SEEKING "CERTAINTY" BETWEEN PUBLIC POWERS AND PRIVATE SYSTEMS

Auretta Benedetti*

Abstract

The decline of the "positivist" concept of certainty in civil law countries and the diffusion in supranational legal systems of new models of trust's guarantee assigned to private certifiers, that are not expression of public powers, triggers the need to carry out a thorough "re-interpretation" of the issue of certainty, particularly in civil law systems. This paper deals particularly with "certainty" created by public subjects or "private experts" in order to guarantee the orderly development of relations amongst private persons, particularly within the scope of economic relations. The need for certainty appears to be darkened by the more pervading "need for trust," which more effectively expresses the condition of parties that need to make choices in conditions of uncertainty. The traditional binary scheme opposing "public" and "private" spheres is no longer sufficient to investigate the issue of certainty. Only the analysis of interrelation between systems of political legitimation and social/market systems can offer the perspective that makes it possible to appreciate the specific nature of the instruments of certainty.

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* Professor of Administrative Law, University of Milan "Bicocca"

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I. Introduction.

This article aims at giving a reflection concerning the certainty's function, in particular due to the decline of the "positivist" concept of certainty, in the civil law countries, and the diffusion, in supranational legal systems, of new models of trust's guarantee assigned to private certifiers, that are not expression of public powers.

In legal scholarship, the term "certainty" immediately evokes the primary mission of a legal system that stabilises social expectations and creates security in the relations amongst members. In this respect, Maurice Hauriou used to define "certainty" as the *ideé directrice* of each legal system and, in particular, of the sovereign legal system[1].

The fact that the term "certainty" has almost disappeared from the vocabulary of contemporary scientific debate – which has entirely shifted towards the opposite concepts of uncertainty,

[1] M. Houriou, *La Théorie de l'institution et de la fondation (Essai de vitalisme social)* (1925), in M. Hauriou (ed.), *Aux sources du droit. Le pouvoir, l'ordre et la liberté* (1933), at 91 *et seq*. Significatively, L. Duguit used to hold that there is no feasible distinction between *souveraineté* and *puissance publique* or *autorité politique* (L. Duguit, *Souveraneté et liberté* (1921, last ed. 2002), at 68). For a complete picture of the political doctrines reconstructing the State's authority in terms of the guarantee of order, see the still relevant text of A. Passerin d'Entrèves, *La dottrina dello Stato* (2009), at 231 *et seq*. References to more recent studies in the different civil law systems on the subject matter are included in P. Costa, D. Zolo, E. Santoro, *Lo Stato di diritto: storia, teoria, critica* (2003).

insecurity, and risk – is the clearest indication of the crisis of the concept of a self-sufficient legal system that is capable of controlling social and economic phenomena. On the other hand, there is increased awareness of the key importance of the interdependence between sovereign and supranational legal systems, as well as between political and institutional systems and private legal systems, whose boundaries often exceed the territories delimiting the respective sovereign areas[2].

The most radical transformations – in terms of models generating certainty – involved civil law countries, which are more exposed than other systems to the erosion of the role of the law as a regulator of social and economic relations and of the consequent "formal" and "positivist" concept of certainty related thereto[3].

As stated by J. Locke[4], Anglo-Saxon culture is typically based on the individual assumption of responsibilities and risks, which requires the legal system to assume a different approach with respect to certainty. It is sufficient to think of the way in which law is created: the doctrine of precedent, typical of common law systems, in addition to anchoring rules to facts to a greater extent, does not consider the lack of a framework of pre-

[2] For a view, even if only partial, of the much-discussed terms at issue, it would be necessary to quote the highly extensive international literature on the effects of globalisation on legal systems. Please allow us to limit the relevant indications to some relevant literature, which J.K. Galbraith has defined in *The Age of Uncertainty* (1977); Z. Bauman, *Globalization. The human consequences* (1998); U. Beck, *Politik der Globalisierung* (1998); M.R. Ferrarese, *Le istituzioni della globalizzazione* (2000); R.O. Keohane - J.S. Nye, Jr., *Power and Intendependence: World Politics in Transition* (2001); A. Baldassarre, *Globalizzazione contro democrazia* (2002); G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili* (2005); S. Cassese, *Oltre lo Stato* (2006); G. della Cananea, *Al di là dei confini dello Stato* (2009); G. Rossi, *Potere amministrativo e interessi a soddisfazione necessaria. Crisi e nuove prospettive del diritto amministrativo* (2011).

[3] To the extent that "certainty" has been defined as the "predictability of the legal consequences of actions," the concept has in fact been linked (for a long time) with the codification supremacy: see the much-discussed volume of F. López de Oñate, *La certezza del diritto* (1942).

[4] Reference is made to the work of J. Locke, *Two Treatises of Government* (1689), which outlines the basic philosophical ideas of the Anglo-Saxon liberal system.

established rules with universal vocation to be a factor of insecurity, thus entailing a different perception of certainty[5].

Furthermore, with regard to the theme of certainty, both the continental and the Anglo-Saxon approach find common ground in the EU legal system, which, despite its significant continuity to civil law systems, is also characterized by prominent and significant discontinuities.

It is sufficient to think of the procedural nature of the European principle of legal certainty, which is essentially derived from the restrictions placed on the legislator and on the courts rather than their respective powers[6], or even the limitation of the "giudicato" effects (a fundamental instrument of certainty in civil law systems) where the need to ensure the supremacy of the EU legal system is at stake[7].

