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EDITORIAL

WHEN RIGHTS ARE CONTROVERSIAL, ARE DIALOGUES BETWEEN COURTS STILL ENOUGH?

Marta Cartabia *

The dialogue between Courts in Europe is by and large the most recurrent topic in constitutional law studies in recent years. Colloquia, conferences, researches, doctoral theses, not to speak about books, articles and essays etc., all converge on the problems of the multiple interactions between national courts and the European Courts, including the European Court of Justice and the European Court of Human Rights.

Indeed, the topic is not new and it is a rather trite one. For years legal scholars have debated and written about the preliminary ruling to the European Court of Justice as the main form of judicial dialogue between judges in the European construction. However, in recent years not only the topic has been re-discovered but it has also been adjusted to the new context. More specifically, the scope has been broadened, under several respects. For a start, a new player has been included in the network of the European judicial architecture and it is the European Court of Human Rights: whereas in the past the European judicial dialogue mainly referred to the relationship between the national judges and the European Court of Justice under the formal rules of the European treaties, at present it also encompasses the relationship between national authorities and the European Court of Human Rights as well as the relationship between the two European Courts. Secondly, the idea of judicial dialogue is now more comprehensive, for it refers not only to formal dialogues through preliminary rulings, but also to informal kinds of dialogues, as for example references made to the case law of foreign courts and the attention paid to the jurisprudence of the European court far beyond the strict obligations imposed by the treaties and the convention. Judge-made law circulates intensely

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in Europe and the main ground on which these fervent interactions are based is that of individual rights.

This topic is at the center not only of legal studies, but also of legal practice. In recent years there have been several events that are worth recalling: the "twin decisions" no.s 348 and 349 of 2007 of the Italian Constitutional Court and then the following decisions no.s 311 and 317 of 2010 started a new course in relations with the European Court of Human Rights; moreover, with decision no. 102 of 2008 the Italian Constitutional Court issued the first preliminary ruling to the European Court of Justice and – looking beyond national borders – one cannot help mentioning the Lisbon ruling of the German Constitutional Court in June 2009 and the Mangold decision in July 2010, the reform of the judicial review of legislation in France and the subsequent decision of the European Court of Justice on preliminary ruling, etc. All these and many other acts have nourished the debate on the European judicial dialogue in recent years.

Why all this fuss about European judicial dialogue in theory and in practice? Why this revival of attention around the courts and their reciprocal interactions in Europe?

The emphasis on the judicial dialogue in Europe is an important ramification of two major trends in European constitutional law of the XXI century.

The first trend can be described as a new era of individual rights. If the second part of the XX century has been described as "the age of rights" by Norberto Bobbio, the beginning of the XXI century can be labeled as "the age of new rights", where all the most important issues and problems of social life are tentatively dealt within the legal framework of individual rights. The right to a clean environment, the rights of immigrants, the rights of disabled people, the rights of children, etc. are all new rights characterizing our time. The emphasis on individual rights brings about an emphasis on judges: after all every individual right is susceptible to be claimed before a judicial authority. That's why rights and courts are closely tied together.

The second trend of European contemporary constitutionalism is the shift in the protection of individual rights from a national level to a European one. Indeed, the national constitutional protection of rights cannot be totally superseded by the European institutions. National Courts, both ordinary judges

and Constitutional Courts, still play a fundamental role in the protection of individual rights. However, since the beginning of the century, Europe has been going through a stage of "integration through rights" –to paraphrase the title of a famous book – the outcome of which is that the epicenter of the protection of fundamental rights is being displaced/shifted in the European Courts.

Within this debate about rights, courts and Europe there is however a blind spot, and it concerns a crucial issue, not a minor one, which deserves attention. Often rights of the new generation are controversial. They are not necessarily part of a common core of unquestionable legal principles. New rights are often matter of discussion and disagreement. They are under debate.

This problem was made clear at the time of the European constitutional saga and more recently with the approval of the Treaty of Lisbon. As a matter of fact, during the negotiations of the Lisbon Treaty a new set of controversial issues emerged among the Member States: from the stance taken by some Member States, it has become clear that even fundamental rights can be an obstacle to the process of integration and a reason for incrementing Member States' Euro-scepticism or Euro-resistance. In particular the attitude maintained by the United Kingdom and Poland during the negotiations, and by Ireland during the ratification process, shows a sort of new distrust towards the 'Europe of rights' that should not be understated.

Unlike other aspects of European integration, the 'Europe of rights' has always been presented and perceived as being a result of an existent common constitutional tradition, as opposed to the outcome of a political bargain. In the first steps of the European Court of Justice's case law on fundamental rights this was an explicit statement and the legitimacy of the judicial activism of the Court was based on the idea that it was 'just' interpreting some common and shared principles that needed only to be spelled out. Fundamental rights in Europe claim to be part of a *jus commune europaeum*, capable of unifying the different national constitutional identities, while at the same time distinguishing European tradition from other western countries. Even the Charter of Fundamental Rights was presented as a 'restatement of law': the claim made was that the Charter was but

a codification of unwritten principles implicit in the European system on which all the Member States agreed.

Certainly, some national institutions have always been 'alert and vigilant' with regard to the activities of the European institutions on fundamental rights. Starting with the German '*Solange*' doctrine and the Italian '*controlimiti*' doctrine, a growing number of constitutional or supreme courts have maintained a cautious attitude towards European developments on the matter and have affirmed over and over again the possibility of contradicting the European interpretations of fundamental rights, if necessary. Those doctrines, however, have never been applied.

During the negotiations of the Treaty of Lisbon dissent broke out. Protocol no. 30 to the Treaty of Lisbon expresses some serious concerns on the part of the United Kingdom and Poland on the evolution of fundamental rights in Europe, and specific reference is made to the expanding role of the European Court of Justice. As to the substance, the British concerns regard, quite unsurprisingly, the entire chapter on social rights whereas the Polish ones seem to be rather addressed towards rights involving ethical disputes, in particular those regarding family and the "edges of life".

In the Irish case, the issue of fundamental rights was raised during the ratification stage. After the first negative referendum, the European Council issued one decision and one declaration regarding all the problematic matters, in order to pave the way to a second and hopefully positive consultation of the Irish people. In those documents a relevant place was occupied by some issues concerning fundamental rights such as the right to life, family and education.

All this points to the fact that a common understanding of individual rights, in particular of new individual rights, cannot be taken for granted. Sometimes they are debated, even harshly debated.

The simple fact that rights can be disputed and disagreed raises a new question that remains to be addressed: when rights are controversial, are the courts the appropriate venue for the dialogue?

In front of the growing problem of controversial rights, on the other side of the Atlantic the case has been made for "political constitutionalism", questioning the legitimacy and the authority of

judges in those cases where rights are divisive. In the present debate about rights and courts in Europe instead the problem is not yet in the spotlight.

ESSAYS

ITALIAN ADMINISTRATIVE LAW UNDER THE INFLUENCE OF EUROPEAN LAW

Daria de Pretis [*]

Abstract.

Administrative law in Italy has changed markedly over the last two decades, a phenomenon which is attributable to various causes, one of which is the impact of European law (this should be taken as referring to both EU and ECHR law). The article offers an overview of the state of the Italian administrative system and its relationship to developments in European law, in order to explain them to a non-Italian reader. The first step was to describe the principal features of administrative organization, activity (which chiefly means administrative procedure) and justice in Italy. The second was to highlight consonances and divergences between Italian and European administrative law and to measure the influence of European regulation on the Italian system. In terms of principles, differences do not appear very profound. If there are divergences, they do not involve compatibility between principles linked to the two systems, but rather the different value or degree of effectiveness given to the same, or basically similar, principles. Nevertheless the influence of European regulation on Italian administrative law would seem to be very important, especially in the fields of the organization and protection of citizens vis-à-vis the public administration. The dismantling of the system of public intervention in the economy was a direct consequence of the new European economic order, as well as the creation of a certain number of independent authorities. Neither the impact on the Italian justice system, nor the fundamental nature of the protection provided have affected its structure, but several aspects have, concerning the detailed implementation of EU and ECHR principles, such as certain procedural mechanisms and some substantive types of protection offered by the courts.

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1. Introduction.

1.1. Principles.

The Italian legal system has a large number of principles concerning the organisation and the action of the public administration and the legal protection of private individuals with whom it interacts [1]. These are special principles that constitute a

[1] S. Cassese, *Il diritto amministrativo e i suoi principi,* in S. Cassese (ed.), *Istituzioni di diritto amministrativo* (2009).

special branch of the law, different from those governing relationships between private citizens. In this branch of the law, principles play an essential role, so much so that we can say that in Italy, as in other countries, administrative law has evolved more on the basis of principles of case-law and the input of legal scholars, rather than on precise rules set down in formal legal acts. In more recent times many principles have been codified, some at constitutional level, but the fact remains that the founding elements of the subject, which have been developed and improved over two centuries by the major administrative court, the Council of State (*Consiglio di Stato*), and scholars of administrative law, continue to exist as unwritten principles.

These principles deal mainly with the relationship between the law, the public administration and the courts. This relationship and the way it operates define the role of the public administration and the conditioning of its power, as well as the guarantees of individuals' protection. Administrative power pursues the public interest and is separated from legislative and judicial powers; it is the law that determines the powers pertaining to the public administration and defines the objectives that it has to pursue; the exercise of administrative power is subject to control by the courts, which verify its compliance with the law.

This synthesis is obviously simplified. The system is not static and the referents themselves alter so far as their content is concerned. In Italy, too, the relationship linking the three entities is changing considerably: the law is less and less law in the formal sense and tends to take on a more universal sense. The Italian language can express this concept as the change from *legge* to *diritto*. The boundaries of the area of public power tend to shift and become less certain [2], both in the relationship between traditional powers and private powers; in a more fluid general context, even judicial review of administrative decisions tend to change, often becoming broader and more incisive, and occasionally more creative [3].

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[2] G. Napolitano, *Pubblico e privato nel diritto amministrativo* (2003).

[3] G. Pastori, *Recent Trends in Italian Public Administrations*, 1 It. J. Publ. L 18 (2009).

When the Republic was founded, the new Constitution formalised more or less explicitly some principles of the system, thus ranking them among the constitutional foundations of the public administration and accompanying them with some – not many - detailed rules for enforcement [4]. It is true, however, that the democratic character of the administrative system and the structural guarantees that were set up to ensure its performance and lawfulness, derive primarily from the broad intention of the Constitution, rather than from the two particular articles (97 and 98) that specifically concern the public administration [5].

Art. 97, par. 1, lays down that "Public offices are organised according to law, so as to ensure good functioning and impartiality of administration". Attention is focused on the organisation of the public administration, but, as will be seen later when administrative procedure is considered, legal scholars and the courts have enhanced the principles in their substantive dimension as guidelines for the actions taken by the public administration [6].

The Italian Constitution does not have provisions expressly placing executive power under the law, unlike for instance the German *Grundgesetz* (art. 20). However, the rule of law or, in Italian terms, the principle of legality is likewise the corner-stone of the Italian administrative system [7]. It has always been considered as such by administrative law and the Constitutional Court, since its creation. With this as a basis, the special powers of the administration exist because they are provided for by the norms of the legal system, and in particular rules provided in parliamentary acts. Moreover, the law must define the power in outline, establishing the conditions for its exercise, contents and legal effects, and clearly identifying the authority it has.

The constitutional provisions from which the principle is usually taken, other than indirectly art. 97 mentioned above, which enables the law to define (albeit in broad terms) the

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[4] S. Cassese, *Le basi costituzionali*, in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003).

[5] C. Esposito, *La Costituzione italiana. Saggi* (1954).

[6] G. Borri, P. Caretti, G. Lony, C. Pinelli, U. Pototschnig, *Commento agli articoli della Costituzione sulla pubblica amministrazione*, in G. Branca, A. Pizzorusso (ed.), *Commentario della Costituzione* (1994).

[7] N. Bassi, *Principio di legalità e poteri amministrativi impliciti* (2001).

organisation of public offices and the officials' sphere of competence and responsibility (paragraph 2), are contained in the many reservations of parliamentary law regulating the possibility for public powers to limit citizens' freedom, either as single individuals or associations (art. 21 ff), and, above all, personal freedom (art. 23), and the right to economic initiative and ownership (arts. 41 – 44).

The subordination of the administration to the law is obviously in order to permit judicial review of administrative action and, as such, the justiciability of right and legitimate expectations of private parties affected by it. In this context, the notion of lawfulness of administrative action extends beyond simple compliance with the law, to include conformity of the administrative decisions to the criteria of logic, reasonableness, correspondence with the facts and substantial equity. Giving constitutional status to the principle of justiciability of private favourable positions vis-à-vis the public administration (art. 113) has allowed instances, arising under the pre-constitutional regulations, excluding the courts' review of certain decisions or certain grounds for review, to be superseded.

For the same reason, courts interpret the category of political decisions restrictively, an adjudication which, under the ordinary laws governing administrative judicial review, is considered final [8]. According to Council of State, such an act may only be so defined if it is political in a subjective sense, because it issues from governmental bodies in charge of policy and management at the top level of public activities, and in an objective one, as pertaining to choices of particular constitutional and political importance, relating to the coherent and coordinated functioning of public powers and institutions of the State [9]. On this basis, an application for judicial review against the enlargement of an American military base in the Veneto Region,

[8] Art. 31 unified text of the rules regulating the Council of State.

[9] Council of State, IV 1053/2008, according to which these include not only decrees of the President of the Republic dissolving the Chambers and the resolution of the Council of Ministers fixing the date for elections, but also the subsequent acts of electoral procedure. See further Council of State V 209/1997, VI 360/2002, IV 1397/2001.

which had received political assent from the Italian government, was held inadmissible [10].

The constitutional principles of impartiality and good functioning (*buon andamento*) of the administration have been implemented by the ordinary legislature through the adoption of some important reforms, primarily at the end of the last century. In its procedural significance, impartiality is thought to mean that the decision-maker is necessarily at arm's length vis-à-vis the interests in play. From a more general organisational perspective, it expresses the idea that administrative action which is not strictly political should be removed from political influence. In this sense, the principle precludes provisions allowing a majority of politicians to be included on the selection panel for the recruitment of civil servants, rather than experts [11]. The occasionally problematic distinction, set out in the laws of the 1990s concerning organisation [12], between policy-making, which is the responsibility of the political leadership, and proper administration, which is the responsibility of the bureaucratic management, was aimed at freeing administrative bodies from partisan political interference.

The 1990 legislative reform of administrative procedure [13] and its update in 2005 [14], promote *buon andamento* through several rules – about which more will be said later – including, among the most important, participation, economy and efficacy, and transparency of administrative action. In a way, codification has not introduced innovations over and above what had already been developed by courts and legal scholars. For example, the duty to give reasons for administrative decisions, which became generalised by law as recently as 1990, was already a principle governing administrative action. With regard to other principles, their formal establishment by law and the introduction into the system of instruments for their effectiveness, have had a great impact. This was certainly the case regarding communication of the initiation of the procedure in order to bring about participation

[10] Council of State IV 3992/2008.
[11] Constitutional Court 453/1990.
[12] Starting with Act 59/1997.
[13] Act 241/1990.
[14] Act 14/2005.

in such procedure, and for the regimen governing access for the purposes of so-called transparency.

Principles of autonomy, decentralisation and subsidiarity will be discussed later, when examining the organisation of public administration.

1.2. Consonance and divergence with European principles.

The principles and the values underpinning Italian administrative law are in line with the founding principles of the European Union (art. 6 TEU). Adherence to obligations deriving from being part of the Community system, primarily loyal cooperation (art. 10 TEC), has not caused conflicts with national principles [15]. The Italian legal system shares the values expressed in the European Convention of Human Rights (ECHR) as well. Bearing in mind the complex circuit of building of the European principles, it is natural [obvious] to mention that Italy has adhered to the common European legal systems since their origin [16].

Broadly speaking we can say that if there have been problems, they did not involve compatibility between principles linked to the two systems, national and European, but rather the different value or degree of effectiveness given to the same principle or basically similar principles, in the two systems. More specifically, tensions have affected the compatibility of some national rules with European principles which, although they were not questioned in so far as the relationship with the equivalent national principle was concerned, have been considered inadequate compared to the European implementation standards of the same principle.

For example, even in the presence of full and effective constitutional guarantees for the legal protection of individuals facing the public administration (arts. 24 and 113 of the Constitution), Community law has acted as the driving force to overcome the rule of non-compensation of infringements of legitimate expectations (*interessi legittimi*). Moreover, some aspects and loopholes in procedures for interim relief pertaining

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[15] A. La Pergola, P. Del Duca, *Community Law, International Law and the Italian Constitution*, 1 Am. J. Int. L. 79 (1985).

[16] G. Greco, *I rapporti fra ordinamento comunitario e nazionale*, in M.P. Chiti e G. Greco, *Trattato di diritto comunitario e nazionale* (2007)

to Italian administrative judicial review have been considered to be in conflict with European standards of legal guarantees for individuals vis-à-vis the public administration. In the first case compliance with European standards was spontaneous, as it followed a ruling by the United Sections (*Sezioni Unite*) of the Italian ordinary Supreme Court (*Corte di Cassazione*) [17]. In the second case, in Italy as in other countries, some adjustments have been made, following interventions by the ECJ, later implemented by national laws for the purposes of realignment to the EU system [18].

Equally spontaneous, and without notable resistance, was the adjustment of the Italian legal system to the proportionality standard as the most recent interpretation of the reasonableness test in reviewing discretionary power exercised by the public administration [19]. Although it is fair to say that the proportionality standard entered the Italian legal system under the influence of the Community law, it should also be added that the reasonableness principle, in its traditional implementation, already allowed the Council of State to question administrative choices in some sensitive areas, such as the protection of property and the environment, using standards that were not very different from those involved in the proportionality test under Community law.

The European Courts have examined the tension between the Italian and the European law regarding, for example, the Italian regimen for expropriation. The Strasbourg Court has intervened several times to rule that Italian criteria for calculating expropriation payments, which were well below market value, were incompatible with private property guarantees established by the European Convention [20]. Even in this instance, though, it was not a case of collision of the principles guaranteeing property rights, which in fact are equally solemnly established by the fundamental acts of national and European law, but rather the differing degrees to which they should be taken into account in their practical application.

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[17] *Corte di Cassazione* United Sections 500/1999.

[18] Act 205/2000.

[19] A. Sandulli, *La proporzionalità dell'azione amministrativa* (1998).

[20] Among many judgments of the Court opposing the systematic and structural infringement of art. 1 of the first Protocol of the ECHR, Scordino 29 July 2004.

Problems caused by a potential hiatus between national and European principles may be considered resolved, due to two important reforms dating from the early years of this century.

Following the 2001 constitutional reforms, Community and international law is formally binding upon State and regional legislators in the exercise of their legislative powers (art. 117, par. 1, Constitution). Rulings by the Constitutional Court offer examples of the effects that the reforms had on the Italian legal system. For example, in matters of expropriation, the Constitutional Court considered the amount of compensation fixed by Italian law compatible with the constitutional guarantee of the property right. The Strasbourg Court instead considered those amounts incongruous and in conflict with art. 1, Protocol 1 of the ECHR, as they did not reflect real market values, particularly when the property being expropriated was land with outline planning permission. Since the reform, the Italian Constitutional Court has modified its approach so as to include the Convention rules, as interpreted by the European Court, as "parameters for integrating" the constitutional rules [21] Another example of the level of integration following the reform is provided by the action undertaken by the Constitutional Court when, for the first time, it made a preliminary reference to the Court of Justice in order to verify the compatibility of a regional law passed by the Region Sardinia – which introduced a new tax levied on all planes and ships arriving there - with the European principles of free circulation and competition [22].

The reform of the administrative procedure act (l. 15/2005) includes "the principles of Community law" (art. 1, paragraph 1) among the principles that govern administrative action. Whereas already existing references to Community principles made by the Italian laws in European field have to be considered unnecessary, the new *renvoi* represents a specific choice towards a generalised opening-up of the Italian legal system to the Community law, and has tended to affect administrative law much more comprehensively than it would otherwise have done, in merely conforming to Community obligations. It is no longer necessary to investigate the degree of incidence of Community law on each

[21] Constitutional Court348/2007.
[22] Constitutional Court 103/2008.

action carried out by the public administration, but rather to derive the principles influencing the whole action of the national administration from Community law.

2. The Governance perspective.

2.1. Organization and personnel.

aa. Bases of the administration's organization.

The primary source of the organisational regimen governing the public administration is the law, as laid down by the Constitution (arts. 97 and 98). As the reservation of parliamentary law has a relative character [23], non-essential aspects of the organisation may be defined by secondary rules, and thus by the public administration's own regulatory powers, where these exist. Some legal scholars maintain that the Constitutional proviso may be the foundation of a symmetrical reservation of the organizational function in favour of the executive [24]. The point is controversial, but of little practical relevance, since the government has been given a general power under the law to regulate the organisation and the functioning of the public administration [25].

A portion of organisational power is given to each public administration, but its amount varies according to the degree of autonomy of the structure involved. Entities with legislative powers enjoy of course the highest level of autonomy, and are thus capable of operating within the reservation of law. This is the case, not only for the State, but also for the regions and the Autonomous Provinces of Trento and Bolzano, which, within the areas of their competences, can define independent organisational models through their own legislative acts.. Public bodies provided with statutory and regulative powers, like municipalities, also have organisational autonomy, within the limits established by the law. The levels of organisational autonomy of other public bodies are set externally, and they are only responsible for the small-scale regulation of their day-to-day work. Wherever its structure comes

[23] Constitutional Court 102/1989

[24] M. Nigro, *Studi sulla funzione organizzatrice della pubblica amministrazione* (1966).

[25] Art. 17, par 1, (d) Act 400/1988.

from, according to the Constitution the definition of the organisational model of the public administration is nonetheless oriented towards the pursuit of objectives in the public interest, as identified by the law, respecting criteria of efficiency, efficacy and cost-effectiveness, impartiality and transparency of administrative action.

In the traditional scenario, public administration coincides with State administration. The local administrations have always formed part of this. The State administration consists in the ministries, hierarchically organised structures under the overall responsibility of a minister. The number of ministries is fixed by law, and they are currently twelve. As the minister is at the same time a member of the Council of the ministers, and as such of the Government, and is also the head of the State department over which s/he presides, the model guarantees the connection between the public administration and Parliament, to which the Government is linked by a fiduciary relationship (Art. 94 Constitution). The ministry has its own more or less complex internal organisation, which also includes peripheral branches that are normally run by the central office.

The Italian system began to move away from this model to a significant extent in the early decades of the 20th century, when administrative functions started to be transferred from ministries to external legal bodies which had been created *ad hoc* and were linked to the ministries through a less strict connection than the one between the ministries and their offices.

The introduction, by the republican Constitution, of the organisational principles of autonomy and decentralisation (art. 5 and Title V) and their implementation over the course of time, culminating in the overturning of the ordering of levels of government (art. 114) and the constitutionalisation in 2001 of the subsidiarity principle (art. 118) [26], mark the radical shift away from the original design. The levels of government have not only multiplied, but have been reorganised on a bottom-up basis, so that under the new 2001 formulation, «The Republic is composed of the municipalities, the provinces, the metropolitan cities, the regions and the State» (Art 114 (1). Each level is basically guaranteed an organisational connection between the

[26] Constitutional Act 1/2003.

administrative power and the citizens, which can go through either the same fiduciary circuit of the elective assemblies towards the organs of government or through the direct election of those in charge of the various administrative positions, such as town mayors [27]. At the same time, the need became apparent to distinguish the political *corps*, in charge of defining political policies, from the administrative *corps*, in charge of carrying out strictly administrative functions. The multiplication of organisational structures with a certain level of independence from political power in the last decades of the 20th century , the so-called independent authorities, posed new problems of legitimation of the powers that they had been given. To that end, the legislative base of the institution of the each authority, and the procedures to identify the person for the position and his/her specific attributes in terms of prestige and authority have been upgraded.

The Italian administrative system has thus become more and more complex over time [28]. The new territorial autonomous bodies such as the regions, the provinces, and the metropolitan cities, which join the already existing municipalities (of ancient tradition, but like the provinces reduced to local district status as a result of State decentralisation during the fascist era) create new administrative structures that are largely independent from the State. Their leaders are elected more or less directly by the local communities, which have their own political and administrative powers. They join the State administration in a complex network of organisational structures.

Within this complex system of administrators, administrative functions are distributed according to criteria of subsidiarity (art. 118 Constitution). Administrative functions are attributed to the governmental level that is closest to the citizen, which basically means the municipality, unless such functions have to be given to a superior level (provinces, metropolitan towns, regions or the State [29]) in order to guarantee uniform

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[27] L. Vandelli, *Il sistema delle autonomie locali* (2005).

[28] L. Torchia (ed.), *Il sistema amministrativo italiano*, (2009), offers an up-to-date and well-reasoned representation of the Italian administrative system. On the trends of the national Government, G. della Cananea, *The Growth of the Italian Executive*, in P. Craig and A. Tomkins (eds.), *The Executive and Public Law* (2005).

[29] Constitutional Court 12/2004.

practice and an adequate and efficient exercise of them . The principle of subsidiarity represents the criteria for the allocation of the functions and the parameter of lawfulness of the organisational choices of the legislators. For this reason, the law currently States, for example, that even in the exercise of substitutive power, when there are regions in default (art. 120 Cost.) that warrant the nomination of an external administrator, the State "must bear in mind" the principle of subsidiarity [30].

The State administrative structure too has been overhauled in both its central and peripheral aspects. The central organisation has seen the reform of the Government offices (the *Presidenza del Consiglio* and the ministries), with the strengthening of the steering functions of the Prime Minister, the reduction of the number of ministries, often through merging (for example, there is now only one Ministry for Economy and Finance, and only one Ministry for Industry), the creation of "departments" for homogeneous functions, and the adoption of the "agency" model for technical-operational functions (for example Emergency Services, or Tax Revenues) [31]. The Ministries of State are complex structures with their own staff and resources, differentiated from one another according to the functions they exercise. In peripheral areas, the old prefectures have been replaced by Government territorial prefecture offices, which have competence over all functions that have not been specifically attributed to specific offices.

Although the Constitution which resulted from the 2001 reform expressly sets out the principle of differentiation (art. 118), in reality the organisation of regional, provincial and municipal administrations tends to follow the organisational model of the central State. This includes an assembly, elected directly by the citizens, equipped with normative powers, a government with executive powers, and a president (a mayor in the municipalities) who is in charge of the administration. Contrary to what happens at State level, though, it is specified that the president (the mayor in the municipalities) is directly elected by the citizens (only regions may have statutes offering different solutions), with the aim of making the executive more stable and government action more efficient.

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[30] Art. 8 par. 3 Act 31/2003.

[31] A. Pajno, L. Torchia (ed), *La riforma del governo* (2000).

The political character of public administration, resulting from the fact that its management is elected, is limited by the principle of impartiality, which the Constitution sets out in broad terms as an organisational principle (art. 97), and then further specifies the rules regarding public offices and the status of those who are in charge (art. 98). From an organisational point of view, the principle is expressed in the separation or distinction between political and administrative activities, between political offices and management offices. The principle of the separation between political power and administrative power was strengthened in the last decade of the 20th century and has been applied at all levels, but primarily at the State administrative level. Based on this, political organs have policy functions, while management organs have managerial functions. The former are politically legitimated to establish objectives, the latter are technically and professionally legitimated to implement them through the realisation of the objectives that have been established at political level. Although this may appear obvious, in practical terms, the border between the two sides is not well defined and this creates uncertainties [32].

A description of the Italian organisational system cannot overlook referring to the well-known notion of "public body" (*ente pubblico*) that has always been one of its main features[33]. The organisational model of the public body has been particularly successful and has been utilised since the times when the State took on activities, including economic enterprise, and the "nationalisation" of large parts of the society (in particular of the bodies which are representative of professional categories and workers, according to the scheme that is typical of a corporative system) occurred through the creation of new public bodies. This model continued to be adopted for a long time, so much so that at a certain point there were tens of thousands of public bodies (naturally, the territorial bodies are part of this group, of which the municipalities alone number more than 8000). Thus it became necessary to reorganise the system and reduce public expenditure.

The State legislators have intervened regularly since the 1970s to reorganise the system, abolishing public bodies that were considered redundant and limiting the creation of new ones.

[32] F. Merloni, *Dirigenza pubblica e amministrazione imparziale*, (2006).
[33] G. Rossi, *Gli enti pubblici*, (1991).

However, especially over the last few years, the need to comply with Community rules aimed at the reduction of public expenditure and the goal of improving the quality of services has led to drastic measures being taken to abolish public bodies recognised as unnecessary [34], or their transformation into companies or foundations if it was felt that their work would be carried out more effectively that way [35], or the generalised elimination of several categories of public bodies that were singled out because of their small dimensions or the type of functions they carried out [36].

Broadly speaking, a public body means a legal entity that has public status – either because it has public powers or because it is functionally linked to subjects that have public powers - and is governed by particular rules, different from those regulating private legal entities. This category includes a heterogeneous multiplicity of types. From a systematic point of view, they have the form of the public body, and are defined as public territorial bodies, first and foremost all the representative bodies with a territorial basis, i.e. the State and the other autonomous bodies mentioned earlier (regions, provinces, municipalities). Economic public bodies, created in the first half of the last century to carry out primarily entrepreneurial activities, have become less important, after the privatisation process, which transformed many of them into companies. Some worked as holdings, managing State participation in private companies, such as Iri, Eni, and Efim; others, like Enel (*Ente nazionale per l'energia elettrica*), operated directly as conventional enterprises. A large variety of public bodies continue to collaborate with State administrations and other territorial bodies, exercising instrumental or service functions vis-à-vis the latter's functions. These public bodies are referred to as instrumental, auxiliary or service bodies. Other public bodies exercise functions of general interest not directly linked to a specific level of government (such as INPS, *Istituto Nazionale per la Previdenza Sociale*), or are remnants of the old phenomenon of nationalisation of private associations

[34] Act 448/2001, so called "*legge finanziaria*" (financial Act) 2002.
[35] Act 137/2002.
[36] Decree 112/2008.

(such as *Automobile Club d'Italia* or professional associations for lawyers, doctors, engineers, etc.) [37].

Since the 1980s, many entities which have followed the organisational pattern of agencies have been created. These agencies carry out technical duties for public administrations, including regional or local ones. The agency represents the same phenomenon of the externalisation of State functions to another public organisational entity which, in the past, was a role assumed by public bodies [38]. Although general rules governing agencies have been issued at the State level with the aim of maintaining a homogeneous organisational model, this category is still disciplined in a rather chequered way [39].

The organisational of the Italian public administration would not be complete if we did not mention the independent administrative authorities, created during the last decades for the exercise of public functions of market regulation and safeguarding of fundamental rights. Their propagation has been facilitated, not only by obligations to implement European law, but also by the weaknesses of Italian political institutions in the last decade of the 20th century [40]. The most important of these authorities are the Competition Commission (*Antitrust*), the Authority for the regulation of energy and telecommunications, the Authority for the guarantee of the right to strike in essential public services, and the data protection Authority. Some older institutions have been included in the category of the independent authorities, and even considered a sort of prototype of them, such as *Banca d'Italia* (founded in 1893), *Commissione nazionale per le società e la borsa Consob* (1974), *Istituto per la vigilanza sulle assicurazioni Isvap*(1982).

In order to protect the interests entrusted to them, considered by the system to be particularly important, or anyhow to be removed from the influence of political, economical and

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[37] V. Cerulli Irelli, G. Morbidelli (ed.), *Ente pubblico ed enti pubblici* (1994).

[38] *Corte di Cassazione* United Sections 11/2001: the agency model is adopted " in those sectors of administrative activity where the creation of bodies which are still public is to be preferred to a reform in the direction of private law, but such as to permit the management of activity public interest to be carried out in a more flexible and effective way, separating the political, decision-making phase from the technical-applicative one".

[39] L. Casini, *Le agenzie amministrative*, 1 R. T. D. Pubbl 393 (2003).

[40] F. Merusi, *Democrazia e autorità indipendenti* (2000); M. Clarich, *Autorità indipendenti. Bilancio e prospettive di un modello* (2006).

bureaucratic powers, these authorities have been given a great deal of independence. The position of neutrality and independence from external interests is guaranteed by the personal characteristics of those in charge, such as professional competence, technical skills, independence and prestige, and also by a special condition of organisational and managerial autonomy established by law. The authority evaluates the interests entrusted to it by being fully independent and outside any governmental political influence. Because of this, and because of the type of powers that they exercise (regulatory, administrative, punitive and monitoring), it is felt that independent authorities cannot be included within any of the three traditional powers of the State [41]. The regime of judicial review of their acts is that governing ordinary administrative decisions.

Finally, the exercise of public functions by private parties and by the public administration, where it takes the form of private law, should also not be overlooked, has increased considerably over the last few years. The privatisation of many public bodies that continue to exercise public functions, albeit in a private form, creates the phenomenon of the utilisation by the public administration of private companies for the pursuit of public functions [42]. On the other hand, the new art. 118 of the Constitution introduces so-called "horizontal subsidiarity", namely the principle by which the execution of activities in the public interest is not limited to public bodies; in fact public bodies must facilitate citizens' autonomous initiatives, either individually or grouped in associations [43].

bb. Admininistrative personnel and civil servants.

For many years, the working relationship between the public administration and its staff has been the subject of special regulation, different from that governing private parties, and is regulated by a special legislative act called "Statute of State personnel" [44]. Moreover, administrative courts have dealt with all

[41] Constitutional Court 226/1995

[42] M, Cammelli, M. Dugato (ed.), *Studi in tema di società a partecipazione pubblica* (2008).

[43] G. Arena, *Il principio di sussidiarietà orizzontale nell'art. 118 u.c. della Costituzione*, in AA. VV. (ed.), *Studi in onore di Giorgio Berti* (2005).

[44] Decree of the President of the Republic 3/1957.

disputes in this field since 1923. The idea of the public nature of public jobs is confirmed several times in the already mentioned constitutional provision regarding organisation matters (art. 97) and the reservation of law that it includes, which, according to one interpretation, would be extended to the regimen for jobs with public administrations.

The 1993 reform of public employment [45] has superseded this regulation, which effected an almost complete privatisation of the work relationship for employees in the public sector [46].

Some residual categories of staff that carry out tasks traditionally linked to the essence of sovereignty, i.e. military personnel, diplomats, prefects, magistrates, and police, have not been privatised and are still subject to a public regimen. The same is applicable to university professors. As a result of the reform, notwithstanding the power that each administration has of organising its own offices (which includes determining staff numbers needed for each task), the working relationship is subject to the same rules that govern private work, with respect to the general legislative regulation of the area and of collective work contracts. Collective contracts are stipulated for each public administration sector by the collective representatives, namely the trade unions which represent the workers, and a special agency (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni ARAN*), which represents the public administration [47].

Other aspects that have not been privatised – other than the definition of internal organisational issues and the number of staff required – are the procedures for the selection of personnel, aimed at ensuring equal opportunities of access to work, and also at verifying the professional skills of those who apply for a position. Under the Constitution, in fact, candidates for public employment are normally selected via a public selection procedure (art. 98).

The reform should have profoundly modified public employment, including the abandonment of the criterion of length of service as a determining factor for career progression, in favour

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[45] Legislative decree 29/1993. The reform has been completed over successive phases, in final form as legislative decree 165/2001.

[46] S. Battini, *Il rapporto di lavoro con le pubbliche amministrazioni* (2000).

[47] A. Corpaci, *Agenzia per la rappresentanza negoziale e autonomia delle pubbliche amministrazioni nella regolazione delle condizioni di lavoro*, 3 Le Regioni 1025 (1994).

of merit, which should also have been linked to salary. The results have not been quite as anticipated. Salaries in the public sector have gone up more than those in the private sector, and executives' salaries have increased the gap with respect to lower level staff salaries. Promotions based on merit, which have replaced automatic career progression, have become generalised as they are agreed to during collective bargaining [48].

According to official data, the number of people employed on fixed-term and permanent contracts in the Italian public administrative sector exceeds more than three and a half million individuals (equivalent to 16% of people in employment in Italy) at an annual cost of approximately 150 billion euros. Most workers are employed in the education and health sectors (32% and 20% respectively), while 19% are employed in regional and local administration[49]. Furthermore, only a small proportion of this considerable number of professional employees work in what can truly be described as the bureaucracy and in particular in the higher ranks, namely civil servants at the highest level: regarding staff employed in the Ministries, out of approximately 200,000 individuals, about 2% are at managerial level [50].

The so-called *dirigenza amministrativa* (civil service management) represents, in the Italian system, a distinct professional category as regards other employees, which since the 1970s has enjoyed special status. The reforms of the 90s have also had a marked impact on this sector of public employment, redefining the role and the relationship with political bodies, and bringing about in particular a large-scale transfer of power from the latter to the civil service managers. The political bodies fix objectives and agendas, whereas civil service managers take all the necessary action to implement these objectives and programmes,

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[48] A. Corpaci, *Pubblico e privato nel lavoro con le amministrazioni pubbliche: reclutamento e progressioni in carriera*, 1 Lav. P. A. 375 (2007).

[49] Data from the "Osservatorio sul cambiamento delle Amministrazioni pubbliche" (OCAP) (RGS, 2004; ISTAT, 2005). More exactly, according to data supplied by the Ragioneria Generale dello Stato (RGS), 3,571,379 individuals as at 31 December 2004. As regards 2005, a certain degree of stability can be observed, attributable to an increase of 0.6% in the aggregate total of public employees (which in 2005 was 3,592,887 individuals), and an increase of 2.7% in the cost of public sector employment (which in 2005 amounted to 148 million euros).

[50] Data from OCAP.

adopting all measures which involve the administration with outside bodies. In this context, the managers are responsible for the administrative aspects of management and the results which follow. Balancing the politicians' loss of power, more significant power has been granted to management-level civil servants and in particular, the power of assigning and revoking management responsibilities.

The distinction between the management role, which is accessed by a process of public selection, giving rise to a stable employment relationship, and managerial responsibility, which is assigned by the political body on a fiduciary basis, is in fact a function of this organisational arrangement. The special responsibilities assumed last for a fixed period and are renewable at the discretion of the political body concerned. Moreover, it may be brought to an end earlier than anticipated, either as a result of a change of government, so far as the higher managerial responsibilities are concerned, or in general where there are negative results on the part of managers concerning their management or their failure to achieve specified objectives.

Attempts on the part of national and regional law-makers to further increase the fiduciary nature of the relationships between top political and civil service management and to extend the scope of the spoils system have been neutralised by the Constitutional Court, which has been invoked on several occasions to rule on their compatibility with the principle of impartiality and good functioning of the administration. Lately, the Court has established that only so far as the very top managerial roles are concerned, can the principle, introduced in 2002, of automatic cessation of duties within 90 days of the new government taking office apply. Leaving aside these exceptional cases, revocation of managerial responsibilities is only allowed provided there is a reasoned decision following an evaluation of results and on the basis of fair procedure [51]. The Court further specified that where managers of technical structures providing services are concerned, the link with the political body does not

[51] Constitutional Court 103/2007, which establishes that art.7 (3) of Act 145/2002 is not lawful, which had operated to revoke all State special managerial responsibilities.

predicate political allegiances that the spoils system cannot legitimately apply [52].

cc. The influences of the European law.

The changes introduced by European law in national administrative organisation have concerned the system of public intervention in the economy, characteristic of the Italian administrative system throughout the 20th Century, rather than the organisational solutions which function in a restricted way to implement, within the national system, the Community policies in this sector.

The Italian public administration system has never, from the structural point of view, demonstrated particular difficulty or resistance to adapting to the implementation requirements of Community law, even in the absence of direct European provisions regarding organisational aspects, nor of adopting of their own motion if necessary , the structural changes which are convenient to achieve the purpose. Thus, for example, taking into account the plurality of national bodies implementing Community law or policies, possibly even independently, a Department for coordinating Community policies has been established since 1987 under the President's office in the Council of Ministers, charged with the task of coordinating the European Union relationships of all national bodies involved. Of course all the prescribed organisational innovations have been introduced whenever Community law requires specific organisational models to be adopted, as occurred, for example, with the establishment of the various regulatory authorities. In all these cases, national authorities implementing EU law can take action both in relation to matters which strictly concern the Community, as well as in relation to national interests, within a system which is becoming increasingly integrated and complex [53]. The result, common to many other national systems too, is to place emphasis on a network rather than a hierarchy in the organisation of public

[52] Constitutional Court 104/2007, nullifying the law provision of the Lazio Region, which established that top managerial positions in health authorities fell with the commencement of a new government.

[53] L. Saltari, *Amministrazioni nazionali in funzione comunitaria*, (2007).

affairs, which now connotes a high degree of inter-dependence, complementary in nature and complex in the action undertaken [54].

However, the heaviest impact on the Italian administration can be seen in its organisation, namely in approximating the national organisational structure to the fundamental framework underpinning the European institutional and economic system [55].

The opening up of the market has brought about the dismantling of the powerful system of State participation and more generally the public economic bodies. The gradual liberalisation of public utilities such as transport, postal services, or economic sectors of strategic importance such as energy, has allowed private enterprise to enter the marketplace. The prohibition on State aid has operated to prevent the continuance of State share-holdings which had involved the acquisition and management of the State in formally private companies by the so-called public economic bodies. Such bodies in their turn were under the directional control of the Government, which exercised its power though an appropriate Minister for the State share-holdings. The great public economic bodies managing the State monopolies were transformed into share companies as a result of the substantial privatisation, wholly or in part, of the public capital in their hands. When the Stability Pact was approved (1992), the privatisation of many public bodies and the sale of their assets allowed Italy, saddled with a huge public deficit, to meet the commitments made as a consequence of joining the pact. And even today, the need to respect the Maastricht parameters by reducing public spending continues to require structural intervention which affects the organisational set-up of the Italian public administration.

From another perspective, the concept of a "body governed by public law" developed by the Court of Justice to define the range of application of the Community law of public contracts has imposed, at least so far as safeguarding competition is concerned, the recognition of the public nature of organisational phenomena, which are only formally private. In this way, in accordance with the European orientation, Italian courts have re-classified as

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[54] C. Franchini, E. Chiti, L'integrazione amministrativa europea (2003).

[55] M. D'Alberti, *Libera concorrenza e diritto amministrativo*, 1R. T. D. Pubbl. 347 (2004).

coming within the category of a body governed by public law such companies as the *Società Autostrade per l'Italia* spa [56] (the company running Italian motorways), because of the substantially public nature of the its activity, Rai spa [57], (the Italian public broadcasting company) because of the control and power of appointment of the State and the purposes of public interest for which it was founded. Whereas the courts have not so held a company which manages a gambling casino, because the activity undertaken is not in response to a collective interest and is performed for profit [58].

One area which has undergone far-reaching innovations under the influence of European law is famously the public services sector and, so far as relevant for the present purposes, the organisational models for managing them. Mention has already been made of the radical transformation which the bodies which managed various public services with State involvement and which in many cases brought about their privatisation, such as happened for example to the body which managed electrical energy, public transport and the postal service. The issue is still open so far as local public services are concerned, where there is potential conflict between the forms of organisation used by the local authorities to manage them and Community principles of safeguarding the market and competition. The well-known question of the limits of application of the in house model in the case of State-owned bodies has also captured much attention in the Italian legal system. Many of the leading decisions of the Court of Justice in this field have arisen from Italian cases coming before the Court [59]. The question still open concerning local public services in the Italian system is whether the in house classification can be applied in the case of a company with mixed public and private ownership whose private partner is selected, as Italian law

[56] Council of State, IV, 182/2008.

[57] *Corte di Cassazione*, United Sections, 10443/2008.

[58] Regional Administrative Court (TAR) Valle d'Aosta, 140/2007; Corte di cassazione, I, 6082/2006.

[59] As representative, see ECJ 18 November 1999, case C-107/98, Teckal; 13 October 2005, case C-458/03, Parking Brixen; 11 May 2006, case C-340/04, Carbotermo e Consorzio Alisei, 8 April 2008, case C-337/05, Commission/Italy; 17 July 2008, case C-371/05, Commission v. Italy.

provides, by means of public and open tendering procedures, for the period of service conferred [60].

Finally, so far as administrative organisation is concerned, there are no points of contention with the European Convention. The breadth of the principle of judicial review of administrative acts and the fact that all decisions affecting individual's interests may be reviewed by a court usually excludes the need for enquiry into the independent and impartial nature of the authority making them, since an appeal to an independent and impartial body, namely the court, is in any event guaranteed.

2.2. Administrative action and procedure.

aa. Foundations of administrative procedure.

The need to interpret public administrative action in legal terms developed towards the end of the 19th Century and was centred on the notion of administrative act [61]. In conceptual terms, the construct functions principally to protect the private citizen in the face of public power and is linked in its turn to the emergence of the subjective concept of *interesse legittimo* (legitimate interest or expectation).

The term legitimate interest means the legal position of a private individual in the face of the exercise of public power: it is a central, specific concept in Italian administrative law. It may consist in a beneficiary's expectation that may derive from the exercise of administrative power (under a favourable provision), or in a right which, as a result of the exercise of administrative power (under an unfavourable provision), is 'reduced' to the status of legitimate interest. It is said that legitimate interest can be distinguished from a subjective right (*diritto soggettivo*) (that is, a true right) in that the legal system does not provide direct and complete protection of it, but only occasional protection, that is, it is protected to the extent that its infringement relates to an unlawful aspect of the act giving rise to it. Thus, for example, in relationships between private individuals, property rights are fully and directly guaranteed by the legal system, and if infringed, a claim can be set up to an ordinary judge in order to redress the

[60] The compatibility of this solution with Community law was considered by the Council of State V, 5587/2008.

[61] F. G. Scoca, *La teoria del provvedimento amministrativo dalla sua formulazione alla legge sul procedimento*, 1 Dir. Amm. 1 (1995).

grievance. Conversely, when the right, it could be the same property right, is adversely affected by the exercise of administrative power, it turns into a legitimate interest and only indirect protection is available. The private party entitled to the interest may ask the court to review the legitimacy of the administrative action which has affected him; if the court establishes that the action is unlawful, it will be annulled.

Italian legal scholars, in interpreting the concept of legitimate interest, have drawn attention to the fact that its weak points are linked to the indirect nature of the protection available, and they have criticised this. On the one hand, the fact is emphasised that protection for "goods of life", underpinning the legitimate interest is indirect, but proceeds by way of challenging the offending decision. As a result, it is conditioned by various factors: from the costs to be born by the complainant in challenging the action, the short period of time (60 days) in which the complaint must be lodged, the necessity to stipulate expressly the alleged unlawful aspects of the action, to the prospect that normally the claimant can only seek to have the decision quashed and not a remedy of *certiorari* or, at any event, one that allows the court to order an action. On closer inspection, many of the limiting aspects are no different from those encountered in other legal systems when protection is sought against the exercise of public powers. However, the more marked limitation, and one which used to be a particular feature of the Italian experience, concerns, as noted previously, the absence of any possibility of claiming compensation for loss or damage arising from the infringement of legitimate interests. The road to overcoming what legal scholars have defined as the "dogma" of the impossibility of claiming compensation has been long and hard.

