rosa, F. Merloni, *Il trasferimento all'ANAC delle funzioni in materia di prevenzione della corruzione*, in *La nuova autorità anticorruzione*, cit. at 35, 53-65.

[38] "The integration of the functions of the two institutions and the consequent extension of the powers of ANAC, set the conditions to oversee more effectively the scope of the contracts and public procurement in which nestles a substantial part of the corruption phenomena" (ANAC – Autorità nazionale anticorruzione, *Relazione Annuale al Parlamento dell'Autorità Nazionale Anticorruzione per l'anno 2015* (2016). http://www.anticorruzione.it).

[39] According with law No. 69/2015: cf. E. D'Alterio, *I nuovi poteri dell'Autorità nazionale anticorruzione: "post fata resurgam"*, in 6 Gior. Dir. Amm. (2015), 757-767.

the ANAC. In particular, they are responsible for ensuring the adoption of all obligatory acts and measures[40].

A second organizational network involves central purchasing bodies: under the new rules governing public contracts, these offices manage the tender procedures for contracts for public works, services and supplies. By specializing competition venues, and reducing their number[41], in the legislative intent it is hoped to improve the quality of public procurement, and ensure tighter control by ANAC of an area that is particularly exposed to the risk of corruption.

It should be added that, in the Italian political landscape, the Authority has assumed a progressively more important position, which sometimes goes beyond the role of ANAC: in particular its president (Raffaele Cantone, a well-known anti-Mafia magistrate), is at the centre of the national policy scene, and is called upon in relation to any scandal involving local or national political systems.

Recent scandals show, in any case, as the Authority's action, which develops through forms of "cooperative control"[42] (operating in synergy with other administrations to follow complex procedures, as happened in the case of contracts for the construction of the Expo 2015 in Milan), it is not always able to prevent the growth of corruption: the major companies that have implemented action in the Expo were recently involved in court proceedings for corruption (and precisely in relation to the realization of works for international exposure). There is a fear, in essence, that the Anti-Corruption Authority control capacity

[40] Cf. F. Merloni, *L'applicazione della legislazione anticorruzione nelle Regioni e negli enti locali tra discipline unitarie e autonomia organizzativa*, cit. at 23.

[41] See, in general terms (on advantages and risks in demand aggregation), G.L. Albano, *Demand aggregation and collusion prevention in public procurement*, in G.M. Racca, C.R. Yukins (eds.), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (2016), 155-171.

[42] The modeli is taken as a reference by the OECD itself in a recent document on the prevention of corruption in public works: OECD, *High-level Principles for integrity, transparency and effective control of Major Events and Related Infrastructures* (2016). See also R. Cantone, C. Bova, *L'Anac alle prese con la vigilanza sui contratti pubblici; un ponte verso il nuovo Codice degli appalti?*, in 2 Gior. Dir. Amm. (2016), pp. 166-176.

remains at a formal level, and this also concerns the limited staff[43] available to the authorities in the light of the new powers that are attributed progressively.

6. The risk of corruption and the plans for preventing it

The Authority is responsible for ensuring that administrations adopt appropriate corruption prevention instruments, and thus develop their own anti-corruption policies, within the framework of the guidelines provided by the Authority and the rules established by the Law No. 190 of 2012.

At the heart of the various measures are the anti-corruption plans, which are responsible not only for the aim of adapting the guidelines deriving from the law, through the national plan prepared at the state level to individual contexts (the National Anti-Corruption Plan[44], a detailed document which indicates a range of essential contents and the procedure for establishing administration plans), by means of an internal analysis, to reach a self-diagnosis (the mapping of the risk of corruption and an indication of the measures necessary to contain it)[45].

The plan brings together various documents (the three-year plan for transparency and the code of conduct) and integrates them as part of a system with other organizational measures, as stipulated by the law. These can also indirectly help raise standards of conduct, for example through an overall

[43] The Authority has, in particular, very little staff (compared to the needs) in the areas of prevention of corruption and transparency, since most of the staff come from the former supervisory authority in public contracts (AVCP): see the organization chart in www.anticorruzione.it.

[44] The PNA is structured "as a programmatic tool subjected to an annual update with the inclusion of indicators and targets in corruption in public administration, in order to make the strategic objectives measurable and to ensure the monitoring of the possible divergences from these targets arising from the implementation of the PNA": ANAC, *Relazione Annuale al Parlamento dell'Autorità Nazionale Anticorruzione per l'anno 2015* (2016). On the basis of the national plan, each public administration identifies, with its own plan, the specific risks of corruption in individual administrations and the measures deemed necessary to prevent them.

[45] F. Merloni, *I piani anticorruzione e i codici di comportamento*, in 8 Diritto penale e processo (2013), 4-15; F. Di Cristina, *I piani per la prevenzione della corruzione*, in *La legge anticorruzione* cit. at 6, 91-111; F. Merloni, *Le misure amministrative di contrasto alla corruzione*, in 369-370 Ragiusan (2015), 9-16.

improvement in public performance (the performance plan) or digitization (the digitization plan).

Therefore, the three-year corruption prevention plan constitutes the essential point of reference for each administration, on the one hand in the drafting of anti-corruption policies, and on the other in adapting them to the specific context and its effective risk level. The approach taken is essentially as follows: each administration has to assess the level of risk of corruption for each sector in which it operates: some areas have already been identified as "high risk" sectors by the national plan and the legislation (staff recruitment, contracts and procurement, concessions and economic subsidies). It is the responsibility of each administration to conduct their own internal analysis and establish the most appropriate administrative mechanisms (transparency, staff turnover, procedural rules, employee obligations, digitalization of procedures, etc.) to prevent the identified risk. This is, therefore, a collection of preventive measures. In the case of an episode of corruption, the anti-corruption compliance officer and the administration will have to demonstrate that appropriate prevention measures have been put in place, and that the case of corruption is therefore an extraordinary and unpredictable event (which, in any case, justifies a further strengthening of the preventive measures).

The national plan, as defined by ANAC, is subject to annual updates, as is the three-year prevention plan for each administration.

It is clear that the validity of the system lies in the adaptation of the plans to the specific requirements of each administration[46], and an attentive process of adjustment and analysis: in the absence of this, the first danger is that of a purely formal system, in which plans are the result of the solitary work of a limited number of offices, are merely copied from other

[46] The relationship between administrative organization and anti-corruption measures is very narrow, and so strong is the organizational impact of anti-corruption rules: cf. F. Fabrizio, *L'impatto delle misure anticorruzione e della trasparenza sull'organizzazione amministrativa*, 3 Il Diritto dell'economia (2015), 483-506.

experiences and documents, and are of poor quality in terms of their analysis of the context and risk assessment[47].

In particular, the "minimal" choice to merely identify the areas of risk as those specified as compulsory by the national plan, or similarly to simply connect these with the (transversal and specific) measures identified in general terms, prefigures the risk of a lack of a comprehensive analysis and, as a result, a broad spectrum diagnosis and ineffective treatment.

Further, the idea of a public administration as outlined in the national plan, which is exposed to the risk of corruption when it "gives" (recruits or promotes, assigns works or contracts, recognizes contributions or non-economic benefits), appears to be limiting, notably in relation to the specific nature of some administrations. The administration is "at risk" even when it penalises an offender, particularly if formal or informal trading begins in response to the dispute. It is therefore the responsibility of each administration to establish a three-year plan, following the indications of the national plan, that can be identified as "its own", in that it is differentiated, specific, and corresponds to the features and characteristics of the individual context[48].

For the sake of completeness, mention should be made of the fact that anti-corruption measures are leading to a more attentive approach to the relationship with the representatives of organized interest groups, albeit in still limited terms: while lobbying is a phenomenon which still awaits comprehensive regulation in Italy, it is touched upon by the National Anti-corruption Plan (which requires each individual administration to take its own dynamics into account, in creating their own corruption prevention plan), and is also affected on several fronts by the anti-corruption legislation (the rules governing public contracts and the illicit traffic of influence).

It is up to the Anti-corruption Authority to assess these plans, even in terms of "quality" (with sample checks): in its annual reports, the ANAC illustrates a number of problems often present in the policies being implemented by the authorities, starting from a poor assessment of the internal and external

[47] ANAC, *Relazione Annuale al Parlamento dell'Autorità Nazionale Anticorruzione per l'anno 2015.*

[48] F. Merloni, *I piani anticorruzione e i codici di comportamento*, cit. at 45, 4-15; F. Merloni, *Le misure amministrative di contrasto alla corruzione*, cit. at 45, 9-16.

context, with often plans the work of a few officials who operate in a state of isolation with respect to the political leadership (that is responsible, however, for the formal adoption of the plan) and then produces documents that aim at a formal legal compliance.

7. Incompatibility, ineligibility, and fitness for office

One strategy that clearly emerges in the Law No. 190 is the support for the impartiality of the administration through the consolidation of the hypothesis of incompatibility, in particular to avoid situations involving a conflict of interest, and providing a plurality of hypotheses (disqualification, ineligibility, and unfitness for office, or "inconferibilità", a new concept introduced by the law) with the aim of excluding from public office those who find themselves in a situation that puts at risk the integrity, or even the appearance of impartiality, that should characterize public action[49].

With regard to disqualification from political office, the matter was regulated by the Legislative Decree no. 235 2012 (provided for by paragraph 63 of Law No. 190), which reinforces prohibitions for politicians convicted of crimes involving corruption, and in particular those who have been definitively convicted and sentenced to more than two years in prison. The decree applies to parliamentary positions, including the European Parliament, and positions in government: the disqualification from elective or governmental offices also applies if the final sentence is delivered after the candidate is elected. This was the case, for example, of Silvio Berlusconi, whose forfeiture was decided by the Senate, in accordance with the law, in November 2013. The importance of this affair has ensured that there has been extensive debate about these provisions and this mechanism in Italy, with widespread criticism of the retroactive nature of the legislation,

[49] B. Ponti, *La regolazione dell'accesso agli incarichi esterni da parte dei dipendenti dopo la legge 190/2012: evoluzione del sistema e problemi di applicazione agli enti territoriali*, in 2 Istituzioni del federalismo (2013) 409-423; F. Merloni, *Nuovi strumenti di garanzia dell'imparzialità degli amministratori: l'inconferibilità e incompatibilità degli incarichi*, in *La legge anticorruzione*, cit. at 6, 196-209; D. Andracchio, *Il divieto di "pantouflage": una misura di prevenzione della corruzione nella pubblica amministrazione*, in 9 GiustAmm.it (2016), 1-10.

which is prohibited for criminal sanctions, but not for administrative measures, according to the statute of limitations[50].

In terms of bureaucratic appointments (directors and administrators of public bodies), another decree published shortly thereafter (No. 39 of 2013) regulates incompatibility, strengthening the safeguards against conflicts of interest, and the prohibition of the conferment of appointments: this applies to those involved in one of the three following situations:

They have been convicted, even if not definitively, for crimes against the public administration.

They operate in sectors subject to control by the authorities concerned, or on the contrary pass from the supervisory administration to a company operating in areas under the control of the same administration.

They hold political office and aspire to top bureaucratic positions, such as the director or manager of public entities.

The latter two situations are usually regulated with the provision of a "cooling period" of one or two years, which involves a ban on recruitment to similar positions.

While the discipline is at times too rigid, and not devoid of shortcomings[51], for which the anti-corruption Authority has repeatedly called for a review, the legislature is in any case intended to strengthen the impartiality of the administration, and reduce the incidence of conflicts of interest, in order to better protect the distinction of roles between political and bureaucratic leadership[52].

8. Integrity and impartiality of officials: the codes of conduct

Codes of conduct, or "ethical" codes, which set out a series of obligations with the aim of guiding the behaviour of officials towards greater impartiality and exclusive dedication to the public interest, are an important tool in the various contexts that

[50] F. Bailo, *La c.d. "legge Severino" sul tavolo della Corte costituzionale: partita chiusa o rinviata?*, in Giur. It. (2016), 206-211.

[51] B. Ponti, *La regolazione dell'accesso agli incarichi esterni da parte dei dipendenti dopo la legge 190/2012* cit. at 49, 409-423.

[52] F. Merloni, *Le misure amministrative di contrasto alla corruzione*, cit. at 45, 9-16.

have developed organic anti-corruption policies[53]: ethical codes are normally backed by sanctions, and have an important function as a "filter" for behaviour, in order to avoid the degeneration that results in criminal action.

In the Italian context, this instrument relates to a specific constitutional principle (the obligation to serve with "discipline and honour", as stated in Art. 54 of the Constitution[54], and exclusively at the service of the public interest, Art. 98 of the Constitution) and was initially provided for after Tangentopoli, in 1993-1994[55]; since then, however, codes of conduct have failed to play a significant role in influencing behaviour and reinforcing the subjective impartiality of officials, for a variety of reasons[56]. In particular, the provisions have been too generic (they essentially address any public employee, from administrative officials to teachers and nurses) and their legal value has been in doubt (in the opinion of many, the obligations are effectively not valid in disciplinary terms, but only of an "ethical" nature), with the consequence of violations not being sanctioned[57].

However, the reform introduced by Law No. 190 of 2012 (which rewrote Art. 54 of Legislative Decree No. 165 of 2001) redefined the institution, providing new regulations, and therefore new potential for codes of conduct[58].

This code (which was adopted in 2013, with Presidential Decree No. 62) contains a list of duties, which relate primarily to

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[53] Cf. B.G. Mattarella, *Le regole dell'onestà*, cit. at 29

[54] G. Sirianni, *I profili costituzionali. Una nuova lettura degli articoli 54, 97 e 98 della Costituzione*, in F. Merloni, L. Vandelli. L. (eds.). *La corruzione amministrativa. Cause, prevenzione, rimedi* (2010), 129-134; F. Merloni, R. Cavallo Perin (eds.), *Al servizio della Nazione*, cit. at 29

[55] See B.G. Mattarella, *I codici di comportamento*, in Rivista giuridica del lavoro (1996) 275-301.

[56] P.G. Lignani, *La responsabilità disciplinare dei dipendenti dell'amministrazione statale*, in D. Sorace (ed.), *Le responsabilità pubbliche: civile, amministrativa, disciplinare, penale, dirigenziale* (1998), 381-404; E. Carloni, *Ruolo e natura dei c.d. "codici etici" delle pubbliche amministrazioni*, in 1 Dir. Pubbl. (2002), 319-361.

[57] See E. Carloni, *Il nuovo Codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, in 2 Istituzioni del federalismo (2013) 377-407; F. Merloni, *Codici di comportamento*, in *Il Libro dell'anno del diritto* (2014); F. Merloni, *I piani anticorruzione e i codici di comportamento*, cit. at 45, 4-15.

[58] E. Carloni, *Il nuovo Codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, cit., 377-407; E. D'Alterio, *I codici di comportamento e la responsabilità disciplinare*, in *La legge anticorruzione*, cit. at 6, 25-51.

the extent of the (potential or concrete) conflict of interest, and result in reporting and transparency requirements, obligatory abstention, and the communication of the interests involved. These responsibilities are applicable to all employees, according to the legislature and the government (Presidential Decree No. 62).

These duties focus in particular on the issue of conflicts of interest, and are intended to counter corruption by favouring disclosure (with transparency rules and reporting obligations), and procedural rules (through legislative action regulating the procedure), and obligations and prohibitions: in this light, the code of conduct is an important part of an overall strategy to reduce the risk of maladministration.

Perhaps the most important aspect is that the national code must be integrated at the level of each public administration (ministries, public bodies, local authorities, universities, etc.), with specific codes of behaviour, the provisions of which are integrated and developed by adapting the required obligations to the individual context.

The adoption of their own codes by each administration provides an opportunity for government agencies and public institutions to adapt the general (and generic) responsibilities to the specific context, as is the case (or should be the case) with prevention plans.

These are obligations tailored to the specific nature of the functions assigned to the administrations (and furthermore, those of their specific offices and categories of staff): it is through these solutions, which take into account the needs and issues typical of any administration (also thanks to participatory processes involving stakeholders), that the public administrations put themselves in a position to improve their own performance and standards of conduct.

Both the national "basic" code and those of the administrations contain obligations, the value of which is clearly primarily disciplinary by nature[59].

Codes of conduct are also, however, a flexible organizational instrument, which can be associated with the

[59] E. Carloni, *Il nuovo Codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, cit. at 57, 377-407; F. Merloni, *Codici di comportamento*, cit. at 57.

administration's own assessment processes and anti-corruption plans, of which they are part.

9. Transparency: "the best disinfectant"

An important part of the fight against corruption[60], and indeed the main aspect according to the declarations of the ANAC president Cantone[61], involves the enhancement of transparency mechanisms according to the old assumption that "sunlight is the best disinfectant"[62], or that "Good government must be seen to be done"[63].

It is clear that transparency measures operate on different levels, and with different aims[64]: above all, in the Italian experience, they perform the function of guaranteeing the rights of citizens affected by administrative action, through the right of access to documents covered by the Italian law on administrative proceedings (No. 241 of 1990)[65], and thus they operate essentially within the paradigm of "due process"[66].

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[60] See D.U. Galetta *Transparency and access to public sector information in Italy: a proper revolution?*, in 2 Italian Journal of Public Law (2014), 229: "The goal of preventing corruption is actually the special focus of the subsequent Legislative Decree No. 33/2013, whose specific aim – pursuant to law No. 190/201262 - is to prevent and eradicate illegality in the Public Administration".

[61] See i.e. ANAC *Relazione Annuale al Parlamento dell'Autorità Nazionale Anticorruzione per l'anno 2015*, p. 5: transparency is "according to the most credited international researches, the best way to prevent corruption; illicit affairs prefer the shadows and shirk from the light shed by transparency".

[62] W. Brandeis, *Other people's money – And how the bankers use it* (1914), in http://www.law.louisville.edu.

[63] S. Kierkegaard, *Open access to public documents – More secrecy, less transparency!*, in 25 Computer Law & Security Review (2009) 1-26.

[64] D. Heald, *Transparency as an instrumental value*, in C. Hood, D. Heald (eds.), *Transparency: the key to better governance?* (2006), 59-74; F. Merloni (ed.), *La trasparenza amministrativa* (2008); G. Arena, L*e diverse finalità della trasparenza amministrativa*, in *La trasparenza amministrativa*, (2008), 29-43; A. Cerrillo Martinez, *The regulation of diffusion of public sector information via electronic means: lessons from the Spanish regulation*, in 28-2 Government Information Quarterly (2011) 188-202.

[65] Law No. 241 of 11 August 1990 setting new rules concerning administrative procedure and the right of access to documents.

[66] See E. Carloni, *La casa di vetro e le riforme. Modelli e paradossi della trasparenza amministrativa*, in 3 Dir. Pubbl. (2009), 779-813; C. Cudia, *Trasparenza amministrativa e pretesa del cittadino all'informazione*, in 1 Dir. Pubbl. (2013), 99-

Another traditional idea is a democratic and participatory dimension of transparency measures[67]: therefore, transparency also binds together participatory policy and the communication activity of public administrations, in which the information provided to the public contributes to a more broad involvement of citizens in activities conducted by the authorities, and even the direct management of public interests (and common assets).

Is in the context of transparency measures (in this case a transparency "from within") that can be considered the new discipline of the whistleblower, introduced by the 2012 legislation[68] and recently the subject of specific guidelines Anac[69].

In the context of anti-corruption legislation, however, it is necessary to focus attention primarily on a different approac: transparency allows widespread control over the exercise of power, and must therefore be ensured through generalized disclosure measures that are not dependent on the position of the interested party[70]. In this regard, the Law No. 190 of 2012 provides for a delegation of the regulation of forms of publicity on

134; D.-U. Galetta, *Transparency and access to public sector information in Italy: a proper revolution?* cit. at 60, 213-231. Cf. A. Romano Tassone, *A chi serve il diritto di accesso. Riflessioni su legittimazione e modalità di esercizio del diritto di accesso nella legge n. 241 del 1990*, in 1 Dir. Amm. (1995) 318.

[67] Cf. G. Arena, *Trasparenza amministrativa*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, VI. (2006), 5954-5960; M. Bombardelli, *Fra sospetto e partecipazione: la nuova declinazione del principio di trasparenza*, in 3-4 Istituzioni del federalismo (2013), 657-685; A. Bonomo, *Informazione e pubbliche amministrazioni. Dall'accesso ai documenti alla disponibilità delle informazioni* (2012); E. Carloni, *L'amministrazione aperta. Regole, strumenti, limiti dell'open government* (2014).

[68] Through the insertion of Article 54-ter of the Consolidated Law No. 165/2001.

[69] In order to stimulate more frequent use of this measure by Public Administrations, the ANAC, published *ad hoc* guidelines (resolution 6/2015): these provide the administrations with recommendations on how to adequately protect whistleblowers while creating awareness on the necessity of having systems of protection in place. See ANAC, 2016. Cf. G. Gargano, *La "cultura del whistleblower" quale strumento di emersione dei profili decisionali della pubblica amministrazione*, in 1 federalismi.it (2016), 1-45.

[70] See M. Savino, *Le norme in materia di trasparenza amministrativa e la loro codificazione*, in *La legge anticorruzione* cit. at 6, 113-123; A. Bonomo, *Il codice della trasparenza e il nuovo regime di conoscibilità dei dati pubblici*, in 3-4 Istituzioni del federalismo (2013) 725-751; G. Gardini, *Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?* in 8-9 Giorn. Dir. Amm. (2014), 875-891.

institutional sites, which was then implemented by Legislative Decree No. 33 of 2013[71].

This decree, which has recently been corrected and updated (Legislative Decree No. 97 of 2016), revised and expanded a number of transparency requirements contained in previous legislation[72]. These obligations were expanded after the digital administration code (Legislative Decree No. 82 of 2005) established the obligation for all administrations to have an organized website, in accordance with common principles and standards, with a number of mandatory informative contents[73]. In general terms, the Internet has greatly accessing government information (Roberts, 2006), and in recent years "have seen trends toward using e-government for greater access to information and for promotion of transparency, accountability, and anti-corruption goals"[74] in many countries.

Decree No. 33 of 2013 should be noted, in this regard, for two functions: it collected all previously existing obligations (in a kind of "transparency code"), and subjected them to common rules, as regulated in the first 10 articles of the decree[75]. Transparency is therefore seen as an anti-corruption tool, but more generally as a set of measures capable of safeguarding a number of constitutional principles: impartiality and responsibility, service to citizens, and legality. In addition, transparency acts as an instrument that guarantees citizens' rights and helps ensure the principle of good administration.

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[71] Legislative Decree No. 33 of 14 March 2013.

[72] In particular, regulated by Legislative Decree No. 150 of 27 October 2009. This decree ("Implementation of Law No. 15 dated 4 March 2009 on the optimization of the productivity of public work and the efficiency and transparency of the public administration") whose objectives include "transparency of the public administrations also as a guarantee of lawfulness" (article 2.2).

[73] See E. Carloni, *Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni*, in 2 Dir. Pubbl. (2005), 573-605; cf. B. Ponti (ed.) *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33* (2013).

[74] J.C. Bertot, P.T. Jaeger, J.M. Grimes, *Using ICTs to create a culture of transparency: E-government and social media as openness and anti-corruption tools for societies*, in Government Information Quarterly (2010), 264; cf. D. Cullier, S.J. Piotrowski, *Internet information-seeking and its relation to support for access to government records*, in 26 Government Information Quarterly (2009), 441−449.

[75] B. Ponti (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013*, cit. at 73; cf. A. Natalini, G. Vesperini (eds), *Il Big Bang della trasparenza* (2015).

The "total" transparency[76] of Legislative Decree No. 33 consists in the publication of a series of documents and information on public administration websites, as expressly set out by the law, resulting in the right of anyone to access this data, and make use of them and reuse them free of charge[77]. To complete this regime of full disclosure, which is open to everyone, the law provides for a special right of civic access. This can be seen in the case of information which an administration has failed to publish on its website, despite the legal requirement to do so: on the basis of a specific request, the administration is required not only to provide the information to the applicant, but also to publish the same data on its website[78].

Also of interest with regard to the information regulations submitted to the field of application of the Decree, are the other two provisions: the obligation to publish the data in an "open format" (open data), in order to facilitate its reuse, with the only limitation being that the integrity of the information is respected; and the provision of quality requirements for the published data, in order to guarantee its accuracy, integrity and completeness.

The legislator ultimately regulates the relationship between this system of publication and the protection of personal data by defining a balance that, for information subject to the publication requirement, is of substantial benefit to the need for transparency: this has led to a number of interventions (even with appropriate Guidelines[79]) by the Privacy Authority[80], which has often operated as a "brake" on this "total transparency" in recent years[81].

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[76] E. Carloni, *La trasparenza (totale) delle pubbliche amministrazioni come servizio*, in 2 Munus (2012), 179-204. According with article 11, Decree No. 150 points out that "transparency has to be understood as *full accessibility*, including by publishing information on the institutional websites of the public administration bodies."

[77] According with he idea of a synergy between Transparency and ICT in the perspective of fighting corruption: see J.C. Bertot, P.T. Jaeger, J.M. Grimes, *Using ICTs to create a culture of transparency: E-government and social media as openness and anti-corruption tools for societie*s, cit. at 74, 264; cf. T.B. Anderson, *E-government as an anti-corruption strategy*, in 21 Information in Economics and Policy (2009), 201−210.

[78] M. Magri, *Diritto alla trasparenza e tutela giurisdizionale*, in 2 Istituzioni del federalismo (2013), 425-451; B. Ponti (ed.) *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013*, n. 33, cit. at 73.

[79] Garante per la protezione dei dati personali, *Line guida in materia di trattamento di dati personali, contenuti anche in atti e documenti amministrativi, effettuato per*

In terms of transparency, the Italian experience is certainly of interest: the Italian regulation of "total transparency" creates a condition of widespread disclosure that is consistent with the cognitive dynamics of the internet, and that is notable for its immediacy, standardization, reusability, and easy accessibility, albeit within the limits of only involving information that is subject to a system of compulsory publication. Each administration, with its specific transparency plan, is required to implement these publication requirements: the institutional website of every public administration in Italy therefore features a "transparent administration" section, which provides information about the organization, its activities, and the use of resources. It deserves attention the fact that, with the most recent legislative changes, this approach of transparency through the institutional websites of each administration, is supported (and partly replaced) by the increasing use of centralized databases accessible by anyone[82].

10. The Italian "freedom of information act"

Along with its undeniable advantages, the Italian model of transparency, as defined in 2012-2013, presents a number of limitations relating to the nature and the character of the transparency instrument given a central (and almost exclusive) role by the legislature: creating conditions of complete transparency. The Italian model of full disclosure requires, at the risk of the phenomena of maladministration moving into the shadows, integration with more effective transparency instruments, with the aim of meeting the demands of citizens.

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finalità di pubblicità e trasparenza sul web da soggetti pubblici e da altri enti obbligati (2014), in www.garanteprivacy.it [doc. web n. 3134436].

[80] L. Califano, *Trasparenza e privacy: la faticosa ricerca di un bilanciamento mobile*, in L. Califano, C. Colapietro, (eds.), *Le nuove frontiere della trasparenza nella dimensione costituzionale* (2015), 35-67.

[81] E. Carloni, *Trasparenza e protezione dei dati: la ricerca di un nuovo equilibrio*, in *Il Big Bang della trasparenza*, cit. at 75, 301-319; E. Carloni, M. Falcone, *L'equilibrio necessario. Principi e criteri di bilanciamento tra trasparenza e privacy*, in 3 Dir. Pubbl. (2017), 723-777.

[82] See i.e. F. Di Mascio, *La trasparenza presa sul serio: gli obblighi di pubblicazione nell'esperienza statunitense*, in 4 Riv. Trim. Dir. Pubbl. (2016).

The right of access to documents, provided for as a guarantee of "due process" within the framework of administrative procedure regulations since 1990, does not carry out this role effectively[83]: it is a useful instrument for the protection of individuals (the law requires a real and present direct interest, and excludes its use for the general monitoring of administrative action[84]) who claim to have been directly affected by administrative action, but is impractical in terms of meeting widespread supervision requirements[85]. The decision not to intervene on administrative procedure law, on which the Italian legislature has remained constant, despite changes in government, has therefore concentrated the requirements for monitoring and the prevention of maladministration on mechanisms of online publication[86].

In terms of both doctrine and public opinion a need for a completion of transparency instruments was therefore recognized, through the provision of forms of access recognized not only to concerned parties but also, more broadly, to all citizens.

The recent decision to introduce regulation on the freedom of access to information in Italy therefore appears to be both coherent and timely, in the wake of the American Freedom of Information Act (FOIA), and similar regulation now widespread in most OECD countries[87].

Recent reform promoted within the framework of the Renzi government has affected many aspects of the Italian public administration: in the context of these reforms, which carry the

[83] See E. Carloni, *La casa di vetro e le riforme. Modelli e paradossi della trasparenza amministrativa*, in 3 Dir. Pubbl. (2009), 779-813.

[84] See article 24 para 3: "no request of access made with the intention of generally monitoring the work of public administrative bodies shall be accepted." On this specific point see D.-U. Galetta, *Transparency and access to public sector information in Italy: a proper revolution?* cit. at 73, 228; F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, 8 Federalismi.it 12 (2013).

[85] Galetta, D.-U. (2014). *Transparency and access to public sector information in Italy: a proper revolution?* cit. at 73, 213-231.

[86] E. Carloni, *Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni*, cit. at 73, 573-605; E. Carloni, *L'amministrazione aperta. Regole, strumenti, limiti dell'open government*, cit. at 67

[87] J.M. Ackerman, I.E. Sandoval-Ballesteros, *The global explosion of Freedom of Information Laws*, in 1 Adm. L. Rev. (2006) 85-130; OECD, *The right to open public administrations in Europe: emerging legal standards*, 46 Sigma Paper (2010).

name of the proposing minister (the "Madia" reforms), Parliament has delegated the Government to modify Decree No. 33, by streamlining and reducing the requirements for publication (which are seen by some commentators to be excessive and overly burdensome for administrations). Simultaneously it has introduced the right of "any person" to access any public administration information, subject to the limits that protect relevant public and private interests.

In implementing this provision, the Government, with some difficulty[88], adopted a decree (No. 97 of 2016) which reduces the requirements for publication, to a limited extent, and remodels many articles of Decree No. 33, introducing a general right of access that is to be granted to any individual "in order to encourage widespread forms of monitoring [...] and to encourage participation in public debate"[89].

However, substantial doubts remain about the effective capacity of this new instrument to influence the dynamics of corruption: the limits set by the decree are particularly wide, and defined in general terms, with the effect of leaving the administration with significant areas of discretion in the decision to allow or deny access[90]. For example, if it is necessary to avoid concrete prejudice to the "protection of personal data" or the "economic or commercial interests of a person", then access can be denied.

The amplitude of the limits and the absence of balancing mechanisms (in particular, in the public interest advantage to the knowledge of information: the so called "public interest test"), make uncertain the outlook of the new instrument of transparency. The first comments of the reform reflect this uncertainty: on the one hand, some believe that the new law will

[88] V. Fanti, *La pubblicità e la trasparenza amministrativa in funzione del contrasto alla corruzione: una breve riflessione in attesa del legislatore delegato*, in GiustAmm.it, 3/2016, 16. See E. Carloni, *Se questo è un Foia*, in Astrid Rassegna (2016), 1-13; D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del D.Lgs. n. 33/2013*, in 5 Federalismi.it (2016), 1-19

[89] So under the new Article 5a of Decree No. 33/2013.

[90] Cf. B. Ponti (ed.), *Nuova trasparenza amministrativa e libertà di accesso alle informazioni* (2016).

have to know a substantially limited role and marginal, on the other hand there are those who supports their centrality.

The task of specifying more clearly the limits and exceptions (a guarantee of public and private interests) to the new general access is entrusted to special Anti-Corruption Authority's guidelines, to be adopted in agreement with the guarantor of privacy. These guidelines have been adopted at the end of December 2016, and have interesting elements, which can ensure a more effective "right to know": in particular, starting from the legislative provision which requires "actual prejudice" of certain interest to justify the restriction of the freedom of information, the Guidelines require the government to demonstrate the "causal link" between the dissemination of information and damage to public or private interests involved.

Considering this innovations, even taking deficiencies and limits into account, a relevant, and gradual, evolution of administrative transparency can be observed[91], which in just a few years has added a range of complementary instruments (general access, online publication, and associated civic access) that compensate for the shortcomings of the traditional instrument of the right of access to administrative documents that has been in place since 1990.

11. Concluding remarks

While presented here in summary form, the Italian administrative corruption policy appears to be elaborate and detailed. Though the plan is ambitious, it does however present a number of problems and unresolved issues, which can be systematically traced back to a number of shortcomings, missed opportunities and uncertainties.

The most obvious shortcoming is the widespread (though not absolute) lack of attention to the issue of "political" officials, which results in a tendency to focus controls and measures at the lower levels (local rather than national administrations, and local politicians rather than constitutional bodies). This results in an

[91] Cf. D.-U. Galetta, *The Italian Freedom Of Information Act 2016. Why Transparency-On-Request Is A Better Solution*, in 2 Italian Journal of Public Law (2016), 269-285; E. Carloni, F. Giglioni, *The three transparency and the persistence of opacity in the Italian system*, in 23 Eur. Publ. L. (2017), 24-43.

overall system that is often disproportionate and unreasonable. As a result, duties of conduct are expected to apply to bureaucratic officials, but not politicians (even when they carry out administrative functions, such as mayors, councillors, or ministers), and the entire system is primarily focused on the "bureaucratic" dimension. In reality, administrative corruption frequently involves the corruption of political staff, and its containment thus ends up being mainly entrusted to the traditional role of supplementing criminal justice.

It transpires that transparency rules have a broader scope, referring expressly, albeit not always with corresponding provisions, to political office-holders and those in administrative positions.

As shown before, the individual mechanisms sometimes present important shortcomings: for example, it remains difficult to enforce disciplinary sanctions for violation of the duties contained in the codes of conduct, while transparency, ensured by the recent development of website publication, albeit with a not entirely convincing regulatory system, has been integrated with forms of freedom of information.

In terms of a lack of implementation, the tendency towards a purely formal application of the obligations contained in the law and the National Anti-Corruption Plan should be noted[92]: this is the case of the code of conduct, in which the adoption of administrative codes has often been carried out with a simple transcription of the "basic" code, with only minor adjustments. The same applies to transparency measures, although they appear to be the most effective and best perceived by citizens and stakeholders, in terms of their utility. This is also the case of administrative anti-corruption plans, which too often merely repeat the national plan or, more often, standard models, or copies of plans from other administrations, in an unmediated and uncritical fashion.

At least two of these ambiguities deserve closer attention. The first is the "resistance" to innovation among some administrations, albeit for doubts which are not entirely unreasonable. In particular, this is the case of the Guarantor

[92] ANAC, *Relazione Annuale al Parlamento dell'Autorità Nazionale Anticorruzione per l'anno 2015.*

Authority for the protection of personal data, which has attempted to counter the model of transparency as total accessibility, and the paradigms of open data government, viewing these regulations as an excessive impediment to privacy requirements. While taking the need to safeguard the underlying principles behind the protection of personal data into account, documents such as the recent May 2014 guidelines lend themselves to instrumental use, as they are capable of favouring opacity, and thus weakening the role transparency can play in the prevention of corruption.

The uncertainty of the government and the legislature is another troubling factor. Anti-corruption policies, and their representatives, have been faced with contradictory positions adopted at the legislative policy level, as the national government alternates between proclamations that measures will be strengthened and, at other times, the concrete downsizing of existing anti-corruption measures.