Given the background of the aforesaid significant changes, this paper will not focus on the certainty that may derive from the law or from the decisions of judges. Instead, it deals with the "certainty" created by public subjects or "private experts" in order to guarantee the orderly development of relations amongst private persons, particularly within the scope of economic relations.

In this area, the differences between civil law and common law legal systems are fundamental: in the former, the creation of

[5] A. Giunchard, *Securité juridique en Common Law*, in L. Boy, J.B. Racine, F. Siirianen (eds.), *Sécurité juridique et droit économique* (2008), at 101 *et seq*. As already stated, there is a different perception of certainty, not an "absence" of certainty, as already pointed out by Italian scholar T. Ascarelli, *Certezza del diritto e autonomia delle parti*, in *Problemi giuridici* (1956), at 117.

[6] In fact, pursuant to the said principle, the necessary publicity and clarity of the laws and of court decisions are laid down: the binding nature of judge-made decisions, the limited retroactive nature of the laws, and above all, the necessary protection of the lawful expectations arising therefrom. Insofar as the principle of legal certainty in the EU legal system is concerned, see T. Tridimas, *The General Principles of EU Law* (2007), at 242 *et seq*.; G. della Cananea & C. Franchini (eds.), *I principi dell'amministrazione europea* (2010), at 94 *et seq*. The European Union's explicit acknowledgment of the need for a principle of legal certainty clearly indicates how the latter is not guaranteed by the legal system itself: "*il faut des normes <<thérapetiques>> pour soigner le système de ses maux*" (J. Baptise Racine & F. Siiriainen (eds.), *Propos introductifs*, in L. Boy, J.B. Racine, F. Siirianen (eds.), *Sécurité juridique et droit économique*, cited above, at 7).

[7] With regard to this point, see R. Caponi, *Giudicati civili nazionali e sentenze delle corti europee tra esigenza di certezza del diritto e gerarchia delle fonti*, 2010, *paper* published on *http://unifi.accademia.edu*.

certainty has traditionally been traced back to public powers and organised as a public role (or public service). Private persons producing certainties have been defined as assistants to public powers (if one considers, e.g., the role of the civil law notary).

In common law countries, such a structured and developed scope of public activities generating certainty is lacking. Nonetheless, Anglo-Saxon systems have developed different forms of production of reliance in the markets, which are centred on private autonomy rather than on public power. Consider the various models of private certifications (from quality certifications to the auditing of financial statements), which aim to increase the trust of consumers or of investors through the certificates issued by licensed private persons operating in the market.

Whilst the EU legal system resulted in a radical reassessment of the public law model of production of certainties in civil law systems, the globalisation of markets has caused an extraordinary spread of market certifications.

Both phenomena, despite their differences, result in the need for a thorough "re-interpretation" of the issue of certainty, particularly in civil law systems[8], which are undergoing a crisis in the legal system model inherited from the French Revolution and are increasingly willing to converge with Anglo-Saxon legal systems.

II. The public law model for the creation of certainties in civil law legal systems.

a. Public certainty and sovereignty.

In civil law systems, public certainty affects a wide area of the activities of public institutions or of the private persons entrusted by the legal system for the said purpose.

In particular, these activities may be ascribed to a public certainty role in order to circulate "not doubtful", thus reliable,

[8] The priority (but non-exclusive) references of this article have been drawn from the Italian legal system, ranked among the emblematic models, insofar as the subject matters dealt with are concerned, within the scope of civil law countries.

declarations[9] on the legal state, qualities, items related to facts, persons, or things[10].

The activities that aim to create public certainties therefore, given their nature, target a general group of recipients (*erga omnes*) but are not necessarily binding. In fact, pursuant to the traditional theory, only the so-called "legal certainties" require receivers to consider the contents of whatever has been declared as "true" (such as the establishment of burdens and measures or notarial public deeds) or, otherwise, to issue specific legal proceedings (such as the forgery lawsuit) in order to "demolish" the produced certainty. In these cases, the binding force derives from the law[11].

Beyond the aforesaid cases, public certainties aim to offer "useful" information, namely, reliable data that can facilitate the development of legal or exchange transactions without being binding (for instance, official weather forecasts)[12].

Many declaration and certification activities of public authorities have developed in civil law countries; these aim to prevent conflicts from arising by declaring, for the purposes of certainty, the existence of facts as well as the presence of personal qualities and status. These activities thus guarantee the spreading of qualified information that does not need to be specifically verified by third party users.

With specific reference to the legal nature of similar activities, legal scholarship has, since its beginnings, stressed the relation of close derivation of public certainties with respect to sovereign power.

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[9] In fact, the etymology of the word "certainty" derives from *certus*, past participle of *cernere*; therefore, the word means "separate" from false and "not doubtful."

[10] Despite there not being a unitary concept of "public certainty," pursuant to the most authoritative Italian law scholars having dealt with the said subject matter, the same defines the set of activities composed of a verification phase (of data, legal states, qualities) and of a declaration phase thereof having *erga omnes* effectiveness. In this respect, see M.S. Giannini, *Certezza pubblica*, in *Enc. dir.* (1960), 769 *et seq*.

[11] M.S. Giannini, *Certezza pubblica*, cit., 772.

[12] It is a case of what Giannini calls *certezze notiziali* (the so-called "information certainties"), understood as the "clarification of facts made available to the public so that whomever may be interested may benefit therefrom" (*Certezza pubblica*, cit., 773).

German law scholars used to define the establishment of burdens and measures as the exercise of an "absolute sovereign right," equal to the monetary function[13]; French legal scholars used to count the "authentication power" (of public officers or Latin notaries) amongst *police administrative* activities, reserved to the public authorities and aimed at the preventative guarantee of public order[14].