The first step was taken with a ruling that compensation could be claimed for damages arising out of the infringement of a legitimate interest deriving from the reduction of a true right. Still following the principle underlying the theory of the downgrading of the right, the disappearance of the decision would correspondingly remove the downgrading and thus would permit the revival of the right. Hence the ordinary courts – which still had jurisdiction over such matters until 2000 – had reached the point of confirming that the legitimate interest of someone who had been adversely affected by, for instance, a compulsory purchase

order expropriating property, which had been nullified as being unlawful, would acquire the full force of the original right again, which would give rise to a claim for compensation. It was only in 1999, as has been noted, that the limitation fell definitively, with the judgment in case no. 500 given by the *Sezioni Unite* (United Sections) of the *Corte di Cassazione*. Once the traditional interpretation of indirect and occasional protection had been overturned, the need for full and direct protection of the goods of life underpinning the legitimate interest is reaffirmed, including through claiming compensation for loss arising from an unlawful decision which has caused damage [62].

As will be seen more clearly when dealing with the administrative justice system, the protection of interests has always been the province of the administrative courts, which provide it through the exercise of the power of review of the lawfulness of administrative action. The 1889 law which established the 4th Session of the pre-existing Council of State, conferring upon it the functions of an administrative court, gave the newly established court, the power to quash unlawful administrative decisions which damage legitimate interest and identified as grounds for judicial review the three cases of lack of competence, violation of the law and excess of power (*eccesso di potere*). These grounds still remain today as the perspective through which the court reviews the lawfulness of administrative decisions.

Lack of competence arises where the decision is taken by an authority which differs from the one it is empowered by law to take. Violation of the law occurs when the administrative action is in conflict with a specific legal provision governing its action. The question of *eccesso di potere* is more complex, typically a defect in the exercise of discretion by the administration. This originally happens through a deviation of the power, a direct importation from the *detournement de pouvoir* of French law, which consists in the use of power for a different purpose than that contemplated by the law. Subsequently the Council of State classified other cases of misuse of administrative power within the class of *eccesso di potere*, considered as being 'symptomatic' of misuse. Amongst these, in particular, are the following: breach of the duty to give

[62] A. Zito, *Il danno da illegittimo esercizio della funzione amministrativa* (2003).

reasons; conflict with standards of consistency, logic and reasonableness in administrative choices; that facts represented by the administration do not correspond to the actual situation; defects in recognising interests in the procedure and more generally, procedural improprieties which do not amount to a breach of the law, and the evident injustice of a decision. Over the course of time, such instances acquire independent force, in that they assume the character of grounds with *eccesso di potere* consequences, even in the absence of alleged actual or presumed deviation.

Naturally, a definition of the regimen and an analysis of the defective course of the administrative decision also implies an evaluation of the respect paid to the rules regarding the formation of the public will (*volontà pubblica*) under which the decision to act was taken by the administrative authority. Over the years, the importance of these procedural rules has steadily increased, from at least two different perspectives. First of all, various administrative procedures are regulated by law in minute detail, with the consequence that their breach is tantamount to a breach of the law. For example, the procedure of expropriation, or that relating to town planning, has always been governed by a quite detailed regulatory regimen. But also many other procedures relating to various sectors are regulated, to a greater or lesser extent, by the law. The courts extrapolate the relevant principles from these regulatory regimes, which they are beginning to apply even in the absence of specific provisions of law.

From a second point of view, courts tend to place increasing emphasis on the area of *eccesso di potere*, extending the range cases of 'symptomatic' misuse of power. Many of them aim to make metajuridical rules such as rationality or reasonableness, correspondence between facts as postulated by the decision-maker and the actual situation, fairness, protection of legitimate expectations, good administration, parameters for the lawfulness of administrative action. Some chiefly concern the formation of public will and consequently procedural aspects, such as an evaluation of the completeness and correctness of the recognition of interests), the evaluation of private interests and the procedural inquiry in general.

However, having framed the issue in terms of the validity of the act, the focus of attention tends to concentrate on the

content of the administrative decision, rather than the *iter* which led to its formation. While the courts strengthen their powers of inquiry into the substance of the decision, which may be revealed through the reasons given, and determined scrutiny of aspects of symptomatic misuse such as unreasonableness, grave and manifest injustice and distortion of the facts, nonetheless the problems concerning procedural protection of the private individual, and his or her participation in the procedure still remain in the background – unless the relevant rules governing each procedure expressly take these factors into account.

Only subsequently, midway through the 20th Century, did attention formally shift from the act itself to the procedure, mainly thanks to the work of legal scholars, who interpreted it by concentrating on its structural aspects. That is to say, they looked at it as a sequence of acts and operations which, by means of a process oriented to attainment of a public goal, leads to the decision eventually adopted [63]. This, therefore, is a procedure taken as meaning a formative process of the administrative will, as a source for the recognition of interests, with the prospect of better care-taking of the interest entrusted to the administration providing it, than as a forum for participation. Nonetheless, it was against this background that the question of the so-called "fair procedure" was first posited, namely a process which is just, because intrinsically it guarantees the private individual the opportunity to participate, not only with a view to ensuring that the administration has a clearer perception of the framework of the interests in relation to which it is acting, but also to safeguard his position. Thus the two functions seen as typical of procedural participation finally come together, namely an enrichment of the procedural process through the contribution made by the private individual to the representation of the interests at stake, and the function of preserving the interests of the individual himself.

The concept of fair procedure includes, in its most developed form, the right to be heard (*audi et alteram partem*). While negating its constitutional status [64], the Constitutional Court recognises its validity on the operational level as a guiding

[63] Reference is made to the work of A. M. Sandulli, *Il procedimento amministrativo* (1940).

[64] Constitutional Court, 23/1978, 103/1993 and 210/1995, 383/1996.

criterion for both lawmakers and those who have to interpret the law [65]. Identifying it as a general principle in the legal system has also had the consequence that regional lawmakers have also had to take account of it, in regulating the procedures that fall within their sphere of competence. The administrative courts in their turn adhere to the principle as a substantive canon of fairness of administrative action, to the point of invoking its origins in *natural justice* [66].

General legislation on procedure arrived in Italy only in 1990, with the passing of Act. No. 241 (Administrative Procedure Act). The reform reversed the previous approach. Prior to this, a body of case law identifying the general principles of the system was built up from occasional, fragmentary pieces of legislation enacted to govern particular procedures; now it is Parliamentary regulation itself that lays down general principles underpinning administrative action, setting down what had been developed by administrative courts precedents over the years. This is for instance the case of the duty to give reasons or the protection of legitimate expectations. But the new regulation offers strong innovative trends as well, in terms of the values inspiring the change – take, for instance, the principles of giving notice and transparency in administrative action, which has made its first appearance on the stage of public administration – or the concrete mechanisms of the implementation of procedural guarantees such as prior notice of a procedure, the fixing of set time for its conclusion and the creation of a specific role of a person responsible for the procedure.

Furthermore, the most far-reaching of the 2005 amendments to the 1990 Act on the one hand recognise the positions already reached by the administrative courts in implementing procedural guarantees, while on the another they introduce some remarkable novel features, such as, for example, the decision that certain formal defects do not invalidate the final decision. As noted, an important innovation provides that the principles of Community law are generally binding in nature.

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[65] Constitutional Court, 13/1962; it is in any case a guiding criterion for both lawmakers and those who interpret the law, 57/1995, 240/1997, 363/1996.

[66] Council of State, IV, 423/1895 *Chiantera*; 299/1900; Council of State, Plenary Session, 14/1999.

We may now pass on to consider the characteristic features of administrative procedure, bearing in mind that, for reasons set out in the description of the historical development, procedural issues from the Italian standpoint tend to become identified with those of administrative action considered from a substantive point of view.

Among the principles which carry greater weight from a procedural point of view, first and foremost the principle of due process should be highlighted. This is linked to the criterion of fair procedure, mentioned above, and the obligation this implies for the administration to offer the chance to be heard to those affected by its action. In this sense, there is express provision for a phase to be dedicated to hearing the interested parties; the possibility of cross-examination is guaranteed under Italian administrative law in procedures which involve measures that are particularly disadvantageous to those affected, such as expropriation or application of penalties, or in especially complex procedures, such as those involving town planning decisions. Furthermore, since 2005, in procedures originating from the request of a private party, the reasons which may prevent the application being accepted must be communicated beforehand to the party making it, so permitting them to formulate their observations *a priori*, which must then be taken into account at the stage of setting out the reasoning.

In other cases, the principle takes the form of a duty on the part of the administration to apply specific rules contemplated in the Administrative Procedure Act, which ensure the effectiveness of participation[67]. The administration must give notice of the start of the procedure to whoever is affected by the final decision, thus permitting those who have received notice to put forward their own reasoned case. Participation may simply take the form of the right of disclosure, or consist in presenting written representations or documents which the administrative body must take into consideration. However, oral hearings involving the interested parties are not expressly guaranteed, but may be permitted by the administration. Likewise, and saving what will be mentioned later in relation to so called consultation procedures, there is no general

[67] Chapter III of the Act.

provision for public hearings, in the sense of the public inquiries familiar to the common-law tradition.

The factor which legitimises participation is the existence of an interest involved in the administrative decision. The interest could be prejudiced by the decision which is to be reached through the procedure. This implies a specific relationship between the interested party and the decision itself, but actual possession of a legitimate expectation in the form of a specific *interesse legittimo* is not an express requirement, since the potential prejudice is identified in general terms by the law. So far as so-called "widespread interests" (*interessi diffusi*) or group interests are concerned, such as environmental issues, which are indistinctly associated with individuals in a collective sense, only organised bodies (associations, committees, organs etc), whose purpose is to protect such interests, are recognised as legitimate participants in the proceedings.

The duty to give reasons for administrative decisions has always existed in the Italian legal order. Consistently applied in the case law relating to decisions with a disadvantageous effect, this duty is now formally set down in the Administrative Procedure Act which has generalised its application, excluding only normative acts (i.e. governmental rules) and acts of a general nature. This is thought to serve a double function: to allow interested parties to know the reasons underlying the decision which is adversely affecting them and to permit judicial review of it. The duty involves the administration setting out the reasoning, both as regards the facts and the law, which supports its decision.

Extending this duty to "all administrative acts" has reduced the importance, for these purposes, of the distinction between binding and discretionary acts; it was only to the latter that the existence of the duty was ascribed by the courts. The importance of the distinction may re-emerge as a result of the introduction, in the 2005 reform, of the category of so-called "formal" defects [68], where it may be considered that the reasoning concerns the form of the act. In fact it is laid down that an administrative decision cannot be quashed by reason of an infringement of procedural rules or the form of the act, where by its binding nature it is clear that its content could not have been

[68] Art. 21 *octies* Act 241/1990.

different from that which was in fact adopted. Thus, regarding reasoning as a formal element of the act, a defect in the reasoning of a discretionary act might remain a ground for quashing it, while the same defect in a non-discretionary act would not be relevant, so long as it was demonstrated – at this point through *a posteriori* reasoning – that the content of the decision could not have been different).

The notion of the transparency of public administration first appeared in the Italian legal system in the 1990 act. The criteria of access to information and transparency stood in contrast to the secrecy which had been the hallmark of Italian administrative law in the past. In this way the previous approach, whereby secrecy was the norm and access to information the exception, was reversed. However, beyond the declaration of principle under the law in force, the institutions which express this principle, primarily the right of access to administrative acts, seem more directed towards the goal of protecting private individuals adversely affected by administrative decisions than as an aim of general transparency in the action of the public administration. The right of access to administrative documents is conferred upon stakeholders entitled to claim before the courts and only in relation to the claim [69]. The Act sets various limits both in regard to which acts are accessible, excluding for example those covered by official secrecy, and for the purpose of protecting the privacy of third parties.

Impartiality has procedural importance. The principle has already been mentioned, with particular emphasis on its connotation of removing the administration from the partisan conditioning of politics and preventing technical decisions from becoming excessively politicized. In this latter sense, and with a more precise reference to procedure, impartiality is identified with the general principle *nemo iudex in causa sua*, and gives rise to the incompatibility of the position of someone who has a personal interest in the issue which has to be decided by the administration. The conflict of interest concerns not only the actual decision-making moment, but the whole administrative procedure, in which whoever is not strictly a stranger to the issue to be decided, cannot participate in any way. In a more general sense,

[69] Art. 22 Act 241/1990.

impartiality in the procedure means that the administration, while called upon to achieve the specific result with which it has been entrusted to deal, must evaluate all the interests at stake, both public and private, and weigh them carefully.

"*Buon andamento*" is often translated using the expression 'efficiency'. The principle is referred to in many provisions of procedural law. It can be summarised as follows: providing for the role of a person responsible for the procedure, namely an individual selected by nomination who takes responsibility, both as regards the internal and external aspects of the conduct of the procedure; the stipulation, provided for all types of procedure, of a date by which the procedure shall terminate, which in any case, in the absence of a specific indication, is normally a period of thirty days; the duty of acting with economy and efficacy, which include a prohibition on lengthening the procedure, for example by calling for a unnecessary advice; the adequacy of the action undertaken to achieve the objective; remedies in the case of the omission to issue advices required by law.

The fundamental principles of reasonableness and legitimate expectation, while less tied to procedure as such, condition administrative activity to an equal extent. Reasonableness, as a natural adjunct to the exercise of power, including administrative power, is an absolute principle of procedure and never takes second place to other principles. Its primary meaning implies a correspondence between the choice made and rules of reason. In procedure, reasonableness is emphasised as a criterion imposing the requirement to weigh all interests, including private ones, characteristic of the exercise of discretion, and preventing the sacrifice of those interests, unless it is strictly necessary to do so. From this perspective, the principle of reasonableness finds advanced expression in the principle of proportionality.

The principle of good faith imposes a duty on the administration to take account of the expectations raised among private individuals [70]. The principle is not expressly set out, but has always been applied by the courts, mainly in the field of so-

[70] F. Merusi, *L'affidamento del cittadino* (1970); F. Merusi, *Buona fede e affidamento nel diritto pubblico. Dagli anni «Trenta» all'«alternanza»* (2001).

called "*autotutela*" [71]. This expression is used to indicate cases in which the administration has gone back on previous steps taken, annulling or withdrawing its own decisions or in any event modifying its own conduct. Protecting expectations results in a limitation of the power of the administration, which, in exercising its discretionary power, must take account of the expectations raised and set out promptly the reasoning underpinning any sacrifice of such expectations. The 2005 reform of the Administrative Procedure Act regulates the powers of annulment and revocation, establishing limits, for the purpose (amongst others) of protecting legitimate expectations, on the power of quashing *ex officio* the administration's own decisions and the duty to compensate whoever is affected by the revocation of a favourable act for reasons of the public interest [72].

Administrative authorities must conclude procedures started by private individuals by express decision. Furthermore, as previously mentioned, the procedure must be brought to a conclusion within the time-limit indicated, or, in the absence of an express date, within thirty days. Once the time-limit has expired, the administration is considered non-compliant and its silence may be made the subject of a specific claim, in the appropriate form, before a court, which, should the administrative body continue its non-compliance notwithstanding a court order, may further nominate a commissioner, to be charged with the task of executing the action in place of the administration which has failed to do so [73].

bb. Foundations of the administrative action.

According to the classic model of State *a droit administrative*, administrative action, in the Italian legal system too, normally takes the form of the exercise of power. In order to pursue the objectives in the public interest which have been entrusted to its, public administration it finds itself, it is said, in a position of supremacy in relation to private individuals, and have special

[71] F. Benvenuti, *Autotutela*, 4 Enc. Dir. 538 (1959).
[72] Art. 21 *nonies* and art. 21 *quinquies* Act. 241/1990
[73] Art. 21 *bis* Act 1034/1971

powers available to them which are not based on a form of contract, but derive from Parliamentary law itself [74].

Administrative powers can be defined and classified in various ways. Administrative power is first and foremost always "typical" in the sense that it is precisely regulated by the law, and is expressed through public acts, administrative decisions, specifically "nominated" by law and characterised by a particular regimen. Its exercise is unilateral and obligatory. The power may be discretionary or bound [75]. From the viewpoint of its effects on the private individual, it may be restrictive or amplifying. However, administrative power may also have a different objective from that of merely dealing with concrete cases and may be regulatory in nature. Here, reference is made to the regulatory powers of the public administration. Moreover, in the Italian legal system, the administrative action takes the form of power also when leading to the adoption of acts of ordinary law, such as contracts. In this case they are referred to as management powers (*poteri gestionali*) [76].

As noted, the concept of the administrative act is central in Italian administrative law. The characteristic features and limitations on administrative power are reconstructed taking this, and decisions in particular, as the starting point. The regimen governing administrative decisions had been defined by legal scholars and case law, and was only partially codified by the 2005 Administrative Procedure Act. The term "decision" means an administrative act which has external and innovative legal effects. It follows that a building permission, a penalty, or a planning decree constitute "decisions", whereas an advice, or the act of consent that an issuing authority must obtain from another administrative body, are examples of "mere acts".

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[74] From this point of view, therefore, art. 1, par. 1 *bis,* Act 241/1990, as amended in 2005, is not of any significance; under this provision, the administrative body, when taking action that is not authoritative in nature, does so in accordance with the rules of private law, unless the law provides otherwise.

[75] Although, according to a minority of legal scholars, administrative action which is fixed by law is not an expression of power, and therefore does not have the capacity to reduce the individual rights with which it is concerned to the status of legitimate interests.

[76] G. Falcon, *Lezioni di diritto amministrativo, I. L'attività* (2009).

Stating that an administrative decision is prescriptive highlights the fact that the administration operates as an authority for the care of the public interest. It is also unilateral, since the sole author is the public administration and the will of the private individual is irrelevant. So far as effectiveness is concerned, it is executory in nature, that is, it of direct effect, and remains so, even if invalid until quashed. Regarding decisions with restrictive effect, effectiveness is subordinate to prior notice to the receiver. Executory effect means that public administration is permitted to execute the decision directly and coercively. According to the principle of legality, however, this possibility is reserved to cases where it is expressly provided for by law.

In distinguishing between discretionary and fixed powers, the Italian approach is to reproduce the models which refer to the different binding degrees of the legislative provision to define the power of choice conferred on the administration. Its distinctive feature lies perhaps in an analysis of the structure of discretionary evaluation in itself as an evaluation of interests. The decisive feature of the discretion in this regard is indeed the comparative evaluation of the interests. The administration pursues the primary interest with whose management it is charged, while taking account of the various other public and private interests involved in the process, including those possibly in conflict with the primary interest[77]. This reconstruction has obvious consequences, both for the definition of the scope of the power to be considered as (truly) discretionary, as well as in regard to the possibility of its being taken to appeal before a court. Options which do not involve a comparative evaluation of interests are not considered discretionary but, for example, are only bound to maximise the primary interest, such as in the case of listed buildings, for their historic or architectural interest. The court can review the comprehensiveness of the procedure, both with regard to the interests taken into account and evaluated by the administration, and the congruity of the evaluation process, including its comparative aspects, applying the standards of reasonableness and also proportionality.

However, defining the action which precedes the actual administrative decision, whether it is discretionary or bound by

[77] M. S. Giannini, *Il potere discrezionale della p.a.* (1939).

law, remains less clear; in particular, the way in which the facts are evaluated. Italian legal order also perceives the need to take account of this area of activity which is neither truly discretionary in the sense mentioned before, since an evaluation of the relevant interests is lacking, nor completely fettered, since in any case the law leaves the authority applying it a certain margin of evaluation. The ambiguous notion of "technical discretion" has been developed to describe this second phenomenon, which for some time has meant that this type of evaluation has only limited possibilities for judicial review, on the basis that the administration has a reserved power of technical evaluation. Also pertinent to this mode of resolution is the fact that until 2000, administrative courts were not permitted to call for expert technical advices, and were therefore not materially in a position to review the technical basis of the choices made by the administration. Since the end of the 20th century, administrative courts have changed their stance, exerting a much firmer control over this kind of evaluation.

The Administrative Procedure Act formalised the practice, previously adopted by administrative bodies but whose admissibility has been doubted [78], of the use of power through agreement [79]. In relationships between private individuals and the administration, there is provision for two types: direct agreements in which the discretionary content of a decision is regulated by consent, and agreements which undoubtedly replace decisions. However, a special regulatory regimen governs these agreements, reflecting their public nature: a preliminary, adoptive administrative decision precedes their stipulation, in order to guarantee the impartiality and good functioning (*buon andamento*) of the administrative action; the administration has a power of withdrawal for supervening questions of the public interest and they are under the jurisdiction of administrative courts.

Administrative power may also take the form of regulatory acts, that is, acts which are administrative in form but regulatory in substance. The regime which governs them differs in certain aspects from that applying to proper administrative decisions. For example, the duty to provide reasons does not apply to them, and

[78] G. Falcon, *Le convenzioni pubblicistiche. Ammissibilità e caratteri* (1984).
[79] Art. 11 Act 241/1990.

the normal guarantees of participation are excluded, occasionally replaced by particular provisions under the law governing them, or, more recently, by the practice of consultation. However, the principle of justiciability applies to these acts as well, which permits legal action by anyone claiming to have been adversely affected by them in a direct and specific way, something which is not always easy to prove, since the provisions are general in content. When this is not the case, the regulatory administrative provision can be challenged, together with the act applying it. In addition, unlawful regulations can also be disapplied by the administrative courts, which, however, are normally precluded from disregarding administrative acts even unlawful ones.

As noted, Italian administrative law also includes within the category of public power actions taken by the public administration which do not differ substantially from those which any private individual could set in motion. The authoritative profile of the decision in this case is not so much constituted by the unilateral nature of the exercise of power as by its function in the public interest. Hiring staff to run the public administration, managing public assets, or dispensing economic benefits such as grants or contributions, are all examples of power of this type, exercised by the public administration. The activity undertaken by the administration and the relationships arising from it are no different in substance from the typical kinds of relationships between private entities. Collocating them within the ambit of powers ensures that they are subject to the rules which govern their exercise and, hence, to substantive and procedural guarantees.

The most usual case concerns contractual relations. The contracts, which an administrative body may stipulate in the exercise of its general legal capacity to engage in private law relations, are in general contracts governed by private law, which are no different to those made between private entities or individuals. Nevertheless administrative conduct which is pre-established to undertake such activity is interpreted in terms of the exercise of power. The act through which the administration stipulates a contract is an administrative decision. The reasons underpinning the decision must give an account of the basis upon which it was reached, including the choice of selection procedure used to choose a contractor. The acts leading to the assignment of

the contract (therefore, the selection competition itself and the act of adjudication) are administrative decisions in themselves.

The action described gives rise to what is known as the "public evidence procedure". Its purpose is just that, namely to provide public evidence of the course of its conduct in forming the intention to contract, which would be substantially devoid of any legal value under ordinary law. By subjecting such actions to the discipline governing administrative decisions, all the substantive guarantees are extended to them (the duty to give reasons, rationality, proportionality, freedom from unreasonable conduct, lack of congruity, etc) as well as procedural ones (of access to information, participation, etc) and legal protection (judicial review), which apply to the exercise of power.

The issue of the consequences for contracts of annulment of the administrative decision, the adjudication in particular, is quite controversial. While the two phases were subdivided between the administrative courts, with jurisdiction over the administrative aspects, and the ordinary courts with jurisdiction over the contracts, the reciprocal, substantive autonomy of the two phases was clear beyond dispute. Annulling the adjudication did not make the contract void, which was something only the administration could seek. The administrative courts, once they had become the only courts competent to deal with matters concerning the award of public contracts, opted instead for the solution of cancelling the contract following the annulment of the adjudication procedure. The issue has re-opened recently with the ruling by the United Sessions of the Cassation Court affirming the permanent jurisdiction of ordinary courts over contracts [80].

cc. Influences of the European law.

The system of guarantees offered by Italian administrative law in regard to dealings with administrative bodies does not differ from the protection, under art. 41 of the Nice Charter, of the right of individuals to see issues concerning them dealt with in an impartial and equitable way, within a reasonable time-span. The administration is under a duty to act in an impartial and even-handed way, and the penalty for infringement of this obligation is the consequent annulment of the act. The power must be exercised

[80] *Corte di Cassazione*, United Sections, 27169/2007.

within a certain period of time which is fixed by law. The expiry of this period with no result opens the way for judicial review. If prejudice arises from the negligent infringement of the obligations indicated, the administration is bound to pay compensation for the resulting loss.

Art. 41 sets out three precise circumstances giving rise to a right to good administration (*buona amministrazione*): the individual's right to be heard prior to measures which are unfavourable to him being adopted; the right of access to decisions which concern him and the duty of administrative authorities to give reasons for their decisions.

The right to be heard in the context of a pre-established procedure preceding the adoption of an unfavourable measure is guaranteed under the participation provisions laid down by the Administrative Procedure Act. To guarantee the participation process there are special provisions placing duties on the administration, from communicating the initiation of administrative procedures that are disadvantageous to them, to announcing in advance the rejection of applications relating to measures in their favour.

Two problem areas can be identified. One concerns the scope of the procedural guarantees, which does not include administrative action aimed at issuing normative acts, general decisions, planning and programming acts [81]. In relation to this type of action, any guarantees depend on the existence of provisions in the law governing such procedures, relating to special cases of participation. Although so far as normative and general acts are concerned, recent practice seems to demonstrate an increase in the use of consultation procedures, a problematic area exists in relation to acts such as planning regulations, which often contain immediately binding provisions, together with a weight of general regulations too. Questions have been raised in the past over some of these, for which the law does not provide a participation phase by interested parties, regarding compatibility with the principle of due process. The Constitutional Court dismissed such claims, on the basis that the principle had no constitutional force [82]. Additionally, the failure to extend the duty

[81] Art. 13 Act 241/1990.

[82] Constitutional Court 107/1994, 313/1995.

to communicate the initiation of administrative procedures that are disadvantageous may raise doubts about the effectiveness of the right to participation, even though it is provided for by the rules governing this sector. Another rule which likewise raises problems is that regarding their justiciability within the short period running from the date of publication, rather than the date of effective full awareness of the interested parties, regarding whom specific communication is not laid down in the rules.

A second problematic point concerns the fact that there is no provision for oral hearing. The possibility of the interested party being called to speak, even though it is neither provided for nor guaranteed by law, is not excluded, but it is left to the discretion of the administrative authority conducting the proceedings. However, it is difficult to imagine that an administrative authority would in fact refuse to hear an interested party who had made a request to address it.

The right of access to administrative acts provided under Italian law only partially corresponds to the right under art. 41 (2) ECHR of every individual to have access to their file, which is intended as a general possibility for people to discover what documentation is in the possession of the administrative authority, regarding their particular positions. In fact, although the right of access is exercisable outside the administrative process as well, it is still safeguarded in order to permit judicial protection of rights or interests of those seeking access. Indeed, whoever has a direct, specific and current interest may have access to documents in the administration's possession relating to circumstances which the law protects and pertaining to the document to which access is requested [83] and the right is in any case guaranteed when knowledge of it is necessary to defend an individual's own interests in court [84]. Moreover, the differing scope of protection between the two systems tends to become blurred, if one notes that under Italian law, an indication in the claim that access is instrumental to obtaining legal protection for a right, is sufficient to permit such access, together with the intention on the part of whoever is seeking access to take legal action, but it is not a requirement that an action has actually been

[83] Art. 22 Act 241/1990.
[84] Art. 24, par. 7, Act 241/1990.

started. Thus it is clear that, as a matter of fact, the only legitimation required to obtain access to one's own dossier in the hands of the administration is to give reasons for the application, indicating the position to be protected and a declaration of the applicant's intention to go to court. The limitations of privacy and professional confidentiality are the same as those contemplated under Italian law, where privacy and professional confidentiality also include those belonging to the public administration itself.

So far as giving reasons is concerned, it has been noted that this is a generalised requirement. The problems may concern exceptions provided for by the law or applied under case-law. In the first place, normative acts and those of general content should be mentioned, in relation to which providing reasons is expressly excluded by law. However, the question should be raised, so far as this is concerned, as to whether the expression used in the Charter of rights (decisions by public administrative authorities) also refers to these types of acts, which clearly differ from concrete provisions both because of the possible damaging effects in relation to the individual who is subject to the administrative decision, as well as the function of the reasoning in normative and general acts. In the second place, on the other hand, the issue is raised regarding the reasons given of provisions which conclude examinations and public selection procedures. The Council of State held until very recently that a numerical vote is sufficient and adequate, but this position was criticised by those who argue that a vote does not take account of the reasons for a decision, but only reflects its outcome.

An issue concerning the effectiveness of guarantees is linked to the previously-mentioned introduction into the Italian system of the so-called "formal defects", whose presence does not always make the decision subject to being quashed. Many of the mechanisms which are there to ensure the correctness of administrative action vis-à-vis private individuals, result in formal and procedural administrative duties, whose infringement, on the basis of art. 21 *octies* of Act no. 241/1990, may prove insufficient to quash the decision. It is true that the consequence of non-voidability is only provided for where binding decisions are concerned and that it is clear that the administrative decision could not have been substantially any different. This would therefore only concern cases where the annulment of the decision

would presumably precede a new decision taken by the administrative authority regarding the same subject-matter as in the quashed decision , to take effect following the renewed procedure. However, it is clear that the solution opted for by the Italian lawmakers, in the absence of other guarantees as an alternative to quashing the decision, weakens the rights of participation of a formal and procedural nature. For this reason, it is open to doubt as to whether they comply with the standards of good administration set out in the Charter [85].

This problem has in fact been raised at national level, too, in terms of the compatibility of the new rules on formal defects with the constitutional principle of justiciability (art. 113 Cost.) and the rule of law or legality in general [86]. At present, administrative courts are demonstrating caution in finding the bases for applying the provision regarding non voidability, and are tending to recoup some margin of protection for the injured individual through a process of evaluating the procedural rather than the substantial aspects of the decision. The decision, while not voidable, would in any case be unlawful in substance, so that the way would still be open for an action for damages for the infringement, in respect of which the sanction of voidability was unavailable.

3. The Democratic Perspective.

The democratic principle is set out in art. 1 of the Italian Constitution, which it refers without distinction to every form of demonstration of "sovereignty" and therefore by implication to the public administration as a public power. The only mention in the Constitution which expresses democratic status as binding in nature occurs with regard to the armed forces (whose organisational system must be informed with the democratic spirit of the Republic, art. 52, par. 3), with the evident purpose of emphasising that the application of the principle is not subject to

[85] D. U. Galetta, *L'art. 21 octies della novellata legge sul procedimento amministrativo nelle prime applicazioni giurisprudenziali: un'interpretazione riduttiva delle garanzie procedimentali contraria alla Costituzione e al diritto comunitario,* www.giustamm.it; D. U. Galetta, *L'annullabilità del provvedimento amministrativo per vizi del procedimento* (2003).

[86] D. Sorace, *Il principio di legalità e i vizi formali dell'atto amministrativo*, 1 D. Pubbl. 385 (2007).

exceptions of any kind. From this specification the idea has developed that democratic status does not end in the legitimation of power to the people, but has a more intense significance, which embraces the adoption of mechanisms involving action shared in by the citizens and which respects the principles and values set down in the Constitution .

Traditionally it is considered that democratic status as applied to the public administration is guaranteed by its connection to Parliament and, through that, to the citizens who elect the MPs. The same circuit of democratic legitimation also works at regional level, in bodies which represent territorial autonomy and is reinforced, so far as municipalities and regions are concerned, by the factors conferring legitimacy directly, through the election of the executive bodies of these entities (the mayors and the regional president as well, where the electoral system, with reference to regional statutes, does not provide otherwise).

The Italian system has come rather late to an awareness of the need for different, and more active, forms of citizen participation in the exercise of administrative power. Only in the 1990s, as we shall see later, did lawmakers put a range of reforms in hand aimed at democratising the public administration, by means of measures such as codifying administrative procedure, making ample space for participation; opening up administrative action to the principle of access to information; involving private citizens in the formative processes behind the major public-sector choices and the promotion of private initiative in carrying out duties of general interest, in competition with public powers. Without doubt, some of these innovations have come about as a result of comparisons made with other countries with more experience in such matters and that supranational influence has played a large part in their adoption.

3.1. Parliamentary involvement.

aa. Parliamentary statute.

The relationship between administrative power and Parliament has already been raised, in dealing with the principle of legality, which is a feature of administrative action. So far as the administration is concerned, the law does not merely represent a negative limitation on it, a factor deriving from its obvious state of

supremacy, but constitutes the fundamental basis of every instance of administrative power. The term law here means, technically, a primary source, whether Parliament-made laws (or regional legislation), or decrees having the force of law enacted by the Government in situations of necessity and urgency which are subject to ratification by Parliament (*decreto-legge*) or by specific Parliamentary delegation (*decreto legislativo*).

It follows, therefore, that in the Italian system there are no administrative powers which originate in the executive, but only powers which have been conferred and are governed by the law. Parliament guides and influences the public administration, determines its modes of action both generally – take, for instance, the radical amendments of the *modus operandi* of the public administration brought about by the law in 1990, setting up a general regimen for administrative procedure – and in the governing of individual exercise of powers, as well as through laws regarding accounting, finance and expenditure.

Moreover, given the basis upon which the Constitutional Court interprets the principle of legality, the law cannot confine itself to considering power as such (formal legality), but must govern the main features (substantive legality), namely the administrative authority in charge of its exercise, the public interest to whose purposes it is directed, its contents and legal effects. The type of power conferred is identified precisely by law. In this way, reference is made to the typicality of administrative powers [87]. Only on very rare occasions can atypical powers be conferred on administrative authorities, in order to meet extraordinary circumstances, where urgent action is required.

The principle of legality is identifiable, as regards certain aspects, with the notion of reserve of primary legislation, either Parliamentary or regional . In fact in many cases the Constitution expressly confers only on Parliament (or regional law-makers) the power to legislate on public actions limiting personal freedom. Additionally, as we have seen, it reserves, at least to some extent, the organisation of the public administration for primary legislation, either Parliamentary or regional . Where such a reserve operates, the Constitutional Court has stated on several occasions that administrative power which is capable of affecting rights

[87] Constitutional Court 35/1961.

protected by constitutional provisions must be subject to appropriate guiding criteria [88]. Hence, for example, laws conferring power to levy taxes and circumscribe property rights must set out precisely the principle elements of such cases which are governed by the administrative authority: identification of the passive parties, appropriate criteria to define administrative discretion, the objectives of the action, the decision-making bodies and their powers [89].

But going beyond the cases to which the reserve applies, it is thought that the binding element of legality pertains to every possible circumstance of the exercise of power, which can legitimately subsist to the extent that it is contemplated by the law. The Constitutional Court gives weight to the link between legality and protection by the courts, which requires that the legislative regimen should never be confined to simply conferring powers on the executive, but must regulate their content [90], the single exception being the case of emergency powers.

Once the limitations deriving from the principle of substantive legality are adhered to, discretionary powers may be conferred on the administration. That is, it may exercise the power entrusted to it, evaluating and adopting whichever is the best solution in the particular set of circumstances. This obviously occurs when the authority making the decision is charged with the task of weighing the interests at stake in relation to a particular event, deciding which should be preferred and to what extent, and conversely, which are the interests to be sacrificed. However, it is thought that a power of evaluation is legitimately attributed to administration, even when the decision to be taken does not

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[88] Significantly, this is the content of the first decision (1/1956) issued by the Constitutional Court after its establishment.

[89] Constitutional Court 4/1957, 30/1957, 36/1958. But see also, beyond cases to do with personal liberty, 36/1959 concerning a law which did not indicate criteria or limits for determining the tariffs for putting up advertisements; and 14/1960 and 51/1960. In this sense 70/1960, (especially point 11) according to which "an financial obligation can be considered constitutionally legitimate even in circumstances where the law does not comprehensively lay down limits, but requires the executive power to determine them, provided that, in this case, it indicates appropriate criteria and limits for circumscribing the exercise of such power".

[90]Constitutional Court, 35/1961, 4/1962, 12/1963, 40/1964; more recently, 307/2003, 355/1993, 359/1991.

concern interests, but facts which do not lend themselves to objective interpretation on the basis of the legal rule or available specific knowledge. This type of case, as we have seen, is referred to as "technical discretion".

For obvious reasons, the monitoring powers of the court over the legitimacy of discretionary activity are limited. First of all, it discounts the fact that, in such cases, the comparison between the decision taken and the legal provision less significant – even though it may retain its importance, for example, for verifying the respect paid to the purposes indicated in the law –and it is expressed in the evaluation of a range of parameters, developed by case-law in the category of *eccesso di potere*, which permits judicial review of the question as to whether or not the discretionary power was exercised correctly. In any case, the court is not permitted to know the merits of the administrative choice to which weighing the interests gave rise.

Administrative action is therefore subject to the law, but it is not exhausted in the mere execution of the law. The administration also enjoys large scope for independent evaluation, in the deployment of which it may decide upon options which are potentially highly innovative. While it is true to say that the lawmakers are free to mould the powers of the administration, it is also true that in many cases there is a need for discretionary powers. The principle of good administrative may require that the administrative authority make decisions, evaluating the circumstances and weighing the interests in the case at hand, and since the lawmaking body is not capable, at the time the general, abstract choice is made, to undertake considerations and evaluations of this type, allowing a margin for evaluation to the administrative authority may be necessary.

With this consideration, we have progressed to an examination of the other side of the relationship between legislative and executive power, namely the issue of possible limits encountered by the law in regard to the administration. The question which has been posed in Italy is whether the law can replace the administration in making concrete decisions. There is debate as to whether some activity is reserved to the administration, in other words whether an area exists which cannot be reduced. Such an area would be reserved to the administration, and non subject to the power of legislators and the

courts. This issue has acquired more practical relevance with regard to the admissibility of the so-called *leggi provvedimento* (law for provision), namely decisions which have the appearance of laws but the concrete and specific content, typical of administrative decision. For example, laws which concede some single benefit to a private individual, or those commonly seen at regional level, approving plans or projects such as town planning or environmental schemes.

The Constitutional Court negates the existence of a reservation in favour of the administration in making concrete decisions. However, it requires that, in the exercise of administrative functions enacting any such provisions, the procedural and jurisdictional guarantees of citizens affected by these powers should not be reduced. Such provisions of law are therefore theoretically possible, on condition that they may be reviewed by the administrative courts on the same basis that those courts review administrative decisions, namely from the perspective of their potential arbitrariness or unreasonableness, to a comprehensive evaluation of all the interests at stake and their consistency with the ultimate objective being pursued [91]. Thus, the Court has held as unreasonable a regional law which introduced a permanent criterion for identifying associations which could be beneficiaries of public grants, without placing importance on the requirement of ascertaining, as a matter of fact, how representative they were. In addition, in order not to exclude participation by interested parties and most importantly legal protection by the courts, the Court has separated the procedure into an early administrative phase, in which private interests which are affected can be protected, and a second phase, of approval of the law. In a case of regional planning approved by law, the Court held that the requirements of participation and the protection of individual parties directly affected by the provisions were already adequately safeguarded by the administrative procedure (which precedes approval by law) and by the fact that this results in decisions which could be challenged [92].

So far as concerns the issue of this reserve of administration *vis-à-vis* jurisdictional power, it is thought that there is an ambit of

[91] Constitutional Court 492/1995, 241/2008 and 271/2008.
[92] Constitutional Court 225/1999 and 226/1999.

administrative action which is not subject to the scrutiny of both the ordinary and the administrative courts. This consists in the so-called 'administrative merits', that is that part of administrative activity which is not covered by law nor even by the criteria of reasonableness, proportionality and congruence with the facts, which produce *eccesso di potere* [93]. In the context of the various solutions which are compatible with these parameters, it is for the administration to decide the best option. This option is beyond judicial control, as the courts are not permitted to substitute for the administrative function As we shall see, the exceptions to this are the rare cases where the administrative courts are also permitted to review the merits of the administrative choices made.

bb. Governance by budget.

Parliamentary control over revenue and expenditure is guaranteed by the relevant reservation of law and by the fact that Parliament has the task of approving the accounts and expenditure presented by the Government (art. 81(1) Cost.). However, since revenue and spending cannot be governed by the budget act (*legge di bilancio* art. 81, co. 3), the budget must be limited to reflecting what has already been decided under the laws which provide for it. The rigidity of this framework, which was set to severely restrict the role of the government, has been bypassed over the course of time by a range of reforms, taking place at approximately ten-yearly intervals since 1978 [94].

The system deriving from these reforms is somewhat complex, it demands a high degree of cooperation between Government and Parliament and may be summarised as follows. Each year, by 30 June, the Government presents a budget to Parliament, containing its economic and financial proposals which, on the basis of four-year economic projections, set out the legislation required to achieve those objectives. In approving it Parliament, in its legislative function, is bound to respect the aims set out in the finance bill.

The legislative acts as such governing public spending consist in the annual accounting budget and the finance bill. These are presented to Parliament by the Government by 30 September

[93] See. supra sub no. **83**.

[94] The reference is to Acts 468/1978, 361/1988 and 208/1999.

each year and are approved by Parliament under special rules which, among other things, exclude legislative procedures which differ from the usual process of parliamentary debate.

So far as the budget is concerned, besides the power of presenting it being reserved to the Government, Parliamentary power is limited to making possible amendments. Owing to binding aspects of a constitutional nature, the Chamber of Deputies can only amend by altering the distribution of funding among the various destinations (for example, they can vote for more funding to one Ministry at the expense of another) but they cannot change the substance of the revenues nor the total expenditure, which remains as proposed by the Government. For these reasons, there has been debate among Italian legal scholars, particularly in the past, as to whether the finance acts are only law in a purely formal sense, and not in a substantive one, given that Parliament does not make any new decisions with regard to such acts, but is confined to taking account of choices already made under other legislative acts.

The finance act introduced under the 1978 reform (which also lays down provisions "linked" to the financial act, setting out the measures necessary for its implementation) is aimed at making decisions about public finance more flexible and, in particular, to allow Parliament, when approving the budgetary measures, to table amendments to the current public spending proposals which no longer appear to be consistent with Government guidelines and which would not be possible to amend through the finance act, owing to the constitutional prohibition, referred to above. The draft reform of the accounting system currently before Parliament provides, in the context of a generalised simplification of the instruments comprising the budget procedure, for the replacement of the finance act by a "stability act" (*legge di stabilità*) covering three years, more flexible and restricted in its application in order to improve expenditure planning [95].

The fact remains that, once the acts approving the budget and financial measures have been passed and the accounting session concluded, there are no further limitations on Parliament's own legislative choices regarding financial policy, theoretically

[95] Draft reform bill presented to the Senate on 27 May 2009, *Atti del Senato* 1397-A.

even going beyond the Government's proposals, the only constraint being an indication as to how they would be financed (art. 81(4) of the Constitution: "any other law involving new or increased expenditure must specify the means available to meet it").

This description would not be realistic if no account were taken of the need to respect Community commitments under the Stability and Growth Pact, which considerably reduces the room for manoeuvre in drawing up the budget. Relations with the guardian of the Pact, the Commission, are maintained by the Government, in particular by the Ministry responsible for finance and the economy, a factor which further reduces the margins for intervention by Parliament.

Parliament does not exercise specific control over expenditure, a function which is left to the administration. Provision is made for it by the administrative authorities according to a complex procedure which does not leave space for Parliamentary action. Monitoring the State's budgetary management (and likewise regional and local management) is the responsibility of the Courts of Accounts (*Corte dei conti*), whose competence also includes, besides supervising public spending, various powers of economic/financial control over both State administration and that of certain public bodies. The Constitution makes provision for a Court of Accounts as an auxiliary organ of Parliament and the Government, and its state of autonomy and independence in relation to both is guaranteed (art.100). The Court reports the results of its findings directly to the Chamber of Deputies.

cc. Further possibilities of parliamentary influence.

The principle of legality and the necessary legislative basis for administrative power create a direct and comprehensive link between the power of the legislature and the power of the executive. However, Parliament has other mechanisms at its disposal to bring influence to bear upon the administration.

The first and structurally most important relates to the fiduciary relationship between Parliament and Government, into whose framework the Constitution places the public administration. The main plank of this relationship, which joins Parliament, Government and the public administration, is

ministerial responsibility. Each minister (as head of one branch of the public administration and also a member of the government) is collectively responsible for the acts of the Council of Ministers and individually for the acts of his ministry (art. 95 Constitution). However, this in fact operates as a rather weak control mechanism by Parliament over the administration, all the more so since the system of opposing political coalitions started to emerge in Italy in the last decade of the 20th Century, based on an electoral system which tended towards majorities; this has brought about a reversal of roles, such that it seems to be the Government rather than Parliament which leads the way. The vote of no confidence, or parliamentary censure motion against the Government, has a political significance more than anything else, and it is difficult to imagine putting it to use in an administrative context.

In the context of outlining the weaknesses of the system, it is appropriate to mention the so-called "individual censure motion" which came into use in the 1990s, and subsequently adopted as part of the regulations. This mechanism, in one single case, has resulted in the resignation of one minister, but in fact it appears to suffer the same limitations as the collective no-confidence motions do with regard to the Government, so far as its usefulness as an instrument for parliamentary control over the administration is concerned. In its turn, the role played by ministerial responsibility is of lesser importance in the context of political scrutiny by Parliament. Thus parliamentary questions and points of order are addressed to the relevant Minister, frequently including, in fact, questions raised by the members of Parliament relating to minor administrative issues. To these may be added fact-finding hearings and inquiries which are available to Parliament relating to the functions of the administration.

Parliament further exercises direct control for purposes of information over the administration, on the basis of the duty imposed on the latter by law to provide information. There are a considerable number of laws, around one hundred, which lay down that administrative authorities (ministries, their divisions, public bodies, and so on) periodically give account (on an annual or monthly basis, sometimes more frequently) of the activity carried out by them, or sometimes even of that planned for the future. However, this is a power of small practical importance, given the scant attention generally paid to reports by Parliament.

Two organisational phenomena, features of the evolution of the Italian administration model, have also had a marked effect on the relationship between Parliament and the administration over the last years of the 20th Century, namely the formal division of responsibilities between politics and administrative authority, with the consequent assignment of functions which are within the competence of the civil service, and the spread of independent authorities, that is, administrative bodies which are not subject to the Government interference..

The strengthening of management and the enhancement of their own functions, not subject from political influence and to be exercised independently from government policy clearly alters the traditional Parliament-Government-administration nexus, in which the administration, incorporated within the Government, was the endpoint of the uniform chain of the majority's political policy. The reformulation of the relationship between executives and ministers (and thus to some extent between the administration and the Government) also inexorably brings about the slackening of the bond between the administration (here to be distinguished from the Government) and Parliament, which is not compensated for by Parliament's normal powers of enquiry and fact-finding, nor by the duty imposed on the Government to communicate the conferral of the most important management responsibilities to Parliament (art. 9, par. 9, legislative decree165/200).

