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EDITORIAL

NEW THREATS TO ACADEMIC FREEDOM

*Giacinto della Cananea**

Universities have become such a common trait of modern civilization that some tend to forget two salient facts; that is, their origin and the importance of academic freedom. Historically, while other centers of higher learning have existed in other epochs and in other regions of the world, the modern Western universities have arisen in Europe during the Middle Age, including Bologna (1088), Oxford (1096), Paris (1150), Coimbra (1290), Vienna (1365), and Heidelberg (1386). Especially the universities created by both scholars and students (as distinct from those established by religious or secular authorities), have recognized their rights to teach and learn, respectively, without interference by governmental authorities and social groups.

Even in Europe, though, academic freedom has had its ups and downs. The latter characterized the dark years of the last century, especially in Germany and Italy. As a reaction to those attacks to academic freedom, both national and supranational bills of rights recognize and protect it. The European Convention on Human Rights does so through its general clause concerning freedom of expression, and the European Court of Human Rights has ruled that the limits of permissible criticism are greater for universities. The underlying reason is that, in the Court's view, academic freedom includes the academics' right to express freely their opinion about the institution or system in which they work (judgment of 19 June 2018, case of *Kula v Turkey*, application no. 20233/06). Moreover, Article 13 of the EU Charter of Fundamental Rights accords particular importance to arts and scientific research, which "shall be free of constraint", as well as to academic freedom.

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According to the Court of Justice, the concept of academic freedom must be understood very broadly, including not only the establishment of universities, but also their research and teaching activities, which cannot be disproportionately limited (judgment of 6 October 2020, Case C-66/18, *European Commission v Hungary*).

Although these judgments can be, and have been, welcomed by all those who deem that academic freedom is a value, especially for liberal democracies, in Europe, the Americas, and elsewhere, it is important to be aware that the threats do not come only from political or religious authorities, as has happened in Italy in the cases *Cordero* and *Lombardi Vallauri*. Threats come from individuals and social groups within universities. Consider the following examples. Firstly, after a prestigious university has accepted a rich donation from the ruler of a non-democratic government, his son receives a doctorate from that university. Secondly, after another old university has received an even richer donation (hundreds of million Euros) by a foundation of a State that adheres to a certain religious belief, the invitation sent to the the ambassador of a third State (for example, Israel) to take part in a public debate is withdrawn by the university's rector on grounds that the ambassador's intervention risks to ignite the debate among students belonging to different political groups. Tis does not happen in Hungary or Turkey, which are involved in the legal disputes previously mentioned, but in one of the founders of the European Community. Thirdly, a religious authority decides to dismiss the invitation to lecture in a public university after a group of insiders, both professors and students, vehemently contested such invitation. Fourthly, an adjunct professor of history loses her position as a result of the university administrators' decision to sanction the showing a portrait of religious character, notwithstanding the warnings timely given by the instructor. And this is decided on grounds that academic freedom matters, but other things matter more.

As the above situations show, there are various contexts in which academic freedom can be subject to threats and these do not come only from national rulers, for example by way of forbidding discussion of a certain issue, but also by other actors. A part of the problem is that even the insiders (scholars, students, and administrators) accord to academic freedom less importance than other things, including the opinion of vociferous minorities. The main purpose of this editorial is not simply to express concern

about these these insidious internal threats to academic freedom, but to discuss the test for determining when a certain conduct is a threat to academic freedom and the mechanisms that could be used to protect it.

In the US context, which is characterized by the broad protection granted by the First Amendment, the courts have often adopted a test based either on a reasonable speaker or on a reasonable listener. The courts using these tests seek to determine whether or not a reasonable person would might react to either a speech or an exhibition, as happened in our first three cases and in the last one, respectively. The tests nonetheless have more than one flaw. A first one is the risk to ban ideas and beliefs "heretical" ideas, which either the majority or a minority of the public dislikes, in sharp contrast with one of the salient traits of academic freedom; that is, the free expression of ideas that may upset most participants in a debate. Another flaw is that these tests do not pay enough attention to the measures that are susceptible to prepare those participants, such as the warnings given by the adjunct professor of history in the fourth scenario indicated earlier. Last but not least, the tests are unsuited to protect academic freedom from indirect threats. They would be used by the courts, for example, in the last hypothetical case, where the adjunct professor of history might convincingly argue that her academic freedom has been infringed. A court might disagree with the university administrators' decision on grounds that it is disproportionate. Similarly, the exercise of disciplinary powers could be contested, in light of the measures (the warnings) taken by the teacher. The tests might be used in the second hypothetical case, for instance, if the professor who organizes the event contests the rector's withdrawal of the invitation before a court. The court might not agree with the rector's contention that the withdrawal was not the only possible measure.

However, the question that arises is how intellectual freedom and independence could be protected in the first and third hypothetical cases. Would the elaboration of more precise standards by an independent institution, such as the Venice Commission be helpful? Alternatively, could a network of national agencies funding universities define measures, such as the delivery of information about the infringement of academic freedom, that are susceptible to have an adverse impact on the reputation of the university in the community at large?

ARTICLES

THE ITALIAN REGULATION ON CONFISCATED ASSETS REHABILITATION: ISSUES AND PERSPECTIVES IN PUBLIC LAW

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Abstract

Over the last few years, multiple legislative interventions have contributed to the definition, at state level, of a regulatory framework aimed at preventing and punishing the phenomenon of organised crime. Legislators, also borrowing from the investigative-judicial approach, have paid special attention to the economic side of illegally accumulated capital and focused on assets which, given certain conditions, must be seized and confiscated. Thus, a set of criminal and administrative procedures has been defined which, according to legal theory and practice, still presents a series of issues related to balancing constitutional rights and harmonising the various applicable legal measures. The purpose of this work is to analyse, through a theoretical approach, the administrative profiles of the allocation of confiscated real estate assets within the circular process of regulation which will be considered not only at national and European level (also observing the regulations and experience of other countries), but also from the judicial, administrative and practical point of view, considering the centrality of the choice of a legislative policy to achieve social aims, in particular through redevelopment and rehabilitation actions.

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1. Definition of the theme and purpose of this paper

The issue of the confiscation of real estate assets included in the possessions of persons belonging to mafia-type organised crime and their reuse has long been the subject of in-depth study from different perspectives. It is so from a scientific point of view and by scholars of different disciplines[1]. Looking at legal studies, numerous scientific

[1] In particular, in different macro-sectors and academic disciplines such as: agricultural sciences (e.g. agricultural economics and appraisal); architecture (e.g. architectural and urban design, urban and regional planning); legal studies; psychology (e.g. work and organisational psychology); geography (e.g. economic and political geography); history (e.g. contemporary history); economics (e.g. economic policy, public economics, business administration and management and organization studies); sociology (e.g. general sociology, economic sociology and sociology of work and organisations). This information was acquired by consulting a database on university research on the subject of mafias created by drawing on information collected by the Iris-Institutional Research Information System, a platform that collects and manages information on university research data in Italy. The database, which can be consulted at crui.it, makes it possible, through the use of key words (e.g., as in our case, "beni confiscati"), to trace the scholars, titles of contributions and the type of publication, for all the academic disciplines that have shown interest in the topic in question (as well as for any other topic). The work was carried out by the Conference of Italian University Rectors (Crui), the Parliamentary Committee of Inquiry into mafia-related organisations and the Interdisciplinary Research Laboratory on Mafias and Corruption (Lirmac) of the Department of Social Sciences of the University of Naples Federico II. For a description of the methodology see A. Scaglione, E. Breno, S. D'Alfonso, *Analysis of the review of research* in S. D'Alfonso & G. Manfredi (eds.), *Universities in the fight against mafias. Research,*

contributions have been published, in particular by researchers in criminal law, criminal procedure, administrative, civil, commercial, constitutional and tax law, philosophy and sociology of law[2].

A second perspective on the issue is the political-institutional one, from which state and regional legislators and the European Union[3] have contributed to the definition of the regulations. The contribution of different parliamentary anti-mafia committees, which have drawn up detailed reports[4] and promoted specific legislative initiatives[5], should also be mentioned.

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teaching and training (2022), 59-70 (open access publication http://www.fedoabooks.unina.it/index.php/fedoapress/catalog/book/377).

[2] For a specific reflection on legal studies on mafias, see S. D'Alfonso, *University research in the field of organised crime. Law studies*, in S. D'Alfonso & G. Manfredi (eds.), *Universities in the fight*, cit. at 1, 87-97.

[3] Continuous and various measures have been implemented by the European legislator over the last twenty years on the subject of asset seizure and confiscation and on the fight against organised crime. These include: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA, of 24 February 2005, on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council Framework Decision 2006/783/JHA, of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders, strengthening European cooperation in confiscation; Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime; European Parliament resolution of 25 October 2011 on organised crime in the European Union 2010/2309 (INI); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime; and finally, Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

[4] Consider, for example, the recent *Report on the analysis of the procedures for the management of seized and confiscated assets*, doc. XXIII, no. 15, 2021, which will be referred to below, and which represents the result of the work of a specific Committee (IX). The Committee carried out an activity that lasted more than two years with the aim of verifying the application of the regulations in force concerning the fight against mafia assets, also in order to put forward proposals for changes to optimise the reuse of such assets.

[5] Reference is made to the organic reform of Legislative Decree no. 159 of 6 September 2011 (the so-called Anti-Mafia Code) implemented through Law no. 161 of 17 October 2017. The reference is to a bill presented by the Parliamentary Committee of

Furthermore, a significant role is played by government bodies such as the '*Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*' (henceforth ANBSC) which collaborates with the Agenzia del demanio (State Property Agency)[6] and a few ministries; also, there are the Prefetture (Central government institution at local level) which perform several functions in this field, for instance by supporting the ANBSC in the verification of the use of assets by private individuals or public bodies[7].

A significant role is entrusted to local institutions, especially municipalities, both through their regulatory power[8] and administrative functions[9], in particular on the subject of confiscated assets and, to a more limited extent, seized property. The role of these institutions is markedly valued and deemed significant at operational level by the ANBSC itself since these are the main assignees of assets[10].

On a different level, a fundamental role is played by the so-called social (or movementist or civil)[11] anti-mafia movement and by

Inquiry into the phenomenon of mafias and other criminal organisations, including foreign ones, established by Law no. 87 of 19 July 2013. The Committee first approved the 'Report on the provisions for an organic revision of the Anti-Mafia Code and prevention measures under Legislative Decree no. 159 of 6 September 2011', which was presented to the Houses in November 2014. The Committee's work is expressly referred to in the Final Report (Doc. XXIII, no. 38), forwarded to the Houses in February 2018, 8.

[6] With different competences than in the past, after the transfer of functions to the ANBSC. This body cooperates with the Agenzia del demanio on the basis of a specific agreement provided for by Article 113 (2) of the Anti-Mafia Code, concerning, in particular, the appraisal and maintenance of the assets in its custody as well as the use of the Agenzia del demanio staff. Such inter-agency cooperation is confirmed by a general reading of the entire Code, and specifically of Articles 48 (5 and 15-quarter); 111 (2), and 117 (3).

[7] *Ex* article 112 (4)(i) of the Anti-Mafia Code.

[8] Municipalities may approve specific regulations on confiscated property, as detailed below.

[9] For example, Article 48 (3)(c) of the Anti-Mafia Code.

[10] See ANBSC *Activity Report - Year 2020*, 14, website benisequestraticonfiscati.it. In the following pages, the Agency reports a series of tables and pie charts that provide a clear description of the 'distribution of assignees' by region and municipalities.

[11] One example is the association Libera, Associazioni, nomi e numeri contro le mafie (libera.it), which not only plays a decisive role in supporting information initiatives for the management of assets by the main beneficiaries - such as voluntary and

the assignees themselves[12], including communities, even youth communities, authorities, the most representative associations of local authorities, voluntary organisations, social cooperatives[13], therapeutic communities and centres for the recovery and treatment of drug addicts[14], environmental protection associations[15], other types of cooperatives provided they are prevalently mutual, national and regional park authorities and, in the terms described below, third sector authorities[16].

The reference to the stakeholders (and the related functions attributed to them)[17] provides us with an initial important piece of information on the multifaceted nature of the reference system, which, at a first glance, suggests a high degree of complexity of the regulatory framework, defined by multiple sources, as pointed out by the legal theory[18]. Another factor to be considered is the influence of the contributions, not without a significant ideological imprint, that can determine individual regulatory changes, at different times, and that, in some cases, end up upsetting the delicate balance between

cooperation associations - but has also promoted and supported fundamental legislative initiatives on the subject. Or, on a different front, Avviso pubblico (avvisopubblico.it), an association involving local authorities and regions.
On the anti-mafia system in its various articulations, see the contribution from a sociological perspective by V. Mete, *La lotta alle mafie tra movimenti e istituzioni*, in M. Salvati & L. Sciolla (eds.), *L'Italia e le sue regioni (L'età repubblicana)* (2015), 306.
For an analysis of the different facets of the anti-mafia system please refer to S. D'Alfonso, *Liberi professionisti e mafie. Per un modello sistematico di contrasto* in S. D'Alfonso, A. De Chiara, G. Manfredi (eds.), *Mafie e libere professioni. Come riconoscere e contrastare l'area grigia* (2018), 11 ff. and S. D'Alfonso, *Professions in Italy: a Grey Area,* 8 Ital. J. Public Law 201 ff. (2016).

[12] Pursuant to article 48 (3)(c), of the Anti-Mafia Code.

[13] Law no. 381 of 8 November 1991.

[14] As referred to in the "Testo unico delle leggi in materia di disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza", pursuant to Presidential Decree no. 309 of 9 October 1990.

[15] Recognised pursuant to Article 13 of Law no. 349 of 8 July 1986.

[16] Pursuant to Legislative Decree no. 117 of 3 July 2017, the so-called Third Sector Code, and Articles 8 and 12 of Law no. 266 of 11 August 1991.

[17] On which we will dwell in part below, insofar as it is of interest to us in relation to the topic at hand.

[18] Hereinafter recalled.

principles and instruments which, respectively, inspire and characterise the different regulations that coexist in the field[19].

The focus of this contribution lies within the space recognised by the legislature for administrative law, especially for functions and activities entrenched in proceduralised models. The specific toolbox must be considered, in particular, for preventive measures, in relation to the broader one that is intertwined with criminal law (the repressive scope of which has been strengthened over time), given the numerous links on the twofold substantive and procedural level. As has been observed, this is directly and formally subsumed by the choice made by the legislator to include the regulation concerning the ''administration of confiscated property in the same anti-mafia legislation, which is essentially criminalistic in nature''[20]. In reference to such relationship, if on the one hand, as has been pointed out, for certain aspects, in particular for the "jurisdictional procedure of prevention", there seems to be a "paradigm [of] ancillarity of the administrative activity of care and allocation of confiscated goods and

[19] On this point, for example, see the contribution by G. Torelli, *I beni confiscati alla criminalità organizzata tra decisione amministrativa e destinazione giudiziale*, 1 Diritto amministrativo 205 ff. (2018). The author highlights (§ 6) the relationship between seizure and confiscation, relating the former instrument to the "sole function" it would have of "depriving the individual of material wealth, so as to make him less strong in the eyes of the territorial community". This choice, however, ends up impacting on principles such as the "presumption of innocence, or the right to property of the person".
A further aspect noted in the legal theory, which helps to argue what has been affirmed, is given by the relationship between the exercise of the administrative function, in particular in the hands of the ANBSC, and the "jurisdictional events that take place both in the phase before and after the final confiscation. As M. Mazzamuto observes, *L'incidenza delle vicende "giurisdizionali" sulla destinazione "amministrativa" dei beni confiscati*, in M. Immordino & N. Gullo (eds.), *Diritto amministrativo e misure di prevenzione della criminalità organizzata* (2021), 92, we are in the presence of a much more complex picture than that which would be perceived from the simple reference to a public authority of the competences in matters of confiscated goods and properties. The issue had already been addressed by the same author in *L'Agenzia nazionale per l'amministrazione dei beni sequestrati e confiscati alla criminalità organizzata*, Diritto penale contemporaneo 1-58 (2015).
[20] See N. Gullo, *Emergenza criminale e diritto amministrativo. L'amministrazione pubblica dei beni confiscati* (2017), 128.

property with respect" to criminal and criminal procedure activities[21], on the other hand, the legal framework is completed through the institution of specific bodies[22], or with the reference to the provisions of administrative law[23], such as seizure and confiscation, which fall within the group of measures of asset prevention. The specific 'weight' that administrative law assumes has also been understood by legal theory in support of an interpretation that goes so far as to define the

[21] *Ibidem*, in view of the origin of the management phase of seized and confiscated property.

[22] The National Anti-corruption authority (Anac) and, more interestingly for our purposes, the ANBSC.
On the role of ANAC, see G. Gallone, in G. Gallone, A. G. Orofino (eds.), *Tra misure preventive e strumenti di contrasto: la via italiana all'anticorruzione*, 29 federalismi.it 85-87 (2020); G. Fidone, *I nuovi scandali, la creazione dell'Autorità Anticorruzione (ANAC) e l'aggregazione della domanda pubblica*, in M. Clarich (ed.), *Commentario al codice dei contratti pubblici* (2019), 26-29; G.M. Racca, *Dall'Autorità sui contratti pubblici all'Autorità nazionale anticorruzione*, 2-3 Dir. amm. 345 ff. (2015). On the establishment of the ANBSC, see the *Relazione annuale del Commissario straordinario del Governo per la gestione e la destinazione dei beni confiscati ad organizzazioni criminali* (2008), 164-165. Extra contributions include L. D'Amore, *L'Agenzia Nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati*, in P. Florio, G. Bosco, L. D'Amore (eds.), *Amministratore giudiziario. Sequestro, confisca, gestione dei beni, coadiutore dell'ANBSC* (2014), 697-803; A. Cisterna (ed.), *L'Agenzia nazionale per i patrimoni di mafia. Amministrazione e destinazione dei beni confiscati dopo l'entrata in vigore dei regolamenti* (2012). See also the work carried out by the Law group of the Fondazione del Monte, M. Cammelli, L. Balestra, G. Piperata, P. Capriotti (eds.), *Beni sequestrati e confiscati alla criminalità organizzata: disciplina, criticità e prospettive* (2015), 12-22.

[23] On the legal measure of confiscation, see G. Fiandaca, chapter *Misure di prevenzione (profili sostanziali)*, Dig. disc. pen. (in Leggi d'Italia) 23 ff. (1994); E. Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo applicativi* (2012), 13; D. Piva, *La proteiforme natura della confisca antimafia dalla dimensione interna a quella sovranazionale*, 1 Diritto penale contemporaneo 201-217 (2013); R. Alfonso, *La confisca penale fra disposizioni codicistiche e leggi speciali: esigenze di coordinamento normativo e prospettive di riforma*, in A.M. Maugeri (ed.), *Le sanzioni patrimoniali come moderno strumento di lotta contro il crimine: reciproco riconoscimento e prospettive di armonizzazione* (2008), 254 ff. On the nature of confiscation measures, in case law: Court of Cassation in joint session, 17 Dec. 2003, no. 920, 1st civil section of the Court of Cassation, 12 Nov. 1999, no. 12535; Criminal section of the Court of Cassation, 21 Jan. 1992, no. 250.

existence of a 'new segment of the legal system', having specific relevance to the 'criminal emergency'[24].

The main objective that state legislators place at the centre of the variegated, complex and transversal legal framework on confiscated property is the fight against mafia-type criminal organisations, pursued by acting on the assets of individuals; and in this, even with all the criticalities of constitutional harmonisation[25] and of the European Union system, the Italian regulations on the matter in question, when compared with those of other member states of the European Union itself, must be credited with having defined specific models of prevention and counteraction[26], acting on the individual

[24] See N. Gullo, *Emergenza criminale e diritto amministrativo,* cit. at 20, 47 (where this concept is first introduced and then analysed in detail).

[25] For example, in the relationship between personal criminal liability and associative offences. The presence of multiple constitutional criticalities is well known. We will dwell on some of them, especially the most determining ones in the reasoning pathways necessary for the framing of the issues of interest.
On the relationship between criminal law and the crime committed by an individual or by several persons as (differently) connected (e.g., *concorso esterno* - external aiding and abetting) with the criminal organisation, with reference to the "possible 'tensions' with constitutional principles" see *amplius* B. Romano, *L'associazione di tipo mafioso nel sistema di contrasto alla criminalità organizzata*, in B. Romano (ed.), *Le associazioni di tipo mafioso* (2015), 8 f. The reference is evidently to Article 27 (1) of the Constitution, hence to the relationship between personal criminal liability and the 'external profile', with the traditional limits of 'liability for the deeds of others'. The author unravels the specificities of the impact of Article 416-bis on the various criminal law fronts and dwells on external aiding and abetting, on which the contribution of case law is now well established. On this point, please refer to what has already been argued in S. D'Alfonso, *Liberi professionisti e mafie. Per un modello sistematico di contrasto* in S. D'Alfonso, A. De Chiara, G. Manfredi (eds.), *Mafie e libere professioni* (2017), 33-34. See also M. Ronco, *L'art. 416-bis nella sua origine e nella sua attuale portata applicativa*, in B. Romano & G. Tinebra (eds.), *Il diritto penale della criminalità organizzata* (2013), 86.

[26] For a detailed commentary on the regulations adopted by a significant number of European countries (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), with particular reference to the procedures for seizure and confiscation, the bodies competent to intervene, timeframes and enforcement practices, see A. Di Nicola e B. Vettori, *Normative e prassi applicative in materia di amministrazione e destinazione dei beni confiscati negli Stati membri dell'UE: una mappatura* in S. Costantino, B. Vettori, A. Di Nicola. A. Ceresa, G. Tumminelli (eds.),

legal measures and in a systemic perspective[27]; this applies, for example, to: the double path chosen which sees the criminal confiscation flanked by the non-criminal one, like in Bulgaria, Greece, Ireland, the United Kingdom, Romania, Slovakia and Slovenia, and differently from the majority of the other countries; the sale by the ANBSC of the goods and properties being possible only in the case in which the allocation or the transfer for "purposes of public interest" has proved impossible (pursuant to Article 48 (5) of the Anti-Mafia Code), differs from what is provided for in most foreign legal systems[28] which, instead, mainly provide for the option of the sale[29]; the fact of having concentrated in the hands of a State body (precisely the ANBSC), the direct competencies for the adoption of measures for the allocation of assets while providing, at the same time, a functional application of the principle of subsidiarity which recognises among the direct or indirect recipients the territorial authorities, in particular the municipalities (ex Article 48 (3)(c) of the Anti-Mafia Code); the definition of specific terms within which the allocation must take place, indicated by a specific rule (provided for only by a few countries)[30], aimed at satisfying the need to consider and resolve the criticalities inherent in the relationship between the time required to make the intervention efficient and the risk of deterioration of the asset[31], with a

La destinazione dei beni confiscati alle mafie nell'Unione europea. Normative e prassi applicative a confronto (2018), 16-68; for a comparative analysis, in the same volume, see B. Vettori, *Normative e prassi applicative in materia di amministrazione e destinazione dei beni confiscati negli Stati membri dell'UE: un'analisi comparata*, 68.
In a more recent contribution, N. Gullo, *Il recupero dei beni confiscati tra restyling normativo e opportunità delle politiche di coesione e di attuazione del PNRR*, 1 Istituzioni del federalismo 72 (2022), defines as "sophisticated [the] management model of assets confiscated from mafias".

[27] With the exception of a few cases, which are recalled and expanded upon below.

[28] B. Vettori, *Normative e prassi applicative*, cit. at 26, 68. For a critical analysis of the different forms of confiscation and the critical issues resulting from 'rehabilitation' that we find in the 'national and international legal context', please refer to the recent in-depth study by A. M. Maugeri, *La riforma delle sanzioni patrimoniali (la confisca penale*), 10 Dir. Pen. Processo 1372 (2021).

[29] *Idem*, 69.

[30] *Idem*, 70.

[31] On this point, within a broader reasoning on the "difficult balance between protection and rehabilitation", on the negative effects in the allocation phase see N.

consequent impact also on the symbolic level[32] of the policies for preventing and combating mafia presence in the territory[33].

Each of these recalled profiles of our regulatory framework - on whose comparison with other legal systems insufficient attention has been paid so far by the legal theory[34] - is essential to understand the system built by legislators starting from the Law of 13 September 1982, no. 646 (so-called Rognoni-La Torre law). A critical analysis of the system must consider the interrelation between the individual legal measures and related application procedures, thereby satisfying the strongly felt need to interpret the individual measures also in the

Gullo, *La destinazione dei beni confiscati nel codice antimafia tra tutela e valorizzazione*, 27 Il diritto dell'economia 124-125 (2014).

[32] On which we will dwell below, *infra* § 2.

[33] Although, it should be noted, in Italy the overall time of proceedings is such that it negatively affects the preservation of assets. On this point, see the Government's Report to the Parliament *Relazione semestrale del Governo al Parlamento sui beni sequestrati o confiscati* (*Consistenza, destinazione ed utilizzo dei beni sequestrati o confiscati - Stato dei procedimenti di sequestro o confisca)*, June 2020, 3, available on the official website of the Ministry of Justice (website giustizia.it), and the *2020 Activity Report* of the ANBSC, cit. at 20. More recently, the Anbsc in its 2021 Report, pp. 36-38, commenting on a scientific university study, measured allocation times in relation to the resident population in an area. More specifically, times are longer in the case of assets in peripheral and rural areas than in central or industrial or commercial areas. In addition, looking at municipalities with a larger population, a lengthening of the timescale can be seen. On the other hand, it is interesting to note that the municipalities with the highest density of confiscated assets are those in which the timeframe for destination is shortened. This is explained by the experience gained in administrative procedures. For some reflections, see V. Martone (ed.), *Politiche integrate di sicurezza. Tutela delle vittime e gestione dei beni confiscati in Campania* (2020), 29 and 124-125; M. De Benedetto, *Rigenerazione e riuso dei beni confiscati: regole e simboli della legalità*, in F. Di Lascio, F. Giglioni (eds.), *La rigenerazione di beni e spazi urbani. Contributi al diritto delle città* (2017), 345 ff.
On the "structural and economic conditions of the assets" and the weight that these assume in the system of destination and management see N. Gullo, *Emergenza criminale*, cit. at 20, 558-559.

[34] On this point see, in a recent contribution, B. Vettori, *The Disposal of Confiscated Assets in the EU Member States: What Works, What Does Not Work and What Is Promising* in C. King, C. Walker, J. Gurulè (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (2018), 706. By the same author, see the earlier *Tough on Criminal Wealth. Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Springer 2006). Consider also S. Costantino, B. Vettori, A. Di Nicola., A. Ceresa, G. Tumminelli, *La destinazione dei beni confiscati*, cit. at 26.

variety of interdisciplinary legal profiles. Thus, for example, the various instruments of an administrative nature, on which we will dwell here, must be correlated with those applicable following a conviction under criminal law for mafia organisation under Article 416-bis of the Criminal Code: among these is the obligatory 'confiscation' - in the case of "things that served or were destined to commit the crime and of the things that are its price, product, profit or that constitute the use" - or, more in general, as already ruled by the Constitutional Court recently, the "various juridical nature" that confiscation can assume, "in concrete terms", in application of single regulations of law and not as an abstract and generic figure[35].

The field of investigation is narrowed down here, in particular by looking at confiscation, while at the same time considering its close link with (prior) seizure and judicial administration[36].

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[35] This is the sense of the Constitutional Court sentence no. 29 of 9 June 1961, in which it stated that confiscation "may be ordered for various reasons and directed to various purposes, so as to assume, from time to time, the nature and function either of penalty, or of security measure, or also of civil and administrative legal measure". On this point see G. Napolitano, *La confisca diretta "per equivalente" del provento del reato* (2021), 52-54. The author, in observing how the words of the Court do not result "undermined by the elapsed time", defines "protean" the confiscation tool. See also G. Pistorio, *La disciplina della confisca nel dialogo tra Corti europee e giudici nazionali*, 8-9 Giur. it. 2068 (2009). On the definition of the legal nature of the institution of confiscation applied to persons suspected of belonging to mafia organisations, it has been affirmed that it could not be qualified as a penal sanction of a criminal nature, nor of prevention, while it would be ascribable to a tertium genus qualified by an administrative sanction. The relevant principles can be found in rulings of both the Constitutional Court and the Court of Cassation: Const. Court ruling of 8 October 1996, no. 335 (with a note by P.V. Molinari, *Una parola forse definitiva su confisca antimafia e morte della persona ritenuta pericolosa*, 2 Cass. pen. 1997, 334) and Court of Cassation in joint session no. 18 of 3 July 1996.

[36] Today governed by the Anti-mafia Code, which innovates on the previous regulations, assuming an applicative perspective of reference that tends to unify the regulations on the subject of personal and patrimonial measures of prevention, taking over as a single body of law following the abrogative provisions of Article 120 of the same Anti-mafia Code. On this point see M. Ronco (updated by M. Lombardo), Sub *art. 416-bis* in Dig. disc. pen. (in Leggi d'Italia).

For a concrete analysis of the articles of seizure and confiscation in reaction to the role played by judicial administrators and the current positioning in the Anti-Mafia Code with respect to these, see P. Florio, G. Bosco, L. D'Amore, *Amministratore giudiziario*, cit. at 22, 5-10.

The theoretical-general reconstruction of the subject must refer, as an initial regulatory premise, to the Anti-Mafia Code: to Article 45 and, above all, to the already mentioned Article 48, according to which, following final confiscation as a measure of prevention, the real estate is transferred to the State property, envisaging different allocations, resulting in specific procedures and assignment measures, which, inevitably, from a dogmatic point of view, cannot but be considered in relation to the traditional categories, especially those of public property.

From this point of view, it must be preliminarily pointed out that the administrative profiles on the subject in question, which at a first glance would seem to occupy the primary position, in consideration of the role and of the specific competences which the law attributes to a public authority such as the ANBSC, when better observed, must instead be collocated within a "much more complex framework (...)": it is sufficient, in primis, to think of the effects determined (in particular, in relation to the goods and properties) in the different jurisdictional phases, preceding and following the definitive confiscation[37].

This already shows how important it is for scholars to highlight and dwell on the link between the nature and effects of the different regulations on the management of assets, both in a broad sense and specifically on the relationship between certain legal measures pertaining to administrative law and, in part, to different frameworks.

2. National and European features of the emergency pre-condition and of the conversion of illegal economic networks into social purposes

The overall theoretical framework of the management and allocation of real estate assets needs a preliminary in-depth analysis of certain specific profiles that characterise the related legal measures, also in correlation with the main constitutional and EU reference principles.

[37] As also pointed out by M. Mazzamuto, *L'incidenza delle vicende "giurisdizionali"*, cit. at 19, 92.

There are two main macro-themes within which the reflection can be focused, namely the balancing of constitutionally relevant interests between legislative policy purposes and the practical application of the legal measures by entrusted institutions and proceduralisation, and the legal nature of seized or confiscated real-estate assets in the theory of public assets.

The first explanatory pathway that can be followed to clarify certain fundamental and general aspects requiring a more precise focus on the legal framework, regards the relationship between the objectives set out by legislative policy and the constitutional framework as a clear reference and condition of the regulatory thread. A necessary in-depth analysis concerns the legislative competence on the subject of confiscated assets and organised crime. The legislative competence lies exclusively in the hands of the State pursuant to art. 117 (2)(h), on the subject of 'public order and security'.

The Constitutional Court, with ruling No. 234[38] of 19 October 2012, makes explicit "reference to the allocation of assets and to the functions of supervision on the proper use of such assets by the assignees", in consideration of the assumption that confiscation is determined by the condition of incurring a cost for the "territorial communities" determined by the presence, or more correctly "emergency", of the mafia. The emergency character is also highlighted at an international level, in particular, by the UNODC (United Nations Office on Drugs and Crime), which recognizes the role

[38] As stated in the same year in Ruling No. 34 of 23 February 2012, discussed below. Other academic positions should also be considered. M. Mazzamuto, *Gestione e destinazione dei beni sequestrati e confiscati tra giurisdizione e amministrazione*, 2 Giur. it. (2013), § 2, which provides a different perspective, critically analysing the relationship between the criminal law system and the administrative regulation of the "management and (...) allocation of assets". In this case the connection with the jurisdictional activity is considered, to be included in the criminal system, regardless of the exact qualification of the confiscation. The same author observes how, on the contrary, constitutional case law is consolidated, having clearly stated the cardinal principles of the matter, referring, as previously indicated, to the matter of 'public order and security'. The reference is in particular to Constitutional Court ruling no. 246 of 24 July 2009, which confirms this principle by also recalling its previous case law. For a comment on the ruling see F. Di Dio, *Giustizia costituzionale e concorrenza di competenze legislative in materia di "tutela dell'ambiente e dell'ecosistema": dalla trasversalità alla "prevalenza" della competenza statale*, 6 Riv. giur. amb. 953 f. (2009).

of 'forerunner' (albeit, for us, dated) of the Italian legislation on the subject of "measures of patrimonial prevention"[39].

The State decides to avail itself of a regulatory framework rendering its actions legal in the face of illegally acquired economic resources by mafia-type groups, thus fighting their entrenchment – also social – through repression aimed at "re-establishing legality"[40].

[39] Unodc, *Digest of Organised Crime Cases, Annotated Collection of Cases and Lessons Learned*, New York, 2012 (website unodc.org). The Digest was produced in cooperation between the Italian and Colombian governments and Interpol. It deals with the issue of extended, *in rem* and non-conviction-based confiscation (97-102). Reference is made therein to the Albanian regulatory framework, which on these aspects similar to the Italian one.
As has been observed, A. Mangione, *Politica del diritto e 'retorica dell'antimafia': riflessioni si recenti progetti di riforma delle misure di prevenzione patrimoniali*, 4 Riv. it. dir. proc. pen. 1186 (2003), the Italian State, as well as European and international institutions, assume among the most demanding and difficult challenges "for the modern liberal democracies" the fight against organized crime. Starting from the increased awareness of an alteration of the 'civil, political and economic fabric', legislative policy choices are determined that move on multiple levels.

[40] The Constitutional Court, with ruling no. 234/2012, was called to rule on the constitutional legitimacy case raised by the Sicilian Region on Articles 45 (1), 47 and 48 (3) of the Anti-Mafia Code. With respect to the matters of constitutional relevance, the Court expressly reiterates what was stated in its previous rulings no. 34 and 35 of 23 February 2012. For a commentary see: A. Morelli, *Le conseguenze dell'invalidità: l'incererto ambito di applicazione dell'art. 27, secondo periodo, della l. n. 87 del 1953*, 1 Giur. cost. (2012), 439; see also G. Di Chiara, *Osservatorio Corte costituzionale - Gestione dei beni confiscati alle organizzazioni criminali e tutela dell'ordine pubblico: inesistente una potestà legislativa regionale*, 7 Dir. Pen. e Processo 807 (2012).
On a similar case, again with reference to Article 117(2)(h), consider the subsequent ruling no. 177 of 30 July 2020, concerning Apulia's Regional Law no. 14 of 28 March 2019 "Testo unico in materia di legalità, regolarità amministrativa e sicurezza".
For a more in-depth examination of the relationship between "public order and security", reference should be made to what has already been affirmed by the Constitutional Court, in rulings no. 6 of 13 January 2004 and no. 162 of 1 June 2004 (in particular, point 4.1 of the consideration in law), according to which these two elements must be considered at the same time.
On the specific point see L. Antonini, Sub art. 117, 2°, 3° and 4° co., in R. Bifulco, A. Celotto & M. Olivetti (eds.), *Commentario alla Costituzione* (2006), 2233. For a recent systematic treatment of the subject see L. Albino, *Ordine pubblico e sicurezza nello stato di democrazia pluralista* in A. Lasso & T H Sooon Hann (eds.), *Identity and Security* (2016), 45 f. and, in particular, 52-53, where, recalling the constant constitutional case

As already stated in 1996, with reference to Law 675, and then re-affirmed in 2012, the adoption of forfeiture measures in question and the consequences determined find their rationale in the definitive removal of an "asset from the 'economic circuit' of origin in order to insert it in another, free from the criminal conditioning that characterises the first"[41].

In view of the same concept of 'economic circuit', the joint criminal sections of the Court of Cassation, in ruling no. 4880 of 26 June 2014, also referring to sociological literature, highlight the distortion and contamination "of the ordinary competitive dynamics of the free market" caused by criminal organisations that direct their activities towards the accumulation of wealth of illicit origin[42]. To better clarify the point, it is useful to recall what the National Anti-Mafia and Anti-Terrorism Directorate observed in its 2019 Annual Report, according to which the relationship between illegal and legal activities must, in any case, take into account the persistence of 'conditions' of illegality[43].

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law on the point, even dating back to previous rulings, he emphasises the non-conflictual distinction of the aforementioned elements.
For a broader reading of public security also in its relationship with public order see G. Pistorio, *Sicurezza (diritto costituzionale) (ad vocem)*, 7 Dig. disc. pubbl. § 3 (2021).
For further reconstructions, in which the constitutional case law of the time is reported, see also, G. Corso, *L'ordine pubblico* (1979) and by the same author *Ordine pubblico nel diritto amministrativo*, Dig. Disc. Public 438 f. (1995).

[41] Thus, the Constitutional Court in its ruling no. 335 of 8 October 1996. More recently, the Constitutional Court refers to this assumption in its ruling no. 21 of 9 February 2012 (in support of a different pathway of argumentation on the issue of confiscation against heirs). On this point, see the sidenote by F. Licata, *La costituzionalità della confisca antimafia nei confronti degli eredi: un altro passo verso la definizione della natura dell'actio in rem*, 1 Giur. cost. 240 f. (2012).

[42] The Court of Cassation in joint session affirms that the activities carried out by mafia groups are aimed at systematically accumulating wealth, through "intimidation, prevarication and the ability to infiltrate" administrations, institutions, as well as moving through the procurement system, "in defiance of the ordinary rules of competition". Therefore, the requirements set out in Article 416-bis (3) of the Penal Code are met.

[43] This is the broader formulation provided by the Dna (National Anti-Mafia Directorate) - albeit in a different argumentative context and with specific reference to the Camorra, but in any case, in our opinion, applicable in a broader sense - in the *Annual Report* 2019, 65, where reference is made to business networks that "heavily affect markets, where they transfer an extraordinary capacity to offer illegal or legal services, but on illegal terms".

The aim of these criminal groups is achieved within a system of relationships and through pervasive actions directed, in terms of the legal aspect hereby concerned[44], towards the external area of the organisations[45]. It is not only the origin that has to be considered but also the dynamic reflections of the 'social dangerousness of the subject' who has been found to belong to the mafia organisation and who would continue to hold the assets, which are precisely the object of the application of a forfeiture measure[46]. On this point, it is necessary to recall Article 18 (1) of the Anti-Mafia Code, pursuant to which the measures of asset prevention "can be requested and applied (...) independently of the social dangerousness of the subject being proposed for their application at the moment of the request for the

[44] A difference can be clearly noticed in the criminalistic approach, including the doctrinal and investigative-judicial one, pertaining to the so-called "internal side", where it is necessary to reflect on the configuration of the mafia association, but also for the mafia aggravating circumstance - ex Article 7 of Decree-Law no. 152 of 13 May 1991, converted into Law no. 203 of 12 July 1991, now provided for by Article 416-bis.1 of the Criminal Code (inserted by Article 5 (1)(d) of Legislative Decree no. 21 of 1 March 2018), external aiding and abetting (*concorso esterno*) and the special aggravating circumstances provided for certain offences - for example: Article 387 of the Criminal Code, which regulates aiding and abetting and provides, in paragraph 2, for a specific penalty "when the crime committed is that provided for in Article 416-bis. For a commentary, see B. Romano, updated by M. Schiavo, *Sub art. 378*, Dig. Disc. Pen. § 6 (2021).

[45] As is now established in legal theory through argumentative pathways that see the legal sciences intersect with those of a sociological and historical matrix. On the external projection of mafias, see C. Visconti, *Contiguità alla mafia e responsabilità penale* (2003). On the relationship between the criminal rule defining mafia organisations and related relationship with meta-legal concepts that are explored in the historical and sociological literature see G. Amarelli, *La contiguità politico-mafiosa* (2017), 14 ff.

[46] Again, according to the Court of Cassation in joint session cited above. Furthermore, on the point, in the sphere of the clarification argued by the abovementioned Court in comparing the generic dangerousness with the so-called qualified dangerousness, the Court focuses on the hypothesis of the evaluation of a dangerousness that is expressed by the relation between "asset components" of illicit origin of which the proposed person does not justify the possession and "the entire (criminal) pathway". For an in-depth study also with reference to the case law of the Edu Court, see M. Maugeri, *Una parola definitiva sulla natura della confisca di prevenzione? Dalle sezioni unite spinelli alla sentenza Gogitidze della Corte edu sul Civil Forfeiture*, 2 Rivista italiana di diritto e procedura penale § 7 (2015).

preventive measure"; therefore, in consideration of the temporal correlation between the social dangerousness and the acquisition of the assets to be confiscated. In this regard, reference should be made to the Court of Criminal Cassation, VI section, ruling no. 10153 of 18 October 2012, which frames the issue in constitutional terms. In particular, the Court states how the need to remove from the availability of the person "illicitly accumulated assets" whose "legitimate origin" is not demonstrated must be considered in relation to the provisions of Articles 42 and 41 of the Constitution, on the protected rights of property and economic initiative that "may be limited respectively in a social function" and "in the interest of the security needs of the general utility"[47]; this issue has been addressed in these terms, albeit with reference to different regulations, even by the Constitutional Court in previous rulings[48].

This can also be linked to the "effects of definitive confiscation as preventive measure" and to the regulation of asset allocation and of the functions related to the oversight activity on obligations sworn by assignees with regards to «correct use». As stated by the Constitutional Court[49], the competency to make laws in this realm lies with the State, as this issue is a public order one.

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[47] On this point see the critical considerations developed in the sidenote of the ruling by A.M. Maugeri, *Un'interpretazione restrittiva delle intestazioni fitttizie ai fini della confisca misura di prevenzione tra questioni ancora irrisolte* (*natura della confisca e correllazione temporale*), 1 Cass. Pen. 256 ff. (2014). The author, moreover, at 271, dwells on the role of legislators, on the discretion they are called upon to exercise, and to which the Court of Cassation refers; this function, as noted in this work, is always relevant in a difficult "regulatory context" subject to frequent tensions in the balancing of constitutionally protected interests. See also E. Mengon, *Confisca di prevenzione e morte del titolare: la pericolosità al momento dell'acquisto del bene*, 9 Cass. pen. 3203 ff. (2013), commenting on the same ruling.

[48] Reference is made to Order no. 721 of 22 June 1988, by which the Constitutional Court declared clearly inadmissible the question of constitutional legitimacy, raised with reference to Articles 41 and 42 of the Constitution, of Art. 2-ter, third, fourth and sixth paragraphs, of Law no. 575 of 31 May 1965, as amended and supplemented by Art. 14 of Law No. 646 of 13 September 1982, in the part in which it does not permit the confiscation of assets of illicit origin in the hypothesis of non-application of the personal preventive measure and of termination of the same for death of the offender.

[49] With aforementioned ruling no. 234 of 2012.

On this last aspect, the legal theory has underlined the presence, we could say, of a hendiadys that synthesizes "the policy of fighting against organized crime" in the "two inseparable dimensions" of the subtraction of goods and properties from mafia "influence" and of the subsequent "reconversion to forms of social use"[50] whose regulation also falls within the matter of 'public order'[51].

The legislation on the confiscation of real estate determines, therefore, effects on the territories and of different types. It should be noted, incidentally, echoing what was published in the ANBSC Report, how, aside from substantial effects, legislators have also considered those of a symbolic nature[52]. This must be taken into account, for example, by looking at the territory where the property is located, whether traditionally mafia-related[53] and where the person has operated; or, when the reference is to 'other' territories[54]. The symbolic side is indispensable in consideration of the relationship between

[50] See N. Gullo, *La destinazione dei beni confiscati nel codice antimafia tra tutela e valorizzazione*, cit. at 31, 60.

[51] *Idem*, on this point a previous reflection of the same author is hereby recalled, *Il procedimento di destinazione dei beni confiscati alla mafia: aspetti problematici della normativa vigente e prospettive di riforma*, Il Foro. it. 72 ff. (2003).

[52] On the role of the "so-called symbolic function", see in administrative theory M. Mazzamuto, *Gestione e destinazione*, cit. at 38, § 3. From the same author on this topic, consider the critical analyses developed in *L'agenzia nazionale per l'amministrazione e la gestione dei beni sequestrati e confiscati alla criminalità organizzata*, www.penaleceontemporaneo.it 38-39 (11 December 2015). In this work, reference is made to the relationship between the "so-called symbolic function", the favour of local authorities in view of the restitutive purpose to the community (corroborated by the aforementioned Constitutional Court ruling no. 34/2012) and the actual ability of the authorities themselves to be vulnerable to mafia infiltration and the consequent risks of negative effects on the symbolic level.

[53] On the control of territories, "especially in certain socio-cultural contexts", see N. Gullo, *Emergenza criminale*, cit. at 20, 35-36.

[54] Truth be told, to an increasingly lesser extent, considering the ascertained mafia presence in many regions deemed 'non-traditional' - where the investment of mafia capital is 'delocalized' with respect to the place of settlement. The Corte dei conti, Sezione centrale di controllo sulla gestione delle amministrazioni dello Stato, also intervenes on this point in its Report *L'amministrazione dei beni sequestrati e confiscati alla criminalità organizzata e l'attività dell'Agenzia nazionale (ANBSC)* of 2016 (p. 62), in which, while stating the "strong symbolic value" of the confiscation of assets, it underlines the erroneous representation of some territories as immune from mafia pervasiveness.

mafia criminal activities and the social context (also in contrast to the myth of 'invincibility' with which mafia groups pride themselves)[55], or insofar as it is directly connected to this, also economic and institutional. On the other hand, as can be deduced from criminal court cases – referred to expressly and constantly by the parliamentary anti-mafia committees of previous legislatures[56], as well as the ANBSC, in cooperation with other authorities[57] – the symbolic element is evoked several times, and to this the legal theory also draws attention by highlighting its characteristics and purposes: for example, grasping its "educational function oriented towards the transmission of the value of legality and its superiority"[58] or containing its teleological scope by qualifying it among the ends-means "subservient to the only end really pursued [...] public order"[59].