More generally, the capacity to "declare" legal qualities or clarified facts in the fundamentally "binary model" that is typical of legal systems inherited from the French Revolution (defined on the basis of the polarity of public power – contractual autonomy) – in a binding way for a majority of subjects (who have not taken part in the deed) – was typically considered a public privilege[15].

In fact, private autonomy relations express the power of the parties to dispose of the "subjective situations falling within their respective competence"; this is sufficient to exclude that the latter may express a function of declaration or judgment, or aim to pursue "truths" to be expressed to third parties. The best civil law scholars have even reconstructed "assessment transactions" as the "removal of uncertainty on the pre-existing situation, implemented through the establishment of the content of the situation itself"[16]. The purpose therefore involves putting the relation "out of discussion" (*Ausserstreitsetzung*)[17], removing the

[13] P. Laband, *Das Staatrecht des deutschen Reiches* (1878).

[14] Therefore, it is a case of activities that are distinguished by the corresponding role allocated to the judiciary (*police judiciaire*) instead. In this respect, see the reconstruction of E. Picard, *La notion de police administrative* (1984), at 503 *et seq*.

[15] "In no way can private persons create legal qualifications to be complied by the majority and, therefore, in no way can the latter create certainties effective *vis-à-vis* third parties: therefore, there are no legal certainties of private origin." In this respect, see M.S. Giannini, *Certezza pubblica*, cited above, at 775.

[16] In this respect, see M. Giorgianni, *Accertamento (negozio di)*, in *Enc. dir.* (1958), at 233, who denies that, in the private legal system, "the expressions of the parties on the facts and legal situations which affect them amount to <<judgments>> or mere declarations of <<science>> or <<truth>>," since these are activities are typical of the "third party" (judge if called to apply the rules of law).

[17] For the original joint reconstruction of assessment transactions, see M.F.G. von Rümelin, *Zur Lehere von den Schuldversprechen und Schuldanerkenntnissen des B.G.B.*, in *Archiv. Civ. Praxis* (1905).

uncertainty with preclusive effects limited to the parts of the legal transaction[18].

Initial Italian law scholarship was thus aware of the fact that the mere declarations aimed at a majority of receivers had to be public, even if the same could be ascribed to the so-called "non-transaction based deeds"[19] of public powers. The fact that the activities producing public certainties were not the expression of an administrative "will" but were instead expressions of the "discretionary power of knowledge" was thus highlighted[20].

The aforesaid concept corresponded to the penal law notion of "public faith," understood as the expression of the "legal certainty" ratified by the State. In this respect, public faith "clashes with private faith since it is subjectively public" – amounting to a joint belief amongst all citizens – "and objectively public, since it is issued by a public Authority"[21].

b. Private activities generating public certainties: the civil law notary.

Therefore, if the power to produce certainties is "exorbitant" with respect to private autonomy, in accordance with traditional administrative theory, the possibility to produce certainties by subjects (who do not belong to the public institutions) derives from the allocation of public power to private persons by the law.

In the aforesaid case, we are before *personnes dépositaires de l'autorité publique* or, otherwise, in charge of a *munus publicum*: this

[18] The definition of the effects of the assessment as preclusive effects is provided by A. Falzea, *Accertamento*, in *Enc. dir.* (1958), 205 *et seq.*

[19] In fact, the first Italian legal scholarship reconstructed administrative activities on the basis of the relevant civil categories and distinguished between "*attività negoziali*" and "*attività non negoziali*," depending on whether or not the same expressed acts of will. Insofar as the aforesaid categorisation is concerned, see, in particular, U. Fragola, *Gli atti amministrativi non negoziali (*1942).

[20] The reference is to the distinction made by U. Borsi (*Le funzioni del comune italiano*, in V.E. Orlando (ed.), *Trattato di diritto amministrativo italiano* (1915), at. 225) and taken up again by G. Sala (*Certificati e attestati*, in *Dig. disc. pubbl.*, (1987), at 538), whereby the certifying public power is the expression of a "discretionary power of knowledge and not of will."

[21] F. Carrara, *Programma del corso di diritto criminale*, vol. VII, § 3356 (1871).

image fully reflects the concept of a private person who acquires exorbitant powers to protect a general interest[22].

In particular, Italian administrative law specialists have developed a role relative to the "private exercising of public functions" in order to specifically embrace the multiple cases in point in which a private person may be called to carry out activities of public interest[23].

The concept does not coincide with the more recent concept of "outsourcing" of roles or services. In fact, the latter not only includes cases in which the public institutions avail themselves of the competence and professionalism of private operators in order to fulfil public duties in a more effective way[24] by delegating public functions or services. The concept is much wider and also includes cases for which there is no "delegation" of powers but an original legal allocation of public duties, such as public certainty functions, to private persons.

The most significant example involves intellectual professions and, in particular, the civil law notary[25].

Since Napoleon's Civil Code of 1804, civil law notaries have been vested with an exclusive right related to family, real property, and corporate services, and with the "authentication function," namely, the power to render the contents of notarial deeds non-challengeable (except by means of specific legal proceedings) for third parties.

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[22] In particular, the theory of *munus*, developed by M.S. Giannini (*Diritto amministrativo* (1993), I, 129 *et seq.*), expresses the typical structure whereby the law entrusts a private person with the protection of an "alien" interest, which may be private or public.

[23] The theory of the private exercise of public functions in Italy is based on the work of G. Zanobini (*L'esercizio privato delle funzioni e dei servizi pubblici*, in by V.E. Orlando (ed.), *Trattato di diritto amministrativo italiano* II (1915), at 235 *et seq.*). Different figures, such as concessionaires or receivers, have been ascribed to the "private exercise of public functions."