So far as the relationship between Parliament and independent authorities is concerned, there are two distinct aspects to consider, beside the legislative choice opted for when establishing them and their actual make-up, obviously. On the one hand, Parliament often possesses the power of appointment to the authorities, or in any case participates in the nomination process. In some cases, this power belongs to the assembly (this is for instance the case of the Authority responsible for privacy), and in others to the Speakers of the two Chambers; in other cases again, the task of expressing their own advice on the Government's proposal – sometimes by qualified majority - belongs to the relevant Parliamentary Committees, which is then passed on to the President of the Republic for the nomination (this applies in the case of the Authorities for telecommunications, electricity and gas). On the other hand, the rules governing the authorities,

although they are not subject to Government control, normally provide that they must report to Parliament on the activities undertaken, or they have power of reference, recommendation or making proposals to the Chambers.

3.2. Other instruments.

aa. Transparency and access to information.

The notion of access to information, in the sense of a principle which is a natural part of the sphere of action of public power, has had a slow start in Italy in the context of the administration. It was only over the course of the 1980s [96] and later, more extensively in the 1990s [97], that the principle of access to information in administration was laid down, in contradistinction to the previous regimen of secrecy, in laws which had first of all set up specific institutions to implement it and then recognised the existence of citizens' rights of information about the workings of the administration, to be preceded by communication on an institutionalised basis [98]. The Constitutional Court has identified a constitutional basis for the principle of access to information, recognising it as being a principle which is part of the common constitutional heritage of European countries, even though it is not spelt out in the national constitution [99].

Despite all this, general legislation on transparency comparable to the US *Freedom of Information Act* is still lacking in the Italian system, and the set of laws which should implement the general criterion of access to information have to be sought across a range of institutions, whose disciplinary regimes are governed by measures scattered over various pieces of legislation, including for specific sectors, which are more often laid down in order to achieve specific objectives than for the purposes of direct visibility of administrative action.

Some of the institutions have already been mentioned in relation to administrative procedure, such as Act 241 of 1990, in particular. This concerns first and foremost the right of access, but also includes the duty to give reasons, the communication of the

[96] Art. 25 Act 816/1985.

[97] Act 142/1990 and later Act 241 del 1990.

[98] Act 150 of 2000.

[99] Constitutional Court 104/2006, which sets the requirement for communication from the initiation of the procedure.

initiation of procedures, participation of private parties in public conferences and the nomination of a person responsible for the procedure. While it is true that these aspects contribute to making administrative action more accessible and transparent, their application is confined to the holders of tangible individual rights in the procedure or process and their function is largely to protect these rights effectively, whereas there is no such provision that anyone may discover how the government operates or who can have access to administrative documents without any pretext.

It is only in certain sectors that information in the possession of the public administration is freely available to everyone, and not limited solely to stakeholders with identified, differentiated positions. This concerns environmental matters, in relation to which any individual citizen can make enquiries in public offices, for information they have relating to the state of the environment [100]. Data gathered and analysed in the context of national statistics is likewise available on request for study or research purposes, since the law expressly defines this information as being in the public domain [101].

Laws requiring the publication of certain acts, such as accounts, which the regions, the provinces, the larger municipalities and other public bodies must publish in newspapers in summarised form [102], merely have the aim of making administrative action visible and transparent, and to account to the general public as to how public resources have been spent [103].

A law passed in 2000 provides for the establishment of public relations offices (URP in Italian), in various administrative bodies, together with the setting-up of institutional communications programmes, which may also publicise their activity through advertising and other means of communication, such as meetings, exhibitions and conferences; this is in order to support the principles of transparency and efficiency of administrative action, taken together with the regimen governing informative action and communication by public administrative

[100] Act 349/1986..
[101] Act 322/1989.
[102] Act 67/1987.
[103] Art. 53, par. 14, legislative decree 165/2001; Act. 244/2007, arts. 3, par.. 18, and 54.

bodies [104]. The URP are charged with the task not only of rendering the activity of the public administration visible, but also guaranteeing participation and access for citizens, in order to involve them in administrative procedures.

Upgrading of digital technology is aimed at achieving transparency, accessibility and the circulation of information held by the administration. Administrative bodies are therefore under an obligation to adopt information technology so that enterprises and the private parties can communicate with public offices through these means, and more generally to facilitate access to data and information held by them, besides organising their own activity more efficiently and communicating more readily with other administrative centres [105].

bb. Participation and self-administration.

Until a short time ago, the notion of consultation exercises was unknown to Italian legal order, in the sense of participation by interested parties in the process leading to the formation of new regulatory acts. Only recently, also influenced to some extent by cross-border binding commitments, consultation processes began to take place at domestic level, with the aim of bringing the new rules nearer and possibly with consensus, to those affected by them.

The so-called "simplification acts" (*leggi di semplificazione*) offered the opportunity for some early attempts in regulating this phenomenon, namely those legal acts which annually introduce measures simplifying the administrative system. In implementing the simplification act for 2003 [106], a consultation procedure was put in place on an experimental basis, involving parties interested in specific Government legislation, by publishing certain draft decrees on the Government's website. The interested parties can transmit their views on them to the Government, in electronic form. The 2005 simplification act too, concerned with an analysis of the impact of the regulation, provides for and reinforces the use of consultation of interested parties [107]. Consultation procedures are provided for more systematically in the formative process

[104] Act 150/2000.
[105] Legislative decree 82/2005
[106] Act 229/2003.
[107] Act 246/2005.

leading to the production of regulations by independent administrative authorities [108]. In some cases, this is established by law; in others, it is a case of normal practice. It is provided for by law in the procedures regulating the activity of authorities governing broadcasting services (AEEG e AGCOM). In relation to the protection of savings, too, the law provides that the relevant regulatory authorities (CONSOB, Banca d'Italia, ISVAP and UIC) carry out economic analyses and consultation of interested parties [109] .

Consultation procedures involving citizens in the regulatory process are increasingly seen at regional level, too, both on the basis of specific provisions and spontaneously, as normal practice, with no legal obligation, based on an evaluation of their expediency[110]. At regional level in particular, measures aimed at encouraging participation in general regulatory decision-making procedures are contained in new regional statutes[111] and in the laws which implement them [112]. The Constitutional Court has upheld the provision in the Statute for Region Emilia Romagna for a consultation procedure in the formative process for legal acts, reasoning, in the absence of a general regimen for consultation, on Community law principles on the subject and on the basis of comparative law studies on the consultation process in other legal systems [113].

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[108] P. Fava, *Promozione della concorrenza attraverso la regolazione delle Autorità dei servizi a rete (l'AEEG)*, in AA.VV. (ed.), *La concorrenza* (2005).

[109] Act 262/2005.

[110] Camera dei Deputati, *Rapporto sullo stato della legislazione 2004-2005 tra Stato, Regioni e Unione Europea (Osservatorio sulla legislazione)*, 11 July 2005, 117-133.

[111] The new "second generation" Statutes, innovative in comparison to the past, contain many provisions on the subject of consultation of interested parties (Statute of Piedmont arts.– 2, 12, 72 e 86; Statute of Calabria art. 4, par. 2;; Statute of Tuscany arts. 19, par. 3, 72 and 73; Statute of Umbria arts. 20 and 21) including, more generally, in the area of the quality of regulation, even introducing, in certain cases, the duty to set out the reasoning underpinning the regional acts (arts. 17 and 19 Statute of Emilia-Romagna, art. 39 Statute of Tuscany) and the economic analysis of the regulation (Tuscany 45 St.; Marche 34 St. and Umbria 61 St.).

[112]The Tuscany regional Act 69/2007 and the Lombardy act 15/2008 govern participation by stakeholders in common and individual interests in processes aimed at developing general regional policy or in specific sectors.

[113] Constitutional Court 379/2004.

In general, however, it must be recognised that participation processes, open to all, continue to be the exception in Italy and that the practice indicated appears to be quite heterogeneous, both with respect to the cases where they apply and to the consultation methods used.

Finally, in dealing with democratic status, as regards the administration, the principle of subsidiarity should not be overlooked, here in the horizontal sense, that is, in the relationship between public power and organisations in society. The Constitution in fact provides, alongside the principle of vertical subsidiarity, the criterion for function distribution between various levels of government, that the public administration should "promote the autonomous initiative of citizens, both as individuals and as members of associations, relating to activities of general interest" (art. 118 (4)). The measure aims at transforming citizens, from simply being the objects of administrative action into active subjects, promoting activity to the benefit of society as a whole. It falls to the administration not to treat them merely as persons who are administered and to facilitate them in taking up activity which is in the general interest, either as individuals or as spontaneously organised groups in society [114].

4. The legal protection against administration.

a. Institutions of administrative justice.

In 1865, on the eve of Italian unification, the Italian Parliament abolished the system of special courts for administrative disputes then in force in the Kingdom of Sardinia and opted for the unified court system [115]: ordinary courts were to concern themselves with the protection of "civil and political rights" of private parties in relation to the administration. For these purposes they were given powers to deal "incidentally" with administrative acts and to disregard (technically 'disapply') them if they were unlawful. To disregard an act means, in practical terms, to exclude it from consideration.

[114] G. Arena, *Cittadini attivi* (2006).

[115] Act 2248/1865 on administrative disputes.

However, right from the beginning, the ordinary courts demonstrated their marked unwillingness to treat as true "rights" the positions of private parties in relation to administrative power, and consequently to take on the task of protecting them. Not only did they refuse to consider the expectation of a favourable decision by the administrative authority as a right (such as the concession of a benefit or an authorisation, for example) but in relation to real individual rights (such as rights of property) they also adhered to the theory of so-called 'downgrading" ("*degradazione*"). On this basis, the right affected by the exercise of administrative power ceased to be a right as such and turned into a mere interest. The ordinary courts had no competence regarding legitimate expectations, nor over 'downgraded' rights.

The necessity to provide protection regarding competence in relation to these lesser positions too, known at the early stage simply as interests and subsequently as "legitimate interests" (*interesse legittimo*) , which, in the absence of a special court, remained for all purposes under the supervision of the administration, led the legislators in 1889 to confer upon the extant Council of State the function of the court of legitimate interests. To this end, the Council of State, IV Session, was established, with powers to quash administrative decisions, unlawful on the basis of lack of competence, violations of law and excess of power (*eccesso di potere*) [116]. The Council of State, which until then had operated in three Sessions, as a consultative body for issues relating to administrative disputes, thus became an administrative court. Two other Sessions, the IV and V, were subsequently created, and in 1971, in late implementation of constitutional provisions for decentralised administrative courts (art. 103, par. 1, of the Constitution), the Regional Administrative Courts were established (known by the acronym TAR, *Tribunali amministrativi regionali*, in Italian) [117]. This is the origin of the dualism of jurisdiction in Italy and of the special criterion for the division between ordinary courts, with jurisdiction over the protection of rights, and administrative courts, responsible for the protection of those positions which ordinary courts in the 19th century did not consider as having the status of true rights.

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[116] Art. 29 unified text of the rules regulating the Council of State.

[117] Act 1034/1971 on administrative judicial review in first instance.

The system of administrative jurisdiction in Italy therefore consists of the TAR, which act as courts of first instance and sit in each regional capital (with separate sessions in the bigger regions) and the Council of State, with competence as a court of appeal from decisions of the TAR. Council of State judgments may be reviewed by the United Sessions (*Sezioni Unite*) of the Italian ordinary Supreme Court (*Corte di Cassazione*), for certain specific points of law, of which the most important by far concern errors of jurisdiction.

On the basis of the criterion mentioned in the previous paragraph, the Italian administrative courts are not in fact the exclusive courts for administrative matters. The 1865 law is still in force, and the ordinary courts maintain their ancient jurisdiction over rights in relation to administrative authority. The highest of the ordinary courts, namely the *Corte di Cassazione*, resolves cases involving a conflict between the two jurisdictions.

Today, protection regarding jurisdiction in administrative matters in Italy is therefore still divided between two separate jurisdictional divisions, ordinary courts and administrative courts. The criterion for the division is based on the individual claim being made by the interested party: to protect a legitimate interest, the action is brought in the administrative court; for an individual right, it is heard before the ordinary court [118]. This may appear to be a heavy-handed mechanism but, in fact, after more than a century of experience, the two distinct ambits have achieved quite clear lines of demarcation. Issues of identifying jurisdiction seldom arise, and only then in relation to novel or borderline issues.

To this should be added that in certain sectors, where the distinction between rights and interests appears more complex, the legislators have opted to assign the whole subject-matter to the administrative courts, which thus become courts of rights as well. Until it was privatized in 1993 this was the case regarding employment in the public sector, and this has applied since 1998 for issues relating to public utilities, the assignment of public

[118] A general overview on the situation and the problems of the administrative justice in Italy is offered by G. Falcon, *Judicial Review of Administrative Action in Italy*, in L. Vandelli (ed.), *The Administrative Reforms in Italy: Experience and Perspectives* (2000), and by F. G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 1 It. J. Publ. L 118 (2009).

works, public supply contracts and public service contracts, planning and the building sector [119].

Since 2000 the administrative courts have also had to decide on compensation for loss arising out of damage to legitimate interests. Once the *Corte di Cassazione* had established that damages arising from unlawful provisions should also be compensated[120], administrative courts were given jurisdiction over compensation claims for loss occurring as a result of unlawful administrative acts. Putting all matters before the administrative court avoids the private individual having the burden of starting two sets of proceedings before two different courts. However, the problem of the so-called *pregiudiziale amministrativa* (prior annulment of the relevant decision) has not been resolved, which arose following the judgment in case no. 500/1999. The issue is whether or not the decision relating to compensation for the loss presupposes that the decision giving rise to the damage has been quashed, prior to the question of compensation being decided. Whereas the ordinary courts tend to a position of reciprocal autonomy of the actions for compensation and for annulling the decision, with the effect that compensation can be claimed directly from the ordinary court, with no need for the prior annulment of the decision, the administrative courts, which since 2000 have been the courts for deciding the liability of administrative authorities for unlawful administrative acts, seem inclined in the opposite direction, albeit with a degree of uncertainty [121].

The extension of the administrative courts' exclusive jurisdiction – with the conferring of new subject areas – and the assignment to them of general competence regarding compensation for consequential loss, have posed new questions of demarcation between the two jurisdictions, problems which therefore have not been completely eliminated [122].

In general, however, it is clear that, even leaving aside the areas of exclusive jurisdiction, the cases which fall within the jurisdiction of administrative courts are more numerous by far than those involving the ordinary courts. Whenever a private

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[119] Legislative decree 80/1998, later amended by act no. 205/2000 approving the reform of administrative judicial review.

[120] *Corte di Cassazione*, United Sections 500/1999.

[121] Art. 7 Act 205/2000

[122] Constitutional court, 204/2004, 191/2006, 259/2009 e 35/2010.

party's position is pitted against a power exercised by an administrative authority, this tends to take the form of a legitimate interest and therefore comes under the administrative courts' jurisdiction.

Furthermore, the results achieved in the area of judicial protection with regard to administrative authority and in particular the considerable effectiveness and wide-ranging nature of appeals for judicial review of administrative action are primarily the results of the work of the administrative courts. They have developed the criteria for judicial review of the administrative exercise of discretion, and have modelled the administrative process in order to provide fuller legal protection for the positions of private individuals. The administrative courts reach decisions in the context of a specific process, namely the administrative process, which until 2010 was regulated in a fairly approximate way, with few legal rules.[123]. Administrative jurisprudence had filled this gap brilliantly, whether by applying civil procedure rules as far as possible, or finding original solutions which are the product of their creative law-making. Many of these solutions had in fact been codified by the legislators and incorporated into the administrative procedure reform of 2000 [124]. In 2009, Parliament delegated to the Government the task of producing legislation reorganizing the process of administrative judicial review, aimed at ensuring a speedy and concentrated procedure, in order to guarantee effective protection for private parties. The new "Code of the administrative process" entered into force in September 2010 [125].

Despite the introduction by the new Code of general remedies of declaration and injunction, the classic remedy in the administrative process remains the quashing order. Quashing the decision usually results in complete satisfaction of the private party's claim, when the act which is challenged restricts the latter's legal sphere. It is less adapted to satisfying the substantive interest of someone challenging the denial of a decision in their favour. Quashing the decision in such a case does not produce the concrete benefit which the private party is hoping for, but merely

[123] Royal decree 1054/1924 and Act 1034/1971

[124] Act. 205/2000.

[125] Legislative decree 204/2010.

opens the way for a new administrative decision, which, in making fresh provision, has no other limitation on it than the legitimacy of the renewed exercise of its power.

Missing from the Italian administrative process are mandatory orders similar to the German *Verpflichtungsklage*, aimed at asking the court to declare whether or not the claimant's grounds are founded and to make an order that the administration should consequently take a particular decision. Even when the decision requested is refused, therefore, the interested party under the current Italian system can only ask for an order quashing the refusal. The only case in which, as the law provides, "the administrative court may examine whether the application to the administration is properly founded" is silence on the part of the administration [126]. A claim against silence, introduced in 2000 and actionable under a special procedure [127], is aimed at ensuring that the court is not limited to declaring the failure to decide on the part of the administration, but may examine the grounds of the claimants application directly and give judgment, indicating the way in which the administration must subsequently decide. Naturally the court, in deciding the lawfulness of the matter, can only evaluate the basis of the claim to the extent that the exercise of administrative power is covered by the law, and it may not, on the other hand, substitute itself for the administrative authority in the exercise of its discretionary power.

Remedies which differ from the quashing order, and in particular, actions for a declaration or an injunction against administrative authorities, enter into the judicial review process whenever the administrative court is also a court of rights, and therefore when it has jurisdiction over compensation for loss arising out of the infringement of a legitimate interest, or, more generally, when it has exclusive jurisdiction.

Italian judicial review is characterized by a process aimed at safeguarding the individual against public power, typical of many other legal systems. Its features are: a particular locus standi, based on an individual position, in this case a legitimate interest, which differs from and is potentially wider than the right protected by the ordinary jurisdiction; the short time-limit, sixty

[126] Art. 2 (5) Act 241/1990.
[127] Art. 21 *bis* Act 205/2000.

days, in which to ask for the decision to be quashed; the continuing central importance of the decision and its review, rather than other evaluation criteria; certain limits on the courts powers of investigation and judicial action, in the sense for instance that the court must refrain in the face of choices on the merits made by the administration and certain conditions relating to the enforcement of judgment.

The reform of the judicial review process which took place in 2000 redesigned the system of *interim* relief, in line with case-law principles and Community legislation. It established that courts could take the most effective interim measures with no limitation as to type [128]. In fact, for some time the courts had been developing some forms of interlocutory relief differing from the suspension of the challenged act, which had been the only one available under the previous legislation. Immediacy of the provisional protection is assured, by the fact that the judge hearing the case must rule at the first available hearing and also by the possibility that provisional measures can be ordered by the President even at an *ex parte* application (*inaudita altera parte*) which are valid until the ruling is given by the full court. The Constitutional Court did not consider the absence of *interim* remedies *ante causam* as being of importance, holding that the protection afforded by the new law was able to satisfy constitutional parameters[129]. Legislators have introduced legal protection *ante causam* in disputes concerning public contracts [130], in order to fulfill the requirement which the Court of Justice has held to be applicable under the relevant Community legislation [131].

A special remedy for enforcing the judgment of the administrative court is the so-called *giudizio di ottemperanza* (judgment for compliance), which permits the execution of judgment under the control of the same judge who granted the relief [132]. Originally conceived to ensure the enforcement of a judgement of an ordinary court against an administrative authority, the remedy allows recourse to the court in order to

[128] Art. 21 (8), Act 1034/1971.
[129] Constitutional Court 179/2002.
[130] Art. 245 (3), legislative decree 163/2006, contracts code
[131] CGCE 29 April 2004 in case C-202/03 *Dac spa*.
[132] Art. 27, no. 4, royal decree 1054/1924.

determine whether compliance with a ruling has been incorrect or omitted, and to enforce it. The Council of State has extended the use of this remedy without a specific provision of law to include even its own decisions [133] so that the administrative court itself has become the watchdog for the effectiveness of its own decisions. If the administration does not comply, the court considers the merits of the claim too, or the omission by the administration and can nominate a person responsible, the so-called "commissioner *ad acta*", who takes the place of the administration and makes provisions on its behalf, in conformity with the court's ruling.

With respect to the compliance process, complaint can be made that the administrative authority has infringed or avoided the final judgment. To this end, judgment is extended to include, in addition to the order quashing the act, the reasons which underpin this result, namely the legal framework outlined by the court which will form the basis for the future conduct of the administration. From this perspective, as we shall see more clearly later, the remedy of compliance reinforced the order for annulment, going beyond its merely quashing effects, conferring a declaratory value upon it, which to a certain extent also affects the nature of an administrative judgment, giving it weight more in terms of individual protection than a merely objective review.

The operational ambit of the ordinary courts is rather restricted. It may be that the court, during the course of a dispute between private parties, is called upon incidentally to examine an administrative act – for example, a piece of planning legislation in a property dispute between neighbors – which is relevant to resolving the case. However, this is an uncommon occurrence. In disputes between private parties and the administration, the action which ordinary courts can take is limited, in principle, to those cases in which it is not the exercise of public power which has harmed the legal sphere of the private party . Otherwise, indeed, the right downgrades to a legitimate interest, and comes within the jurisdiction of the administrative courts.

The ordinary courts have attempted, in various ways, to regain ground for their own jurisdiction. The *Corte di Cassazione*, which is the arbiter of jurisdiction, has developed the notion of "lack of power" (*carenza di potere*) to illustrate the case in which the

[133] Council of State, Sez. IV, 241/1928.

administrative authority, albeit acting as if it were exercising a power, in point of fact does not possess such a power. This would prevent the downgrading of the affected rights, which consequently would continue to be protected by the ordinary courts. It has then gone on to interpret the notion extensively, holding that there is a lack of power even when the administrative provision is so seriously defective as to result in nullity or not to exist at all, or even when the administrative power, although it exists in the abstract, in actual fact has not been exercised within the temporal and territorial constraints which the law concedes to the administrative authority. As an example, when an administrative authority makes provisions referring to a territorial context beyond its sphere of influence or outside the time-limits imposed by law. Furthermore, the ordinary courts have created categories of individual rights which cannot be downgraded (such as health and the environment) which, therefore, are not subject, as an effect of the provision, to being transformed into interests. The 2000 reform of the judicial review process codified the cases of nullity of decisions, which, since they do not give rise to void decisions or downgrading effects, normally come under the jurisdiction of the ordinary courts [134].

However, generally speaking, the kinds of disputes which typically occupy the ordinary courts are those dealing with events which have not involved an exercise of power. All cases concerning non-contractual liability for damage caused by conduct, such as loss arising from an accident involving a public vehicle, failure to maintain a road, or the wrongful occupation of private property.

Following the legislative reforms at the turn of this century, the Italian justice system seemed to on the way to overcoming the duality of jurisdiction in disputes involving the public administration. The instrument responsible for this transformation was the upgrading of the institution of exclusive jurisdiction by legislators, noted above, namely conferring full jurisdiction on the administrative courts over wide, new legal areas. However, the Constitutional Court has slowed down the process, and has

[134] Art. 21 *septies* APA 241/1990. An exception is nullity for infringement and avoidance of final judgments; in such cases, jurisdiction remains in the administrative courts.

intervened by laying down specifications regarding the constitutional room for manoeuvre available to the legislators and ruling as unconstitutional the broad devolution in the fields of public services, town planning and construction.

According to the Constitutional Court, under art. 103 of the Constitution, legislators may only assign "special maters" exclusively to administrative courts, and only on condition that in relation to these "the administration acts as an authority against which protection is available to the citizen with regard to the public authority" [135]. That is, administrative jurisdiction must nevertheless remain one which "also", rather than "exclusively", covers individual rights. However, the administrative courts' new area of jurisdiction regarding compensation for loss arising from unlawful decisions remains intact, since in this case it is not a "special matter", in the constitutional sense, but merely a different technique for protecting legitimate interests.

Therefore, aside from the matters left to the exclusive jurisdiction of the administrative courts – which should be treated as exceptions to the normal rule governing the division between ordinary and administrative courts, it falls to the ordinary courts to safeguard the individual rights of private parties in relation to the public administration. In such cases, the process is conducted according to the rules of civil procedure, and, in principle, the protection afforded to the rights (where they are and remain as such) is not subject to any limitation by reason of the fact that the damage was been caused by the administration. Therefore in such cases the court can also give different types of rulings, which include orders for quashing, declaration and injunction). If, in order to achieve this, it is necessary to deal with an administrative act, then the court can do this. It can decide questions of its lawfulness - that is, immunity from the defects of lack of competence, infringement of the law or excess of power – and, where such defects are found, it can disapply the act. What it cannot do is quash it. The court will rule upon the dispute, disregarding the decision; this will remain effective, however, until the administrative authority itself resolves to quash it.

[135] Constitutional Court, 204/2004.

b. Forms and intensity of judicial review.

Protecting individuals in the face of administrative power thus remains principally, although not exclusively, in the hands of the administrative courts, which are entrusted with the task of ascertaining that it has been correctly exercised. With regard to the comments which now follow, the explanation refers to their jurisdiction and the specific process, the judicial review process, in which it occurs. In Italy, as already noted, the ordinary courts may find themselves, in their turn, incidentally performing an evaluation the lawfulness of an administrative act. The cases where this occurs are, however, rather rare. Moreover – and perhaps for this very reason – their approach to issues involving the exercise of power demonstrates their lack of familiarity with the techniques which are appropriate for this type of review and consequently a certain amount of restraint: the same kind of inhibition which has impeded the achievement of the original scheme of a unique jurisdiction from the beginning.

Administrative courts have not been so timid. The Council of State has shown great awareness of its own function of protecting private parties in the face of public power and it has not been backward in confronting the issue, even going beyond a simple evaluation of its conformity with the law. Its judgments have made a decisive contribution to shaping the administrative process, ensuring an evolution in the direction of providing guarantees, and it has developed more effective forms of review in relation to administrative discretion and techniques for safeguarding interests brought before court, increasingly oriented to the concrete practical satisfaction of the claimant [136].

By law, the courts' role in evaluating administrative acts is to consider their lawfulness and, in particular, the potential defects of lack of competence, infringement of the law and excess of power. This distinction is now conventional and there is a certain amount of overlap between the three aspects, even more marked since the law codified the rules of procedure and action, typically making such violation a case of infringement of the law,

[136] The most important decisions of the administrative courts are collected in G. Pasquini, A. Sandulli (ed.), *Le grandi decisioni del Consiglio di Stato* (1998).

which case law had previously categorised as symptomatic of excess of power.

Given that the major part of administrative action is regulated by legislation, the formal comparison of legal rules and administrative acts allows the court to make an evaluation of the administrative action in terms of both procedural as well as substantive correctness. Beyond the legal provision, however, the defect of excess of power permits a full exploration of the correctness of both the formative procedural process underlying it the administrative decision, as well as the reasonableness and coherence of its contents. Thus the review looks at the steps taken in course of the administrative inquiry and completeness and correctness of the recognition of interests at stake, the effectiveness of participation by the private parties and a consideration of the position which it has set out in the procedure. In addition, with regard to the contents, whether the logical steps are consistent and the solution reached is reasonable.

The courts' action, in so far as it is established by law, in reviewing the lawfulness of administrative acts, tends to manifest itself as an objective protection, aimed, in principle at least, at safeguarding the lawfulness of the exercise of public powers. Furthermore, the typical outcome of the judicial hearing - an order for quashing - corresponds to this, in quashing the act and thereby offering protection to the private party.

Nevertheless, since its beginnings the *raison d'être* of Italy's administrative jurisdiction has always been, as we have noted, to protect the individual's legitimate interest. So that only someone who has an individual position of this type to defend may have recourse to the court, to ask for an order quashing the decision which is prejudicial to him; class actions are not admissible, unless in exceptional cases; group interests may be brought without distinction, but only by organised bodies which have a particular interest in bringing them. Moreover, the whole judicial review process is guided by the adversarial principle and develops stage by stage on the basis of the initiatives taken by the interested parties.

If the functions of subjective protection of legitimate interests and objective protection of the lawfulness of the administration have therefore, since the founding of the system, come together in the administrative judicial review process; the

balance between the two perspectives has tended, over the course of time, to show a clear emphasis on the function of subjective protection. The progress also made towards according declaratory weight to the judgments of the administrative courts is significant in this regard. The Council of State has long approved the interpretation by legal scholars that quashing orders, besides their natural effects of removing the decision, also have declaratory effects on the claimant's legal position, which bind the administration in the subsequent exercise of its power [137]. For this reason, after the quashing of the decision by the court, the administration does not have an entirely free hand in its provision-making, but must respect the legal framework laid down in the ruling.

The trend towards the gradual transformation of the process, from ruling on the act to ruling on the relationship, can be demonstrated by three phenomena characterising the developments taking place in Italian administrative law at the turn of the 21st century. Firstly, the extension of exclusive jurisdiction (that is, in relation to rights as well as to legitimate interests) to include new and important subject matter, has undoubtedly had an impact on the general nature of the administrative jurisdiction. Although as a rule its nature remains as the jurisdiction for the lawfulness of public action, the great extent and the importance of sectors such as public services, contracts, town planning and construction, which are the subject-matter of a very large number of the disputes with the administration, clearly tend to increase the power of the courts. These are steadily becoming accustomed to adopting a more attentive approach to the concrete relationship and concentrating to a lesser extent on the decision as such. The courts' own limits of judicial review have been superseded, without their acknowledged advantages being lost. To describe this, legal scholars refer to the "full jurisdiction" ("*giurisdizione piena*") of the administrative courts [138].

As noted, it is true that the Constitutional Court has, through various judgments, reduced the scale of the matters of

[137] M. Nigro, *Giustizia amministrativa* (2002).

[138] A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo*, vol. I (2000) and vol. II (2001).

exclusive jurisdiction, placing limits on devolution to the administrative courts. Nonetheless, the devolved area remaining within their competence is still extensive, including among other things the whole new jurisdiction over compensation for consequential loss which, besides making the legal protection obviously more effective, also contributes in its turn to guiding judicial action steadily towards the direct protection of the concrete positions of the interested parties.

Secondly, since the court must decide on compensation arising from the unlawful exercise of the administrative function, it cannot stop at merely determining the lawfulness or otherwise of the challenged decision, but must go on to examine the underlying "goods of life", with respect to which compensation is sought and must be quantified. This operation, while instrumental in ruling on liability, clearly makes its effects felt on the whole ambit of the case before the court which, in the last analysis, must consider the relationship under the court's scrutiny in a more direct way. Thus, for example, albeit in the absence of mandatory orders, the court which is required to adjudicate upon the lawfulness of the refusal of an authorisation and the damage suffered by the claimant as a result cannot, when evaluating the loss, stop at merely reviewing the lawfulness of the denial but, in order to determine compensation, must go on to establish whether or not the applicant had legitimate grounds to expect a favourable outcome. Thus scholars refer to the jurisdiction of "entitlement" ("*spettanza*") [139].

The third important factor, noted above, is the provision, in the law reforming administrative procedure, for non-invalidating formal defects. In this case, too, the choice made to consider certain legal defects, which do not substantially influence the relationship with the administration, as irrelevant to the decision to quash the act, presupposes the idea that what matters to the private individual is not so much the formal correctness of the administrative decision, but the substance of the relationship with the administrative body concerned.

The exercise of discretion is not an area of administrative action which cannot be reviewed by the court. On the contrary, the

[139] G. Falcon, *Il giudice amministrativo tra giurisdizione di legittimità e giurisdizione di spettanza*, 1 Dir. Proc. Amm. 287 (2001).

Italian administrative courts have always reviewed the use of discretionary power. The notion of deviation of power already by implication supersedes the idea that the court cannot concern itself with the way in which the administration exercises its discretion. Then, judicial review has gradually been extended and has steadily increased its impact over the course of time. Without doubt, this is a form of control that is always applied externally, as it were, in the sense that the court cannot substitute for the administration in making the discretionary choice. But the review mechanisms developed by the Council of State, above all through the excess of power and the cases which are symptomatic of it, permit a thorough review of the correctness of the use made by the public authority of its power of choice. Thus the court examines the discretionary choice directly, considering its consistency, its correspondence with the facts and its reasonableness. Hence, if it finds substantial inconsistency, unreasonableness or that the choice has been based on an incorrect or untruthful representation of the facts, it will quash the decision.

Research into the issue of discretion by Italian legal scholars, and an analysis of its construction in terms of the comparative evaluation of interests according to the model already mentioned, have contributed to the extension of the objective ambit of judicial review. The court may in fact review in intimate details the completeness and congruity of the recognition of the interests by the administrative authority and hence the real choice of interests. What remains outside the scope of its inquiry are the merits of the discretionary evaluation, namely the choice of the solution to be adopted between those available within the parameters of consistency, correspondence with the facts and reasonableness. Identifying the best option from amongst those which are possible in principle, remains a matter for the administrative authority.

The question of proportionality has already been considered and the fact that, to some extent, a review of proportionality had already been carried out by Italian courts before its imposition by Community law. In particularly sensitive areas, such as expropriation, or penalties, the combination of the criterion of reasonableness together with the correct recognition and comparative evaluation of the interests at stake, in fact permitted a very accurate analysis of discretionary choices and a

comparison in practical terms of public advantage as against the prejudice caused to the private party. Let us not forget that, in its turn, the Community test of proportionality, while giving rise to a more effective review than arises from a general test of reasonableness, does not in any case bring about, at least in the Court of Justice's view, the substitution of appraisal by the competent body for the court, from which, in the evaluation of its expediency, it remains excluded [140].

Conversely, the issue of the degree of control over discretion has developed less rigorously than has the identification of the demarcation lines of what can be considered to be areas of discretion. As has already been noted, interpretations made in applying imprecise provisions or debateable technical rules have already been treated as discretionary evaluations for a long time, as the phenomenon, known in Italy by the formula "technical discretion" (*discrezionalità tecnica*), underlines. Towards the end of the 1990s, and encouraged in this by legal scholars as well [141], administrative courts have partly overcome their own self-restraint in this area, affirming the rule of the availability of review regarding technical evaluations, at least in terms of a review of their reliability [142].

There are some exceptions. One concerns review of evaluations made by independent administrative authorities, over which the Council of State considers that in certain cases it can only exercise "weak" control. The justification for this is found, from the subjective viewpoint, in the particular technical classification of the authority and its special accountability deriving from specific expertise and independence. From the objective viewpoint, in the uncertainty of results from the applied sciences (especially economics) and in the very complexity of their application. In the weak review which courts can undertake, while they can verify the factual assumptions underlying the authorities' decisions directly, the review must however confine itself to criticism of the technical evaluations, through monitoring reasonableness, principle and technical consistency, from the standpoint of their reliability only [143]. This is the case, for

[140] EC J, 18 January 2001, in case C- 361\98.
[141] D. de Pretis, *Valutazione amministrativa e discrezionalità tecnica* (1995).
[142] The landmark case is considered to be Cons. St., IV, n. 601/1999.
[143] Council of State., Sez. VI, n. 5156/2002; 2199/2002

example, of the application by the Competition Commission of legal concepts of economic importance such as "relevant market", "agreement restricting competition" and "dominant position". To conclude, what distinguishes "weak" control from "powerful" control over technical evaluations performed by the administration is not whether it is more (or less) complete – indeed, it has been appositely emphasised by the case-law on the topic, that the fact that the authority is placed outside the sphere of political control makes it all the more necessary that the court's review should be complete [144] - but only the result achieved, which in one case is to substitute, and in the other to quash. Other technical evaluations which are debatable but not discretionary, nor subject to full control by the courts, are those performed in the context of examinations and competitions, where the fact that they can not be repeated plays a decisive role.

c. Alternative remedies.

There are some remedies under the Italian system, as alternatives to action in the courts, for protecting those who interests may have been prejudiced by a public administration[145]. They are mainly administrative means of recourse, from arbitration to the Ombudsman. These are of minor importance, given the traditional degree of diffidence about forms of protection which differ from the usual judicial channels. Only recently has the overloading of the administrative justice system, and the need to find a solution to the excessive length of trials, encouraged an increase in alternative remedies, both through the reinforcement of existing institutions and, especially, administrative routes for review, as well as the introduction into the Italian system of new forms of dispute resolution, brought in from other legal cultures and from the common law systems in particular [146].

The recourse to administrative procedures for review is a very old legal remedy, which constitutes what is known as the "judicial function" ("*funzione giustiziale*") of the public

[144] Council of State,, Sez. VI, n. 926/2004, 280/2005

[145] M. Giovannini, *Amministrazioni pubbliche e risoluzione alternativa delle controversie* (2007).

[146] M.P. Chiti, *Le forme di risoluzione delle controversie con la pubblica amministrazione alternative alla giurisdizione*, 1 Riv. It. D. Pubbl. Com. 8 (2000).

administration [147]. It involves a direct appeal to an administrative authority to seek protection through the quashing or reformulation of an administrative decision. The special feature of administrative action in this case lies in the fact that in deciding the issue, the authority does not pursue a particular, concrete public interest, but, as an institution, acts only in the interests of justice. There are three types of ordinary administrative recourse (hierarchical, quasi-hierarchical and in opposition) and a special recourse to the President of the Republic. The 'hierarchical' recourse lies to the authority in the hierarchy above the one which made the decision. The remedy is general in nature, but now is of little application because the organisational model of the hierarchy upon which it is based has practically disappeared. The quasi-hierarchical recourse lies to a body which is not above the deciding authority in the hierarchy and the recourse in opposition is laid against the same authority which made the challenged decision. However, neither of the latter two have general characteristics, since they only apply to particular types of acts, expressly provided for by law. So far as the 'hierarchical' and quasi-hierarchical recourse are concerned, defects on the merits can also be put forward and their decisions can be reviewed by the courts.

The special recourse (*ricorso straordinario*) is decided by the relevant Minister for that area, in conformity with the required prepared advice of the Council of State. It is only possible to depart from the advice by a resolution of the Council of Ministers. In terms of form, the decision is framed as a decree made by the President of the Republic. The remedy lies for defective acts and only on grounds of unlawfulness. It is an alternative procedure to pursuing the case through the courts and the decree which decides the matter can only be challenged with respect to defects of form and *in procedendo*. This remedy, which many now consider superseded and whose constitutional basis has raised doubts in the past, still retains a certain practical importance, because of the long time-limit (120 days) within which it can be lodged, and consequently because it can be raised when the time-limit for judicial review has expired (appeal to be lodged within 60

[147] F. Benvenuti, *Funzione amministrativa, procedimento, processo*, 1 R. T. D. Pubbl. 139 (1952).

days). As with other administrative remedies, it also has the economic advantage that it can be pursued without the assistance of a lawyer.

Arbitration is a general form of alternative dispute resolution which can also be used in dealings with the administration for questions relating to individual rights. For this reason it is mainly used in disputes concerning public tenders. The dispute is resolved by a panel of arbitrators nominated by the parties. Their decision can be appealed to an ordinary appellate court. The advantage of this procedure lies in its simplicity and speed.

Although strictly speaking the Ombudsman cannot be collocated in the system of alternative remedies, this office usually takes preventive action and occasionally also operates as a mean of alternative dispute resolution. Established in Italy by the 1990 reform of local government, the Ombudsman can be set up by municipalities or regions, with the function of making the relationship between individual citizens and the administrative authorities more flexible and less formal, and of ensuring greater transparency of public action, creating points of contact and reciprocal clarification between the administration and private parties. Its powers are slight, however, and take the form of requests, letters, reminders and points of information transmitted to the administration. It is only in relation to access to documents that the Ombudsman has an effective power, namely reviewing refusals by the administration to deal with private parties' applications.

d. Impact of European principles on Italian justice system.

The Italian constitutional provisions on legal protection from administrative action express the principles and values which resemble those contained in art. 13 of the European Convention of Human Rights (ECHR) and art. 47 of the Nice Charter: legal protection of rights and legitimate interests must be full and effective (art. 24 of the Constitution); it may not be excluded or limited to particular remedies or avoided by special acts (art. 113 of the Constitution); judicial independence is guaranteed (art. 101 (2) and art. 108 (2)of the Constitution). For this reason, the impact of the European principles on the Italian justice system did not affect its structure, which remains

substantially unchanged, nor the fundamental nature of the protection provided, but, here too, only particular aspects regarding the detailed implementation of these principles. More precisely, it affected certain procedural mechanisms and some substantive types of protection offered by the courts. As already noted, the most important are the strengthening of the *interim* protection and more generally the adoption of instruments aimed at streamlining the protection for claims brought to court and making them more effective, the recognition of the right to compensation for loss arising from the wrongful exercise of power and the generalised control of proportionality of administrative discretion.

The fact that in Italy too, the same judge may be called upon to act simply as a national court and simultaneously as a judge dealing with European precepts, therefore applying procedural and substantive Community rules, has had the effect that the domestic legal system tends to systematically adopt European standards of protection. This has sometimes come about through legislative choice, which has implemented the solution imposed by the Community system in a generalised way, and at others by the spontaneous application of a measure by the courts, which, once familiar with the instruments and techniques of review imposed in disputes under European law, have continued to make use of them, applying them to resolve questions of purely domestic law.

Moreover, in giving force of law to the European solutions – if necessary even generalising them, beyond the narrow scope prescribed by Community law – the Italian legislators do not refrain from preserving the special features of the legal system where necessary. So for example, the above-mentioned reform of the *interim* relief in administrative procedure in 2000, while observing Community principles, maintains the traditional framework of Italian provisional protection, which continues to evidence atypical features and generality.

A phenomenon which should be noted, in any case, is the ever-increasing sensitivity of national courts to seeing themselves as part of supranational legal systems, both the European Community and the European Convention of Human Rights. This receives important confirmation, in addition to the growing number of preliminary references to the Court of Justice, the ever-

greater familiarity of the courts with principles and concepts deriving from the Community legal system, which are to be seen in the judgments and in the ever-more frequent references to the ECHR and citations from the case-law of the European Court of Human Rights (ECtHR). For some time now, the Italian Council of State has been reconstructing the relationship between national and Community law in terms of reciprocal integration and therefore considers that Community laws constitute a direct parameter for the lawfulness of national administrative acts, and demonstrates that for these purposes it believes that Community law is "part of" national law [148]. The Constitutional Court itself, which until recently tended to define the relationship between the systems in terms of separateness and autonomy, seems in its turn to have left this outlook behind [149], as shown by the well-known declarations, already referred to, on the constitutional value of the provisions of the ECHR, as interpreted by the ECtHR [150], and on its own accountability in making preliminary references on the compatibility of national legislation with Community law , when the former may be constitutionally doubtful [151].

5. The concept of "good administration".

The concept of "good administration" in Italian administrative law includes the notion that the administrative act, besides being an instrument for the correct and faithful implementation of the law (the lawfulness of administrative action), which aims at pursuing the public interest according to criteria of efficacy, efficiency and economy (*buon andamento*), should be carried out in an objective and impartial way (*imparzialità*) in relation to the private parties involved. In this context, the canon of good administration and its "efficiency" in particular (art. 97 of the Constitution), demonstrates in principle an objective value, defending the effectiveness of administrative action, rather than the subjective one of providing guarantees or giving attention to the interests and positions of private parties

[148] Council of State, Sez. V, 35/2003.

[149] Constitutional Court 406/2005; 129/2006; 50/2007, on the duty of interpretation in conformity with the Community law

[150] Constitutional Court, 348/2008 and 349/2008.

[151] Constitutional Court, 103/2008.

which come into contact with the administration. In short, we are dealing here with the administration's duty to pursue the interests entrusted to its care, respecting certain rules of organisation and action, rather than with a true private right, to be obtained by observing those rules.

The principle of *buon andamento* has, according to some commentators, a broader scope than "good administration" and, according to others, a more limited one; this, under art. 41 of the Human Rights Charter, is a specific fundamental right of the individual. Broader, because it responds to the concern for an effective, permanent functioning of administrative activity in pursuit of the public interest, a concern to which, understandably, the Human Rights Charter draws only incidental attention, to the extent that it affects the protection of the position of the individual. But it also has a more restricted content, because this latter, more as it were guarantee-oriented, perspective, which is only set alongside the national notion of good administration as an after-thought, still remains secondary in constitutional jurisprudence and in the manner in which it is treated by legal scholars who work in this field [152].

Furthermore, a main objective perception of the requirement of good administration is confirmed by the emphasis of the organisational importance of the constitutional declaration. The constitutional provision (art. 97 of the Constitution: "Public offices are organized according to law in order to ensure good functioning and impartiality of administration") links the canons of *buon andamento* and impartiality to the "organisation" of public administration, rather than directly to its actions. This approach was then superseded by the strengthening of the link between activity and organisation. In effect organisation should precede and shape the activity and by the express recognition of a immediate value of the principles also at the level of action [153]. Nevertheless, even applied directly to administrative action, the canons of impartiality and *buon andamento* maintain their primary objective valency as criteria which are not strictly linked to any specific citizen's right.

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[152] F. Trimarchi Banfi, *Il diritto ad una buona amministrazione*, in M.P. Chiti, G. Greco (ed.), *Trattato di diritto amministrativo europeo* (2007).

[153] M. Nigro, *La funzione organizzatrice, cit*. at 24.

The evolution of *buon andamento* towards the so-called "administration by result" is also significant in this regard, namely the type of administration whose hallmarks are the criteria of efficiency, effectiveness and economy, as functions of achieving the result [154]. And, regarding the impartiality of the administration, the undervaluing of the principle as the basis for recognising the general principle of due process The Constitutional Court favours placing due process, rather than under impartiality under (art. 97 of the Constitution), within the general principle of equality (and the prohibition on making unreasonable distinctions or unreasonably treating different situations as if they were equivalent) under art. 3 of the Constitution [155].

The encouragement given by legal scholars, the approval of the general law on administrative procedure and its committed application by the administrative courts, have without doubt contributed, over the last decade of the 20th century, to guiding the notion of *buon andamento* along more subjective lines. The codifying of general institutions of participation and the expansion itself of the principle of due process – to which the Constitutional Court has finally given constitutional weight [156] - is changing the traditional perspective, which now progressively includes the guarantee of positions and the citizen's expectations which are closer and closer to those covered by the Human Rights Charter.

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[155] Constitutional Court 492/1985.

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INTERPRETING STATUTES IN CONFORMITY WITH THE CONSTITUTION: THE ROLE OF THE CONSTITUTIONAL COURT AND ORDINARY JUDGES *

Elisabetta Lamarque *

Abstract.

The article illustrates the developments of the Italian centralized system of constitutional review from the advantaged perspective of the relationship between the Constitutional Court and the regular courts, seen in a chronological way from 1956, the inaugural year of the Constitutional Court, to the present day; and describes the ever-increasing use of constitutional provisions on the part of the regular courts in the resolution of the legal disputes. According to the author, once it had been clarified that the Constitutional Court and the regular courts are called upon in equal terms to use the constitutional provisions in the exercise of their functions, the judicial use of the Constitution and the consequent doctrine of the interpretation of the statute law in conformity with the Constitution has made the activities of the Constitutional Court and of the regular courts progressively more similar and strictly interlinked and coordinated.