At the legislative level, an important public administration reform plan deserves mention, the already mentioned "Madia" Law No. 124 of 2015. The reform process has been slowed by the crisis of government Renzi and by a Constitutional Court ruling[93], which required a greater involvement of the regions in the definition of the rules that cater to the whole administrative system.

In the law we can find predictions that are able to affect the phenomenon of corruption, so different and sometimes contradictory.

On the one hand, it is clear the push to improve quality in the recruitment of civil servants, which is a perennial problem that in recent years has not found improvements. Corruption in Italian public administration is widely diffused and favoured by some specific features of the Italian administrative system, "such as a recruitment and promotion scheme that suffers from a certain obscurity and inefficiency".[94]

On the other hand, however, it provides for an increase in the degree of precariousness in senior management, and this can

[93] Judgement of the Constitutional Court, No. 251/2016.

[94] In this terms GRECO, *Evaluation report on Italy* cit., p. 3, according to a 2007 study on the phenomenon of corruption in Italy, which was carried out by the High Commissioner against Corruption (*Il Fenomeno della Corruzione in Italia. La Mappa dell'Alto Commissario Anticorruzione*. December 2007).

produce effects (in the negative) on the ability to ensure impartiality in administrative activity and in politics.

The presence of these uncertainties at the political level is partly offset by the strengthening, but also the overexposure, of the National Anti-Corruption Authority, which is often presented as a panacea for all the ills of the Italian administrative system, and its president, Raffaele Cantone, who is called into play under any circumstances involving widespread malpractice. However, as this paper has outlined, the powers of the Authority mainly regard the establishment of an organized system of prevention within each administration, and are therefore only partially able to contain the most serious cases, such as corruption involving organized crime, systemic corruption, or allegations of corruption involving political leaders, rather than the bureaucratic apparatus.

Even within these limitations, the "work in progress" that is the Italian fight against corruption remains one of the most important innovations in the Italian administrative system in decades. As the National Anti-corruption Authority stated in its recent report to Parliament, "the construction of effective processes and corruption prevention instruments requires a medium to long term investment before we will see its results." It is certainly possible, in this regard, to agree with the conclusion of the report: "many seeds have been sown, and [...] it is necessary to wait patiently for their effects"[95].

[95] ANAC, *Relazione Annuale al Parlamento dell'Autorità Nazionale Anticorruzione per l'anno 2015.*

ORDER WITHOUT LAW IN THE EXPERIENCE OF ITALIAN CITIES

*Fabio Giglioni**

Abstract

A significant number of cases show that cities are increasingly called upon to resolve potential or effective social conflicts through the recourse to informal law tools. Generally speaking, the law scholars are led to neglect the importance of them on the grounds that they are assumed to be irrelevant to law. This paper tries to show that another approach should be undertaken. Taking the hint of different real cases, the author envisages some different models where the municipal authorities resolve social conflicts stepping paths falling outside the scope of formal and traditional legality. The thesis is that these models are not extraneous to law, but they outline an "informal public law" coexisting with the positive and formal law in a more or less problematic way. However, if the "informal public law" is able to attain some public objectives more effectively, it also arouses a lot of challenges with particular reference to the principle of equality. At the end, though, the "informal public law" allows to rediscover another feature of cities: they are not only a creature of the States, but also a creature of the community.

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1. The discovery of "informal public law" in the experiences of cities

In a well-known essay[1] of more than thirty years ago, Gerald Frug, arguing on the evolution of the legal concept of the city, maintained that their history could be summed up in the following dichotomy: cities as "creatures of State" and cities as "creatures of communities". Needless to say, after the affirmation of the nation States between the seventeenth and nineteenth centuries, the first legal concept has clearly prevailed since States have eradicated municipal experiences as a self-sufficient dimension that had characterized all pre-modern law[2], placing the prevalence of formal law as the absorbing and centralizing fulcrum of law experiences. Cities absorbed by State systems have been left with exercising marginal and undifferentiated functions of the public State tasks in a condition of narrow instrumentality. The passive role of the cities was due to the logic of endowing the cities with the infrastructures from the States in order to affirm citizenship rights, administrative ability, efficacy of decisions and deliveries of public services[3].

However, that conceptual mind is undervaluing the capacity of cities to create law. Actually cities can be also seen as a free association of human beings who share urban land and spaces for better value of their interests[4]. From this perspective cities are able to exhibit a polity itself with the task of ruling the territory interests[5]. Taking the clue from the Frug's insights again, cities

[1] Cf. G. Frug, *The city as a legal concept*, 93 Harv. L. Rev. 1059 (1980).

[2] It is notable the paradox highlighted by M.S. Giannini, *Autonomia locale e autogoverno*, in ANCI, *Autonomia comunale. Sintesi dei rapporti presentati al Congresso di Parigi (luglio 1947)*, (1948), 48, according to which the cities had encouraged the evolution of the legal systems preordained to rise the national States, which then established the end of the cities themselves as an experience of self-government. One can read again a classical author as L. Mumford, *The city in history. Its origin, its transformations, and its prospects*, (1961) spec. 410.

[3] However, a different logic could be also tracked down, aimed at focusing the attention on the needs of territory through which the cities partially restore a specific autonomy and an active role. Cf. J.B. Auby, *Droit de la Ville*, (2016).

[4] In USA the debate is focused on the new significance and value of the "Home Rule", according to which the cities could reserve wide room in order to innovate policies and law; cf. recently R. Su, *Have cities abandoned home rule?*, in 44 Fordham Urb. L.J. 141 (2017).

[5] Cf. R. Cavallo Perin, *Beyond the Municipality: the City, its Rights and its Rites*, in IJPL, 311-313 (2013) who underlines the aggregative feature of the cities for

would be as «creature of community» too. That way allows the law to rediscover its social origin[6], its ability to be creative and innovative.

Emphasising this second mark means dealing with the law of the cities in a new way. To push the emergence of this new institutional reality is the growing lack of state rationality to meet social demands, especially in the local scope. The well known phenomenon of urban sprawl is a clear demonstration: it is increasingly giving rise of inaccuracy, decay and abandon of many urban goods because of incapacity of the local authorities to manage this transformation in an ordered way with the classical planning tool. This forces cities to experience re-generation and re-use of urban goods, like buildings, parks, cultural goods, dismissed factories and so on, in a way local authorities and community pool together in order to make those goods resourceful again. Municipal authorities are constantly challenged by social experiences that, although they originate outside the traditional circuits of legality, take on importance because, acting on spaces and goods that have fallen into disuse or that are in a state of neglect, reactivate their use for social purposes. Examples of this are projects of urban decorum, the management of rundown green areas, the renovation of areas and buildings that have lost their original functions, and more[7].

It is interesting to note that the vast majority of legal studies developed on these issues has focused on less developed areas of the world[8], thus confining the emergence of what I would term

cultural, social and practitioners movements in the territory. See also R.C. Shragger, *The political economy of city power*, in 44 Harv. L. Rev. 114-124 (2017), who maintains that the Frug's vision of the cities as creature of community is able to better handle the economic inequality and the democratic process nowadays.

[6] In other words, that way allows scholars to resume the Romano's view about the social origin of law: cf. S. Romano, *The legal order*, (2017).

[7] On these dynamics see also J.B. Auby, *Espace public, espaces publics*, in Droit administratif, 7 (2009).

[8] In this regard one can cite among others: A. Datta, *The Illegal City. Space, Law and Gender in a Delhi Squatter Settlement*, (2016); A. Brown, *Claiming the Streets: Property Rights and Legal Empowerment in the Urban Informal Economy*, 76 World Development 238 (2015); J. Hohmann, *The right to housing. Law, concepts, possibilities*, (2014); T. Kuyucu, *Law, Property and Ambiguity: the Uses and Abuses of Legal Ambiguity in Remaking Instanbul's Informal Settlements*, 38 Int. Jour. of Urb. and Reg. Research 609 (2014); S. Schindler, *Producing and contesting the*

"informal public law" to situations in which there is assumed to be an inadequate structuring of the network of public powers able to satisfy the claims and expectations of the various social actors[9]. This fact takes on special significance in the light of mounting experiences across Europe. This increasing emancipation of the cities is also proved by the transnational networks they have spontaneously created in different fields[10]. In some circumstances they have earned an active support from the EU (i.e. the Convenant of Mayors, even with more recent developments in energy field[11]); in other ones, they are linked in weaker way (i.e. the rebel cities as Barcelona and Naples)[12]. Moreover, the same EU launched the *Urban Agenda for the EU* in order to develop some actions placing cities at core so as to build a more effective system of different government levels for attaining Union objectives[13].

My hypothesis is that the cities are on frontline facing new social challenges where they are forced to play a creative role so that they are not the only final entities to implement national or regional statutes. Cities use more and more negotiations to address a growing social demand of regeneration so that a creative role of law prevails over the order by (national or regional) law[14].

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formal/informal divide: regulating street Hawking in Delhi, India, 51 Urban Studies 2596 (2014); J.L. Van Gelder, *Paradoxes of Urban Housing Informality in the Developing World*, 47 Law & Soc'y Rev. 493 (2013).

[9] However, some pioneering studies were not absent in Europe: see E. Bohne, *Der informale Rechtsstaat*, (1981). See also the contribution of German scholarship to new grounds of administrative law and, particularly, M. Fehling, *Informelles Verwaltungshandeln*, in W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Vosskhule (eds.), *Grundlagen des Verwaltungsrecht*, III, 1341 (2008). For the combination of urban subjects with the commons theory, see S.R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. Miami Inter-Am. L Rev. 261 (2009).

[10] Cf., for instance, M. Beltrán De Felipe, *La internacionalizatión de la ciudades (y el régimen municipal)*, 305 REALA, 57 (2007).

[11] Cf. V. Heyvaert, *What's in a Name? The Convenant of Majors as Transnational Environmental Regulation*, RECIEL, 78 (2013).

[12] Cf. D. Harvey, *Rebel Cities. From the Right to the City to the Urban Revolution*, Verso (2012). See also C. Iaione, *The Right to the Co-City*, in IJPL, 80 (2017).

[13] This Agenda is a result of Pact of Amsterdam signed by the corresponding EU Member States Ministries in 2016.

[14] Cf. G. Berti, *Stato di diritto informale*, in Riv. Trim. Dir. Pubbl., 4-5 (1992) with regard to the use of negotiations when informal law is required. See also C. Iaione, *Governing the Urban Commons*, in IJPL, 158 (2015).

On that basis, the following takes stock of this emergence, inspired by events that have taken place in Italy.

2. Four models of "informal public law"

By looking at the Italian cases four models of "informal public law" can be summed up according to the following division: the tolerance model, the recognition model, the original legal qualification model and the pact of collaboration model.

The tolerance model – The first to be considered is the most complicated and intended to coexist with degrees of uncertainty and serious conflict with positive law, because informality and illegality tend to overlap. These are situations in which social experiences are simply tolerated. Here positive law has little effect because relationships develop primarily on a political level in a condition that is inevitably destined to be resolved in one of two ways: either by terminating the informal social experience, re-determining a re-expansion of the positive law, or by vectoring the social experience through one of the more innovative forms of "informal public law" with an agreement. Beyond the final outcome, what is interesting to note is that before it occurs, conditions exist in which illegality is tolerated. While this of course can never be considered an acceptable legal condition, the fact remains that public authorities continue to maintain temporary informal relationships of coexistence with such social experiences.

An example has been the management of immigrants temporarily present on Italian soil, as organized by the *Baobab* centre in Rome during 2015 and 2016[15]. In the summer months (and not only) of those years, a significant number of immigrants, lacking a definite legal status since they were neither asylum seekers nor registered as individuals to be expelled, arrived in Rome in a state of total confusion both because reception services were lacking and because they themselves were uncertain about where to go. Thus the city's public facilities soon were occupied and transformed into unhygienic open-air dormitories. To cope

[15] Find the report of this case in N. Lagioia, *Il centro Baobab a Roma è un antidoto al razzismo*, in Internazionale, 27 luglio 2016 (https://www.internazionale.it/opinione/nicola-lagioia/2016/07/27/baobab-roma-razzismo) and https://baobabexperience.org

with this situation, a group of associations took it upon themselves to organize hospitality in an area southeast of the city, occupying an abandoned private property site. This circumstance of obvious illegality did not trigger the immediate reaction of the public authorities to dismantle the centre, thereby restoring a normal condition of formal legality, but instead led the municipal authorities to play a mediating role among the various groups managing the centre, the property owner and security authorities in an attempt to find a solution that balanced the rights in question, which involved offering immigrants temporary housing (and control) that would avoid their running rampant in the city streets. In this role of mediation of the local authorities a significant factor was also the support of the centre that a great many residents of Rome guaranteed with donations of all kinds.

Of course, as anticipated, the experience ended in a cloud of controversy and the condition of tolerance thereinafter came to nothing. This kind of social experience either has the toughness to survive in complete concealment or, once it has established a relationship with the public authorities, first develops an interest in a formal recognition that inevitably leads to a more appropriate legal solution; in fact, the groups that ran the *Baobab* centre were well aware of this. The key point is that for months this condition was tolerated by the public authorities and was sustained by informal kinds of support. The municipality's social services attempted to coordinate the actions of the various volunteer groups and, in the end, the city fully footed the costs of cleaning up and restoring the area after evacuation. Is it fair to say that just because the juridical relationship took place outside of a formalized procedure the law was excluded in this case? To argue this would mean not only failing to get to the bottom of this fact, namely the inability of public authorities to provide assistance services[16], but also closing their eyes to a reality in which, through informal relations tolerated and implemented by public

[16] After clearing out the centre in Cupa street, the Municipality of Rome strove for new accommodation for the immigrants, but a few of them were settled in the new residential centres run by other charity associations. In 2016 the Extraordinary Commissioner of the Municipality of Rome tendered for a contract with reference to new accommodation according to the positive law of public contracts, but it is estimated most of immigrants had followed different ways and abandoned the town.

authorities, important human rights were in any case guaranteed. At the very least, it may be noted that the local government authorities temporarily decided not to observe precise rules of positive law as they cast about for a solution consistent with formal legality. Something not to be underestimated[17].

The recognition model – There are also situations in which informality has transited within a framework of weak legality. Such are those conditions in which the public authorities have formally recognized the value of certain social experiences, but which, after the transitional period has expired, they have continued without these initial conditions being definitively resolved and formalized. A recent judicial case that still concerns the city of Rome can be cited as a useful example.

Before going in-depth analysis of case, it is not useless to remember that in Italy the Court of Auditors is not only a body exercising control on public finance and spending of administration, but also a judicial court. Particularly, as a court in strict sense, the Court of Auditors is entitled to enforce the civil servants responsibility for damage to treasury[18]. It is worth noting that the Court of Auditors is subdivided in regional sections and is also composed of two branches, namely the General Prosecutors, who make the accusation of responsibility for civil servants, and the formation of the Court.

With this in mind, the General Prosecutor of Latium Region's Court of Auditors promoted a lawsuit in 2016, regarding financial liability against a number of Roman city officials guilty of tolerating favorable treatment granted to a civic association which managed a public good in the absence of a definitive grant decision. The charge raised against the officials was the following: after the temporary granting order issued by the city had expired

[17] Cf. R.C. Ellickson, *Order without Law. How Neighbors Settle Disputes*, 134-136 (1991), who maintains that every legal system is based on five types of rules: *substantive rules*, *remedial rules*, *procedural rules, constitutive rules, and controller-selecting rules*. Particularly the *controller-selecting rules* allow the responsible subject to select the rules in the concrete case and the legal tools for enforcement. The mentioned *Baobab* case, therefore, is a clear example of this type of rules, so that, far from being extraneous to the law, it amounts to one of the possible ways the law follows, even if it is radically different from the formal one.

[18] Another judicial remit of the Court of the Auditors is assessing the litigation about pensions, but this type of jurisdiction is outside of the object of this paper.

– even after many years from when the civic association had taken over the management without prior formal recognition – the officials should have demanded the return of the asset to the city and, in any case, should have imposed financial penalties on the operators for unlawful conduct and require payment of at least the subsidized costs. With judgment no. 77/2017 the Latium Region's Court of Auditors[19] did not accept these compensation claims since it ruled that the charge had not proven that the conditions which had led the city to issue a temporary concession, i.e. the use of a good for social ends, had changed[20]. The Court of Auditors concluded that the city's recognition of the social value of the use of the real estate, even if temporary, meant that the officials were not liable, since in the specific circumstances what was contested was not an use inconsistent with the purposes that the city itself found deserving of support. In other words, the Prosecutor opposed a *formal objection* arising from the expiry of the temporary grant. Thus, it follows that the concession measure, in recognizing the social function of the management of the asset, attributed to that situation – no longer falling within the scope of formal legality – a capacity to resist claims of a different use in application of the law. Although in a condition of precarious coexistence, the expiration of the validity of a legitimating title cannot be invoked to claim a different use of a good unless it is accompanied by the assertion that the social use – once established – has defaulted. Therefore the social value underlying the use of the good prevails over a supposed alternative use justified by the law, even though it has received no formal consecration. Of course, the alternative use that the Prosecutor suggested was that of a direct alternative use to the one authorized by the city or a management corresponding to market logic.

The original legal qualification model – A totally different solution is the one offered by Naples, which has provided an

[19] Corte dei conti, sez. Lazio, 18 April 2017, n. 77. Likewise it is also the finding n. 76/2017 of Court of Auditors.

[20] This case law was decided on the grounds of the "absorbing cause of the accusations" technique, through which - according to the judicial process rules - the judges assessed just one of the causes of the accusations, because they deemed that prevailing over the others. That way, the judges did not assess every causes raised by the General Prosecutor. That is why, now it is pending an appeal before the national Court of Auditors.

original answer to recognizing social experiences of general interest. Starting from the experience of the former Filangieri Asylum, a well-known complex located in the city centre, but repeated in other cases, the city of Naples adopted a series of resolutions declaring this type of property *a civic urban asset*[21]. The essential feature of these city council resolutions, which entrust to citizens' committees the use of goods meant exclusively for collective enjoyment, is that through this original qualification, which is extraneous to any definition of clear-cut law, they recognize forms of self-management of organized social groups which the local administration guarantees to the community. Self-management involves the recognition of civic communities that, through democratic assemblies and self-determined acts make decisions to determine the use of goods qualifying for civic use and related activities. As far as these collective organizations are concerned, municipal authorities become supporters and, at the same time, guarantors toward the community itself. This is precisely one of the possible forms of that "informal public law" which goes hand in hand with positive law, by granting to social experience a full legal qualification.

However, it should be noted that the determining factor for achieving this result is the municipal authority's resolution of qualification, which is necessarily singular since it has no general scope but is focused on a single good or space. The content of this resolution is, however, entirely original and not attributable to the general category of formal acts that the national legal system prescribes.

The pact of collaboration model – The last case represented is the pact of collaboration one adopted by municipalities that have chosen to approve the regulation for the collaboration between municipalities and their citizens for managing common urban goods, starting with the example of Bologna, which was the first to adopt it in 2014[22]. Pacts of collaboration are those stipulated

[21] See the decision of the Naples Municipal government no. 893 of 2015, concerning just the former Filangieri Asylum, which represents a sort of paradigm for the next resolutions the Municipality adopted.

[22] This issue has drawn many Italian scholars: E. Chiti, *La rigenerazione di spazi e beni pubblici: una nuova funzione pubblica*, in F. Di Lascio, F. Giglioni (ed.), *La rigenerazione di beni e spazi urbani. Contributo al diritto delle città*, 15 (2017); R. Tuccillo, *Rigenerazione dei beni attraverso i patti di collaborazione tra*

between city authorities and citizens, or citizens groups, who decide to use or regenerate urban spaces and assets for collective purposes. In this case, the initiative can start either from the administration itself or from its citizens, but the real novelty is the all-important negotiating tool that is called upon to regulate this kind of relationship. The nature of the agreement allows the parties to redefine in a creative and non-standardized manner, except for the simplest implementations, solutions that are commensurate with their concrete objectives and the specific factors at hand, making it possible to build – even in this instance – an "informal public law" determined by the subjects involved. Under the terms of Pacts of collaboration a resolution is made by the local government in the form of a general regulation, which both determines the legitimacy of the pacts themselves and offers a general discipline that allows the potential use of any good or space on condition of ensuring their collective use. By the way, two points should be emphasized: (i) the municipal regulations are not enacted by any statutory provision but, from its first articles, they make direct reference to the Constitutional provisions; (ii) almost all the regulations discussed here contain in their first articles a set of highly original principles, among which constant and significant recourse to the "informality principle"[23].

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amministrazione e cittadinanza attiva: situazioni giuridiche soggettive e forme di responsabilità, in F. Di Lascio, F. Giglioni (ed.), *La rigenerazione di beni e spazi urbani. Contributo al diritto delle città*, 89 (2017); F. Giglioni, *I regolamenti comunali per la gestione dei beni comuni urbani come laboratorio per un nuovo diritto delle città*, in Munus, spec. 291 (2016); G. Arena, *Democrazia partecipativa e amministrazione condivisa*, in A. Valastro (ed.), *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali*, 232-235 (2016); P. Michiara, *I patti di collaborazione e il regolamento per la cura e rigenerazione dei beni comuni urbani. L'esperienza di Bologna*, Aedon, 2 (2016); G. Calderoni, *I patti di collaborazione: (doppia) cornice giuridica*, Aedon, 2 (2016).

[23] In Article 3 of Bologna Regulation, which other local authorities made use of, one can read with reference to the informality principle: «the administration demands that the partnership with the citizens takes place in accordance with the requested formalities only when it is provided for by law. In the rest of the cases it ensures flexibility and simplicity in the relationship, as long as it is possible to guarantee the respect of the public ethic, as it is regulated by the code of conduct of the public sector employees, and the respect of the principles of impartiality, efficiency, transparency and judicial certainty» (the translation is drawn by http://www.labgov.it/wp-content/uploads/sites/9/Bologna-

3. The balance between formality and informality in the models under consideration

The cases presented here are an example of the reactions of public local authorities that, in the face of claims from civic participation, do not react by applying legislative command (because they are often not in a position to do so), but by producing a new legality that coexists with the strictly positive one[24]. This is perhaps their feature of greatest interest.

To borrow Ellickson's well-known theory[25], what has emerged here is a special version of *order without law*, whereby rules of law emerge disregarding law as a formal source, so as to establish a system that serves general interests more effectively. However, it must be noted that the definition of *order without law* is employed here in an original and different manner from Ellickson's theory. The first difference lies in the legal and cultural contexts: Ellickson's is a theory applied to common law, while here we are dealing with a judicial system of civil law. This distinction is crucial because, while Ellickson's study shows how formal law can be disapplied to the benefit of *social norms*[26], in the cases outlined above, except for the isolated *Baobab* case, formal law is not supplanted by social norms but by laws that follow paths other than those of formal law so that are always based on the involvement of public authorities in enacting them, as well as judicial authorities in placing them within the Constitutional

Regulation-on-collaboration-between-citizens-and-the-city-for-the-cure-and-regeneration-of-urban-commons1.pdf).

[24] Cf. S.R. Foster, *Collective Action and the Urban Commons*, 87 Notre Dame L. Rev. 57 (2011).

[25] That is the reference to the well-known book written by R.C. Ellickson, *Order without Law. How Neighbors Settle Disputes*, cit. at 17, 15, where the author, through the close-examination of some cases drawn by a small Northern area of California, Shasta County, highlighted how the County inhabitants preferred to enforce social norms instead of common law in a multitude of potential or effective controversy. So the author outlines the existence of another order which is not based on the formal rules, but rather on the social norms regulating the coexistence of residents.

[26] Cf. R.C. Ellickson, *Law and economics discovers social norms*, 27 J. Legal Stud., 537 (1998), who underlines the exaggerated value given to the law for social control by the law and economics scholars, instead of emphasizing the informal enforcement of social norms.

framework. It is informal law, but not exactly an expression of social norms[27].

Another key difference is that in Ellickson's study the observed rules on the communities under consideration were those that individuals developed to protect their own interests in the belief that this also acted for the common good, while in the cases highlighted here the relationship always implies the intervention of public authorities, and the interest of their interventions is always a functional one rather than that of individuals. Even when Ellickson demonstrated a mixed use of informal and formal rules in the subject of his study, the combination still aimed at choosing which rule would ensure the best individual interest, while in the cases so far examined the combination serves the best pursuit of general interests.

However, despite these clear and important differences, the evidence seems to suggest, just as Ellikson's theory does, a legal system of *praeter legem* rules, in which the realization of general interests requires a change of attitude on the part of the public authorities, who see in the collaboration with the community instead of in formal law a bond for achieving the tasks assigned to it[28].

Shifting the legal implications of these experiences onto a deeper level, we need first to make an observation. In all these cases, public authorities create informal relationships because of their inability to meet a social demand. Can it be considered for this alone that the law is extraneous? The latest studies of public

[27] In order to avoid ambiguity in terms of language translation, it is conducive to specify that *social norms* means in this paper non-juridical norms, given that in a broader sense all the juridical norms are social norms too; see, for instance, V. Crisafulli, *Lezioni di diritto costituzionale*, I, 33-36 (1970). To borrow a distinction put forward by A. Nieto, *Critica della ragion giuridica*, 76-79 (2012), what differs juridical norms, is the fact that they are subject to judicial review from properly courts or from other administrative remedies; conversely, social norms are totally based on informal enforcement.

[28] Cf. R.C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J., 1222-1223 (1996), who underlines the role of citizens for controlling abandoned urban areas by executing social norms. In this respect the notion of «collaborative praxis» could be called upon, which includes procedures falling outside the formal law for equity or correctness. In the case of «collaborative praxis» the validity of praxis hinges on realizing the maximum attainment of the general interest with the active contribution of citizens.

law, including those carried out in Italy, show that administrative inefficiency is an issue of public law[29]. The distance between formal abstract law and real law is not bridged by arguing that the latter belongs to the world of facts, but by looking for ways that can reconnect the two domains, allowing them to acceptably coexist. Already a well-known Spanish scholar observed that in public law there are "free zones" of formal law[30] which, far from being considered alien to the law, deserve to be studied because they are based on relationships made of agreements, claims and rules that are spontaneously enacted and as such are juridically relevant. Thus they re-echo the studies that emphasize the wide range of behaviors and rules produced by the operative practice of *praeter legem*, meaning those activities that are suitable for achieving a general political purpose or a primary objective of legislation, perhaps outside of the specific predictions of individual laws[31].

Of course, the four models are very different from each other, expressing a modular combination of formality and informality: very important for understanding their durability before positive law. In other words, while highlighting all the informality of legal relations, the four cited examples establish different forms of "stitching" with formality, which makes them diversely suited to resist the claims that positive law can make.

The first model is undoubtedly the most precarious, the one least able to last very long, even though it is not necessarily subject to a traditional formal outcome. This condition of difficulty is determined by the fact that it starts from a condition in which

[29] One of the most recent handbooks of the Italian administrative law contains, for example, an entire chapter dedicated to the ineffectiveness of administration and administrative law, so that it is a really new law subject; cfr. M. D'Alberti, *Lezioni di diritto amministrativo*, 300-316 (2012). See also R. Ursi, *Le stagioni dell'efficienza. I paradigmi giuridici della buona amministrazione*, (2016), who recalls a new reading of the concept of efficacy.

[30] See A. Nieto, *La organización del desgobierno*, 182-183 (1987), where the author notes that the excessive rigidity of formal law is the origin of attitudes of subjects searching for other ways out, as the numerous convenants between administration and citizens clearly show.

[31] Cf. R. Baldwin, *Rules and Government*, (1995) but also R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation*, 307 (2012), about the preference of guidance as source of law for a principle based regulation, according to which it adequately meets social expectations.

informality and illegality coincide, so that their resistance to normalization is weaker. In the other three cases, however, also in adherence to observations known to legal doctrine[32], informality does not coincide with illegality, although they present in turn specific peculiarities.

The second model demonstrates a durability and coexistence with the strongest positive law, but is enrolled in a risky environment in which the elements of detail and context can play a decisive role. Indeed, the survival of the model is due not to the conscious choice of administrative authorities but to the interpretation of judges, which makes this case more dependent on case-by-case assessment.

The other two solutions of informal law, on the other hand, show a more convincing capacity to be compatible with positive law, especially since they presuppose on the part of local authorities a clear political choice of building an explicit alliance with social experiences. However, within this common frame there are differences. In particular, the third solution can be defined as punctiform in the sense that it always requires a city council resolution for the specific qualification of certain goods, on which the concrete legitimization of the social experience depends. It is not a case of traditional concession because it is based on original forms of legal and management qualification, but it nevertheless presupposes a foundational act that the municipalities adopt on the basis of a precise administrative policy addressing the interpretation of territorial interests in a given historical moment. The relationships thus created stand outside of any immediately recognizable legal framework, but are nevertheless linked to formal pronouncements by local authorities which thus express the interests of the community.

The fourth, on the other hand, aims to define a more structural solution, which implies a general choice determined by the municipal regulation which confers on the pacts of collaboration the power to create self-managed forms for the general interest. It thus constitutes an authentic governing model.

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[32] Cf. A. Datta, *The Illegal City. Space, Law and Gender in a Delhi Squatter Settlement*, cit. at 8, 36-37, who notes that the informal procedures do not involve illegality. In urban contexts the former is a result of providing services and infrastructures falling outside the planning and zoning framework, the latter, though, is given when such informal activities infringe the property law.

It should be noted that in this case, the municipalities' regulation resolutions also implement another Constitutional principle, that of Article 117, Section 6, which leaves to local authorities the general discipline of their organization and activities, as a full expression of autonomy[33].

Despite their differences, the models are not necessarily alternatives for each other.

4. The open challenges of "informal public law"

Of course, the challenges posed by the creation of such a "informal public law" are formidable. First, what should be avoided is that the elaboration of such a conceptual category of law be used to legitimize the disengagement of public authorities from the substantive task that the Constitution entrusts to them, namely the attainment of citizens fairness. The experiences that have arisen between those in which reconnection of informality with formal law occurs in a framework of precarious legality depict an administration that is unaware of its role and that prefers to accommodate *de facto* solutions because it is incapable of coming up with adequate responses. Paradoxically, while it is true that the creative law of cities presupposes a stronger investment in the capacity of social communities to satisfy social needs, it is equally true that all this requires an administration even stronger and more capable of governing the network of experiences so that these solutions do not wind up evading the obligations that the Italian Constitution imposes on public authorities to respect the principle of equality. Valuating informal relationships serves to demonstrate that public authorities have new tools to accomplish their tasks[34]. However, if these solutions were used to evade their obligations, the balances that would be produced would be

[33] The full legality of the municipalities' regulations was uphold by the Court of Auditors, whose branches of control stated that, though they were adopted regardless of a previous statute provision, they are coherent with the Constitutional provisions; see Corte dei Conti, sez. contr., ad. plen., n. 26/2017.

[34] It is a key-factor: the involvement of citizens should be deemed as an integrative resource for administration, beyond the classical one (budget, civil servants, goods). See for this opinion G. Arena, *Introduzione all'amministrazione condivisa*, 117-118 Studi parlamentari e di politica costituzionale, 29 (1997); G. Arena, *Ripartire dai cittadini*, in C. Magnani (eds), *Beni pubblici e servizi sociali in tempi di sussidiarietà*, 77 (2007).

unsatisfactory and would create unlawful privileges. Administrations are in this sense destined to change, not to recede. From this point of view, then, it is obvious that the training and culture of public employees still scarcely reflects these transformations. In order for these experiences not to reproduce the backwardness of the responsibilities of public administrations, it is necessary to invest heavily in organization and in the personnel called upon to interpret them.

Secondly, "informal public law" appears weaker in resisting political guidelines applied to the territorial context. Experiences that do not achieve an adequate degree of formalization are weak, as the *Baobab* case demonstrates, but so are the others, given their episodic and very singular character. Surely in this sense they seem more able to withstand the experiences of the pacts of collaboration supported by municipal regulations, since the normative act makes it possible to place the experiences within a related framework of stability. This is an important point, because in "informal public law" the extent to which public administrations are subject to actuating public policies seems to prevail over their other traditional task of being impartial. In this sense, therefore, the dosage between "informal public law" and the positive law must be well calibrated.

Thirdly, a very sensitive point is that of the potential discriminatory capacity that the experiences of "informal public law" can produce. Encouraging some experiences, however prone to ensuring collective interests, imposes choices of privilege that may benefit some categories of citizens and exclude others culturally and socially. One recalls cases where the subjects of these actions are foreigners or vice versa citizens only in a formal sense, characterized by a strong cultural cohesion that groups some but excludes others; or the use of assets for producing services that supplement those offered by organizing a public service that discriminates between people with large economic resources and others, or between categories of people, such as the young and the elderly[35]. In this sense, "informal public law" should not occupy a space that ends up overly reducing the

[35] This is dramatically underlined in the American cities: cf. A.L. Cahn, P.Z. Segal, *You can't common what you can't see: towards a restorative polycentrism in the governance of our cities*, 43 Fordham Urb. L.J., 241-244 (2016).

sphere of action of positive law, which represents important values such as, first and foremost, the principle of citizens' equality.

The last major challenge is that recognizing the value of "informal public law" must also be confirmed by its interpreters. In this sense, awareness in the law doctrine is growing, and important contributions are being made that can create a cultural context suitable for finding support. Of equal importance is that it should become a matter for case law, which can offer great insights to strengthen these developments[36], although everything is now passing through reconstructions that still seem intent on not deviating from the traditional legal system. Yet, it is precisely the confirmation of these tendencies that will make it possible to enrich the solutions for governing the complex interests that the "informal public law" of cities seems capable of promoting. What also hangs in the balance is the ability of lawmakers to offer useful contributions to social dynamics and not to be left out of transformations that mark important changes.

[36] As for the Constitutional Court is concerned, one can find the rulings no. 203 of 2013 and no. 119 of 2015, through which, on the one hand, judges have widened the field of application of the family leave by enhancing the meaning of family relations as a result of social autonomy and, on the other, they stated illegal the limitation of the civil service to the only formally Italian citizens, thus extending the meaning of citizenship. As for the administrative courts, those findings assigning particular binding legal strengths to the covenants regulating the land use deserve to be mentioned: see, for example, Tar Puglia, 5 dicembre 2013, n. 1642; Consiglio di stato, sez. IV, 6 ottobre 2014, n. 4981. From different perspective it is also interesting rulings demanding the involvement of community when the use of public good is to be decided: see, for example, the pharmacy case Tar Liguria, 15 giugno 2011, n. 938 and the beach case Tar Liguria, 31 ottobre 2012, n. 1348. As for the Court of Auditors is concerned, interesting opinions are Corte dei conti, sez. Piemonte, delib. no. 171/2015/PAR; Corte dei conti, sez. Lombardia, delib. no. 89/2013/PAR; Corte dei conti, sez. Puglia, delib. no. 53/2013/PAR; Corte dei conti, sez. Piemonte, delib. no. 483/2012/PAR; Corte dei conti, sez. Lombardia, delib. no. 349/2011/PAR, where a range of forms of grants to private subjects is considered legally valid if they are aimed at pursuing general interests coherent with the one that the formal law prescribes to public authorities.

5. New perspectives for public law

While taking the necessary precautions to prevent distorted uses of these experiences, in concluding we note that an observation of reality poses to lawyers and, in particular, to those who study public law important research questions that should be developed in the future. This new path of study obliges a juridical valuation of informal experiences. Of course, becoming aware of this means freeing ourselves of some of the ideal constructs on which, above all, the public law of continental Europe has been formed, but this is indispensable for preventing the increased distance of lawyers and their contributions from constructing a sense of today's reality.