[24] S. Cassese, *Istituzioni di diritto amministrativo* (2009), at 116.

[25] Historical studies have shown that the trust relationship between the community and professionals (such as lawyers, pharmacists, or doctors) has very old historical roots and is based on the public reliance generated by these parties, which are holders of "specialised knowledge." In civil law countries, control over these parties has been entrusted to self-regulation forms of interests through the relevant professional societies, which, throughout time, have been granted a public law authority by the State.

Therefore, notarial deeds entail true public certainty since they are as reliable and secure as the law.

Unlike the Anglo-Saxon notary, the civil law notary retains a role of "adaptation" in the legal system (assisting private persons towards the search for the most adequate legal solution for their needs) and produces public deeds fit to bind the judge's rulings[26].

From this standpoint, the civil law notary has been defined as *magistrat de la jurisdiction consensuelle*[27] and the notarial function as "anti-procedural", thus fit to prevent disputes, in a sort of preventative justice[28].

The role of the civil law notary is therefore emblematic since it refers to a specific interpretation of the relation between private (autonomous) interests and the legal system's general interest. The civil law notary has a public role, which is not delegated but which is originally "recognised" by the law; he acts on the basis of private autonomy relations, producing qualified certainties that are binding for third parties.

III. Creation of certainties in open markets through "Reputational Intermediaries."

a. Expert powers and market-wide certainties.

In the open markets, throughout the twentieth century, a new governance "model" (of Anglo-Saxon setting) became consolidated; it was not centred on the exercise of the sovereign power, and it solved "certainty issues" through the intermediation, first of all, of experts working in the market. The most significant examples are those developed in the financial

[26] From this standpoint, the role of the Anglo-Saxon notary is very different; the notary carries out limited certification activities (verification of the validity of signatures and of agreements), does not advise the parties, and does not have the same level of independence. Notarial deeds are not enforceable. See G. Shaw, *Notaries. A profession between State and Market*, Bristol, 2007 (a French version is published in *Le Droit et l'économie*, 2007, 158 *et seq.*).

[27] Likewise, civil law notaries have been defined as "*capable de conférer aux actes qu'il reçoit le caractère authentique, en vertu de la parcelle d'autorité publique don't il est investi*." E. Deckers, *Le ressort de la confiance. Notariat, justice préventive* (1997). According to the author, "*le lien avec l'État est ombelical: sans lui le notariat disparaîtrait*" (37).

[28] F. Carnelutti, *La figura giuridica del notaio*, Riv. notariato 8 (1951).

markets, with audit and rating companies, but the model is repeated with entirely similar features even in other markets, such as quality markets, where forms of certification and declaration that are suitable for overcoming information asymmetries in the markets and creating "reliability signals" for consumers or users are multiplied[29].

Anglo-Saxon literature has focused on the features of the aforesaid model, which can be traced back to the Reputational Intermediaries or the so-called Gatekeepers[30].

Confidence in the markets is produced, in these cases, through the intermediation of a third party with respect to the parties of the single contractual relations (which, in the case of the consumer contracts, are often serial). It is not by chance that similar parties are defined by corporate economics as "third party certifications" in order to indicate the role of the third party, who "facilitates" the exchange, making available information that would otherwise be unknowable, or expressing "reliability judgments" fit to guide the choices of consumers and ensure that the certified subject remains in the market ("gatekeeper" role). The certifiers' judgments are based on the reference to consensual technical rules in the market itself.

The group of parties meeting such features (even if heterogeneous) may be represented by the term "market certifications," which appropriately specifies the origin of parties structured by the interrelation of parties in the market in a "horizontal" way and not through a political willingness to pursue a public interest.

In fact, as indicated by the term "Reputational Intermediaries" itself, the selection of the "third party expert" (certifier) does not occur on the basis of the link of the said party with a public power but on the basis of "reputational"

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[29] M. Power, *The Audit Society. Rituals of Verification* (1997). With regard to this issue, see G. Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund* (2012), expecially 13 *et seq*. and 38 *et seq.*; and, also, please allow us to make reference to A. Benedetti, *Certezza pubblica e "certezze" private. Poteri pubblici e certificazioni di mercato* (2010).

[30] Studies were specifically developed in relation to financial markets. With regard to the literature on the topic, see V.P. Goldberg, *Accountable accountants: is third-party liability necessary?*, in 17 J. Legal Study 295 (1988); J.C. Coffee, *The Acquiescent Gatekeeper: Reputational Intermediaries, Auditor Independence and the Governance of Accounting*, in Columbia L. & Econ. (2001).

mechanisms. This implies, in theoretical terms, that the functionality of market competition mechanisms in which the said parties operate would allow for the selection of those capable of producing more reliable judgments; the said certifiers would then be interested in maintaining high qualitative standards in their respective activities, specifically for the purpose of not wasting their "reputational capital" acquired in the market. The penalty for "bad certifiers" would be the "expulsion" from the market in which they operate.

By using the same competition mechanisms, it was considered feasible to also solve the problems linked with the independence of certifiers and their third party position with respect to the contractual parties (specifically with respect to the certified subjects), but the resounding scandals that overwhelmed the financial markets, particularly since the 1990s, have proved the entire fragility[31].

The problem is that the certifier is contractually linked to the party that requested the certification and carries out the respective activity to the benefit of third parties, which are not parties to the certification contracts. This results in a very high risk of obliging certifications, which is not effectively neutralised by the reputational mechanisms in the market that are characterised by very strong information asymmetries: in fact, consumers are not able to ordinarily distinguish between "good" and "bad" certifications and, therefore, are not able to ensure that the reputational mechanisms work correctly in the absence of other corrective remedies.

b. Private regulatory, certification, and accreditation systems.