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1. Introduction.

Some thorough and well-argumented comparative studies have recently reappeared dealing with the centralized model of constitutional review in European civil-law countries. Comparing its historical origins and current characteristics with the decentralized, or diffused, American model, they have laid out the vices, virtues and the lines of development that are common to all the European legal systems that have chosen, since the end of the Second World War, to equip themselves with apposite kelsenian Constitutional Courts in order to keep under control their own legislators.

In this article I take my cue from some of the loaded and well-reasoned conclusions reached by those comparative studies regarding the evolution of the relationships between the national Constitutional Courts and their respective judiciaries, and I will then attempt to illustrate the moves and developments that came about in Italy over the years which confirm these conclusions.

The general observations about the current developments of the European centralized model of constitutional review which perfectly reflect the reality of the Italian constitutional review can briefly be summarized as follows.

Over the last years, the development of the European model of constitutional review has "enhanced the role of the judiciary", permitting ordinary judges "to participate in the scrutiny of legislation".

This development can be called "the constitutionalization of the legal order", and may be explained as the process through which: "constitutional norms come to constitute a source of law, capable of being invoked by litigators and applied by ordinary judges to resolve legal disputes"; the Constitutional Court, "because of its jurisdiction over concrete review", involves itself in the tasks of the judiciary of fact finding and rule application; and, lastly, "the techniques of constitutional decision-making become an important mode of argumentation and decision-making in

ordinary courts" [1]. In this way, it happens that the distinction between constitutional jurisdiction and ordinary jurisdiction "collapses", because, as constitutionalization deepens, "ordinary judges necessarily behave like constitutional judges – they engage in principled constitutional reasoning and resolve disputes by applying constitutional norms". And furthermore, as constitutionalization takes even greater root, "constitutional judges become more deeply involved in what is, theoretically, the purview of the judiciary; they interpret the facts in a given dispute; and they review the relationship between these facts and the legality of infra-constitutional norms" [2].

From a different point of view it has been argued also that in recent years some forces, both internal and external to the domestic legal systems of the European countries which have adopted the centralized model of constitutional review, "are pushing the model toward a more decentralized arrangement", and that "internally, the pressure comes from the principle that ordinary judges should interpret statutes in conformity with the Constitution" [3]. The problem, it has been noted, is that while everyone knows that an ordinary judge in a centralized system can only interpret a statutory provision, but not set aside or correct it, that task being reserved to the Constitutional Court, it is nevertheless very difficult, or impossible, to determine, in each concrete case, whether a statutory reading in the light of the Constitution made by an ordinary judge is a genuine interpretation or a correction of that statute. Furthermore, in civil law countries we are moving more and more towards an expansive conception of judicial interpretation [4]: so that the boundaries between the judges' activities and those of the

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[1] A. Stone Sweet, *The Politics of Constitutional Review in France and Europe*, in 5 Int'I J. Const. L. 69 (2007). See also A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (2000).

[2] A. Stone Sweet, *The Politics of Constitutional Review in France and Europe*, cit. at 1, 90-91.

[3] V. Ferreres Comella, *Constitutional Courts Democratic Values. A European Perspective* (2009). As far as the changes coming from the external of the national systems, i.e. from Europe, see the comparative law book focused on the French legal and judicial system of M. de S.- O.- L'E. Lasser, *Judicial Transformations. The Rights Revolution in the Courts of Europe* (2009).

[4] V. Ferreres Comella, *Constitutional Courts Democratic Values. A European Perspective*, cit. at 3.

Constitutional Court become increasingly indistinct and there is a heightened risk that the judiciary undertakes a large part of the tasks that were traditionally incumbent on the Constitutional Court, thus turning the constitutional adjudication effectively into a diffused one.

Consequently, to come back to the limited perspective of the Italian legal system, in paragraph 2 I will briefly outline the division of labour between the Constitutional Court and the judiciary which is set out in the few and old Italian normative provisions on the matter. In paragraph 3 I will present the current situation in the relationship between the Constitutional Court and the ordinary, or rather regular, courts that has been reached because of the ever-increasing use of constitutional provisions on the part of the regular courts in their everyday activities. In paragraph 4 I will describe the subsequent stages that have led to the present situation, concentrating my attention on the progressive claim of the principle according to which every court has the precise duty to read legislative provisions in harmony with the Constitution. In paragraph 5 I will point out the misgivings that are triggered by Italian commentators by an at times excessive and somewhat ignored use of the criteria of the interpretation of the statutes in conformity with the Constitution. Lastly, in paragraph 6, I will come back to highlight the positive aspects of the current situation of the relationship between the two guarantor powers in the Italian legal system.

2. The Italian system of constitutional review in theory and in practice.

There is no doubt as to the centralized nature of the Italian system of constitutional review. In fact, the Italian Constitution of 1948 provides for the establishment of a Constitutional Court "which shall pass judgement [...] controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions; (Art. 134) [5].

[5] As well as over "disputes arising over the allocation of powers between branches of State, between the State and the Regions and between Regions", "accusations raised against the President of the Republic, in accordance with the Constitution" (Article 134 of the Italian Constitution,) and of Art. 1 of the successive Constitutional Law No. 1 of 11 March 1953, "whether requests for

However, as far as the constitutional review of law is concerned, a perusal of the text of the Constitution reveals that it only provides for one of the possible means to appeal to the Constitutional Court, stating that "the Government may question the constitutional legitimacy of a regional law before the Constitutional Court and likewise the Regions may question the constitutional legitimacy of law and enactments having force of law issued by the State" (Art. 127). But, in spite of the considerable increase in the number of "regional disputes" brought before the Constitutional Court following the constitutional reform of regional powers in 2001, statistically speaking this is the lesser utilised means to petition the Constitutional Court, and it is also less significant for historical reasons, since the fifteen ordinary

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repealing referenda submitted pursuant to Article 75 of the Constitution are admissible". For a clear, comprehensive description of the Constitutional Court and how the Italian body of constitutional justice operates, see the document "The Italian Constitutional Court" that the Court itself has prepared: http://www.cortecostituzionale.it/versioni_in_lingua/eng/lacortecostituzionale/cosaelacorte/cosaelacorte.asp (2009). See also, for a general overview of the Italian system of constitutional adjudication, G. Treves, *Judicial Review of Legislation in Italy*, in 7 JPL 345 ss. (1958); M. Evans, *The Italian Constitutional Court*, in 17 Int'l & Comp. L. Q. 602 ss. (1968); A. Pizzorusso, V. Vigoriti, C. L. Certoma, *The Constitutional Review of Legislation in Italy*, in 56 Tem. L. Q. 503 ss. (1983); A. Baldassarre, *Structure and Organization of the Constitutional Court of Italy*, in 40 St. Louis U. L. J. 649 ss. (1996) (and also in M. L. Corrado, *Comparative Constitutional Review. Cases and Materials* (2005); D. S. Dengler, *The Italian Constitutional Court: Safeguard of the Constitution*, 19 Dick. J. Int'l L. 363 ss. (2001); G. Rolla, T. Groppi, *Between Politics and the Law: The Development of Constitutional Review in Italy*, in W. Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (2002); M. D'Amico, *The Constitutional Court*, in V. Onida (ed.), *International Encyclopaedia of Laws, Constitutional Law*, suppl. 61 (2005), and J. O. Frosini, *Constitutional Justice*, in G. F. Ferrari (ed.), *Introduction to Italian Public Law* (2008). From the political science point of view see M .L. Volcansek, *Constitutional Politics in Italy: the Constitutional Court*, (2000). For a comparison between the American and the European (and particularly the Italian) model of constitutional justice see A. Pizzorusso, *Italian and American Models of the Judiciary and of Judicial Review of Legislation: a Comparison of Recent Tendencies*, 38 Am. J. Comp. L. 373 ss. (1990); P. Pasquino, *Constitutional Adjudication and democracy. Comparative Perspectives: USA, France, Italy*, 11 Ratio Juris 38 ss. (1998); M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: paradoxes and contrasts*, I CON, 2, 4, 633 (2004); J. Ferejohn, P. Pasquino, *Constitutional Adjudication: lessons from Europe*, 82 Tex. L. Rev. 1671 ss. (2004).

Regions were only instituted in the 1970s. Before that time, the Constitutional Court had only had to resolve relatively few appeals involving the four special statute Regions, which became five with the creation of Friuli-Venezia Giulia in 1963.

By contrast, the text of the Constitution neither allots space nor provides for the most important way, from a quantitative and qualitative standpoint, to refer a law to the Constitutional Court, which is called the "incidental" way. The term "incidental" is used because in this case the proceeding before the Constitutional Court arises as an "incident" that stops a regular civil, criminal or administrative proceeding upon the initiative of the presiding judge. The reason whereby the incidental constitutional review fails to appear in the text of the Constitution is simple: the Constituent Assembly was unable to reach an agreement on that fundamental aspect before 27 December 1947, the date on which the Constitution was promulgated by the provisional Head of State in view of its formal entry into force on 1 January 1948.

For this reason, incidental constitutional review was introduced only shortly after the Constitution itself by means of a special constitutional law that provides as follows: "questions concerning the constitutionality of a law or any other act with the force of law raised by a judge or by a party of a judicial proceeding shall be referred to the Constitutional Court by that judge for a decision, provided that it is not deemed to be manifestly groundless" (Art. 1, Constitutional Law No. 1 of 9 February 1948).

On the basis of this provision, every Italian court which considers that a doubt concerning the constitutionality of a legislative provision which must be necessarily applied in its proceeding is *not* "manifestly unfounded", is requested to refer this doubt to the Constitutional Court with a referral order containing reasons, and consequently suspend his proceeding until the Constitutional Court resolves whether or not the law violates the Constitution.

It is interesting to note that the text of the constitutional law introducing incidental constitutional review was passed by the same Constituent Assembly that drafted the Constitution. In fact, the Assembly remained at work for another month after the Constitution was approved because laws were required to start anew the country's democratic life but there still was no

Parliament to approve them; i.e. laws for the election of the first republican Parliament after the fall of the Fascist regime and the monarchy, laws regarding freedom of the press in view of the first democratic electoral campaign or Statutes for the first four Regions with special autonomy.

Therefore, in addition to ruling on the above-mentioned laws, the Constituent Assembly voted the new incidental constitutional review *in extremis* in the late afternoon of 31 January 1948, the last day on which the it was operative, after frenzied negotiations with the Christian Democrat government in power at that time, so that perhaps the majority of the Constituents who voted it did so not fully aware of what they were voting for.

Some authors consider the resulting system – i.e. the incidental constitutional review – to be a "mixed" one because ideologically it lies halfway between the European centralised model proposed by Hans Kelsen and the diffused American model.

In other words, a system was created that is both centralised, but with diffused powers of initiative, and concrete vocation. This system calls for the existence of a single body empowered to strike down laws as unconstitutional with *erga omnes* effect (Arts. 134 and 136 Const.) and also prohibits ordinary, or regular, courts from directly setting aside a law that violates the Constitution, *but* at the same time entrusts them to carry out a preliminary evaluation of the constitutionality of the substantive or procedural laws that they must apply to concrete cases (Art. 1, Constitutional Law No. 1 of 1948).

In 1953, to ensure that incidental constitutional review functioned as envisioned, few provisions of statute law were added to those already provided by the Constitution and the aforementioned constitutional law, and in March 1956, in order to regulate the remaining aspects of the constitutional review in view of the commencement of its judicial activity, the Constitutional Court itself passed a series of internal regulations immediately after its institution. Nothing else.

So, numerous important aspects governing the incidental review of constitutionality were left devoid of any positive regulation. Consequently, they were defined by constitutional case-law and above all, by the progressive evolution of the relationships between the Constitutional Court and the other

powers of State with which it interacts on a daily basis, in particular with legislators whom the Constitutional Court is called upon to control, and regular courts, who are the "gatekeepers" of constitutional adjudication and the initial addressees of its decisions.

Among the fundamental issues lacking regulation through positive laws are the types of decisions which the Constitutional Court may take and their relative effects, because the Constitution provides for and regulates only the effects of decisions which declare laws to be unconstitutional (Art. 136, Const.).

Furthermore, and what interests us here, is the fact that the boundary itself between the powers conferred on the 'old', traditional, judiciary and those conferred on the 'new' Constitutional Court has been determined right from the start by free "negotiation" between these two actors of the Italian system of constitutional review: that is, they determine the extent to which regular courts' interpretative activities may and must reach, pointing out where and when they must waive responsibility and leave room for the Constitutional Court to intervene.

3. The current relationships between the Constitutional Court and the regular courts.

Given the above premises, clearly an analysis of how law is interpreted in conformity with the Constitution, in such a way that it does not contrast with it, is the vantage point for understanding how constitutional review actually functions in the Italian system.

It is precisely through this analysis that the extent to which the regular courts participate in constitutional review today can be proven. If in addition to exercising their power/obligation to raise questions of constitutionality before the Constitutional Court, ordinary judges also are, or consider themselves to be, empowered to resolve these questions upon their own initiative by offering a different interpretation than that originally envisioned in accordance with the Constitution, it means they are exercising a *de facto* form of constitutional review, albeit with different instruments and effects than those the Constitutional Court has available. At this point, it is necessary to understand how and with what means and limits judges exercise this sort of

constitutional review, and what the consequences in the legal system are.

This paper tries to answer the following questions: how does the "factory" of interpretations of law function in conformity with the Constitution in the Italian system today? Who is its "supervisor" and who are its workmen? What do they do there? And finally, if possible, what are its prospects for the future?

In order to understand how topical these questions are and what their possible repercussions are in today's system, I feel it is necessary to outline the historical evolution of the interpretation of law in conformity with the Constitution by the Constitutional Court and the ordinary courts in the over 50 year-period that incidental constitutional review has been in operation. As Livio Paladin, one of the most important scholars of Italian Constitutional law, once put it with his customary incisiveness, "he who knows not from where he is coming, can even less imagine where he is going" [6]. Before presenting the successive stages in the evolution of the relationships between the Constitutional Court and the regular courts, however, I think it would be useful to describe what the arrival point of this evolution is.

Once it was clarified during the first few years of the Constitutional Court's functioning that the Constitutional Court and the regular courts are called upon *in equal terms* to use the constitutional provisions in the exercise of their judicial functions, an unstoppable process was set in motion, which can be summed up as illustrated below.

The judicial use of the Constitution has had the result that the activities of the Constitutional Court and of the regular courts

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[6] L. Paladin, *La questione del metodo nella storia costituzionale*, 26 *Quad. fior*. 263 (1997) . In the same way, J. Bryce, *The Action of Centripetal and Centrifugal Forces on Political Constitutions*, 1 St. Hist. Jur. 258 (1901) said that "the constitutional lawyer […] must always, if he is to comprehend his subject and treat it fruitfully, be a historian as well as a lawyer. His legal institutions and formulae do not belong to a sphere of abstract theory but to a concrete world of fact. Their soundness is not merely a logical but also a practical soundness, that is to say, institutions and rules must represent and be suited to the particular phenomena they have to deal with in a particular country. It is through history that these phenomena are known. History explains how they have come to be what they are. History shows whether they are the result of tendencies still increasing or of tendencies already beginning to decline".

have become progressively more similar and coordinated and, I might add, have been practically integrated and fused into one. In fact, today the two bodies seem to have given rise to a *single 'big' judiciary*. A single big judiciary where the two bodies are distinguishable "only by their different functions" [7], because the Constitution attributes to the Constitutional Court, but not to the other courts the power to declare a law unconstitutional with *erga omnes* effect whereas it attributes to the other courts, but not the to the Constitutional Court, the power to make the definitive ruling on specific cases.

Although these fundamental differences remain, today the two bodies look ever more like each other [8], because both have the same final aim which is to implement constitutional norms in a concrete way, and they do so by using the same reasoning prompted by those norms. Moreover, they complement each other, because the Constitutional Court extols the interpretative powers of judges whereas the judicial authorities enhance the effects of the Constitutional Court decisions and its role in the legal system to their utmost. And furthermore, the two bodies collaborate with each other in order to ensure that the functions attributed to the other body are exercised in the best way possible.

This progressive overlapping and assimilation of the nature and functions of the two bodies takes place on *at least three different levels*: the constitutional review, the resolution of individual disputes and lastly, the guarantee of the uniform interpretation of the statutes with reference to the principle of equality before the law.

Let me clarify this.

In the first place, the judicial use of the Constitution has progressively shaped the powers and the role of the judiciary itself, removing the label it once had of uncritical and unquestioning subjection to the letter of the law, and offering it

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[7] Article 107.3 of the Italian Constitution provides that "Judges shall be distinguished only by their different functions ", but it only refers to ordinary judges.

[8] While all the kelsenian Courts in their first years of activity immediately after the Second World War in Europe, and in particular the Italian and German Constitutional Courts, were "rather explicitly recognized to be something other than regular courts" (see M. Shapiro, *Courts. A comparative and political analysis* (1981).

the necessary discretionary power to impart "constitutional justice" in concrete court cases whenever the text of a law could be interpreted in conformity with the Constitution.

Secondly, over the years the Constitutional Court has turned itself into a "court amongst other court", more concerned about the non-unconstitutional outcomes which the regular courts give in disputes before them than about the legal impact its decisions may have on objective law.

In this sense it is quite significant that the Constitutional Court rarely uses the *erga omnes* instrument in order to strike completely down a provision of law, preferring rather to "manipulate" the text of the law by adding, removing or substituting the contested provision so the law complies with the Constitution. In 2008, for example, out of a total of 44 judgements accepting the incidental questions of constitutional review raised, 30 of these were "manipulative" judgements; similarly, in 2009 there were 23 "manipulative" judgement out of a total of 31 decisions of unconstitutionality [9].

With regards to the above, it is necessary to remember that the vast category of "manipulative" decisions, a kind of decision that the Constitutional Court "invented" right from the first year of its operation, encompasses all those decisions of acceptance for questions of constitutional legitimacy whose operative part of the decision, alongside the provision or provisions of law declared unconstitutional, fittingly modulates the import of its unconstitutionality. Scholars usually divide manipulative decisions into a series of sub-classifications and speak of interpretative, or interpretive, decisions of acceptance, decisions of partial, reductive or ablative acceptance, additive decisions "of principle" (i.e. additive decisions containing guarantees, or specifying services, mechanisms or principles) as well as of substitutive decisions, decisions that are manipulative over time or decisions of deferred unconstitutionality, to name but

[9] See the papers regarding constitutional review in those years published by the Centre for Constitutional Studies as attachments to the annual press conferences given by the President of the Constitutional Court, at http://www.cortecostituzionale.it/informazione/interventi_dei_presidenti/interventideipresidentidal2001aoggi/relazioniannuali.asp.

a few [10]. In reality, such classifications are of little descriptive use, because all manipulative decisions have the same effect as far as the ordinary, or regular, courts are concerned: according to the type of dispute at hand, they introduce modifications to the text of the law by removing, adding or substituting the text of provisions whose constitutionality has been challenged before the Constitutional Court with new text the Court formulated in the operative part of manipulative decision .

It should also be taken into account that the manipulative decisions have provoked considerable doctrinal debate among scholars, particularly in the past, because through the use of these decisions the Constitutional Court has essentially become a *creator* of new law. In fact, at the time when the Constituent Assembly created the constitutional judge, the latter was considered to have a dual nature: jurisdictional as far as the form of their decisions s was concerned, and legislative regarding the content and effects of their decisions of acceptance[11]. The Italian Founding Fathers had intended creating a body that had negative legislative powers aimed only at striking down unconstitutional laws. Instead, scholars usually note, through its use of manipulative decisions , the Constitutional Court has unforeseeably developed its legislative nature to take on that of a positive legislator at times, a development that consequently encroaches on the powers of Parliament, the popular sovereign body: this is an interference that some consider to be unacceptable and others questionable and in need of curtailment.

Here it is not possible nor useful to dwell on the problem of the relationship between the Constitutional Court and Parliament, nor to further develop a more complex topic connected to it, which is the limits that scholars reckon should be placed on the

[10] On some of these tools "invented" by the Italian Constitutional Court see W. J. Nardini, *Passive Activism and the Limits of Judicial Self-restraint: Lessons for America from the Italian Constitutional Court*, 30 Seton Hall L. Rev. 1 ss. (1999-2000) and also in M. L. Corrado, *Comparative Constitutional Review. Cases and Materials*, cit. at 5.

[11] Regarding the ambiguity that characterizes all models of constitutional review, which are political in substance but judicial in nature, see E. Cheli, *Il giudice delle leggi* (1999).

creative way the Constitutional Court uses manipulative decisions [12].

In keeping with this paper's line of reasoning, therefore, I would just like to emphasize just the following: by refusing to strike down a law brought before it for scrutiny, and on the contrary, by deciding to remedy its constitutional illegitimacy with a manipulative judgement, the Constitutional Court not only accentuates its legislative nature, but its jurisdictional one as well, and becomes "a judge to the utmost of its potential". As such, it takes charge of resolving the practical problem confronting the court that had raised the question and the parties of its proceedings, i.e. it asserts the requirements of the Constitution in a disputed legal relationship in spite of the presence of a law that is unconstitutional since it contains gaps or oversteps its limits or in any case needs to be corrected rather than completely struck down [13].

The third level on which the activities of the Constitutional Court and the judiciary in recent years have become inter-penetrated to such an extent that the two bodies are not easily distinguishable one from the other because of their judicial use of the Constitution, is the Constitutional Court's participation in the onerous task of guaranteeing "the exact observance and uniform interpretation of the law" and the "unity of national objective law" entrusted to the Court of Cassation by the general law on the judiciary [14].

As I will illustrate in greater detail later on, the two supreme Courts in the Italian legal system have been effectively

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[12] On this point, see for all G. Zagrebelsky, *La giustizia costituzionale* (1988).

[13] These are the words of an important scholar, currently a Constitutional Court judge member, G. Silvestri, *La Corte costituzionale nella svolta di fine secolo*, in L. Violante and L. Minervini (ed.) *Storia d'Italia. Annal*i 14. *Legge Diritto Giustizia*, 974 ss. (1998).

[14] Royal Decree 30 January 1941, No. 12, Art. 65. This traditional task, attributed to the Italian Court of Cassation both in civil and in criminal matters, is called the *nomofilachia* task. It implies that the lower courts are not formally bound by the precedents adopted by the Court of Cassation, even if they must be considered by the lower courts as authoritative and highly persuasive judgements, especially when given by the Court of Cassation "*a Sezioni Unite*" (*SS.UU.* - Joint Sections), i.e. in a particular composition of eight members, instead of three, joined together under the presidency of the first President of the Court of Cassation itself.

working together as a "team" to an ever increasing extent, enabling them to overcome interpretative conflicts in the name of the Constitution, or in the short term, to affirm and consolidate interpretative innovations so two objectives can be reached at the same time: the best implementation of the constitutional norms in the Italian legal system and the certainty of law in function of the principle of equality.

Through teamwork, each of the Courts gains in terms of authoritativeness and neither of the two loses its decision-making autonomy.

Of the two, the Court of Cassation benefits the most from this collaboration because the Constitutional Court has become its strong ally in combating the protracted crisis its guiding role in jurisprudence has undergone year after year due to the excessive number of appeals raised before it.

In fact, the Court of Cassation sees the persuasive force of its precedents increase exponentially where its interpretative solution coincides with that offered by the Constitutional Court, that is by a (different) supreme court which is highly visible because of the relatively low number of decisions it issues each year.

In the final analysis, it would seem that today the Constitutional Court and the Court of Cassation really do sit together as majority shareholders with equal stakes on the board of directors of the factory of interpretations of law in accordance with the Constitution. I might even add that where their own spheres of interest are concerned, the Council of State and the Court of Accounts, the supreme administrative courts, also sit on the same board.

Meanwhile, back in the factory, the Constitutional Court and regular courts of all levels and rank are busy at work like skilled "workmen" endowed with special constitutional sensitivity.

To close this train of thought, I would like to point out that such a result, i.e. the utmost collaboration between the Constitutional Court and the regular courts and the reciprocal enhancement of their values, is not simply one of the possible historic outcomes in the evolution of their relationship, but, on the contrary, it represents the *only possible outcome* that allows the

Italian system of constitutional review to function in a truly *effective* way.

Let us not forget that a system of constitutional review of law such as the incidental one drafted by the Constituent Assembly can be considered truly effective only when, on conclusion of court proceedings, a concrete case is *never* or *as little as possible* regulated by an unconstitutional law or by one whose conformity with the Constitution is deemed dubious.

To achieve such a result both actors in the incidental system, i.e. the Constitutional Court and the regular courts, have to share common objectives and creatively endeavour to set up efficient and permanent mechanisms to coordinate their actions both in the ascending phase, when the issue of unconstitutionality is raised, and in the descending phase, when concrete effects are remitted for decision by the ordinary court that raised the question. These mechanisms must necessarily supplement the few constitutional and ordinary laws that distribute powers to the two bodies.

In this sense, Piero Calamandrei's intuition regarding this mechanism, which he explained in his paper written in 1956 to celebrate the beginning of the Constitutional Court's official life, entitled "Constitutional Court and Judicial Authorities", was truly prophetic [15].

Even back then Calamandrei saw that the indispensable condition for the correct functioning of constitutional review in Italy and for the defence and promotion of constitutional values would be "an atmosphere of mutual understanding and comprehension" between the new Constitutional Court and the old, traditional, judicial authorities. He felt, and rightly so, that in order for the review of the constitutionality of laws to function in practice, between the Constitutional Court and the judiciary there could not just be "mere negative respect of individual limits of power, based on the division of power all public bodies are called upon to observe", but that "something else was required": "a *true active collaboration* between the Constitutional Court and regular courts working together like two complementary and inseparable

[15] P. Calamandrei, *Corte costituzionale e autorità giudiziaria*, 1 Riv. dir. proc. 8,9 and 53 ss. (1956).

gears of a single procedural mechanism in order to accomplish such a difficult task".

Above all, it is at the level of interpreting law in the light of the Constitution that the active collaboration, mutual understanding and reciprocal comprehension Calamandrei hoped for when he wrote has been achieved in recent years.

This is an excellent result, even though problems have on occasion cropped up, as I will discuss in paragraph 5 of this paper.

4. Interpretation of law in conformity with the Constitution by the Constitutional Court and the regular courts. A story in three chapters.

Now I will proceed with a brief summary of the various historic events marking the relationship between the Constitutional Court and the judicial authorities with regard to interpreting statutes. The Italian organ of constitutional justice was finally able to start functioning in the spring of 1956 amidst many unknown factors [16].

In fact there remained serious doubts as to the nature of this entirely new body in the Italian system and to its role and location within the system of existing powers of State. Would it really have the courage to go against the will of the Republican Parliament? And by what right? In this regard, the words Palmiro Togliatti, leader of the Italian Communist party, spoke before the Constituent Assembly members still echoed, and revealed his utmost mistrust in "that bizarre thing called the Constitutional Court, a body nobody knows what it is; a body that, thanks to its

[16] See A. Simoncini, *L'avvio della Corte costituzionale e gli strumenti per la definizione del suo ruolo: un problema storico aperto*, 4 Giur. Cost. 3065 ss. (2004). The Constitutional Court was not established until more than seven years after the entry into force of the Republican Constitution because of the lack of an ordinary law implementing the new body. As J. C. Dams, P. Barile, *The Italian Constitutional Court in its First Two Years of Activity*, 7 Buff. L. Rev. 251 (1957-1958), "with respect to the Constitutional Court the Italian Parliament was in a position analogous to that of the legendary Bertoldo, condemned to be hanged and then entrusted with the task of selecting the suitable tree. As it was in Bertoldo's interest never to find a suitable tree, so it was in the interest of Parliament never to find the correct formula for the implementation of a constitutional provision of which the principal function would be to limit its own power".

institution, few distinguished citizens are put above all Assemblies and the whole Parliamentary system and even democracy itself, to pass judgement on them. Who are these judges? Where would they get their power if the people are not called upon to elect them?" [17].

It was even unclear whether the Constitutional Court would be really capable of fully functioning because no one knew whether the regular courts had sufficient constitutional sensitivity to rule "not manifestly groundless" those questions of constitutional illegitimacy raised by parties in their proceedings and, consequently, whether they would open the 'door' to the Constitutional Court or would rather keep it closed.

Above all, there were serious doubts about the real normative force of the 1948 Constitution. On one hand, it suffered from the delay by the new Republican legislators in implementing its provisions [18] and, on the other hand, it saw its normative content taken over by the traditional judiciary [19]. In this regard, we must remember that between 1948 and 1956 it was the ordinary courts that were responsible for dividing constitutional provisions into programmatic provisions and prescriptive provisions, and further subdividing the latter into prescriptive provisions with

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[17] P. Togliatti in his speech before the afternoon session of the Constituent Assembly, 11 March 1947.

[18] In 1956, the year the Constitutional Court started functioning, of all the new bodies or institutions provided for by the Constitution of 1948, the only one to have been implemented by law at that point was the Constitutional Court itself. The legislative body had failed to implement the Superior Council of the Judiciary, the abrogative referendum or even, as indicated above, the Regions, not to mention the fact that Parliament never repealed any of the laws restricting freedom enacted by the Fascist regime, starting with the unified law on public security of 1931 which limited freedom of expression (that the Constitutional Court afterwards declared unconstitutional in its groundbreaking Judgment No. 1 of 1956). On this issue see J. C. Adams, P. Barile, *The Implementation of the Italian Constitution*, 47 Am. Pol. Sc. Rev. 61 ss. (March 1953).

[19] Who had been entrusted with carrying out constitutional review until the Constitutional Court began functioning. According to Art. VII, paragraph 2 of the transitory and final provisions of the Constitution of 1948 "until such time as the Constitutional Court begins its functions, the decision of controversies indicated in Article 134 shall be conducted in the forms and within the limits of the provisions already in existence before the implementation of the Constitution".

immediate effectiveness and prescriptive provisions with deferred effectiveness, with the overall result of preventing most constitutional provision from really operating in the Italian legal system in the first years after the new Constitution came into force.

All of these fears, difficulties and uncertainties explain and justify the notorious mistake committed by the first President of the Constitutional Court, Enrico De Nicola, while addressing the inaugural conference of the Court's first public hearing on 23 April 1956 [20]. Well aware that the body over which he presided was at the mercy of the regular courts because it needed referral orders from them to operate, he expressed the hope that the judiciary would demonstrate "*unity of intent and action*" with the Constitutional Court when evaluating doubts raised about the constitutionality of a statute, but nevertheless he reckoned and strongly affirmed that "*the Constitutional Court* [would remain] *the vestal of the Constitution and the regular courts the vestal of the Law*".

This is what could be simply called "the De Nicola rule", with the Constitution on one side and the law on the other, each with its own devoted guardian and interpreter, with no possibility for either to encroach on the other's territory except when they had to work together, as if they were two completely extraneous bodies, to evaluate first that a question of constitutionality was not manifestly groundless and subsequently to rule on its constitutional legitimacy. Such an arrangement was grounded in ideas that emerged from debates on constitutional justice during the meetings of the Constituent Assembly.

The reasons that had pushed the Constituents to reject a de-centralised model for constitutional review not only lay in their mistrust of the constitutional sensitivity of judges of that era, who for the most part had been functionaries under the Fascist regime, but also in the concept the Assembly generally accepted of how the future Constitution would be. As a matter of fact, the Constituents reckoned that the new Constitution would be to be a superior law but not exactly normative in the sense that law is, or in the sense that the constitutions of countries with de-centralised

[20] It can be found at http://www.cortecostituzionale.it/informazione/interventi_dei_presidenti/interventideipresidentidal1956a1960/1956/relazioniannuali_1956_2.asp.

constitutional review are, which apply directly within the sphere of material relationships and restrict the judiciary's actions [21].

In other words, as a legacy from the period of Italy's Albertine Statute, there was the deep-seated conviction in the minds of the members of the Constituent Assembly and of most scholars of the subsequent period, that public bodies, and in particular Parliament, were to be the exclusive addressees of constitutional rules and that these rules were not intended to operate in the relationship between the individuals in the society [22].

The choice of centralised constitutional review certainly responds to the intention of the Constituents to maintain the *status quo,* that is to conserve the old ordinary legal system based on the force of law alongside the new constitutional legal system [23]. The confirmation that this was their intention lies in the fact that they never thought of abolishing the Court of Cassation once the Constitutional Court was instituted; they intended to create precisely just what they did, i.e. a diarchic system in which each of the two levels of legality had a "vestal" of its own, that is a relatively autonomous system of judicial guarantees.

The "De Nicola rule" which apportioned laws to the judiciary and the Constitution to the Constitutional Court, was rejected in the brief space of several weeks, and probably in the jury room following the first public hearing. This rejection became evident between the end of June and the beginning of July that year, when the Constitutional Court issued judgements in which it *breached the wall* that seemed to divide its competences from those of ordinary judges, and thus enabled *the two worlds*, that of the legislative legal system and that of the constitutional legal system, which previously had no point of contact with one another, *to communicate.*

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[21] C. Mezzanotte, *La Corte costituzionale: esperienze e prospettive* (1979).

[22] M. Fioravanti, *Per una storia della legge fondamentale in Italia: dallo Statuto alla Costituzione*, in M. Fioravanti (ed.), *Il valore della Costituzione. L'esperienza della democrazia repubblicana* (2009).

[23] To the point that in case of conflict between the two spheres before an ordinary judge neither of the two directly prevails, and the "only possible remedy is to suspend the proceedings" (C. Mezzanotte, *La Corte costituzionale: esperienze e prospettive*, cit. at 21).

The instrument the Constitutional Court used to breach that wall was the "interpretative" decision of dismissal (but someone translate it with "interpretive" decision of dismissal: *sentenza interpretativa di rigetto*), a decision which proposes a new interpretation of the statute, different from the one that the regular court that raised the question had chosen, and on the basis of it declares unfounded the doubt of its constitutionality.

With this innovative type of decision , the Constitutional Court refuted the very foundations of "De Nicola rule", because on one hand it re-affirmed its competence to interpret also the statues it was reviewing, and no longer limited its range of action to simply interpreting the Constitution; and on the other, I would say above all, it invited the ordinary courts to "not stop at the barrier of law in their interpretative activities, but to surmount it and venture into the world of constitutional values" [24].

From that moment on, all commentators note it could no longer be asserted that ordinary judges had a monopoly on interpreting statutes or the Constitutional Court a monopoly on interpreting the Constitution. It became evident, on the contrary, that in the same way as the Constitutional Court must interpret the statutes it reviews, so ordinary judges have to interpret and apply the Constitution to their cases [25].

As far as the effects of interpretative decisions were concerned, it took two disputes between the Constitutional Court and the criminal division of the Court of Cassation, better known as the first and second "wars" between the two supreme courts, that broke out at a distance of forty years one from the other, in

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[24] C. Mezzanotte, *La Corte costituzionale: esperienze e prospettive*, cit. at 21.

[25] F. Bonifacio, *Corte costituzionale e autorità giudiziaria*, in G. Maranini (ed.), *La giustizia costituzionale* (1966); S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana*, (2004). It must also be remembered that despite some authoritative doctrinaire opinions (for example the one expressed by Leopoldo Elia in numerous contributions), the Italian legal system does not provide for the regular courts to be formally bound by the way the Constitutional Court interprets the Constitution, in the same way that in the Constitutional Court is not formally bound by the way the regular courts, Court of Cassation included, interpret the statutes (even if for some time in the past – see below paragraph 7, second stage, "the living law doctrine" – the Constitutional Court preferred not to correct the interpretation of the law constantly and principally upheld by the regular courts).

1965 and in 2005, to establish in the first war[26] and to reaffirm in the second one[27], that in a Constitutional Court decision of

[26] In 1965 the practice of using interpretative decisions of dismissal that conflicted with the interpretation generally followed by regular courts created a short-lived but bitter dispute with the Supreme Criminal Court regarding the right to a defence in the "summary examination" phase of the old (now repealed) code of criminal procedure. At the end of this dispute, after the Court of Cassation refused to follow the interpretation that the Constitutional Court had proposed in its interpretative decision (Const. Court Judgement No. 11 of 1965), the Constitutional Court was obliged to utilise the different instrument of the decision of manipulative acceptance in order to declare that the "living" provision of the code of criminal procedure was unconstitutional (Const. Court Judgement No. 52 of 1965). On this issue see J. H. Merryman, V. Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 Am. J. Comp. L. 665 (1966-67).

[27] On this last conflict between the two Courts see L. Garlicki, *Constitutional Courts versus Supreme Courts*, 5 Int. J. Const. L. 56 (2007). In the decision of the Constitutional Court that gave rise to the matter, an interpretative decision of dismissal "for the reasons given" proposed that the interpretation of the provisions of the criminal law code regarding the maximum length of pre-trial custody previously used by the ordinary courts be abandoned in favour of a new interpretation consistent with the Constitution (Const. Court, Judgement No. 292 of 1998). After this interpretative decision of dismissal some courts raised the same question again, saying they were not convinced by the interpretation the Constitutional Court had proposed. They continued to request a decision of manipulative acceptance, but the Constitutional Court answered with an order of manifest groundlessness and insisted on re-proposing its original interpretation, labelling it a "constitutionally mandatory" interpretation (Const. Court Orders No. 429 of 1999 and Nos. 214 and 529 of 2000). In the meantime, the *criminal* Joint Sections of the Court of Cassation (see above footnote 14) pretended to pay lip service to the Constitutional Court's decision by issuing the Musitano decision (Court of Cassation, criminal Joint Sections, 29 February 2000, No. 4), but adopted instead an interpretation of the law that contrasted with it. The Constitutional Court, in the latest of its orders of manifest groundlessness (Const. Court Order No. 529 of 2000), singled out and denounced the fact that the Court of Cassation had avoided following its judgement by issuing the Musitano decision. At this point, it was the Joint Sections of the Court of Cassation which brought up the question again, and this time the Constitutional Court answered with an unusually harsh order of manifest inadmissibility in which it pointed out that "a similar approach to constitutional review can never be admissible especially if one considers that the order issued by the Joint Sections, in addition to appearing perplexing..., closes with an explicit invitation to "respect reciprocal attributions of power" as if this Court were permitted to affirm constitutional principles only through judgements with repealing effects and as if it were denied the power to interpret the law in the light of the Constitution in other types of decisions. This

dismissal an interpretation of a statute does not have the status of a binding precedent, but only of an authoritative precedent *if supported by persuasive reasoning*.

Therefore, interpretative decisions of the Constitutional Court dismissing a question raised are not binding on the ordinary regular courts. Consequently, for every Italian judge the interpretation of a statute law rendered by the Constitutional Court is worth no more but - importantly – no less than that rendered by another authoritative court, such as the highest ordinary (Court of Cassation) and administrative (Council of State and Court of Accounts) courts.

Let us return to the historical development of interpretative decisions [28], which is of great interest to us because each of the stages these decisions pass through marks an evolution in the way

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order, which testifies to the harshness of the dispute over the interpretation of law, was followed by two additional orders of manifest groundlessness of the same nature, adopted in relation to referral orders issued by several judges from the merits courts (Const. Court Order No. 335 of 2003 and No. 59 of 2004). The Court of Cassation was thus divided because some sections followed the Musitano decision and its orientation whereas others decided to listen to the Constitutional Court. The conflict between the different sections of the Court of Cassation spread to the Joint Sections, which, by means of the Pezzella decision (Court of Cassation, criminal Joint Sections , 17 May 2004, No. 23016) re-affirmed the interpretation it followed in Musitano because, in its opinion, the interpretation was correct and consistent with the Constitution. However, it never raised the question of its constitutionality again. At this point, the Constitutional Court took note that " a living law had been formed which was incompatible with the interpretation upheld thus far", and declared it be contrary to the Constitution with a decision of manipulative acceptance, the same type of decision the judicial authorities had been insistently requesting the Court to issue for seven years (Const. Court, Judgement No. 299 of 2005).

[28] See R. Romboli, *Qualcosa di nuovo… anzi d'antico: la contesa sull'interpretazione conforme della legge*, in AA. VV (ed.) *Studi in memoria di Giuseppe G. Floridia* (2009); R. Romboli, *L'applicazione della Costituzione da parte del giudice comune*, in S. Panizza, A. Pizzorusso, R. Romboli (ed.), *Ordinamento giudiziario e forense* (2002); R. Romboli, *L'interpretazione della legge alla luce della Costituzione tra Corte costituzionale e giudice comune*, in E. Navarretta, A. Pertici (ed.), *Il dialogo tra Corti* (2004); G. Sorrenti, *L'interpretazione conforme a Costituzione* (2006), 177; R. Pinardi, *L'*horror vacui *nel giudizio sulle leggi* (2007), 98 ss. and R. Pinardi., *L'interpretazione adeguatrice tra Corte e giudici comuni: le stagioni di un rapporto complesso e assai problematico*, in G. Brunelli, A. Pugiotto, P. Veronesi (ed.), *Il diritto costituzionale come regola e limite al potere*, IV, *Dei giudici e della giustizia costituzionali* (2009).

the "factory" produces interpretations in conformity with the Constitution in the Italian legal system.

First stage - 1956 – 1965.

Up to the first half of the 1960s, the instrument of interpretative decisions of dismissal and the relative request for regular courts to make use of the Constitution as legal norm had a purely pedagogic or educational function for those courts. The Constitutional Court used it to propose its own interpretations of law in the light of the Constitution as alternatives to the ones the regular courts were practicing.

This request fell on the deaf ears of the Court of Cassation and of the other highest courts because their judges were elderly and had qualified in the pre-republican era, but above all because they lacked constitutional sensitivity [29]. In those years, however, even younger judges in the lower courts, who were more sensitive to constitutional innovations, did not dare proceed alone to interpret law in conformity with the Constitution. They feared, and rightly so, that the judges of the higher courts, conservative by nature, would have re-written their more innovative judgements, so they too usually preferred to ask for help from the Constitutional Court and choose the path of the constitutional question rather than the path of the interpretation of the statute in the light of the Constitution [30].

To summarize. Although in the first stage, it was the Constitutional Court in particular that enabled the factory to keep on producing interpretations of law in conformity with the Constitution, the Constitutional Court still called on all the other judges to work alongside it there, albeit without much success in the beginning.

Second stage - from 1965 to the middle of the 1990s - the living law doctrine.

Starting in 1965, the Constitutional Court's pedagogical efforts in favour of the Constitution started to bear their first

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[29] On the relationships between the Constitutional Court and the Court of Cassation in that period see the degree thesis of S. ALITO, *An introduction to the Italian Constitutional Court* (1972), in http://www.princeton.edu/~mudd/news/Alito_thesis.pdf, and V. Vigoriti, *Italy: the Constitutional Court*, 20 Am. J. Comp. L. 412 (1972).

[30] V. Onida, *L'attuazione della Costituzione fra Magistratura e Corte costituzionale*, in *Scritti in onore di Costantino Mortati* (1977).

fruits. Indeed in that year, at the end of a stormy meeting of the National Association of Magistrates, whose members at that time were only lower court judges, a well-known motion was approved which *clearly affirmed for the first time* that henceforth, alongside the power to raise incidental questions of constitutionality, every regular court has to exercise also the power to use the Constitution as a normative source, both to interpret law in compliance with it and to directly apply it where technically possible [31]. This could naturally also occur upon their own initiative, even in the absence of an explicit request from the Constitutional Court.

In those years, the factory of interpretations in conformity with the Constitution underwent considerable expansion and continuously had to engage new workmen for its plant. Lower courts were the first to work alongside the Constitutional Court, and then, little by little, due to the generational turnover of personnel in the judiciary and changes in Italian society itself, also the highest courts, changing their earlier attitude, began reading statutes in the light of the constitutional provisions.

This second "season" of interpretative decisions reached its apex at the beginning of the 1980s, and progressively declined in the 1990s. In this stage, characterized by the regular courts' increasingly wide-spread use of constitutional norms, the Constitutional Court seemed to be satisfied with the results it had obtained thus far and, not wanting to force the regular courts' hand, proposed new interpretations in conformity with the Constitution only when an unconstitutional settled case law had not been formed.

So, it is the custom to say that the Constitutional Court joint the so-called "living law doctrine" (*dottrina del diritto vivente*), by which in the presence of an unequivocal and well-consolidated interpretation of a statute in the regular courts' case law, and in particular in the Court of Cassation's case law, the Constitutional Court renounces its own interpretative freedom and declares itself bound to judge the constitutionality of that statute just as *lives*

[31] The motion stating this position, whose title is "the Constitution's judicial function and political tendencies", can be read in the minutes of the National Association of Magistrates, *Atti e commenti*, XII National Congress, Brescia-Gardone (1966) and at http://www.associazionemagistrati.it/public/File/gardone.pdf.

concretely in judicial practice (from here we get the expression "*living* law") [32].

As a consequence, in that period the Constitutional Court tended to use interpretative decisions of dismissal only in two instances: where the interpretation accepted by the court that had raised the question conflicted with a 'living law' in conformity with the Constitution, or where no 'living law' had yet been formed for the law whose constitutionality was under review. Instead, where the settled case law was unconstitutional – that is, when there was an unconstitutional 'living law' –, the Constitutional Court proceeded with a decision of unconstitutionality.

Third stage - from the second half of the 1990s to the present day - the prevalence of the doctrine of interpretation in accordance with the Constitution over the doctrine of the "living law" and the metamorphosis of the interpretative decisions of dismissal.

In the third stage of interpretative decisions, a work in progress which is still evolving, the Constitutional Court has increasingly enhanced the value of interpretation in accordance with the Constitution, with the effect of relegating to a less important position the other criterion followed until then, i.e., as already said, the adherence to the 'living law'.

The inversion in the order of priority of the two criteria that can be used to resolve the continual conflicts between the legislative legal system and the constitutional legal system [33] has caused a true genetic mutation, or better still, a metamorphosis [34] in various senses, both formal and substantive, of interpretative decisions of dismissal of the Italian Constitutional Court.

Above all, classical interpretative decisions of dismissal – i.e. those that present, in the operative part of the judgement, the words "for the reasons given" – are being used in completely new contexts compared to the past.

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[32] See A. Pugiotto, *Sindacato di costituzionalità e "diritto vivente". Genesi, uso, implicazioni* (1994).

[33] M. Luciani, *Su legalità costituzionale, legalità legale e unità dell'ordinamento*, in AA. VV. (ed.) *Studi in onore di Gianni Ferrara* (2005).

[34] A. Pugiotto, *La metamorfosi delle sentenze interpretative di rigetto*, 3 Corr. Giur. 985 (2005).

The Constitutional Court resorts to them both in order *to contest* consolidated interpretative tendencies it feels are contrary to the Constitution, something it never used to do, *and to open* the door to creative interpretations that comply with the Constitution but which are light years away from the letter of the law or almost incompatible with it.

Instead, in other less controversial cases, the Constitutional Court issues decisions of dismissal whose substantially interpretative nature is not stated in the operative part of the judgement [35].