The growing affirmation of informal relations is now renewing the debate on this issue and may rediscover the other nature of cities, as being creatures of communities. Of course, this raises important questions related to the evolution of the legal systems. In other words, the promotion of informality in public law is not an issue linked solely to verifying coexistence with the principle of legality, but demands important reflections on the relationship that they develop with States[37]. It is no coincidence that publications by international law scholars, who have long argued for balances between the formalities and informalities of international law, have significantly recognized the emergence of cities as one of the most emblematic features of this evolution[38].

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[37] Periodically the relationship between cities and States is going under strain; cf. O. Gaspari, *Cities agains States? Hopes, Dreams and Shortcomings of the European Municipal Movements. 1900-1960*, 11 Contemporary European History 597 (2002). For a more actual confrontation with one of the most important contemporary issues, see R.B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 Ariz. L. Rev. 681 (2008).

[38] See for instance H.P. Aust, *Shining Cities on the Hill? The Global City, Climate Change, and International Law*, 26 Eur. J. Int. Law, 1, 255 (2015); F.G. Nicola, S. Foster, *Comparative urban governance for lawyers,* XLII Fordham Urb. L.J., 1 (2014); J.B. Auby, *Mega-Cities, Glocalisation and the Law of the Future*, in S. Fuller e al. (eds.), *The Law of the Future and the Future of Law*, 203 (2011); J. Nijman, *The Future of the City and the International Law of the Future*, in S. Fuller e al. (eds.), *The Law of the Future and th(e Future of Law*, (2011); I.M. Porras, *The city and international law: in pursuit of sustainable development*, 36 Fordham Urb. L.J., 3, 537 (2008); M. Beltràn De Felipe, *La internacionalización de la ciudades (y el régimen municipal)*, cit. at 10, 57; Y. Blank, *Localism in the New Global Legal Order*, 47 Harv. Int'l L.J. 263 (2006); Y. Blank, *The City and the World*, 44 Colum. J. of Transnat'l L.

All this envisages potentialities that make it possible to rediscover some of the features of European law that seemed extinct and that have now been revived in a context that is profoundly renewed, so that these same elements of the past do not reproduce the old systems but coexist in a new framework. "Informal public law" emphasizes forms of civic participation, that is to say it shows a new shape of democracy based on effective and concrete capability of citizens[39]. All this means that democracy and rule of law are increasingly under the strain, so that the fight for law is not anymore the fight for an abstract legality necessarily[40].

875 (2006); G. Frug, D.J. Barron, *International Local Government Law*, 38 The Urban Lawyer 1 (2006).

[39] Cf. B.R. Barber, *Three Challenges to Reinventing Democracy*, in P. Hirst. S. Khilnani (eds.), *Reinventing Democracy*, 147 (1996) who alludes to the new challanges coming from the civic organizations to institutions.

[40] An interesting point of view is that of Schragger as to the ability of the cities to control mobile capital in order to plan an equal and democratic development of city communities. He contends the widespread idea the States are the most appropriate subjects to attain the social needs, by just giving to them the responsibility to make the cities weak: see R.C. Schragger, *Mobile capital, local economic regulation, and the democratic city*, 123 Harv. L. Rev. 534-536 (2009).

SHORT ARTICLES

CROSS-BORDER PROCUREMENT PROBLEMS AND TRANSNATIONAL ENTITIES

*Lydia Lebon**

Abstract

This paper addresses the matter of transnational entities, especially in the field of joint cross-border procurement. In this regard, if Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts implicitly allowed for joint cross-border public procurement, Directive 2014/24/EU on public procurement unequivocally advises this form of cooperation. Among the transnational entities emphasis is given to the European grouping of territorial cooperation, which seems to be the most convenient legal structure to welcome joint cross-border procurement operations. But the use of the EGCT might raise some legal questions. Eventually, it seems that the joint cross-border public procurement operation is a complex architecture and the purpose of this paper is to highlight some issues and obstacles and to demonstrate that the European Union law is far from being thorough in addressing them.

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1. Introduction

This paper[1] addresses the matter of transnational entities, especially in the field of joint cross-border procurement. In this regard, if Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts implicitly allowed for joint cross-border public procurement[2], Directive 2014/24/EU on public procurement unequivocally advises this form of cooperation[3].

The purpose of the provisions of the directive is indeed to facilitate cooperation between contracting authorities and central purchasing bodies from different Member States[4]. At the same time, joint cross-border public procurement contributes to enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. The actual implementation of joint cross-border public procurement projects has further policy objectives since it would "allow buyers deriving maximum benefits from the potential of the internal market in terms of economies of scale, reduced transaction costs, and risk benefit sharing"[5]. These objectives will

[1] This paper is a working paper presented in the workshop "A la recherche du droit administratif transnational" in Spetses, September 2016, at the annual reunion of the EGPL, workshop organised by Professors J.-B. Auby, O. Dubos, G. della Cananea, T. Perroud and S. Torricelli.

[2] See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.

[3] See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.

[4] The directive emphasizes in recital (69) that "centralised purchasing techniques are increasingly used in most Member States".

[5] See Recital (73), Directive 2014/24/EU.

thus be fulfilled after the implementation phase, but in anticipation to these provisions, several initiatives can be listed, such as the HAPPI project[6], the German–Dutch–Austrian cooperation in hospital procurement[7], or the MEDEV[8]. If the health field seems to be particularly favourable to joint cross-

[6] The Healthy Ageing Public Procurement of Innovations (HAPPI) is a collaboration of 12 purchasing bodies and innovation experts from 8 Member States (France, UK, Germany, Italy, Belgium, Luxembourg, Austria and Spain), which is supported by the European Commission. The consortium's aim is to identify, assess and purchase innovative and sustainable health products, services and solutions, which will improve ageing well. So far, the partners have developed and purchased over 150 innovative medical solutions with the help of their procurement strategy. It comprises early market studies and communication of the tender to a multitude of companies including SMEs. The procurement procedure is designed and conducted by central purchasing bodies from different Member States. On this project, see the policy brief n° 21, *How can voluntary cross-border collaboration in public procurement improve access to health technologies in Europe?*, J. Espín, J. Rovira, A. Calleja, N. Azzopardi-Muscat, E. Richardson, W. Palm, D. Panteli, *World health organization*, (2016). A legal study on the feasibility of this project has been conducted by Professor G.M. Racca, from the University of Turin. See S. Ponzio, *Joint procurement and innovation in the new EU directive and in some EU-funded projects*, Ius pub. 24 (2014).

[7] The German Purchasing Association GDEKK, which since 1998 acts as a central non-profit purchasing body on behalf of 75 municipal hospitals in Germany, extended its geographical scope to also include public hospitals in Austria and university hospitals in the Netherlands. Despite the legal differences in health- related procurement, it is believed that through further economies of scale, cost reductions can be achieved for all participating bodies in this enhanced European cooperation for health procurement. The association set up a professionalized procurement system, which includes defining common procurement needs, market analysis and establishing quality criteria.

[8] The Medicine Evaluation Committee (MEDEV) was established in 1998 as a standing working group of the European Social Health Insurance Forum. Today, MEDEV represents the drug experts and pharmacologists of national social insurance organizations and HTA agencies in 18 EU Member States. The principal purpose of MEDEV is to provide the national health insurance organizations and other competent bodies with timely analyses of drug-related trends and innovations at both national and European level. While it focuses mostly on HTA, national exchange of experience and information also relates to the definition of parameters for cost–benefit analyses and international price analyses. The group also follows cross-border procurement initiatives. Particular attention was given to the early dialogue with companies developing orphan medicinal products, the Method of Coordinated Access to Orphan medicinal products (MoCA). This dialogue has mainly covered clinical study issues but has also addressed some novel procurement models.

border procurement[9], other scientific disciplines can be registered, like in maritime research, with the Joint Programming Initiative Healthy and Productive Seas and Oceans[10].

In any case, there certainly is a growing demand in this regard. The changing European Union framework is thus expected to facilitate cross-border cooperation between contracting authorities and help clarify the applicable law and responsibilities of the different parties involved.

Recital (73) of Directive 2014/24/EU reminds that "[j]oint awarding of public contracts by contracting authorities from different Member States currently encounters *specific legal difficulties concerning conflicts of national laws* (…)[11]. Contracting authorities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts".

The Commission intended to remedy such difficulties with the adoption of new rules and the offer to expand cooperation, by allowing to use cross-border and transnational entities. Directive 2014/24 thus aims at getting public buyers to think from a "*European perspective*"[12]. Some provisions of Directive 2014/24

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[9] See the Policy brief n° 21, aforementioned, p. 7: "all these initiatives in the health field can be explained because of the characteristics of the markets for health products have dramatically changed since the 1990s and globalization has had a significant impact on the nature of the supply chain. A series of high-profile industry mergers has reduced competition in many medicines markets. National health systems, on the other hand, have in several cases become more decentralized in relation to procurement. Cross-border collaboration in the field of public procurement is often put forward as a promising strategy to address some of the existing imbalances and challenges of the health technologies market".

[10] See http://www.jpi-oceans.eu/joint-public-procurement. The Joint Programming Initiative Healthy and Productive Seas and Oceans (JPI Oceans) is established in 2011 as a coordinating and integrating strategic platform, open to all EU Member States and Associated Countries who invest in marine and maritime research. JPI Oceans covers all European sea basins with 21 participating countries and provides a long-term integrated approach to marine and maritime research and technology development in Europe. The project has received funding from the European Union's Horizon 2020 research and innovation programme.

[11] See Recital (73) of Directive 2014/24, aforementioned.

[12] See the complete analysis of A. Sanchez Graells, *Collaborative Cross-Border Procurement in the EU: Future or Utopia?*, 3, Upphandlingsrättslig Tidskrift – Proc. L. J. 11-37 (2016), see especially p. 14. The author refers to the European

should therefore come under scrutiny and this paper's purpose is to address these elements, but more precisely to study these issues from a French law point of view, and more accurately, from a French *public* law point of view. The French legal framework presents interesting features underlining the potential complexity of these projects. First, there is the fact that public procurement is a public discipline and as such, traditionally avoids all contacts with conflicts of law rules[13]: the European Union law plays an important part in changing this premise[14], especially in the public procurement field.

Moreover, there is the distinction between civil courts and administrative courts, a distinction that has to be taken into account.

In light of the above, the study will be divided in five parts.

Section 1 will briefly present the scope of the analysis that concentrates on procurement involving contracting authorities from different Member States.

Sections 2 and 3 will respectively address the issues, both legal and political, that may be raised by these possibilities.

Section 4 will eventually focus on a specific transnational entity which is specifically addressed by the 2014 Directive and appears to be the adequate instrument to aggregate these authorities[15]: the European Grouping of Territorial cooperation referred to in this paper as the EGTC.

Section 5 will briefly mention the national provisions of implementation, in French law, albeit not very enlightening.

Commission Draft Proposal for an action plan on cooperative procurement of 8 October 2015, on file with author, where the Commission justifies the use of joint cross-border procurement, because it forces the buyer to think "Europe" rather than "local".

[13] See the PhD. thesis of Professor M. Laazouzi which refers to an "avoidance" behaviour, M. Laazouzi, *Les contrats administratifs à caractère international* (2008), in the introduction, where he mentions, in French, the "évitement".

[14] Not that it is EU's intent to do so, but the distinction public/private law does not have the same meaning in EU law. See L. Azoulai, *Sur un sens de la distinction public/privé dans le droit de l'Union européenne*, Revue trimestrielle de droit européen 842 (2010).

[15] See Public buyers save money with cooperative procurement, available at http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9013&lang=fr

2. The scope of the analysis: procurement involving contracting authorities from different Member states

As stressed out by the European Commission[16], "public purchasers, such as cities, public administrations, universities and hospitals often purchase goods and services on their own, failing to take advantage of the economies of scale that could be achieved by purchasing them jointly with other public bodies (also called "cooperative procurement")[17]. Indeed, it appears that "On the supply side, higher value contracts motivate more companies to submit bids which increases competition among enterprises. This leads to substantial savings through cooperative procurement when compared to individual purchases. In reaction to these findings, centralised purchasing and joint cross-border procurements have been facilitated by the new EU public procurement legislation which EU countries had to transpose into national legislation by 18 April 2016"[18].

The new Directive 2014/24/EU thus encourages cases other than domestic ones. In the domestic cases, all public sector entities remain in one and the same Member state. This means that they are subjected to the same set of legal rules and the cooperation between contracting authorities or between contracting authorities and central purchasing bodies[19] may develop within one member state, that is to say within one legal system.

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[16] See at this address: http://ec.europa.eu/growth/toolsdatabases/newsroom/cf/itemdetail.cfm?item_id=9013.

[17] The Commission gives the example of hospitals buying body scanners individually, when they could make a larger order through a central purchasing body which would help them better cope with rising healthcare costs.

[18] *Ibid*. See the data on public procurement with the aggregation indicator, at EU Commission, Public procurement indicators on the 2015 period, available at this address,http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm#maincontentSec3. The aggregation indicator measures the proportion of procurement procedures with more than one public buyer. For example, for France, in 2013, the aggregation rate was of 5% and 6% in 2015 which is an "unsatisfactory" rate. Out of 28 member States, only 11 member States have a satisfactory rate of aggregation, that is to say superior or equal to 10%.

[19] As Recital (69) reminds us, "The central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding public contracts/framework agreements for other contracting authorities, with

The cases that would interest us here would be cases where there is a cross-border element on the public side, that is to say, whenever the central purchasing bodies and/or contracting authorities are from different Member States[20].

Such cases create conflicts of laws situations, where the courts are faced with a choice of laws from different Member states. The outcome depends on which jurisdiction's law will be used to resolve each issue in dispute. For instance, there can be a cross-border collaborative procedure between central purchasing bodies, the cross-border element being that of the location of these central purchasing bodies in different Member States. Only one of the central purchasing body will then administer the framework agreement, which is the instrument considered as an efficient procurement technique[21]. Despite contracting authorities from the other Member State having a domestic relationship with their own central purchasing body, the framework agreement will be administered by the central purchasing body from another State. Also, the contracting authorities from one Member State will enter arrangements with suppliers (even domestic ones) that might also be subjected to the laws of the Member State where the central purchasing body administering the framework is located.

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or without remuneration. They should be able to act as wholesalers by buying, stocking and reselling or, secondly, they should be able to act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities. Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, as between the central purchasing body and the contracting authorities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

[20] This paper only addresses the cases between EU member states, even if other issues could potentially be raised with the involvement of non-EU countries.

[21] See Recital (60) of Directive 2014/24/EU: "the instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is". The contracting authorities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases.

Articles 37 to 39 of Directive 2014/24 deal indeed with centralised, joint and cross-border procurement. The Directive clarifies in Recital (73) that the purpose of those rules is to determine the conditions for cross-border use of Central purchasing bodies and designate the *applicable public procurement legislation*. This set of rules is complementing the conflict of law rules of Regulation (EC) Nº 593/2008 of the European Parliament and the Council, Rome I[22]. Article 39 (2) also states that "A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State".

These provisions of Directive 2014/24 are thus supposed to stimulate the cross-border collaborative public procurement, and to provide conflicts of laws rules that address all issues derived from such exercises. However, as other scholars have pointed out[23], a few problems may remain and the conflicts of law rules established by the Directive do not prevent from legal issues.

3. Legal issues

It seems that most buyers are reluctant to be involved in cross-border public procurement projects, especially because of the complex legal architecture that might be involved. If the Directive was supposed to provide rules to help establish these projects, one can only agree with this suspicion of complexity when you consider all the legal issues that might be raised by these projects. First, there might be issues regarding coordination of laws, especially in Member states where public procurement entails *public laws*: these aspects will be addressed in section 2.1. Another important issue will be related to legal remedies that can be offered to claimants and the possible discrepancy between two

[22] Regulation (EC) n° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 4.7.2008, Official Journal of the European Union, L 177/6.

[23] See the much more thorough study of A. Sanchez Graells, A. *Collaborative Cross-Border Procurement in the EU: Future or Utopia?*, cit. at 12, 11-37. The author's conclusion is that "the legal deficiencies of the rules laid out in Articles 37 and 39 of Directive 2014/24 make it legally impracticable, if not completely impossible, to implement cross-border collaborative procurement—particularly if central purchasing bodies are involved, and in the absence of a new wave of international agreements between EU Member States".

Member states: this issue is studied in section 2.2. Eventually, we will address in section 2.3. the limits to contracting that are mentioned in the directive provisions, those limits requiring some interpretation.

3.1. Coordination of public laws

First, regarding conflicts of law issues, the directive refers to Rome I regulation[24]. This regulation is supposed to fill the gaps when there is the need to determine "the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation". However, there was a scholarly debate, especially in France, as to whether administrative matters are included in this regulation or not. Indeed, the regulation scope is about contracts in « civil and commercial matters » and specifically rules out « contracts in revenue customs or *administrative matters* »[25]. In French law, as a public procurement contract is considered an administrative contract by the legislator's classification[26], it would be excluded from the Regulation's scope. However, the European conception of administrative matters, which is an autonomous conception, is also a restrictive one[27].

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[24] See recital 73, "new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting authorities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. Those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, *complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council*". Emphasis added.

[25] See article 1 of the Rome I regulation, "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters".

[26] See article 2 of the so-called «MURCEF» Law.

[27] It combines a personal criterion with a material one. See, ECJ,14 October 1976, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, Case 29-76. See § 4, *although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the convention, this is not so where the public authority acts in the exercise of its powers",* about the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

Furthermore, some think the contracts in administrative matters would still be submitted to the 1980 Rome I convention, on the law applicable to contractual obligations[28]. In any case, both regulations stress the importance of freedom of choice regarding the applicable law. For some scholars, the Rome I rules are also appropriate to determine the applicable law, to the extent that if the applicable Member State law has not been chosen by the parties, or if the choice of law clause is invalid, the criteria of Regulation (EC) n° 593/2008 shall be applied to determine which Member State law is applicable[29].

There could be an issue of coordination of the administrative law that controls relationships between public authorities or entities and the public or (private) contract law applicable to the relationships between contracting authorities and suppliers. Article 39(3) of Directive 2014/24 subjects centralised purchasing activities by a central purchasing body located in another Member State to *the law of the Member State in which the central purchasing body is based*[30]. But as other scholars have pointed out[31], it is also "the law applied to the call-offs carried out by the contracting authority of the other member state. This means that

[28] S. Lemaire, *Le règlement Rome I du 17 juin 2008 et les contrats internationaux de l'administration*, Actualité juridique du Droit administratif 2042 (2008).

[29] See Book IV of the Research network on EU administrative law, quoted by A. S. Graell, about the applicability of Rome I regulation to the EU contracts: the scholars think that the Rome I provisions are appropriate to be applied *mutatis mutandis* to EU contracts even when not directly applicable: not all EU contracts may be qualified as contracts in "civil and commercial matters", but some may be qualified as contracts in "revenue, customs or administrative matters" in the sense of Article 1(1) of the Rome I Regulation. *However there is no reason why the criteria set out in the rules of the Rome I Regulation would not be appropriate to determine the applicable law even in these cases'*. See the Book IV, Contracts, of the ReNEUAL Model Rules on Administrative procedure, p. 177, available online.

[30] See article 39 (3), "The provision of centralised purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with *the national provisions of the Member State where the central purchasing body is located*. The national provisions of the Member State where the central purchasing body is located shall also apply to the following: a) the award of a contract under a dynamic purchasing system; b) the conduct of a reopening of competition under a framework agreement; c) the determination pursuant to points (a) or (b) of Article 33(4) of which of the economic operators, party to the framework agreement, shall perform a given task."

[31] See. A. Sanchez Graells, A. *Collaborative Cross-Border Procurement in the EU: Future or Utopia?*, cit. at 12, 31.

the contracting authority and/or the central purchasing body would be operating under a *foreign public procurement law*". As pointed out, this can be a problem because "they don't usually have *jurisdiction* to do so"[32]. Indeed, public law of a State usually is intended for the public entities of this State[33]. In France, for instance, if it is admitted that a French public entity can implement a foreign law[34], the award of public contracts is one of the public policy rules. It is indeed part of the "règles impératives de droit public" which is a key notion in the administrative case law and has recently been used in important cases[35]. These questions about the public laws coordination certainly contribute to make the international administrative contracts legal system commonplace.

One can wonder if it really is a problem? Indeed, one can assume that the differences between domestic procurement rules are limited, now that the European Union legislation is so important on the matter. Subsequently, the contracting authority would actually be implementing the national measures of transposition. However, if the commonality is important in this area, it might not avoid all differences. It is also quite a shift of perspective to consider the public law rules as "interchangeable" rules[36], at least from a French point of view.

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[32] I*bid*.

[33] See S. Cassese, "Until a few decades ago, both administrative systems and administrative law developed in the specific context of the nation-State. The legal environment that favoured the development of administrative systems and administrative law was a national government, which was run by a political body called the "State". Public administrations were conceived of as belonging to national communities, and as being structurally dependent upon national governments. Administrative law was thus fundamentally *State* law". See S. Cassese, *Global Administrative Law* (2015).

[34] See F. Brenet, *Contrat administratif international et droit international privé*, Actualité juridique du Droit administratif 1144 (2015). It certainly is a long way since the idea that to a judge, there is only one law, the law of the judge's jurisdiction. See the famous comment of the *Commissaire du gouvernement* Barbet in the *Habid Bechara* case, see CE, 11 january 1952, Sieur Habib Bechara, *Revue juridique et politique de l'Union française* 292 (1952).

[35] Especially about the administrative control over an international arbitral award. See below Section 2.3 about the limits.

[36] Professor M. Laazouzi speaks of the «substituabilité» of public procurement rules. M. Laazouzi, *La spécificité des contrats publics internationaux*, 3 Revue des contrats 545 (2014).

Eventually, article 39(4) establishes that in case of joint cross-border procurement, "[u]nless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement...". What would be the nature of this agreement between the participating contracting authorities?

It wouldn't be *per se* a European Union act, it would not be an international agreement, it would be a transnational agreement between contracting authorities but required by the European Union law[37]. It would be part of a transnational administrative law which premices can be identified with the works on global administrative law and international administrative law[38].

According to article 39(5), the agreement shall determine: '(a) the responsibilities of the parties and the relevant applicable national provisions; [and] (b) the internal organization of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts'[44]. But what if the agreement does not provide these elements? The Directive does not answer this question and does not provide any solution if there is no choice of law by the agreement. Besides, in some states, there might be an issue of jurisdiction to conclude this agreement. In France, for example, among the contracting authorities, are the municipal authorities, yet the jurisdiction for local authorities to contract with other authorities is relatively new. The international jurisdiction of the municipal authorities had to overcome the hurdle of the State sovereignty and the idea that the State only can conclude agreements with foreign authorities. A 1992 law has allowed this possibility for municipal authorities, a legal

[37] See in the French literature, for a study distinguishing these international contracts of the administration with transnational agreements, M. Audit, *Les conventions transnationales entre personnes publiques*, LGDJ (2002).

[38] S. Cassese, *Le droit administratif global: une introduction,* Droit administratif (2007), 7. See S. Cassese, *Global Administrative Law*, cit. at 33 and the references mentioned in footnote 6. See the work of K. Neumayer, *Le droit administratif international*, Revue générale de droit international public 492 (1911). Dr. A. Sanchez speaks of a "trans-EU public law", See A. Sanchez Graells, *Collaborative Cross-Border Procurement in the EU: Future or Utopia? ,* cit. at 12, 34.

framework since strengthened by different legislations, especially a 2008 law[39].

3.2. Applicable legislation on remedies

The original proposal of the Commission for a Directive[40] provided that "Decisions on the award of public contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law applicable. In order to enable the effective operation of review mechanisms, Member States shall ensure that the decisions of review bodies within the meaning of Council Directive 89/665/EEC (…) located in other Member States are fully executed in their domestic legal order, where such decisions involve contracting authorities established on their territory participating in the relevant cross-border public procurement procedure"[41]. Such a mechanism provided unprecedented rules of conflicts of jurisdictions, especially for States like France: it would have been the first step towards creating a recognition and enforcement of foreign decisions mechanism for the administrative judge[42].

The final version of the text is not as daring in this regard, for this provision eventually disappeared. Furthermore, the final version is not as thorough regarding the remedies.

The Directive clarifies in Recital (73) that the purpose of those rules is to determine the conditions for cross-border use of Central purchasing bodies and "designate the applicable public procurement legislation *including the applicable legislation on*

[39] See the Law n° 95-114 of February 1995, called the "loi d'orientation pour l'aménagement et le développement du territoire (LOADT)". See also the Law of n° 99-553, June 1999, called the "loi d'orientation pour l'aménagement du territoire " and the Law n° 2004-809 of August 2004, "loi relative aux responsabilités et libertés locales". Eventually there is the law n° 2008-352 of 16th april 2008, "loi visant à renforcer la coopération transfrontalière, transnationale et interterritoriale". We will see in Section 4, that the latter allowed the transposition of the EGTC provisions.

[40] See the Proposal for a Directive of the European Parliament and of the Council on public procurement, COM/2011/0896 final.

[41] See article 38 § 9 of the Proposal aforementioned.

[42] The provision stated that the "Member States shall ensure that the decisions of review bodies (…) located in other Member States are *fully executed*". Emphasis added. Such a control mechanism has been developed by and in favour of the administrative court's over an arbitral award. See Conseil d'État, Assemblée, 9 november 2016, *Fosmax LNG*, req. n°388806.

remedies, in case of cross-border joint procedures". We may assume that the applicable legislation on remedies would be that of the Member state where the central purchasing body is located. This seems not to cause any problem for the suppliers or contracting authorities located in that Member state: to them, it won't be different than in a domestic case. But it will be different for suppliers and above all for contracting authorities from another Member state. This means that a Contracting Authority could be sued in another Member State; that is, the State where the Central Purchasing Body is located (the 'home' State from the point of view of purchase) which is also the State where the legislation is applicable.

What about remedies brought to the jurisdictions of the Contracting Authority applying foreign rules? The national judge would have to apply the law of the Member state where the central purchasing body is located. In some states, this might be legally impossible, or at least, it might raise some issues. For example, in France, if it is a foreign law that is applicable to the contract, private or public, more specifically if the contract does not involve any French *public* law, then the administrative judge has no jurisdiction for legality control[43]. In the *Tegos* case, the *Conseil d'Etat* links its jurisdiction to the applicable legislation, and not the other way around. At best, the judge checks the respect of general principles of public procurement and the transparency rule[44].

What about remedies for disappointed bidders or for third parties? Can we imagine a situation where a disappointed bidder in one Member State would be able to have a remedy against a national contracting authority operating under a framework agreement from another central purchasing body, a remedy that they wouldn't have had, had they been in a domestic situation? This would create a reverse discrimination that each State has to handle. One can object that remedies are now quite the same in every country, because of the commonality of the European law. But for some remedies, it is not that obvious. For example, in France, there was an evolution in this regard for third parties, but only quite recently. Disappointed bidders do have a remedy

[43] See Conseil d'État, 19 November 1999, *Tegos*, n° 183648.
[44] Conseil d'État, 29 June 2012, *Sté pro2C*, n° 357976.

against the contract since the *Tropic*[45] case which is already ten years old[46]. But all third parties only do have this remedy since the *Département de Tarn-et-Garonne*[47] case, from 2014.

3.3. Limits

However, there are limits: a first one is of course that cross-border collaboration in procurement is not supposed to infringe on the European Union competition law. Another limit is specifically mentioned by article 39. This provision states that contracting authorities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing *mandatory public law rules,* in conformity with Union law, which are applicable to them in the Member State where they are located. What are those *mandatory public law rules* [48]?

And what use is the clarification that these mandatory public law rules have to be "in conformity with Union law"? To answer the latter, we can think about a reminder of the European Union law's primacy. To answer the former, we can relate to the notion of "overriding mandatory provisions", from article 9[49] of Rome I regulation, a concept that "should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively"[50]. According to article 9, the overriding mandatory provisions "are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective

[45] See Conseil d'Etat, Assemblée, 16 July 2007, *Société Tropic travaux*, n 291545.

[46] The *Tropic* case was an anticipation of the transposition of Directive 2007/66/EC of the European Parliament and of the Council directive 2007/66/CE of 11 december 2007 amending council directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. This Directive was then transposed with the Ordonnance n° 2009-515 of 7 May 2009.

[47] See Conseil d'Etat, Assemblée, 4 April 2014, *Tarn-et-Garonne*, n° 358994.

[48] See also Recital (41): "Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy".

[49] Regulation (EC) n° 593/2008 of the European parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[50] See regulation Rome (EC) n° 593/2008, recital (37).

of the law otherwise applicable to the contract under this Regulation".

Directive 2014/24/EU states that "Such rules *might include*, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies"[51]. In French Law, it certainly reflects the notion of «règles impératives de droit public» used in the *INSERM* decision[52] clarified by the *Sté Fosmax* case[53], about the administrative court's control over an arbitral award. In the *INSERM* decision, the Tribunal des Conflits[54] decided that "a challenge against an arbitral award rendered in France on the basis of an arbitration agreement contained in a contract concluded between an entity of French public law and a foreign company, which contract has been performed on the French territory and which concerns the interests of international trade, is to be brought before the court of appeal where the award is rendered pursuant to article 1505 of the Code of Civil Procedure even if the contract is to be characterized as administrative according to French domestic law". The Tribunal however added that "the situation is different where a recourse brought under the same circumstances implies that the award be reviewed according to French mandatory rules of public law on the occupation of the public domain or *according to the rules governing public expenditure that are applicable to public procurement,* to public partnerships or to the delegation of public services, as such agreements are subject to a mandatory administrative regime that is of public policy"[55]. A recourse with respect to those contracts is subject to the jurisdiction of the administrative court. It might come as a little

[51] See Recital (73).

[52] See, Tribunal des conflits, 17 May 2010, *INSERM*, n° 3754, see F. Brenet et F. Melleray, *Droit administratif*, 2010, comm. 122. See also S. Boueyre, *Les règles impératives du droit public, vues comme des lois de police*, 1 Journal de l'arbitrage de l'Université de Versailles - Versailles University Arbitration Journal 4 (2014).

[53] Conseil d'État, Assemblée, 9 November 2016, *Sté Fosmax LNG,* n° 388806. On this case, see. F. Brenet, *Contrôle de la juridiction administrative – Le contrôle du juge administratif sur les sentences arbitrales internationale*s, Droit administratif, 3, (2017).

[54] The *Tribunal des conflits* is the jurisdiction empowered to settle a conflict of jurisdiction between civil and administrative courts.

[55] Conseil d'État, Assemblée, 9 November 2016, *Sté Fosmax LNG,* n 388806. Emphasis added.

tricky to reconcile the will to establish collaborative cross-border procurement under a foreign law and this caution about circumventing mandatory public law rules which seems to have a comprehensive meaning[56].

4. Political issues

Political issues have to be addressed though these issues are intertwined with legal issues aforementioned. The main consequence will be that a contracting authority of a Member State could be sued in front of the courts of the Member State which procurement law is applicable by virtue of the location of the central purchasing body. This raises legitimacy and democratic issues.

For instance, and it is quite a traditional question whenever transnational cases are created, there might be accountability issues[57]. Public procurement involves purchasing actions with public funds, and protection of public funds is a fundamental principle, it is a constitutional goal from a French point of view and quite a sensitive issue lately[58]. Indeed, there must be some kind of a link, some kind of a connection between public expenditure and public interests, that is to say, national interests. Every time there is a call-off, the suppliers will be paying rebates or fees to the central purchasing body. For contracting authorities located in other member states this will imply a transfer of rents or implicit payments to the central purchasing body located in the other country.

Furthermore, the arguments for this type of procurement is to allow buyers deriving maximum benefits from the potential of

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[56] Professor Brenet describes them as «*les règles les plus essentielles du droit public, celles qu'il faut protéger à tout prix car elles sont au cœur de notre système juridique*», which can be roughly translated as "the most fundamental rules of public law, the ones that we have to protect at any cost, as they are deeply rooted in our legal system". See, F. Brenet, *Contrôle de la juridiction administrative – Le contrôle du juge administratif sur les sentences arbitrales internationales*, 3 Droit administratif (2017).

[57] See J.-B. Auby, *La globalisation, le droit et l'Etat*, (2010) on the accountability issues.

[58] The presidential election campaign highlighted that the use of public expenditure is quite a main concern for the French people who expect more transparency in the public policy.

the internal market in terms of economies of scale, reduced transaction costs, and risks benefit sharing. We concur with the statement that there might be questions as "to where the financial burden lies, and who actually benefits from any economic efficiencies derived from centralisation and (cross-border) collaboration"[59]. Nevertheless, there seems to be an increasing leaning towards these cross-borders procurement solutions[60] that justifies finding rules that must address these gaps.

If the directive considers "other entities established according to the Union law", thus allowing the establishment of legal entities which could act as central purchasing bodies at the European level, it is the European Grouping of Territorial Cooperation (EGTC) that is presented as the appropriate instrument for establishing joint entities.

5. The EGTC

The European Grouping of Territorial Cooperation is a European structure that embodies the idea of transnationality (4.1); it thus appears as the perfect structure to aggregate joint cross-border procurement (4.2).

5.1. A transnational entity

The cross-borders cooperation instruments originally came exclusively from the Council of Europe. The European Union's awareness on this subject came later, despite the EU framework offered at first not being entirely consistent with the purpose of the cooperation: the European Union law thus offered the frame of the European Economic Interest Grouping (EEIG), which introduces a legal instrument designed to minimise the legal, fiscal and psychological difficulties that natural persons, companies, firms and other bodies face in cooperating across borders[61]. But the EEIG was quickly outshone by another

[59] See A. Sanchez-Graells, *Collaborative Cross-border Procurement in the EU: Future or Utopia*?, cit. at 12.

[60] http://www.weka.fr/actualite/appel-doffres/article/ville-paris-sengage-groupement-commandes-transnational-31410/. See https://ec.europa.eu/health/preparedness_response/joint_procurement/jpa_signature_en

[61] See Regulation (EEC) N° 2137/85, the European Economic Interest Grouping.

instrument, the European grouping of territorial cooperation (EGTC)[62].

The EGTC is the European legal instrument to facilitate and promote cross-border, transnational and interregional cooperation. Indeed, developing transnational projects at regional and local levels used to be complex and lengthy, often requiring the negotiation of bilateral treaties by national governments. European groupings of territorial cooperation (EGTCs) were first introduced with Regulation n° 1082/2006[63] to promote inter-regional working. EGTCs are legal entities set up to facilitate cross-border, transnational or interregional cooperation in the European Union (EU).

It is a legal entity and as such, allows regional and local authorities and other public bodies from different member states, to set up cooperation groupings with a legal personality to deliver joint services. This instrument was initially limited to the implementation of territorial cooperation programs or projects co-financed by the Community through the European funds. The EGTC is a perfect example of a cross-border structure.

As of today, there are about 63 EGTCs registered at the Committee of Regions portal[64]. Changes to Regulation (EC) N° 1082/2006 have also been made to allow more extensive use of EGTCs to contribute to better policy coherence and cooperation between public bodies without creating an additional burden on national or Union administrations[65]. This instrument favours the establishment of cooperative groups at European level and invested with legal personality, also in the public procurement sector. However, the regulation does not provide any rule that

[62] See Recital (4) of the Regulation (EC) N°1082/2006: "The existing instruments, such as the European economic interest grouping, have proven ill-adapted (…)".