The production of credit in the markets through the Reputational Intermediaries model is not fully understandable if we disregard the "systemic" aspect of these mechanisms.

In fact, the development of these forms of certifications arises in the open markets due to the need to control and disclose

[31] See the remarks of J.C. Coffee, *Understanding Enron: It's about Gatekeepers, Stupid*, July 2002, *Columbia L. & Econ.*, working paper No. 207, on *http://ssrn.com/abstract=325240.*

the adjustment of market players to technical standards or regulatory principles (accounting or otherwise), which arose in order to guarantee the development of the markets and the reliability of the parties operating in the latter.

The extraordinary proliferation of international regulation bodies, such as the ISO, is instrumental to the spreading of techniques "for general and repeated use"; the related certifications aim to communicate the adjustment to similar rules through qualified private persons[32].

In this respect, reference is made to market governance mechanisms, which make up for the lack of a joint regulator in addition to representing the interests involved and developing control and certification instruments that are fit to develop the relationship between firms as well as between companies and consumers or investors.

In this contest, the issue of the distinction between public and private is no longer significant, as illustrated by the rating systems, which make reference to private players or political entities without distinction when the latter enter the bond market and request to be judged as regards their reliability as creditors.

Both technical regulation and certification functions, as well as control over certifiers through various forms of accreditation, are organised through these market systems. Even in this case, there are auditing activities used to assess the presence of technical prerequisites and control over the operations of certifiers on the part of entities that are themselves private and subject to competition with entities implementing the same functions.

The distinguishing feature of these systems is their legitimation, which does not derive from public powers (besides,

[32] In Italy, the law scholar debate has stressed the process of erosion of technical regulatory power and, as a result, of state sovereignty in favour of "aggregated groups which produce technical rules," according to the reconstruction made by A. Predieri, *Le norme tecniche nello Stato pluralista e prefederativo*, in Dir. Economia 279 (1996). Insofar as the debate on the subject matter is concerned, see the studies collected in the volume by P. Andreini, G. Caia, G. Elias, F.A. Roversi Monaco (eds.), *La normativa tecnica industriale. Amministrazione e privati nella normativa tecnica e nella certificazione industriale* (1995); F. Salmoni, *Le norme tecniche* (2001); G. Smorto, *Certificazione di qualità e normazione tecnica*, in *Dig. disc. priv. – sez. civ., Agg.*, II, (2003), at 205; M. Gigante, *Norma tecnica*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, IV (2006), at 3806; A. Zei, *Tecnica e diritto tra pubblico e privato* (2008).

it is a case of systems that exceed the dimensions of the specific legal systems) but from the interrelations and the repeated relations amongst market players[33]. In this sense, it is possible to speak about a legitimation of "reputational" nature, specifically in order to specify the mechanism for the acquisition of consent and power through the repeated relations spread throughout the market. The limits of these systems may be found in the same mechanisms of the market, which are not perfect and, above all, fail under the strong information asymmetries amongst operators and consumers. The need for public law regulation (with regard to the entire problems connected with the different dimensions between the regulator and the regulated party) is placed in this dimension.

IV. Metamorphosis of models in the EU legal system.

In the main European civil law countries, the revision of the public law model of production of certainties is not only the effect of an opening of the markets and, therefore, of the pervasiveness of further and different models, such as those of Reputational Intermediaries. A fundamental role is held by the EU legal system, which requires member states to redefine the same instruments of implementation of the legal system, and for the creation of certainties on the basis of a new model, which allocates a primary role to economic freedom. As a result, public power becomes, on the one hand, inadequate in guaranteeing credit that is anchored to market mechanisms; on the other hand, it is forced on reconsidering the activities generating certainties due to a new

[33] The "systemic" approach is drawn from sociological studies of special interest, such those of N. Luhmann and, in particular, G. Teubner (*Diritti ibridi: costituzionalizzare le reti di* governance *private*, in *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, cited above, 89 *et seq.*; from the same author, see *Diritto policontesturale: prospettive giuridiche della pluralizzazione dei mondi sociali* (1999). With regard to the law studies in this field see G. Rossi, *Introduzione al diritto amministrativo* (1999), at 60; G.F. Schuppert, *Governance. A Legal Perspective*, in D. Jansen (ed.), *New Forms of Governance in Research Organisation* (2007), at 50 *et seq.*. With regard to the neo-istitutionalism theory see A. Benz, S. Lutz, U. Schimank, G. Simonis (eds.), *Handbuch Governance. Theoretisce Grundlagen und empirische Anwendungsfeleder* (2007), at 161 *et seq.*

market pervasiveness as a scheme of relations amongst members[34].

a. Competition regulations and erosion of the public law model.

The integration between the EU legal system and member states sets the decline of the self-referential sovereign power, which has the exclusive duty of qualifying and declaring on the basis of certainty, as well as establishing the forms of implementation of the legal system itself through private persons in charge of public certainty roles.

The problem is not only about facilitating and simplifying certainty-specific public control activities, through mechanisms such as the *autocertificazioni* ("self-certifications")[35], nor simply about structuring public law activities of technical control, on the basis of certainty, according to market relations (a case in point that is significantly represented in Italy by the "SOA" – public works certification companies[36]).