Furthermore, in this stage when it rejects the interpretation that was accepted in the referral order, alongside the decision of dismissal (whether "for the reasons given" or not) the Constitutional Court has begun to utilise a *decision of inadmissibility* to admonish judges who have neglected to carry out *their precise duty* of taking all the necessary steps to bring the law back into harmony with the Constitution *before* referring the question of its constitutional legitimacy to the Court.

The case that officially inaugurated this tendency is the noteworthy judgement No. 356 of 1996 which affirms that "in principle, laws are not declared constitutionally illegitimate because it is possible to give them unconstitutional interpretations (and some judges feel they can do this), but rather because it is impossible to give them an interpretation in conformity with the Constitution". The mere "possibility" of offering an interpretation of the challenged statute in the light of the Constitution prompted

[35] Instead, if a living law has still not been formed for a given provision or even if one exists that conforms to the Constitution, the Constitutional Court usually prefers a decision of dismissal whose interpretative nature is not stated in the operative part of the judgement. In these instances, the academic literature speaks, rather than of veritable decisions of "interpretative refusals" "*interpretative di rigetto*" decisions , of "decisions of dismissal with interpretation" [V. Onida, M. D'amico, *Il giudizio di costituzionalità delle leggi. Materiali di giustizia costituzionale.* I. *Il giudizio in via incidentale,* (1998)]; "interpretative decisions of dismissal" [A. Ruggeri, A. Spadaro, *Lineamenti di giustizia costituzionale* (2009)]; "masked decisions of dismissal" [E. Malfatti, S. Panizza, R. Romboli, *Giustizia costituzionale* (2007)]; "hidden decisions of dismissal" [A. Celotto, *Il (pericoloso) consolidarsi delle "ordinanze interpretative"*, 2 Giur. Cost. 1463 (2003)]; "concealed decisions of dismissal" (G. Sorrenti, *L'interpretazione conforme a Costituzione,* cit. at 28), or even of interpretative decisions lacking in "jurisprudential evidence" [L. Elia, *Modeste proposte di segnaletica giurisprudenziale*, 5 Giur. Cost. 3688 (2002)].

the Constitutional Court for the first time not to adopt a decision of dismissal, which requires regular courts to adapt the statute to the constitutional provisions *together with* the Constitutional Court, but rather a decision of inadmissibility, that is a decision requiring regular courts to provide an interpretation that adapts the statute to the Constitution *befor*e appealing to the Constitutional Court, and preferably *in its place.*

This clear invitation to all judges in the Italian legal system to work in the factory of interpretations in conformity with the Constitution has become *increasingly insistent* and, I might add, *unavoidable* [36].

In the following years, at least from 1998 onwards, what had once been the quest for an interpretation of law in conformity with the Constitution prior to its review has by this time become a new condition for incidental constitutional review alongside the relevance of the doubt of constitutionality and its non-manifest groundlessness, because the Constitutional Court has begun to use the instrument of order of manifest inadmissibility in a peremptory way, to reprimand the court that had raised the question for failing in its efforts to interpret the law in line with the Constitution.

Statistically speaking, orders of this type have increased greatly, and has become more peremptory, to the point that the Constitutional Court does not always indicate what the possible interpretation of the statute adapted to the Constitution is, but only states that it exists, and so leaves the judges completely alone in the difficult task of finding it.

5. The doubts of the scholars… .

From this brief outline it is clearly emerging that the new millennium is seeing the "explosion" and "radicalisation" [37] of the doctrine of interpretation of law in conformity with the Constitution by the Constitutional Court. This means that regular courts are more and more often invited to read statutes in the light of the Constitution. In the ordinary courts on the other hand, this

[36] R. Romboli, *Il ruolo del giudice in rapporto all'evoluzione del sistema delle fonti ed alla disciplina dell'ordinamento giudiziario*, *16* Quad. Ass. St. Ric. Parl. 73 (2006); R. Romboli, *L'attività creativa di diritto da parte del giudice*, 1 Quest. giust. 203 (2008).
[37] G. Sorrenti, *L'interpretazione conforme a Costituzione,* cit. at 28,

involves the extensive use of the interpretative doctrine on the part of judges both following the Constitutional Court's interpretative decisions - either of dismissal or of inadmissibility (whether simple or manifest) - and, more often, anticipating the Constitutional Court's intervention or replacing it on their own initiative.

Little by little, over the years, the system has progressively reversed the 'De Nicola rule' from where it started.

The *keyword* now seems to be that both *the law and the Constitution belong to regular courts* when possible, if necessary even stretching the semantic potential of the legislative text, and to the Constitutional Court only when the regular courts are unable to read the relevant statute in conformity with the Constitution.

The impression is that at least from the second half of the 1990s onwards, the Constitutional Court has preferred to delegate to judges in ordinary courts to control legislation and bring it back into harmony with the Constitution, in order to avoid direct confrontations with the political powers. A further indication of the Constitutional Court's withdrawal from the limelight in order to draw other actors into it, according to some observers, is the greater value it places on the jurisprudence of the Luxembourg and Strasbourg courts, which the Constitutional Court itself put into effect with tools I will not discuss in this paper: an attitude which once again, could be likened to the delegation of its interpretative powers to the two European courts [38].

In fact, this gives rise to the suspicion that behind its increasingly insistent request for judges to proceed alone to adapt the law to the Constitution lies the Constitutional Court's intention to avoid a direct confrontation with political power, withdraw from the front line and let others control the majority where possible. In short, it wants to exercise the well-known "passive virtues" typical of a supreme court that is attributed with the power to review the constitutionality of law, but which finds itself operating in a system with a very strong political power.

[38] See in their entirety the remarks of T. Groppi, *The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?*, 3 J. Comp. L. 115 ss. (2008) and, on the same constitutional case law, O. Pollicino, *Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism. Judgements No. 348 and 349 of 22 and 24 October 2007*, 4 Eur. Const. L. Rev. 363 ss. (2007).

This suspicion seems obviously to be validated by the fact that in the mid-1990s, the Italian electoral system reached a turning point and went from the proportional to the quasi-majoritarian system. These changes, as a result of the electorate's decision in the referendum on the electoral system of 18 April 1993, were implemented by Parliament during the XI[th] legislature, 1992-1994 [39], which, according to some authors, was probably a reason for an increase in the Constitutional Court's 'counter-majoritarian difficulty', with the consequent need to moderate its own role [40].

The many *perplexities* scholars rightly manifest are derived from just this. They feel that many risks are inherent in the excesses – including both those already committed as well as those feared – of the doctrine of interpretation of statutes in conformity with the Constitution.

The first risk is that the judges' uncontrolled or excessive use of this rule of interpretation will deprive the role of the Constitutional Court of substance and seriously undermine its *raison d'être* in the Italian legal system [41]. If an interpretation in conformity with the Constitution is permitted to ignore or force the limits of a law text, it will allow the ordinary courts to set aside

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[39] On this point see, G. della Cananea, *The Growth of the Italian Executive*, in P. Craig & A. Tomkins (ed.), *The Executive and Public Law* (2005).

[40] On this, see in particular P. Pederzoli, *La Corte costituzionale* (2008), 1 ss. Note, however, that said analysis seems incomplete because it does not take into consideration the fact that the Constitutional Court has never abdicated its role of restricting the very powerful majority in recent years. Here it is sufficient to cite the decision with which the Constitutional Court declared inadmissible the conflict between branches of State that Parliament raised against the Court of Cassation, which had been accused of having used its provisions of law as "mere formalities behind which it could produce law or diminish Parliament's exercise of legislative power" (Const. Court. Order no. 334 of 2008), and the decision with which the Constitutional Court declared unconstitutional the so-called "Alfano law" (Const. Court Judgement No. 124 of 23 July 2008), which provided for the suspension of criminal proceedings against Prime Ministers, Presidents of the Chamber of Deputies and of the Senate and Presidents of the Republic (Const. Court Judgement No. 262 of 2009). Both decisions can be seen in their entirety in English on the official website of the Constitutional Court at http://www.cortecostituzionale.it/versioni_in_lingua/eng/attivitacorte/pronunceemassime/recent_judgments_2007.asp .

[41] M. Luciani, *Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione "conforme a"*, cit. at 33.

the law in substantive terms and to betray the centralised system of constitutional review in favour of a *de facto* diffused system.

The second risk, others perceive, is that the counter-majoritarian function of controlling the legislative body, when removed from under the Constitutional Court's jurisdiction, will be completely entrusted to ordinary courts, that are unsuited for such a task. The Italian judiciary, and the society in which it operates, is in fact far removed in structure and guarantees from the American judiciary, vested with powers of diffused constitutional review [42].

I might add, however, that only the distorted applications of the doctrine of the interpretation in conformity with the Constitution, namely the excesses, run these risks.

A closer look at the excesses committed in practice to date shows they concern specific cases and therefore appear to be simple exceptions to the commonly followed rule which calls for judges to use interpretative decisions in accordance with the Constitution as far as possible, but subject to the respect for the limits imposed by the statute's text.

Rather than dwelling on *pathological possibilities*, it is worthwhile stopping to reflect on the physiology of the system, to note that this "explosion" and "radicalisation" in the doctrine of interpretation in conformity with the Constitution is not a unilateral phenomenon put into effect by one of the actors in the system and forced on the other. On the contrary, this "explosion" is found with the same intensity both in the Constitutional Court and in the regular courts.

In other words, it is this phenomenon that constitutes both the cause and the maximum expression of the present coordination and collaboration between the Constitutional Court and regular courts that I spoke about in paragraph 3, and which invites us to recognise their fusion into a single 'big' judicial power in opposition to the representative political power.

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[42] M.R. Ferrarese, *Magistratura, virtù passive e stato attivo*, at http://www.cirfid.unibo.it:80/murst40-97/index_geografico.html

6. …and the certainties of the practice.

In conclusion, I would like to emphasize that the current close co-operation between the Constitutional Court and the regular courts inside the factory of interpretations in conformity with the Constitution *works*, and rather well at that: it operates at full capacity and above all, it turns out stable interpretative solutions that satisfy the requirements of legal certainty.

This co-ordination between the two bodies takes place in a variety of unforeseeable ways.

In the first place, as far as decision-making techniques are concerned, the interventions of the Constitutional Court are weighed differently and may be judgements *("sentenze")* of dismissal, simple or "for the reasons given" , or judgements *("sentenze")* of inadmissibility supported by detailed and well-grounded reasons, or also summary orders *("ordinanze")* of manifest groundlessness or manifest inadmissibility.

Secondly, the type of interpretation in accordance with the Constitution sustained by the Constitutional Court may be perfectly compatible with the letter of the law at times, whilst at others it may be very creative and daring. Or, as mentioned before, the Constitutional Court's orders of manifest inadmissibility which invite judges to choose a different interpretation of the law that is compatible with the Constitution may not even indicate what this interpretation is.

In the third place, the contexts in which interpretative constitutional decisions intervene are widely diversified and may regard statutes passed a long time ago, or recently approved by the majority; they may intervene in the absence of any significant intervention by the higher courts, or in the presence of varied case law, that either complies with the Constitution or violates it.

One of the most successful solutions from the standpoint of stable interpretative orientations in conformity with the Constitution is obviously when the Constitutional Court, in a well-documented and well-reasoned interpretative judgement (a "*sentenza*"), upholds the interpretations of a statute in conformity with the Constitution already put into practice by the other judges, and above all by the Court of Cassation.

But in reality almost all possible combinations can work. For example, there may be interpretations that the Constitutional Court first proposes against a hostile jurisprudential backdrop,

which are however immediately regarded as persuasive by the Court of Cassation and also accordingly by the lower courts; there may be innovative adaptive interpretations proposed by a single judge that conflict with the 'living law', but that find immediate favour with the majority of the regular courts thanks to the Constitutional Court's timely intervention in support of that innovative solution; there may be occasions when the Court of Cassation realizes that a constitutional proceeding is pending on a particular provision, so it anticipates the Constitutional Court's decision and proposes an interpretation in the light of the Constitution which the Constitutional Court promptly makes its own; and so on, in a thousand different ways that do not, however, spare us some *coups de théâtre*.

The only combination that risks not working, as emerges from a study carried out by the Constitutional Court's own Centre for Studies [43], seems to be when the Constitutional Court, in order to request that judges overcome conflicting case law in the name of the Constitution, uses an inadequate tool, often a poorly reasoned "order" (an "*ordinanza*" and not a "*sentenza*"), which is barely visible and often unconvincing. In such instances, it may be the case that the interpretative decision is actually ignored by ordinary judges or, even, if they are aware of it, that it has no effect on their previous orientation unless a higher regular court, usually the Court of Cassation, intervenes to enhance its value even years later.

Otherwise, we can undoubtedly say that that most of the interpretative proposals put forward by the Constitutional Court are freely accepted by the regular courts and, in parallel, that almost all the attempts at interpretation conforming with the Constitution tried out by the regular courts are well received and enhanced by the Constitutional Court.

On only one occasion, indeed, did the Constitutional Court disprove the interpretation conforming with constitutional principles carried out by the Civil Joint Sections of the Court of Cassation [44].

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[43] E. Lamarque, *Il seguito delle decisioni interpretative e additive di principio della Corte costituzionale presso le autorità giurisdizionali (anni 2000-2005)*, 1 R. T. D. Pubbl. 699 (2008).

[44] Const. Court, Judgment No. 77 of 2007, which declares "that Article 30 of law No. 1034 of 6 December 1971 (Law on the establishment of the regional

In the final analysis, the real *strength* of all the forms of collaboration that work is the *willingness* of the Constitutional Court and the regular courts to *dialogue* with each other and *to exchange their views* on the goodness and feasibility of each interpretative solution compatible with the Constitution.

In turn, dialogue and exchange of views are nurtured by the knowledge and due consideration that each of the interlocutors has of the other's orientation and reasoning, and are therefore promoted by two factors.

First of all, they are favoured by the use of a means of communication suitable for making itself known, which the interlocutor understands and accepts (for the Constitutional Court, a well-reasoned judgement, a "*sentenza*", and not a summary order, an "*ordinanza*").

Secondly, they are furthered by the variety and flexibility of the forms through which the dialogue is best able to develop over time so that a broad consensus is reached by all judicial bodies involved, thereby achieving a result that is satisfactory for all.

I feel that the prospects for the future of the factory of interpretations in conformity with the Constitution in the Italian legal system are staked on maintaining this elasticity in the forms of dialogue between the Constitutional Court and judicial authorities and on their openness to diverse solutions of collaboration.

And it is important to note that such a co-ordinated use of the interpretation of law in conformity with the Constitution on the part of the Constitutional Court and the regular courts is essential, for the time being, in order to control the respect of the

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administrative tribunals) is unconstitutional insofar as it does not provide that the substantive and procedural effects of an application submitted to a court which lacks jurisdiction be maintained, after jurisdiction has been declined, in proceedings before the court with jurisdiction". It is possible to read the whole text of the decision in English on the official site of the Constitutional Court at http://www.cortecostituzionale.it/versioni_in_lingua/eng/attivitacorte/pronunceemassime/recentjudgments_2007.asp. The Italian commentators have pondered this case at great length, highlighting its uniqueness in the complex scenario of the relationship between the Constitutional Court and regular courts. See R. Romboli, Translatio iudicii *tra Corte costituzionale Corte di Cassazione: due sentenze "storiche" sono meglio di una?* , 1 Quad. Cost. 129 ss. (2008) and, willing, E. Lamarque, *La* translatio iudicii *e gli effetti delle sentenze manipolative della Corte costituzionale*, in 3 St. Iur. 968 ss. (2007).

Constitution by the political power without creating greater friction than that which has existed in Italy for the past twenty years because of other, different factors, well-known on the international political scene, but impossible to be considered here.

SHORT ARTICLES

THE GAMBLE OF FISCAL FEDERALISM IN ITALY

Tommaso Edoardo Frosini *

Abstract.

Since the Italian Constitution has undergone a profound reform with regard to the relations between central and local government. Although a widespread opinion argues that, Italy has taken its first steps towards a federal system, in fact it has strengthened its regionalism. Only in 2009, in particular, has Parliament implemented the new Article 119 of the Constitution, which deals with fiscal federalism. This article argues that the Act does not aim at achieving a system of competitive fiscal federalism, but, rather, a financial system in which healthy competition among areas is combined with cooperation, in order to effective protection of the entirety of citizens' rights. However, new principles and standards are laid down, which seek to enhance autonomy, transparency, accountability. In particular, the incremental variations based on historical spending will be replaced with standard spending, which implies a strong cultural change.

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1. Introduction.

With the 2001 reform of the Italian Constitution and in particular Title V thereof dealing with relations between central and local government, Italy has taken its first steps towards a federal system. In fact, Italy has gone from a regional system in which central government enjoyed all the powers combined with a limited role for local government to a system that can best be defined as 'federalist like' because the federalisation process has not yet been completed, especially in terms of establishing a house of parliament representing the interests of the regions, provinces and municipalities as such.

A significant step towards the development and growth of the federal system in Italy will undoubtedly occur through implementation of fiscal federalism governed by article 119 of the Constitution. The fact is that up to now there has been a structural anomaly: the federal system has been achieved only in part relating to administrative functions (Bassanini Law) and legislative powers (reform of Title V of the Constitution) while the whole issue of funding has remained where it was before, based essentially on a model of grants made by central government. The effect of this asymmetry is that public spending (excluding pensions and interest) is at this point in time divided equally between central government on the one hand and the regions/local authorities on the other hand but the latter raise less than 18% of tax revenues. There is thus a weak link between taxation and spending. Centralised government may well have been checked but federalism has not been created.

From this perspective the Italian situation is similar to that which reigned in Spain in the 1980s when the new constitution granted greater legislative and administrative functions to the autonomous communities there but not the power to levy taxes. This lack of association between spending and taxation led to public spending spiralling out of control and the remedy was fiscal federalism, which was quickly and resolutely introduced shortly afterwards.

By contrast in Italy central government continues to be the paymaster of last resort. It is clear that a federal system which does not also incorporate fiscal federalism will not be very effective. Maintaining a model essentially based on grants from central government in a country that has witnessed a

decentralisation of significant legislative powers since 2001 creates serious confusion, disassociates spending from taxation, generates an institutional situation that makes it nigh impossible to keep public accounts under control and fosters duplication of facilities, inefficiencies and little accountability. This defect damages the system like a virus as the figures on public spending by central and local government over the past few years demonstrate.

2. The challenges of fiscal federalism.

Briefly, and before examining the issues associated with fiscal federalism and its implementation, it is worth explaining the 'federalist like' system that operates in Italy today. The constitutional reforms of 2001 significantly overhauled the relationship between the legislative powers of the State and those of the regions. Article 117 of the Constitution sets out the exclusive competencies of the State (for example, foreign policy, defence and armed forces, the administration of justice, immigration, etc.) and the concurrent competencies of the State and regions whereby the former lays down the basic principles in a national law and the latter specify the contents in more detail through regional laws (for example, foreign trade, health care, scientific research, etc.). All of the other matters not specified in the Constitution fall within the competence of the regions, which in effect amounts to a residual competence in their favour.

The 2001 constitutional changes did not just concern the distribution of legislative powers between the State and the regions. Other issues were addressed too, the most important of which and quite representative of the entire system is the principle enshrined in the first paragraph of article 114 of the Constitution: «The Republic is composed of Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State». Whereby the State, regions, metropolitan cities, provinces and municipalities are all at the same level thereby overturning the previous approach that saw the State as being above everyone and everything.

The question is: is Italy a federal country? If one considers the classic federal countries perhaps Italy cannot be considered to be federal system. There are no elements of strong autonomy of constituent parts like, for example, in the United States and

Germany (e.g. relationship between constituent parts and local authorities, involvement of constituent parts in any constitutional revision process, role in the administration of justice). However, if we consider the constitutional reform of 2001, the regions and local authorities have become bodies that together with the State itself make up the Italian Republic and that enjoy legislative and administrative autonomy guaranteed directly by the Constitution. The central government cannot limit their autonomy if not within the boundaries permitted by the Constitution itself.

It is necessary to underline the difference existing between the typical model of federalism – which is a process concerning the aggregation of states/regions originally apart – and the Italian federalism like, where "federalism" take birth by the division of the State which was originally unitary.

Compared to the past, central government has more limited powers to intervene to safeguard the unity of the system and limit the authority of local government. What the 2001 constitutional reforms lack are transitional provisions which guarantee the change over to the new system. These are slow processes. For example, regional authorities where envisaged by the 1948 Constitution but they were actually created only in 1970.

Today the most important factors are three: a) the actual implementation of the reform; b) negotiation and sharing among central government, regions and local authorities; c) the interpretation of the Constitutional Court (which decides on the constitutionality of laws). Law No. 42 of May 2009 is key to promoting this implementation process and already contains in its title a reference to "fiscal federalism". Is this perhaps the Italian route to federalism?

3. Constitutional reform and the optimal dimension of local autonomy.

The implementation of fiscal federalism, the details of which are explained shortly, will witness an essential aspect of the functioning of the constitutional reforms of 2001 taking shape, i.e. the independent raising of financial resources by local government within the framework of coordinating principles laid down by national law as provided for in the first paragraph of article 119 of the Constitution: «Municipalities, Provinces, Metropolitan Cities

and Regions shall have financial autonomy with respect to revenues and expenditures».

The second, third and fourth paragraphs of article 119 of the Constitution then go on to provide as follows respectively: a) local authorities, from this standpoint equivalent to the regions, may set and levy their own taxes and revenues («Municipalities, Provinces, Metropolitan Cities and Regions shall have independent financial resources. They set and levy taxes and collect revenues of their own, in compliance with the Constitution and according to the principles of co-ordination of State finances and the tax system. They share in the tax revenues related to their respective territories»); b) national laws must establish equalisation funds without restrictions as to how they may be used («State legislation shall provide for an equalisation fund, with no allocation constraints, for the territories having lower per capita taxable capacity»); c) the overall resources raised from the foregoing sources must be such as to fully fund the functions of the regions and local authorities («Revenues raised from the above-mentioned sources shall enable Municipalities, Provinces, Metropolitan Cities and Regions to finance fully the public functions attributed to them»).

The principles that govern local taxation have thus been significantly modified in light not only of the wording of the new article 119 but also the indispensable link that Title V establishes between that same article 119 and article 117 of the Constitution granting the State exclusive legislative power over national taxes (paragraph 2, subparagraph e) and granting the State and the regions concurrent competency in relation to "coordination of the public finances and taxation system" (paragraph 3), evidently granting the regions residual exclusive competence over regional and local taxes.

It must be said that, from the standpoint of the method, implementing article 119 within the framework of the new Title V of the Constitution calls for a deep transformation of the State, perhaps the most radical one in decades. It means committing a vast number of regions and local authorities to be able to rigorously manage resources, increase the efficiency and productivity of their facilities for providing services, assess performance, and adopt 'carrot and stick' policies capable of fostering ability, merit, quality and productivity. It means in

substance putting in place an essential tool to attain the revolution of the institutional and administrative system which has often been announced in the past (and to some degree commenced) but which has never been fully achieved up to now.

Also because the question of fiscal federalism, i.e. the allocation of resources among different levels of government, raises a constitutional issue of paramount importance that goes to the very heart of the form of State because it concerns the relationship between central and local politics, the common need to have resources to fund public services and above all the guarantee that all citizens can enjoy their civil and social rights equally.

It has to be said that the essential levels of civil and political rights remain in the sphere of national legislative competence.

Since 2001 both the regions and local authorities (provinces, metropolitan cities and municipalities) have enjoyed autonomy directly guaranteed by the Constitution. As for legislative powers both the State and the regions can pass laws on the subjects that fall within their remit, allocating "administrative functions" to local authorities, according to the principles set by the Constitution (in summary: the subsidiarity principle). However, the State has exclusive legislative power in relation to a series of matters that touch upon regional competence, including the identification of the "fundamental functions" of local authorities. The distinction between "fundamental functions" and "administrative functions" of local authorities is not a simple one. Therefore, through the "fundamental functions" clause the State can significantly limit the legislative autonomy of regions in connection with the exercise of administrative functions.

For a series of historical and financial reasons, local authorities are not generally in favour of regional power. They prefer to engage in direct dialogue with central government. They prefer the far-reaching and thorough intervention of the State when it comes to fundamental functions. This also has an impact on financial relations. It is, therefore, not completely correct to state that the Italian system follows a hierarchical structure: central government - regions - local authorities. This naturally makes the financial system of the functions of the regional and local authorities more complicated.

4. The Act of Parliament on fiscal federalism.

Article 119 of the Constitution and hence Italian fiscal federalism is to be implemented through delegated legislation whereby parliament entrusts the national government - through Law No. 42 of 5 May 2009 – "Delegation to the government in the matter of fiscal federalism further to article 119 of the Constitution" – with the task of adopting legislation to establish and organise fiscal federalism. It should be said that the principle that informs the law is "institutional loyalty among all levels of government", which applies to the whole process of implementation of fiscal federalism, as well as the principle of "participation by all public administrations in attaining the objective of the national public finances consistent with the restrictions imposed by the European Union and international treaties".

The federalism in the Constitution is thus a 'joint' one, in which healthy competition among areas is not a *bellum omnium contra omnes* (war of everyone against everyone) but a system of cooperation-emulation-subsidiarity aimed at creating the best conditions for the effective protection of the entirety of citizens' rights, securing sustainable growth for the nation as a whole through harnessing the energy and resources of each regional and local community, adapting management choices and mechanisms to the peculiarities of each community, re-establishing political accountability for resources and spending, fostering the productivity and efficiency of public facilities and enhancing the synergy between private initiatives and public action, all within the logic of horizontal subsidiarity.

5. Legislative principles and guidelines.

Given the complexity of the law that has been passed, summarised in ten points hereunder are its main criteria and principles.

It is provided that the move to the new system must not lead to a greater fiscal burden for citizens. The greater taxation powers of the regions and local authorities will correspond to a reduction in the taxation imposed by central government

commensurate with local government's greater fiscal autonomy. The overall tax burden should not increase and every transfer of central government functions to local government should be accompanied by the transfer of human resources and facilities in order to avoid duplication of functions or additional costs.

Fiscal autonomy entails: the end of the grants system based on historical spending and the gradual move to a system based on standard needs; the introduction of effective taxation and spending powers for local government, meaning that there will be taxes that regional and local authorities may determine the content of within the limits and framework laid down by law, in essence: i) derived taxes, in the sense of taxes established by the State but whose revenues the regions and local authorities are entitled to; ii) regional and local surtaxes (a given proportion of the revenue remains with the geographic area that generated it; iii) own taxes properly speaking, in the sense of taxes established by the regions and local authorities themselves; a series of regional and local taxes that assure flexibility, room for manoeuvre and territoriality, with this latter criterion expressing more than any other the ethos of the system that it is sought to introduce since it assigns a central role to the concept of territory in its many meanings and ensures that there is a link in general between the place that tax revenues come from and the place that they are spent in; the possibility for more efficient administrations that manage to contain costs, services being equal, to fine tune their taxes (for example, reducing the rates or introducing deductions or exemptions). In particular, in order to finance essential levels of services (especially health, education and welfare) regions will have the following available to them: i) regional taxes to be determined on the basis of a link between the type of tax and the service provided; ii) a personal income tax (IRPEF) surtax; iii) regional share of VAT receipts; iv) specific shares of the equalisation fund. On a transitional basis expenditure will be financed by revenues from the existing regional production tax (IRAP) until such time as that is replaced by other taxes. The provinces and municipalities will have their own taxes, shares of revenue, surtaxes and dedicated taxes linked to matters such as tourism or urban mobility; a connection between the tax and the function performed by the authority (principle of correlation between taxation and benefits).

As regards standard needs and costs, the funding for the regions and local authorities must be based not on historical spending, which could also include waste and inefficiency, but on costs calibrated having regard to a public administration's average level of efficient management. Reference is to be made to the costs borne by an administration that provides services and performs functions respecting average efficiency parameters, in other words, the effective need in relation to each service rendered is to be taken into account. Therefore, the councilors will have to answer to the electorate for any costs over and above the level taken as the benchmark.

Equalisation is based on the following suppositions: overcoming of the criterion of historical spending; reference to standard needs and costs for expenditure in connection with essential levels of service that must be guaranteed throughout the country and for the fundamental functions of local authorities; full equalisation for authorities with lowest tax revenue generating capacity per capita as regards expenditure in connection with essential levels of service and the fundamental functions of local authorities, as always within the limits of standard needs and costs. Equalisation means bridging the gap between the different areas of the country, guaranteeing essential services to the citizens of each region in accordance with the principle of social solidarity thereby assuring that the least well off regions can provide services to their citizens with minimum uniform levels. For local public transportation, reference will be made to the national benchmark and the associated standard needs; equalisation of the differences in capacity to generate tax revenues must be done without changing the order and without impeding modification over time depending on how the economic picture develops. This is very important because it is a reasonable limit to equalisation. In short, the wealthiest region, province or municipality before equalisation must contribute to the equalisation fund but may not after equalisation end up being poorer than another area that previously had fewer resources. For example, if the revenues pro capita from taxation are 100 in a wealthy region and 70 in a poorer region, equalisation can take place in order to achieve some balance and guarantee essential services for everybody. However, equalisation cannot be so extensive as to produce an outcome whereby because of it the resources pro capita in the first region

end up being 80 and those in the second one 90, and perhaps only because the second region spends more and in a worse way; the regions may redefine equalisation for the local authorities in their territory subject to agreement with those authorities.

In order to afford guarantees for local authorities, Law No. 42 of 5 May 2009 provides for: taxes established by the State or region in their capacity as holders of legislative power, subject to a significant degree of flexibility and respect for the local authority's own autonomy; sharing of national and regional taxes, in order to assure the stability of the local authority; full equalisation based on standard needs for expenditure in connection with fundamental functions.

The system of rewards and sanctions envisages: rewarding virtuous conduct and behaviour that demonstrates efficiency in the exercise of fiscal powers and in financial/economic management; penalising the bodies that do not achieve an economic/financial balance or do not provide essential levels of service, including disqualification from office for the management in charge of local authorities suffering from a financial crisis and in the worst cases the option for the State to step in directly itself. Irregularities that cause serious financial difficulties amount to violations of law for the relevant regional managers.

The convergence pact is a mechanism through which the central government, subject to joint discussions and assessment at a so-called 'unified conference', sets out a path for dynamic coordination (which must be submitted to parliament with the national economic and financial planning document) to achieve the objective of a convergence between standard costs and needs as well as service targets, which the local authorities are obliged to adhere to. In the event of a failure to attain the objective, the central government establishes the reasons therefore and takes suitable corrective action through a special purpose "plan to attain convergence objectives".

Transitional provisions envisage the establishment of metropolitan areas whose autonomy in matters of revenue and expenditure should be commensurate with the complexity of the broader functions assigned to them. Moreover, other fundamental functions are identified in addition to those already exercised by the province concerned.

They are: general planning of the territory and infrastructure networks; structuring of coordinated systems for the management of public services; promotion and coordination of economic and social development.

The transitional provisions also set out the procedures governing the establishment of metropolitan cities through a referendum to be held in the provinces in which the cities of Turin, Milan, Venice, Genoa, Bologna, Florence, Bari, Naples and Reggio Calabria are located. It is further provided that a specific legislative decree will regulate the resources to be allocated to the city of Rome for its role as the national capital. Rome will also be given its own set of assets. Finally, municipalities will be granted a series of specified administrative functions in addition to those that they already exercise.

The following principles will govern coordination of the various levels of government: transparency in the different capacity per capita to generate tax revenue before and after equalisation so as to highlight financial flows between bodies; a role for each region and local authority in observing the stability pact; introduction of a series of rewards and sanctions for respectively the most and least virtuous bodies.

Law No. 42 of 5 May 2009 provides as follows in order to implement the fifth and sixth paragraphs of article 119 of the Constitution: specific rules for allocating *additional resources* and adopting *special measures* in favour of given regions and local authorities to remove particular forms of economic and social imbalance (the measures are financed by the State budget, EU grants and national co-funding); that the sixth paragraph of article 119 of the Constitution on the transfer of State assets to the regions and local authorities is to be implemented.

The following are envisaged for coordination purposes: a "parliamentary commission for the implementation of fiscal federalism", comprising 15 deputies and 15 senators appointed by the speakers of both houses of parliament, whose function is to give opinions on draft implementing legislation, check progress on implementing Law No. 42 of 5 May 2009 itself, submit observations and provide the government with whatever evaluation might be of use to it in drawing up implementing legislation. The commission is to be dissolved at the end of the transitional phase. The commission is to liase with the regions and

local authorities and to this end a committee of their representatives is set up. It is provided that should the government decide not to follow the opinion of the joint parliamentary commission or those of the other relevant parliamentary commissions, it must submit the text concerned to the houses of parliament and make a statement thereon before them: once 30 days have passed the government may adopt the legislation in final form; a "joint technical commission for the implementation of fiscal federalism", set up at the Ministry of Finance, an advisory body whose function is to provide advice to the government and local authorities as well as to obtain and analyse whatever information may be necessary for the drafting of the implementing legislation; a steering body in the shape of the "permanent conference for the coordination of the public finances", comprising all of the institutional players involved in the process of achieving fiscal federalism, whose function is to check the working of the new financial order of the regions and local authorities, the adequacy of resources and consistency of data. It performs an advisory role and is the forum for sharing information among all concerned.

The commitment of central and local government to combating tax evasion and avoidance is acknowledged, including rewards for the regions and local authorities that achieve positive results in this area in terms of increased tax revenues.

It is provided that the regions with special constitutional status and the autonomous provinces shall contribute to attaining the objectives of equalisation and solidarity, shall exercise the rights and duties associated therewith and shall adhere to the internal stability pact and EU obligations in the manner to be set forth in legislation implementing their respective regional and provincial constitutions. Any new functions allocated to them will be funded by sharing revenues from national taxes and excise duties. Within the framework of the State-Regions Conference a round table is established between the central government and each single region with special constitutional status and each autonomous province in order to assure their participation in achieving equalisation and solidarity and observing the internal stability pact. This forum also serves to assess the consistency of the financial resources allocated to the said regions and provinces

after the entry into force of their constitutions in order to check coherence with the new system of public finance.

The transitional phase for regions: in respect of the equalisation fund there will be a gradual move away from the grants given to the single regions in 2006-2008 to the principle of standard needs. The new equalisation will operate once the financial aspects of the essential levels of services and fundamental functions have been determined with the switching to the principle of standard needs within 5 years. For non-essential levels funding will have to progressively depart from historical spending within 5 years but in cases where regions cannot objectively bear the change the State may adopt corrective action in the form of compensation but only for a maximum of five years. On a transitional basis regions will not have to bear any shortfall between projected and effective revenues.

The transitional phase for local authorities: the State and the regions will fund the additional administrative functions transferred to the local authorities as well as those that the latter already perform. The system of historical spending is to give way to one based on financing standard needs within a period of 5 years for expenditure connected to fundamental functions and other spending. Until such time as the rules on fundamental functions take effect in full, the functions performed by provinces and municipalities are financed on the basis that 80% of expenditure is to be considered as fundamental and 20% as not fundamental.

Finally there are financial saving clauses providing that: the new system of public finance is to be compatible with the growth and stability pact; the reform and implementing legislation must not lead to any new or greater burden on the public finances; the transfer of functions must be accompanied by a transfer of personnel to avoid the duplication of functions.

Very briefly: financial independence and accountability for all levels of government; granting of independent resources to regions and local authorities in accordance with the principle of territoriality; regional law may, in relation to a taxable base not subject to taxation by the State: a) introduce regional and local taxes; b) decide the changes to tax rates or tax relief that municipalities, provinces and metropolitan cities may adopt in the exercise of their own autonomy; a region may share the revenue

from regional taxes and its part of national taxes with local authorities; prohibition against adopting measures in relation to the taxable base and rates for taxes that do not pertain to one's own level of government; guarantee of maintaining an adequate degree of fiscal flexibility through establishing a basket of taxes and shares of taxes payable to the regions and local authorities, the composition of which is made up to a significant extent by taxes that allow room for manoeuvre; fiscal flexibility spread over a number of taxes with a stable taxable base and distributed in a generally uniform manner throughout the country so as to enable all the regions and local authorities (including those with the lowest revenue generating capacity) to fund – through harnessing their own potential – spending levels beyond merely the essential services and functions associated with local authorities; reduction of national taxation commensurate with the greater taxation powers of the regions and local authorities allied to a corresponding reduction in the central government's human resources and facilities; regulation of local taxes in a way that allows horizontal subsidiarity to be exploited in full; territoriality of taxes, neutrality of taxation and ban on the exporting of taxes.

What will the main problems associated with the application of the law on fiscal federalism be? The end of the system whereby central government transferred funds to local government implies a massive undertaking: to eliminate all state funds aimed at financing regions and local authorities and to have them replaced by revenues raised on foot of the fiscal autonomy enjoyed by those same regions and local authorities with the only exceptions beings equalization funds and special measures.

The application of Law No. 42 of 5 May 2009 will be important in order to establish how federal Italy has really become. Consider the following examples.

If most of the funding for regions ends up being guaranteed by sharing the revenue from national taxes, the autonomy of regions will be limited. As a matter of fact, revenue sharing is not substantially that different from grants. On the contrary, the autonomy of the regions will be stronger if they mainly depend on their own taxes or surtaxes rather than revenue sharing. The same is true for local authorities which are further limited by the fact that they do not enjoy legislative power.

If the so-called 'special measures' provided for by the Constitution for specific local government bodies become a form of additional and permanent equalization there will be no drive towards efficiency for the public administration. If special measures are limited in scope and time, the less virtuous too will improve their efficiency. The main difficulties in enforcement will lie in the sharp differences between certain geographical areas of Italy. North and South exhibit strong economic and infrastructure differences. The unemployment rate in the South is much higher while per capita income is much lower. Tax evasion is higher there too. One figure: the net average household income in 2006 in the North was almost 31,000 euros but only 23,500 euros in the South. The phenomenon of the black economy is mostly concentrated in the South which accounts for 45% of the total (source INAIL-ISTAT-IRES). The transitional phase will last no less than seven years and will try to reduce the infrastructure deficit of the least wealthy areas as well as to increase the efficiency of public administration. Another example: costs for health care are generally higher in the South but many people living there move to the North to receive public medical care.

Fiscal federalism cannot bring about an increase in the tax burden. This is stated by the law but it is not enough. For this reason, forms of coordination and collaboration among state, regional and local authorities are envisaged, especially with the aim of avoiding overlapping in tax assessment and collection. As a matter of fact, it is necessary to avoid duplication of activities, and hence of spending. Those bodies which efficiently act to fight evasion will be assigned additional resources. Already today, municipalities can keep part of the higher receipts stemming from their efforts in tax collection. The enforcement of the law will be accompanied by the transfer of a meaningful set of assets from the State to regions and local authorities.

Lastly, the issue of special regions. For historical reasons, five of the twenty regions in Italy enjoy a special degree of autonomy guaranteed by five separate constitutional laws (Valle d'Aosta, Trentino Alto Adige, Friuli Venezia Giulia, Sicily and Sardinia). Each constitutional law also guarantees that the regions concerned have significant fiscal autonomy. The law on fiscal federalism requires the State to have "open negotiations" with special regions (especially the first two named above, which are

the richest) to involve them in the equalization process in favour of the less wealthy areas.

This is a crucial time for the Italian system, to implement federalism but above all to improve the overall performance of the public system for citizens, families and businesses. A lot will depend on how Law No. 42 of 5 May 2009 is applied and enforced.

6. The power to tax.

Alongside the rationalisation of expenditure through benchmarking, the second plank of the fiscal federalism reform is increasing the fiscal autonomy of local authorities through a series of provisions to be found here and there in Law No. 42 of 5 May 2009, ranging from principles and guidelines to be followed in the delegated legislation to the more detailed provisions specifically set forth in articles 12 and 21, the latter article concerning the transitional phase. The value of fiscal autonomy can be deduced for example from subparagraphs a and e of article 2.2 which place autonomy in generating tax revenues, accountability at all levels of government and the allocation of resources on the basis of territoriality at the top of the list of principles that the law itself seeks to achieve. But also the provisions in subparagraph u on tax assessment and collection that assure efficient methods for direct allocation and automatic payment seem to point in the direction of local taxation, especially if read in conjunction with the rewards on offer for virtuous behaviour and efficiency in the exercise of taxation powers as per subparagraph z.

Overall, therefore, local taxation should acquire more weight as compared to national taxation within a framework in which the total tax burden should fall thanks to the beneficial effects of cuts in spending or at the very least rationalisation. In any event the Constitutional Court has ruled out that any reform of the financial independence of local government and specifically the regions can operate to decrease their resources without affording them alternative means of raising revenue, having regard to the overall financial picture in light of the functions exercised rather than to just single taxes or items of income (judgments 29/2004, 241/2004, 381/2004, 431/2004 and 155/2006).

Tax revenues should also play a greater role in the context of local finance as a consequence of greater autonomy in levying taxes and as a result of the power that the regions enjoy to introduce local taxes in relation to a taxable base not already subject to regional or national taxation (articles 7.1.b.3 and 12.1.g). One can deduce as much also from the emphasis that the law places not only on the taxation powers of municipalities and provinces recognised by the State for the purposes of primarily financing fundamental functions (articles 12.1.a and 12.1.b) but also on the issue of dedicated taxes in connection with investments linked to managing the territory concerned (article 12.1.d).

Naturally these are just general principles destined to be incorporated into and elaborated on in detailed delegated legislation. That said, they can serve as interpretative tools in cases of judicial review in light of the provisions of article 119 of the Constitution and can be relied on by the Constitutional Court in this regard.

The entry into force of Law No. 42 of 5 May 2009 and associated delegated legislation should resolve the issue of the relationship between a region's legislative power and local authorities' regulatory autonomy in tax matters.

The Constitutional Court's view that legislation governing the basic framework for local taxes is a precondition for local authorities to exercise their own regulatory powers should open the way to rules on three levels operating on two planes, national and local or regional and local, as the Court itself has stated.

What remains to be seen is whether, in the wake of Law No. 42 of 5 May 2009 and the first pieces of delegated legislation, the issue of the types of sources of funding for local authorities has been addressed. Initially the Constitutional Court had ruled that for non-tax funding the State could act "in conformity with the new division of competencies and new rules" also without the need to first enact a coordinating national law (judgment 16/ 2004) only to then admit shortly afterwards that the maintenance of existing funds and their financing were lawful as was the making of changes to the legal framework that had established them (judgments 320/2004, 423/2004, 36/2005 and 225/2005).

In relation to the transfers specified in the current article 119 of the Constitution, i.e. the equalisation funds, special

measures and additional resources, the Court has already laid down some essential markers. The fund must be used solely for bodies that have a lower tax revenue generating capacity and the grants must not be subject to restrictions on their use (i.e. they must not be "grants with strings attached" as American writers would say). The special measures and additional resources are over and above that which is required to fully cover the functions assigned to local government, must fulfil the equalisation objective laid down in the Constitution and be addressed not to all bodies but merely single bodies or categories thereof.

The Court then held that regardless of the provisions of subparagraph e of the second paragraph of article 117 of the Constitution and the State's exclusive competence in the equalisation of financial resources, the regions could set up or replenish funds devoted to special measures and additional resources whenever they exercised planning powers for areas within their remit (judgments 16/2004 and 49/2004). The Court held that State funds divided among the regions (judgment 370/2003) or among regions and local authorities (judgment 49/2004) or among local authorities circumventing the regional level were unconstitutional and ruled out the transfer of resources conceived and given effect to by methods other than those envisaged by the fifth paragraph of article 119 of the Constitution, methods that owed much to past practice when national law and the way the Ministry of the Interior was run allowed virtually any form of transfer of resources to local authorities on the basis of distributions that were essentially discretionary.

It is not that clear if the Court considers that only national law impinging on the financial independence to raise revenue and spend funds infringes the fifth paragraph of article 119 of the Constitution or whether also provisions that are not binding as regards spending but nonetheless create a general dependence on State revenue fall foul of the Constitution. It appears that grants from central government that by their very nature or structure have nothing to do with the types covered by the fifth paragraph of article 119 of the Constitution are admissible even though they come with restrictions as to their use provided that they concern matters falling within the State's exclusive remit, especially if the principle of sincere cooperation has induced central government to involve the Conference owing to its heavy interference in the

exercise of administrative functions in spheres that pertain to the regions or local authorities.

The interpretation thus far given by the Constitutional Court regarding the limits to State grants that can be made consistent with article 119 of the Constitution would seem to bring to the fore the division of legislative power enshrined in article 117 of the Constitution, which might well do justice in the specific cases that the Court had to consider also in light of the principle of sincere cooperation but risks depriving the strictly financial and fiscal rules in article 119 of the Constitution of any binding force thereby opening up an avenue of parallel funding.

It remains to be seen if, following the entry into force of Law No. 42 of 5 May 2009 and associated delegated legislation, that approach can be maintained or whether a more rigid assessment will be employed warranted by the greater detail of the rules in both bilateral and trilateral situations. In other words, one must wait and see if the escape route offered by the principle of sincere cooperation that saved State intervention in the area of funding falling outside the scope of the fifth paragraph of article 119 of the Constitution can survive the new rules. And also if the progressively more precise fine tuning of the fiscal framework governing relations between the various levels of government will enable the Constitutional Court to continue to rely on factors of financial necessity or use principles that cut across al sectors such as antitrust rules to justify macroeconomic intervention likely to have significant repercussions on the funding and fiscal autonomy of local government.

The Constitutional Court pronounced on this topic decision n. 201/2010, such pronouncement has to be mentioned, even if it concerns the Sicily Region.

Put another way, one must await developments in caselaw to understand whether the Constitutional Court intends to treat Law No. 42 of 5 May 2009 or rather the associated delegated legislation as constituting a turning point in the financial and fiscal autonomy of local government or whether by contrast central government intervention will be assessed in much the same way that it has been since the reform of Title V of the Constitution. In particular, it is necessary to understand if, after article 119 of the Constitution has been implemented with a body of rules expressly designed to give full effect to the constitutional

provisions in question, the legal framework so formed will be considered as the sole source of law governing financial autonomy or whether by contrast there will still be room for a sort of parallel system whereby the type of funding one can deduce from article 119 of the Constitution will apply only to the spheres in which local government bodies pursue their own policies on foot of the legislative and administrative powers granted to them while outside that sphere central government – using agreement with all concerned as a shield or exercising broad powers whose boundaries are not well defined – can continue with a looser financial regime than the strict one founded on article 119 and subject only to general and fluctuating limits rooted in principles like proportionality and subsidiarity or on emergency type needs of a macroeconomic nature.

Any assessment of the degree of implementation of fiscal autonomy must start from what the actual situation is, which can be summarised as follows:

The municipalities can currently rely on the following taxes: municipal property tax (Legislative Decree No. 504/1992), electricity surtax (article 6 of Legislative Decree No. 511/1988), municipal advertising tax (Legislative Decree No. 507/1993 and article 63 of Legislative Decree No. 446/1997), waste disposal tax (Legislative Decree No. 507/1993 and article 49 of Legislative Decree No. 22/1997), dedicated taxes (article 1.145 of Law No. 296/2006) and a personal income tax surtax (Legislative Decree No. 360/1998).