[63] Regulation (EC) N°1082/2006 of the European parliament and of the council of 5 July 2006 on a European grouping of territorial cooperation (EGTC).

[64] See https://portal.cor.europa.eu/egtc/CoRActivities/Pages/welcome.aspx.

[65] See Regulation (EU) n° 1302/2013 of 17 December 2013 amending Regulation (EC) n° 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

would cover problems linked to cross-border procurement encountered by EGTCs[66].

5.2. The perfect instrument to aggregate joint procurement

It is the 2014 directive that specifically advises the EGTC to foster cooperation among Member States in order to set a joint public procurement at a European level[67]. The EGTC can indeed be convenient as it precisely allows to avoid the use of international treaties. In France, this was a true revolution that allowed local entities to contract with other entities *or Member states*, without the need of an international treaty[68]: it is an exception to the principle that no agreement can be concluded between a local authority and groupings or a foreign State[69]. The main advantage of the EGTC is that it is an effective mechanism to reduce the "bureaucratic burden of the territorial cooperation"[70]. Regarding public procurement, and more precisely, collaborative cross-border procurement, the EGTC could either be used to coordinate purchasing groups or as a central purchasing body for its members or for other contracting authorities.

Article 39 (5) of Directive 2014 refers to this possibility and indicates that, in these cases, the choice of applicable law to the joint procurement by decision of the competent body of the joint entity is limited to (a) the national provisions of the Member State of the EGTC's registered office, or (b) the national provisions of the Member State where the joint entity is carrying out its

[66] See recital (25) of Regulation n° 1302/2013, "*This Regulation should not cover problems linked to cross-border procurement encountered by EGTCs*".

[67] See article 39(5), "Where several contracting authorities from different Member States have set up a joint entity, i*ncluding European Groupings of territorial cooperation* under Regulation (EC) N° 1082/2006 of the European Parliament and of the Council or other entities established under Union law, the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following Member States". Emphasis added.

[68] See the Law n° 2008-352 of 16th April 2008 *visant à renforcer la cooperation transfrontalière, transnationale et interterritoriale* aforementioned.

[69] According to article L. 1115-4 of the *Code géneral des collectivités territoriales*, local authorities can't conclude agreement with groupings or a foreign State, with the exception of allowing the creation of an EGTC.

[70] A. A. Martínez, *Towards a New Generation of Cooperation of Territorial European Groupings, New Programming Period and Lessons Learnt*, European Structural and Investment Funds Journal (2014).

activities. This choice of law can be determined on a project-specific or a temporary basis. This is a simplification especially for joint cross border procurement. The first part of the provision relates to the rule of article 8 of the 2006 regulation[71].

But, we have to take into account the provisions from article 15 of the 2006 Regulation. This provision deals with jurisdiction, and states that «Third parties who consider themselves wronged by the acts or omissions of an EGTC shall be entitled to pursue their claims by judicial process». Article 15 (2) states that "Except where otherwise provided for in this Regulation, Community legislation on jurisdiction shall apply to disputes involving an EGTC. In any case which is not provided for in such Community legislation, the competent courts for the resolution of disputes shall be the courts of the Member State where the EGTC has its registered office". Furthermore, this provision states in the 3rd paragraph that "Nothing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of a) administrative decisions in respect of activities which are being carried out by the EGTC, b) access to services in their own language and c) access to information. In these cases the competent courts shall be those of the Member State under whose constitution the rights of appeal arise". The simplification is quite challenged here.

The solutions might be found within the national measures of transposition, but as for French law, if the Directive has been implemented by an *Ordonnance* of July 15th 2015, the implementations provisions are not really enlightening in this regard. Indeed, national provisions don't provide much enhancement or clarifications on this matter[72], at least, from a French law perspective.

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[71] See article 8 of Regulation 2006: "An EGTC shall be governed by a convention concluded unanimously by its members. According to Article 8 2. (e) The Convention shall specify "the law applicable to the interpretation and enforcement of the convention, which shall be the law of the Member State where the EGTC has its registered office".

[72] See article 29 of the Ordonnance, about the transnational collective entities, which is quite laconic.

6. National provisions of implementation

The European Union law led to the adaptation and reconfiguration of French law in public procurement. The provisions about public procurement are set out by the *Ordonnance* of 15th of July and the decree implementing this *Ordonnance*[73].

The possibility to establish collaborative procurement is henceforth organised at article 28 of the *Ordonnance*. It is an option for all buyers, whether they are contracting authorities or public entities. According to this article, especially in the paragraph 4, a "groupement de commandes" allows coordination among different entities, allowing to award a contract to an economic operator as a result of a single tender procedure. Article 29 of the ordonnance is about "transnational joint entities", such as European grouping of territorial cooperation. In keeping with a trend of the main concerns of public policy[74], these provisions help to satisfy the objective of pooling resources. The implementation provisions do not provide further explanations about this option.

The scholars unanimously welcomed the clarification and simplification brought by the reform[75], but as of today, as we know it, there are not many studies analysing the effects of these provisions. Only time will tell if the hurdles aforementioned can actually be overcome.

7. Conclusion

Legal barriers are not the only obstacles to cross-border procurement and there might be several levels of complexity with the addition of a joint cross-border procurement procedure. Language barriers, exchange rates, strong domestic competition,

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[73] The Ordonnance of the 15th of july 2015 and the Décret d'application of the 25th march 2016 are the provisions implementing the European directive. See *Ordonnance n° 2015-899, 23 juill.et 2015 relative aux marchés publics,* Journal officiel 24 juill. 2015, p. 12602, See, the décret d'application *n° 2016-360, 25 mars 2016 relatif aux marchés publics,* Journal officiel 27 mars 2016, texte n° 28.

[74] The main concerns are the pooling of resources, the innovation and the digitisation. See S. Braconnier, F. Olivier, N. Sultan, *L'environnement juridique des nouvelles politiques publiques locales,* Contrats et marchés publics (2016).

[75] See the special issue of the *Actualité juridique du droit administratif,* 32 (2015).

lack of experience with foreign tenders and administrative are among the elements that can be quoted and have not be studied here[76]. From a French point of view, the few elements mentioned highlight the fact that public procurement might trigger some changes on the use of conflict of laws and/or jurisdictions rules for the administrative judge. It certainly shows that analyses on these issues might flourish. Transnational entities might be generated by these legal structures, and among them emphasis is given to the European grouping of territorial cooperation, which seems to be the most convenient legal structure to welcome joint cross-border procurement operations. But the use of the EGCT might raise some legal questions, as presented in section 5. The joint cross-border public procurement operation is indeed a complex architecture and the purpose of this article was to highlight the issues and obstacles and to demonstrate that the European Union law is far from being thorough in addressing these obstacles. These gaps show that the European Union law may not have sorted out all the difficulties involved with the collaborative cross-border procurement[77]. They can be interpreted

[76] See E. Menđušić Škugor, *EU procurement reform - the case of Croatia*, Public Procurement Law Review (2017): "with respect to Croatia, it is also likely that the specifics of the Croatian procurement market are off-putting for foreign bidders.Croatia has a specific type playing field for public procurement as several major players, mostly Croatian publicly-owned companies, dominate the sector. The strict and highly formal tender documentation, the use of the Croatian language, difficulties in obtaining prior information on vital aspects of the tender procedure, expensive remedies and a risk of corruption, are not traits for attracting investors".

[77] A feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States has quite recently been published. See the *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, published on the 20th March 2017 available here: http://ec.europa.eu/DocsRoom/documents/22102/. It seems that the study admits that "the legal framework dealing with JCBPP is still in progress and that the regulatory approach towards the complex theme of JCBPP has not wholly settled yet in all its details". The study even states that "the relevant legal provisions on the EU level show some gaps, are not always fully coherent and definitely pose a number of interpretational problems of their own". It relies on the Member States, and eventually on the European Court of Justice to deal with these questions: "Just as in other areas of EU harmonisation legislation, a number of questions will have to be dealt with by the Member State's legislation and jurisdiction, but may eventually also need answering by

DEREGULATION AS A MEANS OF SOCIAL POLICY?*

*Laura Chierroni***

Abstract

Deregulation poses serious challenges for Italian legislators. While the EU has adopted a liberal approach to this process, encouraging the removal of restrictions on free competition, the implementation of EU directives has proven to be extremely difficult in Italy for two main reasons: the resistance opposed by the so-called "close corporations" of established market operators, and the potential negative impact of deregulation on social welfare. The aim of this paper is to determine whether and on what conditions deregulation can positively impact social interests.

As a first step, the legitimacy of existing limits to competition is tested by taking into account two market sectors, the Italian taxi and pharmacy services, which are examples of close corporations and, as such, are characterized by positions of privilege and little or no competition. Subsequently, the obstacles to free competition, which are a distinctive feature of these services, are analyzed in order to assess whether their total removal can actually improve social welfare. A series of auxiliary measures aimed at mitigating the social risks of extensive deregulation are then examined and their effectiveness is evaluated. The results found in this paper show that a massive process of deregulation, such as the one promoted by the EU, cannot guarantee long-term social benefits. Sustainable economic growth can only be achieved by means of a "supervised deregulation process" that is by removing barriers on competition while also preserving those limits which are essential to ensure the protection of social welfare. It is concluded that Italian legislators are facing the difficult task of balancing the nation's obligation, as a member state, to meet EU requirements in terms of deregulation, and the government's duty to safeguard domestic social welfare

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1. The controversial relationship between deregulation and social equity.

This paper analyses the disputed issue of the effect of liberalisation on social welfare in Italy. Whilst a beneficial link between deregulation and economic growth is commonly recognised, no dominant position has been reached regarding the relationship between deregulation and social equity, despite a heated debate in the literature[1]. Instead, two broad approaches can be identified. According to the first, the increase in competition brought about by deregulation can never increase social equity and general well-being[2]. The second approach acknowledges potential positive effects of deregulation on social equity by arguing that the removal of obstacles in the pursuit of economic activity has an impact on the growth of per head income, on the gradual levelling of income disparities and on social mobility, thereby increasing overall social wealth[3]. Legal scholars who recognize the potential benefits of deregulation on social welfare, however, also claim that no real social advantage can be derived from deregulation without preserving certain levels of restriction[4].

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[1] A. Bassanini, E. Ernst, *Labor market institution, product market regulation, and innovations: Cross Country Evidence*, (2002); A. Bassanini, S. Scarpretta *The driving forces of economic growth*, (2002); G. Nicoletti, S. Scarpetta, *Product market reform and Employment in OECD Countries*, (2005); G. Nicoletti, S. Scarpetta, JM Arnold, *Does Anticompetitive Regulation Matter for Productivity? Evidence from European firms*, IZA, 551 Discuss papers (2011); P. Parascandolo, G. Sgarra, *Crescita e produttività: gli effetti economici della regolazione*, Concorrenza bene pubblico (2006).

[2] S. Kuznets, *Economic Growth and Income Inequality*, 45 Am. Econ. Rev. 1-28 (1955); A. Lewis, *Economic Development with Unlimited Supllies of Labor*, 22 Manchester Sch. Econ. Soc. Stud. 139-190 (1954); J. Mazur, *Labor's New internationalism*, 79 Foreign Affairs 79-93 (2000); A. Petrucci, *Liberalizzazione e semplificazioni amministrative: tecniche di regolazione e riflessi su imprese e consumatori*, www.amministrazioneincammino.it (2007).

[3] J.E. Stiglitz, *The prince of inequality: How Today's Divided Society Endangers Our Future* (2012); V. F. Schivardi, E. Viviano, *Entry Barriers in Italian Retail Trade*, 121 Economic Journal 145-170 (2010); A. Pezzoli, A. Tonazzi, *Concorrenza e ... equità*, www.eticaeconomica.it (2015).

[4] M. Ramajoli, *Liberalizzazioni: una lettura giuridica*, in F. Manganaro, A.R. Tassone, F. Saitta (eds.), *Liberalizzare o regolamentare: il diritto amministrativo di fronte alla crisi, atti del XVII convegno di Copanello 19-30 giungo 2012* (2013); F. Silva, *Liberalizzare è un*

The interest of this paper is not to analyse the theories which either recognise or thoroughly reject the positive social effects of deregulation. Instead, the focus will be on the analysis and identification of measures and rules which aim at promoting social equity and socially sustainable economic growth, while also fostering competition as far as possible. A potentially positive effect of deregulation on society has also been advocated by the AGCM (Italian Antitrust), which urged legislators to adopt deregulation policies[5].

In order to analyse the relationship between deregulation and social welfare it seems appropriate to start from the consideration that too much regulation and market planning can often lead to positions of privilege. This belief is also shared by various legal theories in literature. Privilege gives a perception of income which does not reflect the actual production of wealth, hinders national economic growth[6], and distorts the entire redistributive system, thus directly affecting the degree of social equity[7].

It is when referring to these privileges of position that the 'Italian case' comes to the fore. Italy has been characterised historically by a strong presence of professional associations, which have obtained - more or less directly - political protection, and have prevented access to newcomers by means of internal alliances. In addition, in Italy, the approval of deregulation bills is subject to a complex and time-consuming process, which does not often allow the actual removal of obstacles to economic activity. This is particularly evident in the two sectors of taxi service and pharmacy, which show at least three common features: stringent and detailed regulation with strong barriers against entering the market; rooted corporatism (by

processo politico e sociale, prim'ancora che economico, in B.G. Mattarella, A. Natalin (eds.), *La Regolazione Intelligente: un bilancio critico delle liberalizzazioni italiane* (2013).

[5] AGCM, *Relazione annuale – Presentazione del Presidente Giovanni Pitruzzella* (Annual Report – President Giovanni Pitruzzella Presentation), www.agcm.it, (2013).

[6] OCSE, Reports Regulatory Reforms in Italy (2001); OCSE, *Reviews in Regulatory Reform in Italy: Better Regulation to Strengthen Market Dynamics* (2010).

[7] L. Berti, *Il cancro che divora l'Italia: l'attrazione fatale della rendita*, www.civicolab.it (2014); J. E. Stiglitz, *The prince of inequality: How Today's Divided Society Endangers Our Future*, cit. at 3.

means of direct and indirect pressures on politicians through Parliamentary consultations, technical meetings and strikes); and rewards related to position.

2. The scope of our analysis; positions of privilege in the taxi and pharmacy sectors.

The scope of this analysis is limited to the Italian taxi and pharmacy services, as these sectors allow us to better observe the nature and characteristics of different kinds of positions of privilege which are common features of the Italian economy. More specifically, both sectors show positions of privilege which are the result of direct economic regulation - a form of government intervention which tightly limits access to the profession by predetermining the maximum number of professionals in a given sector, discourages alternative services, grants established professionals incentives and facilitations, and fixes minimum prices and tariffs. Direct economic regulation prevents a full development of competition, thus allowing established professionals to gain additional rewards which cannot be traced back to market dynamics (from now on non-market rewards), unlike other kinds of rewards which are market-generated competitive advantages gained as a result of price strategies and technological innovations[8].

Non-market rewards can be further classified into two subcategories: economic privileges that certain categories of professionals, such as pharmacy owners, acquire exclusively as a result of Laws introduced by the state or by Local Authorities (direct privileges); and economic rewards that can only be enjoyed through direct economic participation, as is the case with the taxi sector, where licenses are traded and purchased on the secondary market (indirect privileges).

[8] C. Bentivogli, M. Calderini, *Il servizio di taxi in Italia: ragioni e contenuti di una riforma*, 5 Occasional papers, www.bancaditalia.it (2007).

3. The regulation of taxis and vehicle hire with driver services.

In order to verify the extent of deregulation procedures in the Italian taxi sector, it is appropriate to start from the provisions under Law n. 21 of 15th January 1992, the 'regulatory framework for unscheduled transport of people'. This Law allows us to understand the extent of regulation and planning in this sector and evaluate, on such bases, the degree of deregulation achieved.

This regulation concerns two different services: taxi service (article 2), and vehicle hire with driver service (article 3), both of which require registration in the drivers' roll before starting the activity (article 6), as well as a licence or, in the case of vehicle hire with driver service, an authorization (article 8).

Regional authorities and local authorities (LAs) are expected to implement such rules by defining the number of vehicles that can be used, the service delivery system, the procedures for issuing the licence or authorization, and taxi fares (articles 4 and 5).

Article 8 of Law n. 21/1992, which establishes the general criteria for issuing licenses and authorizations, specifically forbids taxi drivers from holding more than one licence; however, no specification is provided for vehicle hire with driver service. Under article 9, transferring a licence is subject to the following requirements: 5 years must have elapsed since the licence was granted, and the transferring holder must be at least sixty years old or fall into the category of ill, disabled, or disqualified. In case of death of the holder, it is specifically provided (paragraph 2) that the licence can be transferred to a family member – an heir having the required qualification – or, as an alternative, to a third party directly chosen by the heir, subject to authorization by the LAs and within two years of the holder's death.

Article 11 introduces specific territorial restrictions for both services. Taxi drivers must collect customers and start the service within the boundaries of the city where the licence has been issued. In the case of vehicle hire with driver service, it is compulsory to book at the garage, and vehicles are prohibited from parking in public areas of cities which are provided with taxi service - unless specific dispensation is given by the city council in agreement with

trade unions. Should dispensation be granted, parking is still restricted to specific areas which are different from those reserved for taxis.

Article 11 also provides that cars offering vehicle hire with driver service are allowed to use fast tracks and other facilities reserved for taxis (paragraph 3), but only taxis are given right of way at passenger-gates (article 7). As far as fares are concerned, article 13 of the regulatory framework states that taxi service is provided upon a passenger's direct request against payment of a fee which is calculated on the basis of fares established by the competent LAs. As for vehicle hire with driver service, the fee is agreed upon directly between carrier and customers.

The regulatory framework for taxi service also includes specific tax exemptions and subsidies. Law n. 427/1993[9] establishes a tax credit based on the excise tax paid on the fuel used during the year. The Stability Act 2014 (Law n. 147 of 27th December 2013,) established a 15 per cent increase in this tax credit. In addition, taxi drivers are exempted from issuing invoices, unless specifically requested by passengers, and from paying VAT for transporting people and their luggage within the city borders or between two cities which lie more than 50 km apart. In 2006, the so-called 'Bersani Act' (Law Decree no. 223/2006[10]) marked the first steps towards effective deregulation in the taxi service sector. This decree allows LAs to exempt taxi drivers from the obligation of holding no more than one licence. However, LAs will distribute no less than 60 per cent and no more than 80 per cent of the revenues received from granting new licenses among holders of single licenses. As a result of long discussions with trade unions, this provision was amended when the 'Bersani Act' was converted into Law (Law n. 248/2006[11]). The ban on holding more than one taxi licence was thereby reintroduced, and the percentage of revenue coming from granting new licences to be distributed among holders of single licenses was

[9] Law No. 427, of October 29, 1993.
[10] Law-decree No. 223, of July 4, 2006.
[11] Law No. 248, of August 4, 2006.

raised to no less than 80 per cent. In 2009[12], the mandate which required hired vehicles with drivers to leave from a particular garage and return there after each ride was introduced. Subsequent deregulation measures have been impeded, as the rules established by European directive 2006/123/CE expressly exclude the taxi service sector from the application of the deregulatory measures which the directive introduced for the internal market. (recital 21).

In 2010, an amendment to Law n. 21/1992 was proposed - though subsequently rejected - in order to restore the former provision by removing the obligation of vehicle hire with driver service to book at, leave from, and return to the same garage after each ride. Subsequent statutory measures which aimed to deregulate the market did not introduce any change in the taxi service sector, but removed, as a general rule, the ban on performing economic activity outside an established geographic area.

Equally ineffective in terms of deregulation of the sector was the 2015 legislative proposal[13]. This proposal included a clause repealing the obligation of hired vehicles with drivers to park in a garage located in the city where their authorization was granted, and to leave from and return to the same garage after each ride. However, the clause was removed from the proposal during the approval process.

4. Regulation, planning and deregulation in the pharmacy sector.

Various aspects of drug sales are also heavily regulated. A careful analysis of the existing regulation and of its development over time can help establish the extent of deregulation in the pharmacy sector.

The Italian regulatory framework for the pharmacy sector has long been characterized by a restrictive and precise planning of the territorial distribution of chemists' shops. Law 468 of 1913[14], the so-

[12] See Article 29, par. 1-quarter of the Law No. 14, of February 27 2009.
[13] House of representative act No. 3012, of April 3, 2015.
[14] Law No. 468, of May 22, 1913.

called 'Giolitti reform,' introduced an accurate plan for the distribution of pharmacies based on a ratio of available pharmacies per number of citizens with the intent to guarantee a widespread presence of pharmacies in the country. This ratio used to be one pharmacy per 4,000 customers in cities and towns with less than 12,500 inhabitants and one pharmacy per 5,000 customers in cities and towns with more than 12,500 inhabitants. The distribution plan also set the minimum distance between pharmacies at 200 meters.

Both Law n. 475/1968[15] and subsequent Law n. 362/1991[16] concerning the reorganization of the pharmaceutical sector adopted the same distribution system. In order to guarantee a widespread distribution of pharmacies in the country and, more specifically, to facilitate the accessibility of pharmacy service in less populated areas, Regional Law introduced subsidies and residence allowances for chemists operating in such areas and also granted pharmacies located in the countryside and small towns a discount for access to the national health care system[17]. New rules for the territorial distribution of pharmacies were introduced by article 11 of the above-mentioned Law Decree n. 1/2012. The Legislative Decree increased the number of available pharmacies to one per 3,300 inhabitants (with the possibility of opening another pharmacy should the surplus population exceed 50 per cent of 3,300 inhabitants). It also gave regional authorities the power to allow more pharmacies to be established - within a limit of 5 per cent and provided that no other pharmacy was within a 400-meter distance - inside railway stations, civilian national airports, marine stations, and gas stations along roads or motorways with high traffic density which were equipped with hotels and restaurants. In addition, Legislative Decree n. 1/2012 provided that pharmacies could open inside shopping malls and large sales establishments with more than 10,000 square meters of floor surface, as long as the distance from an existing pharmacy was at least 1,500 meters.

A certain margin of discretionary power has been conferred

[15] Law No. 475, of April 2, 1968.
[16] Law No. 362, of November 8, 1991.
[17] Art 1, Law No. 221 of March 8, 1968.

upon LAs in order to facilitate access to the pharmaceutical service. However, as the decree has not modified the distance and distribution criteria, they are still expected to implement an allocation plan for pharmacies which abides by said criteria. The ownership of pharmacies and the procedures to transfer pharmacist licenses are also heavily regulated. Pharmacy ownership structure can be distinguished as public or private ownership. Public pharmacies are owned by the municipal authorities of the city or town where they are situated. Initially public pharmacies were regulated according to a royal decree of 1925[18] authorizing LAs to run pharmacies.

According to both state Laws governing public services and local legislation, LAs are authorized to exercise their pre-emption right to acquire ownership of 50 per cent of unoccupied pharmacies and 50 per cent of newly established ones, which are opened on the basis of the local distribution plan. Under the Local Government Act of 1990[19], pharmacies owned by LAs can be managed via: a) self-management; b) an *ad hoc* enterprise; c) a consortium of LAs; or d) a joint-stock company established between an LA and the pharmacists who were previously working in a public pharmacy. Once the company has been established, the aforesaid pharmacists are no longer employees of the LA.

The ability to exercise their pre-emption right and to select one of the managerial models is one of the 'exclusive and discretionary' powers of LAs[20]. When there is only one unoccupied or newly established pharmacy, the exercise of the pre-emption right and the process of competitive selection occur alternatively. When there is an odd number of unoccupied pharmacies, the management of the remaining pharmacy is preferably assigned to an LA. According to legislative decree n. 1/2012, LAs are explicitly denied the exercise of their pre-emption right whenever public authorities decide to use a competitive selection process. However, until 2022, they will still be allowed to exercise their pre-emption right on pharmacies situated in

[18] Royal Decree No. 2578, of October 15, 1925.
[19] Law No. 142, of August 7, 1990.
[20] Corte dei Conti, Regional Control Section for Regione Lombardia, decision No. 70, of February 3, 2011.

railway stations, civilian international airports, etc. Those LAs which have exercised their pre-emption right under such provisions cannot transfer ownership or management of the pharmacy. If they relinquish ownership, the pharmacy will be considered unoccupied and therefore subject to reassignment according to the above-mentioned procedure.

Private pharmacies can be owned by individuals, partnerships, or Ltd cooperatives. Ownership of or shares in a private pharmacy can be acquired by contract, inheritance, or - if the owner surrenders his/her license - by competitive selection. Certified pharmacists possessing the required qualifications, such as a degree and a board certification, may participate in the competitive selection process, which is organized by Italian municipalities every four years. The most successful candidates are given a newly established or unoccupied pharmacy. Ownership of the pharmacy cannot be transferred until three years have elapsed since the issuing of the authorization by the competent authority. Once a pharmacy ownership has been transferred, the right to ownership of a new pharmacy can be exercised only once. This right is forfeited if a new pharmacy has not been purchased within two years from the transfer date. In any case, former owners who transfer ownership forfeit the right to participate in competitive selection for the assignment of a pharmacy for the next ten years.

The 2015 legislative proposal regulating the market and competition[21] has relieved Ltd cooperatives of some of the legal burdens involved in running a pharmacy through the following legislations: by repealing the obligation of partners to be certified pharmacists or to obtain specific academic qualifications; by removing the ban on owning more than four pharmacies in the same province; and by allowing partners to employ a certified pharmacist as a manager, thus relieving them from the obligation to personally manage the pharmacy.

The Italian pharmaceutical sector is also affected by specific restrictions in terms of the types of drugs that can be sold in pharmacies and para-pharmacies. Prior to the approval of Decree n.

[21] House of representative Act No. 3012, of April 3, 2015.

223/2006, the sale of drugs was restricted to those pharmacies which had been opened in accordance with the local distribution plan. Article 5 of Decree n. 223/2006 authorizes para-pharmacies to sell over-the-counter or self-medication pharmaceuticals and any other pharmaceutical or product for which no medical prescription is required, provided that at least one certified pharmacist works at the para-pharmacy. Since the introduction of the decree, the range of pharmaceuticals that can be sold by para-pharmacies has been broadened. In addition, Art. 33 of Law Decree No. 201/2011 established that 'any contractual conditions and commercial practice adopted by pharmaceutical firms which should result in unjustified discrimination of para-pharmacies, shall constitute unfair commercial practice and will be punished accordingly'[22].

It can be concluded that the sale of pharmaceuticals has benefited from a certain degree of deregulation, not only in terms of the liberalization of drug commerce, but also in terms of prices. The 'Bersani Act' actually introduced the opportunity for producers and distributors of pharmaceuticals to freely offer discounts 'as long as they are clearly visible and legible and are offered to all customers'.

5. Quota-system and maximum limits on the number of professionals.

A review of the rules regulating the two sectors which are being taken into consideration in this paper reveals that the full development of competition still remains restricted to a great extent. For example, limits to the number of professionals are a common feature in both sectors. In the taxi sector, these limits are the result of the maximum number of licences granted, whereas in the pharmaceutical sector, they derive from the strict system of territorial distribution which imposes a maximum number of pharmacies per number of inhabitants in a given municipality. Such provisions result in a strict quota-system which does not allow new professionals to enter the market, except in cases when an existing pharmacy becomes available or a taxi licence is transferred in the secondary market.

[22] Law Decree No. 201, of December 6, 2011.

Although these limits on competition raise many justified doubts as to their legitimacy, both domestic courts and the European Court of Justice have confirmed the legality of these provisions[23].

The case Law states that provisions setting the maximum number of professionals in any given sector are important for consumer protection, since they favour a suitable balance between offer and demand, avoid useless redoubling of service, and guarantee the availability of the service in geographically isolated or disadvantaged areas. This argument is supported by the observation that the quota-system also guarantees established professionals in these sectors a suitable income. Courts have repeatedly underlined the importance of this aspect with specific reference to the pharmaceutical sector, stating that a reduction in pharmacists' incomes may negatively affect the quality of the service offered to clients[24]. In other words, it would appear that the necessity of not 'disrupting' the smooth running of existing activities has led courts to legitimize the existing regulatory system. However, it is still doubtful whether a legitimate quota-system is actually capable of protecting consumers and guaranteeing a high level of service. Some authors suggest that other measures - like establishing a minimum number of professionals - could achieve the same purpose without negatively affecting competition[25]. A removal of the quota system by

[23] Italian Constitutional Court, decision No. 4, January 9, 1996; European Court of Justice, judgment of June 1, 2010, Grand Chamber, Blanco Pérez and Chao Gomez, C-570/2007 571/2007; European Court of Justice, judgment of 5th December 2013, Venturini and others, cases from C- 159/2012 to C- 161/2012; Tar Puglia, Section II, decision No. 278, of January 31, 2014. F. Levi, *Aspetti pubblicistici dell'apertura e gestione delle farmacie*, in AA.VV., *Atti del XVIII Convegno di studi di Scienza dell'Amministrazione* (1975); M. Delsignore, *Il contingentamento dell'iniziativa economica privata. Il caso non unico delle farmacie aperte al pubblico* (2011).

[24] European Court of Justice, Venturini and others, joined cases from C- 159/2012 to C- 161/2012, of December 5, 2013; Tar Puglia, Section II, No. 278, of January 31, 2014. G. Licata, *Considerazioni sulla 'liberalizzazione della vendita di (alcuni) medicinali al di fuori della rete di distribuzione delle farmacie 'tradizionali'*, in F. Manganaro, A.R. Tassone, F. Saitta (eds.), *Liberalizzare o regolamentare: il diritto amministrativo di fronte alla crisi, Atti del XVII Convegno di Copanello, 29-30 giugno 2012* (2013); N. Salerno, *Le farmacie nel diritto dell'economia*, 1 Dir. Econ. (2011).

[25] M. Delsignore, *Il contingentamento dell'iniziativa economica privata*, cit. at 23, 154 ff.;

introducing a minimum number of professionals, which would vary depending on the market's demand and supply, would still guarantee a full satisfaction of demand while also offering consumers improved quality of service. An increased number of pharmacies or a higher concentration of taxis in the same area would not cause any disadvantage for consumers, whose demand would be guaranteed by the minimum number system. In addition, they would have the opportunity to choose a specific service or product on the basis of the prices and quality offered, which would determine, over the medium-long term, a selection of professionals. It is true that increased competition in sectors previously subject to a quota-system would negatively affect the income of professionals - with potential consequences on the quality of the service offered. This is a well-known, unavoidable outcome of deregulation. However, the removal of the quota-system and the concurrent loss of income would inevitably drive professionals to sharpen their entrepreneurial skills so as to allow their activity to survive and thrive in a more competitive market, with positive effects in terms of quality and costs.

Despite the clear benefits that may be derived from the 'minimum number' system, the quota-system still seems to offer an extra advantage as it guarantees a far-reaching service even in geographically isolated or scarcely inhabited areas[26]. However, it should be considered that even the quota-system cannot ensure an even geographical distribution given that no public administration can force professionals to work in a certain area. Therefore, neither the quota-system nor the 'minimum number' system can guarantee uniform and widespread distribution, which can only be obtained through direct intervention by public authorities[27] and by means of measures aimed at encouraging voluntary activity in uncovered areas[28].

[26] Italian Constitutional Court, decision No. 27, of February 4, 2003.

[27] See paragraph 13.2.

[28] To this end L.A.'s pre-emption right for ownership of new or vacant chemist's shops would be justified. Given the inadequacy of private operators to guarantee public interests. L. Martini, *L'autotrasporto pubblico non di linea: il servizio taxi*, in A. Brancasi (ed.), *Liberalizzazione del trasporto terrestre e servizi pubblici economici,* (2003).

In light of all the above-mentioned considerations, the 'minimum number' system would appear to be the best solution, as it offers the same advantages as the quota system without negatively affecting competition. What remains to be seen is whether limits to competition are still necessary and legitimate on the basis of other considerations, including the public nature of the services provided and the need to protect specific rights.

5.1. Legitimacy of domestic limits to competition in light of the allegedly public nature of the service provided.

The term 'public service' is repeatedly used in the Italian legal system[29]. However, no clear definition of the services which fall into this category is provided. Over the years there have been attempts at establishing an undisputed definition of the term, given that it is only the public nature of a service which can legitimate restraints to competition. In the absence of a clear definition of 'public service', the definition 'local public service of an economic nature', which is provided by the Italian legislation, can be used as point of reference given that it has the same content as the definition 'services of general economic interest' (S.G.E.I.), which was introduced by the EU under provisions 14 and 106, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU)[30]. In order to fall under these definitions a service must have been recognized as compulsory by a public authority, and must be provided either directly, by a public authority, or through private operators in order to meet a community's needs. Both requirements impose restrictions on operators in terms of how they provide the service, as well as preventing them from quitting the service at any time[31].

[29] Legislative Decree No. 267, of August 18, 2000; Law No. 146, of June 1990, n. 146, modified by Law No. 83, of April 11, 2000; Art. 358 Italian penal code approved by Royal Decree No. 1398 of October 19, 1930; Art. 23-bis, Law No. 133, of August 6, 2008.

[30] Italian Constitutional Court, decision No. 325, of November 3, 2010, n. 325 and Italian Constitutional Court, decision No. 272, of July 13, 2004.

[31] When providers of public services are private operators, however, such restrictions are in conflict with the freedom of economic initiative, which is safeguarded by the Italian constitution, as these operators cannot exercise the right

Under the second paragraph of article 106 TFUE, the public nature of a service makes it possible for public administrations of member states to set down specific limitations to competition in order to satisfy specific communal needs. Therefore, all limitations set forth by a member state in order to compensate for the inadequacy of private action in a certain sector are legitimate if considered necessary as outlined above.

It is therefore important to verify whether and to what extent the economic activities under scrutiny in this paper can be qualified as public services and hence if the legislative limitations imposed on them can be justified by the need to provide a compulsory service to a community. To this end it is appropriate to make reference to three common features of public services which have been underlined in the literature: compulsoriness, access to the market after having obtained a licence or authorization, and regulated prices or fares[32]. In this paper it is argued whether these three features are also common to the taxi and pharmacy services. In order to assess the compulsory nature of a service it is necessary to examine state and regional regulations aimed at guaranteeing its continuity.

In the case of the taxi and pharmacy services, even a brief analysis of such regulations leads us to the conclusion that although their aim is to guarantee continuity of service to consumers, the element of compulsoriness is absent as private operators can quit the activity at any given time, and public authorities have no obligation to provide an alternative service[33]. However, public services cannot be considered as such unless public authorities directly guarantee the continuity of the service. In the case of the two sectors under examination, public authorities do not act as providers but rather as regulators of private operators. For instance, in the pharmacy sector the scope of activity of lawmakers and regional regulatory frameworks is limited to decisions regarding chemist shops' opening

to stop providing the service at their discretion and at any time. A. Brancasi, *Il trasporto terrestre e la liberalizzazione dei servizi pubblici a carattere imprenditoriale*, cit. at 30.

[32] L. Martini, *L'autotrasporto pubblico non di linea*, cit. at 27, 253- 266.

[33] L. Martini, *L'autotrasporto pubblico non di linea*, cit. at 27; M. Delsignore, *Il contingentamento dell'iniziativa economica privata*, cit. at 23.

hours, and management. However, they do not bind either individuals or corporations to carry out the activity on a permanent basis. Testament to this is the fact that the distribution of night shifts – which guarantees the right of consumers to the service – is made on the initiative of the single operator or on the basis of binding shift agreements established by the sector's trade unions[34].