This is, moreover, taken into account when making regulations, so when the state legislature enhances the role of the private social sector in the direction of social goals, in order to give concreteness to

[55] As stated in N. Gullo, *Emergenza criminale*, cit. at 20, 569.

[56] Recently, in 2021, *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati* (Report on the analysis of the procedures for the management of seized and confiscated goods), 3.
See also the *Relazione sulle prospettive di riforma del sistema di gestione dei beni sequestrati e confiscati alla criminalità organizzata*, approved by the Anti-Mafia Parliamentary Committee of the 17th Legislature in its sitting of 9 April 2014, p. 14 and 32, in which reference is made to the social rehabilitation of confiscated property as a "symbol of legality and civil rebirth" and to the "symbolic value of confiscation".

[57] Reference is made to the Agency for Territorial Cohesion and to the Ministry of Economy and Finance, the State General Accounting Office and the General Inspectorate for Relations with the European Union and, in particular, to the document *National Strategies for the Rehabilitation of Confiscated Properties Through Cohesion Policies*, 2018. In the identification of the purposes to which reference should be made when defining the "forms and modalities of real estate use" there is an explicit focus (p. 23) on the 'symbolic profile', as precisely an 'end' to be considered in opposition to "customary practices" consolidated over time in territories subject to criminal control.

[58] In the sense of the educational function oriented to the transmission of the value of legality and its superiority see S. Pellegrini (ed.), *La vita dopo la confisca. Il riutilizzo dei beni sottratti alla mafia* (2017), 25.

[59] M. Mazzamuto, *Gestione e destinazione dei beni,* cit. at 38, § 2.

the management activity with a consequent contribution on the symbolic level[60].

Similarly, it has recently been decided to enhance this profile in the context of actions aimed at defining investments and the implementation of interventions under the National Recovery and Resilience Plan (NRRP)[61]. In fact, specific weight was given to the 'symbolic value' of confiscated assets when selecting projects to be assessed for specific and significant funding[62].

Even in the local context we find similar interventions that take the form of the exercise of regulatory power by municipalities, which (optionally) intervene on the subject of confiscated property[63].

The European side provides us with a number of significant references that are worth considering. More recently, a significant intervention was given by the ruling of the European Court of Human

[60] As noted in legal theory, N. Gullo, *Emergenza criminale*, cit. at 20, 538, the involvement of the "social private sector" that determines favourable effects for the community on the territory re-asserts the authority of the State, with the consequent erosion of the social consensus of criminal groups. The ANBSC also points out that the interest to be satisfied is symbolic. Thus, in its *Activity Report - Year 2020*, p. 13 (viewable at benisequestraticonfiscati.it).

[61] Reference is made to the "Public Notice for the submission of proposals for the selection of projects for the rehabilitation of confiscated properties to be financed under the NRRP, Mission 5 - Inclusion and Cohesion- Component 3 - Special interventions for territorial cohesion- Investment 2 - Valorisation of assets confiscated from mafias financed by the European Union- Next Generation EU".

[62] Alongside features such as size, sustainability and development prospects.

[63] The municipal regulations adopted provide, in fact, for the obligation of the person receiving the asset in concession to display, outside the same assets, a plaque indicating expressions such as 'property confiscated from the mafia, or from crime, acquired by the Municipality'.

It is worth noting that it is not compulsory in the legal system for municipalities to adopt regulations on the allocation and management of confiscated property. However, how such adoption is urged by several parties. It is worth noting, in particular, the observation of the Parliamentary Anti-Mafia Committee in the *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, in particular p. 388 and 400-401: therein the indispensability of the municipal regulations is affirmed, as a tool "necessary to implement the principles of equality, impartiality, publicity, sustainability and transparency". On this point see P. Pastorino, *Pubblicazione del modello di Regolamento sul trattamento dei beni confiscati alla criminalità*, 24 June 2020, in legalitaincomune.it.

Rights[64], 22 February 1994, no. 281. Although in the presence of a different regulatory framework, in analysing the two different measures of seizure and confiscation, the ECHR linked "the general interest", the "extremely dangerous economic power of an 'organisation' such as the mafia", "the difficulties encountered by the Italian State in the fight against the mafia", the relationship between "illicit activities, particularly "drug trafficking", the investment of accumulated capital and "international relations". In view of this general framework, the Court goes so far as to affirm that "confiscation constitutes an effective and necessary weapon" that legitimately accompanies seizure[65].

On this issue, European institutions have repeatedly and differently intervened over the last thirty years[66], starting from the adoption by the Council of Europe of the Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990[67]. After the Council Framework Decisions 2001/500/JHA and 2003/577/JHA on money laundering, seizing and confiscation of instrumentalities and the proceeds of crime, Framework Decision 2006/783/JHA is approved on the application of the principle of mutual recognition to confiscation orders. This is the first EU measure entirely dedicated to the disposal of confiscated property, including regulatory instructions (Article 16) on the transfer of such assets[68]. Looking at the regulations adopted by different EU

[64] The relevance of which is also proven by the special attention paid to it by the legal theory.

[65] Point 30 of the consideration in law.

[66] For a more in-depth analysis, see B. Vettori, T. Kolarov, A. Rusev (eds), The RECAST Report– *REuse of Confiscated Assets for social purposes: towards common EU Standards* (2014). The report includes the results of comparative research between EU states on the subject of confiscation and confiscated assets.

[67] The Strasbourg Convention (8 November 1990) states in the Preamble that for the attainment of a common criminal policy a well-functioning system of international co-operation must also be established. The adoption of legislative and other measures to confiscate instrumentalities and proceeds or property is one of the first objectives set out in article 2.

[68] In particular, pursuant to article 16 (2) of the aforementioned Framework Decision 2006/783/JHA, "Property other than money, which has been obtained from the execution of the confiscation order, shall be disposed of in one of the following ways,

States[69], it should be noted that, despite the introduction of various measures in the Framework Decision, according to the 2014 Recast Report, in EU Member States sale represents the primary choice[70], often within a procedure that guarantees the restitution to victims or their families.

More recently, the European legislator has acted with Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. The third 'whereas' of this regulation states that confiscation is among the most effective means of combatting crime and that the EU is committed to ensuring the re-use of criminal assets in accordance with The Stockholm programme – "*An open and secure Europe serving and protecting the citizens*" of 2010[71].

Within this regulatory framework, which as has been observed has failed to produce "common reference models"[72], Italy is the only EU Member State where the most frequently adopted measure is the re-use of confiscated assets, with symbolic value, through the allocation of the same assets[73].

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to be decided by the executing State: a) it may be sold, and proceeds of the sale shall be disposed of in accordance with paragraph 1; b) transferred to the issuing State. If the confiscation order covers an amount of money, the property may only be transferred to the issuing State when that State has given its consent; c) when it is not possible to apply (a) or (b), the property may be disposed of in another way in accordance with the law of the executing State".

[69] Contributions in legal theory include: B. Vettori e B. Misoski, *Social reuse of confiscated assets in the EU: current experiences and potential for its adoption by other EU and non-EU countries*, in *Liber amicorum. Studia in honorem academici Vlado Kambovski septuagesimo anno* (2019), 721-738; B. Vettori, *The disposal of confiscated assets in the EU Member States: what works, what does not work and what is promising*, in C. King, W.C. Walker, G.J. Gurulé (eds.), *The Palgrave handbook of criminal and terrorism financing law* (2018), 705-733.

[70] On this point, see the Recast Report, cit. at p. 20. For further details, see project-payback.eu on the creation of a European data management system for confiscated assets.

[71] Available online at eur-lex.europa.eu/legal-content.

[72] See N. Gullo, *Il recupero dei beni confiscati*, cit. at 26, 73-74.

[73] *Idem*. On this topic, the United Nations Office on Drugs and Crime (UNODC) performed, together with the Calabria Region, a study on the use of confiscated assets in Italy whose results were published in the Report "*The Italian experience in the*

It can be observed how the symbolic value (or impact on the general public) of property, especially with real estate, takes on a different meaning as in certain cases it manifests itself markedly whereas in other instances it does so only to a lesser extent or more marginally. As a consequence, this would require drawing a difference in terms of rehabilitation. This topic has been on the agenda of the Parliamentary Anti-Mafia Committee[74] and found operational space in the actions performed by the ANBSC[75].

3. Antimafia legislation, confiscated assets and general provisions of administrative law: critical aspects

The subject of confiscated real estate, particularly in terms of its allocation, interpreted in relation to the provisions of administrative law and to the constitutional system, is affected by a legislative policy approach which has strongly proposed to support anti-crime action, opposing mafia through prevention and repression, starting from criminal law and reaching a point relevant to administrative law[76], leading to dubious overlaps, and even potential conflicts between administrative and judicial power[77].

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management, use and disposal of frozen, seized and confiscated assets", Vienna, 2 September 2014. In p. 13-14 and 18 of this report clear reference is made to the centrality of the symbolic meaning of reusing confiscated assets in practical cases in Italy.

[74] In the abovementioned *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, 161, the Parliamentary Anti-Mafia Committee calls for the identification of those who are actually such and can therefore be valorised; this task should fall to the director of the ANBSC, and further action should be taken in the accreditation procedures.

[75] On "exemplary assets" to be rehabilitated, the ANBSC has implemented actions. The issue falls within the space of the "National Strategy for the Rehabilitation of Confiscated Assets Through Cohesion Policies". See *Activity Report – Year 2020*, p. 27 f.

[76] See M. Mazzamuto, *Gestione e destinazione*, cit. at 38, § 1.

[77] See the thorough argumentations of N. Gullo, *Emergenza criminale e diritto amministrativo,* cit. at 20, 566 f. who, referring in particular to temporary destination, highlights, expanding on the critical issues already noted by M. Mazzamuto, *L'Agenzia nazionale per l'amministrazione dei beni sequestrati e confiscati alla criminalità organizzata*, Diritto penale contemporaneo 15 (2015), reflects on the power exerted by

While on the one hand public-interest aims are undoubtedly pursued at theoretical level - also in the previously mentioned 'all-inclusive' sense of public order, social instances and re-use, as well as ethical and cultural purposes -, significant dysfunctions and certain inconsistencies emerge from the analysis of the regulatory framework in its different applications and these cannot be ignored when performing an in-depth theoretical study.

In order to substantiate this assertion, it is useful to focus on the effects of the choices made by legislators when defining certain legal measures. An example is the regulation of the phase between seizure and confiscation, when real estate tends to lose value, causing particular difficulties that impact on its subsequent reuse, an issue which can only be addressed through a burdensome financial and administrative commitment. This is one of the most critical issues highlighted in empirical observation, which is also reflected in the political-administrative will of potential recipient entities. As observed in several institutional fora, most recently by the Anti-Mafia Parliamentary Committee, "the dramatic shortage of funds at their disposal prevents (or at least significantly hampers) municipalities' ability to exploit or even to ask for the allocation of confiscated assets or their provisional assignment"[78]. On the other hand, as pointed out,

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the ANBSC with respect to the jurisdictional function - when this body is entrusted with the function of proposing to the judicial authority the adoption of measures deemed necessary to optimise the use of the asset "with a view to its destination or allocation" -, on the other hand, the judicial authority, in application of Article 11 (2)(b), expresses "an assessment [...] on the methods of allocation within the competence of the ANBSC". As observed by N. Gullo, *Emergenza criminale e diritto amministrativo*, cit. at 20, p. 568, this means 'entering into the context of evaluations that are a primary manifestation of administrative discretion concerning the pursuit of public interests, an unquestionable prerogative of the public administration'. This would constitute a generalisation provided for by the Anti-Mafia Code, which would be reprehensible from a constitutional point of view precisely because it would undermine the principle of separation of powers of the State. For a commentary on Article 110 of the Anti-Mafia Code see A. Cisterna, in G. Spangher & A. Marandola (eds.), *Commentario Breve al Codice Antimafia e alle altre procedure di prevenzione* (2019), 422-427.

[78] In 2021, in the Report on the Analysis of the Procedures for the Management of Seized and Confiscated Assets, cit. at 56, p. 302.

precisely on the subject of real estate, the Anti-Mafia Code itself, despite a detailed regulation on the subject, makes no provision for the rehabilitation of assets. More recently, these assessments have been confirmed in the 2021 Annual Report of the Anbsc[79]. For this specific aspect, as well as for other critical issues concerning the matter - e.g. insufficient technical-administrative capacity of public administrations, quality of confiscated assets or technical-urban peculiarities such as, for instance, illegal constructions and, finally, the impact of the mafia presence in the territory[80] — attention has also been paid from a de iure condendo perspective, analysing critical issues and proposing revisions to the relevant legislation. It would be up to the Parliament of the 19th legislature, which has just begun, to reconsider these needs[81].

A further critical aspect is given by the insufficient implementation of the rule of the Anti-Mafia Code[82] that imposes on local authorities the obligation[83] to form a list of the confiscated assets that have been transferred to them, to be updated monthly; this list must be published on the institutional website of the same recipient authorities, and must contain specific data concerning: "the consistency, destination and use of the assets as well as, in the case of

In the same report, there is a focus on public financial support and the criticality of relations with the banking system (p. 120-138).
An entire paragraph is also dedicated (p. 139-155) to ordinary, national and regional resources, to the financial instruments of Law No. 208 of 28 December 2015, (Article 1, paragraphs 195-198), to European funds and cohesion policies, and, finally, to the National Recovery and Resilience Plan (NRRP). This issue is also addressed in the Vademecum annexed to the Report (p. 320, 339), produced by Prof. Stefania Pellegrini of the Alma Mater University of Bologna.

[79] Submitted in August 2022 (available on the website benisequestraticonfiscati.it), cit. p. 35. Among the causes of criticality is the insufficiency of "financial resources for the repurposing of assets".

[80] *Ibidem*.

[81] The Anti-Mafia Committee itself, at several points in its detailed Report, cited above, proposes hypotheses for regulatory revision (e.g., p. 157). We can also find such activity in the work carried out by the ANBSC, which in its Report for the year 2021, cit. at 33, p. 45-47, also refers to those actions that have been reflected in the most recent regulatory interventions.

[82] Art. 48 (3).

[83] The provision expressly refers to Article 46 of Legislative Decree No. 33 of 14 March 2013. Failure to publish the list entails managerial responsibility.

assignment to third parties, the identification data of the concession holder and the details, object and duration of the contract of concession". As recently pointed out in detailed research on the relationship between confiscated goods and transparency, the data show a discouraging lack of attention on the part of territorial authorities[84], with obvious repercussions on access to information.

Generally, the question arises as to the extent to which the ideal, if not ideological, profile that inspires legislative activity affects the concreteness of administrative action and of the rules legitimising the exercise of administrative functions themselves; the relationship between the choices made and the constitutional principles of reference must therefore be considered.

First of all, two spheres of applications must here be considered and kept distinct within the regulation of confiscated assets: the allocation (in general and in particular for social purposes) and the (alternative measure of) sale.

With respect to the former, it is not a mere speculative exercise to respond to requests for clarification as to the possibility of classifying the confiscated asset as a non-available asset and, as provided for by the law, adopting the consequent measures, including for example the assignment of the asset "on the basis of a specific agreement" (as provided for by the Anti-Mafia Code)[85]. Of particular relevance for our purposes is the impact from the point of view of

[84] In summary, 63.5 % of municipalities do not publish the list, as noted in an important work of monitoring and critical interpretation of the data, in *Libera. Associazioni, nomi e numeri contro le mafie* (authors R.C. Falcone, T. Giannone, G. Illustrazione, L. Mennella), Fondazione Gruppo Abele (L. Ferrante), Department of culture, politics and society of the University of Turin (V. Martone), Rimandati. *Secondo Report Nazionale sullo stato della trasparenza dei Beni confiscati nelle amministrazioni locali* (2022), 14 (https://www.confiscatibene.it/rimandati_2022).
In numerical terms, out of 1073 municipalities monitored, 392 have published this list. But even these, to a large extent, have done so incompletely, failing to comply with the requirements of the Anti-Mafia Code. The same can be said of the other monitored entities (provinces, metropolitan cities and regions).
For an in-depth study of the subject, see U. Di Maggio, G. Notarstefano, G. Ragusa, *Re-cognising Confiscated Assets*, in R. Ingrassia (ed.), *Economy, criminal organisations and corruption* (2018), 157-174.
[85] Art. 48 (3)(c).

administrative law and the relationship with certain traditional classifications.

The question, which recurs frequently in the scholarly debate, is whether and in what way the asserted specialty of the anti-mafia legal framework (deriving from the axiom of emergency)[86] justifies some 'twistings' and the consequences these entail in the relationship between different institutions. This is also because one must not shy away from evaluating, on a theoretical level, the extensibility of regulations without a prior clarification of the reference criteria. One must ponder whether the aforementioned argument of the mafia criminal emergency is sufficient to justify some dogmatic impositions and, in any case, whether a greater attention by legislators is not desirable, in order to better respond to the needs of balancing the constitutionally protected interests and so as to avoid uneven clustering of measures, which also have an impact on rights and on the distribution of powers within the State[87].

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[86] With respect to this particular 'emergency' aspect, to further argue what has been elaborated above in § 2, it is worth emphasising certain reflections proposed by administrative and criminal law doctrine. Here, we shall report only two significant points of view. The first reference is to N. Gullo, *Emergenza criminale e diritto amministrativo*, cit. at 20, p. 550-553, who after broad arguments of general scope and their more specific repercussions on "antimafia law" summarises in the expression "administrative law concerning the criminal emergency and the administration of confiscated goods" a process of maturation and "transformation of administrative law in parallel with the expansion of economic criminal law" (p. 547-548). From a criminal law perspective see V. Militello, *La "lotta" alla criminalità organizzata*, 2 Rivista Italiana di Diritto e Procedura Penale 779 (1 June 2020). The author - in a wide-ranging work that also describes the anti-mafia legal framework 'undergoing the DNA test represented by the criminal law of the enemy' (791 ff.) - dwells critically on the feature of the emergency, which is in reality stabilised, reconstructing its regulatory references with an approach that is also historically based. It is interesting to observe how the frequent use of emergency decrees (p. 780, nt. 12) is a first eloquent indicator (p. 784).

[87] The considerations developed in the critical conclusions of the wide-ranging and articulate work by N. Gullo, *Emergenza criminale e diritto amministrativo*, cit. at 20, 571, are relevant in this sense. The author points out how the experimentation of 'legal models' is sometimes marred by 'normative approximation, technical legislative superficiality' with repercussions on 'administrative action'. Regarding the contribution of scholars, in particular administrative law scholars, the author calls for a necessary in-depth study of these issues, also in support of the *de iure condendo*

One of the issues that has long been the subject of in-depth discussion concerns the rights that the legal system recognises to the person in charge of seizure and confiscation. Legal theory dwells on such rights, establishing a relationship between criminal law and procedure, and administrative law[88].

Prior to analysing the allocation of confiscated real estate for social purposes, we must mention a different, alternative option, the alienation of assets, in order to clarify its prerequisites. These must also be considered because of their relevance in terms of administrative law (which intersects with civil law), and of the consequences for the legal nature of confiscated assets. Again, we find ourselves, *mutatis mutandis*, within the same loop - criminal emergency, economic circuit and illicitly acquired assets, restoration of legality and restitution, ultimately, directly to the public.

The body in charge, the ANBSC, is vested with a discretionary power differently delimited in time, with not only formal but also substantial effects that are not to be underestimated. The legal system provides for the exercise of the power of alienation of property only by the State and in respect of specific conditions, among which the most significant one is avoiding that the property may, in the future, be directly or indirectly attributed to the person in charge of the procedure, but also to recipients of legal measures that link them to

perspective. The need to develop such specific support on a scientific level equally takes into account the contributions of criminal law and private law scholars.

[88] On this point, please refer to: M. Mazzamuto, *Gestione e destinazione*, cit. at 38, § 5.1 on seizure and non-definitive confiscation § 5.3; M. Mazzamuto, *L'Agenzia nazionale*, cit. at 77, 53. For a critique on the complexity of the confiscation system see A. Macchia, *Le diverse forme di confisca: personaggi (ancora) in cerca d'autore*, 7-8 Italian Supreme Court – Criminal Section 2719 (2016). See also G. Torelli, *I beni confiscati alla criminalità organizzata,* cit. at 19, §1, which critically investigates the legal arrangements of seizure and confiscation under the Anti-Mafia Code in their relationship with the sentences of criminal trials, considering the jurisprudential evolution on the matter.

On this point, from a *de iure condendo* perspective, see the Parliamentary Anti-Mafia Committee, *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, 260, intervening on the issue of different classifications of danger - citing the recent Constitutional Court judgment of 24 January 2019, no. 24, with case note by C. Forte, *La Consulta espunge dal sistema le misure di prevenzione nei confronti dei soggetti "abitualmente dediti a traffici delittuosi"*, ilpenalista.it (March 28th 2019).

mafia crimes; it must be said, though, that the instruments currently foreseen do not appear suitable to effectively avoid this occurrence[89].

A further limitation is the inalienability of the asset in the following five years[90].

As a last resort, an ex-post intervention is envisaged, as the Anti-Mafia Code provides for a dispensation from the assignment and destination order in the event that the asset should be returned "to the availability or under the control of the person subject to the confiscation order" through a third party (where legislators have recently provided for the specific competence of the Agenzia del demanio, the State Property Agency redefining an important new distribution of the management function)[91].

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[89] On this subject, see the critical remarks of the Parliamentary Anti-Mafia Committee in its *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati,* cit. at 56, 41, according to which "the anti-mafia certification does not appear sufficient, as it would have been preferable to provide for more thorough asset investigations on potential purchasers, also to verify the lawfulness of the funds used for the purchase".

[90] Pursuant to Article 48 (5) of the Anti-Mafia Code.

[91] Article 48 (15) of the Anti-Mafia Code. More recently, legislators, through Article 60-bis (1)© of Law Decree No. 77 of 31 May 2021, converted with amendments by Law No. 108 of 29 July 2021, established that in the event of revocation of the destination, the ANSBC will take possession of the asset, evaluating the possibility of its subsequent destination. In the event of a negative outcome, the asset will be kept as State property. The relevant management responsibilities will fall to the *Agenzia del demanio* (Italian Public Property Agency). The relevant paragraphs of the mentioned Article 48 are 15-*quater* and 15-*quinquies* - introduced, respectively, by Articles 36 (1)(g) of Law Decree no. 113/2018 and 60-*bis* (1) of the abovementioned Law Decree no. 77/2021. For a recent reflection on the 'historical transitions' induced over time by the 'political will' to reshape the relationship between ANSBC and *Agenzia del demanio* (Italian Public Property Agency) in terms of ordinary management of confiscated property, see N. Gullo, *Il recupero dei beni confiscati*, cit. at 26, 80-81. The author dwells on the role that would be assumed by the Agenzia del demanio, which, in light of the current regulations, would be responsible for functions such as the adoption of measures to recover and rehabilitate the confiscated assets themselves - including also "their urban regularisation" (as known, a high impact critical point) -, and then, according to the current regulations, the allocation to local authorities and to the various social actors who are potential recipients under the Anti-Mafia Code.

These conditions fulfil a very specific requirement, which also, *a contrario*, includes the symbolic aspect, since every possible care must be taken to prevent goods from re-entering the illegal economic circuit.

The field of observation must, however, be expanded, since the sale of confiscated real estate to private parties would be applicable at the administrative level once various other avenues have been unsuccessfully pursued, such as: the retention of the asset by the State or local and territorial authorities, the transfer from the ANBSC, the concession to a series of subjects for different purposes, essentially social, but also for profit[92] whose proceeds would be allocated to social purposes or to the maintenance of assets whose management has the same purposes. The balance of interests chosen by legislators also entails the sale, for example, in the event that this leads to 'a greater utility for the public interest or if [...] it is aimed at compensating the victims of mafia-related crimes'[93].

4. Legal nature of confiscated assets allocated to social purposes and theoretical principles of public assets: general framework and critical reflections

The phrase 'property confiscated from organised crime'[94] refers to those assets that have already 'passed' the seizure procedure - inspired by the logic of safekeeping, preservation and, where possible, increased profitability[95] - and now enter the confiscation phase, heading towards the reintegration of the asset into the legal circuit. Both periods, seizure and confiscation, fall within the broader judicial

[92] If they could not be assigned through procedures open to public scrutiny.

[93] The above is provided for in Article 48 of the Anti-Mafia Code. On this point, see the ANBSC *Activity Reports for the year 2020* (*Relazioni dell'ANBSC sull'attività svolta dell'Anno 2020)*, cit. at 20, 10 (which mentions the impact on the matter of Law Decree no. 113/2018 on the Anti-Mafia Code with particular reference to the sale) and for the year 2017.

[94] First used in Law no. 646 of 13 September 1982 (the so-called Rognoni-La Torre Law).

[95] The period of seizure, pursuant to Art. 24 (2) of the Anti-mafia Code, lasts one year and six months from the date of the court-appointed administrator's entry into possession, barring extensions of six months for no more than two times. Concerning the logic that inspires the regulation of preventive seizure, see, among others, P. Florio, G. Bosco, L. D'Amore, *Amministratore giudiziario*, cit. at 22, 55-73.

phase, and after the definitive confiscation sentence, flow into the so-called administrative phase[96], where the task of administering and managing the assets is entrusted to the ANBSC, which also becomes the subject holding the power of allocation.

One of the main points of attention is the legal nature[97] of the assets confiscated from organised crime, which, under Article 48 of the Anti-Mafia Code, may be movable, immovable or corporate[98]. For our

[96] A combined reading of Art. 110 (2)(d) and Art. 44 (1) of the Anti-Mafia Code reveals that this task and this role are entrusted to the ANBSC as of the moment the confiscation decree is issued by the court of appeal. For the sake of completeness, we must say that within the judicial phase one can distinguish three sub-phases: the first, from the seizure to the (possible) first-degree confiscation; the second, from the first-degree confiscation to the (possible) second-degree confiscation; the third, from the second-degree confiscation to the (possible) definitive confiscation which is issued with a sentence by the Court of Cassation. For some contributions on seizure and confiscation proceedings, see supra §1. The competent subjects are different depending on the specific stage of the procedure. In the judicial phase, starting at the time of issuance of the decree of seizure by the Court of preventive measures, it is up to the court-appointed administrator to dynamically preserve the seized assets and, where possible, to increase their profitability: in other words, while the National Agency performs a role of assistance up to the second degree confiscation, the court-appointed administrator is responsible for the administration of the assets and their management "on behalf of those responsible"; this management performs a function of conservation and restitution in favour of those who will emerge as the legitimate holders of the disputed right at the conclusion of the proceedings. In particular, pursuant to Article 110(2)(f) of the Anti-Mafia Code, the ANBSC may adopt initiatives and measures necessary for the timely allocation and destination of the confiscated assets. Concerning the administrative phase, see - although the work predates the establishment of the ANSBC and the entry into force of the 2011 Anti-Mafia Code - N. Gullo, *Il procedimento amministrativo di destinazione dei beni confiscati alla mafia: aspetti problematici della normativa vigente e prospettive di riforma*, 126 Foro it. 72-83 (2003).

[97] Concerning the current debate on the legal nature of confiscated property see F. Manganaro, *Le procedure per il recupero sociale dei beni confiscati alla criminalità organizzata*, in N. Gullo & M. Immordino (eds.), *Diritto amministrativo e misure di prevenzione della criminalità organizzata*, cit. at 19, 85. On the same topic see also N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 111, who highlights the failure of legislators to intervene on the specific issue in the 2011 Anti-Mafia Code, despite the debate generated in legal theory in the previous years.

[98] To get an idea of the number and types of assets referred to, see the recent semi-annual Government Report to Parliament on seized or confiscated assets (Consistence, destination and use of seized or confiscated assets - Status of seizure or

purposes, we are interested in observing, in particular, whether and where the public law nature of the assets emerges, especially as regards immovable property; subsequently, we will focus on whether they are part of the non-available assets of the local authority.

In the Italian legal system, as is well known, public assets[99] are 'traditionally' divided into three categories (state property, non-available property and available property) and, depending on the category, the legal status differs more or less significantly from that of private property, not only in terms of use, but also in terms of protection and circulation. In relation to use, moreover, public assets are traditionally divided into: assets for collective use, assets intended for use by one or more administrations, assets owned privately by administrations[100].

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confiscation proceedings), December 2021, 22 and ff., available on the official website of the Ministry of Justice.

[99] Traditional public law theory defines public goods as a "descriptive category covering multifarious and articulated normative cases whose common feature is that they are subject to a different regime compared to common law". So reads M. Arsì, *I beni pubblici*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo speciale. Tomo II* (2003), 1513 ff. Let us briefly recall some references to the US literature on the subject - in particular with reference to the definition of public goods as goods "*...which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good, so that simultaneously for each and every with individual and each collective consumptive good*", P.A. Samuelson, *The Pure Theory of Public Expenditure,* 36 M.I.T. Review of Economics and Statistics (1954), 387-389. See also: L. Johansen, *The theory of public goods: misplaced emphasis?*, 7 Journal of Public Economics 147–152 (1977); A. Sandmo, *Public goods*, in J. Eatwell, M. Milgate, P. Newman, (eds.) *Allocation, Information and Markets* (1989), 254 ff.

[100] On the subject see G. della Cananea, *I beni*, in S. Cassese (ed.), *Istituzioni di diritto amministrativo* (2012), 233 ff.; A. Vesto, *I beni. Dall'appartenenza egoistica alla fruizione solidale* (2014), 126-12.

It seems useful to recall what has been affirmed by the civil section of the Court of Cassation in joint session, 16 February 2011, no. 3813, whereby "there are 'goods that, regardless of a prior identification by the legislator, due to their intrinsic nature or purpose prove to be functional to the pursuit and fulfilment of the interests of a community, on the basis of a full interpretation of the entire regulatory system". In legal theory, it has been observed that the legal status of public assets must be distinguished according to whether they are 'reserved' assets or assets for public use: reserved assets are those identified by law for their natural characteristics and as such

The analogies and differences between state property and patrimonial property[101] are useful here, and may be helpful in understanding the most specific subject of this work. State assets[102] are inalienable, indefeasible, and cannot be expropriated, regardless of whether they are part of the so-called necessary[103] (Article 822 (1) of the Civil Code) or accidental[104] (Article 822 (2) of the Civil Code) state property. Therefore, such assets cannot be the subject of rights in favour of third parties and therefore of legal transactions under private

reserved for public ownership; assets for public use are those of the public administration intended for a public function or service (see V. Cerulli Irelli, *I beni pubblici nel codice civile: una classificazione in via di superamento*, 20 Economia Pubbl. (1990), 523-527). Authoritative doctrine holds that 'reserved' assets are those which cannot be appropriated by subjects other than public bodies, see S. Cassese, *I beni pubblici: circolazione e tutela* (1969), 123. For a reflection on the evaluation of goods, see A. Ferrari Zumbini, *Valutazione e valorizzazione dei beni pubblici in una prospettiva comparata*, in A. Police, *I beni pubblici: tutela, valorizzazione e gestione* (2008), 635-638.

[101] Similarities and differences to be found as far back as the 1865 Civil Code. The reference is in particular to Article 426, located in Chapter III concerning property in relation to the persons to whom it belongs, Title I concerning the distinction of assets, Book II of assets, ownership and its modifications, of the Royal Decree of 25 June 1865.

[102] In any case, the essence of state property lies precisely in the functional link between the instrumental asset, which must be public property, and the best pursuit of a public purpose. See F. Baldi, *Il demanio culturale e le alienazioni del patrimonio immobiliare pubblico*, 3 Il Mulino – Economia della cultura (2004), 386.

[103] We refer to so-called 'necessary state property' because, by its very nature, such property could not but be: 'the seashore, the beach, the roadsteads and harbours; rivers, streams, lakes and other waters defined as public by the relevant laws; structures intended for national defence' (art. 822 (1) of the Civil Code). To put it more precisely, the necessary state property comes into existence *ex re*, i.e. it comes into existence by reason of the natural state of the assets comprising it.

[104] Accidental state property is the immovable property and the universality of movable property that becomes state-owned only when it comes into the possession of the territorial public bodies: in addition to the nature of the subject holding the property, an administrative act is required. These are: "roads, motorways and railways; airfields; aqueducts; buildings recognised as being of historical, archaeological and artistic interest in accordance with the relevant laws; collections of museums, picture galleries, archives and libraries" (art. 822 (2) of the Civil Code). For a commentary see G. Minunno (updated by D. Parola), *Sub art. 822 of the Civil Code*, in *Commentario al codice civile* (in Leggi d'Italia).

law[105], nor can they be subject to usucaption; they can, however, be the subject of administrative concessions[106].

Non-available patrimonial assets[107], on the other hand, are in principle marketable, as long as they are not removed from public use. The relevant legislation, however, establishes their non-marketability: in this respect, the status of non-available assets is similar to that of state property[108].

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[105] Except in the manner and within the limits established by special laws. The administrative authority therefore has the task of protecting such assets, including by the authoritative legal means of coercion under public law. State ownership, in short, presupposes that the asset is among those expressly provided for by law, that it belongs to the State or public bodies (including territorial ones), that it is intended for a public purpose. Among the works on this subject, see: M. Olivi, *Beni demaniali ad uso collettivo: conferimento di funzioni e privatizzazione* (2005); M. Renna, *I beni pubblici*, in F. Fracchia (ed.), *Manuale di diritto pubblico* (2014), 188-197.

[106] In the relevant laws concerning state assets, "where the possibility for the administration to create rights in favour of third parties over the assets is provided for, it is generally established that this takes place through the instrument of the administrative provision of concession (e.g. concessions of beaches and lidos, water concessions, port concessions, or airport concessions)", M. Renna, *I beni pubblici*, cit. at 105, 191. Concessions on state assets may determine, depending on the case, the attribution of real rights or rights similar to personal rights of use. See G.F. Nicodemo, *Concessione a favore di terzi: illegittimo l'affidamento di beni pubblici senza gara*. Note to Council of State, 5 Giur. it. 2 (2017).

[107] On the topic, see M. Clarich, *Manuale di diritto amministrativo* (2019), 420-422. For a contribution on non-available assets and the impossibility of identifying 'a common element from which to infer the homogeneity of the category', see M. Dugato, *Il regime dei beni pubblici: dall'appartenenza al fine* 29-30 (2008).

[108] Furthermore, the transition to the regime of patrimonial assets occurs when, due to natural phenomena or technical developments, or, in any case, due to historical events, state assets lose the characteristics that made them intrinsically such, without this depending on the will of the public administration. As a matter of fact, it is not undisputed either in legal theory or in jurisprudence whether the so-called tacit removal from state ownership could arise: as regards removal from state ownership pursuant to Article 829 of the Italian Civil Code, the transfer of property from public domain to state property must certainly result from a declaration act by the administrative authority. To this effect: D. Sorace, *Cartolarizzazione e regime dei beni pubblici*, Aedon § 5 (2003). Both legal doctrine and jurisprudence have identified mandatory criteria for the "tacit removal from state ownership" of assets, namely: "unequivocal and conclusive acts, incompatible with the will of the public authority of preserving the destination of the asset for public use"; N. Centofanti, *I beni pubblici. Tutela amministrativa e giurisdizionale* (2007), 182. It should also be borne in mind that,

Gradually delving into the merits, it may be noted that case law has sometimes affirmed that confiscated property belongs to the public domain[109]. This statement, albeit concise and therefore not inclusive of any further analysis leading to different classifications[110], seems useful,

unlike state property, non-available patrimony assets may belong not only to territorial entities but to any public body and may be movable and immovable assets. For a collection of legal directives on the subject of 'state property and public assets' refer to *Demanio e patrimonio pubblico. Principi generali*, in *Rassegna di giurisprudenza 2009-2019* (2020).

[109] In administrative case law, see, most recently, Council of State, sect. III, 10 April 2019, no. 2364; 28 September 2018, no. 5569.

[110] Even the traditional classification of assets for accounting purposes, derived from Royal Decree no. 827 of 23 May 1924, is based on the civil law distinction between public property and patrimonial property. It has been remarked by A. Crismani, *La contabilità dei beni pubblici*, in A. Police, *I beni pubblici: tutela, valorizzazione e gestione*, cit. at 100, 611-612, that public accounting terminology was aligning itself (or has by now aligned itself) with that of business accounting: the classification of assets as produced and non-produced non-financial assets (ex annex 1, decree of the Ministry of Economy and Finance of 18 April 2002) expresses an economic logic for the representation of assets, which differs from the logic arising from legal-administrative requirements on which the categories hitherto reported in the general account were based. In fact, Article 15 of the same Royal Decree stipulates that public assets (i.e. owned by the State as if privately) are to be shown in special accounting records, representing the changes in their amount and value. In turn, these assets are divided into available and unavailable assets and, again, into movable and immovable assets. The latter can be found in various ways in both the financial and property records that are kept by each public administration. And it is precisely in the property records that their amounts and value 'should' be identified. In this regard, pursuant to Article 36 (3) of the public accounting and finance law, Law No. 196 of 31 December 2009, the General Asset Account is the accounting document, prepared by the Statal Department of the General Accounting Office, that annually discloses the State's asset situation and the demonstration of the various points of concordance between the balance sheet and asset accounts. To be able to enter an asset in the balance sheet, it is necessary that it be classified as a 'public asset' beforehand. This is where the notion of public assets and their division into the three traditional categories comes into play. With regard to state property, for example - although not relevant to the more specific subject we intend to discuss here - Legislative Decree no. 279 of 7 August 1997 (setting forth the identification of the basic provisional units of the State budget) provides that state property, without prejudice to its legal nature and the constraints to which it is subject under the laws in force, is evaluated on the basis of economic criteria and entered in the General State Property Account. Article 14 of Legislative Decree no. 279 of 1997 introduces a

since it provides a straightforward description that enables one to approach the complex subject of confiscated property and its legal nature. On the other hand, available patrimonial assets are distinguished from both state-owned and non-available assets: from the former, in that public ownership is not required; from the latter, because public use is not required. They are also characterised by a regime that is (almost) entirely governed by civil law, except in the case of asset disposal, which must take place under public law, i.e., by public auction or public sale[111].

Specifically, in the procedure for the allocation of confiscated assets, within 90 days of receipt of the notification of the final confiscation order[112], and after carrying out an estimate of the value of the assets – the ANSBC is tasked with arranging for the adoption of the measure of allocation, by resolution of the Board of Directors, (Article 47 of the Anti-Mafia Code). In doing so, the ANSBC enjoys broad discretionary powers with regard to the destination to be conferred on the property[113]: in Article 48 (3) of the Anti-Mafia Code[114], legislators expressly provide - after an evaluation in view of a 'virtuous use'[115] of

new classification with the aim of identifying assets susceptible to economic exploitation. However, this is not a new classification replacing the previous one, but additional to the traditional distinction into 'categories' of public assets. On this point, see A. Crismani, *La contabilità dei beni pubblici*, cit. here, 586 ff.

[111] On this subject, see M. Renna, *I beni pubblici*, cit. at 105, 188-189.

[112] Extendable by a further ninety days in the case of particularly complex operations.

[113] On this point N. Gullo, *Il procedimento amministrativo*, cit. at 89, 76, observes that the State property agent could deviate from the proposal of the competent territorial office by accepting the possible indications of the mayor or the prefect, or decide to transfer the property to the municipality even in departure from the opinion expressed by the mayor. The reference is to the legislation in force before the entry into force of the Anti-Mafia Code, under Law no. 575/1965. More recently, see again N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 74.

[114] Already Article 45(1) of the Anti-Mafia Code provides that "as a result of the final preventive confiscation, the goods and properties are acquired by the State free of charges and burdens [...]".

[115] Constitutional Court, 15 February 2012, no. 34. On the effective and efficient use of confiscated good, see also *Strategia Nazionale per la valorizzazione dei beni confiscati attraverso le politiche di coesione* (February 2018), 20 ff., available at this webpage: benisequestraticonfiscati.it, created by ANBSC in cooperation with the Territorial Cohesion Agency and the Ministry of Economy and Finance - State General

the confiscated assets - the possibility of maintaining such property as State property for purposes of justice and public order, or to transfer it for institutional or social purposes 'to the non-available patrimony' of the municipality (or province, metropolitan city[116], region) where the property is located.

On closer inspection, even before the adoption of the allocation measure, Article 47 (2) of the Anti-Mafia Code, concerning the protection of confiscated assets refers to the second paragraph of Article 823 of the Civil Code, which entrusts the administrative authority with the protection of property belonging to the public domain and, according to a now consolidated legal direction[117], to non-available assets. According to one hermeneutic position[118], this regulatory provision would not suffice to entitle the administration to exercise the so-called executive self-protection, since it is a mere reference to the codified provisions, lacking the necessary requisites of the principle of legality[119].

As observed by legal theory[120], the inclusion of real estate confiscated from mafias in the non-available or available assets of the local authority does not always originate from a discretionary assessment of the public administration. In fact, the considerations of the judge must be taken into account when pronouncing the confiscation order. These are capable of affecting the very legal nature of such assets and the ANBSC's acts of allocation. In particular, the reference is to the application of the preventive measures of seizure and confiscation - governed respectively by Articles 20 and 24 of the

Accounting Department, with favourable opinion of the State-Regions Conference of 19 April 2018.

116 N. Gullo, *Il recupero dei beni confiscati*, cit. at 26, 87, is favourable to including metropolitan cities, also in view of the 'more relevant operational dimension' that they have come to assume over time.

117 More recently, see ruling no. 596 of the Council of State, 5th section, 24 January 2019.

118 M. Ragusa, *Dubbi sulla pretesa natura pubblica dei beni oggetto di confisca di prevenzione*, in M. Immordino & N. Gullo, (eds.), *Diritto amministrativo e misure di prevenzione della criminalità organizzata*, cit. at 19, 71-73.

119 Among the many works on this subject, see F. Merusi, *La legalità amministrativa. Altri sentieri interrotti*, Bologna, 2012; F. Sorrentino, *Le fonti del diritto amministrativo*, in G. Santaniello (dir.), *Trattato di diritto amministrativo* (2004), 262-263.

120 See G. Torelli, *I beni confiscati alla criminalità organizzata*, cit. at 19, 205-247.

Anti-Mafia Code.[121] As held by the case law of the Italian Court of Cassation even prior to the entry into force of the Anti-Mafia Code[122], seizure is aimed at temporarily removing the assets from the control of the addressee of the court order (or those who hold them on his behalf), while confiscation, which is subsequent to seizure, "targets entire patrimonial estates that can be traced, on the basis of evidence, to a presumed illicit origin"[123].

As noted above in greater detail[124], the same Article 48(3)(a) establishes, in the presence of victims of mafia-type crimes and for compensation purposes, the possibility of selling the confiscated property[125], in priority over other possible uses. This provision is

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[121] For an overview of the preventive seizure and management of seized assets, see *Relazione semestrale al Parlamento sui beni sequestrati o confiscati*, December 2019, 6-12, a report issued by the Ministry of Justice – Department of Justice Affairs. Although both are independent of the final ascertainment of the offender's guilt (in this sense, see Constitutional Court, 8 October 1996, no. 335), seizure and confiscation are two different but closely related instruments. While seizure is a measure of a provisional and precautionary nature issued by the Court without prior hearing of the other party, and aimed at temporarily removing the assets from the addressee of the measure (or those who hold them on his behalf), the anti-mafia confiscation is a measure of prevention subsequent to the seizure and "targets entire patrimonial estates that can be traced, on the basis of evidence, to a presumed illicit origin". On the measures of prevention, fundamental are the studies of G. Fiandaca, *Misure di prevenzione* (substantial profiles), 8 Dig. pen. 108 ff. (1994). Among the most recent works, see F. Menditto, *Le misure di prevenzione personali e patrimoniali* (2019), 490 ff.; A.M. Maugeri, D. Falcinelli, A. Cupi, *Sequestro e confisca* (2017), 24 ff.
For a contribution on the evolution of seizure and confiscation, accompanied by statistical data on their application, covering the period before 2003, see B. Vettori, *Sequestro e confisca dei proventi della criminalità organizzata*, in M. Barbagli (ed.), *Rapporto sulla criminalità in Italia* (2003), 373-398.

[122] Among many examples, see Court of Cassation – Civil Section, 16 January 2007, no. 845.

[123] E. Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo applicativi* (2012), 13. For a reflection on confiscation, see D. Piva, *La proteiforme natura della confisca antimafia dalla dimensione interna a quella sovranazionale*, 1 Diritto penale contemporaneo 201-217 (2013).

[124] *Supra* § 3.

[125] In fact, recourse to sale as an alternative solution to destination was introduced by Law no. 515 of 22 December 1999 concerning the revolving fund for solidarity with the victims of mafia crimes. In the literature, see N. Gullo, *Il procedimento amministrativo*, cit. at 89, 76, and more recently G. Torelli, *I beni confiscati alla criminalità organizzata*, cit. at 19, 216-217.

certainly not helpful in the legal classification of confiscated assets: at a first reading, one might think that legislators, by allowing the circulation of confiscated assets, favour their return within the available assets. However, this does not seem to be the case for at least two reasons. On the one hand, in fact, the transferability of the asset cannot be considered a necessary criterion, since the sale of certain assets of the available patrimony of a local authority can take place only under certain conditions[126]; on the other hand, one cannot help but consider that the primary purpose of the transferability of a confiscated immovable asset is to compensate the victims and their families for the damage caused[127]. It has also been observed that the rationale behind the provision may lie in the intention to guarantee a

[126] This refers to state assets transferred to territorial entities upon request, pursuant to Article 2 (5) of Legislative Decree No. 85 of 28 May 2010 (introducing the so-called *federalismo demaniale*, i.e. state property federalism). These assets - with the exception of property related to airports and cultural property indicated in the context of specific development agreements - become part of the available assets of the region or local authority and can be sold after the involvement of a special services committee aimed at acquiring the necessary authorisations, permissions and approvals for the change in the urban destination of the assets. See the following works: A. M. Colavitti and A. Usai, *Federalismo demaniale e autonomie locali: gli strumenti per regolare i rapporti interistituzionali nel trasferimento dei beni costieri appartenenti al Ministero della difesa*, 2 Aedon (2014); A. Police, *Il federalismo demaniale: valorizzazione nei territori o dismissioni locali?*, 12 Giorn. dir. amm. 1233 ff. (2010). See also the comment to Article 822 of the Civil Code by A. Police and A.L. Tarasco, in A. Jannarelli, F. Macario (eds.), *Della proprietà (Commentario del codice civile)* (2012), 122-124.