The EU legal system forces a reconsideration of the structure of the same private activities that are designed to produce certainties, on the assumption that the consideration of

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[34] The phenomenon is connected to the "institutional complementarity between public and private law-making at EU". With regard to this issue see F. Cafaggi, *Private Law-making and European Integration: Where Do They Meet, When Do They Conflict?*, in D. Oliver, T. Prosser and R. Rawlings (eds.), *The Regulatory State. Constitutional Implications* (2010), at 223. With regard to the practical and theoretical issues concerning regulation in European Union see R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation. Theory, Strategy and Practice* (2012), at 388 *et seq*.

[35] In this case, the declaration of status, personal qualities, or significant legal facts is entrusted to the declarations of interested persons and is subject to subsequent control by the public authority. Reforms of said nature bring into play the individual liability of those who make the declaration but do not remove the public control, which is simply moved from before to after the declaration (pursuant to the procedures established by the public authorities).

[36] The objective is the qualification of firms aiming to take part in public works contracts: whilst, in the past, a centralised system based on the recording into a roll held at the Ministry of Public Works was in force, the amendment law has marked the passage to a certification system based on companies (the so-called SOA) working on the market and supervised by the Authority for public contracts.

the public law aims also needs to follow the adequate assessment of the activity's competition structure.

The most evident transformations specifically concern the work of intellectual professions, whose public law framework has been significantly undermined by the extension of the competition regulations. The EU legal system, in particular, has questioned the systems of exclusive rights and those aspects of public law regulations of professions that create artificial barriers to access and competition amongst professionals and are not effective in providing public protection for the professions themselves[37].

It is very significant, from this standpoint, to consider the work of the Court of Justice, which aimed at systematically demolishing the public law interpretation of a series of private activities of general interest in order to affirm the prevailing nature of competition regulations.

The Court has denied that the auxiliary nature of a private activity with respect to public powers is sufficient to shield the activity itself from competition regulations[38]. It has stated the prevailing nature of competitive reasons with respect to public law qualifications made by member states in many cases: when the activity carried out by the private professional is solely of collaborative nature with respect to the exercise of a public role by each state body (unfit to change the effective exercise)[39]; when the private person's duty is performed in an assessment of technical nature for public decision-making purposes (with the relevant undertaking of public law liability)[40]; and, more generally, in all

[37] On the subject matter, see G. della Cananea, *Libera concorrenza nelle professioni liberali (dell'Europa unita)*, in *Scritti in onore di Alberto Romano* (2011), and, from the same author, *Professioni e concorrenza* (2003).

[38] G. Corso, *Amministrazione transnazionale. Normativa comunitaria sul mercato e le sue conseguenze sul diritto interno*, in *Tempo, spazio e certezza dell'azione amministrativa, Atti del XLVIII Convegno di studi di scienza dell'amministrazione di Varenna* (2003), at 335 *et seq*.

[39] With regard to this issue, for instance, refer to EC Court of Justice, 21 June 1974, case C-2/74, *Reyners*, in *Racc.*, 631, the first case law on the subject matter, whereby the Court denied the possibility to include the lawyerly profession within the concept of "public power."

[40] See EC Court of Justice, 30 March 2006, case C-451/03, *Servizi ausiliari dottori commercialisti*, in *Racc.*, I-2941. Furthermore, see the twin judgments of the Court concerning private certifiers of organic products: EC Court of Justice, 29 November 2007, case C-393/05, *Commission/Republic of Austria*, in *Giorn. dir.*

those cases in which the private activity of general interest is based on contractual relations of private autonomy (therefore excluding their being traced back to a "direct and specific expression of public power")[41].

In the special (and emblematic) case of the civil law notary, the Court has furthermore specified that in no way can the "authentication function" be deemed the expression of public powers: it is an activity of general interest that justifies a specific public law regulation but not total exclusion from competition regulations[42]. The binding effects vis-à-vis third parties of the certainties produced by notarial deeds would exclusively be ascribable to the law governing the notarial activity, which, on the other hand, is organised in accordance with a competition structure and is therefore suitable for justifying the extension of the regulations.

Therefore, the EU legal system aims to "separate," with respect to the activities producing certainty, the expression of private autonomy – and therefore what needs to be defined pursuant to a competition structure (even if regulated) – from those effects that only legal norms can impose for certainty purposes but that cannot lead to qualifying the activity of private persons from a public law standpoint. More specifically, in accordance with this reconstruction, civil law notaries would not carry out a public activity but a service activity towards private persons that aims at increasing the security of exchanges: the fact that notarial deeds create certainty for third parties solely concerns the law, which is intended to reinforce the effect of public safety by limiting individual free valuation as to the authenticity of the deed's content.

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amm., 2008, p. 732; and EC Court of Justice 29 November 2007, case C-404/05, *Commission/German Federal Republic*, in *Racc.*, I-10195.

[41] EC Court of Justice, 31 May 2011, case C-283/99, *Commission/Republic of Italy*, in *Racc.*, I-4364.

[42] In this regard, see EC Court of Justice, General Court, 24 May 2011, cases C-47/08 (*Commission/ Kingdom of Belgium*); C-50/08 (*Commission/French Republic*); C-51/08 (*Commission/Grand Duchy of Luxembourg*); C-53/08 (*Commission/Republic of Austria*); C-54/08 (*Commission/German Federal Republic*); C-61/08 (*Commission/Hellenic Republic*); C-52/08 (*Commission/Portuguese Republic*), with a note by A. Benedetti, *Libertà di stabilimento e professione notarile*, in *Giur. it.*, 2012, 703 ss.

b. Incentives for market certifications and public law regulations.

The EU legal system encourages the spreading of market certifications and, at the same time, proposes models for the regulation of market instruments.