The provinces likewise can rely on a personal income tax surtax and a share of the electricity surtax (same legal basis as above) as well as motor vehicle registration tax (article 56 of Legislative Decree No. 446/1997), motor vehicle insurance tax (article 60 of Legislative Decree No. 446/1997), a share of landfill taxes (article 3.27 of Law No. 549/1995), and a waste disposal tax surtax for environmental protection and health functions (article 19 of Legislative Decree No. 504/1992).

Among implementative legislation adopted to enforce federalism, it has to be mentioned at least the "state federalism" ("*federalismo demaniale*") d.lgs. 85/2010.

7. Concluding remarks.

In short, the new structure of economic-financial relations between central and local government seeks to overcome the grant system of funding and endow regions, provinces, municipalities and metropolitan cities with greater independence in levying taxes and spending resources subject to observing the principles of solidarity and social cohesion. Key principles of fiscal federalism are, firstly, coordination of taxation centres with spending centres thereby automatically ensuring that bodies will be more accountable for their spending and, secondly, replacement of historical spending based on continuity with spending levels reached the previous year with standard spending.

To become operative fiscal federalism requires a series of measures that will take seven years: two years for implementation and five years of transition. The law makes provision above all for an ad hoc commission to draft the contents of the implementing decrees, to be ready within two years after the entry into force of the law. Provision also exists for a permanent commission to be set up to coordinate public finances.

The funding of the functions transferred to the regions through the implementation of fiscal federalism will obviously lead to the cancellation of the relevant appropriations from the State's budget including personnel and operating costs.

An equalisation fund with no restrictions as to use will be set up in favour of regions with reduced revenue raising capacity as required by article 119 of the Constitution.

Fiscal federalism introduces a rewards type system for bodies that assure high quality services and impose a tax burden below the average for that of other bodies at its own level of government providing equal services. Vice versa for bodies whose performance is wanting, sanctions can be imposed in the form of a ban on hiring personnel and making discretionary spending. At the same time those bodies have to clean up their balance sheets through disposing of part of their real and personal property and resorting to their taxation powers to the maximum allowed.

Automatic sanctions are also imposed on executive and administrative organs should a region or local authority fail to achieve the economic-financial balance and objectives set for it. Specifically, management in charge of a local authority which is declared to be insolvent will be disqualified from office.

Turin, Milan, Venice, Genoa, Bologna, Florence, Bari, Naples and Reggio Calabria will become metropolitan cities. Rome, the capital of Italy, already enjoys special legislative, administrative and financial autonomy within the limits prescribed by the Constitution.

The implementation of fiscal federalism must be compatible with the financial commitments undertaken with the stability and growth pact. To conclude, the implementation of fiscal federalism is a gamble that needs to pay off for the sake of progress in the Italian economy and institutions.

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DIRECTIVE 2007/66 AND THE DIFFICULT SEARCH FOR BALANCE IN JUDICIAL PROTECTION CONCERNING PUBLIC PROCUREMENTS

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Abstract.

What kind of judicial protection has the EU developed in the sector of public procurements? What balance has EU law struck between the three main poles in this area – the public contracting authority, the successful tenderer and the excluded tenderers - as far as judicial protection is concerned? In order to tackle this question, three aspects of the regulatory framework established by Directive 07/66 are investigated: firstly, the protection provided in the period between the decision to award a contract and the conclusion of the contract in question; secondly, the protection granted after the conclusion of the contract; thirdly, the protection offered by the award of damages. The analysis shows that EU law lays down a flexible framework in which the balance between the various interests changes in relation to both the phase in which the dispute arises and the gravity of the infraction. At the same time, however, the new regulatory framework responds to the unitary rationale of protecting all the various interests in play after the decision to award. The new regulatory framework can be welcomed under several regards. Yet, it also presents some shadows, in particular as far as the regulatory discretion left to the States is concerned.

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1. The problem.

What kind of judicial protection has the European Union (EU) developed in the sector of public procurements? What balance has European law struck between the various interests at play in this area as far as judicial protection is concerned? EU substantive law in the field of public procurements creates a particularly complex «gravitational field», in which the goal of fair competition between European internal market operators is combined with the equally important value of the economic efficiency of administrative action [1]. What balance has European law struck between the three main poles in this gravitational field – the public contracting authority, the successful tenderer and the excluded tenderers - as far as judicial protection is concerned? Is this balance reasonable or problematically ambiguous?

To answer such questions in an analytical way, this paper will examine the balance struck by Directive 07/66. This Directive represents, as it is well known, the most recent step in the long evolution of a sophisticated framework for protecting concerned tenderers, generated by European courts and political institutions. This development stretches back to Directives 89/665 and 92/13,

[1] On the basic principles of the European law on public procurements, pursuing at the same time the target of competition between economic operators in the internal market and the goal of the economic efficiency of administrative action, see S. Cassese (ed.), *La nuova costituzione economica* (2007). Of the rich literature on public procurements European law, see S. Arrowsmith, *An Assessment of the New Legislative Package on Public Procurement,* 2 Common Mkt. L. Rev. 1277 (2004); C. Bovis, *Public Procurement in the European Union (*2005); Y. Allain, *The new European Directives on Public Procurement: Change or Continuity?*, 1 Publ. Contr. L. J. 517 (2006).; J. M. Hebly (ed.), *European Public Procurement: History of the 'Classic' Directive 2004/18/EC* (2007). The notion of economic efficiency of the administrative action is used in the text to refer to those situations in which predetermined objectives are achieved with a mininum expenditure of resources and authorities are able to get better value for money through the implementation of the awarding proceedings; see, Europe Economics, *Evaluation of Public Procurement Directives. Final Report* (2006) http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf; for a general discussion on the possible applications of the notion of economic efficiency to administrative action, see e.g. B. E. Dollery and J. L. Wallis, *Economic Efficiency*, Enc. Publ. Adm. & Publ. Pol. (2008); and M. Sheppard, *Efficiency in Public Administration* (2009), available at www.allacademic.com/meta/p83878_index.html.

which Directive 07/66 later modified and built upon [2]. The pages that follow will not go through the various steps of such process of creation of a framework for protecting concerned tenderers. Rather, they will focus on Directive 07/66's comprehensive framework for consolidating and systematizing this protection.

The overall rationale of the protection established by Directive 07/66 will be reconstructed by considering three specific aspects of the regulatory framework: the protection provided in the period between the decision to award a contract and the conclusion of the contract in question; the protection granted after the conclusion of the contract; and the protection offered by the award of damages. These three aspects do not depict the complete picture of the protection in the area of public contracts provided by European law. But they do let us focus on three elements which particularly impact the balance that European law sets between the various competing interests in the awarding of public contracts.

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[2] The abundant legal commentary on Directives 89/665 and 92/13, regarding public supply, works and service contracts and public contracts in the sectors of water, energy, transport and telecommunications, respectively, cannot be thoroughly reviewed here; see, however, the overviews provided by G. Morbidelli, *Note introduttive sulla direttiva ricorsi*, 1 Riv. It. D. Pubbl. Com. 825 (1991), and S. Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (1993). Directive 07/66 was adopted by the European Parliament and by the Council on 11 December 2007 (OJ 2007 L 335) and the deadline for its implementation at the national level was fixed for 20 December 2009. This represents an attempt to rationalize the existing European legislation. This is suggested by the Directive's title, according to which the new regulatory framework aims at improving the effectiveness of review procedures concerning the award of public contracts, also in light of the evolution of the jurisprudence of the Court of Justice (recall the famous decisions in *Alcatel*, *Commission v. Austria* and *Stadt Halle*) and the new substantive Directives 04/17 and 04/18. Among the comments published thus far, see in particular G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, 1 Riv. It. D. Pubbl. Com. 1029 (2008); M. S. Sabbatini, *La direttiva 2007/66/CE sulle procedure di ricorso in materia di appalti pubblici: la trasparenza è anche una questione di termini*, 1 Dir. Comm. Int. 131 (2008); M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario* (2008), in www.giustamm.it; A. Bartolini and S. Fantini, *La nuova direttiva ricorsi*, 2 Urb. App. 665 and 1093 respectively (2008); E. M. Barbieri, *Il processo amministrativo in materia di appalti e la direttiva comunitaria 11 dicembre 2007, n. 66/CE*, 1 Riv. It. D. Pubbl. Com. 493 (2009).

These aspects of the regulatory framework will not be examined in comprehensive detail. Rather, we will proceed in a general way, focusing on those rules and provisions that seem useful to capture the rationale of the European legislation. At the close of this examination, we will return to our initial questions, in order to attempt some concluding observations.

2. Protection prior to the conclusion of the contract: the suspensions regime.

The first aspect to consider is the protection provided in the period between the decision to award a contract and the conclusion of the contract in question. This protection has been significantly enhanced by the Directive. The Directive incorporates the general approach of the Commission, which has always emphasized the need to prevent or quickly correct for breaches of European law, so as to encourage private operators to participate in national administrations' calls for tenders [3].

This protection revolves around various institutions, which should be examined in detail in order to catch the balance between the interests of the public administration, the successful tenderer and other interested market competitors following the awarding of the public contract. In explicating the rationale underlying the new legal framework, however, it may suffice to focus on the minimum standstill period that must expire before the contract may be concluded, which the Directive defines awkwardly as the «suspension». This is particularly important because it is characteristic of the protection available in the period between the decision to award and the conclusion of the contract, and also because it influences the other kinds of protection.

Directive 07/66 provides that a period of at least 10 calendar days must expire following the decision to award before

[3] See, in particular, the Commission's proposal in its communication COM (2006) 195 final. This proposal provided also for some review mechanisms in the period prior to the conclusion of the contract that have not in fact been preserved in the final text of the Directive: the primary one is the attribution of new powers to independent authorities, which would have been empowered to notify the awarding authorities of the most serious infractions; this proposal was rejected due to the opposition of national governments, citing the difficulty of budgeting for the economic burdens of funding such authorities.

a contract may be concluded [4]. If the decision to award the contract is eventually challenged, this period gets extended, so that the awarding authority or entity cannot conclude the contract before at least another 10 days have passed, which must allow the review body to make a decision on the application either for interim measures or for review, as provided by the Member State in its implementing legislation [5]. A third suspension term applies when a Member State requires the concerned tenderer to seek review by the contracting authority first. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract [6].

These suspensions, provided for the first time by Directive 07/66's modifications to Directives 89/665 and 92/13, represent a new element in the EU conception of protection in the sector of public procurements.

The suspensions provided by European law consolidate and reinforce the effectiveness of the review mechanisms in the area of public contracts, not exactly by protecting the position of concerned tenderers, but by striking a balance between the conflicting interests of the actors playing in this sector, i.e. the contracting authorities, the successful tenderer and the other concerned tenderers. The suspensions regime set up by European law strikes a reasonable balance between the interests pursued by each of these three subjects. The temporal interval between the decision to award the contract and its conclusion gives other concerned tenderers enough time to apply for review of the decision. It allows contracting authorities to get best value for money from their procurements, in so far as it is an instrument to remove a possible infraction. It also defers the costs that the contractor has to sustain in commencing the performance of the contract. In this sense, the protection provided by the new suspensions, in the period between the decision to award and the conclusion of the contract, seems an optimal balance between the

[4] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2a/2 of Directive 89/665 and 2a/2 of Directive 92/13).
[5] Articles 1/1 and 2/2 of Directive 07/66 (new Articles 2/3 of Directive 89/665 and 2/3 of Directive 92/13).
[6] Articles 1/1 and 2/1 of Directive 07/66 (new Article 1/5 of Directive 89/665 and 1/5 of Directive 92/13).

various interests triggered by the decision to award a public contract.

In the search for this balance, the EU system bears certain similarities to the American system for resolution of bid protests. In the U.S., the filing with the contracting agency of a protest pre- or post-award, as provided by Art. 33/103 of the Federal Acquisition Regulation, produces the legal effect of suspending, respectively, the award or the performance of the contract, pending agency resolution of the protest. This is so unless the contracting officer adopts an override decision, which is a written act setting forth the urgent and compelling reasons or the «best interest of the Government» necessitating the conclusion of the contract [7]. A suspension of the awarding of the contract is also determined by filing a complaint with the General Accounting Office, as provided by Art. 33/104 of the Federal Acquisition Regulation, which is also subject to a possible override decision [8]. The similarities between the American and European systems, however, do not cancel out the significant differences. Just consider that there is no minimum standstill period between the decision to award and the signature of the contract. American law, moreover, does not provide for automatic suspension, just interim measures, in the case of an application to the Court of Federal Claims. This court has jurisdiction over controversies regarding the administrative procedure leading up to and following the awarding of public contracts.

The new Directive is more exacting upon Member States than it might first appear.

We can appreciate the impact of the new European rules on a Member State by looking at Italy. Even before the adoption of Directive 07/66, according to Italian law a contract could not be concluded before thirty days had passed from the communication

[7] Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures

[8] For a survey of the procedures before the awarding authority and the General Accounting Office, as well as their comparison with the European legal order, see A. Massera *L'attività contrattuale*, in G. Napolitano (ed.), *Diritto amministrativo comparato* (2007) and B. Marchetti, *Il sistema di risoluzione delle* bid disputes *nel modello federale statunitense di* public procurement, 1 R. T. D. Pubbl. 963 (2009).

to the concerned tenderers of the decision to award [9]. This could suggest that the suspensions regime envisaged by the new European law did not really constitute a genuine step forward with respect to the domestic legislation. However, these suspensions have actually affected Italian law in several regards, as confirmed also by the implementing measure adopted in 2010 [10]. The following four aspects may be considered.

Firstly, the period provided by EU law in the case of an application for review is completely new to Italian law [11].

Secondly, even with respect to the initial minimum standstill period, the EU Directive has required an adjustment of the Italian law. The latter already envisaged a 30-day time period running from the communication to concerned tenderers. But this communication served a less important function than it is required by the new European legislation. Italian law provided that the candidates must be informed not only of the outcome of the invitation to tender, but also of the reasons underlying the decision that has been taken. But while the outcome of the bidding competition was communicated automatically, these underlying reasons were given only upon the written request of the interested party [12]. The new Directive, instead, requires that the communication of the decision to award made to every tenderer be accompanied by «a summary of the relevant reasons» indicating the reasons for which the candidate was rejected [13]. And the Italian implementing measure has laid down a new discipline of the initial standstill period that takes into account these specific indications given by Directive 07/66 [14].

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[9] Art. 11/10 of the Code of public works, services and supply contracts, implementing Directive 2004/17/EC and 2004/18/EC, in force since July 1, 2006 (Legislative Decree of 12 April 2006, n. 163, as subsequently amended).

[10] Decreto legislativo 10 marzo 2010, n. 53, containing a number of amendments to the Italian Code of public procurements.

[11] Such suspension has been introduced in the Italian Code of public procurement by the legislative decree implementing Directive 07/66; see Article 11/10-ter of the Code of public procurement.

[12] Art. 79/1, 3 and 5 of the Legislative Decree of 12 April 2006, n. 163.

[13] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2a/2 of Directive 89/665 and 2a/2 of Directive 92/13)

[14] See the new Articles 11/9-10 and 79/5-bis of the Italian Code of Public Procurements.

European law affects Italian national law in a third, related manner. Before the adoption of the new Directive, Italian law allowed the contracting authorities to derogate from the standstill period in the case of «motivated reasons of particular urgency». European law, by contrast, allows Member States to derogate from the standstill period only in specific cases: for example, where European law does not require the prior publication of a contract notice or in the case of a contract based on a framework agreement or a specific contract based on a dynamic purchasing system [15]. The Italian implementing measure has modified accordingly the Code of public procurements, although the contracting authorities still have the possibility to derogate from the standstill period for urgency reasons when delay would determine a serious prejudice to the public interest served by the procurement: a possibility that seems scarcely compatible with the narrow set of exceptions envisaged by the Directive [16].

A fourth reason why the European suspensions regime is directly relevant for the Italian legal order is that suspensions, as it has been properly observed, will probably obviate the functional need for the monocratic *ante causam* and *inaudita altera parte* interim measures [17]. So, quite far from being irrelevant, the introduction of suspensions is likely to compress a judicial doctrine, recasting the current system.

3. Protection with respect to concluded contracts: European legislative self-restraint, and its disadvantages.

The protection afforded in the period between the decision to award and the conclusion of the contract represents a reasonable balance between the various interests at stake after the decision to award. A more nuanced picture can be drawn with reference to the protection provided by European law after the conclusion of the contract.

To examine the European balance between the various interests at play once the contract has been concluded, we need to

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[15] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2b of Directive 89/665 and 2b of Directive 92/13).

[16] See the new Article 11/9 of the Italian Code of Public Procurements.

[17] G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, cit. at 2.

look at the key provisions governing the effects of the setting aside of the award decision on the public contract concluded on the basis of that decision.

Directive 07/66 contains many important innovations in this regard.

Maintaining continuity with the former European rules, the Directive reaffirms that the legal effects of the setting aside of a decision to award on the contract concluded subsequent to its award shall be determined by national law [18]. Yet, in contrast to the original text of Directives 89/665 and 92/13, the new provisions introduce a remarkable exception to that principle: the effects on the concluded contract are determined directly by the European legislation in certain cases in which the breach of EU law is particularly serious and the activation of effective judicial remedies would be particularly difficult, because of a lack of transparency or a failure of respect for the standstill period [19].

This applies specifically in cases of: i) tenders which have been wrongly awarded without prior publication of a contract notice; ii) infringements of one or more of the standstill periods previously mentioned, if this has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies and on condition that the infringement is combined with an infringement of the substantive public procurements' directives and that infringement has affected the tenderer's chances of obtaining the contract; iii) violations of the rules of competition for public contracts based on a framework agreement or a dynamic purchasing system, if the Member States have invoked the derogation from the standstill period.

In all of these cases, the Directive requires the Member States to ensure that the contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body. Moreover, the Directive provides for generous periods for the review of concluded contracts: introducing a relevant innovation, it establishes that the time limit for review in cases of the above violations should be at least six months with effect from the day

[18] Articles 1/1 and 2/2 of Directive 07/66 (new Articles 2/7 of Directive 89/665 and 2/6 of Directive 92/13).

[19] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2d/1 of Directive 89/665 and 2d/1 of Directive 92/13).

following the date of the conclusion of the contract and at least 30 calendar days with effect from the day following the date on which the contracting authority published a contract award notice or informed the tenderers and candidates concerned of the conclusion of the contract [20].

Arguably, the regulatory framework laid down by the new Directive is articulated and differentiates among various possible situations.

In cases of serious breaches of European law and of difficulties in the activation of effective review, the balance between the competing interests in the public contracts sector following the conclusion of the contract is struck directly by European law. The ineffectiveness of the contract shifts this balance clearly in favour of those economic operators who have been illegally deprived of the opportunity to compete, whom the directive seeks to advantage by restoring business opportunities and creating new business opportunities [21]. The seriousness of the violation and the difficulty of obtaining pre-contractual review justify the negative effects upon the contractor and the public authorities. Such choice implies also the setting aside of certain national judicial doctrines. In Italy, for example, the public authorities' failure to respect the time limits for the conclusion of the contract is qualified by some administrative courts as just a mere «irregularity». This approach is no longer justifiable under the new European law.

In all of the other areas, the definition of the balance between the interests at play following the conclusion of the contract is left to the Member States, who determine the consequences of the ineffectiveness of an award of a public contract. The Member States enjoy a wide discretion in determining the concrete balance between the interests of the third party harmed by the award, those of the contractor and the need for economic efficiency of the administrative action. Consider the differences between the automatic ineffectiveness with ex tunc effects, which is strongly oriented to the needs of the concerned

[20] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2f/1 of Directive 89/665 and 2f/1 of Directive 92/13).

[21] Directive 07/66, fourteenth whereas

tenderer, and more balanced solutions preserving the contract and the interests of the good faith contractor.

The regulatory choice made by the European legislator gives application to the principle of subsidiarity. Such choice does not simply reflect the traditionally prudent approach of international regulation, which establishes minimum duties upon the States to provide for national mechanisms for applying for the review of the decisions of awarding authorities [22]. The approach of this Directive demonstrates instead a valuable self-restraint on the part of the European legislator. Member States are left with full discretion over the determination of the legal effects on the contract of the setting aside of a decision to award. And European law intervenes only in those particularly insidious cases in which it is necessary, where the violation of EU law is serious or effective judicial protection is harmed. This ought to have the effect of checking the recent tendency of excessive EU interference into national regulation. Just consider the Commission's attempt to require – indirectly, through the use of the infringement proceedings – the resolution of the contract, notwithstanding that Directives 89/665 and 92/13 established that the Member States could limit the powers of the review body, once that the contract is

[22] The main reference is to the Agreement on Government Procurement concluded in 1994 by the World Trade Organization. On the basis of Article XX, the Parties to the agreement undertake to provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have an interest. The Agreement's prudence and respect for the procedural autonomy of the Party states can be clearly seen in letter c) of paragraph 7: this provision requires that «correction of the breach of the Agreement or compensation for the loss or damages suffered…may be limited to costs for tender preparation or protest», without preventing Parties from preserving the effects of contracts already concluded. As B. Marchetti writes, in *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni: profili di diritto comparato*, forthcoming in *Diritto pubblico* (2010), § 2.1. «the Government Procurement provisions do not bind the State to a particular consequence for an unlawfully awarded contract». For an introduction to the content of the Agreement, see A. Massera, *L'attività contrattuale*, cit. at 8, 252 ff.; for a detailed analysis, see, in particular, M. M. Salvadore, *Gli appalti pubblici nell'organizzazione mondiale del commercio e nella comunità europea* (2001); S. Arrowsmith, *Government Procurement in the WTO* (2003); H. Caroli Casavola, *L'internazionalizzazione della disciplina dei contratti delle pubbliche amministrazioni*, 1 R. T. D. Pubbl. 7 (2006); and S. Evenett and B. Hoekman (ed.), *The WTO and Government Procurement* (2006).

concluded, to awarding damages to the person harmed by an infringement [23].

The EU law's preference for a heightened protection of economic operators illegally denied the opportunity to compete over the interests of the contractor and the contracting authorities seems proportionate. Its radical choice to restore competition, by denying the effects of the contract, is justifiable in light of the seriousness of the violation of EU law and the particular harm to third parties' judicial protection.

Once we observe these values in the new regulatory framework though, we must examine whether European law ought to assert itself in a more wide-ranging and incisive way.

A more incisive European intervention would perhaps have been desirable with reference to those cases where European law directly determines the consequences on the contract of the setting aside of a decision to award.

At least two lacunae may be identified in the regulatory framework.

The first is the EU law's renunciation to define the legal meaning of an ineffective contract: it is for the national law to provide the consequences of a contract being considered ineffective, and thus to determine whether there shall be the retroactive cancellation of all contractual obligations or just the

[23] The Commission took this path, for example, in the proceeding that led to the decision in *Commission v. Germany*, case C-503/04, in [2007] ECR I-6153. The case was born out of a prior decision in 2003, in which the Court of Justice had found Germany to be in breach of EU obligations because two of its municipalities had violated the European regulations in awarding public contracts (*Commission v. Germany*, Joined Cases C-20/01 and C-28/01, in [2003] ECR I-3609). Following that, the Commission brought an infringement action before the Court of Justice contesting Germany for its failure to fulfill its obligations under the Court's decision, because at least one of the two contractual relationships challenged in the previous case was still intact. In this case, the infraction procedure becomes a tool enabling the Commission to challenge the preservation of a contractual relationship, notwithstanding that Directives 89/665 and 92/13 permit Member States to limit the powers of review bodies, once the contract has been concluded, to the awarding of remedial damages. The Commission's approach has been upheld by the Court of Justice. For a criticism of this position, see G. Greco, *Superprimato del diritto europeo: le direttive sui mezzi di ricorso vincolano tutti, ma non la Commissione e la Corte di giustizia*, 1 Riv. It. Dir. Pubbl. Com. 431 (2009).

cancellation of those obligations which still have to be performed [24].

The second gap in the current regulatory framework is the renouncement to define at the European level the precise meaning of the «overriding reasons relating to a general interest» that would justify a national review body, where provided by national law, not to consider a contract ineffective, even though it was awarded illegally [25].

It might be argued that these are not genuine gaps in the European legislation, but rather legal spaces correctly left to national law. And it could be argued also that the Directive does provide corrective mechanisms to prevent the Member States from undermining the overall approach of the European regulatory framework: though in certain situations the Member States can avoid the requirement of declaring illegally awarded contracts ineffective, the Directive nevertheless obliges them to impose alternative penalties, which can consist of fines levied on the contracting authority or the shortening of the duration of the contract [26].

And yet, we cannot blithely assume that such corrective mechanisms will function properly, nor can we doubt that the legal spaces that EU law has left to national legislation, and in particular the precise definition of the «overriding reasons relating to a general interest», will give rise to serious controversies, hardly functional to the exigencies both of public administrations and of private operators of the internal market. An obvious example, though probably not the most insidious, is the current economic crisis: does the need to confront the crisis permit a derogation from the Directive's normative framework? The Directive assumes that the market functions normally. But could serious market failures themselves trigger the overriding reasons relating to a general interest, and thus justify a derogation from the EU rules?

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[24] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2d/2 of Directive 89/665 and 2d/2 of Directive 92/13).

[25] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2d/3 of Directive 89/665 and 2d/3 of Directive 92/13).

[26] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2e of Directive 89/665 and 2e of Directive 92/13).

The intervention of European law-makers could have perhaps been not only more incisive and penetrating, but more extensive in scope as well.

Actually, the decision to confirm the choice made by the previous directives, leaving in principle to the Member States the task of determining the legal effects on the contract of the setting aside of a decision to award, could perhaps be read as an application of the principle of subsidiarity, as well as gesture of respect towards different national legal systems. But this decision also fails to adequately protect the interest in the certainty of the law, which is indispensable to the good functioning of the European economic and social space.

Italy offers a particularly clear example of the danger of giving national legislatures too much autonomy in determining the legal effects on the contract of the setting aside of a decision to award.

In the silence of the European law, Italian law-makers enacted a sectoral law, concerning public contracts in the areas of infrastructure and strategic, productive plants. Such legislation provides that the annulment of the award decision does not imply the setting aside of the contract concluded afterwards, limiting the protection granted to the tenderers concerned to equitable monetary damages [27]. At the same time, the legislature failed to adopt a general, non sectoral legislation, regulating the consequences of the annulment of the award decision for public contracts in general.

This has triggered a very rich debate in Italy on the «fate» of the contract after the annulment of the award decision [28]. Two main positions have emerged: (1) contracts ought to be regarded as void [29]; or (2) the annulment of the decision to award should

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[27] Art. 14 Legislative Decree 190/2002, later incorporated into Art. 246/4 of the Procurements Code, cit

[28] See, *ex multis*, the comprehensive overview of L. Garofalo, *Annullamento dell'aggiudicazione e caducazione del contratto: innovazioni legislative e svolgimenti sistematici*, 1 Dir. Proc. Amm. 138 (2008); J. Polinari, *Annullamento dell'aggiudicazione e sorte del contratto: spunti per una lettura sistematica*, 1 App. Contr. 37 (2009); M. G. Vivarelli, *Ancora sulla sorte del contratto in seguito all'annullamento dell'aggiudicazione: nuove e vecchie prospettive*, 1 R. T. A. 327 (2009).

[29] For the relevant case-law, see Council of State, *adunanza plenaria*, 30 July 2008, n. 9, establishing that «following the judicial annulment of the decision to

not prejudice the rights of the parties, if these rights have been acquired in good faith [30].

This debate is of high interest from the theoretical point of view, and it certainly expresses a rich vitality of courts and legal scholarship. But the reality on the ground is that economic operators in the European internal market must navigate a legal system that is extremely uncertain and confusing. This situation is so grave to induce a court to observe that «the possibilities left open by the case-law, civil and administrative, appear to be lacking in the coherence and systematic quality indispensable to such an important area of law, and necessary to ensure the certainty of contractual relationships, the uniformity of the relative

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award the public contract, the contract becomes ineffective»; Council of State, section V, 12 February 2008, n. 490; Regional Administrative Tribunal of Lombardy, section I, 8 May 2008, n. 1380, arguing the automatic ineffectiveness of the contract through an *a contrario* interpretation of Article 246/4 of the Procurements Code (the rule according to which «the suspension or annulment of the award does not imply the ineffectiveness of the concluded contract» applies *only* for infrastructure and industrial development contracts; therefore, outside of these areas, the annulment of the award also implies the ineffectiveness of the contract); Council of State, section V, 14 December 2006, n. 7402; Council of State, section V, 29 November 2005, n. 6579; Council of State, section V, 28 September 2005, n. 5194; Council of State, section V, 11 November 2004, n. 7346; Court of Cassation, unified section 28 November 2007, n. 24658; and Cassation section I, 15 April 2008, n. 9906, which represents the most important decision and which establishes that «the annulment of the decision to award…voids the entire effect…starting with the procurement contract», which, lacking in its own autonomy and being a merely formal and reproductive act, suffers from the same vices as the award to which it depends. In the reflection of legal science, the automatic ineffectiveness of the contract is supported by R. Garofoli, *La giurisdizione*, in A. M. Sandulli (ed.), *Trattato sui contratti pubblici*, vol. VI (2008). For a detailed summary of the various arguments courts use to justify the elimination of the contractual bond, see P. Minervini, *La patologia dei contratti con la pubblica amministrazione*, in C. Franchini (ed.), *I contratti con la pubblica amministrazione* (2007) and S. S. Scoca, *Evidenza pubblica e contratto: profili sostanziali e processuali* (2008).

[30] See, in particular, Council of State, section VI 30 May 2003, n. 2992; Council of State, section IV 27 October 2003 n. 2666, Council of State, section V 12 November 2004 n. 7346, Council of State, section V, 28 September 2005 n. 5194. In the legal science, this position is developed by G. Greco, *I contratti dell'amministrazione tra diritto pubblico e privato. I contratti ad evidenza pubblica* (1986), and G. Scoca, *Annullamento dell'aggiudicazione e sorte del contratto* (2007), in www.giustamm.it.

rules and the effectiveness of judicial protection» [31]. In the same vein, some commentators have written of a «crazed puzzle, in which the individual pieces almost never fit together, and do not even suggest what the final picture ought to be» [32].

We might find this judgment to be excessively severe, because the final picture can in fact be envisioned by the courts, even in the absence of a general legislative framework. This is precisely what seems to have happened with respect to the question of jurisdiction over the fate of the contract after the annulment of the decision to award. The Court of Cassation, in the important decision of its unified sections of 28 December 2007, n. 27169, held that «following the annulment of the decision to award by the administrative court, it falls to the civil court to decide upon the fate of the public contract» [33]: a statement that has been later upheld and developed in the decision of the Council of State of 30 July 2008, n. 9 [34]. Moreover, the process of convergence

[31] Ordinance n. 1328/2008 of 16 June 2008, with which Section V of the Council of State forwarded to the *adunanza plenaria* of the Council of State the question of the fate of a public contract concluded on the basis of an annulled award; the question produced the above recalled decision of the Council of State, 30 July 2008, n. 9

[32] G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, cit. at 2.

[33] The main reason for such orientation is that civil courts have jurisdiction over contractual relationships, in which public authorities are not exercising authoritative powers. According to this line of reasoning, the successful plaintiff, who has already obtained the annulment by an administrative court of the decision to award, would be required to act before a civil court to request a new judgment on the effects of the annulment of the award upon the concluded contract. See also the decision of the unified civil sections of the Court of Cassation, 18 July 2008, n. 19805.

[34] The *adunanza plenaria* of the Council of State, decision of 30 July 2008, n. 9, confirmed the decision of the Court of Cassation with respect to the jurisdiction of civil courts on the effects of the annulment of the award upon the concluded contract. The judgement of the Council of State has overridden the many challenges raised by administrative courts, which tended to decide, in the context of a review of the award decision, also on the validity or efficacy of the concluded contract. The plenary hearing of the Council of State, however, also specified the position of the Court of Cassation. If the relevant public authorities do not comply with the judgement, the administrative court may review the acts of the public authorities where an action of compliance is brought. In this context, the administrative court may also fully review the administration's activity, adopting all measures necessary to give exact and integral execution to the judgement. In other terms, after the civil court's

concerns not only the issue of the competent jurisdiction, but also the question of the substantial consequences on the concluded contract of the setting aside of the award decision. As a matter of fact, the case-law seems to have converged upon a position in favour of the voiding of the contract following the judicial annulment of the award [35]. Therefore, not only can the courts create a coherent picture out of the puzzle pieces, this is what they have effectively done.

It could also be added that the new Directive represents a positive step forward with respect to the former law. It is true that the national law can still freely determine the consequences upon the contract of the annulment of the decision to award. But it is also true that the new Directive, especially in its preamble, provides some indications in favour of judicial remedies able to provide focused and rapid protection [36], and also of the need to provide a reasonable and proportionate balance between the effective protection of the concerned tenderer and the need to guarantee the legal certainty of the decisions of the awarding authorities. National legislators therefore might find in this new European framework support for the construction of the relevant domestic law, and national courts could work to make this law

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decision, the public authority may allow the interested bidder, wrongly denied the opportunity to compete, to take over the contract, thus correcting for the prejudice caused by the illegal award. Only in the compliance judgment can the administrative court adopt all measures necessary and opportune to give exact and integral execution of the judgement, which includes replacing the wrongly successful bidder and the inclusion of the party which obtained the award's nullification. On the ambiguity of this position, see in particular the comment of A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, 1 Riv. It. D. Pubbl. Com. 307 ff. (2009). The judgement of the Council of State, Section V, ordinance 26 August 2008, n. 4532, drew from the plenary hearing n. 9 of 2008 some implications regarding interim protection in the special proceedings for public contracts. The Council of State, given the lack of jurisdiction of administrative courts over the fate of the contract, excluded the possibility to grant interim measures that may enable the possible substitution of the successful plaintiff while waiting for the decision on the merits

[35] The reference is to the plenary hearing of 30 July 2008, n. 9, and to the decision of the Court of Cassation, Section I, 15 April 2008, n. 9906

[36] See in particular, A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, cit. at 34.

coherent with the European framework [37]. This process, moreover, could be facilitated by European Court of Justice, which plays the role of the final arbiter in the interpretative processes that are triggered by the concerned tenderers and through which the relationship between national and European law are constructed.

And still, we can ask whether the European regulatory choice, which depends upon national law-makers and, especially where national law-makers are silent or lay down nuanced solutions, upon national courts, really responds to the needs of economic operators in the European internal market [38]. Is a choice whose value depends upon a gradual process of convergence [39] and on the initiative of market operators and the capacity and patience of lawyers and judges, sufficient to respect the values of legal certainty underpinning the European market?

It will be interesting, in this perspective, to assess the functioning of the Italian regime established by the legislation implementing Directive 07/66. The judicial annulment of the decision to award does not always imply that the public contract becomes ineffective, as courts can assess the public and private interests at stake in order to preserve the effectiveness of the contract, considering elements such as the state of execution of the contract, the reciprocal interest of the parties and the good faith of the contractor [40]. Admittedly, such regime is highly flexible and encourages the elaboration of ad hoc solutions by the courts through their assessment of a number of predetermined legal criteria. Yet, it will be necessary to assess in the next years its

[37] In Italy, for example, the Court of Cassation has even anticipated the national legislator. Before Directive 07/66 was implemented in the domestic legal order, the Court of Cassation has modified the position taken in the decision of 28 December 2007, n. 27169. Such position was considered not compatible with the new Directive, whose principles of a focused and rapid protection require to overcome the distinction between the jurisdictions of administrative courts on the annulment of the decision to award and the jurisdiction of civil courts on the effects of the annulment of the award upon the concluded contract. See Court of Cassation, unified section 10 February 2010, n. 2906

[38] The relationship between legal procedures and their function in the European economic space is stressed, in the Italian debate, by F. Merusi, *Annullamento dell'atto amministrativo e caducazione del contratto*, 1 F. A.-T.A.R. 659 (2004).

[39] A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, cit. at 34 writes of a «asynchronic dialogue between courts», with reference the Italian legal system.

[40] Article 245-ter of the Code of public procurement.

concrete functioning, in order to verify whether the flexibility inherent to the new regime is really functional to the needs of legal certainty underlying the European internal market or whether it results in legal fragmentation and unjustified differentiation.

4. Awarding damages.

The third and final element illuminating the overall rationale of the EU protection granted in the area of public procurements is the possibility to award damages to the harmed persons.

Directive n. 66 of 2007 builds upon the earlier framework of Directives 89/665 and 92/13, allowing Member States to limit the powers of the body responsible for review to the awarding of damages to any person harmed by an infringement, after the conclusion of the contract [41]. This regulatory choice ought to be read in the light of the above observations about the fate of the contract after the decision to award it has been set aside. Member States may limit their protection to the awarding of damages, without considering ineffective the concluded contract. Yet, Member States' discretion in this area does not extend to cases of serious violations of EU law and of excessive reduction of the concerned tenderers' protection, where the Directive directly provides for the ineffectiveness of the contract, and thus opens up the possibility of new opportunities for economic operators illegally excluded, in the forms set forth by the national law.

The relationship between protection through the award of damages and the consequences of the annulment of a decision to award, clarifies the rationale behind the new European regulatory framework.

In cases of serious breaches of European law and particular prejudice to the protection of the concerned tenderers, EU law strikes a balance between the competing interests that is clearly tilted in favour of those economic operators illegally deprived of the opportunity to compete.

In all other cases, by contrast, EU law leaves the definition of this balance to the discretion of the Member States, that can

[41] Articles 1/1 and 2/2 of Directive 07/66 (new Articles 2/7 of Directive 89/665 and 2/6 of Directive 92/13

variously mix a protection based upon the ineffectiveness of the concluded contract with a protection centred upon the award of damages, and that can therefore establish different balances between the interests of the public contracting authority, those of the successful tenderer and those of the excluded tenderers.

Consider the wide difference between, on the one hand, the automatic ineffectiveness of the contract with *ex tunc* effects and restoration of the excluded operator's rights, which is strongly oriented to the needs of the concerned tenderer, and, on the other hand, a protection strictly based upon the award of damages, essentially aimed at preserving the position of the contractor. There are also intermediate solutions between these two extremes, aimed at more nuanced outcomes. French law provides an example: it reconciles the need to protect interested competitors and the need to allow contractors to perform the activities defined by the contract through a complex remedial system, which provides a relative preservation of the contract and the protection of the third party prior to the conclusion of the contract, and monetary damages following its conclusion [42]. Another example is provided by the Italian legislation implementing Directive 07/66, where the award of damages is envisaged only in those cases in which the ineffectiveness of the contract is not considered by the administrative court as the most appropriate option.

We can appreciate the restraint of the European regulative choice: the European law-makers have basically made use of the normative instrument of the directive consistently with its specific function, that is leaving Member States the space to define the concrete means for attaining the objectives established at the European level, in respect of the variety of different national legal traditions.

The decision of the European legislator to avoid fixing the balance between the competing interests once and for all also responds to the need for flexibility and differentiation, often recognized in Western legal systems.

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[42] This refers to the legal framework developed before the adoption of Directive 07/66 and determined by the *Code des Marchés Publics* as well as by case-law, and particularly by the *Conseil d'Etat* in the *Tropic* decision of 16 July 2007 (*Conseil d'Etat Ass.*, 16 July. 2007, *Societé Tropic Travaux Signalisation*, n° 291545); among the numerous comments on this decision, see those collected in number 5 of the 2 Rev. Fr. D. Adm. 923 (2007).

In the American system for resolution of bid protests, for example, the appropriate type of protection is not defined ex ante by the relevant norms. The specification of the balance between the different interests at play is instead left to the body charged with resolving the dispute. This body enjoys a wide discretion, as demonstrated by the broad range of the decisions that the General Accounting Office can adopt, and the sophisticated, penetrating powers of the Court of Federal Claims. This court can decide to preserve the contract notwithstanding the demonstrated unlawfulness of the decision to award, depending on the interests at stake. It can also adopt various kinds of corrective decisions, such as requiring the public authority to award the contract to the protester and awarding damages to interested competitors for lost earnings [43].

Still, the decision of the European law-makers is rich of ambiguities.

The Directive certainly allows for the coexistence of many different solutions from one Member State to another. But while this variety might be intellectually interesting, it is not at all clear whether it is fit to meet the needs of a single European market and its operators.

For example, both the French and the UK legal systems traditionally permit the awarding of damages, calculated on the basis not only of the costs of participation in the bidding competition but also of lost profits, as demonstrated by the interested tenderer. But the criteria used to make this determination are more rigid in the UK [44], and more generic in France, where a distinction between lost chances and chances sérieuse is applied [45]. And other countries, like Germany, do not calculate lost profits at all [46].

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[43] The wide discretion of the Court of Federal Claims has been recently underscored by B. Marchetti, *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni: profili di diritto comparato*, cit. at 22, § 3.

[44] On this point, see the summary of M. Browsher and P. Moser, *Damages for Breach of the EC Public procurement Rules in the United Kingdom*, 1 Pub. Proc. L. Rev. 195 (2006).

[45] *Conséil d'État*, 18 June 2003, *Groupement d'entreprises solidaires ETPO Guadalouope*.

[46] The German legislation for the protection of competition, *Gesetz gegen Wettbewerbsbeschränkungen* – GWB, provides in paragraph 126 that a third party which demonstrates that it had a serious chance of obtaining the award of the

The functioning of the internal market, as economists have clearly shown, does not necessarily require a perfectly harmonized legal regime [47]. And European market operators themselves do not count the lack of a uniform legal system as one of the main obstacles to presenting bids outside of their country of origin [48].

Nevertheless, it is still worth asking whether the differences in the degree of protection that an operator may receive, depending upon where in the European market it finds itself, are really serving the goals of competition and economic growth. The fact that the national implementation of the European law is so variable represents an element of legal complexity that can translate into an obstacle to the mobility of European undertakers

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contract if there had not been the violation of the competition law has a right to damages for the costs of the preparation of the offer and participation in the tender. For a synthetic account, see J. Pietzcker, *La nuova impostazione del diritto tedesco delle aggiudicazioni: alcuni aspetti di fondo*, in E. Ferrari (ed.), *I contratti della pubblica amministrazione in Europa* (2003) and P.M. Huber, *L'europeizzazione del settore degli appalti pubblici in Germania*, in E. Ferrari (ed.), *I contratti della pubblica amministrazione in Europa* (2003).

[47] For a discussion on this point, see for example, W. Molle, *The Economics of European Integration: Theory, Practice, Policy* (2006); for a law and economics analysis, see R. Inman and D. Rubinfeld, *Federalism*, in *Encyclopedia of law and economics* (2000). The legal literature on the strictly connected issue of regulatory competition in the European internal market is too abundant to be usefully recalled here; see however the classic works by N. Reich, *Competition between Legal Orders. A New Paradigm of EC Law?*, 2 Common Mkt. L. Rev 861 (1992), J. Sun, J. Pelkmans, *Regulatory competition in the Single market*, 1 J. Common Mkt. St (1995).; C. D. Ehlermann, *Compétition entre systèmes réglementaires*, 1 Rev. M. C. U. E. 220 (1995) and D. Esty, D. Gerardin (ed.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (2001); among the Italian studies see in particular A. Zoppini (ed.), *La concorrenza tra gli ordinamenti giuridici* (2004); and L. Torchia, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo* (2006).

[48] On this point, see the interesting study, *Evaluation of Small and Medium-Sized Enterprises' (SMEs') Access to Public Procurement Markets in the EU*, carried out by GHK and Technopolis and commissioned by the European Commission in http://ec.europa.eu/enterprise/newsroom/cf/itemshortdetail.cfm?item_id=33 The authors observe that «t]he key barriers to entry for all SMEs appear to be the awarding authorities' over-emphasis on (purchase) price, the administrative burden," together with "the low quality of tender documentation; lack of opportunities for a dialogue with the client; no or inadequate provisions for the exclusion of unrealistic offers", as well as "insufficient possibilities for legal remedies».

and their effective ability to participate in calls for tender, for example by discouraging small or medium businesses from participating in competitions in national legal orders where the judicial protection is inadequate or a possible dispute following the decision to award would be too costly [49]. It has not, moreover, been demonstrated that the variety of national regimes has triggered a process of comparison and mutual adjustment and correction of individual national laws, as some economists consider to be possible [50].

Lacking empirical evidence of the actual impact of the possible coexistence of many different solutions from one Member State to another, in any case, the inconveniences associated with this lack of a comprehensive and fully accomplished European regulatory framework ought not to be exaggerated. Admittedly, the Directive does orient the choices of national legislatures and, in many cases, indirectly offers a solution to the questions possibly arising at the national level.

In general terms, one should admit that the Directive expresses an overall preference for the preservation of the concluded contract. The provision of a sophisticated suspensions regime prior to the conclusion of the contract aims at giving the concerned tenderer the tools necessary to obtain full satisfaction in this phase. And the ineffectiveness of the contract is envisaged by the Directive itself only in those cases in which there is a serious breach and effective protection has been made excessively difficult. Thus, the Directive does not directly limit national legislatures, which remain free to combine a protection based upon the ineffectiveness of the concluded contract with a protection centred upon the award of damages. However, the European law does orientate domestic choices, as a national rule

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[49] For a general discussion of the relationship between harmonization and the reduction of transaction costs, not in specific reference to judicial protection or the substantive law of public contracts in the European single market, see L. Ribstein and B. Kobayashi, *An Economic Analysys of Uniform State Laws*, 1 J. of Legal St. 131(1996); with reference to European civil law, U. Mattei, *Hard Code Now!* (2002), in www.bepress.com/gj/frontiers/vol2/iss1/art1; among the extremely abundant studies on regulatory arbitrage and its implications see M. Gnes, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, (2004).

[50] Based on the classic theory of C. M. Tiebout, *A Pure Theory of Local Expenditures*, 1 J. of Pol. Ec. 416 (1956).

intended to be fully in conformity with the Directive's underlying rationale would have to limit the cases of ineffectiveness of the contract to those expressly provided by the European law [51].

As for the specific questions that may be raised within the national legal systems, an example is provided by the discussion on the Italian doctrine according to which an action for damages can be brought only if the relevant administrative measure has been challenged before a court and damages may be awarded only if the measure has been annulled (so called *pregiudizialità amministrativa*) [52].

The Italian Court of Cassation has rejected the necessity of prior annulment of a decision to award before damages can be awarded in Italy, observing that «to admit the necessary dependence of the monetary damages on the previous annulment of the unlawful and harmful act, rather than on just the verification of its unlawfulness, would mean shrinking the protection of the private actor vis-à-vis the public administration and subordinating his right to monetary damages to an Italian-style administrative *Verwirkung*» [53]. The awarding of monetary damages, in other words, must be tied to an autonomous five-year statute of limitations. And the interests of whoever is asking for monetary damages ought to prevail over those of the other parties to the dispute.