[127] Even in Law Decree No. 373, containing the 'Code of anti-mafia laws and preventive measures as well as new provisions on anti-mafia documentation', transmitted by the Government to the Presidency of the Chamber of Deputies on 16 June 2011 (documenti.camera.it/attigoverno/Schedalavori), Article 58 (3)(a), it was stipulated that 'assets are kept in the State's property for purposes of justice, public order and civil protection [...], unless they have to be sold to compensate the victims of mafia crimes'.

'welfare function'[128] for the victims of mafia crimes. And precisely this function would give it the 'character' of public purpose[129].

In view of this regulatory framework, administrative case law[130] has consolidated an orientation according to which the asset acquired as a result of confiscation has now taken on a strictly public nature that does not allow it to be diverted, even temporarily, from its intended use and public purposes. This would determine that the legal regime

[128] The exact phrase 'welfare function' is used by G. Torelli, *I beni confiscati alla criminalità organizzata*, cit. at 19, 217. Likewise, N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 75.

[129] In literature, on the public function character of confiscated property, see N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 112-113 and 116. More recently, G. Torelli held the same opinion in *I beni confiscati*, cit. at 19, 229. M. Ragusa's view differs in *Dubbi sulla pretesa natura pubblica*, cit. at 118, 71 ff.

[130] On this subject, see: Council of State, 3rd section, 10 December 2020, no. 7866; Council of State, 3rd section, 22 October 2020, no. 6387; Council of State, 3rd section, 5 February 2020, no. 926; Council of State, 3rd section, 4 March 2019, no. 1499; Council of State, 3rd section, 19 February 2019, no. 1159; Council of State, 3rd section, 16 June 2016, no. 2682; Council of State, 3rd section, 25 July 2016, no. 3324; Council of State, 3rd section, 5 July 2016, no. 2993; Council of State, 3rd section, 23 June 2014, no. 3169. See also the Control section of the Corte dei conti (Court of Auditors) of the Apulia region, resolution of 26 March 2020, no. 28; Civil cassation, labour section, 11 June 2018, no. 15085.
All the aforementioned rulings are linked by a single common thread: the assimilability of the confiscated property to the regime of non-available assets. The 1st section of the Criminal Court of Cassation, through ruling no. 12317 of 31 March 2015, seems to have paved the way for the orientation then consolidated in administrative case law, stating that "it must be recognised that the legal status of property confiscated under Law no. 575 of 1965 can be assimilated to that of state property or to that of property included in non-available assets". On this subject, see N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 116; G. Torelli, *I beni confiscati*, cit. at 19, 218, according to whom "only confiscation gives a public service imprint to the asset to be sold on a priority basis, with the consequent reclassification in the category of non-available property"; L. D'Amore, *Sub art.* 48, in G. Spangher, A. Marandola (eds.), *Commentario breve al Codice antimafia*, cit. at 77, 280, in which it is stated that "with reference to the legal regime applicable to confiscated assets, given the current regulatory and jurisprudential context, it is possible to affirm that such assets are part of the so-called non-available public property". In the same direction, see also the ANSBC's guidelines *Linee guida per l'amministrazione finalizzata alla destinazione degli immobili sequestrati e confiscati*, 2019, 9.

of the confiscated item is similar to that of assets forming part of the State's non-available property[131].

Therefore, actual facts and constant case law, supported by the legal theory[132], attribute confiscated assets to the non-available assets belonging to the local authority; furthermore, there seems to be no room for their inclusion in the available assets, resulting in a series of consequences that we should specify. While non-available assets (and state property) are subject to a special public law regime, available assets are subject to one of a circulatory and dispositive private law nature[133].

In the case of available assets, on the other hand, the municipality assigns them, acting by private law, by means of a loan for use agreement, or of a lease (or rental) contract.[134]. Public assets are classifiable as available assets, according to case law[135], when it is impossible to exploit administrative concession in order to assign the use of such assets in favour of private individuals. In this case, the public administration can only recur to a loan for use (or lease) agreement.[136] Rather, one might think that - in view of the economic advantage that the third party would enjoy from the 'transfer' of an

[131] It must also be ruled out that a judgment balancing public and private interests is required, since the same has already been carried out by legislators, who have regarded as priority the need to combat organised crime by eliminating from the market an asset of illicit origin, by means of a final forfeiture order, allocating said asset to public interest initiatives. On this, see Council of State, 3rd section, no. 926/2020.

[132] Recalled earlier.

[133] On the regulation of available assets, see: A. Torrente, P. Schlesinger, *Manuale di diritto privato* (2019), 180-183; R. Caterina, *I beni*, in S. Mazzamuto (ed.), *Manuale di diritto privato* (2017), 449; P. Zatti, V. Colussi, *Lineamenti di diritto privato* (2013), 229-230.

[134] On this subject, see for example A. Torrente, P. Schlesinger, *Manuale di diritto privato*, cit. at 133, 180 ff.; F. Gazzoni, *Manuale di diritto privato* (2021), 199 ff.

[135] As stated by the Court of Cassation in Joint Session, 25 March 2016, no. 6019; Court of Cassation 3rd civil section, 10 November 2016, no. 22917; Administrative Tribunal of Lazio-Rome, section II-*bis*, 2 October 2019, no. 11489.

[136] On available assets and their falling under private law, see, among others, S. Vaccari, *Sulla concessione in comodato di beni pubblici a enti del terzo settore*, 2 Dir. amm. 435 (2020).

available asset through a loan for use agreement[137] – it is necessary to comply with the principles of public evidence even in the case of confiscated assets returned to the local authority's available assets. That is, the local administration should choose the bailee (as well as the concession holder) in the light of the general principles of publicity, transparency, impartiality and equal treatment[138]. Only then would the difference between available and non-available assets be mitigated, treating equally the confiscated assets belonging to either category.

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[137] According to S. Vaccari, *Sulla concessione in comodato*, cit. at 136, 444-445, the economic advantage for the beneficiary would consist in the "use 'at no cost' of the asset, with evident and economically appreciable savings - not having to pay the average fee for the acquisition of an analogous asset by turning to the market". And as a result of this definition, the case would fall within the scope of application of Law no. 241/1990, Article 12, from which would derive "the duty of the body granting the concession to carry out a comparative procedure for the selection of the bailee" (p. 444). In this vein, the Corte dei conti, Molise regional control section, opinion n. 1/2015.
Administrative case law (*ex pluribus*, Council of State, A.P., 28 September 1995, no. 95) has brought the concession of public property within the framework provided for by the aforementioned Law no. 241/1990 Article 12. The rationale of the provision is to ensure the transparency of the administrative action, which is to be pursued not only by adequately disclosing to the public the start of the procedure, but also by meeting objective criteria that precede the individual measure. On this point, see G.F. Nicodemo, *Concessione a favore di terzi*, cit. at 106, 7. For an analysis of Article 12, see the comments by F. Giglioni, *Commento all'art. 12*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (2017), 672; D. Vaiano, *Commento all'art. 12*, in A. Bartolini, S. Fantini, G. Ferrari (eds.), *Codice dell'azione amministrativa e delle responsabilità* (2009), 324-326.
For an experience concerning a municipality, see for example the *Guidelines* of the Municipality of Naples, cit., noting that what is provided for therein could well have found a place in a normative source, specifically in a municipal regulation. Article 11 of said *Guidelines* (Executive provision for the assignment of assets - *Disposizione dirigenziale di assegnazione del bene*) establishes, in paragraph 1, that the department responsible for confiscated assets allocates by executive provision the confiscated asset to the person(s) identified by the Selection Committee referred to in Article 9 above, at the end of the public disclosure procedure.
[138] For the general principles of allocation see, among others, M. Clarich, *Manuale di diritto amministrativo* (2019), 431 ff.; M. Cafagno e A. Farì, *I principi e il complesso ruolo dell'amministrazione nella disciplina dei contratti per il perseguimento degli interessi pubblici (artt. 29, 30, 34, 50, 51)*, in M. Clarich (ed.), *Commentario al codice dei contratti pubblici*, cit. at 22, 201 ff.

Even assets confiscated from the mafia, whose public nature is thus evident in the light of the underlying public interest, transcend the traditional allocation of public assets in a strict sense[139], to achieve a social function[140].

This classification would coincide with the innovative framing perspective provided by the Court of Cassation[141], and then consolidated over time, according to which the classic tripartition of public goods must be reinterpreted through constitutional principles. There would be assets that, in light of their innermost nature, are functional to the pursuit and satisfaction of the interests of a community, regardless of prior identification by legislators. Reasoning in terms of possible ownership by the State, the interpretation to be offered does not regard the State as an apparatus, as a public legal person, but rather refers to the State as collective, in view of its exponential status that predisposes it towards the realisation of broader interests encompassing the entire citizenry.

The jurisprudence itself must exhort us to go beyond the three-dimensional type of distinction, and instead push our gaze 'beyond, with regard to function and related interests'. Therefore, one can perceive the need to change the perspective through which we look at

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[139] About which we have previously dwelled.

[140] Consider the arguments of N. Gullo, *Emergenza criminale e diritto amministrativo,* cit. at 20, 557. In his conclusions, he observes how if one wants to continue to refer to the 'trichotomy of the civil code', one must observe how confiscated assets, to be ascribed to the category of patrimonial assets, are characterised "by a form of reinforced protection, against both illicit behaviour and the legal claims of third parties". The reference in this case is to assets at the pre-destination stage. Otherwise, in the subsequent phase, when the ANBSC has proceeded with the choice of destination, the "legal framework" would change, having to return to the "categories of the Civil Code, albeit with the persistence of some exempting profile".

[141] Court of Cassation in joint session, 14 February 2011, no. 3665; Court of Cassation in joint session, 16 February 2011, no. 3811 e 3812; Court of Cassation in joint session, 18 February 2011, no. 3937, 3938 and 3939. On this subject, see G. Fidone, *Proprietà pubblica e beni comuni* (2017), 1-2. For reflections on the topic, see also C.M. Cascione, *Le Sezioni Unite oltre il codice civile. Per un ripensamento della categoria dei beni pubblici*, Giur. It. 12 ff. (2011); E. Pellecchia, *Valori costituzionali e nuova tassonomia dei beni: dal bene pubblico al bene comune*, 1 Foro it. 573 ff. (2012); A. Di Porto, *Res in usu publico e beni comuni. Il nodo della tutela* (2013).

public assets, regarding them no longer purely as patrimonial-proprietary, but as personal and collectivistic[142].

On the other hand, if we accept the traditional approach to public assets, in case confiscated assets are eventually placed within the local authority's available assets, they are "used in a manner that more or less complies with the rules of the Civil Code, without the restrictions that apply" to state property and non-available assets, "in particular with regard to the required identification of the purpose for which the asset is functional"[143]. In the light of these in-depth studies, which also take into account legal theory and case law, we believe that the level of complexity of the matter is even more evident, as the institutions responsible for applying the rules have also expressed - for example, during the hearings at the Parliamentary Anti-Mafia Committee. In view of the framework of principles (on which we have dwelt) and of the overall rationale *taken as reference by the scholars and the judges in their role as interpreters of the law*, it can be assumed that the social function underlies the same legal qualification. Hence the prevalence - not only de facto (which, as we have seen, emerges from the data interpreted by the ANBSC) but also theoretically - of the allocation precisely for social

[142] This is because "there are assets that, regardless of prior identification by legislators, by their intrinsic nature or purpose are functional to the pursuit and satisfaction of the interests of a community, on the basis of a full interpretation of the entire regulatory system" Court of Cassation in joint session – civil section, 16 February 2011, no. 3813. See G. Spoto, *Usi civici e domini collettivi: "un altro modo" di gestire il territorio*, Riv. giur. edil. 9 (2020).

[143] G. Torelli, *I beni confiscati*, cit. at 19, 207. It follows that the provisions of articles 822 and following of the Italian Civil Code are "still relevant to the extent that the administrative bodies have greater or lesser decision-making capacity in the choice of how to use the property (sale, free transfer, lease, rent, rehabilitation)".
As observed by N. Gullo, *La destinazione dei beni confiscati*, cit., 111, "through a survey of the normative data on the matter in question, one must note the absolute impossibility of attributing confiscated assets not only to the categories envisaged by the civil code (state property, non-available property and available property), but also to the more recent dogmatic categories fashioned by public law doctrine in order to overcome the contradictions and inconsistencies of the codified tripartition".
On the categorisation of public assets, see G. della Cananea, *I beni*, cit. at 100, 230-231. According to the author, 'at the centre of the legal framework is not so much the ownership of assets as their use. The pre-eminence of use over belonging is evident in the legal system of the European Union". With reference to the classification of assets, see also M. Dugato, *Il regime dei beni pubblici*, cit. at 100, 17-20.

purposes. The sale of the confiscated assets, on the other hand, has limited application potential, especially with regards to our main area of interest, namely real estate. *De iure condito*, this is what can ultimately be inferred.

5. On the (administrative function of) confiscated assets rehabilitation

The main line of thought hitherto pursued has led us to frame our subject from the point of view of principles, to delve into the legal nature of assets confiscated from organised crime and to identify some underlying critical issues, in particular in the relationship between the regulatory framework in question, with its specific features, and the provisions of administrative law. Reviewing the topics discussed, a concept recurs several times in acts of a political and programmatic nature, in regulatory sources, administrative acts and judicial measures. The concept is the rehabilitation of assets confiscated from organised crime. The use of the term 'rehabilitation' well represents, also symbolically, the role to be played by political institutions, public administrations and private social bodies within the broader system of governance[144].

The term mainly recurs within acts aimed at defining programmes and policies. An example is cohesion policy through European funds. In implementing the 2017 Stability Law[145] explicit reference is made to the term in the "National Strategy for confiscated assets rehabilitation through Cohesion Policy", which, in a context of cooperation between institutions, envisages that the fight against organised crime is realised through the link between confiscation and rehabilitation[146], in consideration of the provisions of the 2015 Economic and Financial Document, approved by the Council of Ministers, which refers to the rehabilitation of the aforementioned assets[147]. This type of act identifies - along with the instruments of

[144] Envisaged in particular by the codes of law.
[145] According to the provisions of Article 1 (611) of Law no. 232 of 11 December 2016.
[146] Reference is to Resolution no. 52 of 25 October 2018, adopted by the Inter-Ministerial Committee for Economic Planning, available at agenziaceosionegov.it.
[147] Approved by the Council of Ministers on 10 April 2015. Reference is in particular to Section III.

aggression against illicit assets - rehabilitation of confiscated assets as an objective, to be pursued through coordinated procedures between the single relevant administrations and the ANBSC. These procedures are aimed at the planning of interventions, monitoring and analysis of the results achieved, thus involving the exercise of specific administrative functions.

Similarly, Article 1 (194) of the 2016 Stability Law[148] states that the rehabilitation of assets is to be achieved through 'specific actions aimed at strengthening and developing skills, including internal skills, necessary for the effective performance of institutional functions'.

The concept of rehabilitation can be found in the Reports prepared by some competent authorities on the subject: thus, the ANBSC dwells on its 'action of administration and allocation of confiscated assets under management', which aims at rehabilitating the 'real estate assets taken away from mafia groups' by devolving them to the community, thus pursuing 'the improvement of social and economic welfare'[149].

The Anti-Mafia Code also mentions rehabilitation, and on specific issues: in Article 41-bis on financial instruments for the management and rehabilitation of seized and confiscated companies; in Article 112 (4)(g), on the subject of changing the intended use of the confiscated asset[150]; more recently[151], with Article 48 (15-quinquies), legislators have established that, in the event of revocation of the intended use of the confiscated asset, and under certain conditions, the State Property Agency (Agenzia del demanio) will take over the management and will have the task of regularising the asset and making it functional again[152].

[148] Law no. 208 of 28 December 2015.

[149] In particular, reference is to the ANBSC's report *Activity Report – Year 2020*, cit., p. 13.

[150] On the fragmentary nature of the 'segment' on recovery and rehabilitation of confiscated assets, as well as on the lack of direction in defining the basic guidelines for public action in this field, see the *Strategia Nazionale*, cit. at 108, 3.

[151] Through Law decree no. 77 of 31 May 2021, converted with amendments by Law no. 108 of 29 July 2021.

[152] And also the subsequent allocation, free of charge, to the persons referred to in paragraph 3 (c) of the same Article.

In addition to State legislation, we also find explicit references to rehabilitation at a regional level. For example, the Apulia Region Law no. 14 of 28 March 2019 '*Testo unico in materia di legalità, regolarità amministrativa e sicurezza*' (subjected to a review by the Constitutional Court), provides for a series of interventions to be carried out to rehabilitate real estate and companies confiscated from organised crime[153]. In such cases, attention must be paid to the limits on the exercise of the legislative function of regions in matters that fall within the competence of the State[154], verifying, in any case, that any legislation supporting the rehabilitation of such assets does not conflict with the constitutional provisions, and that it does not interfere with state regulation or its implementation.

The foregoing attests to the fact that despite the evolution of the concept of 'rehabilitation' over time, which is articulated in numerous and diversified activities, also liable to adaptation in the face of arising needs linked to the relevant territories[155], legislators have not deemed

[153] The law in question is the Apulia Regional Law no. 14/2019.
The Constitutional Court pronounced its ruling in Judgement no. 177 of 30 July 2020. It declared as unfounded the question of the constitutional legitimacy of paragraph 2 of said article, concerning the possibility for the Region to grant itself the power to reward projects that contemplate activities of social reuse of real estate (for the part that is relevant for our purposes), and to do so through "understandings and cooperation agreements with State bodies" and public (as well as private) entities. The Court affirms (consideration in law, point 12.3) that the regional law does not innovate or provide "differently from the State regulations on the further use of real estate and businesses confiscated from the mafia", seeking, on the contrary, to promote the very same values recognised in the State legislation; therefore, no negative impact would be caused "on the regulation or implementation of the rules on the further use of confiscated assets". Rather, what is provided therein constitutes "stimulus and impulse to activities considered - by the State itself - of significant importance".

[154] We have dwelled on such aspects above, see § 2.

[155] These needs emerge on multiple levels of government. These include the aforementioned *Strategia Nazionale*, cit. at 108, 40 ff., and at a regional level, the Campania region's *Piano strategico per i beni confiscati*, Regional Council Resolution no. 110 of 26 March 2019, which intends to strengthen governance in the field of confiscated assets, intervening across several areas, from improving urban quality and safety conditions in cities to helping innocent victims. On the subject, see E. Tedesco, *Conclusioni. Riflessioni su una stagione di policy e prospettive future*, in V. Martone (ed.), *Politiche integrate di sicurezza*, cit. at 33, 176-179.

it necessary to provide a definition. The result is a broad and undefined notion, to which doctrine has also paid attention, albeit in few works[156].

It may be useful to cast a broader gaze on the subject, albeit briefly. In doing so, we can notice a closer attention by legal theory in another fundamental, broad and organic regulatory framework, namely that governing cultural assets. In this context, it seems interesting to recall that legal thought which dwelt on rehabilitation, reflecting on its meaning in terms of the actual exercise of an administrative function of rehabilitation. The issue to which we refer for further study[157], however, seems quite different from that of confiscated goods and, more specifically, of rehabilitation, both in consideration of the 'robust' constitutional references and of the

[156] In legal theory concerning the rehabilitation of confiscated assets, the preeminent work is by N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 103 and 123-130, and R. Di Maria, in R. Di Maria, F. Romeo, (eds.) *I beni confiscati*, cit. at 595, thus in the part where the author, with regard to assets subject to court-imposed administration, finds in the Anti-Mafia Code "some references to (possible) rehabilitation from the economic/management point of view".

[157] The reference is to the regulation of cultural heritage in Legislative Decree No. 42 of 22 January 2004 (the so-called Code of Cultural Heritage and Landscape). Although there are several elements that differentiate it from confiscated goods, a comparison with the regulation on the rehabilitation of cultural heritage may be useful. In particular, their rehabilitation is defined and regulated in Articles 6 and 111 ff. of the Cultural Heritage and Landscape Code. According to Art. 6 (Rehabilitation of cultural heritage), it 'consists of the exercise of functions and the regulation of activities aimed at promoting knowledge of the cultural heritage and ensuring the best conditions of public use and enjoyment of the heritage itself, including by the disabled, in order to promote the development of culture'. The literature on the subject is extensive. See, among others, M. Dugato, *Fruizione e valorizzazione dei beni culturali come servizio pubblico e servizio privato di utilità pubblica*, 2 Aedon (2007); D. Vaiano, *La valorizzazione dei beni culturali* (2011); among L. Casini's works see: *La valorizzazione dei beni culturali*, 3 Riv. trim. dir. pubbl. § 1 (2001) and 10, the most relevant to the subject of our analysis; The rehabilitation of landscapes in 3 Riv. trim. dir. pubbl. 385 ff. (2014); *Valorizzazione del patrimonio culturale pubblico: il prestito e l'esportazione di beni culturali*, 1-2 *Aedon* (2012); *Ereditare il futuro. Dilemmi sul patrimonio culturale* (2016), 108; *Valorizzazione e gestione,* in C. Barbati, M. Cammelli, L. Casini, G. Piperata, G. Sciullo (eds.), *Diritto del patrimonio culturale* (2017), 203; M.C. Cavallaro, *I beni culturali: tra tutela e valorizzazione economica*, 3 Aedon (2018); F.G. Albisinni, *L'affidamento in concessione dei servizi culturali*, 4 Riv. trim. dir. pubbl. 1107-1126 (2020). For a contribution prior to the entry into force of the Anti-Mafia Code but after the Law Decree of 31 March 1998, no. 112, see S. Cassese, *I beni culturali: dalla tutela alla valorizzazione*, 7 Giorn. dir. amm. 673-675 (1998).

decidedly greater attention that the legislator has reserved to the rehabilitation of cultural assets.

This line of argumentation has specific features that could possibly lead to a deeper exploration in this direction in our case as well. However, there is a systematic reason why it cannot be dealt with here. As a matter of fact, in the same way as what has been widely argued, in an innovative sense, on the subject of "regeneration and reuse of public property spaces" - in relation to the hypothesis of characterising the theme in terms of administrative function - it would be necessary to proceed to a reconstruction "starting from the state, regional" - within the limits previously mentioned - "and municipal regulations adopted in recent years, as well as from administrative practice"[158]. Referring, even in our case, to this methodology of analysis would necessarily require a prior theoretical framework through specific references to the dogmatic concept of the administrative function[159]. This pathway of argumentation could not find correspondence in the present contribution, as the necessary strands of study would not be satisfied in an approach, however partial, characterised by the delimitation we have assumed in defining the scope of a work circumscribed to the management and destination of assets confiscated from organised crime. The range of activities, and corresponding regulatory sources and practices, which can be summarised in the concept of rehabilitation, should in fact be traced within a much broader regulatory body than the one we have identified, in particular, from a limited part of the Anti-Mafia Code.

Considering again the rehabilitation of confiscated assets[160], it can be useful to dwell on a few specific aspects that enrich the reference framework in terms of the objectives set out in this work. Therefore, looking at the re-use of such assets with the aim of promoting the values and culture of legality[161], it can be observed how administrative law needs to take into account a regulatory system not limited to the

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158 See E. Chiti, *La rigenerazione di spazi e beni pubblici: una nuova funzione amministrativa?*, in F. Di Lascio & F. Giglioni (eds.), *La rigenerazione di beni e spazi urbani* (2017), 15-16.

159 As we observe in the two contributions referred to: *ibidem* and L. Casini, *La valorizzazione dei beni culturali*, cit. at 157.

160 And this, evidently, also applies to confiscated companies.

161 On this subject, see S. Pellegrini (ed.), *La vita dopo la confisca*, cit. at 58, 25.

forfeiture of assets from criminal property but, as highlighted in legal theory[162] through a series of "indicators applied to the regulation", including the rehabilitation of assets while pursuing institutional or social purposes[163]. Rehabilitation is in fact achieved through a series of administrative actions[164]. However, even in this case, the system reflects a series of critical issues in the exercise of the administrative functions that are associated with it. In the local context, for example, one cannot help but observe how the use of concession related to the management of such goods and properties, in application of the positive element of the Anti-Mafia Code, has determined significant implications on the institutional level, producing actual phenomena of transfer of the exercise of the administrative function to private subjects. In fact, in the administrative procedure for the destination of the confiscated property, the local authority to which the National Agency has allocated the confiscated property, following the expression of interest at the services conference, acquires it as part of its own unavailable assets and thus becomes the manager. This point needs clarification, in the sense that - pursuant to Article 48 (3)(c) of the Anti-Mafia Code[165] - it is possible to distinguish between direct and indirect management: the former is carried out by internal organisational structures of the public administration (i.e. a municipal administration office within a confiscated property); the latter is

[162] N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 124. The reference is to a series of provisions of the Anti-Mafia Code, in particular: the possibility of the use of confiscated property by the National Agency for economic purposes (Art. 48 (3)(b)); the alienability of real estate, both to acquire, as a priority, resources to be allocated to compensate the victims of mafia-type crimes, and to favour the circulation of assets in the market in case of non-allocation (Art. 48 (3)(a) and (5)); the sale of business assets (Art. 48 (8)(b) and (c)); the possibility of assigning real estate to social cooperatives(Art. 48 (3)(c)); the overall regulation of confiscated companies, aimed at preserving the continuation of entrepreneurial activity (Articles 35 and 41).

[163] See the *Relazione sull'analisi delle procedure di gestione dei beni sequestrati e confiscati*, cit. at 56, 317, by the Parliamentary Anti-Mafia Committee.

[164] See N. Gullo, *La destinazione dei beni confiscati*, cit. at 31, 124; G. Torelli, *I beni confiscati*, cit. at 19, 205 ff.

[165] According to which, territorial authorities may administer the property directly or, on the basis of a special agreement, assign it in concession, free of charge. The Parliamentary Anti-Mafia Committee in its recent Report, cit. at 56, 337-338, also expresses itself in terms of direct and indirect management.

implemented by means of a concession in use to third parties by the administration to whose unavailable assets the property belongs. In other words, it is from this rule that it follows that the relationship between the local administration and the private social sector[166] (public-private relationship) can be considered intrinsic and inherent to the activity of rehabilitation of the confiscated property. And it is precisely in such a context that the dichotomous view of the relationship between public and private law frameworks seems to be abandoned in order to embrace a new perspective that considers not only distinct public interests but also private interests, understood as the interests of the general community and of individuals to be able to use such property.

The choice between direct or indirect management is left, on a case-by-case basis, to the local administration to which the asset belongs, and is a discretionary assessment based on the concrete needs of the administration itself and of the territory of reference. It has been observed that, although the administration can choose between two different possibilities, it generally tends to opt for forms of indirect management through third parties, especially from the private social sector, through 'concessions'[167], subject to public procedures, i.e. following comparative evaluation procedures of the projects presented in the public notice. The reference model in the field of indirect management is the measure of concession.

What has been discussed here allows us to return to the critical considerations on which we initially focused when approaching the matter in legal-administrative terms, highlighting the numerous framing and interpretative difficulties that the regulatory framework concerning confiscated property continues to present. The hope, already envisaged, remains that of sensitising legislators to place greater attention on the relationship between administrative functions and traditional legal measures of administrative law, considering, with

[166] On the definition of 'private social sector' see P. Donati, *Pubblico e privato: fine di una alternativa?* (1978). The same author also provided a subsequent contribution in *Privato sociale. Le nuove forme di solidarietà associativa nel welfare societario*, in *Welfare state. Il modello europeo dei diritti sociali* (2005), 101-123.
[167] Pursuant to article 48 (3)(c) of the Anti-Mafia Code.

greater attention, the results that the case law and scholars continue to produce on the subject.

THE AUSTRIAN MODEL OF ADMINISTRATIVE PROCEDURE. ORIGINS, CHARACTERISTICS, DIFFUSION AND THE IMPORTANCE OF THE PERSONAL FACTOR

*Angela Ferrari Zumbini**

Abstract

There is one cross-jurisdictional dialogue in the interwar period to which comparative lawyers should pay more attention: the diffusion of the Austrian general law on Administrative Procedure of 1925, also thanks to its circulation by scholars and judges, including those jurists who migrated after the collapse of the Hapsburg Empire after World War I.

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1. Introduction

There is one cross-jurisdictional dialogue in the interwar period to which comparative lawyers should pay more attention: the diffusion of the Austrian general law on Administrative Procedure of 1925, also thanks to its circulation by scholars and judges, including those jurists who migrated after the collapse of the Hapsburg Empire after World War I.

The Austrian *Allgemeine Verwaltungsverfahrensgesetz*[1] of 1925 dominated the administrative law scene and its dogmatics for at least fifty years in Central Europe. However, despite the centrality of Austrian law, the importance of the AVG (in terms of influence, elaboration of a model, and diffusion) is often underestimated in recent research. The Administrative Procedure Act of 1925 codified principles, institutions, rules and forms that had been elaborated over fifty years of *Verwaltungsgerichtshof* case law. Therefore, before arguing the centrality of the AVG in *Mitteleuropa,* its roots and characteristics need to be recalled.

2. The *Verwaltungsgerichtshof* and its case law

The *Verwaltugsgerichtshof* was established in 1875 by the *Gesetz vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes*. The law entered into force on April 2nd, 1876 and the first judgment was handed down on October 26th, 1876[2].

The Austrian administrative court played a crucial role in the development of general principles of administrative action. When the law establishing the *Verwaltungsgerichtshof* (from now on VwGH) was adopted in 1875, the legislation on administrative matters was antiquated, incomplete and above all, there was no general law on administrative action[3]. The legislator granted the

[1] *Allgemeine Verwaltungsverfahrensgesetz* – AVG (BGBl 274/1925). The original German text (in gothic) is available at www.coceal.it/pdf/Legge%20del%201925%20testo.pdf

[2] K. Lemayer, *Der Begriff des Rechtsschutzes im öffentlichen Recht, (Verwaltungsgerichtsbarkeit); im Zusammenhange der Wandlungen der Staatsauffassung betrachtet; Festschrift aus Anlaß der Feier des 25jährigen Bestandes des Österreichischen Verwaltungsgerichtshofes* (1902); W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich* (1966); T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (1999).

[3] In the first volume collecting the first VwGH judgments (published in 1877), the editor Adam Freiherrn von Budwinski writes in the foreword that at that time there

judge the power to annul administrative acts for "lack in the essential forms of the procedure"[4] but avoided defining or listing these essential forms, leaving this task to the VwGH. Therefore, the court had to define general standards of administrative action to be used as a criterion for assessing the legitimacy of administrative acts in concrete cases. The VwGH elaborated several procedural rights that individuals could exercise against the administrative authorities[5].

In drawing up these standards, the *Verwaltungsgerichtshof* did not limit itself to establishing standards to check the objective legitimacy of administrative action, but also constructed a system of citizens' rights vis a vis public authorities[6].

The principle of due process and its first and fundamental element of the right to be heard are recognised by the judge through reference to natural law. As early as 1884[7], the *right to a hearing* is traced back to the nature of things, thus constituting a right to be protected even in the absence of an express legal provision providing for it. The right to be heard is defined as an unwritten general principle that belongs to natural law.

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was no codification of administrative law, many laws were more than one hundred years old, and the most recent laws contained *lacunae*. Therefore, it was clear that the importance and relevance of the VwGH rulings went beyond the individual case decided, as the rulings defined the rule applicable to concrete cases. Foreword to the "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes. Zusammengestellt auf dessen Veranlassung von Adam Freiherrn von Budwinski, k. k. Hofsekretär*" (1877).

[4] Art. 6 of the *Gesetz vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes.*

[5] On the principles developed by the VwGH see A. Ferrari Zumbini, *Standards of Judicial Review of Administrative Action (1890 – 1910) in the Austro-Hungarian Empire*, in G. della Cananea, S. Mannoni (eds), *Administrative Justice Fin de Siècle. Early Judicial Standards of Administrative Conduct in Europe (1890 – 1910*), (2021), pp. 41-72.

[6] H.R. Klecatsky, *Der Verwaltungsgerichtshof und das Gesetz*, in W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich*, cit. at 2, pp. 46 ff., explicitly states this role of the *Verwaltungsgerichtshof.*

[7] Judgment no 2263 of 24 October 1884, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1884, pp 493-495.

In Tezner's[8] volume on administrative procedure of 1925[9], the expression "*die Natur der Sache*" is used eight times. In particular, he clarifies that "contrary to law is not synonymous with contrary to law. The notion of contrary to law also includes everything that is contrary to the law as it results from case law, even in the absence of an exactly identifiable normative basis. Law is everything that the *Verwaltungsgerichtshof* has affirmed as such, referring to the Nature of Things or general principles"[10].

The control exercised by the VwGH was exclusively formal and was limited in several respects.

In fact, the court could only annul the act and leave it to the administration, any other type of power outside the cassatory power being precluded[11]; the court could not perform any assessment of the facts, having to decide on the basis of the facts as established in the course of the administrative investigations; any kind of investigation on the merits was also precluded, as the court could not even assess the proportionality of the administrative

[8] Professor Friedrich Tezner was the first to construe an organic systematisation of Austrian administrative procedural law based on VwGH case law. In essence, Tezner made a systematic collection, divided by subject matter, of the decisions of the VwGH, on which he then founded a dogmatic reconstruction of the institutes. Tezner was appointed to the VwGH on 1907 and became *Senatspräsident* in 1921, and his systematisation shaped the Austrian law of administrative procedure. The VwGH exercised creative power in some specific cases. Tezner's monumental work, in which he picked out some single concrete decisions and built a number of general principles on them, has been a key element in the development of the general principles of the proceedings.

[9] F. Tezner, *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung, IV. Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis,* 2nd ed. (1925).

[10] F. Tezner, *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung, IV. Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis,* cit. at 9, p. 305.

[11] This situation remained unchanged until 2014, when the 2012 reform came into force, which introduced the administrative courts of first instance, thus implementing a system with two levels of judgement and giving administrative judges further powers than the mere annulment of the act. For a general overview of the 2012 reform, see the handbook edited by J. Fischer, K. Pabel, N. Raschauer, *Handbuch des Verwaltungsgerichtsbarkeit* (2014), especially the chapter by W. Steiner, *Systemüberblick zum Modell 9+2*, pp. 105 ff, and the volume entirely devoted to the courts of first instance edited by M. Holoubek, M. Lang, *Die Verwaltungsgerichtsbarkeit erster Instanz* (2013).

action, or the proper pursuit of public purposes.

Thus, the VwGH could only carry out a formal check, i.e. verify that the administrative procedure had been carried out correctly, in accordance with the law. In spite of these considerable limitations, the VwGH with its case law (and thanks to the systematisation carried out by Tezner) built up a well-developed system for the protection of the rights of private individuals, which allowed for a rather intensive control of administrative action. It could be said that the restrictions imposed on its jurisdiction, which was limited to a formal type of control, caused the VwGH to focus solely on the procedure, thus establishing several fundamental principles that were later codified in the 1925 law.

However, even when the court referred to natural law, it still invoked principles of a formal nature and not those of a substantive nature. For example, in a case of the cancellation of the trade mark that took place almost twenty years after registration and for reasons that did not arise subsequently[12], the VwGH resolved the issue by referring to the nature of things and invoking the general principle of the right to be heard, while making no mention of the (albeit relevant) principle of legitimate expectation. The VwGH elaborated several principles, deduced from the natural law, from which derived numerous procedural rights that individuals could concretely exercise vis-à-vis the administrative authorities.

3. The principles elaborated by the VwGH

The first and most important principle established by Austrian administrative law is the *Parteiengehör*, according to which the person who will be affected by the administrative act must be heard before the act is issued. The principle of participation as set out by the court does not only have a defensive function, but also has a collaborative function as it is necessary for the correct reconstruction of the relevant facts[13].

[12] Judgment no 11996 of 5 October 1898, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1898, pp 999-1000.

[13] For a detailed description of the cases – here only synthetically mentioned – please refer to A. Ferrari Zumbini, *Judicial Review of Administrative Action in the Austro-Hungarian Empire. The Formative Years (1890-1910)*, in 10 IJPL 9 (2018).

The VwGH does not merely affirm the right to be heard[14], but requires that the *Gehör* is always a *rechtlicher Gehör*[15], i.e. that the private individual is guaranteed a series of rights and protections during participation.

First of all, equal treatment of all intervening parties must be ensured during participation[16]. In addition, the invitation to participate in hearings must reach the interested party well in advance in order to effectively enable him/her to participate, and must be drafted in a language that the addressee understands[17].

With respect to the rights that can be exercised, access to the investigative acts must be allowed[18]. Indeed, interested parties must have full knowledge of all documents that the administration uses to establish the facts and circumstances relevant to the adoption of the act[19]. Moreover, private parties must have the right to submit memoranda to comment on and refute the facts and circumstances as they emerge from the documents in the administration's possession[20].

In addition to the right to submit pleadings, the VwGH also establishes the corresponding and fundamental obligation for the administration to take the documents produced by private persons into serious consideration[21].

Participatory rights also have an impact on the effectiveness of acts. According to the VwGH, an act enacted without the involvement of the person concerned cannot produce legal effects vis-à-vis that person[22]. Therefore, the participation of the person

[14] Judgment no 2263 of 24 October 1884, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1884, pp 493-495.
[15] Judgment no 6218(A) of 22 October 1908, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1908, pp 1045-1046.
[16] Judgment no 2452 of 13 March 1885, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1885, pp 164-167.
[17] Judgment no 6837(A) of 26 June 1909, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1909, pp 780-781.
[18] Judgment no 8150 of November 10th, 1894, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1894, pp 979-980.
[19] Judgment no 8686 of May 22nd, 1895, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1895, pp 654-656.
[20] Judgment no 9441 of 14 March 1896, *Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1896, pp 457-458.
[21] Judgment no 3212(F) of 3 January 1905, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1905, pp 3-4.
[22] Judgment no. 3544(A) of 13 May 1905, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1905, pp 562-567.

concerned is an essential prerequisite for the full effectiveness of the act.

Finally, the court affirms the general principle of due process, to which every administrative procedure must conform regardless of the concrete sectoral legislation[23]. Thus, whenever the administration conducts a procedure (*Verfahren*), it must ensure that it is a fair procedure (*Rechtsverfahren*).

As many Authors recognized[24], the Austrian Administrative Procedure Act of 1925 would not have been conceivable without the case law of the VwGH as the AVG simply transposed the principles developed in the fifty years of the Administrative Court into positive law in many respects.

4. The Austrian *Allgemeine Verwaltungsverfahrensgesetz* (AVG) of 1925

The *Allgemeine Verwaltungsverfahrensgesetz* was adopted within a package of five laws, aimed at simplifying and systematising the administrative proceedings[25].

In the same official gazette (*Bundesgesetzblatt* of 14 August 1925), five laws were published on 21 July 1925, which came into force on 1 January 1926: The Law on the Introduction of Administrative Procedure Laws; the General Administrative Procedure Law; the Administrative Criminal Law; the Law on Administrative Execution; the Law on the Simplification of Administrative Laws and Other Measures for the Decongestion of Administrative Authorities.

The Introduction to the Administrative Procedure Laws (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*, EGVG), contrary to what the title might seem, did not identify the general principles of the discipline or any transitional rules. It mainly contained the list of public authorities that were obliged to comply with the laws on administrative procedures, with a specific

[23] Judgment no 11996 of 5 October 1898, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1898, pp 999-1000.

[24] F. Becker, *Das allgemeine Verwaltungsverfahren in Theorie und Gesetzgebung. Eine rechtsvergleichende Untersuchung* (1960) p. 64; W. Antoniolli, *Allgemeines Verwaltungsrecht* (1954) p. 222; R. Herrnritt, *Das Verwaltungsverfahren: Systematische Darstellung auf Grund der Neuen Österreichischen und Ausländischen Gesetzgebung* (1932) p. 10.

[25] An early fundamental commentary on these laws can be found in E. Mannlicher, E. Coreth, *Die Gesetze zur Vereinfachung der Verwaltung* (1926).

indication of the various fields of application for each, according to the various subjects. Among the main areas excluded from the application of procedural laws were tax matters and public employment matters[26].

In any case, even for administrations included in the list, *Privatwirtschaftsverwaltung* was expressly excluded from the scope of application of the laws on administrative procedure.

With a view to an order without loopholes, the law also contained a closing rule. In fact, it set a minimum fine to be applied in cases where a substantive law, in providing for a fine for administrative violations, had omitted to indicate the amount of the fine.

The General Administrative Procedure Act (*Allgemeine Verwaltungsverfahrensgesetz*, AVG) introduced a uniform model of administrative procedure, establishing its general regulation which will be examined in detail in the following paragraphs.

The Administrative Criminal Law (*Verwaltungsstrafgesetz*, VSG) consisted of two parts, one devoted to the substantive profile of administrative criminal law, the other to procedural aspects.

Finally, there followed the Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz*, VVG) and the Act on the Simplification of Administrative Laws and Other Measures for the Decongestion of Administrative Authorities (*Verwaltungsentlastungsgesetz*, VEG), which significantly opened in Article 1 with the abolition of three national holidays, reducing the relevant days to working days

a) Aims, principles and objectives of the AVG

The AVG[27] does not contain an initial listing of general principles of administrative action such as Art. 1 of Italian Law 241/1990[28]. However, it is possible to identify a number of general

[26] Art. 2(5) and (6a) EVGV.

[27] An English translation of the Austrian Act of 21 July 1925 on Administrative Procedure with a parallel alignment with the original German text can be found in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion (1920-1970)* (2023), forthcoming.

[28] The Austrian Act of 21 July 1925 on Administrative Procedure was translated into Italian by Michele La Torre and Giacomo del Carretto and published in 1928 in *Rivista di diritto pubblico*, pp. 278 ff. The translation was reprinted in 1960 in *Rivista trimestrale di diritto pubblico*, pp. 963 ff. Subsequently, the law, as amended by the 1950 novella, was translated again and published in the volume edited by

principles that form the basis on which the entire discipline is built, the objectives that the law aims to achieve, and the essential goals that the law intends to pursue.

The aims pursued by the AVG are explicitly set out in section 37, according to which "The purpose of the investigation procedure is to establish the facts relevant for the conclusion of an administrative matter and to give the parties the opportunity to assert their rights and legal interests"[29]. The purpose is thus twofold, since the intention is to ascertain the material truth (*Grundsatz der materiellen Wahrheit*) but at the same time to enable the parties to protect their rights through procedural participation.

The *Parteiengehör* provided for in Art. 37 AVG certainly constitutes a cardinal principle, around which the construction of the model is hinged. As has emerged from the foregoing analysis, the *Parteiengehör* was recognised and protected by the *Verwaltungsgerichtshof* as early as 1884 in Judgment No. 2263 as a fundamental principle pertaining to the nature of things.

The right to be heard constitutes a fundamental principle that is also clarified and reaffirmed in the various procedural steps, attributing numerous procedural rights to the parties, which will be examined in more detail in para. *c)* below. A second fundamental principle that can be deduced from the entire structure of the law is that of efficiency. Indeed, the AVG indicates the general principles by which the authority must be guided in the conduct of the entire administrative procedure and in all discretionary decisions on how to proceed with the procedure. The principles referred to are those of "expediency, speed, simplicity and cost-saving" (*Zweckmäßigkeit, Raschheit, Einfachheit und Kostenersparnis*)[30], which can be subsumed and brought back to a more general principle of efficiency.

There are various institutions and provisions in the law that can be considered means of implementing the principle of efficiency.

First of all, an administrative authority that receives an application for a matter outside its competence is obliged to

G. Pastori, *La procedura amministrativa* (1964), where, in addition to the AVG, the EGVG and excerpts of the most procedurally relevant provisions of the VSG and VVG have also been translated.

[29] "*Zweck des Ermittlungsverfahrens ist, den für die Erledigung einer Verwaltungssache maßgebenden Sachverhalt festzustellen und den Parteien Gelegenheit zur Geltendmachung ihrer Rechte und rechtlichen Interessen zu geben*".

[30] Art. 39 (2), last sentence, AVG, still in force.

transmit it "without unnecessary delay" to the competent authority (Art. 6(1) AVG). Therefore, it is not possible to simply dismiss an application received by an incompetent administration, but the authority is obliged to identify the office responsible and transmit the documents to it.

A duty of decision is also imposed on the authorities, with a time limit of six months for the issuance of the final decision (Art. 73(1) AVG). In the event of inertia, the party may appeal directly to the competent superior authority (Art. 73(2)), which will also have a time limit of six months to act, starting from the date of the party's request (Art. 73(3)).

Another application of the efficiency principle can be found in Article 18. This article is contained in the section on communication between authorities and interested parties, and contains a number of indications for the authorities.

For example, it requires them to carry out as much of the processing or instructions as possible orally or by telephone, then briefly noting the essential content on a report or other document (Art. 18(1)). In addition, officials must also make use of the occasional presence of the persons concerned in their offices to give communications or take advantage of an official trip to take care of another business (Art. 18(2)).

Finally, Articles 40 to 44 are devoted to the regulation of oral proceedings, which is indicative of a predilection for orality. The oral hearing allows for speedy progress compared to a repeated exchange of documents, and also favours the adoption of solutions shared by the authority and the parties. It also favours the adoption of shared solutions between the authority and the parties, as the latter are not only in the position of approving or refuting the solutions proposed by the administration, but can, in an oral procedure, exchange opinions and points of view in an attempt to arrive at shared solutions.

Obviously, the two fundamental principles of efficiency and protection of the rights of the parties may sometimes conflict. The AVG contains two interesting provisions aimed at reconciling the conflicting requirements underlying the principles of public efficiency and the protection of the private position.