In the end, in the sectors under examination, it is the private economic initiative that guarantees the satisfaction of consumers' even if public authorities still control licences and fares. Given that a key feature of public service, compulsoriness, is absent in both the taxi and pharmacy services, limits to competition imposed on the basis of the allegedly 'public' nature of these services are not justified.

5.2. Social interests as a limit to economic freedom. 'Free competition' as a limit to 'competition'.

Another interesting point to consider is whether and to what extent limits to competition are legitimate if aimed at protecting social interests. For example, taking the Italian taxi and pharmacy services into consideration, what would be the social and economic impact of a removal of the quota system, if combined with the abolition of limits on holding more than one licence?

The existing limits on holding more than one licence (in the case of taxis) and more than one chemist's shop (in the case of the pharmacy service) prevent big companies and multinational corporations from accessing and monopolizing the market, which would have an undesirable social impact by destroying competition, and consequently increasing prices and flattening the quality of service[35]. Such a detrimental social and economic impact raises some concern regarding the social repercussions of unlimited competition. In this regard, free competition, which is promoted by the EU and encourages total removal of limits on economic freedom, is in conflict

[34] Tuscany Regional Law No. 16, of February 25, 2000.

[35] U. Mattei, *Liberalizzazione, mercati e legalità*, www.leggiditalia.it; A. Garibaldi, *I "padroncini" temono New York. Licenze regalo per ricompensarli*, in Corriere della Sera, 14th January 2012 .

with the concept of competition itself[36]. By contrast, a more 'supervised' kind of competition, such as that guaranteed by the Italian constitution, can maintain a fair balance between economic interests and social values. The European Court of Justice only seems to legitimate limits to competition which are aimed at protecting individuals' fundamental rights such as health. In the matter of drug distribution, for example, the European Court of Justice legitimated the licence quota-system introduced by a member state in order to ensure the quality of the pharmacy service[37]. However, when ruling on the limit to the establishment of large shopping centers imposed by a member state, the Court did not consider it legitimate, as such a limit was not aimed at protecting a fundamental right of individuals, but the social/economic interests of consumers[38]. The Italian Constitutional Court, while recognizing the importance of free economic initiative as a fundamental right of all operators, tends to legitimate a wider spectrum of limits on competition[39]. The rationale behind this approach is that, in the taxi service and pharmacy sectors, a high number of operators can help ensure lower prices and higher quality of the service provided, thus safeguarding consumers and bringing social benefits. However, the limits to competition imposed by Italian legislators seem to have favoured the specific interests of regulated professions rather than consumers' interests.

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[36] E. Picozza, *Le situazioni giuridiche soggettive nel diritto comunitario*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto amministrativo europeo* (2007). J. Wolswinkel, *The Allocation of a Limited Number of Authorizations. Some General Requirements from European Law*, in L. Arroyo, D. Utrilla (eds.), *La administracion de la escasez. Los fundamentos de la actividad administrative de ajudicacion de derechos limitados en numero* (2015).

[37] EU Court of Justice, judgement of 5 December 2013, joined cases Venturini, from C-159/12 to C-162/12.

[38] EU Court of Justice, judgement of 24 March 2011, European Commission v Kingdom of Spain, C-400/08.

[39] Italian Constitutional Court decision No. 94, of May 22, 2013; Italian Constitutional Court decision No. 270 of June 23, 2006; Italian Constitutional Court, decision No. 241, of May 15, 1990; Italian Constitutional Court, decision No. 223, of December 16, 1982.

6. Protection of 'traditional' service to the detriment of alternative services.

Another characteristic of the sectors under investigation is the presence of rules aimed at discouraging alternative delivery of the service. In the pharmacy service, for example, the disincentive is that prescription drugs can only be sold in a registered pharmacy. Such a restriction, which prevents competition between pharmacies and para pharmacies, is based on the assumption that only qualified professionals possess the adequate skills to sell prescription-only medicines. The validity of this assumption, however, is questionable for a very simple reason. The Law provides that para-pharmacies must have a qualified pharmacist in order to operate. However, given that non-prescription drugs can be sold without the supervision of a pharmacist[40], compelling para-pharmacies to operate under the supervision of a qualified pharmacist without allowing them to sell prescription medicines seems a paradox. In addition, given that certain medicines can only be prescribed by physicians and the pharmacist's basic duty is to check prescriptions before dispensing the medication, the limits imposed on para pharmacies are not justified, as they do not appear to coincide with the specific needs of patients, and end up favouring a certain category of professionals. This is even more the case if we take Legislative Decree n. 17/2014 (implementing Directive 2011/62/EU) into consideration, which established that non-prescription drugs can be sold and bought online without the supervision of a pharmacist. In order to avoid these contradictions, two possible solutions can be identified. The first involves removing the obligation for para-pharmacies to sell non-prescription drugs under the supervision of a pharmacist, a requirement which should be compulsory only for registered pharmacies. The other solution is to allow para-pharmacies to sell prescription drugs under the supervision of a qualified pharmacist. The distinction between pharmacies and para-pharmacies would no longer exist and the restriction on selling prescription drugs would be the absence of a pharmacist, a limit which would only affect online sales.

[40] Law decree No. 223, of July 4, 2006 converted in Law No. 248, August 4, 2006.

Similar considerations apply to the existing restrictions which do not allow other alternative operators to compete with regular taxi services[41]. For example, alternative, authorized operators providing vehicle hire with driver service are required to start and complete each fare at the same garage, which is both time-consuming and less consumer-friendly. In addition, limits are imposed on the number of vehicles used to provide the service. Such restrictions cannot be justified by advocating the need to guarantee a good transport service. By allowing competition, the service would undoubtedly improve in terms of number of vehicles available and lower prices. Alternative and more technologically-advanced methods of booking and paying would also be introduced, thus meeting the demands of a wider range of users.

Again, as in the case of the pharmacy service, imposing restrictions on alternative taxi services should be aimed at protecting consumers' safety by preventing inexperienced or unqualified operators from accessing the market. However, given that both regular and alternative taxi service providers must meet the same requirements in order to operate, they should benefit from the same market opportunities and be subject to the same limits.

In other words, in the absence of specific reasons for protecting consumers' interest, banning alternative taxi and pharmacy services merely protects 'traditional services'. It is also necessary to consider that alternative services can lead to technological advances, and that the need to adapt domestic rules to new technology is currently at the center of debate not only in Italy but also in other countries. In order to satisfy the needs of a more technological society, the Italian Constitutional Court has recently encouraged legislators to amend current regulations by removing barriers to entry for alternative services[42].

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[41] F. De Benedetti, *Uberpop, monopoli e interessi dei cittadini*, Il Sole 24 ore, 26th June 2015; E. Calvano, M. Polo, *Tra Uber e i tassisti, perde il consumatore*, www.lavoce.info.it, (2015); G.L. Clementi, *Liberalizzazioni, perché l'Italia ha un disperato bisogno (anche) di Uber*, Il Sole 24 ore, 28th May 2015.

[42] Italian Constitutional Court decision No. 265, of December 15, 2016.

In the same vein, in their Report n. 1354/2017[43] the AGCM highlighted the importance of alternative taxi and pharmacy services in improving quality and reducing costs and

invited legislators to reform Act of Parliament n. 21/1992 accordingly.

7. Inheritance of profession and protection of inter-generational position.

Several studies concerning the inheritance of a profession in Italy show the impact of family relationships on the choice of a job[44]. Family members inherit not only the profession itself but also access to the market which includes advantages like availability of full information regarding operating conditions, direct transfer of knowledge, and potential goodwill. Such advantages cannot be removed and they are present in both regulated and non-regulated professions. However, professional inheritance should not be confused with the phenomenon of 'amoral familism', which is well-known in sociology and can lead to illegal actions aimed at facilitating the beginning and continuity of a certain profession[45]. From our perspective, it is important to examine how some provisions regulating taxi and pharmacy licences can limit access to the market. For example, direct transfer of a taxi or pharmacy licence to a relative who already has the necessary qualifications (in the case of death, beneficiaries who are related to the deceased have 18 months to obtain the required qualifications) limits access to the market for operators who are not beneficiaries of direct transfer.

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[43] AGCM, AS1354 Riforma del settore della mobilità non di linea, 9 Bollettino Settimanale AGCM, 54 (2017).

[44] M. Pellizzari, G. Basso, A. Catania, G. Labartino, D. Malacrino, P. Monti, *Legami familiari ed accesso alle professioni in Italia*, 4 July 2011 Workshop Dinastie Professionali, organized by Università Bocconi and Fondazione Rodolfo DeBenedetti, www.frdb.org; M. Pellizzari, G. Pica, *Liberalizzare i servizi professionali: evidenza empirica sugli avvocati italiani*, 4 July 2011Workshop Dinastie Professionali, organized by Università Bocconi and Fondazione Rodolfo DeBenedetti, www.frdb.org.

[45] E. C. Banfield, *The Moral Basis of a Backward Society*, (1958).

8. Impact of the 'close-corporation' system under investigation and difficulties in deregulation: the 'regulatory capture'.

The services under investigation are characterized by strong representation, which derives from Italian medieval and ancient Roman guilds, and was brought to new life during the Fascist regime[46]. Their strong representative power allows these interest groups to influence political decisions in order to preserve their positions of privilege. They exercise their power either directly by claiming their right to participate in Parliamentary hearings and/or indirectly by means of strikes or resorting to mass media to advance their claims[47]. Once they have obtained a certain market arrangement by using their power, these interest groups exploit their electoral leverage to preserve existing privileges, thus producing the so-called 'regulatory capture' effect[48].

Both the interest groups under investigation can rely on a number of associations which handle their relationships with public decision-makers and protect their interests in the event of regulations aimed at restricting and/or modifying the existing market structure[49]. Such a task is frequently carried out during Parliamentary hearings when the representatives of these groups have the opportunity to protect their vested interests by directly participating in the policy-making process[50]. While the direct participation of trade associations in the regulatory function is fundamental in order to make legislators more aware of the specific needs of certain market sectors, it can also

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[46] S. Cassese, *Lo Stato fascista*, (2010). L. Ferrara, *Cesure e continuità nelle vicende dello Stato italiano. In particolare, il corporativismo fascista e quello cattolico*, 4 Ist. Federalismo, 935 ff. (2011).

[47] M. Di Giulio, *I gruppi di interesse nei trasporti, XXVIII Convegno della Società Italiana di Scienza Politica Perugia, 11th -13th September 2014*, www.sisp.it (2014).

[48] G. Stigler, *The Economic Theory of Regulation*, vol. 1 n. 1 Bell J. Econ. & Manag. Sci., 3-21 (1971); J.E. Stiglitz, *The price of inequality*, cit. at. 3; S. Cassese, *Amministrazione pubblica e interessi in Italia*, 2 Dir. e Soc., 223 ff (1992).

[49] S. Cassese, *Amministrazione pubblica e interessi in Italia*, cit. 51; S. Cassese, *Lo Stato introvabile: Modernità e arretratezza delle istituzioni italiane*, (1998).

[50] C.P. Guarini, *Riflessioni in tema di regolazione del mercato attraverso Autorità indipendenti*, in F. Gabrielli, G. Bucci, C.P. Guarini (eds.) *Il mercato: le imprese, le istituzioni, i consumatori* (2002).

make it more difficult for legislators to remove existing barriers to competition.

The 'regulatory capture' effect is particularly relevant to the taxi and pharmacy services since their economic policies are determined locally. The proximity of 'regulators' to the 'regulated parties' increases the political clout of these interest groups and makes their consent a fundamental part of the decision-making process[51]. In order to verify the role played by these groups as potential obstacles to deregulation it is useful to compare a series of Law Decrees - which are issued by the government - with the Acts of Parliament which converted them into Law. This transition, in Italy, is punctuated by Parliamentary hearings that are petitioned by trade associations[52]. A clear example is the provision originally included in the 'Bersani' Law Decree of 2006, which was aimed at removing limitations on the same operator holding more than one taxi licence. Following several Parliamentary hearings and a well-orchestrated mass-media campaign at the hands of trade associations, the provision was not included when the decree was converted into Law. A provision included in the first draft of the Competition Bill of 2015, which aimed at removing the obligation for hired vehicles with drivers to leave from and return to the same garage, achieved the same outcome. The pharmacy service suffered the same fate when, in September 2015, the proposal to allow physicians, pharmaceutical companies and sales representatives to own a pharmacy was rejected after several Parliamentary hearings with trade associations. Such a repetitive pattern in Parliamentary procedures highlights the power exercised by trade associations in both the taxi and pharmacy services and confirms the role they play in blocking deregulation policies.

It is now clear that certain features characterizing the pharmacy and taxi services can be obstacles to competition. The following paragraphs are focused on the social and economic impact

[51] United States Supreme Court, Decision No. 13-354, of February 25, 2015, North Carolina State Board of Dental Examiners v. Federal Trade commission.

[52] Taxi trade associations, 7th February 2012 (Decree Law n. 1/2012), www.senato.it; Chemists trade unions 12th June 2015 (Government Bill No. 2085/2015), in www.documenti.camera.it; Taxi drivers associations and vehicle hired with drivers associations 28th February 2017 (Law 27th February 2017, n. 29).

of deregulation, and analyze the social risks involved in the removal of restrictions on competition.

9. Removal of 'not market' rewards and redistribution of income. Premises.

Theories that advocate a positive social effect of deregulation claim that competition can benefit from the removal of positions of privileges, or 'non-market rewards', which obviously act as a disincentive for operators to improve the quality of their service while also encouraging monopolistic price strategies. Repealing regulations which allow privileges and create barriers to market entry would negatively affect the income of established operators, but it would also lay the foundation for a redistribution of income on a competitive basis. In addition, there would be a transition from a condition of 'concentrated advantages and spread costs', where the advantages of an elite of established operators means disadvantages for consumers and other operators, to a fairer market condition of 'concentrated costs and spread advantages', where the removal of privileges would benefit not only new operators but also consumers[53]. However, opening the market to competition requires additional, concurrent measures in order to prevent deregulation from producing negative social and economic repercussions. The aim of the following chapters is to analyze the social and economic effects of deregulation, and identify appropriate measures aimed at ensuring a socially and economically sustainable deregulation process.

10. The 'loss of tranquility' and the development of technologically advanced, high-quality services.

The removal of limits on economic initiative has an immediate effect on the behavior of established operators who, being deprived of their position of privilege, experience a 'loss of tranquility'[54]. In

[53] G. Amato, L. Laudati, *The Anticompetitive Impact of Regulation*, (2001).

[54] R. Costi, M. Messori, *Per lo sviluppo. Un capitalismo senza rendite e con capitale*, (2005).

addition, access to the market by new operators boosts competitive behavior in terms of reduction of prices and improved technological innovations. As a result, established operators need to adopt more competitive strategies, by focusing on the quality of the service offered in order to preserve their position in the market. In this scenario, more and more operators will strive to provide increasingly technologically advanced, high quality services. The Uber 'case' exemplifies this phenomenon clearly. The American firm Uber offers private car transportation through a software mobile application ('app') that directly connects passengers and drivers– as well as traditional taxi service by registered professionals with a licence – by offering a platform for private transportation: the so-called ride sharing (UberPop)[55]. Unlike other ride-sharing systems, Uber only accepts payment by credit or pre-paid cards with no direct exchange of money between driver and passenger. In addition, the price of fares can be estimated on the basis of the itinerary and it is possible to book a fare using the application which identifies the closest car. This service was offered in Italy from 2013 to 26th May 2015, when the Court in Milan suspended the service by upholding the claim for unfair competition advanced by taxi drivers' trade unions. Despite its short life, Uber drove established taxi operators to improve their technological standards by introducing innovative applications like 'IT Taxi' in order to become more competitive.

11. Deregulation and short-termed price reduction.

A decrease in prices consequent to increased competition is an economic factor which can be easily observed in any market[56]. A higher number of operators leads to competition and, more specifically, to the adoption of different market strategies, including those based on price reduction. In order for this process to begin,

[55] See R. Griffiths, R. Harrison, H. Simpson, *The link between product market reform, innovation and EU macroeconomic performance*, European Economy-Economic Paper, (2006); P. Aghion, R. Blundell, R. Griffiths, P. Howitt, S. Prante, *The Effects of entry on incumbent innovation and productivity*, 91 Rev. Econ. Stat., 20-32, (2009).

[56] See, AGCM, *Relazione annuale* 2013, cit. at 5; S. Fisher, R. Dornbusch, R. Schmalensee, *Economia,* (2010).

however, barriers to the pursuit of certain economic activities must be removed and fixed prices must be abolished. Prices generally start to decrease soon after the opening of the market to competition and, over the medium-long term, those professionals who are not able to adapt to a lower level of prices are pushed out[57]. This results in an advantage for consumers in terms of purchasing power, the effect of which will be even stronger with widespread deregulation[58]. In order to find evidence for the social and economic impact of increased competition and reduced prices, it is necessary to observe a market where the process of deregulation has been started - even if only partially - and a certain elasticity of prices has been achieved by either removing fixed prices or opening the market to discounts. An analysis of the pharmacy service which has been characterized by partial deregulation - limited to the selling of over-the-counter drugs - enables us to compare the economic and social results achieved through partial deregulation and those obtained by means of more extensive deregulation.

The deregulation of the sales of over-the counter medicines that was started by the 'Bersani' Law-Decree in 2006 has greatly boosted the business of para-pharmacies and other drug stores, thus triggering a decrease in prices. Evidence of this process can be found by comparing the prices of over-the counter drugs in registered pharmacies before and during deregulation. While the price of drugs sold in registered pharmacies increased by 35 per cent from 1997 to 2005 (before deregulation) it only reached 12 per cent between 2005 and 2015 (during deregulation)[59]. Taking inflation rates into account, such results are even more significant and highlight the role played by para pharmacies in reducing prices. Over the same time frame, the price of over the counter drugs sold in para pharmacies was reduced

[57] S. Fisher, R. Dornbusch, R. Schmalensee, *Economia*, cit.at 60, 189.

[58] Press release of January 10, 2012, published by Organizzazione Nazionale Federconsumatori, www.federconsumatori.it (2012). Unione Nazionale dei Consumatori, *Liberalizzazioni – Per le famiglie risparmi dimezzati* -, www.consumatori.it (2012).

[59] Data collected by Altroconsumo analysing drug's prices and discounts practiced by pharmacies and para-pharmacies from 2006 to 2015; *Liberalizzazione del mercato farmaceutico, ancora molto da fare, Dossier Tecnico*, in www.altroconsumo.it (2015).

by 4 per cent. Generally, para pharmacies are more inclined to adopt aggressive price strategies by offering discounts on medicines up to 22 per cent, while discounts in registered pharmacies barely reach 8 per cent. This can be explained by the fact that para-pharmacies are not allowed to sell prescription drugs and are not, therefore, protected by any position of privilege. Consequently, in order to compensate for this disadvantage, they attract customers by offering much lower prices for non-prescription medicines[60]. These observations enable us to predict a further decrease in prices should the remaining positions of privileges reserved for pharmacies be removed. It is hypothesized that a complete deregulation of the pharmacy sector, combined with the currently adopted discount strategies, would produce savings between 620 and 1230 billion euros in the yearly amount of money spent on drugs[61]. However, while dramatic price decreases can produce significant social and economic benefits for consumers, a free market and the removal of restrictions to the maximum number of licences involve serious social risks as they favour larger companies and multinational corporations[62]. Having more financial resources and capital, large firms or groups can afford to lower their prices to levels that result in little profit or even losses in order to push competitors out of the market. Once their monopolistic position on the market is well established, the positive effects of competition will be nullified and these industrial giants will acquire an even stronger position of privilege. The decrease in the prices of drugs achieved in the first stage of deregulation will therefore be as short-termed as competition since the newly established large firms and groups will have the power to increase prices at their discretion. The social and economic impact of the new oligarchy will be extremely negative for more than one reason. Firstly, it will produce concentrated wealth and prevent the distribution of resources, thus hampering sustainable economic

[60] G. Licata, *Considerazioni sulla 'liberalizzazione' della vendita di (alcuni) medicinali*, cit. at 24, 205-237.
[61] Available data concerning 2013; N.C. Salerno, *Valutazione d'impatto della riforma delle farmacie*, www.reforming.it (2015).
[62] U. Mattei, *Liberalizzazioni, Mercati e legalità*, cit. at 38.

growth. Secondly, the acquisition of a high number of licences by large corporations and multinational companies will imply that pharmacies and taxi services will no longer be run by self-employed individuals who are directly responsible for their service and have the success of the business at heart, but rather by a number of employees, who are usually hired on a temporary basis and who are typically less motivated to provide good customer service. The social impact of this development will be two-fold and will involve not only a lower quality of the service provided, but also a dramatic change in employment practices with a transition from self- and permanent employment to temporary job contracts. These social risks could be avoided by implementing a sort of 'supervised' competition which would involve opening the market to new operators while preserving limits to the number of licences owned by the same operator. In this case, restrictions would be justified by the need to ensure a sustainable economic growth[63].

12. Social mobility.

Alongside advantages in terms of prices and service quality, deregulation encourages social mobility, which is described in literature as the 'social revolution'[64]. By removing positions of privilege and allowing a higher number of operators to access the market, it is possible to base the distribution of income on the quality and efficiency of the service provided. This positive effect acquires even more significance in Italy, a country where professional inheritance and the political power exercised by interest groups go hand-in-hand with one of the lowest rates of social mobility in industrialized countries. In 2010, the percentage of economic advantage inherited from high-income parents was at least 40 per cent[65].

[63] M. Libertini, *Concorrenza e coesione sociale*, 3 Rivista O.D.C. (2013); M. Luciani, *Sui diritti Sociali, Studi in onore di Manlio Mazziotti di Celso* (1995); R. Bin, *Diritti e Argomenti*, (1992).

[64] F. Silva, *Liberalizzazioni, consumatori e produttori,* 1 Cons. dir. merc., 91 (2007).

[65] OCSE, *A family affair: Intergenerational social mobility across OECD countries*, in OCSE (ed.) *Economic Policy Reform: Going for Growth* (2010).

13. Auxiliary measures.

In the light of the observations above, it can be concluded that while deregulation involves several advantages, it can also pose a threat to social and economic welfare. The previous paragraphs have analyzed the risks deriving from indiscriminate deregulation and have highlighted the importance, for legislators, of identifying specific deregulatory measures which can guarantee a fair balance between economic and social interests. In the following paragraphs, two major categories of auxiliary measures are outlined: compensation measures and incentives.

13.1. Compensation measures.

One of the provisions included in the 'Bersani' Law Decree of 2006 provides an example of a compensation measure. Under this provision, no less than 80 per cent of the profit that LAs derive from granting new taxi licences should be redistributed among established taxi operators. Such a measure is aimed at compensating professionals for the damages deriving not only from increased competition but also, and more importantly, from the loss of their indirect privileges. Given that licences are granted against a payment which is based on the market value at any given time, partial or full deregulation will inevitably result in a reduction or complete loss of the licence value. Such a risk should not be ignored if the purpose of competition is not just boosting business but also ensuring social welfare through a fair distribution of income.

Compensation measures can also play a crucial role in ensuring a successful deregulation process. If established operators are compensated for any unfair damage deriving from deregulation, they will not have any legitimate reason to complain and their influence in the policy-making process will be substantially reduced[66].

13.2. Incentives.

Under this category we find provisions aimed at incentivizing

[66] C. Bentivogli, M. Calderini, *Il servizio di taxi in Italia: ragioni e contenuti di una riforma*, 5 Occasional papers, 23 cit. at 8.

private intervention in sectors and areas that are not commercially attractive and would otherwise be characterized by lack of service unless there is an intervention by the public sector[67]. For example, the introduction of tax facilitations and financial incentives for pharmacists ensures access to pharmaceutical service even in isolated areas, thus positively impacting social welfare throughout the Italian territory. For example, qualified professionals who do not have the financial means to open a pharmacy in attractive locations could still invest in pharmacies situated in less urbanized areas. As well as ensuring widespread distribution of pharmacies, easier access to the pharmacy service and social mobility, this development also avoids resorting to public intervention, thus reducing public expenditure. These public savings can be used to finance incentives with no additional cost.

13.3. Common features of auxiliary measures

One common trait of auxiliary measures is that they are welfare measures, since their purpose is to avoid any social distortion that may derive from market liberalization such as unfair income redistribution, lack of social mobility and limited access to essential services.

An even more significant trait of auxiliary measures is that they are financially self-sufficient. Compensation measures find their sustenance in deregulation, as public authorities can use the additional profit deriving from granting new licences to finance them. Incentives, likewise, are financed by increased competition. The increase in private initiative brought about by tax exemption and financial aid releases public authorities from providing a service which would be extremely costly. Therefore, any cost deriving from tax exemption of financial support to operators is compensated for by public savings. The self-sufficiency of auxiliary measure is even more significant in times of economic crisis when public authorities are reluctant to invest in welfare policies.

[67] R.H. Thaler, C.R. Sunstein, *Nudge. Improving decisions about health, wealth and happiness* (2008).

14. Social effects of deregulation.

In light of the above considerations, deregulation appears to be a versatile tool which will produce different outcomes according to whether it is used to its full capacity – an approach which is encouraged by the EU - or in a limited and controlled way. In the first case, the outcome will be increased competition and economic growth over the short term. However, over the medium-long term, the continuing use of deregulation could impair or nullify the benefits of competition and even negatively impact social welfare by transferring the positions of privilege from a group of established operators to an oligarchy of large corporations[68]. If deregulation is used with caution, on the other hand, it will still generate increased competition and economic growth, but will also produce significant and long-lasting social benefits such as social mobility, a more equitable income distribution, and price reduction. A limited or 'supervised' use of deregulation involves a careful examination of the existing limits on competition and an assessment of their social impact. It also necessitates the adoption of a series of auxiliary welfare measures aimed at compensating for the social distortion which is inevitably associated with deregulation.

To conclude, while a 'supervised' use of deregulation is undoubtedly the most appropriate strategy to prevent competition from negatively impacting social welfare, it also true that adopting this approach will pose several challenges to Italian policy makers. When introducing deregulation policies, they will find strong resistance from 'close-corporation' such as the taxi and pharmacy service whose interest is to maintain the status quo. Additionally, by adhering to 'supervised' deregulation by preserving limits on competition, they will contravene EU Directives[69]. It remains to be seen whether Italian policy makers will be able to conceive a regulatory framework which can ensure socially sustainable

[68] L. Einaudi, *Economia di concorrenza e capitalism storico. La terza via fra i secoli XVIII e XIX*, 2 Rivista di storia economica 67 (1942).

[69] M. Ferrera, *Neowelfarismo liberale: nuove prospettive per lo stato sociale in Europa*, 97 Stato e Mercato 3-35 (2013); A. Spadaro, *Dai diritti 'individuali' ai doveri 'globali'*, (2005).

deregulation domestically, while still meeting the obligations deriving from being a EU Member State.

THE SITUATION OF THE ITALIAN WELFARE IN AN AGE OF AUSTERITY

*Melania D'Angelosante**

Abstract

The aim of the study is to discuss the state of the Italian Welfare in an age of austerity. Three sets of topics in the areas of healthcare, social assistance, and social housing will be discussed to this aim: the scope of social welfare entitlements in the light of the constitutional amendments on devolution, fiscal federalism and budget balance; how decision-making process regarding the implementation of social rights has been affected by the economic recession; whether and to what extent the courts have been keen to defend social rights.

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1. Main goals and structure of the study

The aim of this study is to discuss the state of the Italian Welfare in an age of austerity[1] by highlighting the emerging tendencies. Three sets of topics in the areas of healthcare, social assistance, and social housing[2] have been discussed to this aim:

[1] As regards the relationship between social rights and the Italian model of Welfare State see G. Ferrara, *La pari dignità sociale (Appunti per una ricostruzione)*, in *Studi Chiarelli* (1974); A. Barbera, *Commento all'art. 2 Cost.*, in Comm. cost. Branca (1975); A. Baldassarre, *Diritti inviolabili* (*ad vocem*), in Enc. giur. Treccani (1989); R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (1992); F. Modugno, *I "nuovi" diritti nella giurisprudenza costituzionale* (1994); C. Pinelli, *Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario*, in A. Ruggeri (ed.), *La motivazione delle decisioni della Corte costituzionale* (1994); L. Carlassare, *Forme di stato e diritti fondamentali*, Quad. cost. 33 (1995); M. Luciani, *Sui diritti sociali*, in *Studi in onore di Manlio Mazziotti di Celso* (1995); A. Giorgis, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale*, (1999); C. Salazar, *Dal riconoscimento alla garanzia dei diritti sociali. Orientamenti e tecniche decisorie della Corte costituzionale a confronto* (2009); B. Pezzini, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali* (2009); D. Bifulco, *L'inviolabilità dei diritti sociali* (2003); P. Ridola, *Libertà e diritti nel sistema costituzionale*, in R. Nania, P. Ridola (eds.), *I diritti costituzionali* (2006); M. Midiri, *Diritti sociali e vincoli di bilancio nella giurisprudenza costituzionale*, in *Studi in onore di Franco Modugno* (2011); A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo?: più sobrio, solidale e sostenibile)*, www.rivistaaic.it. 4 (2011); M. Benvenuti, *Diritti sociali* (*ad vocem*), in Dig. disc. pubbl. (2012); I. Ciolli, *I diritti sociali al tempo della crisi economica*, Costituzionalismo.it 3 (2012); A. Guazzarotti, *Giurisprudenza CEDU e giurisprudenza costituzionale sui diritti sociali a confronto*, www.gruppodipisa.it (2012); L. Trucco, *Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali*, www.gruppodipisa.it (2012); S. Scagliarini, *Diritti sociali nuovi e diritti sociali in fieri nella giurisprudenza costituzionale*, www.gruppodipisa.it (2012); G. Razzano, *Lo "statuto" costituzionale dei diritti sociali*, www.gruppodipisa.it (2012), who does not consider this model in its traditional meaning of social policies managed by public authorities and covered by public spending, but in a partly different and wider meaning, also including other kinds of measures (such as many of the policies aimed at implementing the economic development).

[2] This choice is mainly due to the fact that healthcare – on the one hand – and social assistance – on the other – are the most representative sectors mirroring two different models in the allocation of social welfare benefits, *i.e.* – respectively – the *perfect universalism* and the *selective universalism* (*infra*). Furthermore, they are both interested by devolution, since they are in principle policies devolved to the legislative competence of the regions (which is exclusive for social assistance and concurrent with the State for healthcare), albeit limited by the horizontal clause regarding the determination at central

the scope of social welfare entitlements in the light of the constitutional amendments on devolution, fiscal federalism and budget balance; how decision-making process regarding the implementation of social rights has been affected by the economic recession; whether and to what extent the courts have been keen to defend social rights.

The relationship between these sets of topics can be better understood by considering that the role of public authorities in implementing social rights is changing as a consequence of the said constitutional amendments, which, in turn, can partly be seen as a consequence of economic recession. Moreover, the new constitutional landscape influences both the degree of autonomy of the regions and local levels of government and how social benefits are supplied (due to the need to reduce public spending), particularly whether in-cash or in-kind. Within this framework, the courts may try guaranteeing the effectiveness of social welfare entitlements, especially when legislative implementation of constitutional provisions or administrative implementation of legislative provisions are either absent or inadequate to grant a social minimum. To this trend, the Italian Constitutional Court's (ICC) case law regarding the recentralization of devolved powers also belongs.

Our analysis shows that, as for the scope of social welfare it has been affected by a significant degree of uncertainty for the reform of budget balance – the only one which can be traced back to the financial crisis – that has encroached upon the

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state level of a sort of welfare minimum and, for healthcare, also by the setting of general principles by statutory law. Regional and local autonomy, in turn, may work as a a tool to make social welfare policies closer to the needs of the population they refer, but also as an hindrance for the adoption of a systematic reform agenda. As regards social housing, the sector has been taken into account since, over the last ten years, corresponding exactly to the eruption and evolution of the economic crisis, it has been one of the most reformed field, in a wide ranging perspective. This is common, however, to the fields of pensions and labour market. These areas have been just briefly mentioned: as regards social security, this is due to the fact that it is based on a contributory system mainly focused on pensions and having its own features. Furthermore, some policies regarding the workers who lose their job can be traced back to the social assistance. Education too has been just briefly mentioned: this is due to the fact that it mirrors the 'perfect universalism' model, already represented by healthcare.

implementation of fiscal federalism, thus hindering the completion of devolution and with this the possibility that devolved government deals with social policy. As for the decision-making process the combined effect of such constitutional amendments and economic recession has reduced both the autonomy and spending capacity of those public authorities in charge of implementing social rights. As for the courts, they have been swaying between either giving priority to financial 'rationality' or to the obligation to take heed of the *essential core of social rights*. However, judicial review has somewhat been confined to an 'external scrutiny'.

2. The scope of social welfare entitlements in the light of the constitutional amendments on devolution, fiscal federalism and budget balance

Three main constitutional reforms regarding respectively devolution (1), fiscal federalism (2), and budget balance (3) have affected over the last 15 years social welfare entitlements. Of these amendments, only the latter – passed with the constitutional Act of Parliament (AoP) n. 1/2012 as a consequence of the EU constraints – can be directly traced back to the financial crisis. In fact, in 2011/2012, Italy received financial assistance from the ECB, thus had to give reassurance to the EU about limiting its debt and deficit. Moreover, the implementation of the reform of fiscal federalism, as a part of the ampler constitutional amendment regarding the devolution of powers to the Regions passed in 2001, was initiated only in 2009, in the midst of the financial crisis. Hence, the most severe legislative measures which have been introduced since 2012 as a response to the economic recession seem to have encroached upon such an implementation. Among such measures the said 2012 reform of the overall national budget with the prohibition of creating deficit did not favour the shift towards fiscal federalism.

The crux of the matter is that any welfare policy entails the balancing of the provision of services of a certain quantity and quality against the control of public spending. Such goals have become more difficult to pursue after the eruption of the financial crisis, which has determined at the same time an increase in demand for social services and a decrease in public funds aimed at

meeting the increased demand of social services[3], for poor economic development determines a reduction in tax revenue[4]. As regards this point, one has to bear in mind that economic/fiscal policies too may be considered, at least in part, as (a tool for) social policies, at any rate in the sense that they entail to a good extent the balancing of social rights and economic rationality and also of different social rights between each other[5]. In turn, social policies may be considered an important tool for the achievement of a certain level of economic development[6], which cannot be reached without welfare support for the workers and their families.

Within this perspective, the gist of the decision-making process in this field regards the setting of the basic level of welfare services to be guaranteed in the overall national territory, which, pursuant to art. 117 par. 2 lett. m) Const., is for the National Parliament to determine. It is clear that this determination is strongly based on political-ethical stances. One can think of the different kinds of universalisms which respectively characterise the Italian social assistance system and the healthcare system. They are indeed the consequence of different political/ethical

[3] Though the percentage of public spending for welfare compared to the Gross Domestic Product increased (+ 3,2%) in the midest of the economic crisis, see Censis, *Rapporto annuale sulla situazione sociale del Paese* (2013): this is probably due to the decrease of the GDP.

[4] See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2011).

[5] See M. Luciani, *Sui diritti sociali*, 1 Democrazia e diritto 569 (1994, 1995). See, moreover, A. Baldassarre, *Diritti inviolabili* (*ad vocem*), cit. at 2; R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, cit. at 2; C. Pinelli, *Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario*, cit. at. 2; M. Midiri, *Diritti sociali e vincoli di bilancio nella giurisprudenza costituzionale*, cit. at 2; A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo?: più sobrio, solidale e sostenibile)*, cit. at 2; L. Trucco, *Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali*, cit. at 2.