But just when the question seemed resolved in Italy, the European Directive comes in to reopen it, suggesting a different construction to the national legislator [54]. Firstly, it gives Member States the ability to «provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary

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[51] For a more restrictive interpretation of the European requirement, see G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, cit. at 2, which interprets the directive as implying a genuine limit upon national legislatures, that should maintain the effects of the contract.

[52] Among the recent studies on the subject see, in particular, F. Cortese, *La questione della pregiudizialità amministrativa* (2007).

[53] Court of Cassation, Unified Sections, ordinance of 13 June 2006, n. 13659 and n. 13660.

[54] As for the Italian legal order, the issue has not been addressed by the legislation implementing Directive 07/66 and should be regulated by the Code of the administrative judicial proceedings whose adoption is currently under discussion.

powers» [55]. Secondly, it provides for a very short time limit, just 10 days, for presenting the various applications for review, included the application aimed at obtaining the award of damages [56]. This is clearly a minimum period, that the national legislature can extend. And yet, this minimum term reveals the Directive's basic orientation in favour of the interested candidates' ability to adequately assert their interests in an action for damages without becoming victims of dilatory behaviour by the public authorities. But the European Directive also favours the other parties to the dispute, in particular the public authorities, and is ultimately much less centred on the protection of the interested candidate than the Italian Court of Cassation.

So, the Directive leaves the Member States the ability to fix the comprehensive balance between the different interests competing in the public contracts sector after adoption of the decision to award. But it provides national legislatures with a general framework and some specific indications pulling them towards choices aimed not at guaranteeing the rights of the interested candidates but rather at balancing the different needs of the interested candidates, the contractor and the public administration. This orientation does not go into the direction of a genuine uniformity, but it certainly contributes to the construction of a homogeneous regulatory space, even though this may imply, as in the case of the Italian *pregiudizialità amministrativa*, reopening a legal issue that seemed finally resolved.

5. Conclusions.

The analysis carried out in the previous pages suggests some general conclusions.

A first conclusion that we can draw from the inquiry is that the European Directive adopts a differentiated approach to the judicial protection in the public procurements sector. It does not fix a single, immutable balance between the competing needs of the public contracting authority, the successful tenderer and his market competitors, in the period following the decision to award.

[55] Article 1/1 of Directive 07/66 (new Article 2/6 of Directive 89/665).

[56] Articles 1/1 and 2/3 of Directive 07/66 (new Articles 2c of Directive 89/665 and 2c of Directive 92/13).

Rather, it opts for a more flexible framework in which the balance between the various interests changes in relation to both the phase in which the dispute arises and the gravity of the infraction.

In particular, three main hypotheses may be identified.

In the phase between the decision to award and the conclusion of the contract, the European suspensions regime balances between the different conflicting interests in play, without sacrificing one to the others: in fact, it allows the interested tenderer to take the initiative within a time permitting the applicant to obtain a restoration of his rights and business opportunities; it allows infractions to be corrected, in the interest of the economic efficiency of the administrative action; it postpones the expenses that the contractor will have to sustain in beginning the performance of the contract.

A different balance is struck in the period after the conclusion of the contract, where there has been a serious violation of European law or judicial protection has been made particularly uneasy. In this case, the ineffectiveness of the contract shifts the balance clearly in favour of the economic operator illegally deprived of the opportunity to compete, providing that his commercial opportunities ought to be restored, to the detriment of the contractor and the public administration.

Where the contract has been concluded, but the violations are not particularly grave, European law lets Member States define the balance between the various interests in play, and identify the most suitable combination between a protection based upon the ineffectiveness of the concluded contract and a protection centred upon the award of damages. However, the new European Directive is not completely neutral between the choices that Member States are called to make. Various indications suggest a comprehensive orientation towards a proportionate and reasonable balance between the effective protection of the protesting competitor (who must be able to assert his interests adequately, without being victimized by possible dilatory behaviour by the public administration) and the need to guarantee the legal certainty of the decisions of the awarding authorities, in favour of these authorities and the private contractors.

As articulated as this is, such regulatory framework nevertheless responds to the unitary rationale of fixing a balance between the various interests in competition after the decision to

award, in such a way as to take account of each of these interests in play, without unduly prejudicing the satisfaction of the others. This is the objective pursued by the European law in the phase leading up to the conclusion of the contract; the suspensions regime enables the protection of the competitors' interests without ignoring those of the contractor and the public administration. And this is also the objective towards which the Directive indirectly orients national legislatures in providing rules for cases in which the contract is already concluded. A solution strongly weighted in favour of the market competitors is provided only in exceptional cases, and is justified by the gravity of the violation of the EU law and the particular reduction of effective protection for the economic operator illegally deprived of the opportunity to compete.

A second general conclusion follows from this first conclusive remark. Notwithstanding certain statements made in its preamble, the European Directive does not ultimately aim at the categorical protection of the aggrieved market competitors, illegally denied the opportunity to compete for public contracts. In balancing the needs of the administration, the private contractor and its market competitors, the European law instead aims to combine the effectiveness of judicial protection with the effectiveness of European law. The new Directive aims at implementing, on the side of judicial protection, the same principles of transparency, non-discrimination and efficiency of the administrative action that guide the substantive law of European public procurements. Thus, the new Directive is a faithful continuation of its predecessors, which sought to address obstacles to freedom of movement and competition caused by the lack of adequate protective mechanisms for the effective application of the substantive Directives.

The new framework erected by the latest Directive – and this is a third and last general conclusion - presents some lights and shadows.

The lights concern those profiles that the European law regulates directly. Regulating the period between the decision to award and the conclusion of the contract, the new Directive determines a reasonable and convincing balance between the different interests of the administration, the private contractor and its market competitors, without sacrificing one to the others. And

the incisive protection granted in certain cases to market competitors, to the detriment of the contractor and the public administration, can be substantively justified by the gravity of the violation of the EU law and the particular reduction of effective protection characterizing those specific cases.

The shadows relate with the regulatory discretion left to the States. It is true that the decision to refer to national law is justifiable as a matter of political compromise and understandable as a historical matter reflecting the traditional caution of international regulation. And one can appreciate the respect that this choice expresses towards the preservation of the variety of legal traditions of the different Member States, overcoming a recent tendency towards an excessive interference in the national regulatory space. We must also remember that the Directive aims at reducing the possible inconveniences of national legislative autonomy, by offering a general framework and various specific indications to orient national discretion towards a proportionate balance of the different needs of the interested candidates, the contractor and the public administration.

At the same time, however, the decision to rely heavily on national courts and legislatures presents certain inconveniences. First of all, it does not fully guarantee that legal certainty indispensable to the European economic and social space, as unambiguously demonstrated by the Italian debate over the «fate» of the contract after the annulment of the decision to award. Member States' discretion moreover leads to the coexistence of many different solutions, varying from one Member State to the other, according to a paradigm of legal pluralism that is hard to reconcile with the needs of the European single market and its operators. It is true that the functioning of the single market does not necessarily presuppose a perfectly harmonized legal regime. Still, the differences in the degree of protection available to a private economic operator, depending upon where in the European market it is positioned, might represent such a legal complexity as to be an obstacle to the mobility of EU economic operators; and no demonstration has been given so far that a process of mutual comparison and correction of national differences has been triggered by the variety of national regimes of judicial protection.

Hence a risk and an opportunity. The risk is that the regulatory spaces left to the Member States may become factors in the paralysis or slowdown of the European market. The opportunity falls to legal practitioners, courts and scholars to contribute to the drawing of a legal picture able to coherently support the goals of competition in the single European market.

REGULATION AND TARIFFS IN THE TRANSPORT SYSTEM: THE CASE OF LOMBARDY

Michele Giovannini *

Abstract.

Of the various sectors subject to regulation, the road and motorway network in particular has been subject in recent years to an intense regulatory and administrative decentralisation process, as a result of which frequent hypotheses of potential overlaps of governmental authority have arisen. The situation is therefore complex, and significant uncertainty remains even today. For example, on the matter of the power to determine the motorway tariffs, while some of the hypotheses are clearly of a regional nature, others remain firmly anchored to a prevalently centralist notion of relations between the state and the regions. This creates considerable problems in a sector whose development is also subject to incentives and monitoring at European Union level, not only because of the economic interests involved, but also and above all in terms of the need to contribute to a Europe-wide network with no boundaries or restrictions on traffic movements. The approach which has been taken by Lombardy Region over the last decade reflects the complexity to which we referred above, and should be examined due to the importance that it attributes to the achievement of consensus as the method that the regional, national and European institutions are expected to adopt in their development policies.

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1. Introduction

Around the turn of the century, the legislation, regulations and administrative rules on roads and motorways were subjected to a significant decentralisation process. This process is of interest from a number of viewpoints, while the many interests involved, both public and private, are frequently in open conflict, interwoven as they are in a complex scenario which is difficult to decipher on the basis of the traditional relationships between the public and private sectors.

With specific reference to motorways, the conflict is institutional first and foremost, involving the state and other central administrative authorities on the one hand and regional and provincial government bodies on the other. We need merely consider the determination of the general powers for the control of the sections and the related regulatory powers. Then, we have to consider the characteristics and role played by the bodies which grant the concessions, the limited companies in which there are state, regional or mixed shareholdings, whose ownership structure has an effect – even if only indirectly – on their relationships with the various institutional levels, as well as with the concession-holders and, above all, the users.

The matter of the regulatory powers of the regional authorities for the roads and motorways is a wide-ranging one, which has already to a certain extent been dealt with in general terms.

However, there are certain aspects which the most recent studies have not looked into in depth which are of determining importance if we are to understand if and to what extent the transfer of powers which began in the late nineties has in the meantime become a consolidated fact, and if it can effectively be taken seriously [1].

We may, for example, take the question of the determination of the tariffs, with a view to offering incentives to invest, simplifying the overall situation and the relationships with

[1] A hope which has been expressed in general terms for some time in doctrine. On this point, see L. Mariucci, R. Bin, M. Cammelli, A. Di Pietro, G. Falcon, *Il federalismo preso sul serio,* (1996).

the users. As is known, we are dealing of powers whose exercise is often shared at different levels of government, national, regional and European, directly or indirectly. This leads to a state of constant uncertainty with regard to the profitability of the economic investment made in creating infrastructure, which is therefore crucial in terms of achieving the objective laid down at European level of setting up a network with no boundaries or obstacles to the free movement of goods and passenger traffic [2].

The aim of these reflections is to consider the above aspects, with particular reference to the overlaps between the state regulations and those laid down by the Lombardy Region, which is one of the most highly developed regions in Europe and has, over the last few years, dedicated considerable attention to the question of investments in infrastructure, and in the planning of new sections of regional motorway in particular.

2. The regulation of the road and motorway network between the State, regions and local authorities.

At national level, the first organic legislative intervention based on a logic of explicit decentralisation of powers took place with the issue of legislative decree no. 112 of 31st May 1988, on the "Transfer of powers and administrative tasks from the state to the regional and local authorities, in application of Section I of law no. 59 of 15th March 1997".

Following this operation, pursuant to article 98 of the decree, the state continues to exercise a number of fundamental powers by agreement with the regional authorities, within the context of the Unified Conference under the terms of legislative decree no. 281 of 28th August 1997. These include, for example, responsibility for the planning of the road and motorway networks which form part of the major national and international connecting trunks, the collection and handling of information on the road network as a whole, the control of traffic movement, including the various road safety aspects, the determination and upgrading of the motorway tariffs and the approval of concessions for the construction and management of the

[2] As noted by M. Sebastiani, *Le infrastrutture di trasporto*, in P. Manacorda (ed.), *I nodi delle reti* (2010).

motorways, with all the consequent control aspects. At the same time, article 99 entrusts the regional and local authorities with all the administrative powers not expressly mentioned, such as the planning, design, construction, maintenance and management of the roads which do not form part of the national motorway and road network [3].

Article 101 states that these roads, formerly the property of the state pursuant to article 822 of the civil code, have been transferred to regional control on a definitive basis [4].

In real terms, the identification of the motorway and road network of national significance as defined in article 98, paragraph 2, has taken place in a number of successive stages. Firstly, by means of legislative decree no. 461 of 29th October 1999, later amended by the prime minister's decree of 21st September 2001, for the implementation of the terms of law no. 340 of 24th November 2000. And subsequently, by means of the prime minister's decrees of 21st February, 12th October and 13th November 2000, which effectively brought about the transfer of powers from the state highways body ANAS to the regional authorities, and refer to such factors as the personnel units to be transferred, the methods for the handover to the regions of the goods and properties required for the management and maintenance processes, the ways in which the regional and local authorities are to take over all the relationships formerly in the hands of ANAS, and so on.

The legislator has in any case taken care to ensure a smooth transition from the old system to the new, by attributing significance to the differences which exist at regional level, especially in terms of the capacity to exercise the powers transferred to them. It is in this sense that we have to interpret article 6, paragraph 4, of legislative decree no. 419 of 29th October, which authorises ANAS, in accordance with the European regulations, to set up "mixed companies with the regional, provincial and local authorities for the design, construction and

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[3] There is a large body of literature on this subject. In general, see F. Franchini, *Strade pubbliche, private e vicinali*, in *Noviss. Dig. It.* (1940) and following, A.M. Sandulli, *Autostrada*, 1 Enc. Dir. (1959), L. Orusa, *Strade e autostrade,* in *Dig. Disc. Pubbl.* (1999), G. Pasquini, *Le strade e la circolazione,* in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003).

[4] E. Castorina, G. Chiara, *Beni pubblici. Articles 822-830* (2008).

maintenance of the roads within their territories, and to exercise the rights to design, build and maintain roads on behalf and in the interests of the regional, provincial and local authorities …". This solution has already been put into broad application in a number of northern Italian regions, such as Veneto and Lombardy [5].

This same method of interpretation also has to be applied to article 99, paragraph 2, on the basis of which the local bodies to which the powers have been transferred may entrust ANAS with the design, maintenance and management of the roads passed on to them under the terms of article 101, paragraph 1, on the basis of specific agreements reached pursuant to article 15 of law no. 241 of 7th August 1990.

Collaboration between local bodies by means of companies specially set up for the purpose is a widespread phenomenon in the current legislative situation [6]. The use of this model does not come without consequences of a systemic nature, especially in terms of the immediacy of management control by the reference bodies. It is in fact the management process (with its consequent responsibilities) which takes on particular significance in terms of the involvement and handling of regional and local interests.

For this reason, in addition to the reference to the company model, it is the regulations on the agreements which are of greatest relevance for our purposes, as these govern the of necessity temporary nature of the involvement of the state through ANAS. In other words, the direct and exclusive involvement of the state is justified due to the fact that the regions are unable to exercise the powers conferred upon them in a fully autonomous manner, and therefore require the support of ANAS.

This does not imply that the collaboration between the regions and ANAS will automatically be of a temporary nature. However, while the legislation acknowledges the need to identify various forms of collaboration among the bodies involved, it

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[5] We will return to this point below. We should point out, however, that there are three different concession-granting authorities in Lombardy, only one of which adheres to the mixed model referred to above, that is, Concessioni Autostradali Lombarde S.p.a. (CAL), jointly owned by Anas S.p.a. and Infrastrutture Lombarde S.p.a., all of whose shares are held by the region.

[6] M. M. Cammelli, in M. Dugato (ed.), *Studi in tema di società a partecipazione pubblica,* (2008). Among the recent works, also see M. Clarich, *Società di mercato e quasi-amministrazioni,* 1 Dir. Amm. 253 (2009).

prefers to lay the emphasis on the role of the regional authority, to avoid the setting up of dynamics that could slow down the decentralisation process, and with it the process for the structural and company conversion of ANAS.

Setting aside the various doubts as to interpretation provoked by this legislative intervention, the fact in any case remains that legislative decree 112/1998 is a fundamental step forward in this area. It brings about an initial link between ownership and management of the roads and entrusts the regions and the regional law with the power to lay down the reference regulations, in this way enabling them to play a driving role in the area of regional roads and motorways. Substantially speaking, this is a legislative intervention which has brought about a profound reform in the Italian road system, on the basis of the national, regional and local interests which it aims to satisfy [7].

3. Regional legislation and reform of section V of the Constitution: the case of Lombardy Region.

We now have to consider whether and to what extent the subsequent changes have confirmed or denied that the new situation is to be based on the role of the regions and local bodies.

This assessment is particularly interesting if we take the case of Lombardy Region, whose system was outlined by regional law no. 9 of 4th May 2001, a law that came into force prior to the reform of section V of the Constitution, approved in October 2001. In substantial terms, we have to consider the regional law in the light of what went before (legislative decree no. 112 of 31st May 1998) and after (constitutional law no. 3 of 18th October 2001) if we are to understand if and to what extent the national decisions have been denied, confirmed or even rendered obsolete at regional level.

We should make it clear right from the start that regional law 9/2001 appears to be decidedly regionalist in its focus. This is certainly the case in the areas of road safety and advertising, which are subject to section V of the law on regional control and monitoring and are based on the exercise of typically

[7] P. Urbani, *Il federalismo stradale tra* Anas *e Regioni: l'attività di service e la costituzione delle società miste,* 1 Reg. 43 (2001).

administrative powers, such as those regarding authorisations, permits, concessions and so on.

But above all, this is significant in terms of the planning and coordination of the regional road network. For example, according to article 3, paragraph 1, the regional authority lays down "… homogeneous criteria for the classification of the regional road network, with the exception of the national trunk routes …". These criteria also apply to the local and provincial road networks. Paragraphs 2 and 3 confer upon the local and provincial authorities the power to classify the roads, even though they are obliged, on the one hand, to adhere to the criteria laid down by the region, and, on the other, to submit their classification proposals to the regional government for approval.

In addition, under the terms of article 3-bis, it is the region which "… promotes the setting up of the regional road register as a tool for the procurement, filing, updating and analysis of the information on the road network within the territory of the Lombardy Region …". For that purpose, the bodies which own the roads are obliged to pass on their information in this sense to the regional authority, partly on the basis of incentive and financing programmes and agreements to be stipulated between the various parties involved. It is the regional authority which manages the road register and the use and exchange of the information which it contains, by defining the most strictly technical aspects subject to regional government resolutions, and, on the basis of article 4, promotes the efficiency and safety of the regional road network and lays down the minimum maintenance standards, by agreement with the provincial and local authorities, to which the various bodies are obliged to adhere.

We should add that the regional authority, on the one hand, schedules the development of the regional road network by means of the methods and conditions laid down in the Regional Mobility and Transport Plan pursuant to article 9 of regional law no. 22 of 29th October 1998, and enables these to be applied by advancing or supplementing the resources transferred by the state for the purpose, as laid down in regional law no. 25 of 9th December 2003 on "Interventions in local public transport and roads". On the other hand, it plays an active role in the area of regional motorway concessions, which is one of the aspects of the administrative implementation of these scheduling activities.

On this subject, article 7 states that the regional government has the power to grant "… regional motorway concessions …" for "… the planning, construction and effective and economic management of the correlated works …", as well as the power to approve the related agreement and exercise "… control and monitoring powers over the concession-holders on the planning processes, the construction of infrastructures and supplementary and/or related works, adherence to the economic and financial frameworks, the application of the tariffs and the correct fulfilment of the obligations set out in the agreement in general, including those regarding payments and the impact limitation factors".

Then, in accordance with article 10, the regional government lays down a measure to determine "… the maximum toll tariffs for regional motorways and their reviews. The tariffs and their review parameters are determined specifically for each regional motorway on the basis of the specific social and territorial situations, and form part of the base for the concession award competition". Finally, on the basis of the terms of article 10 bis, and as introduced by article 1 a) of regional law no. 25 of 21st October 2004, recently amended by article 12, paragraph 3 c) of regional law no. 15 of 26th May 2008, the regional government may decide to confer many of the above powers to Infrastrutture Lombarde S.p.A., by means of specific agreements.

The regulatory framework which emerges from this brief description confirms that the system for the scheduling and development of the road network in the Lombardy Region is of a broadly regionalist nature. In the end, what this means is that regional law 9/2001 represents a decisive step forward with respect to the previous situation, based on legislative decree no. 112 of 31st May 1998.

At this point, it is possible to consider regional law 9/2001 in the light of the subsequent reform of section V of the constitution, as approved by constitutional law of October 2001. Given that the positive framework acknowledges that the regional authority plays a central role in this area, we will now consider whether Lombardy Region may be granted further freedom of action based on the above constitutional reform.

As we know, article 117 of the constitution states that the legislative power is exercised by the state and the regions in

accordance with the constitution and the restrictions deriving from the European legal system. Paragraph 2 of this article lists the areas for which the state has exclusive power, and which therefore have to be interpreted in the strict sense. In such areas, only the state has the power to lay down regulations of a legislative nature. In the same way, paragraph 4 attributes exclusive powers to the regions for the areas not expressly subject to state legislation. In such areas, only the regions have the power of legislative intervention. Paragraph 3 deals with the area between these two extremes, in which the state and regions have concurring powers, and then goes on to list the areas in which the regions have legislative powers for all aspects except the determination of the fundamental principles, which is the exclusive responsibility of the state [8].

The constitution makes no explicit reference to roads and motorways, but this area is covered in the list of paragraph 3, by means of the expression "major transport networks", which means that the legislative powers for such matters are conferred by the constitution upon the state and the regions, with all the difficulties that such a decision involves in terms of the correct marking off of the respective spheres of responsibility [9].

It is therefore difficult to determine in the abstract sense what the fundamental principles are for the correct division of the legislative powers over the roads and motorways between the state and the regions. In case law, some of the provisions of the new highway code, adopted by means of legislative decree no. 285 of 30th April 1992 and subsequent amendments, are regarded as such. For example, on the definition and classification of roads, article 2 lays down a number of rather narrow parameters from which it is difficult for the regional legislator to deviate – a position which is also shared by the Court of Cassation [10].

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[8] On the question of constitutional reform in general, see the Astrid *Position Paper*, *La riforma del titolo V della Costituzione ed i problemi della sua attuazione* (2002), in www.astrid-online.it.

[9] These difficulties are emphasised in F. Merloni, *Infrastrutture, ambiente e governo del territorio,* 1 Reg. 58 (2007).

[10] In the Court's interpretation (section I, 10th January 2005, no. 287) the highway code "*… by laying down the criteria for the classification of the roads on the basis of their construction and technical features and the type of use for which they are designed, offers a description in point B of a trunk road as one with separate carriageways divided by a central barrier, in which each carriageway has at least two*

This classification was confirmed by Lombardy regional law 9/2001, whose article 3 attributes to the region the power to lay down "… homogeneous criteria for the classification of the road network within the territory of the region …", while at the same time stating that the local and provincial authorities have to adhere to these criteria and that the regional powers may be exercised "… without affecting the road classification pursuant to article 2 of legislative decree no. 285 of 30th April 1992 …".

The value of a fundamental principle may also be attributed to the provisions of the highway code on the construction, protection and safety of the roads, as well as to planning at national level, the distribution of resources by the state, the technical and construction specifications of the infrastructures, the minimum standards which have to be satisfied, the connection and distribution functions at inter-regional level and related control processes, and so on.

Substantially speaking, these are principles which the 1998 legislation reserved for the state, not so much in terms of their semantic significance as with regard to the national importance and dimensions of the road network in question. This approach was therefore reviewed with the introduction of the primary regional regulations, as a result of which some of the decisions taken have in actual fact anticipated the most recent situation introduced by the constitutional reform.

The regulatory framework which has been in force up to now therefore obliges us to carry out a series of practical assessments geared towards ascertaining the essential factors of the single rules in principle which are submitted to the examination of the court. This means that such assessments are of uncertain outcome, with results which cannot be taken for granted. Indeed, the growing disagreement between the state and the regions over the ambiguity inherent in the division or concurrence of powers makes it extremely difficult to come up with a single interpretation of the problem [11].

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lanes and paved surfaces, with no direct intersections, coordinated lateral access to the lateral properties, reserved for use by only certain categories of motor vehicle, with special spaces for use by other categories of vehicle and special access areas with deceleration and acceleration lanes …. and in addition, if a road is to be classified as a main trunk road …. specific start and end of road signs are required …".

[11] G. Vesperini, *Le autonomie locali nello Stato regionale,* 3 Reg. 672 (2007).

For example, in assessing the legitimacy of a regional law laying down "guidelines for the technical design of energy production, distribution and consumption systems", the court, while acknowledging the value as a general principle of the state regulations, found in favour of the law challenged by emphasising that – in accordance with the terms of article 29 of legislative decree 112 of 31st May 1998 – the only technical rules which constitute a general principle and therefore restrict the regional legislator are the essential ones applicable to energy production, distribution and consumption systems [12].

The assessment of this essential nature is therefore a constant in constitutional case law, even though at times it does not take place in wholly explicit terms. For example, in declaring an excessively detailed state law unconstitutional, the court recently found, and in so doing inferred that the principles involved were of a non-essential nature, that the entire margin for action and manoeuvre on the part of the regional legislator had been eroded, as a result of which the powers of the region had been compromised [13].

The activity of regulating the road network does not take place solely through the use of the legislative source. A significant part of the regional road system is in fact determined by the administrative activities of the region and the other territorial bodies. With regard to such activities, the interpretation which emphasises the role played by general principles is in fact incompatible with the text of the constitution.

As we know, article 118 of the constitution, which completes the work begun by legislative decree 112/1998, introduced a general criterion for the allocation of administrative powers on the basis of the principles of subsidiarity, differentiation and adequacy. On the basis of this criterion, the administrative powers are always attributed to the level of government closest to the citizen, unless they have to be exercised in a unitary manner, in which case they will be attributed to the provinces, metropolitan areas, regions and state. In the constitutional sense, then, it is possible that such unitary requirements will have the effect of passing an administrative

[12] Constitutional Court, 13th January 2004, no. 7.
[13] Constitutional Court, 23rd November 2007, no. 401.

power all the way along the territorial hierarchies of government to the point of reaching state level itself [14].

However, this hypothesis deviates so far from the terms laid down in the constitution that we have to introduce a series of measures and precautions to temper its effects and implications. In this sense, the Constitutional Court states that, if the exercise of an administrative power at state level is to be compatible with the constitution, there have to be sufficient reasons for the unitary exercise of the power in question [15].

According to the court, the law which confers the power on the state is "…..adopted following procedures which guarantee the participation of the levels of government involved by means of instruments of faithful collaboration, or in any case has to ensure sufficient mechanisms of cooperation for the effective exercise of administrative powers …." [16]. This law "…. may aspire towards crossing the threshold of constitutional legitimacy only when there are regulations in place which lay the necessary emphasis on concerted action and lateral coordination, that is, on the necessary understandings, all of which factors have to be based on the principle of good faith …" [17]. Once again, in application of the principle of faithful cooperation in the area of understandings, the court affirmed that the parties have to undertake genuine negotiations. Indeed, "… the instrument of understanding between state and regions is one of the possible ways of putting the principle of faithful cooperation into action …. in the form of a joint determination of the contents of the deed by equals …" and has to take place "…. by means of repeated negotiations geared towards overcoming the differences that prevent an agreement from being reached, without in any circumstances reducing the activity of joint determination of the understanding to the level of a mere consultancy process" [18].

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[14] L. Violini, *I confini della sussidiarietà: potestà legislativa "concorrente", leale collaborazione e strict scrutiny,* 3 Reg. 587 (2004).

[15] C. Bertolini, La sussidiarietà amministrativa, ovvero la progressiva affermazione di un principio, 2 Dir. Amm. 940 (2007).

[16] Constitutional Court, 13th January 2004, no. 6.

[17] Constitutional Court, 1st October 2003, no. 303, recently confirmed by Constitutional Court, 14th March 2008, no. 63.

[18] Constitutional Court, 20th January 2004, no. 27. On this point, see S. Agosta, *La leale collaborazione tra Stato e regioni* (2008).

In the end, what we see emerge from the above is a legal framework which is perfectly compatible with a policy of "credible" transfer of legislative and administrative powers for the regulation of the regional road networks from the state to the regions and the other territorial bodies. However, it would seem that this aspect is not always adequately perceived.

4. Institutional pluralism, with equality still to be achieved.

It is therefore correct to say that the new constitutional view of the division of legislative and administrative powers between the state, regions and local authorities not only has the effect of consolidating the powers of Lombardy Region already laid down in regional law 9/2001, but could even go beyond the regulations in force for the identification of new operating methods that may be adopted by the Region in the regional highways sector of interest.

There appears in any case to be no doubt that the sphere of influence of the regions has expanded in recent years, especially in terms of the capacity to satisfy the expectations of the public directly and otherwise. This is how things stand in Lombardy, where the Region strongly controls and regulates a segment of such economic importance and we can only acknowledge the legitimacy and power of that deed of synthesis and political representation par excellence which is the regional law. This solution, as we have seen, is backed up by the new constitutional layout, and is a factor which undoubtedly legitimises the administrative activity implemented when the legislative provision is applied.

We need merely consider the determination or approval or tariffs or the act by means of which third parties are granted concessions to design, build and manage a given section of motorway.

On the matter of the nature and characteristics of tolls, there is wide ranging, but not yet defined, debate, mainly due to the

absence of a clear regulatory indication [19]. According to one position in case law on motorway tariffs, the obligation to pay tolls has to be regarded as a payment in exchange for the use of the motorway, with the consequence that the tariff has the nature of a service rendered in exchange for another service [20]. A different view has it that the payment of the toll does not create a contractual relationship between the user and the manager, and simply involves a payment imposed on the user to entitle him to make use of a public service [21].

Whether or not it is possible in legal terms to pin down a single set of regulations which may be applied to the concession or the methods for the exercise of the power to set, approve or review the tariffs, and taking into consideration the diversity that is inevitable given the multiplicity of parties, tender competitions and agreements between the issuer and holder of the concessions, what we have to emphasise is the undoubtedly administrative nature of activities of this kind, with all the consequences ensuing in terms of the legal system which applies and any disputes that might arise [22].

This is especially relevant in terms of the relations with the higher level sources, as the validity of the activity in question depends on the correct interpretation of these. In this sense, the role played by the regional law takes on determining importance, and this is perfectly in line with the terms laid down by regional law 9/2001 and regulation no. 4 of 8th July 2002, which are entirely unequivocal on the matter of tariff-setting powers [23].

It is true, however, that the administrative process of setting the motorway tariffs continues to be significantly

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[19] G. Sanviti, *Prezzi e tariffe,* item 1 Dig. Disc. Pubbl. 511 (1996), C. Savastano, *Pedaggio,* in *Enciclopedia del Diritto* (1982), L. Musselli, *Direttive comunitarie e creazione amministrativa di un mercato dei servizi pubblici,* 1 Dir. amm. 130 (1998).

[20] Court of Cassation, section III, 13th January 2003, no. 298, TAR Lazio, Rome, 3rd September 1998, no. 2251.

[21] Court of Cassation, joint sections, 7th August 2001, no. 10893, Court of Cassation, section I, 20th September 2002, no. 13770.

[22] State Council, section IV, 23rd January 2007, no. 399, State Council, section IV, 13th March 2008, no. 1094 with note by C. Guccione, *La qualificazione giuridica delle società concessionarie di autostrade,* 3 G. D. A. 975 (2008).

[23] As we have already seen pursuant to article 10 of regional law 9/2001. On this point, see C. Guccione, *La disciplina regionale delle concessioni autostradali,* 3 G. D. A. 1025 (2002).

influenced by the involvement of CIPE (the Interministerial Committee for Economic Planning) [24], which issues binding directives on the review of the agreements applicable to the concessions and, as a consequence, on the tariffs.

CIPE is therefore in a position of considerable importance within the system, empowered and, to a certain extent, privileged by the consolidated tendency in administrative case law [25]. The importance of CIPE and, with it, the presence of the state, has also been reaffirmed by the recent law decree of 8th April 2008 (converted into law no. 101 on 6th June 2008), whose article 8-duodecies, paragraph 2, approves " … all the framework agreements with Anas S.p.a. which have already been signed by the motorway concession-holders …" and states that each subsequent amendment or addition to the agreements are approved as laid down in law decree no. 262 of 3rd October 2006, converted into law no. 286 on 24th November 2006.

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[24] More specifically, under the terms of article 11 of law no. 498 of 23rd December 1992, "… the Interministerial Committee for Economic Planning (CIPE), on the recommendation of the Ministry for Public Works and by agreement with the Ministry for the Treasury, Balance Sheet and Economic Planning, issues directives ….. for the review of the agreements and additional deeds applicable to motorway concessions, and, from 1994 onwards, the review of the motorway tariffs, taking into account the financial plans, cost of living fluctuations, volumes of traffic and the productivity indicator figures. The motorway tolls are set in accordance with the CIPE directives by means of a decree by the Ministry for Public Works, acting in agreement with the Ministry for the Treasury, Balance Sheet and Economic Planning ….". In applying this regulation, CIPE created the mechanism for the setting of the tariffs by means of resolutions 65/1996, 319/1996 and 39/2007. On the problems arising out of this system, see G. Coco, M. Ponti, *Riflessioni per una riforma della regolazione nel settore autostradale,* in C. De Vincenti, A. Vigneri (ed.), *Le virtù della concorrenza* (2006), 307.

[25] For example, on the basis of the decision by TAR Lazio, Rome, section III, 5th October 2005, no. 7832, with reference to the powers of CIPE, and given the elasticity of the criteria determined by the law, by means of which " … CIPE has been granted the power to lay down the guidelines for the review of motorway tariffs, this committee is legally entitled to set up a system based on a dual principle, the first of which is of an ordinary nature and is used for the annual determination of the tariff increases, which vary with the increase in traffic values, and the second extraordinary, linked to the financial plans drawn up by the service concession holders at the start of the concession agreement, or in the event of amendments to, or the transfer of, the agreement itself … ".

While CIPE plays a central role in the exercise of specific powers, such as the determination of the tariffs, at general level the presence of Anas SpA in the legal relationship set up between the granting body and the licence-holder continues to be decisive for the correct division of responsibility for the motorway system between the state and the regions [26].

As we know, the state-owned Anas S.p.a. is subject to public control by the Ministry for Infrastructures and the Ministry for the Economy and Finance. This control regards not only the governance of the company, by means of the appointment of the chairman and members of the board of directors, but also and above all its operations, by, for example, approving the economic and financial plan, the interventions at infrastructure level on the road and motorway network, and, especially, the agreements with the concession-holders.

It is in this latter aspect, however, that we see the most significant 'original' feature of the system.

At national level, ANAS continues to be an issuer of concessions, for the construction and management of motorway sections and the services to be supplied to the users. These concessions are issued to private companies, as in the case of *Autostrade per l'Italia Spa.*, or to companies in which the public sector has an interest, sometimes through ANAS itself. In this latter (and more frequent) case, then, ANAS is both issuer and holder of the concession at the same time, with all the consequences which ensue – given the absence of a sector monitoring body – in terms of observance of the principle of separation between the regulator and the manager [27].

Certainly, the main justification of the running of the system by the State is the fact that ANAS possesses the organisational structure and performs its tasks in accordance with the legislation. However, this is compatible with a system which is centralised in terms of the planning of the operations, classification of the motorway sections, the resources used, the

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[26] For an in-depth discussion on the role and nature of Anas S.p.a., see N. Rangone, *Le società a partecipazione pubblica nel settore dei trasporti: profili di diritto nazionale,* in M. Cammelli, M. Dugato (ed.), *Studi in tema di società a partecipazione pubblica,* cit. at 6.

[27] Even though the context is to a certain extent different, see G. della Cananea, *Privatizzazioni senza autorità di regolazione?*, 1 G. D. A. 490 (1997).

setting of tariffs and the control of the activities and responsibilities of the management body. However, it becomes more difficult to understand within a system in which the regional authority has seen an expansion in its legislative and administrative powers, to the extent that it becomes the central core around which the regulation of the motorway sections ought to rotate.

At regional level, the presence of ANAS takes a multiplicity of forms and is structured in different ways. In Lombardy, there are three issuers of concessions, one controlled by the state, one by the region and one mixed (with state and regional control).

ANAS, as will be explained in greater detail below, issues the concessions for the motorways already in operation and the future *Tirreno-Brennero (TiBre)* motorway. *Concessioni Autostradali Lombarde S.p.a. (CAL)*, jointly owned by ANAS and *Infrastrutture Lombarde*, grants the concessions for the future *Pedemontana Lombarda, Brebemi* and *TEEM* [28] motorways. Finally, Infrastrutture Lombarde S.p.a., wholly owned by the region, grants the concessions for the future *Cremona-Mantova*, *Broni-Pavia-Mortara* and *Interconnessione Pedemontana-Brebemi (IPB)* motorways.

It is therefore only in this latter case that the granting body has no connection with ANAS. This means that the relationships set up by Infrastrutture Lombarde in carrying out its tasks, including those with the various concession-holders, are entirely subject to the regional regulations.

In all the cases referred to above, the agreements with the concession-holders are fully operational. However, in most of these, the motorways involved have still to be completed and are located entirely (or at least mainly) within the regional boundaries, as laid down in articles 2, 3 and 6 of regional law

[28] In accordance with the terms of article 1, paragraph 979, of the law of 27th December 2006 (the 2007 Finance Act), which transferred the granting functions and powers attributed to ANAS for the construction of Pedemontana, Brebemi and TEEM "… to a public body taking over all the rights and obligations on the construction of the motorway infrastructures, which will be set up as a company partly controlled by Anas Spa and partly by Lombardy Region or an organisation wholly owned by this latter".

9/2001, and will fall within the definition set out in article 1, paragraph 2, of regional law no. 4 of 8th July 2002 [29].

We cannot underestimate these two aspects when reassessing the relationship between the state and Lombardy Region on the regulation of the sector, especially with regard to the powers to amend the agreements and determine the tariffs, operations which the system continues to submit to the directives (and approval) of CIPE, especially due to the presence of ANAS, in clear conflict with the terms laid down at regional level.

This is particularly the case with CAL, in which the involvement of ANAS takes place through its shareholding only, which is insufficient to shore up the relationship, significantly unbalanced as it is towards the centre of the system, contrary to principles which are now consolidated even at constitutional level[30].

5. Changes to the existing motorway tariff.

We therefore have to reassess the regulation of the sector in the light of the changes in the relationship between the centre and the periphery.

However, any increase in the regional powers for the setting of the tariffs for the motorway network of Lombardy must of necessity take into consideration the terms of the existing concessions and the agreements applicable to them, including the financial plans and tariff review conditions. In the abstract sense, this limit has no effect on the powers of the region, but does compromise its ability to exercise these in full.

If we are to understand whether or not the region has margins for intervention and, if so, what these are, we have to start from the general situation, as widely understood and perceived.

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[29] This is the regulation containing "Procedures for regional motorway concessions", article 1 of which lays down that the regional motorways are "… *motorway infrastructures, with at least two lanes in each direction, an emergency hard shoulder, carriageways separated by a physical barrier and slip roads and turn-offs at various levels which are located entirely within regional territory, mainly used to handle regional traffic, not subject to national concessions, subject to regional planning, for which the regional authority itself organises the concession procedure …".*

[30] M. Cammelli, *Amministrazione (e interpreti) davanti al nuovo Titolo V della Costituzione,* 4 Reg. 1273 (2001).

The motorways which run through Lombardy Region can substantially be subdivided into two main categories.

On the one hand, we have the motorways already in operation, which are managed by six concession-holders, on the basis of differing concession relationships and agreements. These are: *Autostrada del Sole* (A1), *Serenissima* (A4), *Milano Serravalle* (A7), *Autostrada dei Laghi* (A8 and A9), *Autostrada dei Vini* (A21), *Autostrada del Brennero* (A22), and the Milan West (A50), East (A51) and North (A52) Ring Roads.

On the other hand, as we have already seen, there are the motorways to be built in the future, which are also managed by different companies on the basis of a variety of concession agreements, in this case: *Brebemi*, *Cremona-Mantova*, *Pedemontana Lombarda*, *Ipb*, *TiBre*, *Tem* and *Broni-Pavia*.

There are significant differences between these two categories, starting from the tariff setting procedures, which are by no means uniform. If, for example, we analyse the tariffs laid down for the existing motorways, we can see that considerable differences may apply to the same category of vehicle. For some of the future motorways, on the other hand, the average tariffs applied to the existing motorways in 2008 are almost doubled [31].

Any intervention by Lombardy Region on the existing tariffs has to be hypothesised first and foremost with a view to limiting these differences, which, in the eyes of the user, are difficult to comprehend.

But there is a further difference between these two situations, based on the role played by the region in the handling of the concessions and the agreements applicable to them. As we have already seen, in both cases, any intervention by the region for the amendment of the tariff conditions has an effect on an existing agreement.

However, unlike the situation of the existing motorways, the regional authority has an interest – to some, more or less direct, extent – in the concession issuing body for the future motorways, while the Lombardy Region has no involvement, even of an indirect nature, in the legal relationships with the

[31] See *Rapporto finale sulla regionalizzazione delle tariffe*, by the Lombardy Regional Research Institute, (2009).

concession issuing bodies for the existing motorways, beyond the fact that sections of these roads cross the regional territory.

As we have already seen, this aspect has an influence on the determination of the party with general entitlement to regulate the concession relationship. In this case, however, the problem is affected by the terms of the concession agreements, to which, as we know, access is not a simple matter [32].

In general terms, however, we should point out that administrative case law tends to place the emphasis on the nature of the agreements between the concession issuer and holder and the decisions on motorway tariffs. This nature cannot be called into question even by the regional legislator, in the exercise of the institutional prerogatives of the region for the planning and development of its motorway network.

In this sense, when it declared the illegitimacy of the deeds by means of which *Strada dei Parchi Spa*. ordered – and ANAS authorised – an increase in the tolls for the A24 and A25 motorways run by *Strada dei Parchi Spa*, TAR Lazio stated that "… any change in the overall conditions imposed on the concession-holder either requires a new agreement or, at the very least, a new financial plan with a redetermination of the tariff review criteria, or leads to a conflict with the commitments taken on, and, unless there is a specific motive, cannot justify the implementation of the agreement and the original financial plan in terms of tariff reviews …" [33].

In other words, in the case of the motorway concessions currently in force, especially those which apply to the existing motorways, it would appear that the regions do not have the power to amend the tariff review process for the sections of motorway within their territory. The introduction of new tariff mechanisms in a legal relationship which was set up on the basis of different conditions and factors alters the balance of the contract bond and, by bringing about a change to the financial plan, forces the parties to reconsider the entire economic structure of their agreement. This position in case law is based on the acceptance of

[32] G. Ragazzi, *I signori delle autostrade* (2008).

[33] TAR Lazio, section III, 5th October 2006, no. 9917, with a note by G. Balocco, 1 Urb. App. 249 (2007),.

the central role played by the will of the parties within contract relationships [34].

On this subject, however, we have to consider a recent pronouncement by the State Council on the basis of which, "… in civil law, the act of determining the tariffs requires measures by authorities which, irrespective of the law (articles 1339 and 1419 of the civil code), might have an effect on the utility contracts …" [35]. If this interpretation is correct, which remains to be seen, the substance of the matter, for our purposes, remains unchanged. Even if we do sustain that the legislator is not barred from intervening right from the start, due to conflict with the will of the parties as initially manifested, we must in any case acknowledge that such an intervention is only valid as an addition to the governance of the contract, which means that any innovation on the part of the legislator must at least be backed up by the willing renegotiation of the entire economic structure of the agreement by the parties.

This point does not appear to be denied by the most recent changes to the regulations. Article 8-duodecies, paragraph 2, of law decree no. 59 of 8th April 2008, converted into law no. 101 of 6th June 2008, lays down the *ex lege* approval of all the framework agreements with Anas S.p.a. which had already been signed with the motorway concession-holders on the date when the decree came into force. We might ask ourselves if and to what extent this act of approval by the national legislator might affect the contractual significance of the framework agreements already signed, with a consequent shift of the problem under discussion here to a different level of conflict between sources, that is, the level of state law versus regional law, rather than that of law versus agreement. What we cannot deny is that this approval means that these agreements become subject to the procedure laid down in article 2, paragraphs 82 and following, of law decree no. 262 of 3rd October 2006, converted into law no. 286 of 24th November 2006, on amendments or additions to agreements granting access to motorway concessions.

On the possibility of changes to the tariffs applicable to the regional motorway concessions, article 10, paragraph 2, of

[34] C. M. Bianca, *Diritto civile, vol. 3,* (1996).

[35] State Council, section IV, 23rd January 2007, no. 399.

Lombardy regional law 9/2001 states that, "The concession and the financial agreement applicable to it, as specified in article 7, paragraph 3, also identify the cases and the methods whereby the tariffs and/or the duration of the concession are reviewed, following changes to the reference parameters on which the concession is based, or in the event of amendments to the reference regulations". Again, as specified in paragraph 5 b), the tariffs set by means of the agreement are subject to review in the event of changes to other parameters laid down in the agreement itself.

The need to adhere to the existing terms of the agreement restricts the margins of intervention of the region, at both regulatory and administrative level, and its powers in this sense are only likely to extend beyond these margins upon the expiry of the existing concessions. This conclusion does not come without consequences, given that the expiry of the concessions held by the motorway companies currently operating in Lombardy is due to take place within a period of time ranging from 2011 to 2050.

Within this situation, however, we have to acknowledge that the region does have the power to act in relation to the bilateral nature of the relations between the parties to the concession agreement. The intention of bringing about a consensus between the parties may only succeed when the power of the authority, both legislative and otherwise, encounters limits.

The implementation of a general power to review the motorway tariffs therefore cannot be separated from the use of the legal tools which normally back up the decisions reached by public powers, planning agreements and service conferences first and foremost, as governed by law no. 241 of 7th August 1990. The attempt to achieve consensus between institutions clearly has to be backed up by a similar striving for consensus between these latter and the main players in the regional motorway market, with whom agreement has to be reached on the changes to the existing concession relationships.

The possibility of introducing a single method for the setting of regional toll motorway tariffs, to avoid distortions due to excessive differences between the various tariff plans, also has to be considered from the point of view of the consensus situation. In a situation of this kind we have to admit that, even if full consensus between the parties is not reached, the regional

authority could go ahead with the operation in any case, by setting a homogeneous level of tariffs payable by the users and taking on responsibility for compensating the concession-holders, either directly or through other forms of relief, for the variations brought about by increases or other possible fluctuations, by means of a system which may or may not be subject to maximum limits.

This option, exercised on the existing agreements and solely to the benefit of the users, should certainly deserve to be explored in greater detail, especially if we consider its potential for the simplification of the regulatory framework and the creation of greater transparency in the exercise of a public power.

6. Conclusions.

With the adoption of legislative decree 112/1998, the regulations applicable to roads and motorways have been subject to an organic and consistent process of decentralisation of powers towards the regional authorities and local bodies. This process was later completed by the reform of section V of the constitution, which redrafted the relationships between the state and the regional and autonomous local authorities, starting from a new division of legislative powers.

Almost simultaneously with the constitutional review of 2001, Lombardy Region, by adopting regional law 8/2001 on the "Planning and development of the regional road network", significantly extended the powers of the regional authority for the planning, coordination, development and safety of the regional road network, with particular reference to the regional motorways and the concessions system, including the power to set tariffs. The resulting framework fully confirms the legislative policy decisions taken at the turn of the century, and gives Lombardy Region a broad-ranging power to manage the regional motorways.