Art. 42(3) provides that "if the person on whose application the proceedings were instituted fails to attend the hearing, it may either be held in his absence or postponed to another date at his expense". Therefore, in order to guarantee the expeditiousness of

the proceedings, the oral hearing may take place in the absence of the party concerned who, although summoned on time, does not appear; or the administration may decide to postpone it but the costs will be borne by the party. As in all preliminary proceedings, this decision is left to the discretion of the authority.

Article 57(1) strikes a balance between the right to be heard and the need for speed and expeditiousness in certain contexts. Certain exceptions are, in fact, established with respect to the general need for a prior procedural investigation before adopting a measure. The cases in which the authority is authorised to omit the procedural investigation, i.e. the participatory phase, are those in which "it is a matter of prescribing monetary payments according to an index established by law, statute or tariff or, in the case of imminent danger, a matter that cannot be postponed". Another general principle that pervades the AVG as a whole is the *Offizialmaxime*, according to which proceedings are commenced, continued, suspended, and concluded at the instigation of the court. For example, the authority may *ex officio* conduct an oral hearing (Art. 39(2); the authority is entitled to assess the preliminary questions arising in the investigation procedure, which would have to be decided as main questions by other administrative authorities or by the courts, according to its own view of the relevant circumstances and to base its decision on this assessment; however, it may also suspend the procedure until the preliminary question has been legally decided if the preliminary question is already the subject of pending proceedings before a competent authority or if such proceedings are pending at the same time (Art. 38); the authority may order the necessary evidence *ex officio*.

With regard to evidence, there is the further principle that the administration is free to decide whether or not a fact is to be regarded as proven (Art. 45 AVG).

As will be seen below, the main objectives pursued by the law as a whole are to standardise the administrative procedure, establishing a uniform model, and to simplify administrative action as much as possible (always respecting the rights of individuals)

b) Individuals as subjects of rights

Compared to previous ministerial instructions in which guidelines were outlined for officials to follow in carrying out

administrative procedures[31], in which the recipients were the objects of administrative activity, the AVG elevates the parties to rights holders.

The rights of individuals vis-à-vis the public authorities, as enumerated by the Administrative Court, were formalised in legislative provisions, thereby recognising individuals as subjects of protectable rights vis-à-vis the authorities also in positive law.

Article 8 contains a definition of persons interested in the proceedings. Persons interested in the proceedings are those who have submitted a request to the authority to obtain a measure and the persons to whom the activity of the administration relates. If these persons are interested in the proceedings "by virtue of a right or a legitimate interest", they are deemed to be parties[32]. The distinction between interested parties (*Beteiligten*) and parties (*Parteien*) dates back to Bernatzik[33], and was also criticised by some authors, such as Herrnritt, who considered it superfluous and confusing[34].

In any case, the definition of parties had been largely elucidated by case law, as Tezner had devoted an entire chapter of his volume to the concept of "parties"[35]. The consideration of individuals as subjects of rights rather than objects of administrative activity represents a Copernican revolution in the entire construction of the administrative procedure. Public power and public interest must balance each other and respect the rights of individuals.

Regardless of the assessment of the necessity to distinguish between interested parties and parties, and the internal consistency

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[31] Instructions of the Ministry of Education of 1876; *Kaiserliche Verordnung, wirksam für alle Kronländer, mit Ausnahme des lombardisch-venetianischen Königreiches und der Militärgränze, wodurch eine Vorschrift für die Vollstreckung der Verfügungen und Erkenntnisse der landesfürstlichen politischen und polizeilichen Behörden erlassen wird*, of 20 April 1854, RGBl 96.

[32] '*Personen, die eine Tätigkeit der Behörde in Anspruch nehmen oder auf die sich die Tätigkeit der Behörde bezieht, sind Beteiligte und, insoweit sie an der Sache vermöge eines Rechtsanspruches oder eines rechtlichen Interesses beteiligt sind, Parteien*' (Art. 8 AVG, still in force).

[33] E. Bernatzik, *Rechtsprechung und materielle Rechtskraft. Verwaltungsrechtliche Studien* (1886), pp. 181 ff.

[34] Herrnritt, R., *Das Verwaltungsverfahren: Systematische Darstellung auf Grund der Neuen Österreichischen und Ausländischen Gesetzgebung* (1932) p. 54, calls it precisely *überflüssig* and *beirrend.*

[35] Chapter XII of Tezner's volume on Administrative Procedure is devoted to the concept of "*Parteien*".

of the AVG in considering this distinction, it should be pointed out that the law attributes numerous important participatory rights only to the parties, which will be examined in the next paragraph.

c) Participation rights

The AVG, like the VwGH in its previous case-law, does not only affirm the *Parteiengehör*, but also establishes a series of rights to be guaranteed to participants.

In essence, all the case law recalled previously was positivised by the 1925 Act.

The administrative court had gradually redefined the right to be heard, increasingly extending the right to be informed to the right to have full knowledge of the facts and findings of the investigation, which was outlined in detail in a 1895 judgement on a Cistercian monastery[36]. In that case, the court had annulled the act of the administration, despite an extensive preliminary investigation phase in which the monks had participated, because the monks had merely been informed of the findings of the experts, whereas the parties must be guaranteed the right to have full knowledge of the facts and documents.

The pre-trial procedure outlined by the AVG is based on the principle of *Parteienöffentlichkeit*, i.e. the publicity of the pre-trial proceedings for the parties. Furthermore, bearing in mind the dual purpose, expressed in Art. 37, of protecting the rights of the parties and ascertaining the truth of the facts, the participation of the parties concerned is structured in such a way as to fulfil not only a defensive function, but also a collaborative function[37]. The VwGH had immediately emphasised this dual function of participation in its first judgement of 1884[38], which was reiterated on this point in its judgement of 1898[39] concerning a decree imposing certain obligations on a Viennese factory towards its workers. In particular, according to the judges, the right to be heard also meets the need for

[36] Judgment no 8686 of May 22nd, 1895, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1895, pp 654-656.

[37] On the different functions - defensive, collaborative and democratic - performed by private participation, see S. Cassese, *Il privato e il procedimento amministrativo. Un'analisi della legislazione e della giurisprudenza*, in *Rivista italiana di scienze giuridiche*, 1971, pp. 25 ff.

[38] Judgment no 2263 of 24 October 1884, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1884, pp 493-495.

[39] Judgment no 11393 of 5 February 1898, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1898, pp 144-147.

a correct and adequate reconstruction of the facts relevant to the decision.

Article 17 codifies the right of access to documents for the parties (*Akteneinsicht*), which the *Verwaltungsgerichtshof* had elaborated as early as 1885 with judgment n. 2452[40], concerning an expropriation procedure for the construction of a railway. The right of access is configured from the outset as a genuine right, not conditioned by discretionary choices of the administration, since the authority must allow the parties to inspect the documents, and to have specific knowledge of the factual findings upon which the commission was deciding, as this knowledge is necessary to assert or defend their legitimate interests.

It was precisely in judgement 2452 of 1885, which annulled an expropriation order because the parties had not been granted access to the entire preparatory documentation, that the Court had also pointed out a further defect arising from the unequal treatment of the parties in the preparatory procedure. Here too, Art. 17(3) codifies the prohibition of unequal treatment by allowing access equally on request, to all parties.

Art. 45(3) AVG specifies that "the parties shall be given the opportunity to take note of and comment on the result of the taking of evidence".

Participatory rights are exercised not only through institutes that guarantee full knowledge of the preliminary investigation, but also by submitting pleadings and documents to present one's point of view. The VwGH had sanctioned the right to submit pleadings in a judgment of 1896[41] concerning the right to use a woodland, annulling an authorisation granted to two residents belonging to a different fraction because the community of the fraction concerned had not been able to submit pleadings to state its opinion.

In line with this assumption, Section 43(3) AVG gives the parties the right to comment on all issues addressed during the preliminary investigation, i.e. not only on the facts presented by the administration but also on all requests made by other parties, witnesses or experts, specifying that the parties must also be able to "prove" their views, i.e. by submitting pleadings and documents.

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[40] Judgment no 2452 of 13 March 1885, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1885, pp 164-167.

[41] Judgment no 9441 of 14 March 1896, *Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1896, pp 457-458.

5. The Austrian model

The discipline of administrative proceedings as codified in Austria in 1925 is usually defined as a judicial model, in which there is a guarantee of adversarial participation in order to ensure the legality of administrative action[42]. This model is often contrasted with the American *interest representation* model, in which broad participation is guaranteed in order to ensure the democratic nature of administrative action[43].

Perhaps it would be appropriate to re-evaluate this definition, in light of the fundamental characteristics of the AVG's model of proceedings that have been identified here.

A correct reconstruction of the model is an operation with its own autonomous relevance in dogmatic and structural terms; it is also a necessary preparatory operation for a twofold purpose, namely both to verify its transposition into other legal systems and to carry out comparative analyses.

In this way, it is possible to outline some fundamental characteristics of the Austrian model, which quite clearly deviate from the traditional and commonly accepted reconstructions.

Firstly, the discipline of the administrative procedure codified in Austria in 1925 finds its actual origin in the creation of jurisprudence, as all the fundamental institutions and the very structure of the procedure can be found in the judgments of the *Verwaltungsgerichtshof* between 1876 and the first two decades of the 20th century.

Secondly, the regulation of the administrative procedure was aimed at recognising and attributing rights to individuals vis-à-vis the administration, aiming to guarantee not only the legality of administrative action but also, and above all, subjective protection of procedural rights. In this respect, the *Verwaltungsgerichtshof* played a fundamental role, recognising the individual as a subject of rights in the proceedings and not merely as an object of administrative activity. Such a theoretical-conceptual choice, however, developed at a time when the attention of doctrine

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[42] A. Sandulli, *Il procedimento,* in *Trattato di diritto amministrativo,* edited by S. Cassese, 2nd ed., *Diritto amministrativo generale* (2003) pp. 1035 ff., spec. p. 1049.

[43] L. Torchia, *I modelli di procedimento amministrativo*, in L. Torchia (ed.), *Il procedimento amministrativo: Profili comparati* (1993) pp. 33 ff. On the Anglo-American model see also G.F. Ferrari, *Il procedimento amministrativo nell'esperienza anglo-americana*, in *Diritto processuale amministrativo*, no. 3/1993, pp. 421 ff.

and jurisprudence in other legal systems was mainly focused on the final result of the activity, the administrative act; and if anything, on the consequent right of appeal.

Thirdly, the AVG set as its main goal (next to the protection of individual rights) the simplification and thus the streamlining of administrative activities[44]. This essential objective constitutes a fundamental component to be taken into account for a correct reconstruction of the Austrian model, as it allows us to grasp the strongly characterising elements of the uniformity of the basic scheme and its simultaneous adaptability and simplicity.

Fourthly, the Austrian model was constructed on the basis of a philosophical and theoretical concept of natural law and not on the basis of Kelsenian normativist law.

Important consequences follow from this consideration.

The judicial structure of the procedure is not an effect of the assimilation of the judicial function and the administrative function, both of which are intended to execute the law. Nor does the 'processualisation' of administrative proceedings derive from a weakness or limitation of judicial review[45], which, as we have seen in para. 2 and 3, was instead rather pervasive, even if only endowed with cassatory powers.

The procedural structure of the procedure derives (at least also) from the fact that the legislature had intentionally delegated to the *Verwaltungsgerichtshof* the task of working out the essential forms - and thus the discipline - of the administrative procedure in the complete absence of any legal rules on the subject. Therefore, the positive regulation of the administrative procedure was created by the judges, who adopted a judicial model, i.e. they built a system on the substratum most familiar to them and, to a certain extent, akin to it, the sequential one.

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[44] Simplification of administrative activities was one of the conditionalities imposed on Austria from the League of Nations in order to obtain a loan and restore its economic and financial situation. On the role played by the so-called *Genfer Reformbeschlüsse* concluded in 1922 between the defeated Austria on the one hand and victorious United Kingdom, France, Italy and Czechoslovakia on the other, please refer to A. Ferrari Zumbini, *The Austrian AVG: an underestimated archetype with deep roots and external factors*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion (1920-1970)*, cit. at 27.

[45] F. Benvenuti, *L'attività amministrativa e la sua disciplina generale*, in G. Pastori (ed.), *La procedura amministrativa* (1964) esp. pp. 547 ff.

6. The neglected role of the Austrian AVG

Although Austria was the first country to codify a general regulation of administrative procedure[46], the importance of Austrian law (in terms of its influence and the development of a model) is often underestimated in recent research[47]. Until the 1960s, at least in continental Europe[48], the importance of the Austrian contribution was clearly recognised and highlighted, but over time its centrality gradually diminished for reasons that must also be examined in depth from the point of view of the history of ideas.

Austria is often overlooked in the more recent works on comparative administrative law, even in the most important and impressive works devoted to the codification of administrative procedures. Austria is often forgotten also in comparative studies from the English-speaking world. Frank Goodnow's first treatise on comparative administrative law, published in 1897[49], gave an overview of the national and local administrative systems of the United States, England, Germany and France, but no chapter was devoted to the Austrian Empire. In comparative studies, the German-speaking country of choice is often Germany, not only because of its undisputedly great public law tradition. However, Germany has always been bound to the legacy of Otto Mayer, who

[46] Actually, a first law on administrative procedure had been enacted in Spain in 1889. It is the *Ley de 19 October 1889 - de Bases de Procedimiento Administrativo*, which is the first European legislative text on procedural rules for administrative action. On this subject, see. A.R. Brewer-Carias, *Etudes de droit compare* (2001). Numerous procedural rights were already provided for in the Spanish law of 1889, including the right to be heard and the right to examine administrative documents. However, the law did not introduce a directly applicable regulation of administrative procedure, but rather contained a list of general principles that administrative activity should be inspired by. Each ministry was then asked to adopt a regulation to regulate its administrative procedures. As will be seen in the next paragraph, the first general law on administrative proceedings was enacted by Lichtenstein in 1922, however, this law was drafted on the basis of Austrian legal drafts, so even though it predates them in time, it constitutes an implementation of the Austrian discipline.

[47] The complex reasons explaining this phenomenon are analysed in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann, (eds.), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion 1920-1970*, cit. at 27.

[48] A.M. Sandulli, *Il procedimento amministrativo* (1940); G. Pastori, *La procedura amministrativa* (1964). In Germany, see C.H. Ule, F. Becker, K. König (eds), *Verwaltungsverfahrensgesetze des Auslandes* (1967) vol I, esp 41 ff.

[49] F.J. Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems National and Local, of the United States, England, France, and Germany* (1897).

systematised administrative law based on the concept of the administrative act, since this is the basis for judicial protection.

The main assumption here is that the AVG has played a central role as an archetype of discipline, exerting a profound influence in other legal systems, not always adequately recognised.

7. The spread of the Austrian AVG: the importance of the personal factor

The diffusion of the AVG as a model, and even as an archetype, is a very complex phenomenon, that cannot be adequately investigated and analysed here[50]. The more limited purpose of this article is to shed light on the personal factor that contributed to the spread of the Austrian law on administrative procedure. Indeed, after World War I, many scholars and judges of the Former Austro-Hungarian Empire moved to other Countries (or became citizens of other countries even remaining in the same place), becoming scholars and judges of other countries and contributing to the spread of the Austrian legal influence.

The legal orders most profoundly inspired by the Austrian codification were those that had been part of the Austro-Hungarian Empire in some way. Although it would have been reasonable to assume that the nation states that emerged from the ashes of the Empire in 1918 would have disregarded the Austrian regulations in order to reassert their conquered independence, this was not the case.

Moreover, the model did not spread to the former imperial territories alone. In fact, the draft of the AVG was the model for the law on administrative procedure that was adopted in Liechtenstein as early as 1922 (*Landesverwaltungspflegegesetz)*[51].

A clear and precise transposition of the Austrian model can be found in Poland[52]. In 1922 a Supreme Administrative Court was established, modelled on the *Verwaltungsgerichtshof*, and whose first

[50] For a detailed analysis, please refer to G. della Cananea, A. Ferrari Zumbini, O. Pfersmann, (eds.), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion 1920-1970,* cit. at 27. The following citations of chapters, refer to the chapters of this book.

[51] See the chapter by E. Schädler, *The Austrian Model and the Codification of Administrative Procedure in Liechtenstein*, pp. 57 ff.

[52] See the chapter by W. Piątek, *The Polish Legislation on Administrative Procedure*, pp. 10 ff.

president, Jan Sawicki, had been a judge at the Administrative Court in Vienna. On 22 March 1928, the Polish Code of Administrative Procedure was enacted.

The sequence of events in Czechoslovakia[53] was very similar to that in Poland. Due to its historical membership of the empire, the new-born nation created from the ashes of the Austro-Hungarian Empire was well aware of the fundamental importance of the existence of an administrative jurisdiction. As early as 1918, a Supreme Administrative Court was therefore established, which did not merely follow the model of the *Verwaltungsgerichtshof*. Indeed, among the first members of this court were two judges who, until 1918, had been judges of the *Verwaltungsgerichtshof* in Vienna and who became the first and second Presidents of the Czechoslovak Administrative Court respectively: František Pantůček and Emil Hácha brought their cultural background with them. Czech scholarship is unanimous in its agreement that the Czechoslovak Administrative Court predominantly used the previous Viennese case law je when deciding cases (at least until the 1950s, when the new Communist regime abolished administrative jurisdiction). The Code of Administrative Procedure was adopted in 1928, substantially transposing the Austrian law.

The Kingdom of Yugoslavia[54] also adopted a general law on administrative procedure in 1930, which is unanimously recognised by scholarship as emphasising the Austrian model. Large parts of Yugoslavia were part of the Austro-Hungarian empire until its dissolution in 1919. Austrian influence was thus strongly present. Indeed, the majority of civil servants and judges in the country, especially in the pre-World War II period, were educated in the Austrian tradition.

Even in the Italian experience, where Austrian law exerted little influence, some connecting elements deriving from personal factors can be traced. Suffice it to cite a small example, representative of a more complex general context. At the end of the First World War, a provisional section of the Council of State was established in Italy to decide pending (and new) cases in the redeemed provinces. The VI Provisional Chamber performed its functions from 1919 to 1923, applying the law in force in the former

[53] See the chapter by L. Potěšil, F. Křepelka, *Administrative Procedure Legislation in Czechoslovakia*, pp. 86 ff.

[54] See the chapter by S. Lilić, M. Milenković, *Administrative Procedure in Former Yugoslavia and the Austrian Administrative Procedure Act*, pp. 119 ff.

empire, pending the completion of the annexation of the territories with the extension of the Italian legal system. It was therefore necessary to appoint judges who were familiar with the law of the empire. The section was presided over first by the Istrian Francesco Salata, then by Guido de Bonfioli Cavalcabò, who had been a judge of the VwGH from 1910 to 1918 and after the fall of the empire had opted to take up service in the administration of the Kingdom of Italy. After the suppression of the provisional section, Guido de Bonfioli Cavalcabò continued to carry out his jurisdictional functions in the other Sections of the Council of State, taking with him his background in Austrian administrative law.

8. Conclusion

The *Allgemeine Verwaltungsverfahrensgesetz* codifies the discipline of the administrative procedure as outlined by a copious case law, in the vanguard of the protection of the rights of individuals, which rested on a long tradition of good Habsburg administration. The diffusion and transposition of the procedural model of the AVG highlights the fundamental contribution that Austrian legal science of the late 19th and early 20th century made to the formation of a common legal heritage of administrative law in Europe. The personal factor – intended as the circulation of scholars and judges of the former Austro-Hungarian Empire toward other countries – played an important role in this phenomenon.

THE ITALIAN CONSTITUTION: A PERSONALIST CONSTITUTION

Elisabetta Lamarque[*]

Abstract

After briefly introducing the essential and original features of the personalist principle that is embraced by the Italian Constitution, the paper considers the work of the Constituent Assembly in which, in spite of its undoubtedly Catholic origin, the substance of the personalist principle was fully endorsed by the other ideological and cultural groupings present within the Assembly. It then goes on to examine the potential of the principle and how it has been understood and implemented in Italy within republican legislation, as well as constitutional case law.

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1. Introduction[1]

In a recent, profoundly insightful, book in defence of social constitutionalism, one of the most renowned Italian scholars of constitutional and comparative law evokes the provisions of the Italian Constitution of 1 January 1948 – in an attempt to save them from the fate of oblivion to which they are currently exposed – that impose inderogable duties of solidarity on all persons under the legal order, and that oblige public authorities to combat all forms of inequality and to remove barriers to the full development of each human person[2].

According to the author, the message that the Italian Constitution delivers to current generations and the wider world is that "we can't save ourselves on our own". This is "the endowment with which we appear on the global scene, our national visiting card"[3].

An essential element, and perhaps the core, of this precious legacy left to the world by the Framers of the Italian Constitution is the personalist principle.

Unlike the other fundamental principles set out in the Constitution, each of which is specifically enunciated in one of its first 12 articles, the personalist principle is not all contained within the large perimeter of Article 2[4]. On the contrary, it is expressed in several passages of the text and holds up the entire constitutional architecture, so much so that some have asserted – and rightly so – that the Constitution itself is "personalist" as a whole, and not only in terms of this or that individual provision[5].

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[1] This paper is a translated, modified and updated version of the article entitled The personalist principle due to be published in forthcoming M. Benvenuti, R. Bifulco (eds.), *Trattato di diritto costituzionale italiano*, II: *I princìpi fondamentali* (2023)

[2] T. Groppi, *Oltre le gerarchie. In difesa del costituzionalismo sociale* (2021).

[3] T. Groppi, *Oltre le gerarchie. In difesa del costituzionalismo sociale*, cit. at 1, 91.

[4] Article 2 It. Const.: "The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled".

[5] A. Ruggeri, *Il principio personalista e le sue proiezioni*, in L. Ventura, A. Morelli (eds.), *Principi costituzionali* (2015), 168 and 195 et seq. Similarly, according to A. VEDASCHI, *Il principio personalista*, in L. Mezzetti (ed.), *Diritti e doveri* (2011), 222, the personalist principle is a value with reference to which also the other fundamental principles contained in the Constitution should be interpreted.

Besides, those who argued in favour of the introduction of the personalist principle within the Constituent Assembly elected on 2 June 1946 sought to achieve precisely this outcome.

This clear intention was stated by one of the most ardent supporters of the principle, the Christian Democrat La Pira. In his lengthy address to the Assembly on the "fundamental problems relating to the construction of the new constitutional architecture", he concluded by declaring that he wished to propose to his colleagues the overall design of a "human Constitution", that is a "home" "made for people" in which each individual provided "support" and acted as the "cornerstone" for the entire edifice[6].

This paper will be structured as follows.

After briefly introducing the essential and original features of the personalist principle that is embraced by the Italian Constitution (section 2), it will consider the work of the Constituent Assembly in which, in spite of its undoubtedly Catholic origin, the substance of the personalist principle was fully endorsed by the other ideological and cultural groupings present within the Assembly[7] (section 3). The paper will then go on to examine the potential of the principle (section 4) and how it has been understood and implemented within republican legislation (section 5) as well as constitutional case law (sections 6 and 7).

2. The essential characteristics of the personalist principle embraced within the Italian Constitution of 1 January 1948

At the time of the Constituent Assembly, as moreover is still the case, personalism was a highly articulated school of thought. Thus, before dealing with the origin of the principle, it is appropriate to

[6] La Pira 11.3.1947. The verbatim report of every sitting of the Constituent Assembly can be read at *https://storia.camera.it/lavori/transizione/leg-transizione-costituente/faccette/all#nav*.

[7] Three-quarters of the Constituent Assembly comprised representatives of the three main anti-fascist parties, i.e. Christian Democrats, Socialists and Communists (VV.AA., *Constitutional Law in Italy*, 3rd ed. (2021), 35), and percentage of votes around 5 per cent or below were obtained by other parties. For more details, see M. Cartabia, N. Lupo, *The Constitution of Italy. A Contextual Analysis* (2022), 9-10.

identify the characteristics of personalism that were effectively incorporated into the text of the republican Constitution.

Constitutional scholars stress above all the aspect of the – logical, historical and axiological – priority of the human person over any constituted public authority.

This aspect is unequivocally apparent within the wording of Article 2 of the Constitution, in which it is asserted that the Republic "recognises" inviolable human rights as pre-existing, before even guaranteeing them[8].

However, it should be borne in mind that the prior status and primacy of fundamental rights vis-a-vis state authorities are not exclusive either to the personalist principle or to the Italian Constitution, but have rather underpinned Anglo-American constitutionalism since the outset, as well as all European constitutionalism from the post-War era. As such, one can only agree with those who assert, from this perspective, that the novelty and merit of Article 2 consisted simply in the fact that it bridged the gap between the human rights traditions of continental Europe and the common law. It thus turned the page on an era which, since the revolutions of the end of the eighteenth century, had juxtaposed the two traditions, banishing them to mutual isolation[9].

The contours to the personalist principle are rather set out in other provisions of the Constitution, which vest it with an indubitable original streak.

a) Article 2 of the Constitution itself provides, first and foremost, a genuine and entirely new *definition* of the "person", i.e. the human being, from which the personalist principle takes its name: the "person" is defined both "as an individual" and as a human being "in the social groups within which human personality is developed".

Article 3(1) of the Constitution then goes on to qualify the person vested with the right to non-discrimination in terms of a human

[8] See *supra*, at 3.

[9] A. Baldassarre, *Diritti della persona e valori costituzionali* (1997), 2 et seq.

being in relation to others, because it premises the principle of equality before the law on the assertion of the equal "social" dignity of all[10].

Moreover, in keeping with the notion of the individual as a "social man"[11], the structure of part I of the Constitution presents the constitutional rights and duties listed within it in the form of "relations" ("civil", "ethical and social", "economic" and "political" "relations", as is reflected in the names of the four titles to part I) and thus as *human* relations, which must then be modelled on the principle of solidarity. Indeed, according to some authors it is the "combination" of the personalist principle and the principle of solidarity that "defines the concept of the person as a relational creature"[12]. However, whilst the close and practically inseparable links among all of the various fundamental principles underpinning the republican Constitution must be recognised, it is preferable to distinguish the definition of the person in terms of social or relational human being, and hence to ascribe it in full to the personalist principle, leaving for the principle of solidarity the task of sketching out the characteristics that relations among people must have.

b) The other original characteristic feature of personalism embraced by the Framers lies in the fact that it stipulates the full realisation of the individual as defined in Article 2 of the Constitution as the aim of all public action. This entails the full realisation not of human beings understood in an abstract sense but rather of each specific individual person in his or her singular uniqueness and diversity, considered with reference to actual life circumstances and the network of social relations of which the individual is a member.

Article 3(2) of the Constitution in fact provides that it is the task of the Republic to favour conditions for achieving the "full development"[13] of the human person, which Article 2 considers both

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[10] Article 3, para. 1, It. Const.: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions".

[11] G. Ferrara, *La pari dignità sociale (Appunti per una ricostruzione)*, in *Studi in onore di Giuseppe Chiarelli*, II (1974), 1099.

[12] E. Rossi, *La doverosità dei diritti: analisi di un ossimoro costituzionale?*, 9 Rivista del Gruppo di Pisa (2019), 54.

[13] Article 3, para. 2, It. Const.: "It is the duty of the Republic to remove the economic and social obstacles which by limiting the freedom and equality of citizens prevent

as an individual, and also within the context of those networks of social relations that enable each and every human person to develop.

Article 4 of the Constitution, in turn, insists on this feature in that, in defining "work" (which is established as the foundation for the entire Republic)[14] as both a right and a duty which all people are obliged to perform "according to their own possibilities and choices", it considers "work" as being those activities and functions that are capable of achieving the material or spiritual progress of society only through the realisation of the person, and never to the their detriment[15]. Moreover, it must always be recalled that precisely this definition of "work" clarifies the meaning of its stipulation as a basis for the Republic (Article 1): in fact, the centrality of the human person requires democracy to be construed in new terms as "a democracy where, having cast aside any individualistic conception, the human person is called upon to participate through work in the life of everybody[16].

3. The Constituent phase

Albeit with different focuses and nuances, all scholars – philosophers, historians, political sciences and jurists – who engaged with the personalist principle during the Constituent phase agreed on a number of fixed points of reference in terms of its origin, which must be taken for granted here.

These include at least the following aspects: a) that the choice to incorporate the personalist principle into the republican Constitution was a clear and informed choice; b) that the initiative to do so was taken and persistently pursued by the Catholic block; c) that the Catholic members of the Constituent Assembly drew on French thinking, including in particular on Maritain and Mounier; d) that the

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the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".

[14] Article 1, para 1, It. Const.: "Italy is a Democratic Republic, founded on work".

[15] Article 4, It. Const.: "[1] The Republic recognises the right of all citizens to work and shall promote such conditions as will make this right effective. [2] Every citizen has the duty, according to capability and choice, to perform an activity or function that contributes to the material or spiritual progress of society".

[16] T. Groppi, *Menopeggio. La democrazia costituzionale nel XXI secolo* (2020), 81.

strategy pursued by Christian Democrats during the work of the Constituent Assembly was to purify their proposal of any excessive ideological baggage, with the aim of achieving consensus with the Left; e) that this Catholic proposal, once stripped of all rhetoric, was not reworked into a compromise solution with the Communists and Socialists, but was rather fully endorsed as it stood[17]; f) that, despite Liberals' low level of involvement in that debate[18], the Framers were essentially unanimous in embracing the personalist principle[19]; and g) that most members of the Constituent Assembly regarded the personalist principle without any doubt as constituting the keystone, alongside the democratic principle, of the entire constitutional system.

There is no doubt that the personalist principle was introduced by the Catholic block. Indeed, if the Christian Democrats were the only party, out of all the anti-fascist parties, that came to the Constituent Assembly with a general political and constitutional policy[20], it must also be said that the backbone of this policy was specifically the personalist principle.

On the other hand, it is a matter of debate what kind of relationship there was with French philosophical thinking on "communitarian personalism"[21]. Were the Italian Framers directly influenced by the French theory, or did the French theory simply happen to be consistent with the prevailing sentiment in Italy?

There are several factors to suggest that the latter was the case. The French and Italian Catholic thinking that subsequently fed in to the work of the Constituent Assembly was in both cases aligned with the social doctrine enunciated by the Catholic Church in the 1931 encyclical *Quadragesimo anno*[22]. Italian views in particular were

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[17] L. Basso, *Il Principe senza scettro. Democrazia e sovranità popolare nella Costituzione e nella realtà italiana* (1958), 125.

[18] E. Rossi, *Art. 2*, in R. BIFULCO, A. CELOTTO & M. OLIVETTI (eds.), *Commentario alla Costituzione*, I (2006), 40.

[19] N. Occhiocupo, *Liberazione e promozione umana nella Costituzione. Unità di valori nella pluralità di posizioni* (1988), 55.

[20] D. Nocilla, *I cattolici e la Costituzione: tra passato e futuro* (2009), 26.

[21] B.A. Gendreau, *The Role of Jacques Maritain and Emmanuel Mounier in the Creation of French Personalism*, 8 The Personalist Forum, Supplement: Studies in Personalist Philosophy. Proceedings of the Conference on Persons (Spring 1992), 97-108.

[22] P. Pombeni, *The ideology of Christian Democracy*, 5 J. Political Ideol. (2000), 296.

inspired by the radio messages broadcast by Pius XII during the Second World War[23] in which, anticipating the characteristics of the future post-War polity, the Pope had insisted on the central importance of the human person, identifying a close link between it and democracy[24]. French and Italian Catholic personalists shared a common understanding of the political crisis that had resulted in the totalitarian regimes of the early twentieth century. These were regarded by all of them as the inevitable consequence of the liberal regimes that had left free rein to capitalism and disregarded the fact that the state's task should be to create the spiritual and material conditions necessary for the development of every human being[25]. As a result, these economic liberal views were also to be cast aside, along with totalitarianism.

There was a shared view that people could only live and develop within the natural communities in which they found themselves and that, without these communities, "the individual is nothing"[26].

Moreover, Maritain and some of the most influential Italian Christian Democrat intellectuals within the Constituent Assembly, such as the "little professors" Dossetti, La Pira and Moro, also referred back to the thinking of Thomas Aquinas[27]. In any case, although it was censored by the fascist regime, Maritain's 1936 book *Humanisme intégral* nonetheless became known in Italy thanks to authoritative Vatican figures such as Cardinal Montini (the future Pope Paul VI), who gave a copy of it to La Pira[28]. Handwritten extracts from the book also circulated in Florence, which were discussed during meetings held at the Florentine convent where La Pira lived[29]. Moreover,

[23] At *http://w2.vatican.va/content/vatican/it.html*.
[24] G. Campanini, *Dal Codice di Camaldoli alla Costituzione. I cattolici e la rinascita della democrazia*, 57 Aggiornamenti Sociali (2006), 402-403.
[25] E. Mounier, *Révolution personnaliste et communautaire*, (1932-1935); J. Maritain, *Humanisme intégral* (1936).
[26] E. Mounier, *Révolution personnaliste et communautaire*, cit. at 24.
[27] F. Pizzolato, *Finalismo dello Stato e sistema dei diritti nella Costituzione italiana* (1999), 54 et seq. and 75 et seq.
[28] G. Campanini, *Dal Codice di Camaldoli alla Costituzione. I cattolici e la rinascita della democrazia*, cit. at 23, 400 et seq.
[29] J.D. Durand, *Giorgio La Pira-Jacques Maritain: dialogo per un'Europa cristiana (giugno-luglio 1946)*, in P.L. Ballini (ed.), *Giorgio La Pira e la Francia* (2005), 5.

Mounier's *Declaration of the rights of people and communities* of 1941 (referred to by La Pira as the *Mounier Project*), later published in the magazine Esprit before the end of the war[30], was well known and appreciated within the same circles. Another fact, considered by some authors to be highly significant, is that precisely during the period in which the Constituent Assembly was sitting, Maritain himself was serving as the French Ambassador to the Vatican City (1945-1948), and thus had the opportunity to establish personal relations most certainly with La Pira himself, although probably also with other Christian Democrat members.

The Catholic idea of a new state can be found in its first embryonic form in the *Camaldoli Code* drawn up in July 1943 at the sixth gathering held at the Benedictine monastery in Camaldoli by a group of Catholic graduates led by Bernareggi, the graduates' chaplain at the association Azione Cattolica Italiana, which still exists today. It was completed in Rome under the direction of the Catholic Institute for Social Activity, thanks to contributions by, amongst others, intellectuals who would subsequently come to prominence in the Constituent Assembly, including La Pira and Moro, after which it was published in the spring of 1945[31].

The document sets out explicitly the two defining features of Catholic "communitarian personalism", which would later develop into the personalist principle embraced by the new Constitution. These were specifically the conception of the person as a human being immersed in relations with other people, and secondly the purpose of the state, which was considered to consist in the full development of each person, defined in these terms. As regards the first characteristic, the document opens in section 1 by asserting that "man is an essentially social being: his spiritual requirements and bodily needs can only be satisfied through cohabitation", whilst section 3 goes on to clarify that "society is not a numerical unity or the simple sum of its constituent individuals", but "is rather the organic union of people, families and groups sharing the same end, that is the common good".

[30] E. Mounier, *Faut-il refaire la Déclaration des Droits? Projet d'une Déclaration des Droits des personnes et des collectivités*, 13 Esprit (1944).
[31] VV.AA., *Per la comunità cristiana. Principi dell'ordinamento sociale a cura di un gruppo di studiosi amici di Camaldoli* (1945), *passim*.

As regards the second characteristic, sections 4 to 6 clarify that "society organised into a state" is "a unity of order" and that "the goal of the state is to promote the common good, to which all citizens may contribute in line with their aptitude and circumstances"[32].

Turning now to the work of the Constituent Assembly, agreement concerning the personalist principle was reached within the 1st Sub-Committee of the "Committee for the Constitution", comprised of 75 out of 556 deputies, which was responsible for considering the rights and duties of citizens.

The Christian Democrats had appointed to this Sub-Committee some of their most astute intellectuals–, such as Dossetti, La Pira and Moro, as well as Tupini, who however sought to remain largely equidistant from the parties as the Sub-Committee's chairman[33].

Left-wing parties also nominated heavyweights, and were represented by Togliatti and Iotti for the Italian Communist Party and Basso for the Italian Socialist Party of Proletarian Unity.

It is interesting to note, first and foremost, that the Catholics drew inspiration from Maritain also, so to speak, in terms of the method by which the French philosopher had suggested that Christians proceed with their "temporal mission", namely the "work of transforming the social regime" inspired by the gospels[34].

As the Christian Democrats in the 1st Sub-Committee wanted to ensure that the personalist principle was accepted by all, they followed each of the steps suggested by the philosopher when engaging and cooperating with left-wing parties in the shared historical endeavour of building a new society[35]. This involved: a) *admitting* that Communism was rooted in the same Christian ideal of communion to be achieved in this world; b) *acknowledging* that Marx had been right in his criticism of capitalist society when arguing that nothing is more

[32] VV.AA., *Per la comunità cristiana. Principi dell'ordinamento sociale a cura di un gruppo di studiosi amici di Camaldoli*, cit. at 30.
[33] P. Pombeni, *Il gruppo dossettiano*, in R. Ruffilli (ed.), *Cultura politica e partiti nell'età della costituente*, I (1979), 428.
[34] J. Maritain, *Humanisme intégral*, cit. at 24.
[35] L. Elia, *Maritain e la rinascita della democrazia. Schema per una ricerca*, 73 Studium (1977), 586; S. Illari, *La partecipazione di Giuseppe Dossetti ai lavori dell'Assemblea costituente e la formazione graduale delle sue convinzioni in tema di Costituzione*, 61 Jus, (2014), 488.

alien to the Christian spirit than a society in which life is defined exclusively in terms of the interplay between specific interests; c) *honouring* the "sincere sentiments"[36] of many communists who, aside from their adherence to party discipline, did not profess Soviet atheism (a metaphysical or religious ideal at odds with the Christian ideal), but rather embraced an economic and social ethics, or even nothing more than a toolkit for transforming the economic system[37]; d) finally, *understanding* that "Communists are not the same as Communism" and – a step that was particularly easy for Catholic members of the Constituent Assembly, who had fought in the Resistance alongside members from left-wing parties – that "they are absolutely deserving, having paid the price in blood for the liberation of all, of the right to participate in the work of reconstruction as fellow comrades in the struggle"[38].

It was thus that on 30 July 1946 – at the start of the Assembly's work – the 1st Sub-Committee discussed a "systematic list" of (numerous) rights, all of which were termed "freedoms", and (only a few) duties, which had been prepared by a small working group. Rather unexpectedly, Christian Democrats and left-wing members immediately agreed on some points, which would not subsequently be departed from. First of all, the Socialist Basso proposed that the schematic structure be changed in order to avoid "the impression that individualism alone should be stressed"[39]. This proposal was immediately followed up by the Christian Democrat La Pira, who agreed on the need to frame issues not in terms of freedoms but rather as "rights of the human person" and of the communities, "in which the human person develops himself"[40]. Chairman Tupini charged the unlikely pair of Basso and La Pira, united by their steadfast rejection of liberal individualism, with the task of drafting a report on "principles of civil relations[41], to be examined by the Sub-Committee when it resumed its work after the summer break.

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[36] J. Maritain, *Humanisme intégral*, cit. at 24.
[37] J. Maritain, *Humanisme intégral*, cit. at 24.
[38] J. Maritain, *Christianisme et démocratie* (1942).
[39] Basso 30.7.1946.
[40] La Pira 30.7.1946.
[41] Tupini 30.7.1946.

On the same day another improbable pair started to work together, comprised of Togliatti, the Communist leader, and Dossetti, an important exponent of the Christian Democrats, who by contrast agreed on the need to give "historical solidity"[42] to the constitutional proclamation of rights[43]. And it was precisely on the tangible historical level, and not on the doctrinaire level, that the positions of the two groups ultimately converged on all of the points mentioned above (section 2).

When work resumed on 9 September 1946, Chairman Tupini decided to start specifically with a discussion of the principles applicable to civil relations, taking the view that this issue was preliminary to all others. The two reports, which operated as a frame of reference for the 1st Sub-Committee, followed completely different styles: the La Pira report contained a lengthy and learned presentation of the theoretical foundations for the part of the future Constitution dedicated to rights; on the other hand, the Basso report simply provided a list of articles, each followed by a very brief explanation.

It is often recalled that, in his very long report, La Pira illustrated the outline of the Catholic proposal of underpinning the entire constitutional architecture with the personalist principle, providing numerous references to French Catholic personalism[44].

However, it is important not to overlook the fact that Basso's report sets out the position on which the left-wing parties spontaneously converged, and which overlaps with Catholic personalism[45]. This was the embryo of what would subsequently become the principle of substantive equality, which was indubitably imbued with a personalist approach from the outset, as is clear from the text submitted for discussion: "it falls to the collectivity to eliminate all social and economic obstacles that, in *de facto* limiting freedom and equality among individuals, prevent human persons from achieving their full dignity, and in developing to the full in physical, intellectual, moral and material terms". In his brief concluding remarks, Basso pointed out that he regarded this provision as the basis for the entire

[42] Tupini 30.7.1946.
[43] Togliatti and Dossetti 30.7.1946.
[44] La Pira 9.11.1946.
[45] Basso 9.11.1946.

Constitution, in the same way as La Pira placed Catholic personalism at the heart of his own parallel proposal: "it is a norm-principle, which will then provide the key to all other norms contained in the Constitution concerning work, business, ownership and public services. It is particularly advisable in this respect, and it lends the Constitution a presentational clarity and a basic solidity that cannot be found elsewhere".

Returning now to the weighty La Pira report, its reasoning appears to contain the following steps. First of all, it is necessary to *abandon* the idea of "reflexive" rights granted by the state, which is typical of a totalitarian regime, and *return* to the "relationship between the individual and the state as previously construed within western constitutions", in which the state was (previously in the past) conceived of "in terms of the individual and the natural rights of the individual". Here La Pira proposed a synthesis which would often be taken up by commentators as a slogan: '*the state for the person and not the person for the state*': this is the unavoidable premise of an essentially democratic state". However, it is important to stress that this slogan was traced back by La Pira to the preamble to the 1789 Declaration of the Rights of Man and the Citizen, as confirmation of the fact that the prior status of rights to public authority was – rightly or wrongly – regarded by the Constituent Assembly as a characteristic of democratic constitutionalism *tout court*, to which it was simply necessary to return, and not a novelty of the future Constitution of the Italian Republic. Secondly, in an analogous manner to the *Mounier Project* and in keeping with social Catholicism and contemporary Socialism, it was indispensable to *add* the recognition of and protection for the "essential rights of natural communities through which human personality gradually emerges". This is because "the violation of the essential rights of these communities constitutes a violation of the essential rights of human persons and undermines or even renders illusory the assertions of freedom, autonomy and social solidity contained in declarations of rights". Thirdly, it was necessary to *recognise* the "spiritual, free and social nature of man". Finally, it was fundamentally important to *identify* the purpose of the Constitution as being the "protection of the rights of human persons and natural communities, into which the individual organically and progressively integrates and fulfils himself".

The discussion that followed first confirmed that all parties agreed to reject the fascist idea of "the person for the state" and to embrace the opposite idea of "the state for the person". However, it also laid bare a tangible irritation with the "learned report"[46] presented by La Pira, who was accused of having invoked "new testament canons" to insist on the value of the human person, thereby denying all prior theorisation previously conducted within moral and civic research on the same issue[47]. He was also accused of an "excess of ideology", not only philosophical but also religious, which risked "creating a schism at the heart of the Nation"[48].

Dossetti then took the floor. After noting the unsuccessful "attempt" made by La Pira, which had been too heavily skewed in favour of Catholic ideology, he tried to sketch out the contours of an "ideology common to all", finding them in a rejection of the "fascist view of the dependence of the citizen on the state" and the assertion of the "prior status of the individual vis-a-vis the state", who "is fully realised within the communities into which the person is integrated"[49]. Togliatti then spoke immediately after him, declaring that "the comments made by the Honourable Dossetti offer broad scope for agreement", resulting "from a shared political experience, even if not a shared ideological experience": "he might disagree with the Honourable Dossetti in defining human personality; however, he accepts that to guarantee the fullest and freest development of the human person may be indicated as the aim of a democratic regime"[50].

At this point, Dossetti steered the discussion in a new direction, formulating his famous agenda which, whilst not subsequently being discussed or put to a vote, may be regarded as a genuine manifesto of that personalism on which Christian Democrats and left-wing parties agreed.

It is thus important to cite it here in full: "having examined the possible systematic frameworks for a declaration of human rights; having excluded the framework that is inspired by a purely

[46] Mastrojanni 9.9.1946.
[47] Marchesi 9.9.1946.
[48] Togliatti 9.9.1946.
[49] Dossetti 9.9.1946.
[50] Togliatti 9.9.1946.

individualist vision; having excluded the framework inspired by a totalitarian vision, which traces the allocation of the rights of individuals and basic communities back to the state; the Sub-Committee concludes that the only framework that is genuinely consistent with historical requirements, which the new statute of a democratic Italy must satisfy, is the one that: a) recognises the substantial priority of the human person (understood in terms of the fullness of his values and needs, not only material but also spiritual) vis-a-vis the state, and the duty incumbent upon the latter to act in the service of the former; b) recognises at the same time the necessarily social nature of all persons, who are destined to complete and fulfil one another through reciprocal economic and spiritual solidarity: first and foremost within various intermediate communities arranged according to a natural scale (family, territorial, professional, religious communities, and so on), and thereafter, where those communities are not enough, through the state; c) accordingly affirms the existence both of fundamental human rights and also of rights of communities, which are prior to any grant of rights by the state"[51]. Chairman Tupini was able to conclude, at this stage, asserting that "irrespective of the distant ideological premises, everyone can agree on the value that must be given to the human person"[52].

Once agreement had been reached, there was no going back. From this point onwards, debate among the parties would be focused almost exclusively on the wording of the text, first within the Sub-Committee[53] and later within the plenary Assembly[54].