[6] See, for instance, the so called *European Pillar for Social Rights*, having at present its legal basis in the following sources: COM (2016) 127, 8.3.2016, in www.europa.eu; EU Parliament, Proposal for a Resolution – A8-03912016, 20.12.2016, in www.europa.eu; COM (2017) 250 and 251, 26.4.2017, Commission Recommendation and Communication, in www.europa.eu; EU Council Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, 20.10.2017, followed by the Proclamation of the European Pillar of Social Rights, 16.11.2017, from www.europa.eu.

choices, leading to a *selective universalism*[7] in the first case and to a *perfect universalism* in the second, in the face of constitutional provisions (articles 38 and 32) that do not promise a perfectly universal service. Social security, as a contributory system mainly focusing on pensions, has in turn its own features. However, both selective universalism, perfect universalism, and other rules to allocate social welfare benefits have to be balanced, especially in an age of austerity, with the availability of public funds and, thus, the perspective of the so called *sustainable universalism* should be attentively considered[8]. Any of these approaches seem to accept, however, that a core of fundamental rights should always prevail over the aim of controlling public spending.

If one looks at actual facts, nevertheless, as for social assistance, the combined effect of the lack of a sufficiently detailed determination of the basic levels of benefits[9] and the paucity of resources does not guarantee a minimum standard of services throughout Italian regions. As for healthcare, the basic levels of care had not been updated since 2001 (d.p.c.m. 29.11.2001) and, eventually, they were updated in 2017 (d.p.c.m. 12.1.2017) after a very long and complex procedure[10]. Moreover, before 2001 the lack in their determination has caused a constant increase in spending[11], which, however, continued until 2010[12].

Devolution matters here because both social assistance and healthcare are in principle policies devolved to the legislative competence of the regions (which is exclusive for social assistance

[7] See A. Pioggia, *Diritto sanitario e dei servizi sociali* (2014); M. Ferrera (ed.), *Le politiche sociali* (2012).

[8] See E. Boscolo, *Istruzione e inclusione: un percorso giurisprudenziale attorno all'effettività dei diritti prestazionali*, 2 Munus 179 (2014).

[9] Art. 22 of AoP 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced. This situation represents a hindrance for the implementation of art. 119 Const. (and of the following AoP 42/2009, d.d. 216/2010 and 23/2011 on standard needs of municipalities and municipal federalism) in the field of social assistance.

[10] See Acts of Parliament 189/2012, 190/2014, 208/2015.

[11] See MEF – Dipartimento Ragioneria Generale dello Stato, *Garantire la corretta programmazione e la rigorosa gestione delle risorse pubbliche – Il monitoraggio della spesa sanitaria*, 2 www.astrid-online.it (2015).

[12] See MEF – DRGS, *Garantire la corretta programmazione e la rigorosa gestione delle risorse pubbliche – Le tendenze di medio-lungo periodo del sistema pensionistico e socio-sanitario*, 16 www.astrid-online.it (2015).

and concurrent with the State for healthcare), albeit limited by the above-mentioned horizontal clause regarding the determination at central state level of a sort of welfare minimum and, for healthcare, also by the setting of general principles by statutory law. A second limitation regards the financial framework, *i.e.* how these services are funded: at present, in fact, though they are under the prevalent legislative competence of the regions, their funding is still derived from central government decisions, since the most part of the fiscal federalism reform has still to be implemented. A third limitation regards the now constitutionalised duty to keep the budget in balance. Putting it bluntly, the chance that regional policies counteract the austerity trend is actually just abstract or extremely limited, since these policies should be covered by regional independent financial resources – at the same time pursuing budgetary equilibrium – but at present regions lack the power of levering taxes. In principle, they would be allowed to establish regional taxes pursuant to art. 119 Const., but since fiscal federalism is still left standing (*infra*) they do not[13].

The stake regards, then, resource allocation. In this perspective, an EU Commission Report has pointed out that «in Italy there has been a reduction in financial resources for public services, as well as in the general budget assigned to regional and local authorities, *i.e.* the main providers of services and benefits». In this perspective it has also pointed out that: a) «the resources devoted to the "National Fund for Social Policies", which supports local welfare systems, decreased by 32% in 2014 compared to 2010, and by 58% if compared with 2008 levels»; b) «the National Fund for Childhood and Adolescence», playing an «important role in fostering integrated child well-being projects in large metropolitan areas, has been continuously cut since 2008»); c) these cuts have the effect «to jeopardise the service delivery capacity of local authorities», «as demonstrated by a 23.5% general decrease in their investments which occurred between 2008 and 2012»[14].

[13] The ICC has established limits for the regions to finance additional levels of care by declaring them unlawful insofar as the Region was under a Recovery Plan to eliminate the healthcare deficit (we will focus on this topic in par. 4).

[14] See EU Commission (D. Bouget, H. Frazer, E. Marlier, S. Sabato, B. Vanhercke), *Social Investment in Europe – A study of national policies* (2015).

The point is that the objective to build a universalistic system of welfare has to come to terms with the rationing of financial resources and the presence in the system of another variable such as federalism or localism further complicates the picture even though under certain regards it could produce positive outcomes for social welfare policy. To this regard, it is fitting to explain to what extent fiscal federalism has partly already influenced (par. 2.1.) this picture and could influence it more in the future (par. 2.2.) once fully implemented.

2.1. The role of fiscal federalism up to now

Fiscal federalism finds its constitutional basis in art. 119 Const., which has been implemented by the AoP 42/2009 and, as regards the specific policies involved, by different delegated decrees (for instance, d.d. 68/2011 about the healthcare system). This system, however, is still to be completed. In fact, such delegated decrees normally require other regulations to be adopted by the competent ministers, who have failed for the most part to do so, wary of the consequences of the financial crisis, especially with regard to regional financial autonomy. The only aspects which have been implemented of such complex reforms regard the criteria to be used in the distribution of national funds among the regions regarding the NHS[15]. They are based on the notion of '*standard need*', representing, together with '*standard costs*', the parameter which has brought about the repeal of '*historical expenditure*' to finance healthcare services. As for the distribution of national funds among local authorities (LAs), though, this system is not in place yet, as the national equalization fund for LAs is still allocated for the most according to 'historical expenditure'. In addition, the lack of a sufficiently detailed determination of the basic levels of benefits makes it unlikely that such new criteria will be applied in the near future. This has caused that the individuation of 'standard need' has been made by taking into account public services as previously delivered, which, in turn, strictly depend on the fiscal capacity of any territory and,

[15] See Conferenza permanente per i rapporti fra lo Stato, le regioni e le Province autonome, agreement n. 62/CSR, April 14th 2016, representing one of the more recent acts regarding the distribution among the regions of the national healthcare fund according to the new criteria.

thus, it indirectly reintroduces the criterion of 'historical expenditure'[16].

The overall fiscal federalism reform hinges in fact on the role of basic levels of social services, representing a tool for fiscal equalization as opposed to a concept of federalism too competitive and inequitable. Taking healthcare as an example, the expected financial autonomy of the regions is balanced with the possibility, for those which are unable to achieve the basic levels of care according to a 'standard need', to rely on a State fund to obtain all the necessary financial resources to provide for the said basic levels of care, still keeping the budget under control. This is why 'standard need' is the 'key-concept' here, being calculated by multiplying the basic levels of service by standard costs of healthcare services as recorded in the 'virtuous' regions. The identification and choice of the 'virtuous' regions are, then, preconditions to calculate standard costs according to a complex procedure which takes into account a number of criteria such as demographic and aging characteristics of the population concerned.

According to the d.d. 68/2011, 'virtuous' regions are those (a) having a sound budget, (b) able to provide basic levels of care, *and* (c) not being subject to a Recovery Plan. Furthermore, they have to be identified yearly in different geographic areas (North, Centre and South of the national territory including at least one small region), via a procedure which involves both the central and regional level of government (in 2013, for the first application of the standard costs' scheme, the selected regions were Veneto, Emilia Romagna and Umbria; in 2016 they were Marche, Umbria and Veneto[17]). This does not necessarily mean that virtuous regions spend the lowest in healthcare, but that they are capable of optimizing healthcare spending by granting their patient a better level of healthcare service without compromising the equilibrium of regional budget.

[16] See E. Marchionni, C. Pollastri, A. Zanardi (Ufficio Parlamentare di Bilancio), *Fabbisogni standard e capacità fiscali nel sistema perequativo dei Comuni*, note n. 1 / January, www.astrid-online.it (2017).

[17] See Conferenza permanente per i rapporti fra lo Stato, le regioni e le Province autonome, agreement n. 62/CSR, April 14th 2016.

2.2. The relationship between the 'golden rule' of a «sound budget» and the general fiscal federalism scheme

Currently, though, the principles on which fiscal federalism is based need to be reinterpreted in the light of art. 81 Const., which has explicitly introduced the 'golden rule' of a «sound budget» into the Constitution. This amendment has brought about some changes in art. 97 Const. too, which now requires that public administration, according to EU principles, is expected to ensure «balanced budgets and public debt sustainability».

As we have hinted above, by introducing such an element of rigidity this reform can be a threat to the safeguarding of social rights[18], as long as it curbs progressive welfare policies decided by devolved government. One needs to bear in mind, indeed, that much of the responsibility to promote social welfare is conferred to local (regional) government by the Constitution. By assuming here a normative approach we want to suggest a way to interpret these rules as not utterly undermining regional /local choices regarding the protection of social rights.

More precisely, the sound budget reform and the recentralization of policies as a consequence of the economic recession should not necessarily and always side-line regional and/or local autonomy. In other words, autonomy could become a sort of 'prize' for the regions or local authorities which manage to achieve financial stability, a goal which does not seem that different from what fiscal federalism seeks to pursue. We can think, for instance, of the dual role of a sound budget within the allocation of resources described in the previous section, which represents both a precondition to consider a region 'virtuous' according to the principles of fiscal federalism and a constitutional principle introduced as a consequence of the constraints coming from the EU legal order. Autonomy, in other words, is channelled into budgetary cleverness but not always sacrificed in the name of economic recession. There are, moreover, two general safeguards to regional autonomy especially when it is instrumental to the guarantee of social rights, which trump even the necessity of a sound budget, despite its being the actual driving force of the system. The first is a negative condition of procedural nature and

[18] See T. Groppi, *The Impact of the Financial Crisis on the Italian Written Constitution*, 1 IJPL 1 (2012).

it consists in the ICC doctrine that limitations to regional autonomy cannot be solely justified in the name of the *salus rei publicae* even in times of financial emergencies and however they should never become permanent[19]. The second regards the notion of rights as possessing an uncompressible core content[20], which is to be find, by deploying a reasonableness review[21], in the defence of human dignity and physical integrity from conditions of extreme need[22]. As a matter of fact, however, this latter notion operates even against the constitutional principle of regional (and local) autonomy (art. 5 Const.) itself. There are, in fact, cases in which the ICC was prepared to shield exceptional central government measures in favour of the poor to face the harshest consequences of the global financial crisis in sheer contrast with constitutionally established regional prerogatives[23].

Going back to the relationship between the reforms of fiscal federalism and sound budget to find a way through to justify local policies in favour of social welfare, a thorough analysis let us make out a complex mechanism of incentives and disincentives[24]. The incentives are aimed to improve, up to a common standard, which is considered essential to ensure the basic levels of benefits, the quality of social services provided by the most inefficient regional/local systems as well as to optimize spending and not to reduce it in absolute terms (even though overall spending could increase). The disincentives regard the improvement of the quality of those regional systems, which either have reached the level of optimization that fiscal incentives are meant to boost or are already efficient, because any further improvement can only be funded by regional/local budgets and at present regions/local authorities as we have seen lack the power of levering taxes. We

[19] See the following par. n. 4.
[20] See the following par. n. 4.
[21] See D. Tega, *Welfare Rights in Italy*, in C. Kilpatrick, B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014).
[22] More details are available in M. D'Angelosante, *Report on Welfare in Italy. Trying to Answer some Questions Which Arise from the Present Condition of Welfare in Italy*, www.amsacta.unibo.it and http://socialrights.co.uk/ (2015).
[23] See S. Civitarese Matteucci, *Austerity and Social Rights in Italy: A Long Standing Story*, http://ukconstitutionallaw.org/2015/12/17/ (2015).
[24] See M. D'Angelosante, *Strumenti di controllo della spesa e concorrenza nell'organizzazione del servizio sanitario in Italia* (2012).

cannot take for granted that the failure of such a programme is a by-product of the great financial crisis and instead we suspect that it has much to do with political and institutional flaws.

A clue that the system has not been working properly can be deduced by the data regarding movement of patience across regions compared to the quality and basic levels of care, which show that healthcare regional subsystems have not been really converging towards one another. Indeed, the movement of patients increased between 2007 and 2014 in the face of a reduction in the regional divide regarding basic levels of services from 2010 to 2012[25].

3. The role of public authorities in the decision-making process about the implementation of social rights and some consequences of the economic recession over the decisions about the supply of social benefits

The second set of topics of this study concerns how decision-making process regarding the implementation of social rights has been affected by the economic recession. As a matter of fact, constitutional amendments on devolution, fiscal federalism and budget balance combined with an array of other austerity policies have indeed also changed how public authorities deal with social rights including the way in which public services are delivered.

We have noticed (par. 2) that at least some of these reforms, together with cuts to social welfare funds, have both made it more challenging for regional/local authorities to deliver social services and curbed the power to elevate welfare entitlements by way of autonomous regional choice. This state of affairs has favoured, in turn, two ongoing changes. An increase of co-payment schemes, which mirrors the general tendency to cover public deficit with private savings or resources. And a shift from in-kind benefits into in-cash means-tested benefits on the assumption that the cost of organisational requirements is greater than a direct payment to recipients of welfare services. This second trend presents subtler

[25] See S. Gabriele (ed.), *Focus* n. 9, December 21st 2015 – *Ufficio Parlamentare di Bilancio* (2015).

problems and it is more difficult to assess also because of the historical characteristics of the welfare regime in which it occurs.

To deepen our understanding it is useful to focus on some social welfare areas, to check to what extent the above-mentioned shift has occurred. We will take into account the fields of social assistance, social housing and healthcare, for the reasons already mentioned in the footnotes of par. 1.

It is wort focusing on social assistance first, as it traditionally regards both in-cash and in-kind benefits and has a very wide-ranging scope, covering all the policies which cannot be traced back to other specific social fields (such as health, education, work, social security). The most significant of these policies regard anti-poverty aid to combat no-self-sufficiency and alleviate family burdens. Services/benefits concerned are provided in-kind (social services properly named), in-cash (economic aid), or, in few cases, both in-kind and in-cash. For instance, parental leave allows parents to take direct care of their children, having a certain period of time off work and, thus, saving a part of their salaries. Usually the main difference is that, while in the first case (in-kind benefits) services are open to everyone – although the most in need are facilitated in using them and totally or partly exempted from fees – in-cash benefits are means-tested and, generally, recipients are expected to participate in social reintegration programmes[26]. Measures providing for in-cash benefits have progressively been increased[27]. For instance, after the eruption of the economic crisis of 2008 a social card[28] and

[26] See M. Ferrera (ed.), *Le politiche sociali* (2012).

[27] More details are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11. As regards this point, it has been already noticed that the EU Commission has recently published the following data: a) in Italy «expenditure devoted to family benefits increased by 53% in 2014 compared to 2010 (6% compared to 2008»; b) however, «such increase does not represent a clear move towards social investment, since it favors cash benefits ([…] bonuses and vouchers […]) rather than services ([…] those supported by a national fund for family policies decreased by 88% between 2008 and 2014)», see EU Commission (D. Bouget, H. Frazer, E. Marlier, S. Sabato, B. Vanhercke), cit. at 8, 24.

[28] This measure is intended for the purchasing of essential goods, such as food, for a few categories of needy citizens, and has been established by l.d. 112/2008 (art. 81), converted to AoP 133/2008.

a family card[29] have been introduced. Moreover, in this welfare area, other measures have been introduced with the aim to fight poverty, support active social inclusion, and extend the number of beneficiaries[30]. The most recent of them, i.e. the so called 'income for active inclusion', has been established by delegated decree 147/2017, that also established the National Fund for the fight against poverty, whit 1,7 billion euros for the year 2018: the benefit, that will be granted by the National Institute for Social Security, will replace the so called 'income for social inclusion' and is aimed at supporting families with low income and fostering the active social inclusion of its beneficiaries, who – in fact – have to participate in a personalized social inclusion program under the control of the Municipality where they reside.

A shift towards in-cash benefits also can be seen in the area of social housing[31], mainly as regards the granting of financial aid to be used to buy or rent certain kinds of houses. For instance, AoP 9/2007 and d.m. n. 32438/2008 introduced provisions regarding the residential property market, aimed at meeting certain social goals by establishing an integrated system of property funds directed at supporting and increasing the supply of housing for rent at a subsidised rate. The main recipients of these measures are families having low income, students far from home, those tenants subject to pending eviction procedure due to delay in rent payment, regular migrants having low income, and residents who have been living for 10 years in Italy or 5 years in the same Italian region. In addition, several measures have been laid down since 2007 with the aim to relief tenants from eviction procedures[32].

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[29] This measure is aimed at granting Italian or regular immigrant families with at least three children the purchasing of goods or services at social prices; it has been established by AoP 208/2015 (stability law).

[30] This tendency is common to the fields of social security/labour sector; for further information both on social assistance and social security/labour sector and comparison among them, see A. Albanese, *The Italian Social Model and its Implementation*, http://socialrights.co.uk/ (2015).

[31] As regards social housing, since 1903 a number of primary and secondary sources of law have dealt with this policy. More details are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11.

[32] See VV.AA., Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull'edilizia sociale*, report n. 3, www.astrid-online.it (2014).

Other measures can be loosely traced back to a trend to replace in-kind benefits (in the Italian tradition typically a housing lease) with financial assistance. The AoP 102/2013 (art. 6 p. 5) has established a national fund aimed at supporting tenants who encounter temporary difficulty in paying rentals. These financial aids are managed by local authorities and distributed to eligible recipients through a public competition. The Cassa Depositi e Prestiti (CDP) has agreed in 2013 to transfer to the Italian Bank system 2 billion euros to be destined for mortgages mainly to certain categories of recipients (for instance families with disabled members, young couples, big families) and to buy first house. Finally, l.d. 47/2014 (converted into AoP 80/2014) has established measures aimed at allowing the use by local authorities of the special fund provided by AoP 431/1998 (art. 11) to support letting of residential properties. Correspondently, private and public funds (mainly local) aimed at supporting social housing by publicly owned estates have progressively dwindled[33].

As for healthcare, after its foundation in 1978 the NHS came to quintessentially represent a model of in–kind welfare delivery, pursuant to art. 32 Const., which establishes the duty of the Republic to guarantee «free medical care to the indigent». However, also in this field one finds something alike in-cash benefits. Both case law and national and EU/international sources of law allow in fact patients of the Italian Healthcare System to seek, under certain conditions, the reimbursement of what they have paid for treatment received either in the EU and Switzerland or in an Italian region different from the one in which they reside[34]. This same rationale can be made out in that case law

[33] For instance, AoP 183/2011 has reset to zero the rent Fund establisheed by law 431/1998, see A. Misiani, *Fondi statali per le politiche sociali: nuovi tagli con la Legge di stabilità 2012*, www.astrid-online.it (2012).

[34] As regards this issue, we can find at least three schemes. According to the first, the patients can benefit from healthcare services in the EU or Switzerland or States belonging to the EEA (scheme of the indirect healthcare assistance in the EU, based on the EU directive 24/2011, implemented in Italy by the d.d. 38/2014). According to the second one, they can benefit from indirect healthcare assistance (*i.e.* the healthcare services which, though granted by the private system, can be covered by public spending, under certain conditions and a request of the patient) in the Italian Healthcare System (scheme of the indirect healthcare assistance in the national territory, based on the Italian legislation introduced before the eruption of the economic crisis). According to

coeval with the eruption of the crisis which awards patients the reimbursement of expenses for medicines and health services occurred abroad or in another region even though not included in the list of those covered by the national (or regional) healthcare system to which they belong[35]. The legal grounds of the said trend are both of a legislative and judicial nature, and refer to sources both preceding and following the crisis[36].

One issue is to what extent the shift we have noted is permitted by the Italian Constitution. Institutional duty to provide services through either in-kind or in-cash benefits has its legal basis in arts. 29-35-41, 43, 45, and 46 of the Constitution, which charge the Italian Republic of a series of general obligations such as to support family (mainly in those cases when a household has

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the last one, they can benefit from medicines or healthcare services not included in the list of those covered by public funding in the national (or regional) healthcare system to which the patient belongs (special scheme based just on case law coeval with the eruption of the crisis).

[35] The detailed references to the relevant legal sources are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11. As regards the judicial references, see the following par. 4.

[36] The detailed references to these judicial/legal sources are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11. All in all, at least in so far as healthcare is concerned, the financial crisis does not seem to have played a paramount role in causing such developments to occur. Only indirect healthcare assistance in the EU has emerged after the eruption of the economic recession, but it has been mainly driven by the will to further implement free movement of services and persons in the EU. As far as social assistance and social housing are concerned, on the contrary, the financial crisis seems to have played a much more important role. An important question arises here, regarding the meaning of this trend: *i.e.*, whether it responds to the duty of implementing social rights. A sensible answer depends, again, on two of the above-mentioned conditions/outputs of in-cash benefits: firstly, the general trust in the spending ability of recipients and, secondly, the disengagement of public authorities from organisational requirements. Thus, it is clear that is not possible to give a straightforward answer, since the relevance and useful employ of spending ability may differ from a sector to another (let us think of housing compared to complex healthcare treatments), such as the relevance of public organisational requirements (let us think, again, of housing compared to specialised or hospital healthcare). What is indispensable, in any case, is the existence of an efficient 'command and control' system aimed at establishing, in the command-phase, detailed rules to limit how in-cash benefits can be spent as well as checking, in the control-phase, whether these rules have been observed. Furthermore, and finally, an effective sanctioning system for their violation has to be established and applied.

not sufficient means), safeguard health and guarantee free medical care to the indigent, set out State schools and provide education free of tuition for everyone for at least eight years as well as to support all skilful pupils with economic aid, and to provide social security for workers (in case of accidents, illness, disability, old age and involuntary unemployment) as well as welfare support for «every citizen unable to work and without the necessary means of subsistence». It is for the legislature, within this constitutional framework, which does not contain preferences for in-kind or in-cash benefits[37], to decide how to concretely shape such obligations, with legislative measures usually followed by ministerial decrees.

As for administrative authorities, they have, as a general rule, the task of ascertaining whether the conditions laid down by the legislator to provide a certain service are met[38]. In other words, a good deal of welfare entitlements – for example as regards social assistance benefits – is based on bright-line rules which do not entail discretionary decisions[39]. However, a certain amount of administrative discretion arises as regards how to organise those social services which are provided in-kind or by mixing in-cash and in-kind benefits. This type of discretion may be quite important from a practical point of view: for example, in the field of social assistance administrative procedures aimed at allowing legal entities different from local authorities to deliver social services at least partly publicly funded (so called accreditation-scheme) can entail a good deal of discretionary decision-making. A higher degree of discretion, partly overcoming the

[37] Except than for the setting out of State school (as regards the benefits in kind) and the supporting of all skilful pupils with economic aid (as regards the benefits in cash).

[38] See Supreme Court, Labour Section, decisions n. 1606/1990, 1082/1998, 1003/2003, 14127/2006 on disability benefit established by AoP 18/1980; *Id.*, n. 23481/2010 on disability pensions introduced by AoP 118/1971; Supreme Court, Fourth Section, decision n. 27382/2014 on family benefits established by l.d. 69/1988; Supreme Court, Labour Section, decision n. 1389/1991 on social pensions established by AoP 153/1969; Supreme Court, Labour Section, decision n. 16207/2008; Council of State, VI, decision n. 3564/2007, and Court of Accounts of Trentino, decision n. 24/2010, on parental leave established by d.d. 151/2001.

[39] See Supreme Court, Labor Section, n. 23481/2010; Supreme Court, Fourth Section, n. 27382/2014.

organisational requirements, is usually involved, as regards social housing, in the public competitions managed by local authorities with the aim to distribute financial aids to the eligible recipients.

Summing up, the Constitution does not preclude a shift from in-kind into in-cash benefit. One of the effects of the observed shift might be the reduction or change of administrative discretion on the assumption (not undisputed in the literature) that in-cash benefits require less or no discretionary decision-making. Apart from this, other possible consequences of this change are the reduction in the number of beneficiaries, given the more accurate means-testing which benefits are subject to. This is disputed too, however. And a sort of depersonalisation of public welfare services which would be caused by the inevitable dismantling of part of the institutions, and personnel, in charge of delivering in-kind benefits, for public funding is given directly to benefit's recipients to allow them to obtain the service they need[40]. With no further empirical evidence we cannot definitely say in what direction and with what overall consequences such changes are transforming welfare administrative sub-system.

3.1. The relationship between the implementation choices and the general request of social protection: some data about the needs of the population

The implementation choices can be better understood focusing on the general request of social protection, *i.e.* examining some data about the needs of the population after the eruption of the economic crisis.

Soon after the eruption of the crisis, *i.e.* in 2009, the Italian families declared that the mostly used (and needed) social service was healthcare (50,5%), followed by compulsory insurances (48,7%), childcare (15,8%), in-cash and in-kind benefits for primary school (12,3%), social assistance (7,4%), social housing (including the long-term care for the old people: 4,7%), in-cash and in-kind benefits for their essential expenditure (4,6%). Furthermore, they declared that these services were covered for the most part by private spending (78,2%: mainly for compulsory insurances, housing, in-cash and in-kind benefits for their essential

[40] And another point worthy of stress is that this model entails a general trust in the spending ability of recipients.

expenditure) and, for another important part, by public spending (70,3%: mainly for healthcare, childcare, in-cash and in-kind benefits for primary school, social assistance). In this time frame the dissatisfaction of the users was mainly due to the excessive cost (31,8%) and delivery times (31,3%) of the services. The most asked services with costs covered by public spending were: benefits for no-self-sufficiency (85,7%), healthcare (82,5%), unemployment benefits (75,1%), social security and pensions (67,6%)[41]. As regards healthcare, however, the so called *out of pocket* spending directly covered by the users (17,8% of the overall spending for healthcare), is higher than that registered in some of the most important European Countries (UK, France, Germany), though lower than the average of the OECD Countries. This may be partly due to the fact that sometimes the amount of the co-payment overcomes the cost of the service provided with funds fully covered by private spending. Furthermore, private spending for healthcare increased constantly from 2007 to 2013 (these increase is common to other welfare sectors, such as education). As for healthcare, this is also due to the relationship between what each user could spent for a certain kind of service according to different schemes (the copayment and the *out of pocket* spending) and how much time he could wait for the availability of that service according to that different schemes. This trend continued in the following years[42].

As regards the migrants, in 2009/2010, the percentage of them asking for means-tested benefits has considerably increased (22%), while for the Italians the increase has been lower (9,7%). The most part of the migrants asked for in-cash benefits regarding social assistance (65,7%), childcare and education (44,8%)[43].

[41] The sum is greater than 100% since it was possible to give more than one answer to each question, see M.P. Camusi, M. Melis, L. Pardini, V. Coletta, G. Addonisio, *Gli scenari del Welfare – Fra nuovi scenari e voglia di futuro – Rapporto finale Censis* (2010).

[42] See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2012); Censis., *Rapporto annuale sulla situazione sociale del Paese* (2013); Censis, *Rapporto annuale sulla situazione sociale del Paese* (2014); Censis, *Rapporto annuale sulla situazione sociale del Paese* (2015); Censis, *Rapporto annuale sulla situazione sociale del Paese* (2017).

[43] The sum is greater than 100% since it was possible to give more than one answer to each question, see Censis, *Rapporto annuale sulla situazione sociale del Paese* (2011), cit. at 5.

Moreover, in the time frame 2013-2016, the level of absolute poverty of the foreign families increased while for the Italian families the same level decreased[44].

In the most recent years (2015/2016) a part of the population has given up some healthcare (for instance dental care), due to the increase of their cost covered by private spending (in the form of the copayment or *out of pocket* spending) and, at the same time, the public supply of healthcare has been reduced[45].

4. The role played by the Courts

The actual contours of the interplay between Constitutional principles, legislative discretion and public administration in dealing with social rights is commonly affected by case law. The extent to which the courts have concurred to the developments discussed in the previous sections is very difficult to say. As we anticipated the impression is that it was not much appreciable on a macro scale, but there are niches where their role was important in defining some borders.

To this regard, the most frequent grounds of disputes concerns the application of the theory of *social rights as conditioned on finance*[46], which was formulated especially regarding claims to health and social assistance and has recently been reignited as a likely consequence of economic recession[47]. This theory must be balanced with some *counter-limits*, such as the obligation to take

[44] See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2017), cit. at. 19.

[45] See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2016).

[46] See, *ex multis*, Constitutional Court, decisions n. 50/1990, 406/1992, 304/1994, 267/1998, 309/1999, 52/2000, 509/2000, 226/2001, 252/2001, 432/2005, 431/2008, 251/2008, 269/2009, 10/2010, 80/2010; Administrative Court of Lazio, Rome, III, decisions n. 11574/2009, 236/2012; Court of First Instance of Genova, October 16th 2009; Labour Section of the Supreme Court, decision n. 16795/2004; Administrative Court of Veneto, decision n. 395/1989; Council of State, VI, decision n. 2231/2010; *Id.*, Section V, decision n. 3950/2013; Administrative Court of Sardegna, I, decision n. 134/2013; Administrative Court of Abruzzo, L'Aquila, decision n. 255/2014; Administrative Court of Molise, I, decision n. 232/2014; Administrative Court of Lazio, III, decision n. 224/2013; *Id.*, III bis, decision n. 6011/2013; Tribunal of Milan, I, January 4th 2011.

[47] See, for instance: Constitutional Court, n. 455/1990, 267/1998, 248/2011, 104/2013; Labor Section of the Supreme Court, n. 2792/1987.

heed of rights *essential core*[48], even though its meaning is not well defined[49] and should be find, by means of a *reasonableness* scrutiny, in notions such as *human dignity* and *physical integrity*[50]. In this context, the most significant case law of the ICC can be grouped according to the impact of its rulings along the spectrum strong-weak form of review. The so called manipulative decisions, having the same substantive effect of an AoP[51], are the strongest form of review, which can be associated with those decisions which create a new principle of law addressed to the legislator[52]. Another, weaker, form of review is represented by judgments which do not strike down Acts of Parliament establishing exceptional funds aimed at financing essential social needs, despite their infringing upon regional competencies[53]. A third group, in an intermediate position along the spectrum, concerns decisions which limit regional autonomy by striking down regional measures establishing extra social benefits. These are the rulings that can be particularly understood in the light of the

[48] See, *ex multis*, Constitutional Court, decisions nn. 431/2008, 251/2008, 269/2009, 80/2010.

[49] See S. Civitarese Matteucci, *Austerity and Social Rights in Italy: a Long Standing Story*, cit. at 11.

[50] See, among others: Constitutional Court, n. 304/1994, 269/2009, 431/2008; Labour Section of the Supreme Court, n. 16795/2004; Administrative Court of Lazio, III, n. 224/2013; Council of State, V, n. 3950/2013.

[51] In this framework, sometimes the CC has played a quasi-legislative role. In fact, since the '90s the CC, in order to make the generic provisions about social rights effective, has embraced a doctrine that allows the Court to issue a sort of more stringent guidance for the decision-maker and even to adopt 'manipulative' decisions without any remand to the legislator, see A. Albanese, *The Italian Social Model and its Implementation*, cit. at 14. These 'manipulative' judgments can often produce budgetary consequences. Hence, art. 81 Const., which requires «that every law which brings about new expenses must give evidence of the specific means to cover them», should be applied, despite the fact that «a decision of the ICC is not a (statute) law pursuant to article 81», see S. Civitarese Matteucci, *Austerity and Social Rights in Italy: a Long Standing Story*, cit. at 11. This is one of the reasons why these kinds of decisions are phasing out and when the Court wants to intervene on an issue which the Parliament has neglected it normally limits itself to stating a legal principle for the legislator to implement.

[52] See A. Albanese, *The Italian Social Model and its Implementation*, cit. at 14.

[53] See S. Civitarese Matteucci, *Austerity and Social Rights in Italy: a Long Standing Story*, cit. at 11.

doctrine of social rights as financially conditioned[54]. To soften the impact of the application of such a doctrine, many of such rulings refer to a sort of qualification of the decisions which negatively affect regional and local autonomy as a consequence of the economic recession, by pointing out the said constraints should never become permanent and they cannot be justified solely in the name of the *salus rei publicae* in times of financial emergencies[55]. Everyone sees, though, how vague it is the condition attached to a complex phenomenon that it is permanent.

Among the above-mentioned decisions, those belonging to the first group did not emerge as a consequence of the economic crisis. The general tendency of the ICC to adopt quasi-legislative decisions has been accompanied, since the beginning of the economic recession, by the tendency to limit regional autonomy, especially concerning the funding of social services. As we have seen before, it curbs regional autonomy both by directly financing the essential core of social needs and preventing the regions financially troubled from establishing additional social benefits.

As for ordinary/administrative courts, the most significant case law can be grouped on the basis of their practical effects. The first effect is the *protection from the cuts* of part of some welfare areas, such as healthcare (mainly as regards the public funding of healthcare service not included in the essential level of care)[56],

[54] Dec. 104/2013, according to which the additional levels of care covered by regional funds are unlawful insofar as the region is under a Recovery Plan to eliminate the healthcare deficit.

[55] As regards this issue, the CC has in fact ruled that State's measures «combining spending cuts and invasions of competences constitutionally allocated to the Regions […] cannot be justified solely in the name of the *salus rei publicae* in times of financial emergencies (Decisions n. 148 and 151/2012)». Moreover, it declared that limitations to the financial autonomy of Regions, though constitutionally allowed in time of crisis, should never become permanent (decision no. 193/2012), see D. Tega, *Welfare Rights in Italy*, in C. Kilpatrick, B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014).

[56] As we have already noticed above, this is a special scheme based just on case law coeval with the eruption of the crisis. See for example: Court of First instance of Bari, November 3rd 2008 (on the right of patients to benefit, with spending covered by public financing, of medicines which are not included in the list of those covered by the same financing in the national or regional healthcare system, under conditions such as the compatibility with the general principles and rules of the NHS, the lacking of an alternative and appropriate

education (mainly as regards benefits for disabled students)[57], social security (mainly as regards the purchasing power of lowest pensions)[58]. The second one is the *direct application of constitutional provisions* when the Acts of Parliament necessary to implement these rules/principles are either absent or inadequate to grant a social minimum and/or the implementation of their content by the pubic administrations (for instance, as regards the duty to finance with public funding some healthcare services not included in the essential level of care, the relevant judicial decisions have directly applied the constitutional provisions/principles, being the legislative acts either absent or inadequate to support this duty)[59]. The third group includes *decisions ordering administrative authorities to act in a certain way* (for instance, ordering them to compensate or repay something due to the inadequacy of certain services/benefits[60]).

Thus, we can register an effort by the courts to support the effectiveness of social welfare entitlements, especially when the

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care, the usefulness of the care concerned, though a scientific evidence does not exist).