Insofar as the first aspect is concerned, the EU's environmental policy is significant as it bases one of its pillars precisely on the spreading of voluntary instruments of adjustment to high standards of environment protection, such as environmental certifications. Instruments such as ISO 14001 environmental certifications (together with eco-management certifications such as EMAS) are favoured in European legislation; this is also reflected in member states' legislation, contributing to the spread of instruments of production of private credit that are not to be ascribed to national public powers[43].

At the same time, European legislation defined a public regulatory model for certifications that aims to correct the failures of the certification market while establishing a series of public law guarantees.

Therefore, Regulation No. 765/2008 of Parliament and of the Council, dated 9 July 2008, within the framework of a redefinition of the supervision of the quality certification market, has stated that the accreditation bodies "should operate on a non-profit basis," "ensuring the necessary level of confidence in conformity certificates" (recital 12). In fact, it has set forth that the aforesaid activity is reserved to a national accreditation body that is appointed in order to provide non-profit-making "authoritative statements" (articles 4-6). In some passages, the rule appears to make cross-reference to the granting of public powers (as in the definition of the "national accreditation body," which "performs accreditation with authority derived from the State" - Art. 2, 11).

[43] Italian legislation is particularly significant from this standpoint since it spurs the spreading of similar certifications even by ascribing specific public advantages to the respective holdings: in this respect, quality and environmental certifications are preferential requirements for firms taking part in public tenders, pursuant to the public contracts code; for firms holding environmental certifications (such as ISO 14001 and EMAS), the law also sets forth specific privileged paths for the simplification of procedures aimed at the issue or renewal of public law authorisation titles.

Likewise, the European Union has removed the market certification mechanisms by providing for "official controls" for a series of food certifications, which are suitable for shifting the liability for whatever has been declared to consumers on the salubrity of food and on the health of animals to the central public power[44].

In other cases, EU legislation establishes certification systems, through market systems supervised by public power (CE mark, organic or environmental certifications), in order to guarantee maximum reliability on the side of consumers[45].

A mixed model of production of certainties in the markets emerges from such a structured framework, whereby competition mechanisms are combined with more or less penetrating forms of public supervision and control.

V. Hybridisation between models or convergence of legal systems?

a. Decline of the "positivist" concept of certainty.

The review of the public certainties issue, from the standpoint of the civil law systems, is rooted in the transformation of needs, which has an impact on the profile of the legal instruments fit to meet the same.

The need for certainty appears to be darkened by the more pervading "need for trust," which more effectively expresses the condition of parties that need to make choices in conditions of uncertainty.

At present, the greater attention given to the "substantial qualities" of goods and subjects, and to those instruments (public or private) that are more capable of recording similar qualities is in conflict with the prevailing nature of the "formal" concept of

[44] The model of official controls within the food sector is defined in the EC Regulation No. 882/2004 of Parliament and of the Council, dated 29 April 2004, to which the subsequent EU regulations on food certifications also make reference.

[45] For an analysis of the different cases in point from the standpoint put forward, see A. Benedetti, *Certezza pubblica e "certezze private"*, cited above, at 122 *et seq*.

public certainty, which generates reliance in connection with its subjective origin [46].

The instruments aimed at producing reliance in the markets are extraordinarily developed due to market globalisation and mark the limits of the public role of certainty in each single legal system.

In this sense, the "credibility" problem also affects political systems and governmental processes since it is based on factual assumptions and, before that, on obsolete theoretical divisions between "public" and "private."

The formal concept of certainty, as an expression of a sovereign regulating power and of a joint "willingness" aimed at performing general interests, reveals the same limits of the sovereign concept connected therewith. The image of a social order that may be organised in abstract terms through the capacity of the public to distinguish between what is "certain," not doubtful, and what is not almost assumes a utopian meaning within the context of the entire interrelations of which the same legal system is a party.

Certainly, the link between sovereign power and the production of certainties remains untouched with respect to the series of legal qualifications that find their respective exclusive origin in the legal system. The possibility to declare, without doubt, the existence of a status or qualities of exclusively legal nature where, failing the relevant legal rule, the said qualities would not exist remains an exclusive prerogative of public powers and of what has been granted thereby. These are the cases in which certainty is not set up against what is "uncertain" but against what would simply be "inexistent"[47].

However, this qualifying capacity of public powers finds intrinsic limits in the open and dynamic nature of current legal systems. It is by now totally unquestionable that, in the current

[46] A. Romano Tassone, *Amministrazione pubblica e produzione di "certezza": problemi attuali e spunti ricostruttivi*, in F. Fracchia & M. Occhiena (eds.), *I sistemi di certificazione tra qualità e certezza* (2006).

[47] In this respect, the insight of M.S. Giannini is still relevant, whereby, with specific respect to those whom he defines as the *certazioni*, he highlights how, when a legal quality is created by the legal system (for instance, the "healthy and strong physical constitution"), the alternative to the quality's public declaration is not the uncertainty but the inexistence of the same.

scenario, "the certainty of legal relations no longer appears to be achievable through complete and exhaustive regulatory provisions, which finally establish all subjective legal positions"[48].

The foregoing entails that the "certainty" relative to the quality of a good may be ascribable to a set of sources, amongst which private technical rules may have greater legitimation with respect to public law rules, along with forms of private verification of compliance to similar technical rules, even if under public supervision.

The phenomenon is of such extent that Italian courts have questioned, in different circumstances, whether there is a true obligation for the legislator to adapt to the development of technical regulations that are recognised to a greater extent in the markets, with the consequence of assuming the unlawfulness of a law that does not include an explicit reference provision or that, by imposing a uniform and abstract regulation, amounts to a breach of fundamental equality and equity needs[49].