The broad discussion (once again) by La Pira in the Assembly[55] on 11 March 1947 added perhaps only one new element, that is the explicit reference to the thought of Thomas Aquinas. From this he derived the conception of the human person "as a transcendent value outside the body of society", as a result negating "statalism" and the

[51] Tupini 9.9.1946.
[52] Tupini 9.9.1946.
[53] From 11 September 1946 onwards, the date on which the provisions that would subsequently become Articles 2 and 3 in the draft agreed upon between Basso and La Pira were discussed together.
[54] In particular, on 24 January 1947, on the text drawn up by the Drafting Committee, and also later between 4 March 1947 and 24 March 1947.
[55] La Pira 11.3.1947.

theory of reflex rights whilst also more explicitly insisting on the fact that "this human person is not isolated: he has a real relationship, as the scholastics said – a real relationship, not only a voluntary relationship – with others"[56].

Once again, annoyance was caused not by the content of the Catholic proposal, but rather by the "metaphysics"[57] in which La Pira shrouded it. However, when speaking in the Assembly immediately after La Pira, Togliatti defended his proposal (aside from any possible criticism concerning the way in which it had been presented) and declared that, on some of the fundamental principles, the solution reached had not been a compromise with the usual give and take, but that they had rather "sought to achieve consensus; that is to identify the potential common ground on which different ideological and political opinions could converge, and which was sufficiently solid to act as a foundation for the Constitution"[58]. He went on to clarify that this "confluence" of the two major ideologies – Catholicism and Socialism-Marxism – had been reached precisely on the issue proposed by La Pira, since also "Socialism and Communism strive to achieve the full valorisation of the human person"[59].

A few days later, on 13 March 1947, Moro, another prominent Christian Democrat, once again addressed the necessarily social nature of the human person: "when we talk about the autonomy of the human person, we are evidently not thinking about the individual isolated in his egotism and closed inside his own world. We do not mean an autonomy that represents splendid isolation. We want links"[60].

Finally, on 24 March 1947, the day on which some of the fundamental principles, including Articles 2 and 3 of the future Constitution, were definitively approved by the Constituent Assembly, Moro insisted on the same aspect, arguing that it enjoyed "almost unanimous consensus"[61], and finished the work of La Pira, stressing the close link between the personalist principle and the

[56] La Pira 11.3.1947.
[57] Vinciguerra 13.3.1947.
[58] Togliatti 11.3.1947.
[59] Togliatti 11.3.1947.
[60] Moro 13.3.1947.
[61] Moro 24.3.1947.

democratic principle with his famous motto "man is society"[62]. Indeed, he said that "the state genuinely ensures its democratic nature, premising its system on respect for every man, considered in the multiplicity of his expression, man who is not only a single entity, who is not only an individual, but who is society in its various forms, society that does not confines itself within the state. Human freedom is fully guaranteed if man is free to form social groupings and to develop within them. The truly democratic state recognises and guarantees not only the rights of the isolated man, who would in reality be an abstraction, but also the rights of the man associated according to a free social vocation"[63].

It was thus easy for the Chairman of the "Committee for the Constitution" Ruini to conclude shortly before the vote that, in relation to this issue, "we have now achieved a unanimous position, which is not a compromise"[64].

4. The constitutional significance of the fundamental principle

The proposals made by the Christian Democrat group around Dossetti were thus almost all accepted by the left-wing parties and were incorporated into the text of the Constitution (see above section 3). Only two aspects of Catholic personalism were refused, and there is hence no trace of either in the Constitution. First of all, the endorsement of Catholic ideology initially proposed by La Pira was rejected. Consequently, the Constitution does not contain any reference whatsoever to the (spiritual) nature of the human person and the organic conception of society, according to which the human personality develops through its "organic membership"[65] of the various social communities in which each person is naturally included. Secondly, La Pira's idea (initially supported by Dossetti) of "freedom

[62] G. D'Amico, *Stato e persona. Autonomia individuale e comunità politica*, in F. Cortese, C. Caruso & S. Rossi (eds.) *Immaginare la Repubblica. Mito e attualità dell'Assemblea Costituente* (2018), 107.
[63] Moro 24.3.1947.
[64] Ruini 24.3.1947.
[65] P. Pombeni, *Individuo/persona nella Costituzione italiana. Il contributo del dossettissimo*, 12 Parolechiave (1996), 209.

to", under which the very freedoms vested in the individual should only be considered to be guaranteed under the Constitution if and insofar as aimed at the "full perfection of the human person, in harmony with the requirements of social solidarity and in such a manner as to enable the expansion of the democratic regime"[66] was also rejected due – as Dossetti himself admitted – to substantive disagreement on this issue.

By contrast, the two features of the necessary social nature of the human beings and the state's purpose of ensuring the full development of every person, understood as a "social man", are both fully apparent within the Constitution (see above section 2).

However, the republican legal order took some time to embrace these. The very same literature that included the personalist principle within the list of fundamental principles immediately after the democratic principle, and in close conjunction with it, found it difficult to progress beyond the notion that, in asserting it, the Constitution was simply providing an indication of the value of the human beings and of their dignity and inviolable rights[67] as a basis for the republican Italian state.

During the first few years after the entry into force of the Constitution, even the most authoritative scholars of constitutional law did not sufficiently emphasise the fact, which would gradually prove to be crucial in establishing the practical significance of the personalist principle, that when referring to the "person" the Constitution did not intend to refer to the individual in the abstract, but rather by contrast the "social person"[68]. Only a few scholars, such as Vezio Crisafulli, immediately appreciated that, as a result of the personalism embraced within the Constitution, public action would have to apply to the "entire man", i.e. "the concrete man, specifically conditioned by his real situation within civil society"[69].

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[66] La Pira 2.10.1946. See M. Cartabia, *La fabbrica della Costituente: Giuseppe Dossetti e la finalizzazione delle libertà*, 37 Quaderni costituzionali (2017), 473.

[67] C. Mortati, *Istituzioni di diritto pubblico*, 9th ed. (1976), 158.

[68] S. Rodotà, *Il diritto di avere diritti* (2012), 149-150, recalling A. Baldassarre, *Diritti della persona e valori costituzionali*, cit. at 8, 47 et seq.

[69] V. Crisafulli, *La sovranità popolare nella Costituzione italiana (note preliminari)* (1954). Another exception, at that time, was A. Amorth, *La Costituzione italiana. Commento sistematico* (1948), 41-42.

Stefano Rodotà recalls in this regard that it was precisely with the rediscovery of "tangible man" that the Italian legal system succeeded in the difficult task of "reinventing the person"[70] after the experience of totalitarian government, the Second World War and the Holocaust. In fact, the catastrophe of totalitarianism and war – as Capograssi had been the first to recognise in his 1950 pamphlet on "law after the catastrophe" – called for the "reintegration into the legal order of human life in all of its effective content"[71].

There is no doubt that, during the twentieth century, the construction of the "abstract subject" had performed the fundamental task of "formally freeing the individual from the servitude of class, occupation, economic status and gender, on which hierarchical society and inequality was based"[72]. However, the "tangibility of the real"[73] impinges upon the framework set out by formal equality, requiring a new notion of legal subject to be sought after. Accordingly, the constitutional notion of person finally enabled the legal system "to give significance to the materiality of the relational network into which each person is embedded, as well as the social relations characterising them"; moreover, it was thanks to the reference to the person that different subjective figures embodying the human condition in its entirety and in its full complexity penetrated into the legal order and took on self-standing significance[74].

Ultimately, within the republican legal order the personalist principle performed the historical function of "shifting" the decisive moment for the attribution of rights "downwards, towards real society, with its effective baggage of contradictions and inequalities"[75]. In addition, the principle also performed the task of linking the vesting of fundamental rights in the human person *tout court* with the effect of rejecting the notion that rights were vested in citizens only[76]. The personalist principle thus opened up a "twofold" rupture in the legal

[70] S. Rodotà, *Il diritto di avere diritti*, cit. at 67, 148.
[71] G. Capograssi, *Il diritto dopo la catastrofe*, 1 Jus (1950), 198.
[72] S. Rodotà, *Il diritto di avere diritti*, cit. at 67, 144.
[73] S. Rodotà, *Il diritto di avere diritti*, cit. at 67, 147.
[74] S. Rodotà, *Il diritto di avere diritti*, cit. at 67, 152-153.
[75] M. Fioravanti, *Costituzione italiana. Art. 2* (2018), 40 et seq. and 58 et seq.
[76] M. Fioravanti, *Costituzione italiana. Art. 2*, cit. at 74, 40.

order: "one in an upward, universalist direction and the other on a downward trajectory, towards the tangibility of social relations"[77].

In addition to these two breaches imposed by the personalist principle, one upward and one downward, there was also a third breach, as regards the possibility of expanding the catalogue of inviolable rights protected by the Constitution.

Strictly speaking, this issue, which has been widely objected to within doctrinal debate – that is whether Article 2 of the Constitution can give rise to new constitutional rights that are not expressly listed in part I of the Constitution – does not have any direct connection with the personalist principle, construed in the value-laden sense embraced by the Constitution, as mentioned above.

However, it must not be forgotten that the first proposal within the literature of the notion of Article 2 as an "open clause"[78] that was a source of new constitutional rights not specifically enumerated in the Constitution, concerned only to those rights that were deemed to be essential for the free development of the human person, considered "not as an abstract value but as an actual person, in his specific mode of being"[79].

5. Manifestations of the personalist principle within legislation

As regards the influence that the principle has had on the content of legislation during the republican era, from 1948 onwards, it has certainly required a progressive refocusing on the person as the centre of legislative attention, as compared to the fascist-era legislation that regarded the interests of the state as overriding.

The reforms to the Italian Criminal Code, dating back to 1930, which transferred to title XII, on "offences against the person", various offences originally provided for elsewhere – in particular, the fascist Criminal Code classified sexual offences as "offences against public

[77] M. Fioravanti, *Costituzione italiana. Art. 2*, cit. at 74, 41.
[78] A. Barbera, Art. 2, in G. Branca (ed.), *Commentario della Costituzione italiana* (1975), 80.
[79] A. Barbera, Art. 2, cit. at 77, 103.

morals and common decency" – are emblematic examples of this repositioning[80].

However, the most authentically personalist characteristic of republican legislation may be found where state and regional lawmakers acknowledge that the realisation of the personality and the full development of each individual are both dependent on the quality of the individual's personal and social relations, and consequently give effect to the guarantee of rights for all people – including in particular people who are particularly vulnerable – by reinforcing their most significant human relations.

A few examples are sufficient to illustrate this point.

Consider first and foremost the rule providing for mandatory maternity leave[81] which, in contrast to other legal systems, has long been characterised under Italian law by a dual purpose: protecting the health of the woman and also protecting "the relationship established during this period between mother and child, not only as regards most specifically biological needs, but also in terms of the relational and affective needs associated with the development of the child's personality"[82]. Similarly, the 1976 statute law on child adoption has been something of a trailblazer in choosing to provide greater protection to abandoned children, ensuring stability and irreversibility for the relationship with their adoptive parents through the institution of "legitimising adoption"[83].

The 1982 statute law on change of sex on the official register was likewise ahead of its time from a comparative law perspective[84]. The only explanation for this extraordinary result for the Italian legal system, which as regards other aspects of gender discrimination has often been late compared to other countries, is that it was inspired by the personalist principle. Indeed, it guarantees to transsexual persons the right to official recognition for their own gender not only with the public authorities, but also, and above all, with other persons in society.

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[80] Law no. 66/1996 and Legislative Decree no. 21/2018.
[81] Law no. 1204/1971; Legislative Decree no. 151/2001.
[82] Const. C., Judgment no. 116/2001.
[83] Law no. 431/1976; Law no. 184/1983.
[84] Law no 164/1982.

Another significant example is provided by the legislation on the award of custody of underage children in the event of separation or divorce, which has evolved over the years in a direction that is increasingly more inclined to favour the maintenance of personal relationships between parents and children, so much so that it has now stabilised around the assumption of shared custody[85].

The legislation enacted over the last thirty years concerning the circumstances of persons who are ill or who have a disability has also been heavily inspired by the personalist principle. The 1992 statute law on assistance, social integration and the rights of persons with disabilities marked a sea change in this direction in asserting that its primary and principal goal was to promote the "full integration" of persons with disabilities into all social frameworks within which their personality must be able to develop to the full, that is "into the family, at school, at work and within society", whilst also declaring, amongst other objectives, that of "resolving situations of marginalisation and social exclusion of persons with disabilities"[86].

More recently, the 2010 statute law on palliative care[87] recognises and guarantees the relational nature of the human person when the specific individual is close to death[88]. In the same line, the 2017 statute law on end-of-life choices stipulates that the guarantee of the fundamental rights of a seriously ill person must be based on the promotion and valorisation of the "relationship of care and trust between the patient and the doctor"[89] and, in situations involving "illness that is chronic and debilitating or characterised by an inevitable progression with a poor prognosis", it requires "planning of care mutually agreed between the patient and the doctor"[90]. In those situations, where palliative care is being provided, this planning will involve all persons with whom the terminally ill person has established significant human relations (the patient's family or friends, and alongside the doctor also the entire team providing care).

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[85] Articles 155 and 155-*bis* Civil Code.
[86] Article 1 Law no. 104/1992.
[87] Law no. 38/2010.
[88] See E. Lamarque, *Le cure palliative nel quadro costituzionale*, Rivista AIC (2021), 46 et seq.
[89] Article 1 Law no. 219/2017.
[90] Article 5 Law no. 219/2017.

6. The personalist principle within constitutional case law

In case law, as well as in legislation (*supra* section 5), the personalist principle has acted as a powerful engine, capable of imposing the concept of human being as a "relational being" in every sector of the legal system.

However, surprisingly enough also in case law, as in legislation, it has mostly acted 'undercurrent', in a silent way, as if it were taken for granted.

Limiting our focus to the constitutional case law, it can be said that in the first years of its activity the Constitutional Court expressly referred to the principle a few times and in a non-pregnant sense[91], in the same way of the literature of the time, which used it only to generically underline the value of the human persons, their dignity and their rights (*supra* section 4). Over the last few years, on the contrary, there are interesting developments, even if the number of citations of the principle remains very low compared to the importance that the principle really has, from a cultural point of view, in guiding many choices of the Constitutional Court.

In the first place it must be noted that the most closely reasoned judgments that evoke, as the core of the principle, the characterisation of the human person within his specific relational context are related to minors or vulnerable adults.

Of particular significance is the recent judgment in which the Constitutional Court held that the adoption of the partner's biological child – including in the event of surrogacy, which is punishable under Italian criminal law and the effects of which are cannot even be recognised in Italy – must constitute a full adoption, and must therefore create not only a relationship of filiation between the adoptive parent and the adopted child, but also family relationships with the relatives of the adoptive parent[92]. In fact, in this recent judgment the Constitutional Court, evoking the "evoking the personalist importance of family relationships", went to far as to state that human relations, in this case with family members, contribute to establishing the very identity of the child[93].

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[91] For example, Const. C., Judgements nos. 167/1999 and 198/2003.
[92] Const. C., Judgment no. 79/2022.
[93] Const. C., Judgment no. 79/2022, para 7.1.1.

Previously, again in relation to minors, in ruling unconstitutional certain provisions on the automatic suspension of parental authority following the commission of the offence of international child abduction, the Constitutional Court held that the personalist principle, "which permeates the entire Italian Constitution and which is embodied also and above all requires that the rights of the person be recognised and guaranteed not only as an individual, but also in terms of the individual's specific tangible relationships, within the context of which alone the person can develop"[94].

As far as vulnerable adults are concerned, it is important to recall the judgment in which the Constitutional Court held that, as a matter of principle, a person subject to a protective curatorship measure maintains the capacity to make donations, unless specified otherwise by a court of law. According to the Constitutional Court, this conclusion "is moreover required by the personalist principle, laid down first and foremost in Article 2", which protects the human person not only in his individual dimension, but also within the ambit of the relations through which he develops his personalism: these relations without doubt require mutual respect for rights, but may also be strengthened through acts of solidarity. Within the architecture of Article 2, compliance with the duties of solidarity is an essential prerequisite for the recognition of the inviolable rights of each person. As such, to restrict without any objective need a person's freedom to donate without restriction his time, his energies or, as was the case in this instance, his belongings amounts to an unjustified obstacle on the development of his personality and a violation of human dignity"[95].

Another significant judgment was one in which the Constitutional Court held that it was necessary to extend eligibility for house arrest also to convicted mothers of adult children with a severe disability: "the human relationships, including in particular family relations, are decisive factors for the full development and effective protection of the most vulnerable people. This results from the principle of personal value guaranteed under our Constitution, read

[94] Const. C., Judgment no. 102/2020.

[95] Const. C., Judgment no. 114/2019. See E. Lamarque, *The Cross-Border Protection of Vulnerable Adults in the EU from the Italian Perspective*, Osservatorio AIC (2022), 98 et seq.

also in the light of international law instruments, including in this area above all the United Nations Convention on the Rights of Persons with Disabilities"[96].

Within an entirely different context it is important to recall the position within constitutional case law according to which financial disputes between the state and the regions concerning the funding of essential service levels cannot be considered in the abstract, as disputes between bodies concerning solely the delineation of their powers. On the contrary, it is necessary to adopt a "transcendent viewpoint of the guarantee of essential levels of assistance that focuses constitutional protection on the human person, not only in terms of his individuality, but also within the organisation of the communities to which he belongs, which typifies the social nature of the health service"[97].

Secondly, the personalist principle has been relied on within the constitutional case law in order to prevent restrictions on persons' rights in the name of institutional requirements that do not also concern, at the same time, protection for the rights of others[98]. For example, when it struck down as unconstitutional the rule prohibiting a child born into an incestuous relationship to take action to obtain recognition of the relationship of filiation[99], the Constitutional Court recalled that "the Constitution does not justify a conception of the family that is alien to persons and their rights. This is because, it argued, "according to what has been defined as the *personalist principle* proclaimed in it, the value of 'social formations', which evidently include the family, lies in the end ascribed to them of enabling and in fact of promoting the expression of the personality of human beings"[100].

The criminal law and the criminal law enforcement also contain several extremely significant rulings regarding this issue. For example, the Constitutional Court held that "to punish in the absence of guilt with

[96] Const. C., Judgment no. 18/2020.
[97] Const. C., Judgment no. 62/2020.
[98] G. Silvestri, *I diritti fondamentali nella giurisprudenza costituzionale italiana: bilanciamenti, conflitti e integrazione delle tutele*, in *Principi costituzionali*, cit. at 4, 53 et seq.; A. Morelli, *Il principio personalista nell'era dei populismi*, in Consulta on line (2019), 362.
[99] Articles 251, para 1, and 278, para 1, Civil Code.
[100] Const. C., Judgment no. 494/2002.

the aim of 'dissuading' fellow citizens from engaging in the prohibited conduct ('negative' general prevention) or of 'neutralising the guilty person ('negative' special prevention)" entails "an instrumentalisation of the human being for contingent criminal policy objectives which is at odds with the personalist principle asserted in Article 2"[101]. It held likewise that the security measures adopted in relation to mentally ill persons who entirely lacked legal capacity "are justified, within a system inspired by the personalist principle (Article 2 of the Constitution) only if they further simultaneously both of the related and inseparable goals of curing the mentally ill and of containing him as a danger to society. A system that pursued only the goal of avoiding dangers for the society, without protection the person who is ill, could not be considered to be constitutional"[102]. Moreover, in the first of the two decisions on assisted suicide[103], the Constitutional Court assessed the reason underpinning the provision concerning this offence within the fascist Criminal Code "in the light of the changed constitutional framework, which considers the human person as a value in himself and not as a simple means for satisfying collective interests"[104].

Thirdly, the Constitutional Court has relied on the personalist principle when interpreting other constitutional provisions concerning rights as well as the express limits contained in them.

In particular, the fact that, under Italian law, individual rights pertaining solely to proprietary rights have always been subordinate or otherwise entirely secondary to rights pertaining to the relational and social sphere of the human person results from a personalist reading of the constraint of "social utility" imposed on private economic initiative by Article 41(2), as well as the guarantee of the "social function" of private property imposed by Article 42(2)[105].

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[101] Const. C., Judgment no. 322/2007.

[102] Const. C., Judgments nos. 253/2003 and 22/2022.

[103] Article 580 Penal Code.

[104] Const. C., Order no. 207/2018, followed by Judgment no. 242/2019.

[105] Article 41 It. Const.: «[1] Private-sector economic initiative is freely exercised. [2] It may not be conducted in conflict with social usefulness or in a way that may harm health, the environment, safety, liberty and human dignity. [3] The law shall provide for appropriate programmes and controls so that public and private economic activity may be oriented and co-ordinated for social and environmental purposes». Various rulings of the Constitutional Court have nonetheless established, in different

7. A few concluding remarks

In conclusion, I can perhaps say that, from 1948 until today, the personalist principle has silently imposed itself in the entire Italian legal system: it has worked well, it has worked hard, but it has permeated the legal system without appearing, acting underground and without much fanfare.

This tireless work done behind the scenes by our principle has achieved, in my opinion, at least two great results.

Firstly, it inspired the introduction into the text of the Constitution itself, with the 2001 constitutional reform[106], of the principle of horizontal subsidiarity, which is evidently the reflection on the level of the organization of the public powers of the "profound social nature" of the human person[107].

Secondly, and above all, the personalist principle has had an effect on the content and nature of human rights guaranteed by the Italian legal system, which can be described in this way.

On the negative side, the principle imposed the rejection of the very idea of human freedom as pure self-determination and prevented the rights guaranteed at the constitutional level from assuming an individualistic connotation. On the positive side, it required that the full development of every single concrete human being be guaranteed also through the safeguarding of their most significant relationships, and not solely and exclusively through the guarantee of their self-determination capacity.

Summarizing, in the Italian legal system, thanks to the personalist principle, the self-determination that denies or ignores interpersonal relationships, or that puts them at risk, finds no constitutional guarantee.

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contexts, that it is impossible to give equal weight to considerations relating to the development of the human person and considerations relating to assets, invariably subordinating the latter to the former. See, for example, Const. C., Judgments nos. 479/1987; 419/2000; 219/2008; 204/2016; 83/2017; 58/2018.

[106] Article 118, para 4, It. Const.: "The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity".

[107] Const. C., Judgment no. 131/2020.

I can give two examples, taken from constitutional case law, of this silent, not explicit, but very effective action of our principle.

Think, for example, of the judgment that ruled unfounded various questions concerning the constitutionality of legislation on recruitment to and aiding and abetting prostitution[108]. Here in fact the Constitutional Court recalled that the Italian Constitution recognises and guarantees rights "in relation to the protection for and development of the value of the person", and that "this value is attached not to the individual in isolation, but to a person vested with rights and duties, and as such embedded within social relations". The conclusion is very revealing: "the offer of sexual services for consideration does not by any means constitute an instrument for the protection and development of the human person but rather – much more simply – a particular form of economic activity", which as such is subject to far-reaching constitutional constraints.

The prohibition, enforced by criminal sanction, of the practice of surrogacy[109] is, in my opinion, even more significant.

The link of this prohibition with the personalist principle emerges, almost imperceptibly, in a hint contained in some recent judgments of the Constitutional Court and of the Court of Cassation which deal with related issues, such as the *status* of the child born abroad through surrogacy and the 'living law' which excludes recognition in Italy of a foreign court decision declaring the relationship between the child and the 'intended' parent on the grounds that the prohibition of surrogacy is a principle of *ordre public*. According to this case law, indeed, surrogacy not only "causes intolerable offence to the dignity of the woman", but also "profoundly undermines human relations"[110].

[108] Const. C., Judgment no. 141/2019.

[109] Article 12(6) of Law No. 40/2004.

[110] Const. C., Judgments nos. 272/2017 (para 4.2.); 33/2021 (para 5.1.); 79/2022 (para 5.2.3.). The same words are repeated verbatim by Court of Cassation, Joint Sections, Judgment no. 38162/2022.

ADMINISTRATIVE LAW REFLECTIONS ON CYBERSECURITY, AND ON ITS INSTITUTIONAL ACTORS, IN THE EUROPEAN UNION AND ITALY

Stefano Rossa[*]

Abstract

This paper offers some reflections on administrative law dedicated to the field of cybersecurity. After reconstructing the European and national discipline of institutional actors operating in this area, in particular the ENISA and the Italian *Agenzia per la Cybersicurezza Nazionale*, the paper investigates the relationship between these two bodies. In the conclusion, the analysis highlights the need for a cybersecurity model characterized by a broader participation of non-institutional actors, also with the benefit of more institutional sustainability.

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1. Introduction. Hybrid Warfare and Cybersecurity: Digital Attacks with Real Effects

The etymology of the Italian word '*guerra*' (war) reveals how it has traditionally been fought with boots on the ground. As

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has been observed[1], the word 'war' derives from the Germanic word '*werra*', which had the meaning of scrum, scuffle, confusion, and was in contrast to the Classical Latin lemma '*bellum*', a term that had a more strategic connotation related to the manoeuvres of armies. 'War', therefore, emphasises how, from the earliest times, conflicts were resolved directly on the battlefields where soldiers fought hand-to-hand.

Over the years, technology applied to warfare[2] has allowed soldiers to physically distance themselves from the enemy while increasing their own offensive capacity – and conversely, the opponent's defensive capacity. Consider that, historically, in the beginning, people fought with sticks and swords, then they moved on to bows and arrows, then to guns and cannons and, most recently, to jets, missiles, and drone bombers.

Military technology, which has also enabled great advances in the civil sphere[3], has undergone strong development particularly since the 20th century and this exponential growth – in accordance with Moore's Law[4] – has not yet stopped. With the increase in the technological level of military equipment, the physical distance with which warfare can be carried out with the aid of ICT has increased in parallel. This is due to the increased ability to collect data, process it into information and use it as an advantage in war contexts, with the simultaneous need to protect communication systems[5].

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[1] Cf. G. Moretti, *Il lungo viaggio delle parole*, 40/158 Prometeo. Rivista trim. di scienze e storia 59 ss. (2022).

[2] On the relationship between anthropology and technology, see A. Gehlen, *Man in the Age of Technology* (1980), in which this Author highlights how technology can be both an evolutionary factor but also a potential weapon.

[3] For instance, the development of GPS which born for military purposes and then adopted in everyday life. Internet itself was developed as a result of the ARPANET (Advanced Research Projects Agency NETwork) project in 1969. Over the years, ARPANET would take on the current architecture of the Internet thanks to the subsequent development of the TPC (Transmission Control Protocol) and IP (Internet Protocol) protocols that would enable the various networks to be interconnected.

[4] Moore's law is an empirical law according to which the computing performance of transistors doubles every eighteen months. Cf. C. Mody, *The Long Arm of Moore's law: Microelectronics and American Science* (2016).

[5] In relation to the link between the security of military communications and the human factor, see the interesting considerations of A. Kerckhoffs, *La cryptographie militaire*, vol. IX, Jan.-Febr. Journal des sciences militaires 5 ss. and 161 ss. (1883).

Modern conflicts have become hybrid wars, fought with both 'traditional' weapons and 'non-traditional' tools, both in a 'traditional' environment such as the battlefield and in a 'non-traditional' environment such as cyberspace. The recent Russian-Ukrainian[6] conflict has highlighted this point, especially in relation to cybersecurity, aimed at preventing cyberattacks that represent a veritable additional weapon of war capable of striking enemy nerve centres at a distance. A digital weapon with tangible consequences in the physical world[7].

2. Topic Outline Fundamental Concepts

This paper proposes to investigate the administrative law implications of cybersecurity policies adopted in the European Union, in particular by analysing the actions of the main institutional actors operating in this field at EU level and at the Italian level.

Before proceeding with the discussion, it is necessary to briefly clarify what is meant by cybersecurity, since this concept is rather broad and intricate, especially from a technical point of view[8].

Cybersecurity is a made up word, composed by the confix 'Cyber' and the suffix 'Security'.

On the one hand, 'Cyber' derives from the ancient Greek expression '*cybernetiké*' used by Plato in Gorgias to indicate 'the art of piloting ships'[9]. Over the ages, particularly since the second half of the 20th century, a number of scientific theories developed that emphasised the link between communication, society and law (as the Wiener's Cybernetics)[10]. From there on, the word 'cyber' was automatically linked to everything to do with IT and digital. And

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[6] For an geopolitical analysis, among numerous contributions, see in Italian P. Sellari, *Il conflitto russo ucraino: una visione geopolitica*, 17 federalismi.it 4 ss. (2022) and E. Chiti, *Guerra e diritto amministrativo*, 3 Gior. dir. amm. 293 ss. (2022).

[7] On the subject, in a broad sense, L. De Nardis, *The Internet in Everything. Freedom and Security in a World with No Off Switch* (2020).

[8] Cfr. European Union Agency for Network and Information Security (ENISA), *Definition of Cybersecurity. Gaps and overlaps in standardisation* (2015) in https://bit.ly/3cLuHbg [last cons.: 06.08.2022].

[9] Cf. A. Taglia (ed.), *Gorgias, Platone* (2014), v. 511.

[10] For instance the Cybernetics by Norbert Wiener. Cf. N. Wiener, *Cybernetics: or Control and Communication in the Animal and the Machine* (1948).

this is also thanks to William Gibson, an exponent of the Cyberpunk literary current who indirectly reinforced this relationship by inventing the term 'Cyberspace' in his book Neuromancer[11].

On the other hand, the suffix 'Security' refers to those organized activities aimed at protecting people or goods from danger or damage. Security is the organisational means to achieve safety.

In the light of what outlined above, it is possible to affirm that cybersecurity means a technical-organisational system aimed at protecting the IT infrastructures of complex public (e.g. the State, government structures, public administrations, etc.) or private (e.g. companies) organisations from cyberattacks. This paper will focus on cybersecurity related to the public sector, where actions are taken to counter cyberattacks that may be a threat to national security: either because they target crucial state infrastructures or because they aim to block the supply of essential services. The discussion, however, will not focus on criminal law aspects, although the field of cybercrime is intricately linked to that of cybersecurity in the proper sense of the term. Therefore, the paper will focus on the analysis of the institutional actors operating in the cybersecurity context, namely ENISA in the EU and the *Agenzia per la Cybersicurezza Nazionale* (ACN) in Italy, and the effects of their relationship.

3. The European Union Agency for Cybersecurity (ENISA) in the Context of the EU Cybersecurity Framework

Sun Tzu, in his work *The Art of War*, warns the reader that to win a battle it is not enough to know the enemy, but that it is imperative to know oneself[12]. According to the Chinese masterpiece, to win it is necessary to prepare a defence system,

[11] Cf. W Gibson, *Neuromancer* (1984).

[12] Cf. S.B. Griffith (transl.), *Sun Tzu*, *The art of war*, III, 30-33, 84 (1963): «[i]t is in these five matters that the way to victory is known. / Therefore I say: 'Know the enemy and know yourself; in a hundred battles you will never be in peril. / When you are ignorant of enemy but know yourself, your chances of winning or losing are equal. / If ignorant both of your enemy and of yourself, you are certain in every battle to be in peril'».

centred on the neutralisation of enemy attacks, that derives from an effective internal tailor-made organisation.

At the beginning of the new millennium, the EU institutions set up some agencies[13] tin order to prevent and fight the crime on European territory. Among them the European Police Office (so-called Europol, based in The Hague), the European Union Agency for Law Enforcement Training (so-called CEPOL, based in Budapest) and the current European Border and Coast Guard Agency (so-called Frontex, based in Warsaw).

The European Union also acted cybersecurity area mainly through two agencies: the Europol and the European Network and Information Security Agency (so-called ENISA, based in Athens), today known as EU Agency for Cybersecurity[14]. Europol acts in particular in the criminal sphere, thanks to the creation in 2013 of the European Cybercrime Centre (c.d. EC3)[15] a special division dedicated to the contrast and prevention of cybercrimes, including those committed in the so-called Dark Web, in particular cyber-dependent crime, child sexual exploitation and payment fraud. ENISA, however, operates on the cybersecurity side properly, from a technical policy implementation viewpoint. As previously underlined, this paper will not dwell on the criminal aspects, which is why the following discussion will be dedicated to the analysis of ENISA without focusing on Europol.

ENISA was created by Regulation (EC) 2004/460[16], as the European institutions had become aware of the need to ensure an adequate level of protection of communication networks and information systems throughout the European Union[17]. In fact, at that time, the proper functioning of communication networks was

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[13] About this topic, see *ex multis* E. Chiti, *European Agencies' Rulemaking: Powers, Procedures and Assessment*, European Law Journal 93 ss. (2013); M. Busuioc, *European Agency: Law and Practices of Accountability* (2013); M. Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (2016); F. Coman-Kund, *European Union Agencies as Global Actors* (2018); in Italian J. Alberti, *Le agenzie dell'Unione europea* (2018).

[14] The ENISA institutional website is https://www.enisa.europa.eu/ [last cons.: 06.08.2022].

[15] About it see https://www.europol.europa.eu/about-europol/european-cybercrime-centre-ec3 [last cons.: 06.08.2022].

[16] The text of Regulation (EC) 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency can be consulted at https://bit.ly/3PFvAAP [last cons.: 06.08.2022].

[17] Cf. Article No. 1 Regulation (EC) 460/2004.

a crucial factor for social, competitive and economic development[18].

Regulation (EC) No. 460/2004 had delineated ENISA as an agency with limited tasks, as these were purely of a technical advisory nature, for the benefit of the Member States, in the field of cybersecurity[19]. For this reason, the Regulation had provided for ENISA to have a limited duration of five years[20].

The rapid technological development, and the consequent increase in its pervasiveness on society, led to an increase in cybersecurity risks. For this reason, in this field the European legislator approved new legislation[21] and implemented previous frameworks such as the one establishing ENISA[22]. The goal was clear: to make the European Union cybersecurity system more resilient and functional than before. One of the most significant new regulations introduced is Regulation (EU) 2019/881 (the so-called Cybersecurity Act) [23].

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[18] Cf. whereas No. 1), 2) and 3) Regulation (EC) 460/2004.

[19] Cf. Articles No. 2 and 3 Regulation (EC) 460/2004.

[20] Cf. Article No. 27 Regulation (EC) 460/2004.

[21] Cf. Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union – s.c. NIS (*Network and Information Security*) Directive. The text can consulted in at https://bit.ly/3PFr0Ct [last cons.: 06.08.2022]. The latter directive established the Computer Security Incident Response Team (CSIRT), an intervention group that takes action in the event of a computer security compromise. There is currently a proposal to revise the NIS Directive with a view to issuing the s.c. NIS 2 Directive, which if approved could have a broader application range than the NIS directive, particularly with regard to its notification obligations. See E. Biasin, E. Kamenjašević, *Cybersecurity of medical devices: new challenges arising from the AI Act and NIS 2 Directive proposals*, 3 Int. Cybersec. Law Rew. 163 ss. (2022).

[22] *Ad exemplum* Regulation (EC) 1007/2008, Regulation (EU) 580/2011 and the Regulation (EU) 526/2013. Among the most significant amendments, it is worth noting the continued extension of the Agency's duration.

[23] The Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) can be consulted at https://bit.ly/3vlYQVf [last cons.: 06.08.2022]. Cf. also the Joint Communication to the European Parliament and the Council. The EU's Cybersecurity Strategy for the Digital Decade, 16.12.2020, JOIN(2020) 18 final 2020 in https://bit.ly/3cOH5an [last cons.: 06.08.2022]. See *multis* A. Mitrakas, *The emerging EU framework on cybersecurity certification*, 7 Datenschutz und Datensicherheit 411 ss. (2018); C. Kohler, *The EU Cybersecurity Act and the*

To achieve this purpose, the Cybersecurity Act operated on two fronts. On the one hand, by redefining the competences and organisation of ENISA. On the other hand, by introducing a common EU cybersecurity certification system for ICT products – protecting the consumer and competition[24] by providing for mutual recognition of cybersecurity certificates of the national authorities of the various Member States[25].

Focusing on the first aspect mentioned above, as a result of the Cybersecurity Act, ENISA acquires a new central role in EU cybersecurity policy, becoming a proper «centre of network and information security expertise for the EU, its member states, the private sector and EU citizens»[26].

This is not only in view of the 'extension' of its duration from temporary to permanent[27], but especially in relation to its new tasks. The mandate given by the Cybersecurity Act to ENISA is twofold. On one side, to create a «a high common level of cybersecurity across the Union, including by actively supporting Member States, Union institutions, bodies, offices and agencies in improving cybersecurity»[28]. On the other side, to reduce fragmentation in the European internal market for cyber security by promoting an EU cybersecurity policy[29].

European Standards. An Introduction to the Role of European Standardization, 1 Int. Cybersec. Law Rew. 7 ss. (2020). Recently Z. Bederna Z. Rajnai, *Analysis of the cybersecurity ecosystem in the European Union*, 3 Int. Cybersec. Law Rew. 35 ss. (2022).

[24] In fact, as stated in Whereas 67) Regulation (EU) 2019/881, national certification systems of individual EU Member States are often not recognised outside the borders of the single national state. In order to participate in cross-border tenders, economic operators are therefore forced to turn to private certifiers, resulting in higher product or service costs. In addition, according to the Cybersecurity Act, such private certifications do not always present homogenous levels of reliability, to the detriment of the principle of equal competition. For contingent reasons, this paper will not analyse the common European cybersecurity certification system.

[25] It should be underlined, however, that Regulation (EU) 2021/887 of 20 May 2021 established the European Cybersecurity Competence Centre, based in Budapest, which will not be analysed in this paper.

[26] European Union Agency For Network and Information Security, *Cybersecurity Culture Guidelines: Behavioural Aspects of Cybersecurity* 1 (2018), in https://bit.ly/3yOc0MI [last cons.: 06.08.2022].

[27] Cf. Article No. 68 Regulation (EU) 2019/881.

[28] Cf. Article No. 3 Regulation (EU) 2019/881.

[29] *Ibidem*. As highlighted by F. Campara, *Il Cybersecurity Act*, in A. Contaldo, D. Mula (eds.), *Cybersecurity Law* 73 (2020), the Court of Justice of the European

To that that, the tasks assigned to ENISA concern specific types of activities: (1) the assistance to EU institutions, bodies, offices and agencies, as well as to Member States, in the development and implementation of Unional policies relating to cybersecurity, including through technical support actions[30]; (2) the operational cooperation, coordination and sharing of information relating to cybersecurity at EU level between Member States, EU institutions, bodies, offices and agencies, and public and private sector stakeholders, as well as between the European Union, third countries and international organisations[31], including by coordinating actual international cybers exercises[32]; (3) the development of skills and knowledge in the field of cybersecurity[33]; (4) the promotion and the development of the EU policy on cybersecurity certification of technological products and services[34].

From the tasks and competences expressly given to ENISA by the Cybersecurity Act[35], it appears that it is no longer merely a EU technical advisory agency, but a proper operational agency in the field of cybersecurity[36].

Union had already ruled favourably on ENISA's role of promoting common European policies in support of the European internal market in favour of the member states. Cf. Court of Justice of the European Union (Grand Chamber), 2 May 2006, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (C-217/04), in https://bit.ly/3zESKlp [last cons.: 06.08.2022].

30 Cf. Article No. 4 and 5 Regulation (EU) 2019/881. According to Articles No. 62 par. 5 and 22 par. 4 Regulation (EU) 2019/881, ENISA is responsible for assisting the European Commission in the secretariat functions of the European Cybersecurity Certification Group (ECCG), as well as in the secretariat functions of the Stakeholder Group for Cybersecurity Certification (SCCG).

31 Cf. Articles No. 4, 7, 9 and 12 Regulation (EU) 2019/881.

32 Cf. the ENISA official website at https://www.enisa.europa.eu/topics/cyber-exercises [last cons.: 06.08.2022].

33 Cf. Articles No. 4 and 6 Regulation (EU) 2019/881.

34 Cf. Articles No. 4, 8, 10 and 11 Regulation (EU) 2019/881.

35 It seems necessary to mention that, according to Articles No. 13 to 28 Regulation (EU) 2019/881, ENISA's administrative structure is composed of five figures: the Management Board; the Executive Committee; the Executive Director (currently Estonian Juhan Lepassaar); the Advisory Group; and the network of national liaison officers.

36 In this sense, in Italian, also R. Brighi, P.G. Chiara, *La cybersecurity come bene pubblico: alcune riflessioni normative a partire dai recenti sviluppi nel diritto dell'Unione Europea*, 21 federalismi.it 24 (2021), and F. Campara, *Il Cybersecurity Act*, in A. Contaldo, D. Mula (eds.), *Cybersecurity Law*, cit. at 29, 72.

As it is easy to deduce, the cybersecurity has impacts on numerous other subjects and in various contexts. For this reason there is a need to standardise as much as possible the legal discipline of the various Member States (despite the fact that there are some areas that are still the exclusive competence of the member states, such as the operational management of cyber incidents[37]). For this reason, each EU State is required to have a national cybersecurity discipline and appropriate bodies, in accordance with the provisions of Directive 2016/1148/EU[38].

In fact, for instance, in France there is the *Agence Nationale de la Sécurité des Systèmes d'Information* (ANSSI)[39], in Germany the *Bundesamt für Sicherheit in der Informationstechnik* (BSI)[40], in Spain the *Instituto Nacional de Ciberseguridad* (INCIBE)[41], in Portugal the *Centro Nacional de Cibersegurança* (CNCS)[42], in Ireland the National Cyber Security Centre (NCSC)[43], in Belgium the Centre for Cyber Security Belgium[44], in the Netherlands the *Nationaal Cyber Security Centrum*[45], in Denmark the C*enter for Cybersikkerhed*[46], in Sweden the *Nationellt cybersäkerhetscenter*[47]. In Italy, instead, the *Agenzia per la Cybersicurezza Nazionale* (ACN) has been recently established[48]

4. The Italian *Agenzia per la Cybersicurezza Nazionale* (ACN) and the Italian Cybersecurity Framework

Under the impulse of EU law[49] the Italian government, headed by Mario Draghi, in the summer of 2021 set up the *Agenzia per la Cybersicurezza Nazionale* (henceforth, ACN).

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[37] In this way, in Italian, L. Tosoni, *Cybersecurity Act, ecco le nuove norme in arrivo su certificazione dei prodotti e servizi ICT*, Agenda digitale.eu. (2019).
[38] Cf. Articles No. 7 and 8 Directive (EU) 2016/1148.
[39] The institutional website is https://www.ssi.gouv.fr/ [last cons.: 06.08.2022].
[40] The institutional website is https://www.bsi.bund.de/DE/Home/home_node.html [last cons.: 06.08.2022]. In the BSI there is the *Cyber-Sicherheitsrat*.
[41] The institutional website is https://www.incibe.es/ [last cons.: 06.08.2022].
[42] The institutional website is https://www.cncs.gov.pt/ [last cons.: 06.08.2022].
[43] The institutional website is https://www.ncsc.gov.ie/ [last cons.: 06.08.2022].
[44] The institutional website is https://ccb.belgium.be/ [last cons.: 06.08.2022].
[45] The institutional website is https://www.ncsc.nl/ [last cons.: 06.08.2022].
[46] The institutional website is https://www.cfcs.dk/ [last cons.: 06.08.2022].
[47] The institutional website is https://www.ncsc.se/ [last cons.: 06.08.2022].
[48] The institutional website is https://www.acn.gov.it/ [last cons.: 06.08.2022].
[49] And this both in relation to the national implementation of the European framework expressly mentioned in the previous paragraph, and in relation to

The legal framework establishing the ACN is provided by Decree-Law No. 82/2021 (converted with some amendments into Law No. 109/2021)[50]. This framework represents only the last piece of the mosaic of the Italian cybersecurity legislation, which arose first with Legislative Decree No. 65/2018[51] – implementing Directive 2016/1148 – and subsequently continued with Legislative Decree No. 105/2019 (converted into Law No. 133/2019)[52] establishing the national cybersecurity perimeter (in Italian *perimetro di sicurezza nazionale cibernatica* – PSNC)[53].

In relation to the PSNC, which for reasons of economy of exposition we do not have the opportunity there to analyse in detail, it is only sufficient to mention that it is a unique and avant-garde instrument in the panorama of the various national cybersecurity frameworks. The perimeter consists of a legal framework within which particular cybersecurity regulations are applied to two specific categories of actors: public or private entities exercising an essential function of the State or providing a public service essential to the maintenance of civil, social or economic activities fundamental to the interests of the State[54]. Of course, this public function or service must depend on information-digital networks or systems[55] from the malfunction,

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the Next Generation EU, adopted at the extraordinary European Council of 17 and 18 July 2020, the substantial programme of investments (as much as 750 billion Euro) and reforms aimed at accelerating the digital and ecological transition in order to revitalise the economies of the member countries deeply damaged by the crisis caused by the pandemic. Thanks to the National Recovery and Resilience Plan (*Piano Nazionale di Ripresa e Resilienza* – PNRR), Italy was able to obtain the funds that the Next Generation EU had planned for it. In the PNRR, cybersecurity plays an important role, since it is considered a precondition for the proper functioning of the country's digitisation system. The text of the National Recovery and Resilience Plan can be found at https://italiadomani.gov.it/en/home.html [last cons.: 06.08.2022].

[50] This regulation can be found at https://bit.ly/3AY0Mqf [last cons.: 06.08.2022].

[51] This regulation can be found at https://bit.ly/3OjrdtA [last cons.: 06.08.2022].

[52] This regulation can be found at https://bit.ly/3B6ZMQN [last cons.: 06.08.2022].

[53] Cf. in Italian B. Carotti, *Sicurezza cibernetica e Stato-Nazione*, 5 Giorn. dir. amm. 629 ss. (2020), and A. Renzi, *La sicurezza cibernetica: lo stato dell'arte*, 4 Giorn dir. amm. 538 ss. (2021).

[54] Cf. Article No. 1 co. 2 let. a) numb. 1) Decree-Law No. 105/2019, conv. Law. No. 133/2019.

[55] Cf. Article No. 1 co. 2 let. a) numb. 2) Decree-Law No. 105/2019, conv. Law. No. 133/2019.

disruption or improper use of which harm to national security may result[56]. With respect to these two categories of actors, the legislation establishes obligations of a preventive nature, designed to avoid *ex ante* a possible cyber incident or attack[57], and notification and response obligations[58].