[57] See, for instance: Administrative Court of Molise, I, decision n. 232/2014; Administrative Court of Lazio, III, decision n. 224/2013; *Id.*, III bis, decision n. 6011/2013; Tribunal of Milan, I, January 4th 2011; Council of State, VI, decision n. 2231/2010; *Id*, V, decision n. 3950/2013 (all about the illegitimacy of the acts, such as administrative Plans, establishing binding limits to the number of specialized teachers for disabled students to be assigned to each school, sometimes in contrast with the 'scoresheet' of the competent technical commission; the common legal basis of this kind of decisions is the impossibility to compress the core of a fundamental right, such as the right to education of disabled students, with the aim of controlling public spending, as declared by Constitutional Court, decision n. 80/2010).

[58] See Const. Court, decision n. 70/2015.

[59] See footnote n. 56.

[60] See, for instance: Administrative Court of Sardegna, Section I, dec. n. 134/2013; Administrative Court of Abruzzo, L'Aquila, n. 255/2014 (both on the duty of the competent public authority, to admit, for disabled students, a compensation due to a delay in the availability of specialized teachers or the inappropriateness of the service concerned); Labour Section of the Supreme Court, decision n. 9969/2012; Supreme Court, III; decision n. 9319/2010 (on the duty of the competent public authority to admit the repayment of the healthcare service enjoyed abroad without any previous authorization, under the condition that the care was necessary and urgent and it was not possible to enjoy it in the NHS to which the patient belongs in a time frame compatible with this urgency).

legislative implementation of constitutional provisions or the administrative implementation of legislative provisions are either absent or inadequate to grant a social minimum, in times of economic recession. In this framework, the obligation of public authorities to protect human dignity and/or physical/personal integrity in granting the core of social rights emerges frequently. However, the limited role of legal accountability in this field may deter the judges to hold authorities to account, in practical terms, especially regarding the resource allocation decisions. Case law has in fact normally focused on using legal devices such as procedural requirements and reasonableness. Furthermore, judicial review is often confined to an 'external scrutiny' which is the expression of a more general deferential approach to the legislature. Bearing in mind that *legal accountability* of public authorities to the Courts, *political accountability* of the executive to the Parliament and *democratic accountability* of the legislature to the electorate have different meaning and consequences[61], this picture could not be seen as necessarily negative.

5. Final remarks

In this section, we want to offer some final remarks.

Different tendencies emerge from this study as regards the influence of austerity over the state of the Italian Welfare. Each of them and the relationship between them highlight some weaknesses of the overall framework, but also some possible solutions to amend this condition.

First of all, economic recession can be deemed to limit, in a general perspective, the adaptation of social welfare entitlements and services to the increasing needs of the population. Thus, for instance, basic levels of social benefits have not been updated – or even ever established in some areas – or updated with extreme delay. This is a significant gap, since they work both as a legal basis for granting welfare services and as a tool for fiscal equalisation and the implementation of fiscal federalism. Economic recession has worsened the general attitude of the

[61] As regards the relationship between the failure in protecting the core of social rights and the violation of ECHR, see C. O'Cinneide, *Legal Accountability and Social Justice*, in N. Bamforth – P. Leyland (eds.), *Accountability in the Contemporary Constitution* (2013).

legislature to use its discretion to implement a certain model of welfare. This condition, in turn, influences the role of administrative authorities in managing social services, given retrogressive choices of the legislature regarding how to concretely shape constitutional obligations. A certain degree of administrative discretion does remain as regards for example organisational requirements, but it barely affects the general picture.

Secondly, the constraints on the implementation of social rights may limit the achievement of a certain level of economic development, given the mutual influence between these two economic factors.

Thirdly, emergency determines the adoption of extraordinary (and sometimes structural) measures with the aim of reducing or amending social welfare entitlements and services, and even of limiting autonomy of regional or local levels of government as regards their supply or financing. In this framework, the constitutional reforms on sound budget, adopted under the pressure of the EU, mirrors a '*cut-approach*' in social policies. In 2011 a similar reform interested the Spanish Constitution for the same reason, *i.e.* the financial assistance received from the ECB and the consequent duty to give reassurance to the EU about limiting the public debt and deficit: as a consequence of these constraints, regressive reforms have been introduced in healthcare, social security and social housing[62]. Social welfare spending is indeed a sizeable part of the national aggregate budget, even though the cutting back of social expenditure is not the only tool to keep public spending under control[63]. In turn, EU financial constraints mirror the market-based approach of the EU process of integration, the prevalence of market rationality over the welfare policies and, thus, the risk of weakening the European Social model, despite the existence of a mutual relationship between economic development and welfare policies, as already pointed out. However, at present EU

[62] See D. Utrilla, *Spain*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017).

[63] See S. Civitarese Matteucci, S. Halliday, *Constitutional Law and Social Welfare after the Economic Crisis*, in F. Merloni (ed.), *The Impact of the Crisis on Democratic Institutions and Public Administrations. How Austerity policies are Changing Public Powers* (2017).

integration is at risk not only for the financial crisis, which threatens its market-based nature, but also for an institutional crisis (epitomised by the Brexit case), which invests the EU as a whole. In the Italian Welfare system spending cuts have especially affected social assistance and, partly, the budget aimed at supporting regional expenses in healthcare. In the healthcare sector, the 'cut-approach' has mainly determined the shifting of funding from the public to the private spending covered by the users (via the increase of the number of co-payments or fees to be payed to private insurances). This is common to other European experiences[64]. Moreover, the 'cut-approach' is supported by that case law which holds social rights are financially dependent. However, this is counter-balanced by another strand of case law, which in particular circumstances is prepared to make the protection of social issues prevail. In such cases the courts often resort to the application of criteria of human dignity or physical integrity with the aim of avoiding the compression of the core of social rights as fundamental rights.

This leads us to the fourth point which concerns the courts and whether and to what extent they managed to limit the harshest effects of austerity, started before the financial crisis but which has become somehow permanent as a consequence of economic recession. The judiciary has often enforced the obligation of public institutions to protect the core of social rights by resorting to human dignity and/or physical/personal integrity. This has occurred especially when the legislative implementation of constitutional provisions or the administrative implementation of legislative provisions were either absent or inadequate to guarantee a social minimum. Except for these cases, courts favour a deferential approach by limiting their review to an 'external scrutiny'. This approach can also be detected in other European countries[65].

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[64] In Germany, for instance, there was a shifting of costs from health insurers to insured individuals, see U. Lembke, *Germany*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017). The co-payment schemes have been increased in France too, see D. Roman, *France*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017).

[65] In Germany, for instance, the Federal CC declared that, under the German basic law, citizens enjoy a fundamental right to a subsistence minimum, to be

Fifthly, the role of public authorities in the decision-making process to implement social rights is changing as a consequence both of the financial crisis and the constitutional amendments on devolution, fiscal federalism and budget balance, in the direction of a restriction of their leeway in organising and delivering welfare services mainly conceived, in the Italian tradition, as in-kind benefits to be replaced by in-cash means-tested benefits. Once again, the increase in the use of means-testing schemes is partly common to other European countries[66].

Sixthly, one more consequence of the financial crisis is the tendency to the recentralisation of competencies, mainly via their shifting from the regions to the State and, thus, the limitation of regional autonomy. This reduction has been usually determined by extraordinary legislative measures, such as those aimed at establishing and *implementing the recovery Plans in healthcare*. Limitation to regional autonomy has also been supported by the Constitutional Court case law. This is, for instance, the case for those decisions which, on the one hand, declared the impossibility of regions to establish additional levels of care covered by regional funds whether the region is under a recovery Plan (on the basis of the theory of social rights as financially conditioned), while, on the other hand, allowed the establishment of national exceptional funds aimed at financing essential social needs, though they infringed upon regional competencies (on the basis of the duty to

calculated, however, by the legislative, according to a transparent and not arbitrary method, see U. Lembke, *Germany*, cit. at 26, and there further citations. The same deferential approach can be found in the UK, French and Spanish case law, see D. Roman, *France*, cit. at. 26; D. Utrilla, *Spain*, cit. at. 25; J. Meers, *UK*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017), and there further citations.

[66] In Germany, for instance, the so called 'Hartz IV' reform (adopted, however, before the eruption of the economic crisis) moved towards a system placing more emphasis on means-testing, activation policies and sanctions for non complying, though many financial benefits were reduced: this is the case of many long-term unemployed people and their families, see U. Lembke, *Germany*, cit. at 26. Also in France there has been the reduction of some social benefits and an increase in activation policies and sanction programs for unemployment benefits claimants failing to comply with their commitments, see D. Roman, *France*, cit. at 26. In the UK too, since 2012, the government introduced similar measures; however, at the same time the discretionary power of the local authorities has been increased as to allow them to mitigate the impact of the harshest social reforms, see J. Meers, *UK*, cit. at. 27.

save the so called social right core). It is true that, as regards this issue, the ICC tried to introduce some counter-limits to the constraints to regional and local autonomy as a consequence of the economic recession, declaring that they should never become permanent. However, nobody knows what happens if the crisis is endemic. In this framework, the chance that regional policies counteract the austerity trend is just abstract or extremely limited. In other European countries, however, the financial crisis has determined a partly opposite tendency: for instance, in the UK, since 2012, the discretionary power of the local authorities has been increased as to allow them to mitigate the impact of the harshest social reforms[67].

Seventhly, going back to the Italian case, it is however possible to argue that, when emergency reasons arise, sometimes extraordinary or even structural measures are adopted with the aim of implementing social welfare entitlements and services. Thus, for instance, as regards social assistance, social security and labour policies, some measures have been introduced with the aim of fighting poverty, increasing the number of unemployment benefits' recipients, supporting an active inclusion. Furthermore, as regards housing, several measures have been established with the aim of supporting tenants or meet other social goals. These policies reflect a tentative, albeit positive, will of fighting conditions of extreme/increasing need of the recipients.

As a way of a conclusive observation, the overall picture makes it clear that the question of the balancing between social rights and economic reasons is still open. The crisis years have lay bare old and structural deficiencies of the Italian welfare State. A piecemeal and tentative attitude of all the decision-makers involved in the managing of the system during the financial crisis has hence even worsen the condition of a chronic invalid, which would instead require a cure based on an integrated methodology, both planned and implemented on a long-term trajectory and flexible enough to be able to face the most likely upcoming shocks and changes. This goal could be also reach considering the regional/local autonomy as an opportunity for the optimization of the delivery of services/benefits more than as a threat for the public spending and budget sustainability.

[67] See J. Meers, *UK*, cit. at 27.

ACTS OF ADMINISTRATIVE ASSURANCE: NATURE AND EFFECTS

Mladen Mladenov[*]

Abstract

This article considers a particular type of measures taken by public authorities; that can be called "Acts of Administrative Assurance". In its essence, this type of measures is characterized by the following elements: i) a public authority, ii) adopts an act with the goal of providing for its future conduct, iii) concerning procedures affecting the same type of substantive interests protected by the law. The Principle of Protection of Legitimate Expectations as a base of such legal concept is examined accordingly. The next step is to distinguish 'typical' and 'atypical' Acts of Administrative Assurance, on the basis of a quick comparative analysis of both the legislations of some European countries and their judicial practice. *De lege ferenda* proposals are grounded in three possible methods of approaches – EU legislation, national general administrative procedural legislation and national sector-specific legislation. Conclusions about legal nature, legal origin, legal ground, legal significance, legal idea and legal effect of the Act of Administrative Assurance are also drawn in the end of the article.

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1. Introduction

This paper has a modest task to describe in a general context the idea, nature, existence and effects of the legal institution of Acts of Administrative Assurance (AAA). The text is structured into six parts. The present first is the introductory one – with a broad view on the assurance as an institutional social phenomenon. The second one leans on the Principle of Legitimate Expectation as a basic principle for the entire European legal area. The third one examines the extant examples of typical Act of Administrative Assurance in the national legislations within Europe, respectively – the fourth one considers atypical forms of AAA. Both typical and atypical existence of AAA are analyzed in their legislative aspects; nevertheless judicial practice and legal doctrine are also used in the argumentation. The fifth part of this work is based on *de lege ferenda* issues – proposals for future legislative approaches. And the last sixth part locks the expose with the logical conclusions in consequences of the developed thesis.

The entire history of human civilization is based on relations between the individuals and the society, and very correctly Barry points out, 'people come to realize that social arrangements are not a natural phenomenon but a human creation'[1]. The human community bases itself on the organizational values, purposes and achievements in both public and private sector. The latter is self-organized (in a certain extend) and the relationships into it are endless as quantity, but also as diversity. And *vice versa* – the public sector subsists by the goods, realized by private sector. In free democratic states with rule of law and open economics, based on competiveness, the public sector *inter alia* regulates the private one with common legal rules. As Hart observes, 'even in a complex large society, like that in a modern state, they are occasions when an official, face to face with an individual, orders him to do something'[2].

The actors both in public and private sector need foresight as a broad vision for the future. In some cases they need even more – assurance in concrete dimension, plan or process.

[1] B. Barry, *Theories of Justice. A Treatise on Social Justice* (1989).
[2] H.L.A. Hart, *The Concept of Law* (1994).

When the politicians during the pre-election campaign promise to the potential voters this is a preliminary *political assurance* in a future policy, a declared line, which pretend to be supported in the course of elections. Commonly such an assurance is uncertain in its beginning, because the promised (during the pre-election competition) ideas for future realization are so many and inconsistent, that they are simply impossible in their combination. It is worthy to note here the thesis of Navarro and Rodriguez that, 'by reference to the ideal worlds there is no chance to represent obligations that stem from the failure to comply with other obligations'[3].

In case of strategic political acts of the government (in broad meaning) as declaration of the executive or/and legislative power, there is a *political assurance with a quasi-normative element (legislative)*. Although in a different context, Cooper punctually alludes to, 'convergence between the legal and political approaches'[4]. Usually such strategies in the modern times are based on idea of equity, transformed to promise for governmental care and its 'understandable" duty; and as Dworkin mentions "we believe our government … does have this duty'[5]. Martinot states that "it signifies a political transformation of legality (due process) into impunity (withholding of basic rights), which occurs as a rejection of accountability"[6]. Namely, the lack of accountability in the political process leads to impunity in any case, including in situations, when the political assurance is not kept. There are not directly expressed opinion by the politicians that their political statements are partially binding for their authors.

However, the rational mind knows that a level of changeability of the final towards expected result always exists to any promise, even for political statements. In such a direction Schedler draws attention to the fact that "We face natural, transcendental, technological, and systemic uncertainties…We and others may always act differently than we are supposed to"[7]. Hence, the own nature of the human life and society presumes

[3] P.E. Navarro & J.L. Rodriguez, *Deontic Logic and Legal System* (2014).
[4] P.J. Cooper, *Public Law and Public Administration* (2000).
[5] R. Dworkin, *Law's Empire* (2002).
[6] S. Martinot, *Due Process and the Reconstruction of Democracy*, 43 Soc. J. 2 (2016).
[7] A. Schedler, *The Politics of Uncertainty. Sustaining and Subverting Electoral Authoritarianism* (2013).

that even the promises are given conscientiously, the various factors beyond the promising person are able to change the promised and expected result.

While the enacted law with the act of its promulgation is a pure *legislative assurance* that the legal relations in the scope of this law will be treated in the course of it. But, as Craig marks, 'there is no sound foundation for the belief that issues of normative choice that do not entail balancing are less problematic than those that do'[8]. In this way, there is no guarantee here, in general, too.

Quite different is the *judicial assurance* with the interpretative decisions of the supreme courts (mostly in the legal systems of Civil Law) and precedents (in the legal systems in Common Law) – shown the line of subsequent judicial acts in similar cases. There is *condition sine qua non* here – the facts must be similar and the law should be the same, for following this line of jurisdiction. But, having in mind the very exact sentence of Posner that, 'the political and personal factors create *preconceptions*, often unconscious, that a judge brings to a case[9]'. Thereby, the facts and legal provisions must be considered in such a way, that the judicial decision to be turned aside of the judicial assurance. For that reason, it is very insecure in its nature.

But the essential difference here from the all assurances above is this one, which is *administrative assurance.* Firstly, it is neither political, nor legislative or judicial assurance, but derives from the executive. Secondly, it exists only in already developing administrative proceedings. And the finally, it is assurance to the concrete legal subjects (citizens and legal entities) and doesn't have legal effects to the third private legal subjects.

Exactly from these reasons this kind of assurance is always administrative act with and individual characteristics. It must have a legal base, i.e. – to be provided in the legislation (normally – in the administrative procedural legal norm from the general legislation, but also in the special legislation with the administrative rules).

Therefore the very plain title of this legal institution should be *Act of Administrative Assurance (AAA)*, because it is a legal act,

[8] P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (2015).
[9] R.A. Posner, *How Judges Think* (2010).

emitted by the organ from the executive power (or another public body with such a competence, or, 'hybrid public/private institutions or even fully private institutions[10]'), with the purpose of assurance in future act by this organ during the coming proceedings based on the same material legal interests.

2. Principle of Legitimate Expectations

Act of Administrative Assurance draws its legal ground in one of the most popular general principle of Law – the Principle of Legitimate Expectations[11]. Into the European legal area there is a plethora of judicial practice on it. Starting with the well-known, 'those who are subject to it are entitled to consider themselves to have suffered damage to their legitimate expectations or to their rights and to ask for reparation of the damage which has thus been done to them'[12], though, 'the concept of force majeure adopted by the agricultural regulations takes into account the particular nature of the relationships in public law between traders and the national administration'[13], across, 'does not… constitute an infringement of the principle of protection of legitimate expectation of the individual'[14].

It must be clarified right here, that the Principle of Legitimate Expectation is a basic principle for the entire European legal area. It might be founded in *one or many* legal acts – laws, administrative acts, contracts and agreements, etc. Thereby frequently there are series of acts or measures in being. They reach the same effect, but on the base of different approaches. Similarly, their authors might be different legal subjects – the legislator, the government, the municipality, the independent administrative body, the professional association, the certified organization, the private contractor and so on. Naturally, a single and unitary Act of Assurance can achieve the same result. The weight of this depends

[10] L Murphy, *What Makes Law. An Introduction to the Philosophy of Law* (2015).
[11] Also known as Principle of Protection of Legitimate Expectations.
[12] Judgment of the ECJ, 14 July 1961, in Joined Cases 9/60 and 12/60, Société Commerciale Antoine Vloeberghs.
[13] Judgment of the ECJ, 17 December 1970, in Case 11/70, Internationale Handelsgesellschaft.
[14] Judgment of the ECJ, 27 May 1975, in Case 2/75, Einfuhr- und Vorratsstelle für Getreide und Futtermitte.

from the legitimacy of the author of the act and from the trust of the recipient of this statement.

European Court of Justice (ECJ) counts 'the principle of the protection of the legitimate expectation of the parties'[15], towards the fundamental doctrine that 'the principle of respect for legitimate expectations prohibits those institutions from amending those rules without laying down transitional measures unless the adoption of such a measure is contrary to an overriding public interest'[16].

As is very clearly written, 'Although in general the principle of legal certainty precludes a […] measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected'[17], this principle is aimed to the future legal effects.

As the judicial practice says the scope of this principle is not general (hence – must be only individual one): "in such a context, the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules"[18].

Ought to highlight that unwritten (in the legislation) *proviso* for the application of the Principle of Legitimate Expectation is the following of the general Principle of Prudence: "the Court has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a […] measure likely to affect his interests, he cannot plead that principle if the measure is adopted"[19].

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[15] Judgment of the ECJ, 8 June 1977, in Case 97/76, Merkur Außenhandel GmbH & Co.KG.

[16] Judgment of the ECJ, 16 May 1979, in Case 84/78, Angelo Tomadini S.n.c. with Unione Industriale Pastai Italiani.

[17] Judgment of the ECJ, 25 January 1979, in Case 99/78, Weingut Gustav Decker KG.

[18] Judgment of the ECJ, 13 July 1995, in Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93, O'Dwyer and Others v Council.

[19] Judgment of the ECJ, 15 April 1997, in Case C-22/94, Irish Farmers Association and Others.

3. Typical Act of Administrative Assurance

As a base of this exposition, the contemporary Albanian legislation is considered as a simple example for the argumentation of the thesis, and the legislations of other European countries confirm in definitive scope the significance of the AAA and the similar legislative approaches to its typical form, and also in the next part of the text – the atypical states of this legal institution too.

Nowadays one among the very newest legislation in Europe gives a very precise definition: an 'act of assurance' is an individual administrative act, through which the public organ, if provided by a special law, may, preliminary assure that it will issue or refrain from issuing a certain administrative act at a later date[20].

In such a way, the Code of Administrative Procedure (CAP) in Albania[21] defines this specific legal institution – act of assurance, to be settled by a special legislation.

This legal provision from Albanian legislation will be one simple example on the ground of the thesis in this article. It may be expected - that into the broad European legal area (when the convergent evolutionary legislator creates laws) - the other counties will amend one day their legislations in the same direction.

There are two conflicting values at stake: the inequality with monopoly position (because the administrative organ is the only one in possession of administrative competence and in a such role it is dominant over the legal subject) and lack of transparency (but with legal certainty) from one side; and equal treatment with open possibilities to anyone and transparency (but with insecurity of endless changes of the legal conditions).

The elements of the Act of Assurance (AA) in the definitions above are:

First, beyond doubt this is an individual administrative act. In most legal systems in the world, the Administrative Law has close understanding about this main administrative institution. If we use the Albanian definition in Ibid, Article 3, paragraph1, letter

[20] Article 3, paragraph 1, letter c) from Law No. 44/2015, Code of Administrative Procedures of the Republic of Albania, adopted in 30.4.2015, into force from 1.5.2016.

[21] An official candidate for accession to the European Union since June 2014.

a) of CAP: an 'individual administrative act' is every expression of will by a public organ, in the exercise of its public function, towards one or more individually determined subjects of law, which establishes, modifies or terminates a specific legal relationship.

With deep respect to ReNEUAL Model Rules on EU Administrative Procedure[22] in its classification of non-legislative acts, adopted by EU institutions the AAA are not visible among private regulatory acts, interinstitutional acts, non-legislative acts of general application present specific problems, plans, and guidelines. Hence, this famous book of procedural rules "is opened" for future categories of non-legislative acts, why not for Act of Administrative Assurance.

Second, it is issued by the public organ. The Albanian CAP (Article 3, paragraph 6) is very precise and might be use even in global aspect with such a definition:

A 'public organ' is any organ of central power, performing administrative functions, any organ of public entities, to the extent they performs administrative functions; any organ of the local government, performing administrative functions; any organ of the Armed Forces, to the extend they perform administrative functions, as well as any natural person or legal entity, which, by virtue of a law, bylaw, or any other form, is conferred the right to exercise public functions.

Third, AAA is provided by a general procedural law. Therefore, it might be applicable by all public sector's institutions and organizations. On principle (but not always), the organic and procedural laws are general, but substantive (material) are special.

Fourth, it has got a preliminary significance related to the regular administrative procedure and its final aim – ordinary administrative act. The preliminary significance affects the present legal motivation of the legal subject, notwithstanding the endmost goal is the final (regular) administrative act.

Fifth, the main idea is assuring in issuing or refraining from issuing a certain administrative act. Sixth and final, the legal effect

[22] H.C.H. Hofmann, J.P. Schneider, J. Ziller, J.B. Auby, P. Craig, D. Curtin, G. della Cananea, D.U. Galetta, J. Mendes, O. Mir, U. Stelkens & M. Wierzbowski (eds.), *ReNEUAL Model Rules on EU Administrative Procedure. Administrative Rulemaking* (2014).

of AA is directed for assurance now, but for real issuing the certain act in the future. Here the assurance is only a bureaucratic promise from issuing or refraining from issuing a certain administrative act. This is very complicate active-passive and positive-negative legal picture in the time to come. In all possible four combination, depends of existence or not of the AA and in the same time – of the legal interests of the legal subject, the assurance now can be verify in the future only.

The combinations are: active-positive (issued act, satisfying the legal subject), active-negative (issued act, satisfying the legal subject), passive-positive (lack of issued act, satisfying the legal subject) and passive-negative (lack of issued act, satisfying the legal subject). Maybe to wit the legal doctrine as the current exposition is able to give assistance to both administrative and judicial practice and also to the next scientific works in connection with the correct understanding and implementation of the Act of Administrative Assurance, rendering on account the values of the going legal order and legal interests of the state, society and individual legal subjects.

This systematical order and doctrinal decomposition on elements, based on one legal definition in national legislation might be used generally for AAA's in global aspect, because of clear normative definition into Albanian CAP, which allows to disclose all important manifestation of this legal institution.

Article 103 arranges definitely the legal institution Act of assurance in Albanian CAP. By virtue of paragraph1, the AA is issued by the competent public organ only upon request of the parties and has at any case a written form. This means that the *ex officio* issuing of such type of AA is impossible. Normally, the public organ is concerned with apparent legal interest of the legal subjects, but not with their legal expectations. That's why the request here is needed. On the other hand, id the public organ is so worried *ex officio*, this abnormal administrative behavior is indicator for partiality, conflict of interest or corruption (or all of them in a pile). The form of prove is written form here – first, for the confidence of the legal subject, second – for the base of future investigation against the public body (for instance – in case of corruption). The second paragraph of Art.103 accepts that if prior to the issuing of the act of assurance, the competent public body considers that there must be a hearing with the person or persons,

or under the law the participation of another public organ is required, the act of assurance shall be issued after the hearing of the person or persons or the participation of the public organ.

The hearing here is the emanation of the Principle Duty to Hear the Addressee of a Decision, but with additional legal ground – in case of participation of another public organ. Brown and Bell accentuate on this "adequate opportunity of presenting views", which is nothing, but "necessity to hear both sides" *(audi alteram partem)*[23]. Harlow and Rawlings[24] point at the statements of Craig that "all legal systems have to determine the content of the right to be heard"[25]. All of these reputable scholars stress on the importance of right of the subject to be heard and for the corresponding duty of the administrative organ to hear this subject. Except for civil rights of the private persons, this procedural duty ensure the informed administrative decision-making process, as well. Thereby, the administrative organ reduce the risk of mistake to one acceptable level.

This is something as Insurance of Assurance, i.e. the public body insures itself against the future administrative or audit pretentions and litigations with one open and transparent procedure for future decision about issuing or not of AAA. The last third paragraph says that if after the issuance of the act of assurance, the facts or legal basis of the case change in such an extent that if the organ would have been aware of this change, it would not have issued the act of assurance, the latter shall no longer be mandatory for the public organ body. The third paragraph from Article 103 of Albanian CAP is very important normative ground for deep understanding of the real nature and legal effect of AAA.

It must be stressed that in both cases – when the facts or legal basis of the case are changed (but after the issuing of AAA), the same hasn't already binding effect for the public organ. The facts might be new or/and unknown, the legal basis might be new or/and modified national, but also International (or European) legislation.

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[23] L. Neville-Brown & J.S. Bell, *French Administrative Law* (2003).

[24] C. Harlow & R. Rawlings, *National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence*, 2 Italian Journal of Public Law (2010).

[25] P. Craig, *EU Administrative Law* (2006).

There is a *proviso* here – if the public organ would have been aware in this changes (factual or legal) on the spot of issuing of AAA, it would not have issued this AAA. The "awareness" here has only intellectual (rational, cognitive) meaning, and excludes the emotional (irrational, spiritual) feelings of the public officials (in public body and its administration). The proviso in its fully conditional sense must be proved factually (with new legal facts or/and new legislation) in each case, when the public body wants to step back from the AAA and its legal effect.

The opposite is breach of the Principle of Legal Certainty and shows an arbitrary approach without legal grounds. The intricacy here is that the proviso (a negative one in its nature) must be applied *ex tunc* (since then; in the past) with the present-day knowledge. This abstraction is *legal fiction* in its pure manifestation. The only one lawful and correct way to apply this *fiction-proviso* is to replace the past factual or/and legal picture by the present one/ones. In such cases the conclusion must be that the AAA has no binding effect, because would not have be issued by public organ.

However, in some cases the Act of Administrative Assurance shall continue its binding effect, because nevertheless new factual or/and legal changes, the final factual and legal picture leads to the same legal conclusions (to issue AAA in the same content to the same legal subject).

Another interesting manifestation of similar necessities can be found in the legislation of another European country; that is, Serbia's Law on General Administrative Proceeding[26] (LGAP)[27]. One clear definition is given in Article 18, paragraph 1:

Guarantee Act is a written act with which the public authority binds itself, at the relevant request of the party, to adopt administrative act of specific content.

Paragraph 2 provides that Guarantee Act shall be adopted when stipulated by specific law.

From analytical point of view here there are two main differences from Albanian legal framework: first, the act is not

[26] Law on General Administrative Proceeding, promulgated State Gazette No. 18/2016, into force from on the eighth day following its publishing in the "Official Gazette of the Republic of Serbia" and shall be applied from 1.6.2017.

[27] An official candidate for accession to the European Union since February 2012.

assurance, but guarantee one; second, the public authority not simply preliminary assures, but binds itself for adopting administrative act of specific content. Anyway, the idea is the

The Failure to Adopt Administrative Act in Accordance with the Guarantee Act is in Article 19. The first paragraph is in sense that public authority shall adopt administrative act in accordance with guarantee act only upon party's request. This is a genuine appearance of the leading principle in the Administrative Law and Administrative Process – Principle of Legitimate Expectations (as considered above).

The second paragraph of Article 19 of Serbian LGAP declares that a party may lodge an appeal against administrative act when administrative act has not been adopted in accordance with guarantee act. Because of that, the provision of Article, paragraph 4 enacts that a party has the right to lodge an appeal in other cases stipulated by law (here is stipulated in general administrative procedural legislation, but there is no legal impediment the same to be pointed out in the special legislation).

What is more, paragraph 6 of the same article explains that an appeal against first instance decision may be lodged by any person whose rights, obligations or legal interests may be influenced by the outcome of administrative proceeding, within the same time limit as the party in administrative proceeding. As a legal consequence, based on Article 158, paragraph1, point 8, decision may be annulled due to the fact that administrative act has not been adopted in accordance with guarantee act.

Further, the third paragraph is very important (because of four specific exceptions) and enacts that the public authority shall not be obliged to adopt administrative act in accordance with guarantee act: when request for adopting administrative act is not submitted within a year from the day of issuing guarantee act or within other time limit stipulated by specific law (the specific time limit, when findings of fact, which are basis of request for adopting administrative act, are significantly different from what has been described in the request for adopting guarantee act (the disparate factual context summons different legal provision to be applied); when legal basis has been amended based on which guarantee act has been adopted in such manner that new regulation prescribes avoidance or setting aside of, or amendments to, administrative acts adopted on the basis of

previous regulations (in principle, the legislations operates *ex nunc*, and when the public authority is functioning now, it applies the legislation in force, not the previous legislation); when there are other reasons stipulated by specific law (exceptions into the legislation).

Article 20 provides that the Guarantee Act cannot be against the public interest, nor yet against the interests of third persons. In searching of meaning of public interest[28] it must be emphasized that this idea has various interpretations in different legal systems. Also, the third persons must be understood as any legal persons, which might be influenced by the Guarantee Act. The legal interpretation here must be in narrow scope – without public authorities, first – because *requirement of the protection of public interest gives safeguard* in such a case; second – because the public authorities have no interests, but *competence and subject-matter* of it. That is why Article 33, paragraph1 specified that subject-matter jurisdiction of the authority shall be determined by regulations which cover certain administrative area or jurisdiction of individual public authorities.

The Article 21 explains that provisions of this law on administrative act are accordingly applied to guarantee act. That is why Article 16 is applicable here. Paragraph 1 contains the following meaning: 'Administrative act', in the sense of this law, is a single legal act by which public authority, directly applying regulations of relevant administrative area, shall decide on rights, obligations or legal interests of the party, or procedure issues. The second paragraph states, administrative acts are decisions and conclusions. And the last third paragraph allows that decisions and conclusions may also be titled otherwise if so envisaged under a special piece of legislation.

There is still another interesting example that is worth considering, that of Bulgaria. In Bulgarian Law on Concessions[29], Article 40, paragraph1 provides that within 7 days from the accepting of the *decision for launching* a concession procedure, the body as per Article 19 paragraphs 1-4 shall approve by a decision

[28] According to Bryan A. Garner, Editor in Chief, *Black's Law Dictionary*, second Pocket Edition (2001), public interest means: 1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.

[29] Promulgated SG No. 36/2.05.2006, into force from 1.7.2006.

the announcement of the procedure, the documentation for participation into the procedure and a draft concession agreement. The second paragraph enacts that by virtue of issuing the decission, the body shall be bound by the decision for the launching of a concession procedure.

The decision for launching a concession procedure is premise for the decision the announcement of the procedure. The 7-days time limit is only period for technical (bureaucratic) preparation of the decision the announcement of the procedure, the documentation for participation into the procedure and a draft concession agreement, and nothing more. If the decision for launching a concession procedure exists, the decision the announcement of the procedure must be realized. The first decision plays role of AAA for the latter one. The last decision only guarantees for the legal subjects that they can participate in the next phases of the concession procedure, but not that they will be chosen for the winner in this competition process as a concessionaire. There is no assurance that the decision for selection of a concessionaire shall indicate concrete legal subject, or the concession agreement conclude with him.

The assurance effect here will be only procedural one – if the legal subject follows strictly decision, the announcement of the procedure, the documentation for participation into the procedure and a draft concession agreement, he is still into concession procedure and might hope to win this competitive procedure as well.

Here the assurance effect does not exist for the substantive dimension of a certain administrative act – first, because there is no substantive aspect of that, and seconds – because the final legal act here is not administrative act, but an agreement. Only as a supplement – here the complex factual composition is existing – administrative acts and following agreement. In other words – this form of AAA secures the procedure, as a series of activities of interested parties – the private person and the public body. The assurance of the private person is in the preliminary approved by the organ conditions. If everything from procedural point of view is followed properly, the very final act will be bases on the documentation and the project of the concession agreement, known *in advance*.

With concluding of the concession agreement, the complex factual and legal composition will be done fully. On that account, here is a mere phenomenon of convergence between legal branches[30] - both from public and private law.

The origins of this procedural legislation is caused by many factors, but two of them are obviously important. Firstly, anyone legal subject is confused by perpetual amendments in Bulgarian legislation. For example, only the Law on Concessions, cited above is changed from 2006 until now 28 times[31]. Secondly, the foreign investors are not very confident of bureaucratic, which frequently changes the requirements in different administrative procedures. This causes the necessity into the Law on Concessions to be "nailed" the rule that the procedure itself, the documentation for participation and a draft concession agreement to be preliminary adopted from all sides in the concession procedure.

The Bulgarian legal regime that we have just examined has some analogies and differences with that which exists in Hungary. Consider Hungary's Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (GRAPS)[32], Section 38/C, paragraph 1, that a certification body so authorized by way of the means specified in an act or government decree may participate in the process of ascertaining the relevant facts of the case. The authority must accept the certificate issued by the certification body in ascertaining the relevant facts of the case, and shall conduct *no further procedural steps in respect of the facts certified*.

The second paragraph in the same section of GRAPS accepts that where an act or government decree so provides, rights based on facts endorsed by a certificate issued by a duly authorized certification body may be exercised directly. The relevant act or government decree shall define the rules pertaining to the liability of the certification body as regards the facts endorsed on the basis of the certificate.

Consecutively pursued pats of legal assurance is settled in Section 85, paragraph 1: 'Official Certificates', where is written that the authority shall issue an official certificate in cases specified in the relevant legislation - containing the information

[30] M. Mladenov, *Convergence between Commercial and Public Law*, 4 Prob. Comm. Law (2015).
[31] Towards 18 July 2017.
[32] Into force since 1.11.2005.

prescribed therein - for the permanent verification of the data or rights of the client.