Therefore, the "stable" definition of the legal entity by the legal system gives way to other forms of qualification that are less stable but more in keeping with characterizing the features that are not subject to the qualifying capacity of the legislator and of public powers.

b. Certainties "for" the market and certainties "through" the market

Market regulations account for the other fundamental limit that public power finds in its original self-sufficiency in creating and verifying legal qualities.

In a closed and self-sufficient legal system, public power generates certainties, binds members to comply with the same, and delegates or acknowledges similar powers to qualified parties within it (a prerequisite of the theory of the private exercise of public duties).

[48] S. Fortunato, *La certificazione di bilancio* (1985), at 557.

[49] The limit is the same as that outlined by legal philosophers with respect to legal certainties: "Legal certainty demands positivity, yet positive law claims to be valid without regard to its justice or expediency," G. Radbruch, *Legal Philosophy*, in K. Wilk (ed.), *The Legal Philosophies of Lask, Radbruch and Dabin* (1950), at 47 *et seq*.

The pervasiveness of competition regulations forces public powers to redefine the area of the activities generating certainty, taking into consideration the structure of financial private activities pursuant to the competition and market principle.

The market organisation modality is nonetheless not predicable with respect to any type of certainty. Since private autonomy truly expresses itself in the market dimension, the latter solely suits those activities that generate reliance and include free choice. For instance, this is the case in the audit of financial statements or of quality certifications that do not create real "certainties" and do not bind their own receivers but entrust their respective credibility to the choices repeated throughout time.

The aforesaid approach offers interpretation perspectives that are useful for grasping the multiple aspects of phenomena and allows one to understand the impossibility in reducing "certainty issues" to the "vertical" dimension of certainty as a substitute for the reality defined by the political party: in fact, in the said cases, the "horizontal" dimension of trust – as a result of the interrelation of the subjects existing within the market – is exhibited in all its complexity, in reciprocal interdependence, and in accordance with a plurality of relations that may acquire their own legal significance or be subject to public regulation (without altering the substantial structure).

The regulation of market certification systems also highlights a special structure of the relation between public powers and certainties.

In fact, regulatory powers are set in a context in which there are no public "prerogatives" and the activity (either of certification or of accreditation) is a service activity carried out in competition by private parties when performing their respective autonomy.

The regulation, as a "public law guarantee of development of market relations pursuant to the competition organisational principle"[50], aims to correct the failures of the certification market by imposing certain obligations and restrictions on private subjects or by subjecting their respective activity to public control.

In this respect, the production of certainties that may be traced back to the certifications only finds – in public powers – an indirect guarantee of correct operation of the certification system

[50] A. Zito, *Mercati (regolazione dei)*, in III *Enc. dir.* (2010), at 815 *et seq.*

in accordance with a market structure. There is no substitution of public power with respect to private players, only intervention aimed at correcting the market mechanisms.

Therefore, the focal axis of the public certainty theory is jeopardised since it used to derive not only the legitimation of binding certainties from sovereign power but also the reliability of non-binding certainties.

c. Certainties and relations between public powers and private systems.

The outlined scenario is therefore significantly more complex than what could be understood by interpreting the analysed phenomena as simply a progressive convergence of civil law and common law systems[51].

In fact, the different analysed models, namely, the continental "public certainty" model and the Anglo-Saxon model of "certifications through Reputational Intermediaries," can only overlap to a minimum extent.

The comparison is nonetheless stimulating since it highlights the limits of a model centred on public powers (the former) and the expansive capacity of a model centred on private autonomy (the latter), which nevertheless has also resulted in failures and critical problems.

On the other hand, it is clear that the certainty issue, understood as the pursuit of security in the relation amongst members, has not simply faded as a certain way of understanding the regulating roles of public powers and of the law.

In civil law systems, the fact of pursuing the highest level of security in the relations amongst members is still a fundamental aim of the legal system, amounting to its distinctive feature (as also proved by recent market crises): what may instead be questioned is the capacity to produce security due to the integration with other legal systems (it is sufficient to think of the impact of the EU legal system) and the existence of phenomena exceeding state boundaries (precisely, as in the case of global

[51] J.R. Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, in 15 *Tulane J. Intern. & Comparative L.* 541 (2007), which may also be found on http://papers.ssrn.com.

markets, in which the new forms of governance are recorded with respect to which single state is not a *dominus* but a "party").

This is the interpretation that explains the expansion trend of public regulations of market certification systems that aim to correct market failures and ensure correct operation. Precisely, however, the reference to the market systems regulated by the public makes it clear that the developments in place may not simply be interpreted from the standpoint of a "removal" of public power with a corresponding expansion of the area entrusted to private autonomy[52].

The traditional binary scheme opposing "public" and "private" spheres (inherited from the French Revolution) is no longer sufficient to investigate the issue of certainties, which, on the other hand, needs be formulated on the basis of the interrelation between systems of political legitimation and social/market systems that are based on their own and autonomous legitimations. Only from this perspective will it be possible to appreciate the specific nature of the instruments of certainty, with their different interpretations and their mutual interrelationships.

[52] With regard to the conflict to the conflict between the bureaucratic paradigm and the regulation, new model of administration, see M. Eifert, *Regulierungsstategien*, in W. Hoffmann-Riem, E. Schmidt-Aβmann, A. Voβkuhle (eds.), *Grundlagen des Verwaltungsrechts* (2006), at 1237 *et seq.*; M. Ruffert (ed.), *The Transformation of Administrative Law in Europe* (2007), at 311 ss.