Coming back to ACN, it seems useful to point out that it was expressly established to protect national interests[59] in the field of cybersecurity[60], instrumentally assisting the *Presidente del Consiglio dei Ministri* (the Italian Prime Minister - for simplicity's sake, henceforth PCM)[61], who has the exclusive direction and

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[56] Cf. Article No. 1 co. 2 let. a) numb. 2-*bis*) Decree-Law No. 105/2019, conv. Law. No. 133/2019.

[57] Including: *ex* Article No.1 co. 2 let. b) Decree-Law No. 105/2019, conv. Law. No. 133/2019, the preparation and periodic updating and communication to the competent authorities of the list of networks, information-digital systems and information services of its own relevance; *ex* Article No. 7 co. 2 DPCM July 30, 2020, No. 131, the preparation of risk analysis of individual technological assets, regarding incidents or cyberattacks on their networks or information infrastructures, also regarding dependency relationships with other networks or other digital infrastructures; *ex* Article No. 8 DPCM No. 81 of April 14, 2021, the adoption of the technical cybersecurity measures established by the competent bodies at the domestic or international level aimed at securing networks, information systems and individual technological assets their components; and *ex* Article No. 1 co. 6 let. a) Decree-Law No. 105/2019, conv. Law. No. 133/2019, the communication to the Center for National Evaluation and Certification, now established at the *Agenzia per la Cybersicurezz Nazionale*, of the intention to proceed with the purchase of procurement of goods, systems or services related to information and communication technologies that can be implemented or used on the networks or information-digital systems with which public functions or crucial public services are exercised for the State.

[58] Including notifying the Computer Security Incident Response Team (CSIRT) of incidents impacting ICT assets related to its networks or information systems or IT services.

[59] In the field of public order and safety, see *ex multis* G. Corso, *L'ordine pubblico* (1979); A. Cerri, *Ordine pubblico. Diritto costituzionale*, IV *Enc. giur.* (1990); P. Bonetti, *Ordinamento della difesa nazionale e Costituzione italiana* (2000); G. Caia, *L'ordine e la sicurezza pubblica*, in S. Cassese (dir.), *Trattato di diritto amministrativo*, Vol. 1, *Diritto amministrativo speciale*, 281 ss. (2003); T.F. Giupponi, *Le dimensioni costituzionali della sicurezza* (2010); A. Pace, *La sicurezza pubblica nella legalità costituzionale*, 1 Rivista AIC (2015); E. Chiti, *Le sfide della sicurezza e gli assetti nazionali ed europei delle forze di polizia*, 4 Dir. amm. 511 ss. (2016). Recently R. Ursi, *La sicurezza pubblica* (2022).

[60] Cf. Article No. 5 co. 1 Decree-Law No. 82/2021, conv. Law No. 109/2021.

[61] Cf. Article No. 5 co. 2 second sentence Decree-Law No. 82/2021, conv. Law No. 109/2021.

responsibility for cybersecurity policies[62]. For this reason, the functions incumbent on the ACN are numerous, so an attempt has been made to group them into a few macro-areas.

First of all, ACN is in charge of coordinating the various actors on the national territory that act in cybersecurity matters[63], also for the implementation of international strategies[64]. To this end, on behalf of Italy, it takes part in cybersecurity exercises coordinated by ENISA[65].

Secondly, ACN promotes the implementation of joint actions aimed at achieving the cybersecurity, that is essential for the digitisation process of the country[66], also through the involvement of Universities and research institutions[67].

Third, ACN is the entity entrusted with the preparation of Italy's national cybersecurity strategy[68], recently approved in May 2022[69]. Because it has the task of bringing together different instances of several stakeholders, and because it is endowed with a very high level of professionalism, ACN is responsible for advisory activities in the area of cybersecurity, updating and taking care of the national regulatory framework, also expressing non-binding opinions on legislative or regulatory initiatives in this field[70], and being able to adopt soft law and technical rules[71].

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[62] Cf. Article No. 2 co. 1 let. a) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[63] Examples include the role of CONSIP, the Ministry of Economic Development and the Intelligence System for the Security of the Republic (secret services).

[64] One example is the role of the Ministry of Foreign Affairs with regard to international cooperation on cybersecurity. Cf. Article No. 7 co. 1 let. q) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[65] Cf. Article No. 7 co. 1 let. o) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[66] Cf. Article No. 7 co. 1 let. a) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[67] Cf. Article No. 7 co. 1 let. r) and v) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[68] Cf. Article No. 7 co. 1 let. b) Decree-Law No. 82/2021, conv. Law No. 109/2021

[69] The Italian National Cyber Security Strategy 2022-2026 is available in English at https://www.acn.gov.it/ACN_EN_Strategia.pdf [last cons.: 06.08.2022]. About it see in Italian P. Mascaro, *La Strategia Nazionale Cybersecurity*, Osservatorio sullo Stato Digitale IRPA (2022).

[70] Cf. Article No. 7 co. 1 let. p) Decree-Law No. 82/2021, conv. Law No. 109/2021.

Fourthly, it is up to ACN to perform the important function of cybersecurity certification[72] established by the Cybersecurity Act, as already written in the previous paragraph.

Lastly, ACN is entrusted with supervisory and sanction tasks related to some specific interventions[73]. Aspect that highlights that this agency has more than just an advisory nature.

It was written above that the Agency has been identified as the competent national (Italian) NIS authority. This directive specifies that member states may establish at their discretion the sanctions they consider most appropriate, provided they are found to have the characteristics of effectiveness, proportionality and dissuasiveness[74]. To this purpose, Legislative Decree No. 65 of 2018, in addition to introducing on the legislative level the Italian Computer Security Incident Response Team, the so-called national CSIRT, recently hinged at the ACN, also places some obligations on private entities, in adherence to the provisions of the NIS Directive. Specifically, the Italian framework, in accordance with the European framework, obligates operators of essential services[75] and providers of digital services[76] to take «appropriate and proportionate» organizational and technical measures to avoid, cope with, and manage any risks of cyberattacks on their network or digital systems[77], as well as to minimize the effects resulting from cyber incidents that may involve the security of the network and digital systems used to provide, on the one hand, essential services[78] and, on the other hand, digital services[79]. To this goal, operators of essential services and providers of essential services must notify the Italian CSIRT «without undue delay» of any incidents that have a significant impact on the continuity of the delivery of provided essential services and digital services[80].

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71 Cf. Article No. 7 co. 1 let. m) Decree-Law No. 82/2021, conv. Law No. 109/2021.

72 Cf. Article No. 7 co. 1 let. e) Decree-Law No. 82/2021, conv. Law No. 109/2021.

73 Cf. Article No. 7 co. 1 let. d), f), h) and i) Decree-Law No. 82/2021, conv. Law No. 109/2021.

74 Cf. Article No. 21 Direttive (EU) 2016/1148.

75 Cf. Article No. 4 co. 2 Legislative Decree No. 65/2018.

76 Cf. Article No. 3 co. 1 let. i) Legislative Decree No. 65/2018.

77 Cf. Articles No. 12 co. 1 and No. 14 co. 1 Legislative Decree No. 65/2018.

78 Cf. Article No. 12 co. 2 Legislative Decree No. 65/2018.

79 Cf. Article No. 14 co. 3 Legislative Decree No. 65/2018.

80 Cf. Articles No. 12 co. 5 and No. 14 co. 4 Legislative Decree No. 65/2018.

Compliance with these obligations is monitored by the competent (national) NIS authority[81], and in the event of violation the above private actors incur administrative fines (from €12,000 to €150,000 depending on the case), unless the act constitutes a crime[82].

ACN's sanctioning power is also referable to the National Cyber Security Perimeter (PSNC). With the obligations already described, the detailed regulations provided, in the event of their violation by those actors established by the PSNC[83], a sanction regime of a twofold nature. A regime of a criminal nature including imprisonment[84], the enforcement of which is entrusted to the Courts, and one of an administrative nature, entrusted to the ACN, which, «unless the act constitutes a crime»[85], involves the imposition of substantial administrative sanctions (from a minimum of €200,000 to a maximum of €1,800,000 depending on the specific cases).

Finally, the aforementioned Cybersecurity Act required the various European States to establish sanction provisions to be applied in the event of non-compliance with cybersecurity certification provisions[86]. As the ACN National Cybersecurity Agency has been identified as the National Cybersecurity Certification Authority, the very recent Legislative Decree No. 123 of August 3, 2022, has given the ACN some new sanctioning powers in the area of certification, consisting of monetary and accessory sanctions imposed in the event of violation of the obligations of the European cybersecurity certification framework[87].

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[81] Cf. Article No. 20 Legislative Decree No. 65/2018.
[82] Cf. Article No. 21 Legislative Decree No. 65/2018.
[83] Cf. Article No. 1 co. 1-9 Decree-Law No. 105/2019, conv. Law No. 133/2019.
[84] For example, imprisonment is provided for those who provide untrue information, data or factual elements relevant to the preparation or updating of the *de quibus* lists or for the purposes of communications, or for the conduct of inspection and supervisory activities, or fail to communicate the aforementioned data, information or factual elements within the prescribed time limits, with the specific intent to hinder or condition the conduct of the proceedings or inspection and supervisory activities. Cf. Article No. 1 co. 11 Decree-Law No. 105/2019, conv. Law No. 133/2019.
[85] Article No. 1 co. 9 Decree-Law No. 105/2019, conv. Law No. 133/2019.
[86] Cf. Article No. 65 Regulation (EU) 2019/881.
[87] Cf. Article No. 10 Legislative Decree n. 123/2022.

These are the main tasks assigned to the ACN[88], a body that, as reconstructed, has undergone a strong centralisation of competences. To achieve the tasks entrusted to it, ACN has been granted regulatory, administrative, organisational, patrimonial, accounting and financial autonomy[89]. An aspect, the latter, that must be taken into account considering the 'classic' trend of the Italian legal framework. In recent years, in fact, new bodies have often been set up with financial invariance clauses[90], i.e. without new or additional costs for public finance. In the reality, as the literature has emphasised[91], this autonomy is highly attenuated in the face of the management-dependency relationship with the *Presidente del Consiglio dei Ministri* (PCM).

4.1. ACN and the Central Role of the *Presidente del Consiglio dei Ministri* (PCM) in Cybersecurity

It is evident, already from what has just been outlined, that there is a close relationship of direction and dependence between ACN and the *Presidente del Consiglio dei Ministri* (PCM), the Italian Prime Minister. PCM is the head of the government[92] and, as

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[88] Additional tasks are also incumbent on the ACN. In any case, the detailed list of the various functions incumbent on the ACN is contained in Article No. 7 Decree-Law No. 82/2021, conv. Law No. 109/2021. These include, for example, the qualification function of cloud services for public administration: cf. Article No. 7 co. 1 let. m-ter) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[89] Cf. Article No. 5 co. 2 second sentece Decree-Law No. 82/2021, conv. Law No. 109/2021.

[90] About this topic see in Italian F. Farri, *Le leggi con clausola di invarianza finanziaria: tra giurisprudenza contabile, giurisprudenza costituzionale e prassi del Quirinale*, 2 *L-Jus* (2021).

[91] L. Parona, *L'istituzione dell'Agenzia per la cybersicurezza nazionale*, 6 Giorn. dir. amm. 714 (2021) who underlined the presence of «hypotheses of hetero-direction, provided for by the decree-law in favour of the President of the Council, [which] reduce the margins of autonomy actually accruing to the Agency compared to those with which, on a first analysis, it might appear to be endowed» [translation from Italian mine].

[92] It must be remembered that in the Italian constitutional system, the government is an «unequal complex organ» [translation from Italian mine], as expressly emphasised by P. Caretti, U. De Siervo, *Diritto costituzionale e pubblico* 252 (2014), as it consists of the President of the Council of Ministers, individual ministers and the Council of Ministers. Moreover, consider that the Italian Constitution states in Article 95 that «[t]he President of the Council of Ministers directs the general policy of the Government and is responsible for it. He maintains the unity of political and administrative policy, promoting and coordinating the activities of the Ministers». [translation from Italian mine]. In

already underlined above[93], has exclusive direction and responsibility for national cybersecurity policies. This dependence is indeed expressly established by its institution decree. In fact, it is the PCM who, on the one hand, determines the annual budget allocated to ACN[94] and, on the other hand, adopts the Agency's accounting regulations by his own decree, which ensures its management and accounting autonomy[95].

The aforementioned dependency relationship of ACN with the PCM can partly be explained by the central role he began to assume, as of 2007, in the field of secret services and intelligence.

In Italy, until that date, Italian secret services were composed of the Intelligence and Military Security Service (*Servizio per le informazioni e la sicurezza miliare* – SISMI) and the Intelligence and Democratic Security Service (*Servizio per le informazioni e la sicurezza democratica* – SISDE). The former was subordinate to the Minister of Defence, the latter to the Minister of the Interior. With the promulgation of Law No. 124/2007[96], the

this area see *ex multis* in Italian A. Pajno, *La presidenza del consiglio dei ministri: dal vecchio al nuovo ordinamento*, in A. Pajno, L. Torchia (eds.), *La riforma del Governo. Commento ai decreti legislativi n. 300 e n. 303/1999 sulla riorganizzazione della Presidenza del consiglio dei ministri* 35 ss. (2000); recently S. Cassese, A. Melloni, A. Pajno (eds.), *I presidenti e la presidenza del Consiglio dei ministri nell'Italia repubblicana* (2022).

[93] Cf. footnote 62.

[94] After informing the Parliamentary Committee for the Security of the Republic (COPASIR). Cf. Article No. 11 Decree-Law No. 82/2021, conv. Law No. 109/2021. However, in terms of financial autonomy, ACN is also entitled to other financial resources. Cf. Article No. 11 co. 2 lett. a)-g) Decree-Law No. 82/2021, conv. Law No. 109/2021.

[95] This adoption takes place in agreement with the Minister of Economy and Finance, on the proposal of the Director General of the Agency, after consulting COPASIR and consulting the Inter-Ministerial Committee for Cybersecurity (CIC), which will be discussed below. Cf. Article No. 11 co. 3 Decree-Law No. 82/2021, conv. Law No. 109/2021.

[96] The Law No. 124/2007 is consultable at https://bit.ly/3PIIVIf [last cons.: 06.08.2022]. This law constitutes the regulatory framework of reform of the structure and organisation of Italian intelligence and the legislation on State secrecy in Italy. On this point see in Italian *ex multis* P.L. Vigna, *La nuova disciplina dei servizi di sicurezza*, 4 Legisl. Pen. 693 ss. (2007); M. Savino, *Solo per i tuoi occhi? La riforma del sistema italiano di intelligence*, 2 Giorn. dir. amm. 121 ss. (2008); P. Bonetti, *Problemi costituzionali della legge di riforma dei servizi di informazione per la sicurezza della Repubblica*, 2 Dir. e soc. 251 ss. (2008); A. Soi, *L'intelligence italiana a sette anni dalla riforma*, 4 Quad. Cost. 918 ss. (2014); N. Gallo, T.F. Giupponi (eds.), *L'ordinamento della sicurezza. Soggetti e funzioni* (2014); recently T.F. Giupponi, *I rapporti tra sicurezza e difesa. Differenze e profili di*

secret service system began to gravitate around the figure of the Prime Minister, on whom they functionally depended[97].

Currently, the Italian secret services, whose correct definition is Intelligence System for the Security of the Republic (*Sistema di informazione per la sicurezza della Repubblica*)[98], in addition to the PCM, are composed of the Interministerial Committee for the Security of the Republic (*Comitato interministeriale per la sicurezza della Repubblica* – CISR)[99], the Delegated Authority (*Autorità delegata*)[100], the Department of Information for Security (*Dipartimento delle informazioni per la sicurezza* – DIS)[101], the Intelligence and Foreign Security Agency (*Agenzia informazioni e sicurezza esterna* – AISE)[102] and the Intelligence and Internal Security Agency (*Agenzia informazioni e sicurezza interna* – AISI)[103].

The reform of Italian intelligence, therefore, has given the PCM a role of direction and responsibility for the entire secret service sector, as underlined by the fact that, differently from the SISMI and the SISDE, the AISE and the AISI report directly to the Prime Minister and not to individual ministers.

The above-mentioned strong role of the PCM is, however, balanced by the activity of the Parliamentary Committee for the

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convergenza, 1 Dir. Cost. 21 ss. (2022). In general on the Italian Intelligence Framework at historical and sociological plan, see G. De Lutiis, *I servizi segreti in Italia. Dal fascismo all'intelligence del XXI secolo* (2010).

97 Cf. Article No. 1 Law No. 124/2007.

98 Cf. Article No. 2 co. 1 Law No. 124/2007. It should be noted that military intelligence departments, such as the Intelligence and Security Department (*Reparto informazioni e sicurezza*), do not belong to the Intelligence System for the Security of the Republic.

99 It is composed of the Prime Minister, the Delegated Authority, the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Defence, the Minister of Justice, the Minister of Economy and Finance, the Minister of Economic Development and the Minister of Ecological Transition. Cf. Article No. 5 Law No. 124/2007.

100 The Delegated Authority may be delegated, by the President of the Council of Ministers, those functions in the field of intelligence that are not exclusively attributed to it. The office of Delegated Authority may be held by an undersecretary of State or a minister without portfolio: cf. Article No. 3 Law No. 124/2007.

101 The DIS is a body of the President of the Council of Ministers and the delegated authority. It is responsible for coordinating and supervising the activities of the AISI and the AISE. Cf. Article No. 4 Law No. 124/2007.

102 Cf. Article No. 6 Law No. 124/2007.

103 Cf. Article No. 7 Law No. 124/2007.

Security of the Republic (*Comitato parlamentare per la sicurezza della Repubblica* – COPASIR), composed of ten members of Parliament (five Deputies and five Senators), which is in charge of verifying that Italian intelligence activity takes place within the limits of the Constitution and laws and in the interest of democratic institutions[104].

The centrality of the figure of the PCM in cybersecurity area also arises with regard to two other brand-new bodies: the Cybersecurity Nucleus (*Nucleo per la cybersicurezza* – NC)[105] and the Inter-Ministerial Committee for Cybersecurity (*Comitato interministeriale per la cybersicurezza* – CIC)[106].

The main function of the NC, established within ACN, is to provide support to the Prime Minister in cybersecurity matters, in relation to the prevention and preparation of possible cybersecurity crisis situations and for the activation of related alert procedures[107]. The NC is composed of the General Director of ACN (as chairman), the Military Counselor of the PCM, one representative of the DIS, one of the AISE, one of the AISI, each of the Ministers represented in the CIC and the Department of Civil Protection of the Presidency of the Council of Ministers, respectively.

Instead the CIC has the functions of advising, proposing and supervising cybersecurity policies[108]. In doing so, the CIC is responsible in particular for proposing, to the Prime Minister, the general guidelines to be pursued in the framework of national cybersecurity policies[109]; for exercising high oversight over the implementation of the national cybersecurity strategy[110]; and for promoting collaborative initiatives between institutional, national and international stakeholders and private operators interested in cybersecurity[111].

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[104] Cf. Article No. 30 Law No. 124/2007.
[105] Cf. Article No.8 Decree-Law No. 82/2021, conv. Law No. 109/2021.
[106] Cf. Article No. 4 Decree-Law No. 82/2021, conv. Law No. 109/2021.
[107] Cf. Article No. 8 co. 1 Decree-Law No. 82/2021, conv. Law No. 109/2021. In any case, the list of individual NC functions can be found in Article No. 9 Decree-Law No. 82/2021, conv. Law No. 109/2021.
[108] Article No. 4 co. 1 Decree-Law No. 82/2021, conv. Law No. 109/2021.
[109] Article No. 4 co. 2 lett. a) Decree-Law No. 82/2021, conv. Law No. 109/2021.
[110] Article No. 4 co. 2 lett. b) Decree-Law No. 82/2021, conv. Law No. 109/2021.
[111] Article No. 4 co. 2 lett. c) Decree-Law No. 82/2021, conv. Law No. 109/2021. In relation to lett. d) of the same article, see footnote 95.

The CIC is composed of the PCM (as chairman)[112], the General Director of ACN (as secretary)[113], the Delegated Authority, the Ministers participants to the CISR[114], as well as the Minister for University and Research, the Minister of Technological Innovation and Digital Transition and the Minister of Sustainable Infrastructure and Mobility. However, emphasising once again the central role of the PCM, the rule[115] provide that the Prime Minister he may invite other members of the Council of Ministers, as well as civil and military authorities whose presence he deems necessary from time to time in relation to the issues to be addressed, to attend meetings of the Committee, without the right to vote.

From the brief analysis of the Cybersecurity Nucleus and the Inter-Ministerial Committee for Cybersecurity, the role of the PCM appears further consolidated. These two bodies are *de facto* coordinating bodies between the various actors operating in this field[116] (i.e. ACN, the Intelligence System for the Security of the Republic and Ministers), but in a servant function to the Prime Minister.

Although cybersecurity is an adjacent, but not overlapping subject to intelligence[117], it is possible to see in COPASIR the only institutionalised instrument by which Parliament and political forces of opposition can exercise (minimal) control, given that the Parliamentary Committee can request a hearing of the General Director of ACN on matters within its competence[118].

From what has been reconstructed, it emerges how, in the Italian context, the legal framework of cybersecurity has been centralized in one body, ACN. However, this process has resulted

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112 Article No. 4 co. 3 Decree-Law No. 82/2021, conv. Law No. 109/2021.
113 Article No. 4 co. 4 Decree-Law No. 82/2021, conv. Law No. 109/2021.
114 See footnote 99.
115 Article No. 4 co. 5 Decree-Law No. 82/2021, conv. Law No. 109/2021.
116 In the field of Italian cybersecurity there are also two other bodies: the External National Assessment and Certification Centre (CVCN), set up Decree-Law. No. 105/2019, conv. Law No. 133/2019, and the Computer Security Incident Response Team - Italy, set up by Article No. 8 Legislative Decree No. 65/2018 transposing Directive (EU) 2016/1148. The institutional website is https://www.csirt.gov.it/ [last cons.: 06.08.2022]. About it see A. Renzi, *Il rafforzamento della difesa cibernetica passa per la sicurezza nazionale: il Computer security incident response team (Csirt) italiano*, Oss. Stato Digitale IRPA (2020).
117 In this sense also A. Renzi, *La sicurezza cibernetica: lo stato dell'arte*, cit. at 53.
118 Article No. 5 co. 6 Decree-Law No. 82/2021, conv. Law No. 109/2021.

in a further centralisation of competences in the hands of the PCM, the Prime Minister[119]. With all the risks and benefits that this condition brings, the words of one of USA founding fathers, Thomas Paine, still hold true: «*[s]ociety in every state is a blessing, but Government, even in its best state, is but a necessary evil; in its worst state an intolerable one*»[120].

5. Final Considerations on Participatory Cybersecurity (and Institutional Sustainability)

On the basis of the previous paragraphs, some concluding considerations can be outlined.

Some aspects emerge from the relations between the EU body in charge of cybersecurity affairs, ENISA, and the various bodies identified by the individual Member States, such as the *Agenzia per la Cybersicurezza Nazionale* in the Italian case[121].

First of all, it should be observed that the relationship between ENISA and the various national cybersecurity authorities follows the network model[122]. Specifically[123], the decentralised star

[119] As the doctrine has pointed out, the choice of legal source for approving the cybersecurity regulation reflects the centrality of the Government, as emphasised by B. Carotti, *Sicurezza cibernetica e Stato-Nazione*, cit. at 53, 639 and L. Parona, *L'istituzione dell'Agenzia per la cybersicurezza nazionale*, cit. at 91, 718. In fact, the ACN was established by decree-law, as the legislation relating to the national security perimeter (respectively Decree-Law. No. 82/2021 and Decree-Law No. 105/2019, both later converted into Law No. 109/2021 and Law No. 133/2019). Pursuant to Article 77 of the Italian Constitution, the Government may, without delegation from Parliament, adopt provisional decrees with the force of law in extraordinary cases of necessity and urgency. Such decrees lose their effectiveness from the beginning if they are not converted into law by Parliament within sixty days of their publication. In the Italian constitutional experience, there has been a real abuse of the urgent decree-law, as the decree-law has been approved almost all the time without there being any situation of extraordinary, necessity and urgency. On this point see, in Italian, L. Imarisio, *Difetto dei presupposti per la decretazione d'urgenza e reiterazione*, in M. Dogliani (ed.), *Il libro delle leggi strapazzato e la sua manutenzione* 95 ss. (2012).

[120] M.D. Conway (coll.), *The Writings of Thomas Paine – Common sense*, Vol. I (1774-1779) 67 (1902).

[121] And this in the consciousness that such considerations are partial, having analysed only the national cybersecurity context of Italy.

[122] On the other hand, the idea that social systems, thus also including the legal system, have developed according to a network-like structure was already elaborated by Friedrich von Hayek, as reflected in F.A. Hayek, *Law, Legislation and Liberty*, in part. Voll. I e II (1973). Concerning social systems and networks,

network model[124], in which the various nodes of the network - the National Authorities of the member countries - are all connected to a central node - ENISA. The central node operates as the coordination of the network and enables the connection between the various points of the network. In fact, it is precisely through ENISA that the various authorities are interconnected. One example is the case of the joint cyber security exercises, organised by ENISA and involving national authorities. The latest exercise, Cyber Europe 2022, successfully held in June 2022, was focused on the cyber resilience strategies in the health sector[125].

As already mentioned above, the main task of ENISA is twofold. On the one hand, to establish a common level of cybersecurity across the European Union, including by actively supporting EU Member States, institutions, bodies and entities in improving cybersecurity. On the other hand, to reduce fragmentation in the European internal market for cybersecurity by promoting an EU cybersecurity policy. From this role of ENISA as an 'active promoter' of cybersecurity in the European Union, it emerges that in the field of cybersecurity the majority of competences, and the most important functions, are actually exercised by States. From the analysis of the Italian context, this aspect emerges in a palpable way, especially in view of the centrality attributed by the Prime Minister.

The network structure of this relationship thus reveals the presence of a central node endowed with different competences over and above those of the other nodes, but acting as a point of interconnection and coordination of the latter. In short: ENISA's

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see also N. Luhmann, *Soziale Systeme. Grundriß einer allgemeinen Theorie* (1984). In relation to Luhmann's thinking applied to internal rules, see in Italian F. Fracchia, M. Occhiena, *Le norme interne: potere, organizzazione e ordinamenti. Spunti per definire un modello teorico-concettuale generale applicabile anche alle reti, ai social e all'intelligenza artificiale* (2020).

123 Indeed, it is necessary to follow the teaching Sabino Cassese, according to whom «[t]he science of law has limited itself to evoking the image of the network, which is not enough; it is also necessary to say what kind of network is involved in each case» [translation from Italian mine], S. Cassese, L. Torchia, *Diritto amministrativo. Una conversazione* 126 (2014).

124 Cf. U. Pagallo, *Teoria giuridica della complessità. Dalla "polis primitiva" di Socrate ai "mondi piccoli" dell'informatica. Un approccio evolutivo* 155 ss. (2006) in Italian, while in English A.L. Barabàsi, *Linked. The New Science of Networks* 143 ss. (2022).

125 On this topic see the ENISA official website at https://bit.ly/3OKQyNk [last cons.: 06.08.2022].

central role in the context of European cybersecurity is strengthened precisely by its task of coordinating the action of individual national authorities, which, as emerged in regard to the ACN case, are endowed with sanctioning powers - and thus with tasks further than those of a merely advisory nature. Because of the coordination of National Agencies with (also) sanctioning functions, ENISA's role appears to be reflexively strengthened, being less weak than in its early years, during which it appeared an "empty" Institution, in charge of coordinating National Agencies partly yet to be established and partly not yet endowed with incisive functions. The domestic agencies themselves, moreover, are conditioned in terms of internal operation by domestic factors. In the Italian case, for instance, the partial overlap between the intelligence and cybersecurity spheres as well as the pivotal role of the Prime Minister, the figure around whom everything rotates in this sphere.

Secondly, looking at the Italian context, it has been written about how the Italian ACN has been in establishment last year. It was not mentioned, however, that the recruitment of personnel for the Italian agency is currently still ongoing[126]. The staff is recruited with an open selection drawing mainly from the market: The overall skill level of the new ACN staff was so high that it was also praised by the hacker group *Killnet*[127].

At the current time, therefore, it is reasonable to assume that the skills of the ACN's staff are the same as those that can be found on the market. As the years go by, however, there will be the challenge of keeping the level of knowledge of the staff constantly up-to-date in an area, such as cybersecurity, where the private sector is progressing much faster than the public sector (thanks to structural advantages and other factors). And, especially in the technology sector, there is a real information gap which disadvantages the public and often results in the s.c. 'lock-in effect'.

Since ACN cannot continuously recruit new staff over the years, this situation could be solved, on the one side, by constantly upgrading staff; on the other side, by increasingly involving private cybersecurity actors. Precisely this second case could be a

[126] Cf. the ACN official website at https://www.acn.gov.it/en [last cons.: 06.08.2022].
[127] Cf. C. Bell, *Cybersecurity, the attack fails. From the hackers congratulations to Italy*, TRRA (2022).

valuable way forward. Indeed, the benefits would be considerable, particularly for the Public Administration. Moreover, there are legal principles that are useful for this purpose and on which it is possible to base this new approach (e.g. the principle of collaboration[128] and the principle of participation[129]). In this sense, the Open Government[130] strategy could be a valuable model.

In any case, the possibility of involving third parties (individuals or companies) is one of the traits that distinguish the sphere of operation of intelligence services and that of cybersecurity, as the same doctrine has highlighted[131]. And this

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[128] About the principle of collaboration, see, *ex multis*, T. Nam, *Suggesting frameworks of citizen-sourcing via Government 2.0*, 29(1) *Government Information Quarterly* 12 ss. (2012); D. Linders, *From e-government to wegovernment: Defining a typology for citizen coproduction in the age of social media*, 29(1) *Government Information Quarterly* 446 ss. (2012); C. Cobo, *Networks for citizen consultation and citizen sourcing of expertise*, 7(3) *Contemporary Social Science* 283 ss. (2012); F. Giglioni, *Subsidiary cooperation: a new type of relationship between public and private bodies supported by the EU law*, 2 Riv. it. Dir. pubbl. comun. 485 ss. (2010); L. Hasselblad Torres, *Citizen sourcing in the public interest*, 3(1) Knowledge Management for Development Journal 134 ss. (2007).

[129] About the principle of participation, see *ex multis* A. Floridia, *The Origins of the Deliberative Turn*, in A. Bächtiger, J.S Dryzek, J. Mansbridge, M. Warren (eds.), *The Oxford Handbook of Deliberative Democracy*, Vol. I (2018); D.F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11(1) Annual Review of Political Science 497 ss. (2018); R. Caranta, *Civil Society Organizations and Administrative Law*, *Hamline Law Review* 39 ss. (2014); C. Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22(4) Governance: An International Journal of Policy, Administration, and Institutions 529 ss. (2009); I. Shapiro, *Enough of Deliberation: Politics Is about Interests and Power*, in S. Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (1999).

[130] About the Open Government see, *ex multis*, J. von Lucke, K. Grosse, *Open Government Collaboration. Opportunities and Challenges of Open Collaborating With and Within Government*, in M. Gascò-Hernandez (eds.), *Open Government. Opportunities and Challenges for Public Governance* 189 ss. (2014); D. Lathrop, L. Ruma, *Open Government: Collaboration, Transparency, and Participation in Practice* (2010); P.G. Nixon, V.N. Koutrakou, R. Rawal (eds.), *Understanding E-Government in Europe: Issues and challenges* (2010). On this topic, in Italian see S. Rossa, *Contributo allo studio delle funzioni amministrative digitali* (2021).

[131] Cf. L. Parona, *L'istituzione dell'Agenzia per la cybersicurezza nazionale*, cit. at 91, 718 and R. Brighi, P.G. Chiara, *La cybersecurity come bene pubblico: alcune riflessioni normative a partire dai recenti sviluppi nel diritto dell'Unione Europea*, cit. at 36, 40 ss.

despite the awareness of critical profiles that in any case permeate the field of cybersecurity[132].

The welcome closer involvement of third parties in cybersecurity contrasts with the strong centralisation of this matter in the hands of the government, as is the case for instance in Italy in relation to the figure of the *Presidente del Consiglio dei Ministri*. Centralisation which, if it can be justified in view of the critical nature of cybersecurity issues and their link with the intelligence sphere, can undoubtedly be criticised in relation both to the level of parliamentary and political minority control, and to the strong political instability that characterises the alternation of governments in Italy[133]. It is clear that this contrast could also result, over time, in a downsizing of the central role of the President of the Council. And this re-dimensioning could also benefit the role of ENISA whose competences could be strengthened in the consolidation of the European *federalizing process*[134].

From what has been described in the previous paragraphs, the cybersecurity appears to be an important and crucial strategy for both the European Union and the individual Member States[135].

From this perspective, cybersecurity can be seen as a valuable tool that can implement Goal No. 16 of the United Nations Agenda 2030 for Sustainable Development[136], dedicated to promoting peaceful and inclusive societies for sustainable

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[132] For instance, the issue of cyber protection of infrastructures that concern essential services crucial to State security.

[133] For a general overview of the duration of governments in Italy see, in Italian, L. Tentoni, *Crisi di governo? In Italia è quasi normale: in 73 anni di repubblica 6 anni in "ordinaria amministrazione"*, in Lab Parlamento (2019), in https://bit.ly/3vlpUnu [last cons.: 06.08.2022].

[134] The reference is to C.J. Friedrich, *Trends of Federalism in Theory and Practice* (1968).

[135] So crucial that part of the literature has seen cybersecurity as a public good. Cf. R. Brighi, P.G. Chiara, *La cybersecurity come bene pubblico: alcune riflessioni normative a partire dai recenti sviluppi nel diritto dell'Unione Europea*, cit. at 36, 40 ss. In this sense, albeit with some distinctions from the Authors just mentioned, also M. Taddeo, *Is Cybersecurity a Public Good?*, 29 Minds & Machines 354 ss. (2019) and P. Rosenzweig, *Cybersecurity and Public Goods: The Public/Private "Partnership"*, in P. Rosenzweig, *Cyberwarfare: How Conflicts in Cyberspace are Challenging America and Changing the World* (2012).

[136] Cf. https://www.un.org/sustainabledevelopment/development-agenda/ [last cons.: 06.08.2022].

development, as well as providing universal access to justice, and building accountable and effective institutions at all levels.

A more participative cybersecurity, open to the participation and collaboration of private actors could in fact lead to «[d]evelop effective, accountable and transparent institutions at all levels»[137], as well to «[s]trengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime»[138]. Opening it up to private actors would strengthen cybersecurity as it would involve the same society it is aimed at defending. And at the same time it would make citizens aware of the risks in the area of cybersecurity.

To quote a famous statement by one of the Fathers of Italian public law, Vittorio Emanuele Orlando, «[t]he law is life»[139]. And sustainable development can rightly be seen as the projection of life into the future, the «weak voice of the other»[140] that is not yet here: future generations. The legal regulation of cybersecurity, therefore, can be a concrete and effective tool to enable public institutions to prevent, fight and cooperate to counter cyberattacks aimed at destabilising the democratic balance. And this is not only for the benefit of current generations, but also for future ones.

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[137] United Nations Agenda 2030 for Sustainable Development, goal No. 16, point 16.6.

[138] United Nations Agenda 2030 for Sustainable Development, goal No. 16, point 16.a.

[139] V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico* 16 (1925).

[140] The reference is to the title of F. Fracchia, *Lo sviluppo sostenibile. La voce flebile dell'altro tra protezione dell'ambiente e tutela della specie umana* (2010). In fact, "*voce flebile dell'altro*" in English means "weak voice of the other". About this topic see *ex multis* E. Giovannini, *L'utopia sostenibile* (2018).

STATE AND LOCAL GOVERNMENT CORPORATIONS AND GOVERNMENTAL PRIVILEGES IN THE UNITED STATES

*Aldo Pardi**

Abstract

The article analyzes the main traits of state and local government corporations in the United States: hybrid entities which are generally established by special statute and are endowed with both a corporate-like structure and governmental powers. Their existence is surrounded by vagueness. Nonetheless, they enjoy several governmental privileges. In particular, they benefit from tax exemptions on bonds issued, corporate earnings and properties owned. Furthermore, they may enjoy sovereign immunity and thus may not be held liable for torts. After briefly explaining their origins, current reasons for proliferation and the main characteristics of these entities, the analysis will focus on the tax exemptions and the sovereign immunity that they may enjoy. The purpose is to highlight the quasi-governmental nature of these entities and how, depending on the context, they act as public or private entities in order to benefit from both public and private traits.

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1. State and local government corporations and blurring names

State and local government corporations (or public authorities) are hybrid entities[1], endowed with both a corporate-like structure and governmental powers and privileges, established by special statute to perform limited public purposes – generally, to finance, build and operate revenue-producing facilities – and to operate outside the regular executive structure of governments, showing traits akin to both public agencies and private corporations.[2]

Referred to also as "shadow government"[3], they are considered as "the fastest-growing, least well understood form of American government," with no one ever performing a comprehensive survey of the entities.[4] This lack of understanding of these complex entities is most likely rooted in the difficulty in reaching a consensus on their definition and classification.[5] Notwithstanding the vagueness surrounding their existence, these entities are responsible for a large percentage of the management and financing activities of local and state governments: building and operating public infrastructures; providing essential services

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[1] K. R. Kosar, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (2011). Kosar uses the term "hybrid" to refer only to federal government corporations. These entities, however, show some traits akin to state and local government corporations. See, for example, H. Seidman, *Public Enterprises in the United States*, 54 Ann. Public Coop. 3 (1983). While there are some similarities between federal government corporations and state and local public authorities (such as, the corporate-like structure and the governmental powers), the following analysis will not address these federal entities because their tort liability and tax regimes differ from those of state and local corporations. Furthermore, the "conduit financing" mechanism – see, section 4 below – has become particularly relevant at the state and local levels. The analysis will also use several examples from New York State, which has seen widespread use and development of these state and local corporations.

[2] J. Mitchell, *The American experiment with government corporations* (1999), 14. See also J. Leigland, *Public Infrastructure and Special Purpose Governments: Who pays and How?*, in D. C. Perry (ed.), *Building the Public City: The Politics, Governance and Finance of Public Infrastructure* (1995). See also The Michigan Law Review Association, *An Analysis of Authorities: Traditional and Multicounty*, 71 Mich. L. Rev. 1376 (1973).

[3] D. Axelrod, *A budget quarter: Critical policy and management issues* (1989).

[4] J. Leigland, *Public Infrastructure and Special Purpose Governments: Who pays and How?*, cit. at 2, 140.

[5] R. R. Trautman, *Effects of institutional control on state debt activity and costs of debt programs: An empirical analysis* (1991).

such as transportation or solid waste disposal; administering loans and subsidies.[6] The Port Authority of New York and New Jersey (Port Authority), for example, operates the main infrastructures in New York State and New Jersey. In particular, it runs the primary airports in the two States (Kennedy, Newark, LaGuardia, and Teterboro), and owns and operates the World Trade Center. [7] Unsurprisingly, however, the public authorities that primarily address finance concerns are the most controversial ones. Indeed, they do not limit their activities to financing, but they also count providing financial resources to other public and private entities amongst their concerns. [8] This is the case of the Dormitory Authority of the State of New York, one of the largest public financing entities in the United States, that provides financing and construction services for student dormitories and for many other structures, including hospitals and medical research centers.[9]

Public authorities are often confused with special districts, listed in the *Census of Governments* by the U.S. Census Bureau, [10] that have an elected board of directors, are self-supporting, and are empowered with the ability to levy taxes:[11] their use of taxation as a form of income generation and the election of board of directors render special districts more similar to small-scale municipal governments, rather than public agencies or private corporations.[12]

Their identification, however, is not straightforward. Not all of the states use the term "public authorities" to identify such corporate bodies, which adds further complicity to an already uncertain context. Moreover, even their names blur: the term "authority" in the name may suggest that the entity is a public authority; but, also "agencies", "funds", "corporations" or "commission" may identify a public authority.[13] As the New York

[6] J. Leigland, *Public Infrastructure and Special Purpose Governments: Who pays and How?*, cit. at 2.
[7] K. M. Henderson, *Other Governments: The Public Authorities*, in J. M. Stonecash (ed.), *Governing New York State* (2001), 210.
[8] *Ibid.*, 213.
[9] *Ibid.*
[10] U.S. Department of Commerce, *Bureau of the Census, 2017 Census of Governments: Government Organization* (2017).
[11] R. J. Eger, *Casting Light on Shadow Government: A Typological Approach*, J. Public Admin. Research & Theory 16 (2006), 129. See also R. B. Hawkins, *Self-government by district: Myth and reality* (1976).
[12] J. Mitchell, *The American experiment with government corporations*, cit. at 2.
[13] *Ibid.*

State Commission on Government Integrity has claimed, "no one has even an approximate count of how many of these organizations exist and where they are, much less an accounting of what they do."[14] Even the State Comptrollers, with the duty of supervising these public entities, have not adopted one sole method for listing these entities. For example, the New York Office of the State Comptroller has adopted a broader definition than that used by other observers, including entities that do not issue debt at all.[15] According to the Public Authorities Reporting Information System (PARIS), in New York State there are 1,192 public authorities.[16]

After briefly explaining origins, current reasons for proliferation and main characteristics of state and local government corporations, this analysis will focus on two specific governmental privileges that they may enjoy: tax exemptions and sovereign immunity.

The analysis seeks to address the following issues. First, it looks to determine whether government corporations form a single category of entities that share the same traits and are governed by the same legal framework. Second, it seeks to ascertain whether these entities have a public or private nature, and whether such distinction is relevant. Third, it aims to determine whether public features prevail over private ones in the legal regimes of these entities or vice versa.

2. Origins and reasons for proliferation

At the beginning of the 19th century, with the coming of the Industrial Revolution and the advent of the steam locomotive, states and municipalities sought to implement large projects, such as canals and railroads, accumulating record debts.[17] Such a situation, coupled with government mismanagement and corruption, soon led to a public outcry demanding an amendment to the states' Constitutions which would require a popular

[14] *Ibid.* See also Council of State Governments, *State public authorities* (1970).
[15] R. B. Ward, *New York State Government* (2006), 288.
[16] Office of the New York State Comptroller, *Public Authorities by the Numbers* (2007).
[17] J. Rosenbloom, *Is the Private Sector Really a Model of Efficiency and Independence? Re-evaluating the Use of Public Authorities During Recessionary Times*, 11 NYSBA Government, Law and Policy Journal 2 (2009), 7.

referendum before states and municipalities could borrow money.[18]

In the late 19th century with the arrival of the Progressive Era, states and municipalities were requested to increase public services and promote economic development, without raising taxes.[19] They struggled, however, to raise capital by borrowing money with the constitutional requirement in place.[20] Citizens refused to approve further borrowing and as a result it was necessary to find an alternative way to raise funds.[21] Politicians elected to adopt into the public sector a private corporate structure viewing the railroad companies as a model of efficiency: these companies, in fact, had developed innovative management practices and accounting methodologies that allowed them to operate on geographically vast areas.[22]

The number of public authorities increased after World War II and they were employed to provide and fund public services and new infrastructures without increasing taxes.[23]

Today, there are several reasons for their proliferation, most of which are common to all the states. One reason in particular is that they were viewed as an instrument to improve government efficiency, thanks to their flexible corporate structure and management.[24] This view rests also on the consideration that elected officials are generally ill-equipped to handle the responsibilities required by modern governments.[25] In addition, directors' terms often last longer than election cycles[26] and, for this reason, public authorities are expected to be free of political interference. These views are also supported by studies that show that centralized, rigid and hierarchical bureaucracies are unsuitable for ensuring the efficient use of resources in response to changing

[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, 50 N.Y.L. Sch. L. Rev. 851 (2006), 864.
[24] See below on corporate-like structure.
[25] W. F. Willoughby, *Principles of Public Administration* (1927).
[26] C, Bourdeaux, *A Question of Genesis: An Analysis of the Determinants of Public Authorities*, 15 J. Public Adm. Res. Theory 3 (2004), 444. See also L. H. Gulick, *Authorities and How to Use Them* (1947).

needs: in today's world, institutions must be flexible, market-oriented, and entrepreneurial. [27]

Another conclusion of their decision-making is that in being isolated from the political process, these authorities may relieve pressure on the state budget by allowing for money to be borrowed beyond the normal debt limits.[28] Moreover, public authorities allow for jurisdictional flexibility: they may operate across jurisdictional boundaries, delivering services on an area-wide basis and, therefore, addressing concerns that would require a regional or interstate solution.[29]

There are also some "pathological" reasons, which could be ascribed to constitutional factors, and that have led to an abuse of this instrument. A case in point is the New York State Constitution: although there is no maximum limit for the amount of state debt, it provides that any increases in state debt must be authorized by voters though statewide referenda (no more than one proposal each year) and debt should be issued "for some single work or purpose."[30] Third, the Constitution requires a "full faith and credit" to repay state bonds.[31] In particular, this debt is paid off though annual appropriations by the Legislature; if the latter fails to make the necessary appropriations, the State Comptroller shall divert state general revenues to make the proper payments. [32] As a consequence, public authorities propose an effective alternative to this cumbersome voter-approval process for borrowing, and they are able to avoid debt and statutory limitations.[33] This is even more true for local governments, which, according to New York Constitution, cannot issue revenue bonds to finance public facilities

[27] D. Osborne, T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).
[28] *Ibid.*, 205.
[29] R. B. Ward, *New York State Government*, cit. at 15, 283.
[30] NY CONST. Art. VII. See also K. W. Bond, *Local Development Corporations in the Eye of the Comptroller*, 29 NYSBA Municipal Lawyer 3 (2015), 21.
[31] K. M. Henderson, *Other Governments: The Public Authorities*, cit. at 7, 206.
[32] *Ibid.*
[33] B. S. Bunch, *The Effect of Constitutional Debt Limits on State Governments' Use of Public Authorities*, 68 Public Choice 57 (1991). See also J. Leigland, *Public Authorities and the Determinants of Their Use by State and Local Governments*, 4 J. Public Adm. Res. Theory. 4 (1994).

and they have recourse to local public authorities in order to achieve these purposes.[34]

While some authors have highlighted how these instrumentalities have rendered possible the operations of facilities that would have not been realized otherwise, [35] others have underlined how these instrumentalities have reduced accountability, by allowing politicians to hide the true costs of government, and by shielding elected officials from making unpopular decisions.[36]

3. Main traits: method of incorporation, corporate-like structure, governmental powers, funding sources, statutory restraints

Methods of incorporation. States often provide for the incorporation of a public authority with special acts of the legislative body, signed into law by a chief executive (generally, the governor).[37] The legislative act, therefore, is the primary source of its discipline. Less frequently, the incorporation of public authorities is made pursuant to general enabling acts.[38] In New York, for example, local authorities can be incorporated by officials of local governments under the Not-For-Profit Corporation Law, section 1411[39] to promote economic development of the local area.[40]

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[34] Office of the New York State Comptroller, *Public Authorities by the Numbers*, cit. at 16. See also K. W. Bond, *Local Development Corporations in the Eye of the Comptroller*, cit. at 31.