This is the administrative assurance in factual or legal dimension. The key word is permanent, which is a guarantee for the party in the administrative proceeding. Further away, the next paragraphs accept that the official certificate shall be accepted by all for verification of the data and rights entered, and the client may not be compelled to supply additional evidence for such data and rights (which defines more accurately, that such a certificate is valid not only for the same proceeding, but for any proceedings before the any authority).

These provisions shall apply to the procedure for providing proof to the contrary. There is a legal safeguard here - if an authority or official person duly authorized to check the official certificate determines that the official certificate or the data it contains is false or untrue, the official certificates shall be confiscated for further procedures against a receipt issued.

Additionally, the Section 172, letter a) recites that or the purposes of this Act: 'Electronic certificate' shall mean an electronic document verifying the existence of facts, status, entitlement or other data, or verifying the particulars or rights of clients, made out by the authority or another organization for use by the client or the authority in proceedings governed by this Act.

Here is the broadest concept of certificate and the paradox is that the electronic form is better explained in the law, than the "common one". The simple explanation can be find in electronic data bases and registers, where facts, status, entitlement, other data, particulars or rights exist and it is very easy to be found, estimated and reproduced (in electronic document with significance of administrative certificate). In such a way, this certificate is an administrative act itself, from the kind of declarative administrative acts. By this means, even though in electronic form, the certificate is not only a contemporary modality, by which an act is 'communicated' to affected parties.

In analyzing of the legal provisions of Hungarian GRAPS there must be underline that maybe this is the most detailed and clear general procedural administrative legislation, arranged quasi - Act of Administrative Assurance, because the last element is not settled – the promise, that the final act will be issued. Anyway, with such a certificate, even if it not sure that the act will be

enacted, the firm believe is that if it will be, the same will be based only on the facts, status, entitlement, other data, particulars or rights, already pointed out into the certificate.

Maybe one among many typical AAA's is defined in German Administrative Procedure Act (APA)[33], Section 38 'Assurance', paragraph 1, which enacts that the agreement by a competent authority to issue a certain administrative act at a later date or not to do so (assurance) must be in writing in order to be valid. If, before the administrative act in respect of which such assurance was given, participants have to be heard or the participation of another authority or of a committee is required by law, the assurance may only be given after the participants have been heard or after participation of such authority or committee. It rouses interest the expression 'the agreement by a competent authority'.

This agreement is not a contract between the authority and the party, but *an expression of full conviction* of the authority in its later activity (to issue or not final act). For this reason, the Act of Administrative Assurance can be in positive (to issue) or negative (not to issue) meaning. It is purposed only at the future (at a later date). The form for legal validity here is needed – a written one.

The third paragraph of Section 38 of German APA explains that after an assurance has been given the basic facts or legal situation of the case change to such an extent that, had the authority known of the subsequent change, it would not have given the assurance or could not have done so for legal reasons, the authority is no longer bound by its assurance. The alteration of both basic facts and legal situation of the case in the moment after issuing Act of Administrative Assurance, the same is not binding one for the authority. There is one legal condition here, which must be interpreted in different ways – the changes must be serious (in such an extent) and so would hold back the authority of issuing of AAA.

It is disputable in each separate case which change is in such an extent, that the given assurance in not already under obligation of its author. Anyway, this legal provision in German legislation is very stable established one, so its influence is for sure

[33] Of May 25th 1976, In the wording last promulgated on January 23rd 2003, Federal Law Gazette I p. 102 [Verwaltungsverfahrensgesetz (VwVfG).

in the fundament of the cited above very new legislations in different legal systems across the Europe.

Following the classification of Schröder, according to the subject-matter this AAA in German legislation is a structuring administrative act, because establishes, changes or removes a concrete legal relationship; according to the consequences it is a beneficial one – because of confirming legal advantage; according to legal limits on the Administrator – it is free act, because it is not bound by any statutory provisions[34].

4. Atypical Act of Administrative Assurance

Atypical (quasi) Act of Administrative Assurance must be this one, which is not explicitly defined in the legislation, but exists in the legal provisions and covers one or more elements (but not all and singular) of a typical AAA.

The legal provision of Article17, paragraph3 of Tax-Insurance Procedure Code (TIPC) in Bulgaria declares: when a liable person acts according to the written instructions of the Minister of Finance, a body of receivables or a public executor, which subsequently appears illegal, the charged interests as consequence of the actions according to the given instructions, shall not be owed, and the sanction determined by the law shall not be imposed[35].

The legal effect is only in restraint from disadvantageous consequences, there is no positive legal result here. In analyzing of this legal norm, it must be found that nowhere here is assurance that the final act will be based on these written instructions, but following them there is no legal threat of administrative sanctions. Uncovering the last element of AAA – assurance of issuing the final act, this kind of written instruction as a legal institution is Untypical Act of Administrative Assurance.

Sensu stricto, "written instructions" must be understood only in the parallel with Article 7, paragraph 3 of Law on Normative Acts (LNA), which specifies: Directives shall be issued

[34] M. Schröder, *Administrative Law in Germany*, in R. Seerden & F. Stroink (eds.) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (2002).

[35] Tax-Insurance Procedure Code, Prom. SG. 105/29 December 2005, in force from 01.01.2006.

by a superior body to a subordinate body, providing instructions on the implementation of a normative act which was issued by the former or the implementation of which must be ensured by it[36].

In juxtaposition, the "written instructions" in TIPC are preliminary interpretation of the law, whereas the same in LNA is instruction on the implementation. The first one is an explanation, the second one is a direction. They are at least to dimensions of this instructions (regulations in their nature), which are guidelines in their substantive character – limitative and explanatory ones. In other words "it should be noted that regulation is often thought of as an activity that restricts behavior and prevents the occurrence of certain undesirable activities (a "red light" concept) […] may also be enabling or facilitative ("green light")" [37].

In searching of judicial practice there is an interesting interpretation what can be understood under "written instruction". The judicial composition decides that it may be also any sort of act (unfortunately, without such an expression). Albeit, it was implicitly noted down in the following two sentences: 'In the present case is applicable the legal provision of Article17, paragraph 3 of TIPC […] The liable person had acted according Protocol for deduction and refund of excise No. 11/16/24.2.2011. It had submitted a demand for refund of excise according tax legislation'[38].

With close manner of interpretation the judicial practice states that: 'The sum […] was admitted as liable to a refund with an act of Customs authorities, by reason of what the complainant had been scrupulous (about the Law) at the moment of receiving of it. The last follows from the explicit provision of Article 17, paragraph 3 of TIPC'[39].

The most interesting judicial interpretation is in the following judgment: 'The Court finds admissible the appeal of the Instructions as intra-departmental act with obligatory nature to subordinate of the organ which issued it, in connection with

[36] Promulgated State Gazette No. 27/03.04.1973, amended SG No. 65/1995.

[37] R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation. Theory, Strategy, and Practice* (2012).

[38] Judgment No. 10062/4.07.2013 of Supreme Administrative Court in Administrative case n. 12328/2012, Chamber VIII.

[39] Judgment No. 4520/2.08.2012 of Administrative Court – Sofia in Administrative case n. 867/2012.

taxation […] the administrative act loses its purely interpretive and internal nature and shows effect "outside" towards third persons, to whom the interpreted legal provisions are applicable and to whom the interpretation is directed. The statement into the Instructions does not be exhausted with the application of the valid legal norm, but in interpreting it, obliges application in the indicated way, i.e. – acquires the normative nature[40]'.

In another Bulgarian legal act - Civil Servants Act (CSA), Article 24, paragraph 3, declares: "each civil servant may request a written confirmation of the official act, should the verbal order given thereto contain a breach of law manifest to the said servant"[41].

This written confirmation is a statement that underwrites the irrevocable and unchangeable belief of the manager in lawfulness of the given order. In other words, in the future moment the manager should stand on the same position to this case and to all identical cases, i.e. – should order exactly the same. Similarly, if the prepared by the civil servant administrative act or performed administrative action might be projected in the field of influence of the manager himself, the final result should be the same. The confirmation here plays a role of Act of Assurance that the preparatory and technical work of the civil servant will be base of the future administrative act/action of the public authority.

More or less, some kind of certificates can be correlated to Act of Administrative Assurance. As an illustration, in Bulgarian Law on Encouragement of Investments[42] Article 15, paragraph 1 proclaims:

The investments, received certificate as class A or class B are encouraged to fulfillment of the investment project with shortened time limits for administrative servicing, individual administrative servicing, and so forth.

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[40] Judgment from 20.7.2007 of Administrative Court – Sofia on Administrative case № 1805/2007, First Chamber.

[41] Promulgated, State Gazette No. 67/27.07.1999, in force since 28.8.1999.

[42] Promulgated, State Gazette, No. 97/24.10.1997, title changed State Gazette No.37/94, in force since 6.8.2004. The more detailed study here is N. Natov, *Foreign Investment in Bulgaria*, Springer (2000). See also K.W. Glaister & H. Atanasova, *Foreign direct investment in Bulgaria: patterns and prospects*, 98 European Business Review (1998).

The certificate in this provision is untypical AAA, which promised certain administrative behavior from the authorities to the investor. This behavior is a privileged one, compared to the other investors, as well to the other legal subjects. The certificate is a particular administrative act, directed to stimulation of a special (for the authorities) legal subject. It gives high level of assurance for special positive treatment. The only one distinction with the typical AAA is that the element of assuring in issuing or refraining from issuing a certain administrative act is not in being here. The special treatment is in the area of pure procedural legal dimension, but the issuing or refraining from issuing a administrative act has both material and procedural dimensions. That is why the certificate cannot "promise" an administrative act, if the material legal conditions (rights of the party) are not in hand. Anyway, in some cases the certificate can assure that the act will be issued *quickly and with high quality.* This is the case, when the document declares or ascertain already existing rights, or a will for issuing or not of a document in connection with rights. That very hypothesis is clearly portrayed in Article 21, paragraphs 1 and 2 in Bulgarian Administrative Procedure Code[43] (APC):

The individual administrative act shall be also and the act of volition, by which are declared or asserted already arisen rights and obligations, as well as an individual administrative act shall be also and the act of volition for issuing of a document, significant for recognition, exercising or redemption of rights or obligations, as well as the refusal to be issued such document.

Hence, the certificate assures that if there are all factual and legal conditions for the issuing of a document (which is recognized in the two provisions above as an individual administrative act), it will be issued to the investor in due privilege administrative servicing.

Looking at it in that light, the Section 151 "Issuance of a document" of Czech Code of Administrative Procedure (CAP)[44] provides in its four paragraphs that where an administrative body fully satisfies an application for the creation of a right the existence of which is certified by a document stipulated by statute it shall be permissible to issue that document only instead of

[43] Prom. State Gazette No. 30/11.4.2006, in force since 12.7.2006.
[44] Promulgated State Gazette, Act of of 24th June 2004, No. 500/2004.

issuing a written decision. A list of documentary materials for the decision shall be entered in the file instead of its express reasoning. The day of the receipt of a document by a participant shall be the day when the decision becomes legally effective and has other legal effects. Should the decision be abolished after it becomes legally effective, the document issued thereby shall cease to be valid.

Namely the phrase "instead of issuing a written decision" can be interpreted, that if the party wants, the written decision should be issued (eve the document already is issued). In a different word, the document assures that the administrative act is issued in another form – as a document itself, instead as a decision (which is the basic form).

5. *De Lege Ferenda*

The Act of Administrative Assurance is a specific administrative instrument. First of all, it is impossible to be issued *ex officio*, but only at the request of the interested party. Even with very good intentions (such as encouraging investments), it is not possible also to be issued by no matter who administrative body, but only by substantially competent one. Issuing by incompetent administrative organ leads to nothingness of this AAA. Second of all, it is not self-under-stood part of the administrative proceedings in its essence, so that is why it should be created by legislation as a legal procedural option for the administrative body.

Ergo, there must be taken legislative steps for the broader recognition of this specific legal institution in the branch of Administrative Law and Administrative process. The methods of approach here may be the following ones:

First, it is possible to use the very sophisticated approach of Model rules, possible adoption as an EU Regulation, as the famous ReNEUAL Model Rules utilizes. In such a way, among other legal values, principles, norms, procedures and institutions, the AAA shall be uniform for the whole EU legal area (including the Member states legal systems). The advantage here is namely in the uniform approach. The predictability and intelligibility of the public authorities in Europe will be visible in using of this option in each separate case. Eventually, the impediments here could be

the confrontation of some legal systems (and their legal authorities) to any promise of the public bodies to private persons (which is the very nature of AAA).

Second, the general procedural administrative codes in the each different legal system to adopt the AAA as a legal possibility in each administrative proceeding. This approach is facilitated by national legal tradition or spacious comparative analyses (as Dragos and Neamtu lately edited, but for another legal institution - ADR[45]) and the advantage here is to use existing legislation as a fundament, with installing the AAA as a legal institution into the relevant part of set of legal norms. Moreover, the national legal language can be used freely here. The shortcomings here could be found in absence of administrative procedure codifications in some countries, and in this respect the AAA should wait the future legislation as a whole – to be part of it.

Third, the AAA to be fixed in more and more administrative material legislation in specific areas. The advantage is in real necessity of such a legal institute in some legal spheres, the disadvantage – in fragmental and (in some cases) chaotic legal approach, with use of heterogeneous legal techniques and terminology, which is the base of future legal hindrances in interpretation and implementation of legislation.

Usually, the practitioners (sometimes – the legislator too) cannot imagine exactly where the Act of Administrative Assurance can be executed. By reason of that, examples ate needed here, even the legal fields of application of AAA are various. Some of the possible stages of applications are:

In the field of Public Procurements it will be good legislative approach, if it is explicitly written in the law, that the public bodies, which administrate the public procurements, issued to the companies (involving in the process) a certificate. The last one must be temporary (one year validity is a judicious approach), with possibility of renewal. This certificate will verify that the owner of it conforms to all legal requirements for admissibility in the process of procurement with public resources. Thus the certificate plays a role of Administrative Act of Assurance – in the phase of submission of the documents (including the certificate

[45] D.C. Dragos, B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (2014).

itself) the subsequent act of admission in the competition is securing, because the administration is bound with its own certificate. Hence, the certificate as an AAA simultaneously is a guarantee for the company (in its participation in a future phase of the process) and stumbling-block for the administration for arbitrary estimation for admissibility (and this is a barrier against corruption too). Thereby, many participants shall compete - if they have valid certificates (without check-up), and if they have not too (but with serious *ad hoc* check-up for admissibility). Anyway, the chance for one and only admitted candidate in the procedure, which will be the winner in the final phase (because of lack of another) is restrain with legislative instrument.

The same approach is applicable in the legal areas of Investments and Concessions, in addition to the already functioning legal regimes, considered above.

In the area of urbanization the legal subjects may need the assurance that if in the future moment they start to build on some plot, the permission will be done, if they cover all legal requirements. This kind AAA assures only the legal status of the plot and do not bind the administration, if the legal subject is careless in other legal conditions, needed in the administrative proceeding.

Close to this is the planning and construction area, when and administrative permission for the building is needed. This permit is a document, having all characteristics of AAA. The same assures, that during the validity of it, all needed documents in the building process, will be granted, if the legal requirements are covered. Even the requirements are covered, but out of validity of the permit, the new one is needed, for the lawful end of the building from administrative point of view.

As for administrative servicing, the best example here is – any sort of proceeding, which requires the document from another public body. Instead of waiting, both the legal subject and the administration can proceed to the next phases of the process (except to the final one). This is possible on the base of AAA from the other administration, which certifies that the legal subject is scrupulous about legal requirements and wait for administrative act (i.e. – the act is admissible, even it is not sure to be positive or not for the applicant). Thus, the Act of Administrative Assurance

is "half-in-half", because assures in admissibility, not in lawfulness of the pretention.

The wise legislator nowadays must weigh up the balance between legitimate expectations of single legal subjects and legal certainty for the common interest of the Society and the State. One of possible approach into the administrative proceedings is the existence of well described into the legislation legal institution of Act of Administrative Assurance.

6. Conclusions

For generalization and concentration of the exposition above, some conclusions must be found.

In the beginning, in its legal nature the Act of Administrative Assurance is an individual administrative act, because concerns one or more legal subjects, but individualized one/ones. In such a way it is not collective administrative act, or sub-normative administrative law (sub-legal act, by-law).

Of its legal origin, the AAA is issued by the public organ, but also by any natural person or legal entity with competence of exercising public functions. They must have a substantive competence for this issuing by law.

Then, as a legal ground the AAA is provided by a special law, as a rule. Anyway, the general law can stipulate its existing as a legal institution in the main, without explanation of legal areas of application. In some cases, even the general procedural law may indicate the possibility of issuing of AAA, though.

Afterwards, the legal significance of the AAA is a preliminary one - affecting the present legal motivation of the legal subject, aimed to the final administrative act in the proceedings. Because of confirming legal advantage this administrative act is a beneficial one.

In its legal idea the AAA is assuring in issuing or refraining from issuing a certain administrative act, i.e. – administrative promise to reach or not the final administrative act. Therefore, it is a structuring administrative act, because establishes, changes or removes a concrete legal relationship.

Finally, the legal effect of AAA is assurance now for the future situation in the concrete administrative proceeding. Thus the Principle of Legal Expectation is covered in considerable

manner. Suffice it to remember the worldly axiom that for each person its own attitude of confidence in administrative body is stronger than the abstract trust in the public authorities in general. On that account, the Act of Administrative Assurance is one perfect legal instrument for increasing of the faith in both the Modern and Democratic State and in the Rule of Law.

BOOK REVIEWS

C. HARLOW, P. LEINO, G. DELLA CANANEA (EDS) RESEARCH HANDBOOK ON EU ADMINISTRATIVE LAW, EDWARD ELGAR PUBLISHING, CHELTENHAM, NORTHAMPTON, 2017 (607 PP.)

Marco Macchia[*]

Once upon a time there were explorers of continents. Then came the age of the discovery of islands and atolls. Today, in the era of Google Earth, every corner of the planet is known to almost all, and unexplored territories no longer exist.

Something similar can be said of today's EU administrative law. All administrative functions and powers can now be examined extensively and in detail, and of course there are a number of handbooks to help us do so. Particularly worthy of note are those by J. Schwarze (*European Administrative Law*, Luxembourg, 1992); P. Craig (*European Administrative Law*, 2012); or H. Hofmann - G. Rowe - A. Turk (*Administrative Law and Policy of the European Union*, 2011); J.B. Auby - J. Dutheil de la Rochère (*Traité de droit administratif européen*, 2014). Italian studies of administrative law include M.P. Chiti (*Diritto Amministrativo Europeo*, 2013) and G. della Cananea - C. Franchini (*I principi dell'amministrazione europea*, 2013). In addition to academic monographs, there are also a number of studies devoted to particular aspects of this branch of law, such as C. Harlow - R. Rawlings (*EU process and procedure*, 2014), providing critical analyses of the administrative procedures of the European Union.

The *Research Handbook on EU Administrative Law* has some distinctive features that give it a special position among the various publications on the subject. First of all, its standpoint and

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its style of analysis provide a broad overview of EU administrative law and, at the same time, a detailed and original examination of "new" issues, including research and practice, such as the administrative activities of the Fundamental Rights Agency, the role of technocratic rules, and the analysis of due process of law in the administrative case law of the European Courts. In terms of content, we might say that this *Handbook* has some unusual "elements" that distinguish it from others in its field. As we read in the *Introduction*, "the Handbook is aimed at a wider readership interested in learning something about the governance structures of the EU and how it is administered". In my opinion though, there are at least three main areas of focus that clearly shape the analysis running through the volume.

The first is its focus on *the mature phase of European administrative law*. Scholars no longer ponder over issues such as whether EU administrative law should be regarded as an autonomous discipline, provided with bodies, techniques and mechanisms of its own. Since the days when this was still a matter for discussion, works belonging to an intermediate phase have gone on to highlight the combination of institutional features, looking in depth at the sources of law and the ways they are formed, and how judicial jurisdiction works, thus merging elements of constitutional law, concepts of administrative law, and techniques of procedural law.

The *Research Handbook* seems to herald a new and more "mature" season, acknowledging the changes that have taken place and the extended sphere of activity of the EU administration, exploring the nature and exercise of the powers of public authorities. Today, EU administrative systems are no longer concerned only with regulation, the mere issuing of rules. The European administration (in its narrowest sense) is also required to provide public assistance, to exercise *imperium* (e.g., during inspections) or to judge between the interests expressed by the Union, taking on board the innovative features of the structures and processes of EU governance. New, shared actions are carried out by the EU through the application of general procedures covering executive law-making, transparency and the regulation of government contracting.

In a study of this kind, providing an overview of the development of the European administrative sphere, some issues

can be skimmed over (being widely known or dealt with in brief), such as the judicial regime of legal sources, traditional models of organisation, or how the Commission adopts executive regulations. The *Handbook* sheds new light on little-known phenomena such as administrative appeals to European agencies, the use of English as the language of academic exchange in EU legal matters, or the frequent interaction between the administration and the judiciary. Examples include the role of the Ombudsman in cases of maladministration, or parliamentary control of EU policies. Parliaments are arenas of public debate and are an important mechanism holding governments accountable and discussing European policy. Other examples include the study of internal audit, audit by the Commission, and external audit by the European Court of Auditors (ECA); after all, courts of justice uphold the law on a case-by-case basis, receiving requests for preliminary rulings from national courts or directly from private parties, whereas control of compliance with the requirements of administrative law by auditors is more systematic. Through its examination of these topics, the *Handbook* confirms its place in the study of the mature phase of European administrative law.

The *Handbook's* second characteristic feature is its focus on the analysis of the new functions of the European administrative system, usually exercised through innovative forms of cooperation among the different systems involved, both at European and national level. EU law reaches out to new areas such as anti-terrorism measures and refugee aid. The new functions concern shared policies such as State Aid, financial regulation, and controlling the EU's external borders – but they do not entail giving up traditional integrative systems based on the principles and forms of the *rule of law* that have been granted effective recognition by the European legal system. The broad-ranging analysis offered by the *Research Handbook* shows that the new forms of action have an important place in legal theory, and scholars can fully appreciate its findings.

It emerges from the analysis that the EU institutions do not operate merely as authoritative bodies, as happens at national level. In reality, they foster cooperation, as attested by the Open Method of Coordination (OMC) and EU Integrated Border Management (IBM), the border management system of the

European Union whereby Member States are equally responsible under the supervision of the European Border and Coast Guard Agency. It is also noteworthy that for some new forms of action, Member States are requested to undertake new international agreements so that the functions they exercise are no longer ruled only by EU law. Another example is the European Stability Mechanism, a tool not covered by monetary policy but stemming from a specific treaty with an international body created specifically for this purpose.

Lastly, the *Research Handbook* stands out for its attention to the measures adopted by Member States to address the various crises affecting Europe. A transversal dimension emerges, characteristic of the European administrative system, and this constitutes a privileged standpoint for legal scholars.

To combat the current crisis facing democracy, coupled with the rising phenomenon of populism, Europe has fostered greater citizen involvement in the work of the administration. European policies are often considered to be weak from the point of view of accountability, and phenomena such as these are addressed in the chapters on transparency and participation and the right to know by access to documents. The European Parliament can also exert pressure on supranational institutions.

On the other hand, in order to combat the world economic and financial crisis, Europe has insisted on the inseparability of the Member States of the Union. *The Rome Declaration* – the Declaration of the Leaders of 27 Member States and the European Council, the European Parliament and the European Commission – state: "We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and *indivisible*".

This assertion of inseparability strengthens the whole system and avoids further and future (more) dangerous crises. "Inseparability" also implies the acknowledgment of circumstances that have lasted so far, recognising that Europe is moving at different speeds, as shown by the concentric circles of the Euro zone, Schengen, and forms of concerted cooperation, all helping to keep States advancing at different paces moving together.

In response to a crisis of legitimacy besetting the European administration, the Union has set up practises of coordination and systems of integration between the European and national authorities. From this perspective, the European Union is a space where national interests have merged, allowing Member States to work together to extend their powers beyond national borders. It may therefore be said that the need for collaboration, inherent in multilateralism, has strengthened the powers of the Member States. One example is the Single Supervisory Mechanism entrusted to the European Central Bank; it consists of national and European supervisors monitoring the activity of banks operating in other States. The *Joint Supervisory Teams* have mixed membership as they comprise staff members of the ECB and national supervisors (Reg. ECB no. 468/2014).

To conclude, the *Research Handbook* has the merit of shedding light on a useful and complex evaluation of the European institutions as good administration. It focuses especially on public policy and the aspects of organisation that allow the EU public authorities to exercise their functions, concluding with a look at some of the problem areas that undoubtedly exist. We might also add that this volume seems to contain tools with which to monitor and assess the whole administrative system and from which to produce a sort of scoreboard. It is imperative that the European Administration not be seen to exist only on paper, but that it should also be a reality for citizens and businesses. The *Research Handbook* is not simply a legal analysis of the functioning and regulation of the EU administration; it is above all a study that underlines the close relationship between legal regimes, European policies, and the resulting mutual implications. From this point of view, it contains the keys to understanding and assessing good administration practices and measuring the effectiveness of citizens' rights. It is, of course, no easy task to evaluate all aspects of administrative powers, but this handbook provides some useful tools that take us a long way in this direction.

FRANCESCA GALLI, LAW ON TERRORISM: THE UK, FRANCE AND ITALY COMPARED, BRUXELLES, BRUYLANT, 2015 (394 PP.)

A DISCERNING ANALYSIS ON THREE EUROPEAN COUNTRIES' FIGHT OVER DOMESTIC TERRORISM

*Laura Muzi**

1.

Law on terrorism is the first monograph of a young Italian scholar, Francesca Galli, who has built her academic career abroad from her native country. This experience has secured her the toolkit to approach her field of research, that is criminal law, and – more precisely – counter-terrorism legislation, from a comparative perspective analysing three European countries, i.e. United Kingdom, France and Italy.

The book's asserted aim is to give a contribution in shaping future anti-terrorism policies in such a way to rebalance the objective of protecting the population at large with the need not to adopt measures too detrimental to individual rights. This work can thus be placed within the wider ongoing academic debate on anti-terrorism legislation which have known huge developments since September 2001. The most striking of them is a shift towards an authoritarian model of preventive criminal law that has its roots in an academic debate stemming from Günter Jakob's theory of a *Feindstrafrecht* – an 'enemy criminal law'[1] – able to deny human rights and legal guarantees to anyone who is seen as sources of danger because of some suspicious behaviour.

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[1]G. Jakob, *Kriminalisierung im Vorfeld einer Rechtsgutverletzung*, 97 Zeitschrift für die gesamte Strafrechtwissenschaft, 751 (1985).

By embracing a civil libertarian's point of view, the Author effort is to deny the validity of this 'us and them' approach in counter-terrorism policies and in criminal law at large, mainly because of the unforeseeable consequences which would affect key principles such as legality, equality, due process and presumption of innocence.

Galli's work finds its clear distinguishing features within this wide debate in its efforts in comparing a common law jurisdiction with two civil law countries, in focusing both on legal provision and case-law. The outcome is – at the end of the day – that the strongest difference among the three approaches lays in the different use of preventive administrative measure. The book has been structured in four chapter each one focusing on a selected theme, while an introduction and a final chapter with concluding remarks complete the work. The first choice worth to be highlighted is the insertion in the introduction of a brief but interesting historical overview for each of the three countries concerning the specific terroristic threats faced in the past and their domestic response. This historical background takes into account a period which goes from the 1960s to the end of the 1990s, that is before the radical Islamic terrorist activities would became a major concern for liberal democracies after September 2001.

2.

Chapter one explore the context, dealing with the evolution of the substantive criminal law designed to face terrorism, such as the attempts to define terrorism and the creation of new offences related to it. The Author highlight the common features shared by the three legal orders on this issue. First of all, terrorism has been defined as a concept rather than a criminal offence as such and a common mens rea is shared by the three definitions, mentioning an indiscriminate use of violence for political purposes. New provisions have introduced criminal offences in inchoate mode and have criminalize of all sort of preparatory acts, and last but not least, they have framed the use of special procedural measures. Therefore, those new pieces of legislation seems to be quite problematic. Instead of keeping the criminalisation of preparatory acts restricted to those which are close to the stage of

execution of the intended offences, they have been drafted – according to the Author – in a too vague fashion, going beyond the limits of what criminal law normally penalises. Actually, the introduction of those inchoate offences has been coupled with the development of anticipative criminal investigations, triggering the application of special procedural rules for the investigation and trial of terrorist offences. However, the latter tend to rely more and more on individual characteristics or belief as if race, religion and ethnicity could be considered indicators of dangerousness. Their application affect a wide group of individuals, often with reduced judicial oversight – such as immigrant – even though they cannot be found guilty of any crime and with a concrete risk of a spill-over effect.

The second and third chapter take into account two different kind of investigative powers and their applying procedures, i.e. the interception of communications and police powers to stop, search, and to detain for questioning. Chapter two examines the distinctive features of telephone tapping provision in the three jurisdictions, a typical mean of investigation which after September 11 has become crucial for its practical uses in prevention and prosecution of terrorist activities. The Author has focused on the actors involved in the interceptions either for authorisation or execution purposes, the scope and duration of them and the potential use of the information gathered as evidence at trial. In the United Kingdom intercept evidence is not admissible in criminal proceeding, while in France and Italy almost all criminal investigations involve the use of intercepted information, which usually contains a plenty of highly probative material to grant the conviction of suspects.

Consequently, it can be easily understood how hard it is to prosecute suspected terrorists in the UK. Telephone tapping can be used for investigative purposes and crime prevention but not for prosecution. To deal with the following shortage of evidence, the government have looked to administrative measures such as control orders or terrorism prevention and investigation measures as means to get hold of those suspected of terrorist activities. Therefore, according to the Author, the ban of the intercept evidence at trial has provided an excuse for the creation of extra-judicial methods by which terrorist suspect can be locked up

without the need to have them prosecuted, convicted, sentenced by the criminal courts.

In France and Italy, an opposite situation can be found: telephone tapping is far better conceived and its crucial in prosecution. In order to achieve this aim, the two continental legislators have drawn a clear line to distinguish between judicial interceptions for the purpose of evidence gathering to support the prosecution case and preventive interceptions for general purposes of national security.

Chapter three deals with enhanced police powers for the purpose of evidence gathering and prosecution of terrorist suspects. More in details, the Author focuses on the powers of stop and search of individuals and vehicles, the powers of entry and search of houses and other premises, the gathering and retention of fingerprints and other non-intimate samples, the powers of detention for evidence gathering with a view to prosecution and pre-trial detention provisions. The most important outcome of this part of the enquiry is that anti-terrorism policies are becoming increasingly proactive, because their aim is to detect and stop terrorists plots before being carried out. They seems to be grounded on suspicions rather than reasonable grounds, as reactive policies in criminal law usually are. Consequently, a common trend in each of three jurisdictions is an higher level of policy autonomy and a mirroring decrease of judicial scrutiny.

This outcome is particularly evident in the UK where, according to Terrorism Act 2000, a person can be arrested on ground of reasonable suspicions of being a terrorist – without any requirement of having committed or being about to commit an offence. This provision have the only aim of gathering evidences during police questioning, and once again is the result of the features of that legal order, where post-charge questioning is considered unacceptable. In France and Italy, police have wide general powers of stop, search and arrest, not only on allegation of terrorism, but these powers ought to be applied under narrow circumstances of necessity and urgency. Moreover, Italy and France allow very long periods of pre-trial detention for defendants which reach a maximum of six and four years respectively, a length that make comprehensible the reasons why these two countries did not have a necessity to introduce

administrative detention measures. Because of that, the two countries have been condemned several times by the Strasbourg Court in relation to these long periods of pre-trial detention which have been judged not in compliance with the right to be tried within a reasonable time ex art. 5(3) ECHR.

Finally, chapter four analyses administrative measures for the detention, control and deportation of terrorist suspect. Being concerned with the thorniest issue relating to anti-terrorism policies, this is also the longest chapter of the book where a in depth analysis of the new administrative tools adopted in the three countries is provided. The shift towards administrative means is due to need of providing a quick answer where national security is thought to be in danger bypassing the complexity of criminal investigations and at the expense of judicial scrutiny. This implies sidelining individual rights being these measures based on secret intelligence gathered by security services which are not meant to be used as evidence in criminal process.

Once again is the United Kingdom's legal order the most concerned by these kind of provisions, mainly because of the aforementioned peculiarities concerning the impossibility to rely on interceptions and pre-charge detention which are deemed to lower the chance of evidence-gathering for prosecution purposes. Therefore, Britain made massive use during the last decades to a range of administrative restrictions on the right to liberty for suspected terrorists, such as deportations, indefinite detention without trial, control orders, terrorism prevention and investigation measures (TPIMs) and proscription. Today's most important administrative instruments are TPIMs and proscription while deportation, detention and control order have been phased-out due to their troublesome effect on human rights.

Also France and Italy rely on administrative measures within anti-terrorism policies, and above all on deportation of suspected terrorist which, nevertheless, seems to be the most problematic tool considering that the person concerned could undergo torture in their homeland and appeals against the administrative decision are not suspensive. Moreover deportation order on national security grounds can be directed only against foreigners thus implying the aforementioned match between immigration and counter-terrorism law.

3.

In conclusion, by comparatively examining the three countries the Author gives to the reader wider means to understand the current situation and to learn some valuable lessons. The diachronic comparison is used to show that today's scenario is not that different from the past – when the main terroristic threat was a pure domestic one. It is acknowledged that some developments in terrorist activities have clearly affected their modus operandi. The internet is just an obvious example of these changes on the operational side, since it opened up to self-recruitment and self-training of 'lonewolves' and home-grown terrorist, leading to the growth of new counter-terrorism policies and the introduction of new provisions.

However, according to the Author, the clear shift towards prevention, surveillance and security should be provided also with theoretical coordinate. In particular, reference ought to be made to sociological studies dealing with the 'risk society' and a 'culture of control'. In other words, the evolution of the terrorist threat we are nowadays facing is just one of the drivers of the law on terror, while citizen's perceptions and the need for national governments to cope with public fear and anxiety are increasingly influencing the political and legal response to terrorism. Thus, the criminal law policies adopted so far have lowered the standards of proof to a 'possibility of future harm' which is based on intelligence information and could not be more faraway from the ordinary 'proof of past criminal activities', which relies on more onerous evidentiary requirements. According to the Author, this evolution is the reflection of a shift towards an 'enemy criminal law' that is replacing a 'citizen's criminal law'. The former implies that anyone whose behaviour intend to deny his opponent's way of life is to be considered an enemy and can legitimately been investigated by the state. The foreigner become an outsiders, thus an enemy and this is particularly true where anti-terrorism policies are matched with immigration law, becoming utmost apparent how the latter is used as a substitute of criminal law. As consequence, we face a politicisation of law and a denial of human rights and legal guarantees.

Therefore, no convincing reason can be easily found to justify the introduction of extraordinary measures which go under the label of 'war on terror' and which allow derogations from the

usual guarantees granted by criminal substantial and procedural law whenever an individual become suspected of terrorism. This is mostly true considering that preventive administrative measures are no more connected only to genuine emergency and are no more exceptional nor temporary. The painful question arising is whether terrorist should not be treated as criminals like the other or they should be entitled only to a lower degree of rights.

All those crucial issues make Francesca Galli's book extremely actual and a real open-minding reading on terrorism law and its spill-over effect on criminal law at large. Beside that, it has to be prized the interdisciplinary approach with an amazing and successful attempt to highlight the blurring boundaries between administrative and criminal law, which make the reading attractive and useful both to administrative and criminal lawyers.