However, the state continues to exert a significant influence over the way in which the sector is regulated, in this way limiting the role of the regional authorities, even in situations in which the exclusively regional nature of certain motorways dictates greater adherence to the spirit of the reforms in question. This is particularly evident with reference to the power to approve the

agreements and tariffs, which, as we know, is exercised by CIPE, in cooperation with the relevant ministries.

There are various concurring factors which bring about this situation, but none of them is founded on a sufficiently solid or positive legal base. A determining role is played by Anas S.p.a., which is a concession-holder and issuer on the one hand, or a concession issuer or simple shareholder on the other, a situation which is favourable to the re-emergence of the state level in the regulation of exclusively regional motorways.

The changes in the relationship between the state and the regions make it essential to alter course in a decisive manner, especially in the case of reviews of (or simple changes to) the tariffs, whose diversification within the region appears to be excessive and difficult for the users to comprehend. On the other hand, a unilateral modification of the existing agreements, some of which are not due to expire for some time to come, cannot be taken into consideration.

This is particularly valid in the case of the motorways scheduled for construction in the future, the situation is to a certain extent different, even though the direct intervention of the regional authority is in this case too subject to the level of effective implementation of the concession agreement.

In the end, due to the complexity of the legal relationships in the motorway sector, no solution is to be found solely in the links between the various legal sources. This fact confirms that the real administrative innovation takes place through the planning capacity of the public powers with a view to taking into account the interests of the parties involved and procuring their prior consent.

COMMENTS

EUROPEAN COMMISSION AND ANTITRUST: CHANGING PATTERNS IN TIMES OF CRISIS

Benedetto Brancoli Busdraghi *

Abstract.

The present short article focuses on competition law in times of crisis. It examines how the current breakdown of economy has modified antitrust policy at EU and national level. The main issues are (i) State aid policy; (ii) control over cartels and abuses of dominant position; (iii) control over mergers. It is contended that, in the field of State aids, the European Commission is playing an active role indeed. It has adopted soft-law provisions and it is applying EU rules in a more flexible manner. Nevertheless, the crisis did not release Member States from the respect of State aid rules. With regard to cartels and abuses of dominant position, during the earlier stages of the crisis, the Commission has, to a certain extent, mitigated sanctions, but there is no rescue for hard core violations. Finally, the financial crisis has involved a decrease in the number of mergers and acquisitions, so that antitrust Authorities did not really have to enact a particular policy in this regard. It is worth mentioning, though, that some national governments seem proactive in facilitating State-engineered transactions in order to rescue big firms.

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1. Introduction.

Even during the new great financial crisis, competition law provisions are still applicable to Member States and undertakings, although their implementation by the relevant authorities may change. With regard to the choices of the European Commission's Directorate General for Competition (hereinafter: "DG Comp"), three issues seem particularly relevant: (i) State aid policy; (ii) control over cartels and abuses of dominant position; (iii) control over mergers. This short article considers such issues in the light of the measures taken by the Commission and some national competition authorities.

2. State aid policy.

State aids are currently at stake in many relevant sectors, such as banking. The banking system has benefited from a benevolent approach by public authorities for systemic reasons: banks are so interconnected that the default of a large bank could affect the whole banking system. Besides, banks provide the liquidity necessary to the whole economic system [1]. Thus, the Commission seems to carry out a significant effort in applying the existing provisions with a certain degree of flexibility, despite the fact that Art. 107(3) TFEU (formerly, 87(3) ECT) – the legal basis for granting exemptions from EC Treaty rules – requires a strict interpretation [2]. Nevertheless, the Commission has frequently updated its approach, in order to adapt it to changing market scenarios.

At the very beginning of the crisis (September 2007), the Commission regarded the concerns raised by troubled banks as individual cases [3]. Thus, Brussels authorised several individual rescue packages [4], relying on the provisions of Art. 107(3)(c) TFUE [5].

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[1] B. Lyons, *Competition Policy, Bailouts and the Economic Crisis*, in http://www.uea.ac.uk/polopoly_fs/1.112187!CCP09-4.pdf.

[2] See, in this regard, Court of first instance, Joined Cases T-132 and 143/96, *Freistaat Sachsen and Volkswagen AG v. Commission*, [1999] ECR II-3663.

[3] D. Gerard, *Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not of the Problem*, in http://papers.ssrn.com/sol3/papers.cfm?.

[4] European Commission, Decision of 5 December 5007 in Case NN 70/2007 (ex. CP 269/07), *United Kingdom Rescue aid to Northern Rock*, 2007/C 6127 final; European Commission, Decision of 30th April 2008 in Case NN 25/2008 (ex. CP

However, in the aftermath of the bankruptcy of Lehman Brothers, the crisis turned out to be systemic. Since October 2008, national governments have increased their subsidies, in particular under the form of State guarantees and recapitalisation measures [6].

Nevertheless, the Commission made several attempts to play a pivotal role. The Commission's underlying policy seems to have been the following: considering the crisis as a general problem, whose solution would require remedies going beyond "tailor-made" solutions. Hence, it granted several exemptions under Art. 107(3)(b) TFEU, i.e. the provision for aids aiming to address serious disturbances in the economy of a Member State – rarely used until the crisis [7].

In order to allow the DG Comp to act promptly, the Commission entrusted the Commissioner responsible for competition with the power to grant authorisations in agreement with the President and the members responsible for services, internal market and economic and monetary affairs [8].

15/08), *WestLB riskshield, Germany*, 2008/C 1628 final; European Commission, Decision of 4 June 2008 in Case 2008/C 9 (ex. NN 8/2008, CP 244/2007), *Sachsen LB, Germany*, 2008/C 226 final; European Commission, Decision of 31 July 2008 in Case NN 36/20085, *Denmark/Roskilde Bank A/S*, 2008/C 4138; European Commission, Decision of 1 October 2008 in Case NN 41/2008, *UK/Bradford & Bingley*, 2008/C 290; European Commission, Decision of 2 October 2008, in Case NN 44/2008, *Germany/Hypo Real Estate Holding AG*, 2008/C 293.

[5] This provision empowers the Commission to declare aids granted to undertakings in economic difficulty compatible with the internal market: see European Commission, *Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty*, 1 October 2004, 2004/C 244.

[6] For an overview on the financial crisis, see, among others, P. Della Posta (ed.), *Crisi finanziaria globale, Stato e Mercato* (2009). See also L.T. Orlowski, *Stages of the 2007-2008 global financial crisis: Is there a wandering asset-price bubble?*, 43 Econ. E-J. Disc. P. 122 (2008); R. Masera (ed.), *The Great Financial Crisis. Economics, Regulation and Risk* (2009).

[7] D. Gerard and G. Schaeken Willemaers, *L'Union européenne au chevet de la crise financière: un état des lieu*, in http://papers.ssrn.com/sol3/papers.cfm?abstract.

[8] European Commission, *Minutes of the 1845th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 1 October 2008 (morning)*, PV(2008) 1845 final, par. 10.4. See, D. Gerard, *EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles*, available at http://www.concurrences.com/article_revue_web.php3?id_article=23208&lang=fr.

The Commission also published a series of communications to explain the approach it would follow towards State aids. The soft-law approach has been followed by the Commission since the early Seventies, when the Council refused to approve Commission's proposals for hard-law regulations. In the following years, this technique proved to be effective, since it prevented the Commission from assessing State aids on a purely case-by-case basis, "structuring" its discretion while allowing flexibility [9]. Today, communications are still an unavoidable tool of Commission's State aid policy, even in crisis management: they provide Member States with legal certainty and leave room for Commission's discretion [10].

Thus, in the so-called "Banking Communication", the Commission immediately acknowledged the need to adopt appropriate measures to safeguard the stability of the financial system. The latter has therefore become one of the main goals of State aid policy. The Commission recognised that it could be necessary for Member States to adopt appropriate measures to safeguard the stability of the financial system, including schemes of aids in case Member State's authorities responsible for financial stability declared to the Commission that there is a risk of a serious disturbance in the economy. However, the Commission announced that it would still interpret the serious disturbance in a restrictive manner [11].

Moreover, the Commission has also enabled its DGs to grant authorisations within a very short time, in order to respond

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[9] M. Cini, *From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime*, available at http://www.eui.eu/RSCAS/WP-Texts/00_35.pdf, 17. See also G. della Cananea, *Administration by Guidelines: the Policy Guidelines of the Commission in the Field of State Aids*, in I. Harden (ed.), *State aid. Community Law and Policy and its Implementation in Member States* (1993); F. Rawlinson, *The Role for Policy Frameworks, Codes and Guidelines in the Control of State Aid*, in I. Harden (ed.), *State Aid: Community Law and Policy* (1993).

[10] The communications were also issued in order to compensate the lack of case law on the conditions of application of art. 107(3) (b) TFEU (D. Gerard and G. Schaeken Willemaers, *L'Union européenne au chevet de la crise financière* cit. at 7.

[11] European Commission, *Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, 25 October 2008, 2008/C 270/02.

to Member States' needs. Authorisations can now be granted within 24 hours and even over week-ends, if necessary [12].

One month later, the Commission has issued the so-called "Recapitalisation Communication", aiming to regulate the conditions for supporting the recapitalisation of troubled banks [13]. Further guidance on impaired assets was then provided in the so-called "Impaired Assets Communication" [14].

In the above mentioned documents, the Commission has showed a growing degree of flexibility towards financial market intervention. Nevertheless, it has not given up its role as competition watchdog. First, it has taken into due account the general principles of non-discrimination and proportionality, in order to prevent aids granted by Members States from becoming unjustified privileges on the market [15]. Second, the Commission has stated clearly on many occasions that it will not stop to enforce competition law. In fact, even in times of crisis, relaxing State aid control or simply giving up any control whatsoever could be detrimental to European economy [16].

Thus, State guarantees have been limited to retail and wholesale deposits and short and medium-term debts, so as to

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[12] Banking Communication, par. 53. Consider also the creation of the so-called "Economic Crisis Team" within the frame of DG Comp. As an example of quick response, see the authorisation granted to the UK for the rescue package to Bradford & Bingley, formally notified on 30 September 2008 and approved on 1 October 2008 (European Commission, *State aid: Commission approves UK rescue aid package for Bradford & Bingley*, IP/08/1437) (on the topic, D. Gerard, *EC competition law enforcement at grips with the financial crisis*, above footnote 8, 48).

[13] European Commission, *Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition*, 5 December 2008, 2009/C 10.

[14] European Commission, *Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector*, 25 February 2009, 2009/C 72.

[15] This non-discrimination criterion was at stake in the discussions concerning the general guarantee scheme for banks in Ireland (European Commission, Decision of 13 October 2008 in Case NN 48/2008, *Ireland/Guarantee scheme for banks in Ireland*, 2008/C 6059). See D. Gerard, *Managing the Financial Crisis in Europe*, above footnote 3, 12.

[16] M. Campo, *The new State aid temporary framework*. *Competition Policy Newsletter*, in http://ec.europa.eu/competition/publications/cpn/2009_1_6.pdf. This is also why competition policy would not be part of the problem, but rather part of the solution (*idem*).

exclude hybrid and subordinated debts [17]. This should address the risk that depositors withdraw deposits, but would not offer any State guarantee to banks engaged in toxic activities. In addition, banks may not enact commercial policies based on the aids that were granted [18]. Besides, both guarantees and capital injections must be remunerated [19].

In addition, aids must have a temporary nature. Under the Commission's Banking Communication, only measures not exceeding two years can be approved, provided that such measures are submitted for review every six months. True, Member States could exceed that length in case the entire functioning of financial markets be jeopardised. However, even the need for such schemes has to be reviewed and reassessed at least every six months [20].

The temporary nature of the measures adopted by Member States has also been underlined in the Recapitalisation Communication with regard to State's presence in banks' capital [21]. A few days later, the Commission has also adopted the so-called "Temporary framework". This document followed the adoption of the communication on the European economic recovery plan and does not concern only the banking sector, but regards more broadly of the economy. It gives details on a certain number of temporary openings to State aids [22]. It is worth noting, in particular, that the *de minimis* threshold has been raised up to EUR 500.000 [23].

Moreover, the Commission has, to some extent, also addressed the concern of moral hazard. In fact, it has provided

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[17] Banking Communication, par. 23.

[18] Banking Communication, par. 27.

[19] Recapitalisation Communication, par. 3. This draw the attention of several institutions on what a proper remuneration would be, and it was defined in 8-10% (D. Gerard, *Financial Crisis Remedies in the European Union: Balancing Competition and Regulation in the Conditionality of Bailout Plans*, in N. Jentzsch and C. Wey (ed.), *The Future of Retail Banking in Europe: Competition and Regolatory Challenges* (2010).

[20] Banking Communication, par. 24.

[21] Recapitalisation Communication, par. 20.

[22] Communication from the Commission — *Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis*, 17 December 2008, 2009/C 16.

[23] Temporary Framework, par. 4.2.2.

some hints, in order to encourage behaviours that foster stability rather than risk-taking. In addition, the Commission has approved the dismissal of the management of some ailing banks, such as Fortis [24], as well as the decision of the Greek authorities to limit the compensation of banks' executives, which cannot exceed the compensation received by the Chairman of the Greek Central Bank [25]. When adopting all these measures, the Commission addressed mainly the concern of market stability. In the Commission's view, it was necessary that capital injections did not go beyond what was strictly necessary, so that they could not allow aggressive commercial policies that would have been incompatible with the stabilisation goal [26].

More recently, the Commission has slightly modified its approach. In July 2009, the so-called "Return to viability Communication" has stressed some conditions that restructuring plans must fulfil. In addition, Member States are required to present a diagnosis of the problems of the banks concerned, and the latter would also be required to disclose impaired assets [27].

According to the "Return to viability Communication", special attention is paid on the overall design of the plan submitted, with particular regard to the flexibility of the program and to the likeliness of its implementation timing. In addition, the burden must be shared between the awarding Member State and the beneficiary banks. In any case, the fulfilment of this condition is assessed in light of the overall situation of the financial sector. If

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[24] European Commission, Decision of 3 December 2008 in Case NN 42/2008, *Fortis*, 2009/C 80. See, in this regard, D. Gerard, *Financial Crisis Remedies in the European Union*, above footnote 19, 4 and 6.

[25] D. Gerard, *Managing the Financial Crisis in Europe*, cit. at 3.

[26] F. Marcos, *Una lecciòn de polìtica de la competencia en tiempos de crisis: el control de ayudas de Estado por la Comisiòn Europea*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1429792.

[27] European Commission, *Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules*, 23 July 2009, 2009/C 195, pars. 7 and following. Note that the temporary framework has been amended at the end of 2009: European Commission, *Communication from the Commission amending the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis*, 15 December 2009, 2009/C 303, 4.

burden sharing is not immediately possible, the issue can be addressed at a later stage of the implementation of the plan [28].

Moreover, the Commission has accepted the possibility to provide additional aids during the restructuring period if justified by reasons of financial stability, although such aids should be limited to the minimum necessary to ensure the viability of the plan [29].

Finally, awarding Member States have to adopt measures aiming at preventing distortions of competition by the beneficiary bank, in order to limit disadvantages to other banks. Thus, the Commission appears to be also balancing the concerns raised by moral hazard, in order to avoid that virtuous and solvent undertakings suffer from a disadvantage vis-à-vis undertakings that benefit from State aids [30].

During the year 2010, the Commission has authorised several schemes pursuant to the communications mentioned above [31]. However, the framework just described will only be valid until 31 December 2010.

Some observers argue that the above-mentioned rules on banks' restructuring aim at striking a balance between concerns for financial stability in the short-term and for the preservation of normal market functioning in the long term [32]. Therefore, more than one year after the beginning of the acute phase of the financial crisis, with lesser risks to financial stability and signs of recovery, the Commission has started to examine the conditions to restore a normal market functioning and the competitive process

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[28] *Idem*.

[29] *Idem*.

[30] F. Marcos, *Una lecciòn de polìtica de la competencia*, cit. at 26.

[31] European Commission, Decision of 3 December 2008 in Case NN 42/2008, *Fortis*, 2009/C 80. In this regard see also D. Gerard, *Financial Crisis Remedies in the European Union*, cit. at 19.
http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/179&format=HTML&aged=0&language=EN&guiLanguage=en#footnote-1 .

[32] A. Bomhoff, A. Jarosz-Friis and N. Pesaresi, *Restructuring banks in crisis. An overview of applicable State aid rules*, available at http://ec.europa.eu/competition/publications/cpn/restructuring_guidelines.pdf.

[33]. This, hopefully, could prevent today's solutions from becoming tomorrow's problems [34].

As a matter of fact, the approach adopted by the Commission in the last two years has changed and is still changing, according to the needs of the particular phase of the financial crisis concerned. Nevertheless, the Commission seems more flexible than it used to be, while checking State recovery measures, so that flexibility definitely constitutes a "silver line" of its State aids policy.

From the point of view of regulatory techniques, the adoption of several communication should receive a warm welcome, since it provides legal certainty, which is one of the key elements of good policies.

3. Control over cartels and abuses of dominant position.

The breakdown of economy has had a deep impact on undertakings in terms of turnover and credit availability. Thus, under the financial crisis, undertakings could be tempted to modify their normal competition policy, in order to earn profits through cartels, concerted practices and abuses of dominant position. Hence, the tasks of competition authorities could be more difficult, and there would be no point in being more flexible on those issues. Quite the contrary, cartels and abuses could be detrimental to the consumers (unless the conditions of Art. 101(3) TFEU are fulfilled) and even delay economic recovery [35].

Interestingly, during the crisis, the Commission has inflicted the most severe fine of every time to a single undertaking in a cartel case: in the so-called "Carglass Cartel", Saint-Gobain has been fined nearly EUR 1 billion [36]. Some months later, during 2009, the Commission has imposed severe fines also on E.ON and

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[33] *Idem.*

[34] European Commission, Decision of 3 December 2008 in Case NN 42/2008, *Fortis*, 2009/C 80. See, in this regard, D. Gerard, *Financial Crisis Remedies in the European Union*, above footnote 19, 9.

[35] B. Lyons, *Competition Policy, Bailouts and the Economic Crisis*, cit. at 1, 22.

[36] European Commission, Decision of 12 November 2008 in Case COMP/39.9125, *Carglass* (see press-release IP/08/1685).

GDF for market sharing in the energy sector: EUR 553 million each [37].

It is true that hardcore cartels cannot be accepted, even in times of crisis. However, the question arises whether such a severe sanction is appropriate in the current financial situation. In fact, many undertakings stop to earn profits and face losses and default. However, sanctions have become softer in the last few months. For example, the producers that took part in the so-called "DRAMS Cartel" were only fined the total amount of approx. EUR 331 million for price cartel [38]. Even a multinational firm like Samsung has been fined only EUR 115 million [39]. Besides, it is worth noting that also the overall amount of fines imposed for cartel cases has decreased during the earlier stages of the crisis, while increasing again in 2010 with signs of recovery in the outlook, as outlined in the following chart.

[37] European Commission, Decision of 8 July 2009 Case COMP/39.401, *E.ON./GDF* (see press-release IP/09/1099).

[38] European Commission, Decision of 19 May 2010 in Case COMP/38.8851, *DRAMS* (see press-release IP/10/586).

[39] The decision was addressed to Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya. It is to be noted that, with the exception of Infineon, which is a German company, all the parties were non-European. See press-release IP/10/586, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586&format=HTML&aged=0&language=EN&guiLanguage=en. Note, however, that the demonstrative capacity of the examples cited above should not be overestimated. In fact, Carglass and DRAMS cases were different and the fine inflicted to Saint-Gobain has been severe also because of its recidivism, while Samsung had a 18% reduction under the leniency notice and another 10% under the settlement notice.

Total amount of fines imposed by the Commission in cartel cases (2007 – 2010) [40]

Year	Fine imposed (not adjusted for Court judgments)
2007	3.338.427.700
2008	2.270.012.900
2009	1.623.384.400
2010	1.668.904.832

Thus, with regard to cartel cases, the Commission has mitigated its fines during the financial crisis, although it has shown clearly that the crisis will not regarded as a justification against severe sanctions in case of "hardcore" cartels [41]. The same applies to abuses of dominant position. In this respect, the Commission seems consistent with its ordinary policy.

During the financial crisis, undertakings could also claim for exemptions under Art. 101(3) TFEU (formerly Art. 81(3) EC). However, since this kind of pro-competitive agreements does not have to be preliminarily notified to the Commission, we have no evidence of decisions authorising their implementation.

At national level, some competition authorities seem to be mitigating fines and tailoring decisions. In this regard, from the very beginning of the economic slowing-down, the Italian competition authority (*Autorità garante della concorrenza e del mercato*, hereinafter "Agcm"), has been keen to accept commitments from undertakings, in order to obtain some pro-competitive effect from possible cartels [42]. However,

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[40] Source: European Commission statistics, available at internet site http://ec.europa.eu/competition/cartels/statistics/statistics.pdf. Last change: 20 July 2010. Please note that the figure of year 2007 takes into account the amendment of 23 June 2008 to the decision of 5 December 2007 in case Chloroprene rubber. The 2008 figure takes into account the amendment of 24 July 2009 to the decision of 11 March 2008 in case Tnternational removal services

[41] See also, in this regard, the so-called "Bathroom fittings & fixtures" case, where 17 bathroom manufacturers have been fined the overall amount of EUR 622 million for price-fixing (European Commission, Decision of 23 June 2010 in Case COMP/39.902, *Bathroom fittings & fixtures*, see press-release IP/10/790).

[42] See, already in 2007, Agcom, Decision of 20 December 2007, n. 17754 in Case I681, *Prezzi del carburante in rete*, 48 Official Bulletin (2007). Nevertheless, such a

notwithstanding the crisis, hardcore cartels do not receive any benefit [43].

4. Merger control

Last but not least, merger control must be considered. Since the beginning of the crisis, the worldwide number of mergers has fallen, as indicated in the following chart.

Evolution of mergers in 2008 comparing to 2007 and in 2009 comparing to 2008 [44]

	2008		2009	
	Worldwide	**EU**	**Worldwide**	**EU**
Number of transactions	- 16,0%	- 18,0%	- 21%	- 16,4%
Total value of transactions	- 35,0%	- 24,7%	- 43%	- 58%
Average value of transactions	- 23,5%	- 8,1%	- 16,8%	- 8%

During the year 2008, in the EU only transactions above EUR 1 billion increased their average value (+31,4%), but their total number was 38,8% lower than in 2007 [45]. In 2009, however, also the average value of very big transactions decreased by 24% [46].

"pro-commitment approach" has also been criticised: it is contended that the Agcm is exercising inappropriate regulatory powers (G. Colangelo, *I rischi della concorrenza patteggiata. Note a margine del caso ACI Global*, 4 Il diritto industriale 353-362 (2009).

[43] See, for instance, Agcm, Decision of 24 March 2010, n. 20931 in Case I700, *Prezzo del GPL per riscaldamento Regione Sardegna*, 12 Official Bulletin 8 (2010).

[44] Source: Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2008*, Addendum A.1, and *Relazione sull'attività svolta nell'anno 2009*, Addendum A.1, available at http://www.agcm.it/.

[45] See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2008*, Addendum A.1, available at http://www.agcm.it/, 336 and following.

[46] See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2009*, Addendum A.1, available at http://www.agcm.it/, 316 and following.

The first five transactions, both in 2008 and 2009, represented 19% of the total value of worldwide transactions, whilst the first 5 transactions in 2007 represented 9% of the total value of worldwide transactions. However, while in 2008 three of them took place in the U.S. and the other two were implemented in the EU [47], in 2009 all the biggest transactions were implemented in the U.S [48].

In such a scenario, Commission merger control has not played a very important role, since only a few cross-border acquisitions have taken place so far [49].

With regard, more specifically, to financial markets, the Commission announced its readiness to grant acquirers of ailing banks derogations to the standstill obligation enshrined in Art. 7 of Regulation 139/2004 [50], in case of urgency and "where there are no a priori competition law concerns" [51]. This would allow the immediate implementation of transactions. However, Commissioner Kroes made it clear that DG Comp will not set aside the existing rules [52]. The so-called "failing firm defence" should therefore apply as well, even though, apparently, no undertaking has relied on the failing firm theory yet [53].

At national level, some Member States intervened in order to facilitate State-engineered transactions. In the United Kingdom, for instance, the proposed acquisition of HBOS by Lloyds would have created a so-called "relevant merger situation", calling for further inquiry by the Office for Fair Trade. However, in order to avoid such a further enquiry, the Government passed a bill providing for the "stability of the UK financial system", which

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[47] See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2008*, Addendum A.1, available at http://www.agcm.it/, 337.

[48] See Autorità garante della concorrenza e del mercato, *Relazione sull'attività svolta nell'anno 2009*, Addendum A.1, available at http://www.agcm.it/, 317.

[49] D. Gerard, *EC competition law enforcement at grips with the financial crisis*, above footnote 8, 55.

[50] Regulation of the Council n. 139/2004 of 20 January 2004, 2004/L 24.

[51] N. Kroes, *Dealing with the current financial crisis*, Addressed to the Economic and Monetary Affairs Committee, European Parliament, Brussels, 6 October 2008, 3.

[52] *Idem*.

[53] D. Gerard, *Managing the Financial Crisis in Europe*, cit. at 3, 12.

justified an exception to the referral of relevant merger situations to the Competition Commission [54].

A similar approach has also been adopted in Italy for the transaction between Alitalia and Air France. In this respect, the Parliament passed for the first time a bill that made the authorisation of the Agcm non compulsory [55].

In sum, there is little room for a European merger policy, given that Member States are proactive in facilitating mergers deemed to help national markets.

5. Concluding remarks.

The conclusions of this analysis are the following. First, the crisis has clearly influenced the State aid policy of the Commission. This policy is more flexible than in the past, and this allows the Commission to seek to play a pivotal role in the management of the crisis.

With regard to control over cartels and abuses of dominant position, the Commission does not seem willing to adopt a relaxed approach. Quite the contrary, despite some rebates on the fines imposed, it is enforcing competition law in a vigorous manner.

Finally, in the field of merger control, the case law is pinpointing a proactive approach of national authorities. In fact, the latter enact industrial policies and intervene actively to drive mergers that could raise competition law concerns. However, while doing so, national authorities should also keep in mind the consequences of their behaviour in the long run. How far will the Commission tolerate behaviours that could affect internal market?

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[54] D. Gerard, *Managing the Financial Crisis in Europe*, cit at 3, 11. See also http://www.ffhsj.com/siteFiles/Publications/8E969877A544C1EDBBA13739199BAEE4.pdf;http://us.ft.com/ftgateway/superpage.ft?news_id=fto111020081514551352.

[55] Art. 1(10) of decree law 28 August 2008, n. 134. Pursuant to art. 10 of the Law 10 October 1990, n. 287, the authorisation would have been compulsory. On the Alitalia case, see S. Spuntarelli, *Poteri pubblici e costituzione dell'economia nel "singolare" caso Alitalia*, 5 F. A. – T. A. R. 1444 ss. (2009).

REVIEW ARTICLES

THE IN HOUSE PROVIDING IN EUROPEAN LAW: WHEN NOTHING GETS LOST IN TRANSLATION

Christian Iaione *

Professors Mario Comba and Steen Treumer have co-edited a book entitled *The In-House Providing in European Law*. The book comprises various contributions, two of which address the in house providing issue in a broader perspective and from an EU law perspective. "The In-House Providing: The Law as It Stands in the EU" by Roberto Caranta, and "In-House providing - European regulations vs. national systems" by Fabrizio Cassella fall within this category. Other contributions look into the interpretation and implementation at national level in six member states: "In-House Providing in Germany" by Martin Burgi; "In-House Providing in Italy: the circulation of a model" by Mario Comba; "In-House Providing in Spanish Public Procurement" by Julio González Garcia; "In-House Providing in Polish Public Procurement Law" by Marcin Spyra; "In-House Providing in Denmark" by Steen Treumer; "From the indivisible Crown to Teckal: the In-House provision of works and services in the UK" by Martin Trybus.

In particular, Roberto Caranta's contribution shows how in the last decade the E.C.J. has developed substantial body of jurisprudence on "in-house providing". Under the "in-house" umbrella, public authorities award public contracts to entities that have a distinct legal personality but are partially or wholly owned by the contracting authority itself [1]. The E.C.J.'s findings, together

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[1] Advocate General Kokott explains in *Parking Brixen*: "… *In-house operations* stricto sensu *are transactions in which a body governed by public law awards a contract to one of its departments which does not have its own legal personality.* Largo sensu, *however, in-house operations may also include certain situations in which contracting authorities conclude contracts with companies controlled by them which do have their own legal personality. Whereas in-house operations* stricto sensu are *by definition irrelevant for the purposes of procurement law, since they involve transactions wholly internal to the administration, in-house operations* largo sensu *(sometimes called 'quasi-in-house operations') frequently raise the difficult question whether or not there is a requirement to put them out to tender …*". Case C-458/03,

with the analysis provided by the Advocates General, represent dissatisfaction with local public entrepreneurship [2].

The first opportunity for the E.C.J. to consider in-house operations came in *Gemeente Arnhem v. BFI Holdings BV* [3]. At issue was whether the award of a public service contract to a public limited liability company jointly incorporated by two Dutch municipalities was subject to E.C. public procurement rules. Advocate General La Pergola contended that the company's formation was a measure of administrative reorganization and the award of public responsibilities to the company was to be construed as an "inter-department delegation," thereby escaping the scope of the (old) Public Service Contracts Directive [4]. However, the E.C.J. did not address this issue [5]. In *R.I.SAN Srl v. Comune di Ischia* concerning a public service contract awarded to an Italian company, the capital of which was held as to 51% of the contracting authority itself and as to 49% of a central government undertaking [6]. Advocate General Siegert Alber maintained that

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Parking Brixen GmBH v. Gemeinde Brixen, 2005 ECR 1-8585. There are three in-house or quasi-in-house scenarios: an award to a company wholly owned by a contracting authority or entity equated with that authority; an award to a joint public company, the shares of which are held by a number of contracting authorities; and, a award to a semi-public company, in which genuinely private parties hold a majority or minority stake.

[2] See C. Iaione, *Local public entrepreneurship and judicial intervention in a Euro-American and global perspective*, 7 Wash. U. Global Stud. L. Rev. 215 (2008).

[3] Case C-360/96, *Gemeente Arnhem v. BFI Holding BV*, 1998 E.C.R. I-6821 [hereinafter *Gemeente Arnhem*]. See also R. Williams, *The "Arnhem" Case: Definition of "Body Governed by Public Law*," 8 Pub. Procurement L. Rev. 5 (1999); E. Papangeli, *The Application of the EU'S Works, Supplies and Services Directives to Commercial Entities,* 9 Pub. Procurement L. Rev. 201 (2000).

[4] Case C-360/96, *Gemeente Arnhem v. BFI Holding BV*, 1998 E.C.R. I-6821 [hereinafter *Gemeente Arnhem*]. See also R. Williams, *The "Arnhem" Case: Definition of "Body Governed by Public Law*," 8 Pub. Procurement L. Rev. 5 (1999); E. Papangeli, *The Application of the EU'S Works, Supplies and Services Directives to Commercial Entities,* 9 Pub. Procurement L. Rev. 201 (2000).

[5] *Gemeente Arnhem*, *supra* note …, at I-6851–52. The E.C.J. canvassed instead the corporate structure of the company to establish whether it constituted a "body governed by public law" (i.e., having legal personality, subject to public control and established for meeting needs in the general interest, not having an industrial or commercial character), falling therefore within the scope of the "in-house" explicit exemption set forth in Article Six of the old Public Service Contracts Directive. *Id.*

[6] Case C-108/98, RI.SAN. Srl v. Comune di Ischia, 1999 E.C.R. I-5219, I-1542.

whether one contracting authority exercises a "decisive influence" over another entity is determinative of whether an "in-house" relationship exists [7].

In its landmark *Teckal* decision [8], the E.C.J. forged a hermeneutic method that has subsequently been adopted to evaluate in-house operations in all cases. *Teckal* concerned the direct award to an interlocal consortium (forty-five municipalities) of a contract to operate the heating systems of several municipal buildings, including the contracting authority [9] The key issue in the case was whether granting a public service to an entity of which the contracting authority is a member is subject to the detailed E.C. rules on public procurement. The E.C.J. carved out the basic elements of an in-house operation and extended it to relations between a contracting authority and entities having a distinct legal personality, provided that certain conditions are met. Most notably, an in-house relation exists if "the local authority exercises over the person concerned *a control which is similar to that which it exercises over its own departments* and, at the same time, that person carries out the *essential part of its activities with the controlling local authority or authorities*" [10]. Thus, substantive subordination to the contracting authority of a publicly-controlled legal entity in regards to decision-making and operating functions does not trigger the applicability of E.C. rules on public procurement.

As to the scope of the in-house derogation, *Teckal* generalized the principle explicitly foreseen only in Article 6 of the Public Service Contracts Directive and extended the application of the in-house rule to public contracts outside public services [11].

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[7] *Id*. at I-5234. On the basis of functional considerations, he concluded that even without knowing all the organizational details of the entity in question, it formed a part of the Italian State by the mere fact that the state owned 100% of its shares. *Id*. at I-5234–35.

[8] *Id*. at I-5234. On the basis of functional considerations, he concluded that even without knowing all the organizational details of the entity in question, it formed a part of the Italian State by the mere fact that the state owned 100% of its shares. *Id*. at I-5234–35.

[9] *Teckal*, at I-8147–249.

[10] *Id*. at I-8154.

[11] The contract at issue concerned both the provision of services and the supply of goods. However, as the value of the latter was greater than the value of

Since *Teckal*, the E.C.J. has broadened the scope of "in-house" services to include public supply and infrastructure works contracts [12], as well as concession agreements [13] granted by a public authority [14], whereby the local government, acting as a

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former, the E.C.J. ruled on the basis of the old Public Supplies Contracts Directive. *Id*. at I-8152–53.

[12] Case C-26/03, Stadt Halle v. Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna, 2005 E.C.R. I-1; Case C-29/04, Comm'n v. Rep. of Austria, 2005 E.C.R. I-9705; Case C-340/04, Carbotermo SpA v. Comune di Busto Arsizio, 2006 E.C.R. I-4137 [hereinafter *Carbotermo*].

[13] See Council Directive 04/18, art. 1 § 4, 2004 O. J. (L 134) 114. A "'service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment." *Id*. at 127. A similar definition is drawn for public works concessions. *Id*.

[14] Case C-231/03, Consorzio Aziende Metano v. Comune di Cingia de' Botti, 2005 E.C.R. I-7287; Case C-458/03, Parking Brixen GmbH v. Gemeinde Brixen, 2005 E.C.R. I-8612 [hereinafter *Parking Brixen*]; Case C-410/04, *Associazione Nazionale* Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, 2006 E.C.R. I-3303 [hereinafter *ANAV*]. "Notwithstanding the fact that, as Community law stands at present, [public services or works concession contracts] are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the [E.C.] Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular." Case C-324/98, Telaustria Verlags GmbH v. Telekom Austria AG, 2000 E.C.R. I-10745, I-10746 [hereinafter *Telaustria*]. The E.C. Treaty prohibits discrimination on grounds of nationality. E.C. Treaty, *supra* note …, art. 12. Regarding provisions on public service concessions, Article 43 states, "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited." *Id*. Also, "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." *Id*. art. 49. The E.C.J. interprets Articles 43 and 49 as specific expressions mandating equal treatment. *See* Case C-3/88, Comm'n v. Italy, 1989 E.C.R. 4035, 4059. It interprets the prohibition on discrimination on grounds of nationality similarly. *See* Case 810/79, Überschär v. Bundesversicherungsanstalt, 1980 E.C.R. 2747, 2764–65. In its case law relating to Community directives on public procurement, the E.C.J. affords equal opportunity to all tenderers when formulating their tenders, regardless of their nationality. *See* Case C-87/94, Comm'n v. Belgium, 1996 E.C.R. I-2043, I-2076, I-2097. As a result, the principle of equal treatment of tenderers must be applied to public service concessions, even absent nationality discrimination. In addition, the principles of equal treatment and non-discrimination imply a duty of transparency, which enables the concession-granting public authority to ensure that they are complied with. It "consists [of] ensuring, for the benefit of any potential tenderer, a degree of

contracting authority, exercises oversight over the awardee company substantially equivalent to that exercised on its own internal services, and the awardee dedicates the majority of its activities to the authority that controls it [15]. And, in *Parking Brixen* and *Commission v. Austria*, the E.C.J. made clear that the award of concessions or contracts even to wholly owned subsidiaries of contracting authorities may be subject to the public procurement regime [16]. Moreover, the E.C.J. has asked for the fulfillment of the *Teckal* test in cases where the purpose of the procurement laws is to ensure a transparent and non-discriminatory selection of private contractors could have no foundation. In *Commission v. Spain* [17], the E.C.J. upheld the application of *Teckal* to inter-administrative cooperation agreements formed between two or more public legal entities. This determines whether the contract in question falls under the scope of the Public Procurement Directives or under the "in-house" exemption. In *Commission v. France* [18] and more recently in *Auroux v. Commune de Roanne* [19], the E.C.J. utilized the *Teckal* test for urban renewal projects. *Auroux* concerned a redevelopment agreement for a brownfield area and the construction of a leisure center in Roanne, France [20]. The Municipal Council authorized the mayor to sign a contract with a semi-public company owned by the Region of Loire [21]. The Court

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advertising sufficient to enable the service market to be opened up to competition and the impartiality of procurement procedures to be reviewed." Telaustria, cit. at 12, I-10746.

[15] In Stadt Halle, the E.C.J. held that: "… *A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement …*".

[16] Parking Brixen, cit. at 12, I-8612; Comm'n v. Austria, cit. at 12, I-9705.

[17] Case C-84/03, Comm'n v. Spain, 2005 E.C.R. I-139; Martin Dischendorfer, *Issues under the EC Procurement Directives: A Note on Case C-84/03, Commission v Spain*, 14 Pub. Proc. L. Rev. 78 (2005).

[18] Case C-264/03, Comm'n v. France, 2005 ECR I-8831.

[19] Case C-220/05, Auroux v. Commune de Roanne, 2007 E.C.R. I-389.

[20] *Id*. at 13–14.

[21] *Id*. at 2. In 2002, the French municipality of Roanne decided, as an urban development measure, to construct a leisure center in the area close to the railway station, including a multiplex cinema, commercial premises, a public car park, access roads and public spaces. See *id*. at 13. The construction of other

stated that the agreement showed that the construction of the leisure center was intended to house commercial and service activities designed to regenerate an area of Roanne, thus fulfilling an "economic function" [22]. As such, it must be regarded as an ordinary public works contract [23].

More recently, the E.C.J. has tried to place the *Teckal* criteria in context. The application of *Teckal* to specific cases revealed the two criteria are blurry and may lead to contradictory interpretations. According to Caranta, the E.C.J. has initially interpreted them very strictly because their fulfillment deactivates the E.C. public procurement legislation and principles. The burden of proof is on the person seeking such derogation [24]and a narrow interpretation could make it unlikely for the *Teckal* criteria to be met [25]. However, the most recent case-law, namely *Asemfo* [26],

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commercial premises and a hotel were envisaged subsequently. *Id.* In order to implement this project, the municipality of Roanne awarded a semi-public development company (the Société d'équipement du department de la Loire), to acquire land, obtain funding, carry out studies, organize an engineering competition, undertake construction works, coordinate the project and keep the municipality informed. *Id*. 15. The Administrative Tribunal of Lyon asked the E.C.J. to establish whether the award of the contract to the regional company constituted an award of a public works contract subject to a call for competition in accordance with E.C. directives concerning the coordination of procedures for the award of public works contracts. *Id.* 20(1). As to whether the development agreement constituted a public works contract, the E.C.J. first reasoned that the directive concerning the coordination of procedures for the award of public works contracts defines a public works contract as any written contract, concluded for pecuniary interest between a contractor and a contracting authority (State, local authority, body governed by public law) whose purpose is, in particular, the design and/or execution of works, or a work corresponding to the requirements specified by the contracting authority. See *id*. 6. The E.C.J. noted that SEDL, a contractor within the meaning of the directive, *id.* at 44, was engaged by the municipality on the basis of an agreement concluded in writing. *Id.* at 43. It observed that, although the agreement to engage SEDL contained an element providing for the supply of services, its main purpose was the construction of a leisure center, which involved work within the meaning of the directive. *Id.* at 46–47. The E.C.J. stated that it was irrelevant that SEDL did not execute the work itself but instead delegated that work to subcontractors. *Id.* at 44.

[22] *Id*. at 41.

[23] *Id*. at 47.

[24] Stadt Halle, cit. at 12, 46; Parking Brixen, cit. at 12, 63; ANAV, cit. at 14, 26.

[25] For instance, Advocate General Cosmas opined that the "control criterion" was unlikely to be met in a case where forty-five municipalities owned the

shows that unrestrained formalism in construing these criteria could jeopardize local self-government and entrepreneurship, administrative innovation and interlocal cooperation.

Caranta's illustration of these interpretative evolution testifies of this latent conflict. According to Caranta, in *Carbotermo* the E.C.J. read the second *Teckal* criterion so "restrictively" to deprive an undertaking of its freedom of action [27]. However, the E.C.J. seems to interpret the "essential part of activities" factor to require that the entity is "devoted principally" to the contracting authority and "any other activities are only of marginal significance" [28]. As a result, national judges must carry out qualitative and quantitative analyses of the facts [29]. This assessment shall apply to any activities carried out under a contract awarded by the contracting authority, regardless of who the beneficiary is (the contracting authority or the user of the services) or who pays the contractor [30]. However, as Caranta demonstrates, the E.C.J. was more lenient on this issue in *Asemfo*.

With regards to the first *Teckal* criterion, it is difficult to prove that a contracting authority controls its legally distinct contractor the way it controls its own departments. The "similar control" criterion should be adapted to the factual context and applied flexibly. Through a restrictive interpretation of this criterion the E.C.J. has gradually narrowed the scope of in-house operations, almost rendering them unrealistic.

First, in *Stadt Halle* the E.C.J. held that the award of public responsibilities to public-private companies cannot be construed as an "in-house" operation being the similar control incompatible with the presence of a private shareholder within the partnership and it is therefore subject to the E.C. public procurement rules [31]. This solution builds on the argument that private and public shareholders pursue different and incompatible goals.

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entity in question and the contracting authority had only 0.9% share of the entity's capital. Teckal at I-8136.

[26] Case 295/05 Asemfo [2007] ECR I-2999.

[27] Carbotermo, cit. at 12, I-4137.

[28] *Id*. at 63.

[29] *Id*. at 65.

[30] *Id*. at 65–67.

[31] See Stadt Halle, cit. at 12.

This holding affected local public-private partnerships [32] such as major, long-term projects for services relating to transportation, public health, and waste management. After *Stadt Halle*, contracting authorities are obliged to apply Public Procurement Directives to the choice of the private shareholder. However, according to Caranta, it is not clear whether the same rule applies to a private financial or long-term investor [33].

Caranta argues that *Carbotermo* and *Asemfo* ruled out usual corporate governance rules as a means to show respect of the "similar control" criterion. He believes that the procuring entity has to have a "a sort of command power" over the in house undertaking which has no choice but to comply. However, Caranta's contribution shows how, starting from 2008, the E.C.J. has taken a much softer stance in cases mainly focused on cooperation modules between public authorities.

If interpreted too restrictively the "similar control" criterion would make it impossible for most public undertakings to fulfill the *Teckal* doctrine. And contracting authorities forced to comply with procurement rules before concluding contracts with their subsidiaries, insofar as those subsidiaries are organized as private limited companies, would much rather drop out. Therefore, the choice of a public or private limited company as a form of organization would become appreciably less attractive.

Through its use of the "similar control" criterion *Teckal* intended to indicate that a local authority has different possibilities to influence its own departments and public

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[32] Public-private partnerships are neither regulated nor defined at the European level. Before *Stadt Halle*, it was not clear whether the assignment of public tasks to such entities in the form of public contract or concession fell within the scope of the Public Procurement Directives. See *id.*

[33] See *Commission Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions* 8, COM (2005) 569 final (Nov. 15, 2005). The European Commission plans to publish an interpretative Communication to clarify the limits of the public procurement rules' application to joint undertakings between the public and the private sector. This initiative, although soft law, will guide the selection of private partners participating in public partnerships and contribute, to a better understanding of relevant E.C.J. case law. *See* Sue Arrowsmith, *Public-Private Partnerships and the European Procurement Rules: EU Policies in Conflict?* 37 Common Mkt. L. Rev. 709 (2000); L. Hausmann & J. Denecke, *Changes to German Public Procurement Legislation by the PPP Acceleration Act*, 14 Pub. Proc. L. Rev. 195 (2005).

undertakings [34]. Whether a contractor is akin to an administrative department or other market operators is not based on whether, *from a formal point of view*, the public body has the same possibilities *in law* as it does in relation to its own departments (for example, the right to give instructions in a particular case). Rather, the issue is whether, *in practice*, the contracting authority attains its public-interest objectives fully at all times.

Such extensive interference with the organizational sovereignty of the Member States and, in particular, with the right to self-government of many municipalities is not necessary for the market-opening purposes of public procurement law. Such an extensive interference in municipalities' self-governance and organizational discretion may appear, even from the EU competition law standpoint, extremely disproportionate [35]. In *Parking Brixen*, Advocate General Kokott noted, after all, the purpose of procurement law is to ensure that contractors are selected in a transparent and non-discriminatory manner in all cases where a public body has decided to use third parties to perform certain tasks. However, the spirit and purpose of procurement law is not also to bring about, "*through the back door*," the privatisation of those public tasks which the public body would like to continue to perform by using its own resources. This would require specific liberalisation measures on the part of the legislature [36].

The lesson learned by reading this book is that the E.C.J. case law on in-house operations deserves at least careful re-reading, due to these local self-governance implications. *Teckal* intended to preserve local governments' sphere of self-governance regarding organization and service provision. Subsequently, the E.C.J. expanded "in-house" to apply to all other types of public contracts [37]. The expansion of this category triggered the E.C.J.'s

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[34] Teckal, cit. at 9, I-8121.

[35] See Charter of Local Self-Government. Article 6(1) provides that local authorities must "be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.".

[36] Parking Brixen, cit. at 12, I-8585.

[37] The Community procurement regime does not provide an "in-house" provision similar to the one foreseen for in the E.C. Directive concerning the coordination of public service contracts awarding procedure.

interpretive self-restraint. Sometimes this attitude led the E.C.J. to deeply weaken local governments' entrepreneurial discretion, as well as interlocal cooperation. More recent case-law shows more respect and deference towards local authorities right to use their own resources to perform the public interests tasks conferred on them. Some uncertainty still lie ahead and this book helps identifying those issues that need further clarification at the national and EU level.

This book is nevertheless very valuable as it is the first to elaborate on the in house providing issue at the EU level and to explore how and to what extent the national laws of various Member States have tried to accommodate European rules and principles relating to the in-house providing doctrine.