[35] J. Leigland, *Public Authorities and the Determinants of Their Use by State and Local Governments*, cit. at 33 concludes that public authorities issue debt when there is a need that cannot be otherwise met by general-purpose government borrowing.

[36] D. Axelrod, *Shadow Government* (1992). See also M. Heiman, *Public Authorities as Agents of Not-So-Quiet Revolution in Hazardous Waste Facility Siting*, in J. Mitchell (ed.), *Public Authorities and Public Policy* (1992), 137–152. See also C. Bourdeaux, *A Question of Genesis: An Analysis of the Determinants of Public Authorities*, cit. at 26, 442 concludes that the local government need to solve a policy problem in a politically competitive environment is a driving factor in the decision to establish these entities.

[37] J. J. Shestack, *The Public Authority*, 105 U. Pa. L. Rev. 553 (1957), 554.

[38] *Ibid.*

[39] N.Y. Not-for-Profit Corp. Law § 1411 (McKinney).

[40] New York State Commission on Government Integrity, *Underground Government: Preliminary Report on Authorities and Other Public Corporations* (1990), 28.

Corporate-like structure. The corporate-like structure is the distinguishing trait of public authorities. This structure allows them to be "businesslike" in their operations and, therefore, to purportedly provide increased efficiency, expertise and independence in the delivery of public services.[41]

Government corporations do not generally have identifiable shareholders like a private corporation, since the government wholly owns the entity.[42] They have, however, a board of directors – appointed for fixed terms and performing only policy functions – that in turn, appoint the executive directors and other top full-time staff that manage the corporation.[43] These individuals often remain from one gubernatorial administration to another. [44]

The members of the board are appointed by elected officials (the governor, in the case of a state corporation, and the city council or the mayor, in the case of a local corporation) or serve in an ex-officio capacity due to a particular position in government (for example, an elected official or an administrator of a department).[45] Removals are often at the discretion of the governor, generally only for a cause, such as "inefficiency, neglect of duty or misconduct."[46]

Even within the same jurisdiction, the composition of the board may vary greatly: for example, the Massachusetts Turnpike Authority has a three-member board, while the Massachusetts Port

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[41] J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 854. See also G. E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763 (2002). See also K. A. Foster, *The political economy of special-purpose government* (1997), 18.

[42] J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 873. See also T. L. Ely, T. D. Calabrese, *Public Borrowing for Private Organizations: Costs and Structure of Tax-Exempt Debt Through Conduit Issuers*, 37 Public Budg. Finance 1 (2017), 5. See also R. J. Eger, *Casting Light on Shadow Government: A Typological Approach*, cit. at 11, 130.

[43] R. B. Ward, *New York State Government*, cit. at 15, 283.

[44] *Ibid.*

[45] J. Mitchell, *The American experiment with government corporations*, cit. at 2, 12. See also J. J. Shestack, *The Public Authority*, cit. at 38. See also R. Gerwig, *Public Authorities in the United States*, 26 Law and Contemporary Problems, (1961) pointing out that the governors and the attorney general are often named as ex-officio appointees, and such appointment reduces the corporation's independence and increases the government's desire to oversee corporation's activities.

[46] C. Bourdeaux, *A Question of Genesis: An Analysis of the Determinants of Public Authorities*, cit. at 27, 446. See also R. Gerwig, *Public Authorities in the United States*, cit. at 45, 601. See, for example, New York State Consolidated Laws, Public Authorities, Article 8, Title 13-A.

Authority has a seven-member board. Also the freedom to make decisions can vary. The New York and New Jersey state governments, for example, have a veto power on the policies adopted by the Port Authority.[47]

Governmental powers. A public authority may be also explicitly endowed with certain government powers, such as power of eminent domain.[48] Some authorities, such as MTA and the Power Authority of the State of New York are also endowed with the power to issue subpoenas,[49] while Port Authority can also provide police protection and regulations.[50]

Funding sources. Public authorities, generally, can finance themselves by setting fees, charges and rents for their service.[51] However, the main source of financing is represented by borrowing. The bonds issued are tax-exempt and not officially guaranteed by the "full faith and credit" of the state (and thus not subject to state's limitations). [52] Originally, government corporations mostly issued revenue bonds – a form of non-guaranteed debt backed by revenues derived from operations such as tolls or fees [53] to promote capital improvements to their own operating infrastructures.[54] However, soon these revenue bonds

[47] J. Mitchell, *The American experiment with government corporations*, cit. at 2, 13.
[48] Kreutzer v. Illinois Commerce Comm'n, 404 Ill. App. 3d 791, 811, 936 N.E.2d 147, 163 (2010). See also City of Oakbrook Terrace v. La Salle Nat. Bank, 186 Ill. App. 3d 343, 347, 542 N.E.2d 478, 480 (1989).
[49] N.Y. Pub. Auth. Law § 1265 (McKinney) (Metropolitan Transportation Authority) and N.Y. Pub. Auth. Law § 1006 (McKinney) (Power Authority of the State of New York): "For the purpose of exercising its powers and performing its duties hereunder and of securing such information as it may deem necessary hereunder, the authority shall have the power to compel the attendance of witnesses and the production of documents. The power hereby conferred upon the authority may be exercised by any one or more of the trustees if he or they are authorized so to act on behalf of the authority by resolution or by law. A subpoena issued under this section shall be regulated by the civil practice law and rules."
[50] N.J. Stat. Ann. § 32:2-25 (West).
[51] D. Cummings, P. Baxandall & K. Wohlschlegel, *Out of the Shadows, Massachusetts Quasi-Public Agencies and the Need for Budget Transparency* (2010), 9.
[52] J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 868.
[53] D. Cummings, P. Baxandall & K. Wohlschlegel, *Out of the Shadows, Massachusetts Quasi-Public Agencies and the Need for Budget Transparency*, cit. at 51, 9.
[54] J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 868.

were issued for other purposes, and government corporations became vehicles used by private and public entities to obtain tax exempt financing as "conduit financers".[55]

Furthermore, governments sometimes provide additional funding to certain authorities. For example, local housing authorities are often dependent on federal grants, while state-level transportation authorities often receive sums from dedicated taxes.[56]

Statutory restraints. The corporate structure justifies government corporations' exemptions from most statutory constraints governing public agencies, such as civil service[57] and procurement regulations,[58] as well as their broad discretion in developing internal policies, budgets and management techniques.[59] Corporation law principles are also applied to solve issues on government corporations operations.[60] On the other hand, government corporations – at least the state ones – are

[55] G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State — Public Authorities, the Chosen Financiers*, 11 NYSBA Government, Law and Policy Journal 2 (2009), 48. See also M. D. Robbins, Bill Simonsen, *Debt Issued Though Others: Conduits, Joint Powers Authorities, and Borrowing Costs in California Local Governments*, 32 Public Budg. Finance 2 (2012), 70.

[56] J. Mitchell, *The American experiment with government corporations*, cit. at 2, 96.

[57] In New York, for example, *Collins v. Manhattan & Bronx Surface Transit Operating Auth. (MABSTOA), 62 N.Y.2d 361, 465 N.E.2d 811 (1984). See also Bergamini v. Manhattan & Bronx Surface Transit Operating Auth., 62 N.Y.2d 897, 899, 467 N.E.2d 521*, 522 (1984). Because public authorities are not considered civil divisions, appointments and promotions can be made regardless of merit and fitness as determined by competitive examination, contrary to what New York Constitution requires for state civil service.

[58] In New York, for example, neither the State Finance law nor the General Municipal Law, which govern state and local governments procurement procedures apply to government corporations. N.Y. State Fin. Law §§135-146; N.Y. Gen. Mun. Law §§ 100-109-b.

[59] K. A. Foster, *The political economy of special-purpose government* (1997), cit. at 41, 10. See also J. Mitchell, *The American experiment with government corporations*, cit. at 2, 12.

[60] R. Gerwig, *Public Authorities in the United States*, cit. at 45, 612 "Miscellaneous legal problems affecting the powers of Authorities generally are determined in accordance with principles of corporation law, tempered by the always present controlling factor of public interest."

usually subject to the administrative procedure acts and freedom of information laws applicable in the relevant jurisdiction.[61]

4. Tax exemptions and "conduit financing"

Public authorities may enjoy tax exemptions on bonds issued, corporate earnings and real property owned. In light of all these exemptions, the assumption that public authorities do not impose monetary costs on governments has been criticized, and it is claimed that they instead reduce general fund revenues.[62]

First, interest received by investors, on public authorities' bonds, could be free of federal, state and local taxes. As a consequence, funds can be borrowed at a lower interest rate, and this makes viable a number of activities which would not be affordable at normal market rates.[63] While the exemption from state and local taxes is generally set forth in the incorporation statute, the exemption from federal taxation is rooted in the Federal Internal Revenue Code (IRC). Pursuant to the IRC, as interpreted by regulations and case law, the interest received by investors will be federally tax-exempt when the state or local entity issuing such a bond "has been delegated the right to exercise *part of the sovereign power*."[64] For the purposes of the IRC, the followings are considered

[61] With reference to the administrative acts, see J.E. Gersen, *Administrative Law's Shadow*, 88 *Geo. Wash. L. Rev.* 1071, 2020, 88, 1087 on the authorities created by interstate compact. For example, in New York, N.Y. A.P.A. Law § 102. With reference to freedom of information laws, see in New York, N.Y. Pub. Off. Law § 86 "Agency means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

[62] *Ibid.* See also A. M. Sbragia, *Debt Wish: Entrepeneurial Cities, U.S. Federalism, and Economic Development* (1996), 194.

[63] R. A. Newman, *Tax-Exempt Financing for Nonprofit Facilities*, 24 Prac. Real Est. Law. 19 (2008), 20.

[64] According to the IRC, gross income for federal income tax purposes does not include interests on any "state or local bond," 26 U.S.C.A. § 103. The following regulations interpreted this rule. Regulation section 1.103-1(a) provides that a State or local bond shall be issued by "a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof," 26 CFR § 1.103-1(a); while Regulation section 1.103-1(b) specifies that a political subdivision "denotes any division of any State or local government unit which is a municipal corporation or which has been delegated the right to exercise part of

as sovereign powers: (1) the power of eminent domain, (2) the power to tax, (3) the police power (*Commissioner v. Shamberg's Estate*).[65] In *Shamberg's Estate*, the Court of Appeals for the Second Circuit concluded that the Port Authority and the interests on bonds issued by the Port Authority were exempt from federal taxation.[66] The Port Authority was "endowed with the power of eminent domain, and with certain police powers, including the promulgation and enforcement of regulations for the conduct of navigation and commerce in the area defined as the Port of New York District."[67] Delegation of only one of the sovereign powers – power of eminent domain or police power – might be sufficient for the authority to qualify for the tax-exemption, if the power is substantial under all circumstances. For example, Revenue Ruling 73-563 held that a rapid transit authority (RTA) possessed a substantial portion of sovereign powers to serve its essential governmental function – even if endowed only with police powers – which was understood as the power to enforce the pubic authority's own regulations by maintaining a security force.[68]

Government corporations' earnings can be also exempt from federal income taxes.

The Internal Revenue Code does not expressly provide for such exemption; however, Revenue Rulings[69] clarifies that these entities are exempt under an "implied statutory immunity" should the entity be endowed with sovereign powers, as defined in *Shamberg's Estate*.[70]

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the sovereign power of the unit." 26 CFR § 1.103-1(b). See E. P. Aprill, *Excluding the Income of State and Local Governments: the Need for Congressional Action*, 26 Ga. L. Rev. 421 (1992). See also American Bar Association Section of Taxation, *Comments on the Definition of Political Subdivision for Tax-Exempt Bonds and Other Tax-Advantaged Bonds*, 69 The Tax Lawyer 2 (2016), 318.

[65] Comm'r of Internal Revenue v. Shamberg's Estate, 144 F.2d 998, 1005 (2d Cir. 1944).

[66] *Ibid.*

[67] Shamberg's Estate v. Comm'r, 3 T.C. 131, 143, aff'd sub nom. Comm'r of Internal Revenue v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944).

[68] Rev. Rul. 73-563, 1973-2 C.B. 24.

[69] 1971-1 C.B. 28 and 1971-1 C.B. 29.

[70] E. P. Aprill, *The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates*, 23 J. Corp. L. 803 (1998), 808. See also E. P. Aprill, *Excluding the Income of State and Local Governments: the Need for Congressional Action*, cit. at 65. See also Gen. Couns. Mem. 36, 994 (Feb. 3, 1977): the IRS concludes that the definition of a political subdivision adopted in the

In addition, public authorities may be exempt from state and local property taxes. The statute, generally, expressly exempts them. For instance, the New York Public Authority Law clearly exempts the real property owned by enumerated state, regional and local authorities.[71]

Public authorities' tax exemptions – in particular, the exemption on interest received by investors on bonds issued – have fostered a specific use of government corporations as "conduit financiers": in other words, public authorities have become a vehicle used by private and public entities to obtain tax exempt financing.[72]

Acting as "conduit" between a specific capital project – to be implemented by other entities – and bondholders, the public authority issues bonds whose proceeds are lent to the parties implementing the project; investors can have recourse only to those parties and the project.[73] As the interest on the bonds paid to investors is exempt from taxation, private entities can obtain in this way low-cost tax exempt financing.[74] The Housing Finance Agency, for example, issues bonds to encourage private investors to build and maintain affordable housing in New York State.[75] Some authors have pointed out that too many public authorities exist

regulations under section 103 should be used in interpreting other Code provisions dealing with political subdivisions. See also IRS, https://www.irs.gov/pub/irs-tege/eotopice90.pdf. Please note that in order to qualify for the corporate earning's tax exemption, a government entity might also demonstrate to be an (1) integral part of the state or political subdivision thereof; or (2) meet the requirements under section 115 (Internal Revenue Code); or (3) an instrumentality of state and local governments. 1987-1 C.B. 18. These categories, however, frequently overlap, and are not clearly defined.

[71] Among these corporations, there are transportation authorities: see Capital District Transportation Authority (Pub. Auth. Law § 1316); Central New York Regional Transportation Authority (Pub. Auth. Law § 1341); Metropolitan Transportation Authority (Pub. Auth. Law § 1275).

[72] G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 55, 48. See also M. D. Robbins, B. Simonsen, *Debt Issued Though Others: Conduits, Joint Powers Authorities, and Borrowing Costs in California Local Governments*, cit. at 55, 70.

[73] S. L. Schwarcz, *The Use and Abuse of Special-Purpose Entities in Public Finance*, 97 Minn. L. Rev. 2 (2012), 8.

[74] *Ibid.*

[75] G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 55, 49. See also R. B. Ward, *New York State Government*, cit. at 15, 291.

exclusively for the purpose of financing capital projects.[76] Not only private parties but also the state has recourse to public authorities for the financing of capital projects: in this case, the debt issued by public authorities is backed by state appropriations ("state-supported debt"). [77] This is the most controversial form of borrowing that raises constitutional concerns as it is considered as a vehicle to circumvent public referendum requested by the Constitution. [78] However, "today, conduit financing by public authorities is virtually the exclusive source of borrowed funds for State infrastructure needs," due to the difficulties in approving the different bond acts. [79] This is also one of the reasons why, for example, in New York case law is well-settled in considering conduit financing by a government corporation for state purposes as constitutional.[80] In particular, states generally enter into complex agreements with public authorities (such as leasebacks) that allow the States to pay "indirectly" for the bond using public funds.[81]

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[76] A. Sbragia, *Debt wish: Entrepeneurial cities, U.S. federalism, and economic development*, cit. at 62.

[77] G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 56, 49. See also R. B. Ward, *New York State Government*, cit. at 15, 291.

[78] Office of the New York State Comptroller, *Public Authorities by the Numbers*, cit. at 16.

[79] G. H. Weissman, *The Reality v. Legality of Conduit Financing by the State – Public Authorities, the Chosen Financiers*, cit. at 56, 50.

[80] *Ibid.*, 53. See also Wein v. City of N.Y. (Wein I), 36 N.Y.2d 610, 613, 621 (1975); Wein v. State (Wein II), 39 N.Y. 2d 136, 140 (1976); Schulz v. State, 84 N.Y.2d 231 (1994).

[81] M. D. Robbins, B. Simonsen, *Debt Issued Though Others: Conduits, Joint Powers Authorities, and Borrowing Costs in California Local Governments*, cit. at 55 describing the certificates of participation (COPs), a form of tax-exempt lease purchase particularly used by California's public authorities. J. Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, cit. at 23, 869 describing a notorious example of leaseback between the state and a public authority: the "sale" of the Attica prison by New York State in 1991. Attica State Prison and a piece of Interstate 187 were sold by New York State to a specific state government corporation, the Urban Development Corporation (UDC). UDC issued $247 million in bonds to buy the prison; such capital was used by the State to balance a shortfall in the New York State budget. However, UDC was not designed to manage a prison, and the debt services on the bonds issued by UDC also needed to be repaid. As a consequence, the State leased the prison back from the government corporation, for an amount equal to the principle and interest on the bonds originally issued. These bonds are still being paid for and they will cost New York taxpayers over $750 million. This fact also showed that

To describe this particular use of public authorities as mechanism to circumvent constitutional debt limitations, some authors have also spoken of "backdoor" borrowing, where the "back door" is used much more extensively than the "front door" of voter-approved debt to finance the state's expansive capital programs.[82]

5. Tort liability and sovereign immunity

Public authorities can be held liable for torts only to the extent that they do not enjoy sovereign immunity or governmental immunity that applies to governmental entities. Sovereign immunity is a well-rooted common law doctrine according to which state and federal governments cannot be sued unless they have waived their immunity or have consented to being sued.[83] It expresses the superiority of the sovereign over the rights of the private citizens.[84] Among the reasons that support this theory today there is the need to preserve government funds, to reduce the judicial workload and to give operational flexibility to elected officials.[85] Only federal and state governments – but not local governments – are entitled to this immunity, in addition to their "arms" – the latter term being used to include in the protection also officials and agencies.[86] States' immunity is not based on a particular constitutional provision; rather, the source on the sovereignty can be traced back to the thirteen independent colonies before the ratification of the U.S. Constitution.[87]

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the bonds issued by government corporations are often used for reasons unrelated to the delivery of public services – such as to fill budget gaps.

[82] R. B. Ward, *New York State Government*, cit. at 15, 291.

[83] D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts* (2011), 329.

[84] W. H. Bryson, *The Prerogative of the Sovereign in Virginia: Royal Law in a Republic*, 73 Tijdschrift voor Rechtsgeschiedenis 371 (2005).

[85] M. R. Brown, *Deterring bully government: A sovereign dilemma*, 76 Tul. L. Rev. 149 (2001). See also The Harvard Law Review Association, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 Harv. L. Rev. 714 (1961) arguing that the policies underlying sovereign immunity – namely, preventing the depletion of public funds and protecting authorized official actions - would not be infringed by refusing to apply this doctrine to public authorities.

[86] T. J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, 24 Rev. Policy Res. 425 (2007), 425.

[87] V.C. Jackson, *Suing the federal government: Sovereignty, immunity, and judicial independence*, 35 Geo. Wash. Int'l L. Rev. 521 (2003). See also M.R. Durchslag, *State sovereign immunity: A reference guide to the United States Constitution* (2002).

Today few states, such as Alabama and Arkansas, have a still strong protection of this doctrine, that extends also to contractual claims.[88] For example, Arkansas Constitution provides that "the State of Arkansas shall never be made defendant in any of her courts" (art. V§20).[89] Art. XVI§2 adds that the legislature shall "provide for the payment of all just and legal debts of the State;"[90] pursuant to this provision, therefore, the legislature created the Arkansas State Claims Commission, an administrative body composed of commissioners appointed by the governor and confirmed by the senate, with the sole discretion on the determination of the payment of the debts and obligations of the state; commission's decisions cannot be appealed to any court.[91] Based on a strict interpretation of the constitutional provisions, in 2018 the Supreme Court of Arkansas held that an employee of a publicly-funded college was barred from filing a claim in court against the entity for failing to compensate him for working overtime, because the college was protected by sovereign immunity.[92] Similarly, the same court ruled that a private company acting as surety could not seek a declaratory judgment in court against an "arm" of the state.[93] The surety had issued a statutory performance bond to secure the performance of a private construction company under a highway construction contract between the private construction company and the Arkansas State Highway Commission.[94] However, because the private construction company had allegedly breached the construction contract, the Arkansas State Highway Commission demanded the surety to ensure contract performance. The surety unsuccessfully

[88] K. McShane, *FFF Sovereign Immunity Series*, Nat'l. L. Rev. (Sept. 30,2022).
[89] Ark. Const. art. V, §20.
[90] Ark. Const. art. XVI, §2.
[91] R. C. Dalby, *Too Plain to Be Misunderstood: Sovereign Immunity Under the Arkansas Constitution*, 71 Ark. L. Rev. 761 (2019), 763.
[92] Bd. Of Trs. Of the Univ. of Ark. V. Andrews, 2018 Ark. 12, at 12, 525 S. W. 3d 616, 622.
[93] Travelers Cas. & Sur. Co. of America v. Ark. State Highway Comm'n, 353 Ark. 721, 728-29, 120 S.W.3d 50, 53-55 (2003) "By contracting as a surety with the State, Travelers relegated any relief based on breach into the hands of the legislative branch. Although Travelers does not seek any affirmative relief, it does seek to control the State's right to seek affirmative relief under the performance bond. As such, the suit for declaratory judgment is one against the State and is barred by sovereign immunity."
[94] *Ibid.*

sought in court a ruling that it was not liable to the Commission on its performance bond.[95]

Many more states retain immunity, but they permit liability under few specific circumstances, such as for injuries suffered for accidents on negligently managed state property or highways.[96] Many other states, such as New York, adopted statutes waiving sovereign immunity, but retaining it in many circumstances. Even in these states, sovereign immunity is generally retained for discretionary decisions and for some business torts, such as libel, misrepresentation, abuse of process.[97] Therefore, even under these liberal statutes, substantial areas of immunity are preserved.[98] Also, many states set a cap for compensatory damages, and they do not allow any punitive damages. [99]

In addition to sovereign immunity, states are entitled to the protection of the Eleventh Amendment to the U.S. Constitution, which could be considered as an exemplification of state sovereignty. [100] This Amendment forbids suits against states in federal courts, providing for a "jurisdictional immunity"[101]: it does not prohibit suits against states in state courts, nor does it forbid suits against state officers, as long as the state's treasury is not

[95] *Ibid.*

[96] Mich. Comp. L. Ann. § 691.1407; Wyo. Stats. § 1–39–104.

[97] Idaho Code § 6–904. See also D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 717.

[98] D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 717. See also A. M. Benintendi, *Valdez v. City of New York: The "Death Knell" of Municipal Tort Liability?*, 89 St. John's L. Rev. 1345 (2015), 1369 "Although the State of New York purported to waive its right to sovereign immunity in the Court of Claims Act, the Court of Appeals has relegated the Court of Claims Act waiver to insignificance through various judicially imposed exceptions to and exclusions from that waiver."

[99] Fla. Stat. Ann. § 768.28; Pa. Consol. Stat. Ann. § 8528.

[100] T. J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, cit. at 86, 427 "The enactment of the Eleventh Amendment has led to a common perception that the amendment grants sovereign immunity. This is a misnomer; the sovereign immunity of states is not derived from the Eleventh Amendment (Aldenn v. Maine, 1995). The sovereignty held by states before our federal Constitution was ratified is the source of state sovereign immunity."

[101] U.S. Constitution Amendment XI: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subject of any foreign state."

subject to the judgement.[102] As the Eleventh Amendment is considered as an exemplification of state sovereignty, only states and their "arms" may be entitled to this protection,[103] excluding therefore political subdivisions such as counties and political municipalities.[104]

On the other hand, local governments cannot invoke sovereign immunity, as they are not sovereign entities and have long been chartered by the states.[105] Notwithstanding, they may claim defenses towards liability, as provided by states' constitutions, legislations and courts: this immunity is generally addressed as "governmental immunity."[106]

Public authorities may be considered to act as "arms" of the state, and therefore be entitled to Eleventh Amendment protection and sovereign immunity to the extent that the incorporating state retains it. Thus, in states such as Arkansas public authorities' liability as "arms" of the state will extend far beyond the exercise of discretionary decisions.

Traditionally, the discussion on whether a government corporation qualifies as an "arm" of the state has focused on the interpretation of the clause in the public authorities' incorporation statute, that allows the entity to sue and be sued in its own name ("sue-and-be-sued" clause). Many courts have assumed that, in absence of such clause in their enabling statute, these authorities would be entitled to complete protection from liability, where such protection was enjoyed by the incorporating state.[107]

Recently, courts have shifted their focus to other factors to determine whether a government corporation is acting as an "arm" of the state government. Among these factors, there is the source of the entity's funding: if an entity is given the power to generate its

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[102] D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 330.
[103] Northern Insurance Company of New York v. Clatham County, 547 U.S. 189, 193 (2006).
[104] Lake Country Estates, Inc. V. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).
[105] D. B. Dobbs, P. T. Hayden & E. M. Bublick, The Law of Torts, cit. 84, at 330. For a further analysis of the corporate origins of the City of New York, see H. Hartog, *Public Property and Private Power. The Corporation of the City of New York in American Law, 1730-1870* (1983).
[106] A. R. Brown-Graham, *Local governments and the public duty doctrine after Wood v. Guilford County*, 81 N. C. L. Rev. 2291 (2003).
[107] The Harvard Law Review Association, *The Applicability of Sovereign Immunity to Independent Public Authorities*, cit. at 86, 718.

own funds or receive from sources different from the state, it is unlikely to be entitled to the Eleventh Amendment immunity.[108] Other factors include the extent of state control over the entity, whether the state designates the entity as an "instrumentality" or the like, and the type of functions performed by the entity.[109]

In *Williams v. Dallas Area Rapid Transit,* the U.S. Court of Appeals for the Fifth Circuit discusses the application of these factors to a regional transportation authority operating in the Dallas region (Texas) and concludes that the public authority was not an "arm" of the state for the purpose of the Eleventh Amendment.[110] The Court of Appeals considered the "sue-and-be-sued" clause in the enabling statute not to be significantly relevant in the inquiry. In contrast, courts should primarily look at the source of the authority's funds, as this factor would determine whether a judgement against corporation would be paid from the state's coffers. [111] This factor, in fact, weighted against the regional transport authority's immunity, which did not receive any state funds, and its bond obligations were not guaranteed by the State of Texas. [112] Other factors weighted also the grant of sovereign immunity: the authority's activities benefitted only local inhabitants, and not the state as a whole, and the statutory characterization of the authority as "governmental unit" was definitely broader than the term "arm" of the state under the Eleventh Amendment.[113]

The same factors were also analyzed in *Lake Country Estates*, where property owners sued the Tahoe Regional Planning Authority, a bi-state agency created by a compact between Nevada and California, claiming that one of its ordinances deprived them of the beneficial use of their lands. After taking into consideration the factors above mentioned, the U.S. Supreme Court concluded that the Authority was not entitled to Eleventh Amendment protection. [114] In fact, this agency received its funds from the

[108] C. N. May, A. Ides, S. Grossi, *Constitutional Law, National Power and Federalism (Examples & Explanations)*, (2019).
[109] *Ibid.*, 196.
[110] *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001).
[111] *Ibid.*, 320.
[112] *Ibid.*
[113] *Ibid.*, 319.
[114] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401, 99 S. Ct. 1171, 1177, 59 L. Ed. 2d 401 (1979) "Unless there is good reason to believe

counties in which it operated (and not from the two states); the States have identified this entity as a "political subdivision" and a "separate legal entity", and not as their "instrumentality"; its land use functions were typically exercised by local governments, and not by the States; while its governing board was controlled by cities and counties (and not by the States).[115]

In *Marshall v. Port Authority of Allegheny County*, however, the Supreme Court of Pennsylvania held that the government corporation was entitled to sovereign immunity, considering it as an "agency of the Commonwealth" rather than a local agency, giving conclusive importance to the incorporating statute of the authority.[116] Even though the Port Authority's board of directors was appointed by county commissioners, the entity was created by the State (Commonwealth), rather than by local government, through an incorporating statute that makes expressly clear in its language that the authority "acts as an agency of the Commonwealth."[117]

Therefore, state government corporations could qualify for sovereign immunity, and thus not be liable for torts to the extent retained by the incorporating state. The clause "sue-and-be-sued" in the enabling legislation does not exclude the sovereign immunity, and it appears irrelevant in the court's examinations.

Based on this analysis, and unlike state public authorities, local public authorities will most likely not qualify as "arms" of the state for sovereign immunity purposes. The factors developed by courts clearly weigh against this qualification, and this is based on the aforementioned view that municipalities were not originally sovereign, and therefore their instrumentalities cannot be entitled to privileges that they do not have themselves. However, two considerations are worthy of note. First, when a judgement is against a political subdivision rather than from the state or its "arm", it would be in effect be a judgement against the state treasury and the courts are likely to treat the action as being one against the state and provide immunization from suit in federal

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that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment."

[115] *Ibid.*

[116] Marshall v. Port Auth. of Allegheny City., 524 Pa. 1, 8, 568 A.2d 931, 935 (1990).

[117] *Ibid.*

court.[118] Second, local governmental entities may be entitled to "governmental immunity", as defined in the state's case law, constitutional provisions, state statutes or judicial decrees.[119] Some states have adopted local government tort immunity acts, limiting the scope of immunity protection in accordance with local governments and their instrumentalities. For example, in *Marshall* the Court of Appeals held that the Port Authority of Allegheny County qualified as a "local agency" under the governmental immunity statute (Local Immunity Act) [120] enacted by the State of Pennsylvania, and therefore, it was still insulated from liability.[121] Courts also tend to grant immunity when the local entity performs governmental functions: these are functions performed by the governmental entities as agents of the state, as opposed to proprietary functions that are undertaken by the government for the public, but typical of private enterprises. Disagreement exists among the courts however on the test for determining whether an activity is governmental or proprietary.[122] Courts may consider an activity as proprietary if a fee is paid, it is carried out for profit, or it has historically been performed by a private enterprise.[123] Other courts also whether the activity relates to a public service.[124] Some authors, however, have argued that such distinction is one of the most confusing in municipal law, and rulings are inconsistent not only between different jurisdictions but also within the same one.[125] Some courts have concluded that the operation of a municipal solid waste system or the construction of public highways or streets,[126]

[118] C. N. May, A. Ides, S. Grossi, *Constitutional Law, National Power and Federalism (Examples & Explanations)*, cit. at 102, 197.
[119] T. J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, cit. at 86, 433 providing the examples of Georgia and Texas.
[120] 42 Pa.C.S. §8522.
[121] Marshall v. Port Auth. of Allegheny City., 106 Pa. Cmwlth. 131, 133, 525 A.2d 857, 858 (1987), aff'd, 524 Pa. 1, 568 A.2d 931 (1990).
[122] D. B. Dobbs, P. T. Hayden & E. M. Bublick, *The Law of Torts*, cit. at 84, 718-719.
[123] *Ibid.*
[124] *Ibid.*
[125] H. D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173 (2016), 174. See also J. C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277 (1990)
[126] H. D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173 (2016), cit. at 125, 175-176.

the collection of garbage,[127] the operation of electric light plants or water systems[128] are governmental functions; on the other hand, others have ruled that these are proprietary functions.[129]

As a consequence, local public authorities, that do not fulfill the courts' requirements to qualify as an "arm" of state for sovereign immunity purposes, may be entitled to protection from liability.

To conclude this discussion on government corporations' liability, few considerations should be devoted to the analysis of a federal cause of action, introduced in the U. S. Code to allow victims of federal rights violations – committed by a state actor – to resort directly to federal courts, without first exhausting state remedies.[130] Under section 1983 title 42 of the U.S. Code, in fact any person acting "under color of" state law is liable for depriving a citizen of federal constitutional or statutory rights; among these suits, claims of violations of the Fourteenth Amendment due process rights are particularly common.[131] With reference to the "under color of state law" requirement, the U.S. Supreme Court emphasized the significance that the wrongdoer commits the federal rights violation in the exercise of a power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law".[132] Public authorities may be sued under section 1983 when they exercise any of the government powers granted by the incorporation statute, such as the authority to issue rules or regulations or the power of eminent domain. However, case law is unanimous in holding that states and their "arms" are not suable persons under section 1983, considering also that the Eleventh Amendment immunity prohibits private parties from suing a state in a federal court without its consent.[133] The designation of a government corporation as "arm" of the state is based on an examination of the same factors that govern the determination of the Eleventh Amendment protection, such the

[127] City of Atlanta v. Chambers, 205 Ga.App. 834, 424 S.E.2d 19 (1992).
[128] Patterson v. City of Little Rock, 202 Ark. 189, 149 S.W.2d 562 (1941).
[129] H. D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173 (2016), cit. at 125, 192.
[130] M. G. Collins, *Section 1983 Litigation in a Nutshell* (2016), 4-6.
[131] 42 U.S.C §1983.
[132] West v. Atkins, 487 U.S. 42, 49 (1988). See also M. S. Gilmore, *Introduction to Liability and Immunities Under 42 U.S.C. 1983*, 51 Advocate 17 (2008), 17.
[133] The Harvard Law Review Association, *Government Tort Liability*, 111 Harv. L. Rev. 2009, 2009-2010.

public authority's economic and financial autonomy that weighs against its qualification as "arm" of the state.[134] On the other hand, a section 1983 claim could be asserted against local governments and local government corporation, as they do not enjoy the same state protection. According to established case law, their liability is limited to only those violations that result from the entity's custom, policy or official decisions.[135]

6. Conclusion

A government corporation could be thought of as a fictitious category that includes entities with various legal structures and characteristics, each designed to achieve a specific public purpose while acting in a businesslike manner. These entities share certain common traits: a separate legal personality, a corporate-like structure, governmental powers and the ability to set their own charges and fees for the services they provide. Like private corporations, they could issue bonds – not guaranteed by the "full and faith credit" of the state – without the need for a public referendum as required for the issuance of government bonds. Their debt is not included in the state budget. Moreover, even though they generally do not have identifiable shareholders, they are provided with a board of directors and officers, and escape many strict regulations applicable to state agencies, such as the civil service and procurement restrictions. On the other hand, like public agencies, they exercise governmental powers and they enjoy many tax exemptions on bond issues, earnings and properties owned. Furthermore, they are frequently incorporated through a special statute and are subject to the administrative procedure acts and freedom of information laws, which are applicable to the state government corporations at the very least.

However, there is no prototype of public authority. Some characteristics are present in some corporations, but not in others. Some government corporations have government powers that others do not, such as the power of eminent domain or the power

[134] Hass v. Port-Auth. Trans-Hudson Corp., 513 U.S. 30 (1994). See also M. G. Collins, *Section 1983 Litigation in a Nutshell*, cit. at 130, 150.
[135] Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

to issue regulations; some authorities are also incorporated under general incorporation laws rather than by special statute.

The different interrelationships of their specific characteristics affect government corporations' legal status, which varies depending on the circumstances and the reference parameter: they are considered as public agencies at times, and private entities at others. Courts may consider the entity as a state arm for sovereign immunity purposes based on a variety of factors, including the amount of state funding, their designation in the incorporation statute, state control over the entity's activities, and the type of function at issue. Thus, the entity will be protected by the Eleventh Amendment and will not be sued in federal court. It will also be protected in state courts to the extent that the incorporating state retains immunity. While Arkansas' arms of state may enjoy contractual sovereign liability, government corporations in many more states such as New York State, will be afforded less protection with immunity granted only when making discretionary decisions or other specific circumstances, such as the commission of business torts; the amount of damage they must pay may also be subject to caps, and punitive damages may be excluded. Local government corporations are unlikely to be considered arms of state, especially if they do not receive state funds, but they may be considered public for governmental immunity purposes: this will generally occur when they perform governmental functions rather than proprietary ones. On the other hand, entities that are not arms of the state for sovereign purposes may be considered as public for federal exemptions of bonds and corporate earnings. This will happen if the entity is given a substantial amount of sovereign power such as the eminent domain power, regardless of whether the state funds the entity or designates the entity as its instrumentality.

INTEROPERABILITY OF LAW ENFORCEMENT DATABASES AND THE CONTROL OF PUBLIC FUNDING AT NRRP TIMES

Carlo Pezzullo[*]

Abstract

Within a fragmented and varied scenario of digitalisation initiatives, at national level, dedicated to interoperability and in view of the EU SOCTA 2021 produced by Europol on criminal infiltration and long-term impacts of the pandemic, there is one area that would require specific attention. This concerns the European Union's Area of Freedom, Security and Justice (AFSJ), with particular focus on law enforcement databases interoperability aimed at the investigation of corruption and criminal infiltration in public funds. This issue today falls within the interoperability framework established by the Regulations (EU) 2019/817 and 2019/818 even in the field of judicial and police cooperation. The proper application of those European guidelines and the resulting effects on the level of investigation, not only repressive but especially preventive, should not be separated from considering the peculiarities of the Italian legal system, with special regard to its Recovery and Resilience Plan governance model.

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1. Interoperability and law enforcement databases: an introduction on the state of the art[1]

Public sector databases – «a set of homogeneous data of relevant interest for one or more organisational units, stored in one or more IT archives, organised and accessible by means of a software tool»[2] – are characterised by pursuing the aim of carrying out institutional functions. In order to achieve greater efficiency[3] of the administrative actions, pursuant to Article 3-*bis* of the Law August 7th, 1990, n. 241, it is increasingly necessary that these databases communicate with each other, in fully (or partially) automated way. Saving time, reducing operating (or management) costs, improving the quality of data and public services offered are some of the main objectives that, now for more than a decade, the European institutions (and consequently the national ones) aim at promoting interoperability. Along the direction of the enhancement of the information assets held by the Public Administration (P.A.), even the most recent Italian National Recovery and Resilience Plan (NRRP) provides for a specific investment (1.3), within Component 1 on Digitalisation, Innovation and Security in the P.A. of Mission 1, dedicated to interoperability among the databases of administrations, aimed at promoting the knowledge and use of public data.

Before going into the more specific topic of this article, there is a concept that needs to be clarified.

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[1] This article is the revised and expanded version of the paper presented at the ICON-S Mundo Annual Conference 2022 "Global problems and prospects in Public Law", held at the University of Wrocław, Poland, July 4th-6th, 2022

[2] Italian Digital Authority (AgID), *Linee guida per la stesura di convenzioni per la fruibilità di dati delle pubbliche amministrazioni*, June 2013, 5.

[3] The Italian doctrine offers many scientific articles and reflections on the efficiency of Public Administration. Among others, see: M.R. Spasiano, *Organizzazione e risultato amministrativo*, in M. Immordino & A. Police (eds.), *Principio di legalità e amministrazione di risultati* (2004), 342; L. Mercati, *voce Efficienza della pubblica amministrazione*, in S. Cassese (ed.), *Dizionario di diritto pubblico* (2006), 2144; A. Massera, *I criteri di economicità, efficacia, ed efficienza*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (2011), 22; R. Ursi, *Le stagioni dell'efficienza. I paradigmi giuridici della buona amministrazione* (2016); R. Ursi, *La giuridificazione del canone dell'efficienza della pubblica amministrazione*, in B. Marchetti & M. Renna (eds.), *A 150 anni dall'unificazione amministrativa italiana* (2017), 445-471; D. Vese, *L'efficienza della decisione amministrativa. Semplificazione e accelerazione del procedimento nelle recenti riforme della pubblica amministrazione*, 18 federalismi.it 2-49 (2018).

To date, there is no unanimous definition of «interoperability»[4]. According to the 2005 Communication from the Commission interoperability is defined as the «ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge»[5]. In this text,

[4] Looking back at the etymology of the word «interoperable», according to the Online Etymology Dictionary compiled by Douglas R. Harper, it is derived from the combination of the Latin word «*inter*», meaning «among, between, betwixt, in the midst of» (also used extensively as a prefix), and the late Latin word (*latinitas serior*) «*operabilis*», meaning «capable of treatment by operation». In the same sense also the Italian Garzanti Linguistica. According to the Merriam-Webster Dictionary, the first known use of «interoperability» was in 1965.
Here it is useful to remind the distinction between legal, organisational, semantic and technical interoperability. The first one is about ensuring that organisations operating under different legal frameworks, policies and strategies are able to work together; the second one concerns the definition of the purposes of the internal organisation, the reorganisation of the management processes and the creation of the means to collaborate with other administrations in the exchange of information; the third consists of the implementation of specific technologies capable of inferring, relating, interpreting and classifying the implicit meanings of resources and electronics; finally, technical interoperability refers to the automatic processing and reuse of information between different systems and platforms, dealing with aspects such as the interconnection of services, the integration of data and middleware systems, data exchange, and security systems. On this distinction, see the NIFO website (joinup.ec.europa.eu), AgID *Linee guida sull'interoperabilità tecnica delle Pubbliche Amministrazioni* (circular October 1st, 2021, no. 547) and in the Italian literature especially G. Carullo, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa* (2018), 132-137. As reiterated by the European Commission in the ISA² programme (COM(2017) 134 final), discussed below, interoperability initiatives should cover all four levels (legal, organisational, semantic and technical).

[5] Communication of 2005 from the Commission to the Council and the European Parliament on «improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs», 3. Interoperability is defined in the same way by the International Organization for Standardization (ISO/TS 27790:2009) in its 2009 Document Registry Framework, point 3.39. A similar definition is adopted by the Italian *Codice dell'amministrazione digitale* (CAD), Legislative Decree March 7th, 2005, no. 85, Art. 1, par. 1, lett. dd), where interoperability is defined as «characteristic of an information system [...] to interact automatically with other information systems for the exchange of information and the provision of services». The definition provided by the Commission in its Communication September 26th, 2003, (COM(2003) 567) is different: interoperability is «the means by which this inter-linking of systems, information and ways of working will occur». G. Carullo, *Dati, banche dati, blockchain e interoperabilità dei sistemi informativi*, in R. Cavallo

even at that time, the Commission initiated an in-depth debate on the form and long-term architecture of information systems, making interoperability as a part of the rationalisation of information, which is now plentiful in the European Union[6]. The technical, and not juridical[7], nature of this definition refers to the way in which systems can interface with each other in an automated manner within interconnected networks, thus allowing access to data stored on a system other than the one requesting the information.

There is one area that would require specific attention. This concerns the European Union's Area of Freedom, Security and Justice (AFSJ)[8], with particular focus on law enforcement databases[9]

Perin & D.U. Galetta (eds.), *Diritto dell'amministrazione pubblica digitale* (2020), 207, seems to prefer this last definition.

[6] On this topic, see the Report from the Commission to the European Parliament and the Council on the results of the final evaluation of the ISA programme (COM(2016) 550 final), 4-19. For a recent and short essay on the interoperability of public sector databases at NRRP times, see G. Buttarelli, *L'interoperabilità dei dati nella Pubblica Amministrazione*, in V. Bontempi (ed.), *Lo Stato digitale nel Piano Nazionale di Ripresa e Resilienza* (2022), 141-146.

[7] G. Carullo, *Dati, banche dati, blockchain e interoperabilità dei sistemi informativi*, cit. at 4, 210. In the same way, P. Guarda, *Il regime giuridico dei dati della ricerca scientifica* (2021), 233, who emphasises that the term «interoperability» does not have a direct juridical connotation, being, rather, an expression of the technical world.

[8] The Area of Freedom, Security and Justice falls within the main purposes of the European integration set forth in Article 3, paragraph 2, TEU. For an in-depth analysis on the AFSJ see the recent volume by A. Di Stasi & L.S. Rossi (eds.), *Lo Spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere* (2020). See also: F. Coman-Kund, *Europol's International Exchanges of Data and Interoperability of AFSJ Databases*, 26 European Public Law 181-204 (2020), who defines interoperability at AFSJ as a «thorny issue» to which «international cooperation adds a further level of complexity», 184; M. Gnes & E. Chiti, *Cronache europee 2018*, 1 Rivista trimestrale di diritto pubblico 286 ff. (2020); R. Mavrouli, *The challenge of today's Area of Freedom, Security and Justice: a re-appropriation of the balance between claims of national security and fundamental rights*, 2 Freedom, Security & Justice: European Legal Studies 90-119 (2019); A. Zanobetti, *La circolazione degli atti pubblici nello spazio di libertà, sicurezza e giustizia*, 3 Freedom, Security & Justice: European Legal Studies 20-35 (2019).

[9] In recent literature, the locution «law enforcement databases» is used by: F. Coman-Kund, *Europol's International Exchanges of Data*, cit. at 7; T. Quintel, *Interoperable Data Exchanges Within Different Data Protection Regimes: The Case of Europol and the European Border and Coast Guard Agency*, 26 European Public Law 212 ff. (2020); A. Fiodorova, *Information Exchange and EU Law Enforcement* (2018), 227.

interoperability aimed at the investigation of corruption and criminal infiltration in public funds.

Upon closer examination, the issue of databases interoperability at AFSJ is therefore far from new. According to some authors, who are amongst the first to address this issue on a scientific level[10], «the access to and sharing of each others information in the justice realm should be governed by three guidelines or guarantees: (1) 'sharing' should only be possible for law enforcement purposes; (2) the receiving party can only 'get' the information when he or she uses it for the purposes that have initially led to its gathering by the sending party; (3) the general principle of efficiency in state administration practice». The interpretation given by later authors – although from different viewpoints – seems not to deviate much from this one and, indeed, seems to have been fuelled over time by visions that are all (more or less) guaranteeing[11].

Unlike the period when these early authors were writing, when there was not yet a specific regulation on interoperability – nor on law enforcement databases interoperability –, this topic is

[10] P. De Hert & S. Gutwirth, *Interoperability of police databases within the EU: An accountable political choice?*, 20 Int. Rev. Law Comput. Technol. 24 (2006). As pointed out by N. Vavoula, *Interoperability of EU Information Systems: The Deathblow to the Rights to Privacy and Personal Data Protection of Third-Country Nationals?*, 26 European Public Law 133 (2020), the academic and institutional interest in this issue started in the aftermath of 9/11. However, in Italy it is initially almost absent on both sides. Since the first ISA program (2010-2015) and then the 2015 Paris terror attack, scientific attention increased.

[11] For recent essays see E. Brouwer, *Large-scale databases and interoperability in migration and border policies: The Non-Discriminatory Approach of Data Protection*, 26 European Public Law 71-92 (2020); F. Coman-Kund, *Europol's International Exchanges of Data*, cit. at 7; G. Caggiano, *L'interoperabilità fra le banche-dati dell'Unione sui cittadini degli Stati terzi*, 1 Diritto, Immigrazione e Cittadinanza 169-184 (2020); O. Borgogno, *Regimi di condivisione dei dati e interoperabilità: il ruolo e la disciplina delle A.P.I.*, 3 Il Diritto dell'informazione e dell'informatica 689-709 (2019). See also D. Bigo, L. Ewert, E. Mendos Kuşkonmaz, *The Interoperability Controversy or How to Fail Successfully: Lessons from Europe*, 6 International Journal of Migration and Border Studies 93-114 (2020), in which the authors critique the technical framework within the interoperability plans have been framed. In doctrine, the two biggest issues seem to be data protection and standardisation. About standardisation, although reasoning in general terms on the use of algorithms in administrative proceedings, see J.B. Auby, *Administrative Law Facing Digital Challenges*, 1 European Review of Digital Administration & Law - Erdal 12 (2020).

now part of the EU Strategy to tackle Organised Crime 2021-2025[12] and of Regulations (EU) 2019/817 and 2019/818 (so called Interoperability Regulations) that establish the interoperability framework even in the field of judicial and police cooperation (in addition to asylum and migration). It aims at strengthening cooperation between national (e.g. Italian State Police) and European (e.g. Europol, Eurojust) authorities concerning the sharing of data and information[13]. As a matter of fact, it is since the terrorist attack in Paris on November 13th, 2015, that the automatic interconnection among databases has received new impetus with the program «ISA² 2016-2020», established by Decision (EU) 2015/2240. Meanwhile, the enhancement of interoperability was also foreseen in the proposals for Eurodac[14] and European Travel Information and Authorization System (ETIAS)[15], as well as already in the program on interoperability solutions «ISA 2010-2015», forerunner of ISA².

Despite such interest from the European institutions, according to the «State-of-play report on digital public administration and interoperability 2020» from the European Commission Directorate-General for Informatics (so called DIGIT)[16],

[12] This Strategy does no more than welcome at European level interventions and initiatives that have already been implemented in the Italian legal system for some time. On this point, see in particular the hearing of Franco Roberti in the Italian Anti-Mafia Parliamentary Commission (18th legislature), May 6th, 2021, available on the institutional website of the Camera dei deputati (camera.it).

[13] The Interoperability Regulations allow the processing by Europol of personal data stored also in non-law enforcement databases. On this point, see F. Coman-Kund, *Europol's International Exchanges of Data*, cit. at 7, 182.

[14] The most recent Commission proposal (COM(2020) 614 final) amends the 2016 proposal, which had already extended the scope of Eurodac, adding new categories of persons for whom data should be stored, allowing its use to identify irregular migrants, lowering the age for fingerprinting, allowing the collection of identity information along with biometric data and extending the period of data retention.

[15] The concept of ETIAS was constituted by the Communication stronger and smarter infomation systems for borders and security (COM(2016) 205). After being adopted with the proposal of November 16th 2016, a specific discipline is introduced with the ETIAS Regulation (EU) 2018/1240.

[16] The «State-of-play report on digital public administration and interoperability 2020» was published within the framework of the National Interoperability Framework Observatory (NIFO) action of the ISA² Program: the entire document can be found at joinup.ec.europa.eu. For updates, see the official IRPA website in the part dedicated to the «Osservatorio sullo Stato digitale» (irpa.eu): e.g. see the

there are not enough digitalisation initiatives – at national level – dedicated to interoperability. Nevertheless, this does not seem to be a problem in all sectors, and its *status quo* even depends on the EU Member State in question[17].

Although this is not the place to review the state of the art on interoperability in all areas where it is required today, it is worthwhile to mention the health sector, which is the other area where – especially during the Covid-19 pandemic – the EU pays particular attention to interoperability. In order to improve access to health data and their use and integration and to optimise health outcomes for all individuals, on May 3rd, 2022, the European Commission presented a proposal for a Regulation on the European Health Data Space (COM(2022) 197)[18]. Here too, interoperability is not just a recent issue. Looking at the Italian legal system, already the November 11th, 2010, Guidelines on the Electronic Health File (EHF) of the Ministry of Health emphasised that interoperability (firstly semantic) is functional to the realisation of the EHF. In spite of the recent interest also shown by the Italian courts[19], interoperability in the health sector is partly still at an experimental state[20].

communication by B. Carotti, *Digitalizzazione della PA e interoperabilità: lo stato dell'arte secondo la Commissione europea*, January 12th, 2021.

[17] For more information on focus areas monitoring results, see the Location Interoperability Framework (LIFO) website.

[18] This Regulation proposal has been presented after the Communication on «A European Health Data Space: unlocking the potential of health data for people, patients and innovation» (COM(2022) 196). These are both parts of the broader objective of the so-called European Health Union, set out in the Commission Communication of November 11th, 2020, «Building a European Health Union: strengthening the EU's resilience to cross-border health threats» (COM(2020) 724).

[19] The reference is in particular to Cons. Stato, III, sent. October 7th, 2020, no. 5962, concerning a public procurement procedure where the interoperability among health devices is one of the requirements. See also the Italian Court of Accounts case-law: Corte dei conti Sicilia, contr. sec., delib., April 5th, 2022, no. 57; Corte dei conti Trentino-Alto Adige, contr. sec., December 6th, 2021, no. 7 and no. 8.
The doctrine also started to show interest: EHF and its interoperability was discussed by A. Pioggia at the *Primo convegno nazionale coordinamento dottorandi in Diritto amministrativo "L'amministrazione pubblica con i big data"*, held at the University of Turin, May 20th -21st 2019.

[20] According to a study carried out by IBM in 2021, interoperability for healthcare has four different levels that have been defined by IT experts and the Healthcare Information and Management Systems Society (HIMSS): some of these levels can

In the interoperability context described above, the profile we would like to focus on concerns the interoperability of the AFSJ databases against corruption and criminal infiltration in the economic and financial field – which today is particularly relevant given the disbursement of the NRRP funds[21] –, and how the latter fits into the Italian governance model.

2. Illicit businesses and proper management of the financial flow of the Italian National Recovery and Resilience Plan (NRRP)

Without focusing on the distinction between money laundering and reusing illegal money[22], which deflect the competition in the market, there are some areas of the public sector, such as procurement processes, which are especially vulnerable to corruption[23] and criminal infiltration, with risks of manipulation of tenders in exchange for bribes and kickbacks.

During the pandemic and the ensuing economic crisis[24], according to the EU Serious and Organised Crime Threat Assessment (SOCTA) 2021[25] produced by Europol, criminal groups

be achieved today with existing healthcare IT architecture and systems, while others will require innovation and further developments in patient-centred technology.

[21] On the Recovery Plan funding, see M. Sapała & N. Thomassen, *Recovery Plan for Europe: State of play, September 2021*, published on EPRS website (europarl.europa.eu); A. Vespignani, *Quali risorse, quali progetti, quali regole per il "Recovery Plan"?*, 4 I Contratti dello Stato e degli Enti pubblici 7-12 (2020).

[22] Among others, see G. Soana, *Tracciabilità e trasparenza: la protezione del mercato tra auto riciclaggio e reati tributari*, 4 Rivista trimestrale di diritto tributario 1023-1041 (2020).

[23] On this topic, see V. Brigante, *Law enforcement against corruption in Italian Public Procurement, between hetero-imposed measures and procedural solutions*, 11 Ital. J. Public Law 334-358 (2019); E. Carloni, *Fighting corruption through administrative measures. The Italian Anticorrpution policies*, 2 Ital. J. Public Law 261-290 (2017).

[24] About the economic crisis caused by the Covid-19 pandemic, see G. Di Gennaro & G. Pastore, *La crisi economica post-pandemia: alcuni indicatori di "risk assessment" strategico dell'operatività delle mafie*, 1 Riv. giur. Mezzogiorno 39-67 (2021); C. Marchese, *Il ruolo dello Stato a fronte dell'emergenza pandemica e le risposte elaborate in sede europea: la garanzia dei diritti ed il rilancio economico alla luce del rapporto tra condizionalità e solidarietà*, 1 Rivista AIC 232-267 (2021).

[25] Europol (2021), EU SOCTA, *A corrupting influence: the infiltration and undermining of Europe's economy and society by organised crime*, Publications Office of the European Union, Luxembourg. The reference is on page 94 and the document is

have quickly adapted to profit from the new business opportunities the pandemic economy has presented them with and have quickly capitalised on these changes by shifting their market focus and adapting their illicit activities to the crisis context. Criminal organisations traits, although appreciably different from each other, are at the basis of «processes of modernization of criminal circuits that multiply the opportunities and patterns of collaboration linked to the needs of speculative reinvestment»[26].

In this period, there was a huge «hypertrophy» of public support[27], which consisted of two forms of aid[28]: non-repayable financing and guaranteed loans. In the Italian legal system two requirements were (and are) demanded to access this: the first one is that, according to Decree-Law May 19th, 2020, no. 34 (so called «Decreto rilancio»), the company had suffered in 2020 a decrease of more than two-thirds compared to the turnover of April 2019[29]; the second one is the so called «antimafia aspect», which means to be in order under the profile of the antimafia certification[30]. This last requirement necessitates some clarification here.

In order to obtain the adoption of the anti-mafia documentation, the interested party could not be in the conditions

freely downloadable from the website europol.europa.eu. EU SOCTA, after analysing the main activities of criminal organisations in the EU (including fraud, cybercrime, currency counterfeiting), examines the long-term impacts of the pandemic from Covid-19 could determine on the role of criminal organisations in the economy. On this last topic and for an economic-managerial perspective, see the volume by S. Consiglio, P. Canonico, E. De Nito, G. Mangia (eds.), *Organizzazioni criminali. Strategie e modelli di business nell'economia legale* (2019), 25-97. As noted on page 51, based on an interpretation of some data provided by Europol in 2013, the financial power of criminal organisations has more serious consequences in economic and financial crisis situations. This investigation, contextualised at Covid-19 pandemic times, is a very current topic. For a reflection on this topic, see F. Roberti, *Mafie e pandemia*, in F. Roberti (ed.), *Mafie e pandemia. Una opportunità per i poteri criminali in Europa. Come reagire?* (2020), 5-13.

[26] G. Melillo, *Organizzazioni criminali, modelli di impresa e mercati*, in S. Consiglio, P. Canonico, E. De Nito, G. Mangia, *Organizzazioni criminali*, cit. at 24, 20.

[27] On the NextGenerationEU financial grant for each Member State, see renovate-europe.eu. In literature, see J. Núñez Ferrer, *Avoiding the main risks in the Recovery Plans of Member States*, 1 Recovery and Resilience reflection papers 9-10 (2021).

[28] With this regard, see the paper *Financial support measures and credit to firms during the pandemic*, written by S. De Mitri, A. De Socio, V. Nigro, S. Pastorelli, 665 Questioni di Economia e Finanza (2021).

[29] Article 25, comma 4, of Decree-Law May 19, 2020, no. 34.

[30] Article 25, comma 9 and 12, of the same Decree-Law.

set out in Article 67 of the Legislative Decree September 6, 2011, no. 159 (so called Antimafia Code). Article 67 enumerates the effects of preventive measures affecting persons to whom one of the preventive measures provided for in Book I, Chapter II has been definitively applied, including contributions, financing, soft loans or other disbursements, certain types of concessions and licences[31]. This is where police databases and their functionality come into play, but it becomes necessary here to ask how the existing legislations and criteria for the use of these databases can be harmonised and what initiatives are currently in place.

In view of the Decision of the «Economic and Financial Affairs» Council (ECOFIN) of July 13th 2021, point 47, in which the role of the Guardia di Finanza[32] in the implementation phase of the NRRP «for the prevention, detection and correction of fraud, corruption and conflicts of interest» is mentioned, among the initiatives undertaken, we can refer to the case of the Guardia di Finanza in Naples[33]. To control pandemic funding, the latter have

[31] For some recent articles on the Italian anti-mafia administrative measures, see L. Bordin, *Contraddittorio endoprocedimentale e interdittive antimafia: la questione rimessa alla Corte di Giustizia. E se il problema fosse altrove?*, 22 federalismi.it (2020), 34-65; J.P. de Iorio, *Le interdittive antimafia ed il difficile bilanciamento con i diritti fondamentali* (2019); V. Salamone, *La documentazione antimafia nella normativa e nella giurisprudenza* (2019); F.G. Scoca, *Le interdittive antimafia e la razionalità, la ragionevolezza e la costituzionalità della lotta "anticipata" alla criminalità organizzata*, 6 giustamm.it (2018). For a *focus* on the interested party participation in the anti-mafia administrative procedure, it is allowed to refer to C. Pezzullo, *Le informative interdittive antimafia e il favor partecipationis*, 107-108 Amministrazione pubblica – Rivista ANFACI 38-47 and 72-83 (2022).

[32] In the Italian legal system, consider also the Legislative Decree of 19 March 2001, n. 68, on «Adaptation of the tasks of the Guardia di Finanza Corps, pursuant to Article 4 of the Law March 31th, 2000, n. 78», which identifies the Guardia di Finanza as a military police force with general competence in economic and financial matters.

[33] This project was presented during the «Mafie, corruzione ed economia sociale» Conference, held at the University of Naples "Federico II", Department of Social Sciences, on June 10th, 2022, organised by Lirmac (Interdisciplinary Research Lab on Organised crime and Corruption) of the "Federico II" University and Lies (Economic and Social Investigation Laboratory), under the patronage of Fondazione Finanza Etica, Fondazione Pol.i.s. and Associazione Amato Lamberti. Its official Report, containing a data analysis by L. Brancaccio and A. Scaglione, is in course of publication.
Although without resorting to this precise technique tried out in Naples, the Lazio Region has also taken steps to strengthen the link among databases: a Memorandum of Understanding was in fact signed between the Lazio Region,

begun working on a data analysis process using Article 67 of the Italian Antimafia Code and textmining[34].

This process would integrate databases containing information on the composition of companies and the list of subjects who received funding. This means the functional supplementing of police data (which are by definition «pathological») and economic data (relating to companies and individuals that make them up). In this sense, the only feasible process is the adoption of effective management and preventive control tools, capable of reducing the risk of recycling, with consequent (and just potential) disqualifications. This tool is mainly identifiable in the adoption of an organisational model of management and control which is appropriate and suitable to prevent the engagement in money laundering, through the identification of the areas in which crimes can be committed.

The Italian legislators established a control mechanism that also involves the Guardia di Finanza, which will be mentioned in the next paragraph. It becomes quite evident the choice to attribute a privileged role to the Guardia di Finanza in terms of communication and data exchange with the Ministry of Economy and Finance (MEF).

There remains only to ask how interoperable investigative databases fit into the renewed framework of institutional relations drawn up by the NRRP and the decrees issued for its implementation. Those just stated seem to be two different issues, but in fact the issue is the same: it concerns the anticipation of the control action and, in particular, the police pre-emptive role within the public funding system via interoperable information systems.

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the Prefecture of Rome, the Rome Police Headquarters, the Lazio Carabinieri Legion Command and the Lazio Regional Command of the Guardia di Finanza, which can be found on the official website interno.gov.it.

[34] Textmining requires the use of algorithms. About the issue of law enforcement and technology, focusing on 'predictive policing' and the use of new tools, see F. Galli, *Law Enforcement and Data-Driven Predictions at the National and EU Level: A Challenge to the Presumption of Innocence and Reasonable Suspicion?*, in H.W. Micklitz, O. Pollicino, A. Reichman, A. Simoncini, G. Sartor, G. De Gregorio (eds.), *Constitutional Challenges in the Algorithmic Society* (2021), 111-130. For some reflections on algorithm and administrative proceedings, see J.B. Auby, *Administrative Law Facing Digital Challenges*, cit. at 10, 7-15.

3. The NRRP governance model and funding control mechanism: the relationship between the Ministry of Economy and Finance and the Guardia di Finanza

Linking national and European judicial and investigative databases is now even more relevant in the economic and financial field in light of the national implementation mechanisms by the NextGenerationEU.

In order to observe the time schedule established by and for the successful implementation of the NRRP and to understand what will happen to the EU funds, a particular institutional control mechanism – so called «governance model» – has been provided[35]. In such a system, it would be appropriate for the central authorities to coordinate their activities with local authorities, using interoperable databases to ensure the respect of sound financial management and to take measures to prevent irregularities and fraud, corruption, conflicts of interest and duplication of funding.

The Italian governance model involves several institutions: the first level consists of an apparatus set up under the Presidency of the Council of Ministers, with responsibility for guidance, divided into a Control Room, chaired by the President of the Council with the participation of the Ministers and Undersecretaries responsible for their own matters; on the same level of governance but with different functions[36] is the Central

[35] The governance model solicited by the NRRP was defined by Decree-Law May 31st, 2021, no. 77, (so called Decreto semplificazioni), converted with amendments by Law July 29th, 2021, n. 108, without any imposition by the European institutions on the structures to be assigned their own competences. In doctrine, see the recent article by V. Bontempi, *L'amministrazione centrale alla prova della governance per il PNRR: attualità e prospettive*, 2 Dir. Cost. 66 (2022). For further information, see the Dossier *Governance del PNRR e prime misure di rafforzamento delle strutture amministrative e di accelerazione e snellimento delle procedure*, July 26th, 2021, 3 ff., produced by the Research Departments (Servizi studi) of the Italian Camera dei deputati and Senato, available on the senate.it website.

[36] V. Bontempi, *L'amministrazione centrale*, cit. at 34, 74, defines the governance structure in question as a «peculiar pyramid» which, although having a single basis, is characterised by the presence of two tips: the Presidency of the Council of Ministers and the MEF.

Service for NRRP established at the MEF – State General Accounting Office[37], with monitoring and reporting tasks[38].

In such a system of governance, the relationship between the MEF and the Guardia di Finanza[39] today moves within a specific memorandum of understanding[40] that was signed in 2021 in order to implement their mutual collaboration to protect the resources of the NRRP. For this reason, the sharing of information assets – including through the interoperability of the respective databases, consisting of data and information on the implementers and executors of the interventions financed by the NRRP – is established. Collaboration activities include the participation of the Guardia di Finanza, with its own representatives, in the so-called «anti-fraud network» established at the State General Accounting Office. In fact, in view of the reinforcement of the control activity referred to

[37] Within the same State Accounting Department, an NRRP audit body is also set up to prevent, identify, report and correct cases of fraud, corruption or conflict of interest. It should be remembered that the Central Service, given its reporting function, is the national liaison point with the European Commission.

[38] The Italian Ministry of the Interior also takes part in the governance: Article 12, paragraphs 1-*sexies* and 1-*septies* of Decree-Law no. 68 of June 16th, 2022, converted by Law of August 5th, 2022, no. 108, provides that the Ministry of the Interior and the MEF – Department of the State General Accounting Office enter into a special memorandum of understanding to define the cooperation activities aimed at setting up unitary territorial garrisons between the Prefectures and the State General Accounting Offices. See also the circular of the Ministry of the Interior, Department for Internal and Territorial Affairs – Central Directorate of Local Finance, no. 9 of January 24th, 2022, concerning «*Piano Nazionale di Ripresa e Resilienza (PNRR) – Indicazioni sul rispetto degli obblighi euro unitari e di ogni altra disposizione impartita in attuazione del PNRR per la gestione, monitoraggio, controllo e rendicontazione delle misure*».

[39] According to the Report on the General State Accounts for 2021 of the Court of Auditors, Sections on Auditing, 59, with reference to Mission 29, for Programme 3 «Prevention and repression of fraud and violations of tax obligations», focused mainly on the activity of the Guardia di Finanza, in the relationship with the MEF, controls on non-repayable grants are highlighted.

On the role of the state police in this matter, with particular reference to the financial police, see P. Sorbello, *Banche dati e predittività. L'archivio dei rapporti finanziari e l'analisi del rischio di evasione*, in A. Massaro (ed.), *Intelligenza artificiale e giustizia penale* (2020), 187-195; U. Sirico, *La Guardia di Finanza e le attività di prevenzione e repressione delle organizzazioni criminali*, 3 Rivista di Criminologia, Vittimologia e Sicurezza (2009). See also L. Borlini & F. Montanaro, *The evolution of the EU Law against criminal finance: the "hardening" of FATF standards within the EU*, 48 Georget. J. Int. Law 1009-1062 (2017).

[40] On the memorandum of understanding, see MEF public statement no. 234 of December 17th, 2021.

Article 7, paragraph 8, of Decree-Law May 31st, 2021, no. 77, the possibility of entering into specific memoranda of understanding with the Guardia di Finanza concerns not only the MEF but all the central administrations in charge of the measures (of which the same administrations may possibly also be the implementing bodies).

In addition, the Bank of Italy performs the Treasury function on behalf of the State and, within the State Accounting Department, the inspectorate of reference for the opening of special accounts, in collaboration with the Central Service for the NRRP, is the Inspectorate General for the Finance of Public Administrations (IGEPA)[41].

As already pointed out[42], if the key topic is implementing communication among administrations on investigations also in economic and financial fields, strengthening anti-money laundering strategy becomes central.

This strategy, at European level, is governed by Directive (EU) 2019/1153 of the European Parliament and of the Council of June 20th, 2019[43]. The need for the strengthening of international anti-money laundering instruments, which is even more relevant today by virtue of the funding from the various national recovery plans, could in part be met by the harmonisation of anti-money laundering rules[44] and national practices, as well as by the monitoring of supranational legislation itself. The recent proposal for a Regulation establishing an Anti-Money Laundering and Anti-Terrorist Financing Authority seems to go in this direction[45].

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[41] IGEPA instructs the file and activates the opening of the special account.
To manage the entire financial circuit, the Central Service for the NRRP has made the «System» available to administrations, which can be accessed through the link available on the website. The link is the following: regis.rgs.mef.gov.it: to access the System, user names and respective roles must be provided.

[42] The reference is in particular to Franco Roberti's hearing in the Anti-Mafia Parliamentary Commission (18th legislature), cit. at 11.

[43] This directive (EU) lays down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA.

[44] In view of the individual implementation measures of the Directive by each EU member state (for which the enactment of a EU regulation would have left no space).

[45] It is the so called AML Package. Concerning this, see the European Central Bank Opinion of 16 February 2022 on a Proposal for a Regulation Establishing an Anti-Money Laundering and Anti-Terrorist Financing Authority (CON/2022/4) 2022/C 210/05.

4. A few tentative final considerations

The challenge to the timeliness and completeness of information exchange comes from the European Commission, pioneer and champion of databases interoperability.

Compared to other areas (e.g. health sector) and although there are still no relevant references in case-law, it must be acknowledged the existence of an extensive and diversified legal framework which allows the interpreter to evaluate effectively the interoperability of law enforcement databases.

It still remains to be seen how the interoperability of these databases, in the Italian legal system, fits into the broader relationship between the executive branch (in which police action is included) and the judiciary.

Moving on an abstract level, at AFSJ the scenarios could be at least two: in the first scenario, which should be excluded in light of the current scientific knowledge on interoperability and in line with some of the reflections on digital administration[46], this relationship would not be affected by such an automated data exchange; in the second scenario, the interoperability would be seen as an «administrative tool» aim at the efficiency of Public Administration and in implementation of the principle of cooperation between powers of the State[47]. The recent experience of the financial authorities to control the public funding system, through the use of interoperable databases – set up by means of agreements and arrangements between the different institutional entities – seems to confirm the latter scenario.

[46] According to J.B. Auby in his preface to G. Carullo, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale*, cit. at 3, XX, «a new chapter of administrative law is really opening up with the problems of public data»: «administrative decision-making processes will follow new directions as they are increasingly fed by large amounts of data, which are necessarily increasingly processed by algorithms», and «[t]hese new guidelines will have an impact on the definition of administrative powers».

[47] About the principle of cooperation between powers of the State, among others, see R. Bin, *Lo Stato di diritto. Come imporre regole al potere* (2017), 64-71.

A PLASTIC WORD. UPS AND DOWNS IN THE NATIONAL APPLICATION OF DIRECTIVE 2019/904/EU

Luna Aristei[*]

Abstract

Today, plastic is one of the biggest environmental problems. Directive 2019/904/EU aims to contribute to an increasingly plastic free society by reducing disposable plastic's use. This paper analyses the criticalities of EU directive comparing States' transposition and finding that some EU Countries are far behind (such as Romania or Slovakia) compared to others (such as Germany, France, or Italy). Also, several EU Regions anticipated State directive's transposition by applying decrees or regulations focusing on citizens' education. Indeed, citizens must be made aware by the regulator of the impacts that the production and mismanagement of plastics can generate on to the environment and health. Italy can be considered one of the most virtuous Countries since it adopted local regulations and it is characterized by case law on plastic.

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1. Introduction

In last century there has been a worldwide increase of plastics' consumption[1]. Indeed, it has been estimated that plastic production is twenty times higher than the 1960s, quantity which is expected to nearly quadruple by 2050[2]. However, although today there is a plastic emergency, there is not a valid alternative since our society is characterised by a strong consumerism.

The European Union (EU) shows its intention to limit plastic waste with directive 2019/904/EU[3] on single use plastic. However, it is difficult to fight completely in an integrated way this problem since the directive has been transposed into national law in different ways. Indeed, there are some Member States that are more efficient than others. The main reason why some Countries are lagging (such as Romania) is because the EU leaves a great margin of discretion to States that sometimes do not perceive the problem of plastic as an urgent one. However, at the same time, there are several examples of European regions that approved regulations before their States. This is due to the need for local entities to curb the phenomenon since they are closer to the citizens and generally have to bear the burden of the waste. A good example in this sense is Italy, that is characterized also by case law on this topic.

For these reasons, this paper analyses the EU and national legislation on plastics and the reasons that have led to a differentiation in national transposition together with the reasons that instead drive local entities to adopt measures to counter plastic use. Indeed, if the plastic problem can be considered as a global one that necessarily involves states, sometimes, due to the greater

[1] T. Rosembuj, *Climate Change and the New Green Deal*, 4 Riv. giur. ambiente 20 (2019). For plastic statistics see https://ourworldindata.org/plastic-pollution.
[2] W. Piontek, *The Circular Plastic Economy and the Instruments to Implement It*, 3 Ekonomia i Środowisko 24 (2019).
[3] Council Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155.

proximity of small entities to citizens, the greater virtuosity of the latter is manifested compared to states and, even more broadly, to the European Union. So, starting from the EU legislation and from the different national transpositions of the EU Directive, the aim of this paper is to identify whether there is a virtuous regulatory model to counter (or at least reduce) the unlimited use of single-use plastics as well as to discuss and analyse legislation's criticalities.

The paper is structured as follows: Section 2 analyses the evolution of European legislation up to Directive 2019/904/EU, Section 3 the single use plastic directive, Section 4 its different reception by EU Countries and Section 5 the Italian legislation and case law.

2. The EU reparatory approach and the extended producer responsibility scheme

In recent years several authors highlighted the single use plastic problem trying to solve it also through the idea of a "*plastexit*" to find systems that allow a more circular use of plastic products to limit waste [4]. Although there are thousands of types of plastics, 90% derived from virgin fossil fuels[5] and Europe is the world's second largest producer of plastics after China. It is estimated that 2% to 5% of produced plastic ends up in the oceans, with negative effects on coastal and marine ecosystems[6]. The European Commission points out that between 150,000 and 500,000 tonnes of plastic are thrown away in Europe, a small percentage compared to the global quantity (ranging from five to thirteen

[4] C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, 8-9 Ambiente & Sviluppo 589 (2019). On plastic, L. Belviso, *Lotta alla plastica ed ecosistemi marini. Il quadro giuridico all'indomani della direttiva UE/2019/904*, 1(24) Przegląd Prawa Rolnego (2019); B. Baran, *Plastic waste as a challenge for sustainable development and circularity in the European Union*, 19(1) Ekonomia I Prawo – Economics and Law 15 (2020); U. Barelli, *La Strategia e le norme dell'Unione Europea contro la dispersione della plastica nell'ambiente e la loro attuazione in Italia, nelle Regioni e nei Comuni*, 10 Riv. giur. Ambiente (2020); K. Meixner & M. Kubiczek, *Microplastics in soil-current status in Europe with special focus on method tests with Austrian sample*, 7(2) Env. Science (2020).

[5] J. Zheng & S. Sangwon, *Strategies to reduce the global carbon footprints of plastics*, Nat. Clim. Change 374 (2019).

[6] U. Barelli, *Le norme UE contro la dispersione della plastica nell'ambiente e la loro attuazione in Italia*, Riv. Giur. Ambiente (2020).

million)[7]. In particular, the Commission states that the phenomenon is exacerbated by the growing amount of plastic waste generated each year, which is also due to the increasing prevalence of single-use plastic products. These are packaging or other consumer products that are thrown away after only a short use, which are rarely recycled and likely to be dispersed into the environment[8].

For this reason, it is important to analyse the existing European legislation on plastics to identify feasible policies to carry out such a "*plastexit*". But since plastic produces pollution and damage predominantly as waste, it is necessary to start from the latter notion.

Waste is defined by directive 2008/98/EC as any substance or object which the holder discards or intends or is required to discard. It is based on the concept of circular economy[9], defined by the Ellen MacArthur Foundation as a self-regeneration economy. It

[7] L. C. M. Lebreton & al., *River Plastic Emissions to the World's Oceans*, 8 Nature Communications 1 (2017). On plastic sea pollution see J. R. Jambeck & al., *Report - Plastic waste inputs from land into the ocean*, 347 Science 768 (2015); M. Nyka, *Legal approaches to the problem of pollution of marine environment with plastic*, 59(131) SJMUS 162 (2019). On soil plastic pollution, see C. Yooeun & A. Youn-Joo, *Current Research Trends on Plastic Pollution and Ecological Impacts on the Soil Ecosystem: a Review*, 240 Env. Poll. 387(2018).

[8] These products include small packages, bags, disposable cups, lids, straws, and cutlery. In these products plastic is widely used because of its light weight, low cost, and convenience. European Commission, *A European Strategy for Plastics in a Circular Economy*, 3 (2018).

[9] Circular economy differs from the linear one, which is based on the scheme produce-use-throw away, with no provision for product reuse or recycling: once the consumption of the good is over, its life cycle also ends, forcing the economic chain to start all over again. In the circular economy, on the other hand, all activities, from production to disposal, are organised in such a way as to allow a good, which has become waste for someone, to be transformed into a resource for someone else. See U. Barelli, *La Strategia e le norme dell'Unione Europea contro la dispersione della plastica nell'ambiente e la loro attuazione in Italia, nelle Regioni e nei Comuni*, cit. at 4, 2. On linear economy see E. Nicoli, C. Spadaro & P. Antonelli, *Plastica addio. Fare a meno della plastica: istruzioni per un mondo e una vita zero waste*, Altreconomia (2019); W. McCallum, *Vivere senza plastica* (2019). On circular economy, F. Iraldo & I. Bruschi, *Economia circolare: principi guida e casi studio*, Osservatorio sulla Green Economy – IEFE Bocconi (2014); F. De Leonardis, *Economia circolare: saggio sui suoi tre diversi aspetti giuridici. Verso uno stato circolare?*, 1 Dir. Amm. 163 (2017); J. Dodick & D. Kauffman, *A Review of the European Union's Circular Economy Policy*, R2P The route to circular economy (2017).

is made up of biological[10] and technical[11] material flows that aim at minimising total waste production by reusing products in subsequent production cycles.

According to circularity, prevention is the preferred solution which consist in the production of fewer products or goods that can be reused, recycled or that have a long-life cycle due to their characteristics and composition. Indeed, the non-production of single-use plastic is the best solution. However, if waste is generated, it has to be prepared for re-use, which consists in controlling, cleaning, disassembly and repairing operations without any other pre-processing[12]. Then there is reuse, which includes any operation by which products and components that are not waste are reused for the same purpose for which they were conceive[13], and recycling, by which waste is processed to obtain products, substances, or materials to be used for their original function (such as recycling plastic, paper, metal, and glass) or for other purposes. After recycling, there are other recoveries whose main result is to allow waste to perform a useful function by replacing other materials that would otherwise have been used, such as composting or oil regeneration. In cases where none of the above steps are feasible, waste disposal is the last solution.

From the 1970s the EU has approved several directives to regulate waste and plastic waste, which are considered problems to be handled. After waste framework directive 2008/98/EC[14], 2015 marked the transition from a predictive and reductive approach to a new awareness. Thanks, in fact, to the 2015 directives, the EU begins to set recycling standards in line with circular economy, although empirical. Indeed, even if the reduction of waste production is the priority, standards for reuse, recovery and recycling began to be set. In December 2015, the European Commission adopted the Action Plan on the Circular Economy, identifying plastics as one of the major priority areas for action. Also, the Commission proposed by 2020 a 30% reduction for the ten types of waste that most commonly pollute beaches, as well as for

[10] Capable of being reintegrated into the biosphere.
[11] Destined to be revalued without entering the biosphere.
[12] An example of preparation for re-use is glass bottles washing.
[13] If we use the same example of the previous note, reuse consists in the use of glass bottles.
[14] Council Directive (EC) 2008/98 on waste and repealing certain Directives [2008] OJ L312.

fishing equipment abandoned at sea, with the Communication "*Towards a Circular Economy: Zero Waste Europe Programme*"[15].

On 2 December 2015, in addition to the Action Plan, the Commission also approved a Package of directives on the circular economy[16]. These directives require the achievement of a 55% recycling target for municipal waste by 2025, 60% by 2030 and 65% by 2035, while reducing landfilling to a maximum of 10% by 2035. The Package also sets recycling target for packaging (65% by 2025 and 70% by 2030) and separate collection from 2025 for hazardous waste, household textiles and biodegradable waste.

In line with the above, the European Commission adopted on 16 January 2018 the European Strategy for Plastics in the Circular Economy to ensure the collaboration between all stakeholders (producers, waste managers, retailers, consumers) to design and produce goods able to be repaired, reused, and recycled, without a total abandonment of plastics. One of the strategy's targets is to make all plastic packaging recyclable within the EU market by 2030 and to implement separate collection and extended producer responsibility (EPR) schemes, whose contributions are expected to simplify design for recyclability.

In 2019, together with the European Green Deal[17] (which is a roadmap to stimulate efficient use of resources to reduce pollution, climate change and move towards a sustainable and circular economy) the Ellen McArthur Foundation, together with UNEP, published the "*New Plastics Economy Global Commitment: 2019 Progress Report*". This Report resumes the New Plastics Economy Global Commitment signed in October 2018 during the Ocean Conference in Bali. This Commitment aims at reducing plastic packaging by introducing a target of 100% recyclable, compostable or otherwise reusable packaging to be placed on the market by 2025. Several companies and nations are attempting to phase out the use of plastics, leading to significant experimental innovations as well as a revolution in the packaging system. However, the 2019 Report shows that companies that are virtuous in this regard produce only

[15] European Commission, *Closing The Loop - An Eu Action Plan For The Circular Economy*, COM(2015) 614 final, paragraph 5,1 and note 34.
[16] T. Ronchetti & M. Medugno, *Pacchetto Economia Circolare: al via il recepimento*, 4 Ambiente & Sviluppo 279 (2020).
[17] European Commission, *The European Green Deal*, COM(2019) 640 final.

3% of the total plastic material by weight[18]. This may be partly due to the fact that it is difficult for a producer to make a sharp switch in the production system; in addition, the study and application of innovative and more sustainable production techniques and the creation of products intended to (if possible) never become waste requires know-how and not inconsiderable economic investments. For this reason, first and foremost, it is necessary for the regulator to set stringent targets to make producers to comply with them.

In this sense, in 2019 directive 2019/904/EU (single use plastic-SUP directive) was approved. This directive, which is discussed in detail in the following section, combines both the predictive and the reductive approaches, preventing the production of plastic waste while reducing its impact on the environment through its more sustainable composition. Moreover, this directive marks a turning point in European regulation, leading to the adoption of more concrete and practical solutions than those empirically outlined previously.

Before analysing SUP directive, a brief parenthesis should be opened on the EPR scheme. According to the EU principle of polluter pays, whoever produces waste (whether a private consumer or a company) must pay for its proper management in proportion to the quantity of waste produced. Indeed, whoever puts on the market a product destined to have a short life without the possibility of recycling is subject to the so-called extended producer responsibility, since he/she contributes to the production of more waste than a virtuous producer of durable goods with recyclable components[19].

This form of responsibility imposes on producers a financial (or financial and organizational) responsibility for managing all phases of the good's life cycle, from when it is placed on the market until it becomes waste. Therefore, it follows that a producer is also responsible for the end-of-life of the product (collection, disposal,

[18] Ellen McArthur Foundation – Unep, *The New Plastics Economy Global Commitment: 2019 Progress Report*, 14 (2019).

[19] OECD defines EPR as "a policy approach under which producers are given a significant responsibility – financial and/or physical – for the treatment or disposal of post-consumer products. Assigning such responsibility could in principle provide incentives to prevent wastes at the source, promote product design for the environment and support the achievement of public recycling and materials management goals". OECD, *Extended Producer Responsibility: A Guidance Manual for Governments*, 164 (2001).

etc.), even if the waste was generated by a third party; this is why it is defined as "extended" responsibility.

At the EU level, EPR is governed by article 8 of the Waste Framework directive 2008/98/EC[20], and directive 2018/851/EU introduced "general minimum requirements" in its article 8a[21]. This article provides that EPR systems must clearly define the responsibilities of the actors involved (producers, organizations, managers, etc.) as well as the waste management objectives. Also, according to the 2018 directive, States must take the necessary measures to ensure that the contributions paid by producers cover the costs related to: separate collection and transport of waste; adequate information to waste holders; data collection and reporting.

According to recital 21 and article 8 of directive 2019/904/EU, Member States must introduce extended producer responsibility schemes that allow for full coverage of costs (management, waste removal and awareness-raising measures to reduce and prevent waste production) in addition to those already provided for in directive 2008/98/EC. However, SUP directive leaves a great margin of discretion for Member States, setting also a too long deadline for the systems' implementation, which does not reflect the urgency of the single-use plastic problem. This is one of the reasons why, as it will be discussed above, several State have not adopted (or have not fully adopted) norms that transpose into national legislation the European provisions, perceiving the directive's rules as insufficiently stringent and long-standing. Anyway, due to the particularly negative environmental impact of these plastic products, it is crucial that Member States set up EPR systems as soon as possible (well before 2024, the date of transposition of article 8 of the directive by Member States), also through eco-modulation of fees, considering durability, reparability, reusability, recyclability, and the presence of hazardous substances.

[20] Article 8, directive 2008/98/EC states that Member States may take legislative or non-legislative measures to ensure that any natural or legal person professionally developing, manufacturing, processing, handling, selling, or importing products (product producer) is subject to extended producer responsibility.

[21] Council Directive (EU) 2018/851 amending Directive 2008/98/EC on waste [2018] OJ L150.

So, a well-designed EPR scheme can play a key role in providing economic incentives for companies to develop more sustainable plastic products and securing the necessary funding. Indeed, in states with very high recycling rates most of the costs of separate collection and treatment of packaging waste are funded by producer contributions. If well designed and implemented across Europe, EPR systems could therefore help improve the efficiency of the recycling process, encourage design for recycling, reduce waste, and promote greater dialogue between producers, local authorities, and citizens. It is therefore important to identify the critical issues encountered by States in the transposition of EU directives to enable an overall reduction of single-use plastics.

3. Directive 2019/904/EU: prevention and reduction of plastic waste into the environment

The Single Use Plastic (SUP) (directive 2019/904/EU) can be considered the first EU directive that sets stricter rules for the ten types of packaging and polluting products most found on EU beaches and for which there are viable alternatives. In particular, the 2019 directive sets quality and composition standards for plastic goods to reduce their dispersion in the environment[22] consequent to their improper disposal into sewers or other drains.

The focus are single-use plastic products, which are products designed, conceived, or placed on the market to be used once or for a limited period and then discarded without any subsequent possibility of reuse[23].

The directive distinguishes single-use plastic products according to whether sustainable alternatives currently exist. For easily replaceable products (e.g. straws, plates, cotton buds) there is an obligation for Member States to ban them by mid-2021; for products for which no viable alternatives exist, such as food containers, Member States must commit to reducing their consumption by 2026 through a range of measures such as national

[22] The directive uses a preventive approach to not generate plastic waste. M. Nyka, *Legal approaches to the problem of pollution of marine environment with plastic*, cit. at 7, 166.

[23] The directive gives examples of single use plastics such as fast-food containers or food containers that do not require further preparation, while excluding containers of dry food or food sold cold that require further preparation or those containing more than one portion.

reduction targets, economic instruments or market restrictions. For products already regulated by other EU legislation (such as plastic bags), the directive simply reinforces existing measures[24]; finally, for those not falling into the above categories (e.g. tobacco products), the directive imposes labelling requirements, awareness-raising measures and EPR schemes.

Under article 4 of SUP directive, Member States must take measures to decrease the consumption of single-use plastic products listed in Annex A thereof (such as: beverage cups, including lids and caps, and single-use food containers) and this is to significantly reduce the use of these products by 2026 compared to 2022. Indeed, States can apply non-discriminatory and proportionate measures to reduce consumption, identify or ensure reusable alternatives to such single-use products, or introduce economic instruments to avoid free distribution of such goods to the final consumer. Articles from 5 to 7 deals with other disposable plastic products (i.e. those made of oxo-degradable plastic)[25]. For disposable plastic containers listed in Annex F Member States must ensure, as of 2025, that PET bottles are manufactured using at least 25% recycled plastic, to be calculated as an average for all PET bottles placed on the market in the territory of the specific Member State and 30% by 2030. To make consumers more aware, article 7 requires Member States to place on the market only those bearing markings in large, clearly legible, and indelible letters, on the packaging or on the product itself, information on: the correct waste management methods and those to be avoided; the indication of the presence of plastic in the product with the specification of the negative consequences that would derive from improper disposal or dispersion in the environment of the waste[26].

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[24] For example, the packaging directive 94/62/EC requires States to implement EPR systems by 2025, achieving the target of 50% recycled plastics in packaging by 2025.

[25] A ban on the marketing of such products is a tool found in many international agreements. M. Nyka, *Legal approaches to the problem of pollution of marine environment with plastic*, cit. at 7.

[26] To harmonize marking rules within the European Union, the European Commission adopted in December 2020 an implementing act aimed at laying down more detailed rules on marking, considering existing voluntary sectoral agreements and avoiding, at the same time, the dissemination of misinformation to consumers. European Commission, *Laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annex to Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the*

Although the directive sets sustainable environmental goals, it simultaneously produces significant impacts on EU SUP industries. Indeed, as pointed out above, the detailed targets set by the directive necessarily entail a change in industrial production processes, which are destined to increasingly move away from the use of single-use plastics; this entails an expansion of corporate know-how along with substantial investment in sustainable production processes, which not all companies are willing to sustain. On the other hand, the reduction of plastics can create a new market and new jobs by developing new green technologies. In addition, start-ups and large companies that started producing eco-sustainable products even before the directive will certainly benefit from the restrictions imposed on plastics in economic terms.

Moreover, as the McKinsey Report 2015 and the European Commission's Plastics Strategy point out, the directive targets states that represent a tiny percentage of the much larger global problem. Indeed, while there is no doubt that Europe constitutes a large pool of plastics production, imposing stringent obligations on EU countries does not solve the global plastics problem making instead European companies less competitive in the global market as they are subject to higher costs for sustainable production. These are key issues that the directive seems to overlook but instead undoubtedly affect the implementation of EU provisions.

Furthermore, while plastics undoubtedly constitute a problem, the directive should have focused more on civic education, for which to date there is no common action but individual virtuous initiatives by Member States or citizens. This is because if citizens become aware of the importance of reducing and properly managing and disposing of single-use plastics, companies and manufacturers would also (most likely) be incentivized to adopt circular policies; this would also attract more customers to green and plastic-free companies. Also, not to be underestimated is the provision of an efficient infrastructure by institutions for the reuse and recovery of plastic products[27].

In any case, as stated in the European Commission's working document accompanying the proposed directive, the measures contained in the directive should allow the saving of 2.6 million

impact of certain plastic products on the environment, (Implementing Regulation) 2151 OJ L 428 (2020).

[27] L. Maestri, *Direttiva SUP e guerra ai rifiuti di plastica: il problema è la plastica o il rifiuto?*, TuttoAmbiente (2019).

tons of CO2 by 2030, thus avoiding damage to the environment worth €11 billion. In addition, it is estimated that it will cost €2 billion to bring companies into compliance, €510 million for waste management and around €6.5 billion for consumer savings[28].

3.1 What is missing at EU level?

Based on this analysis, it is possible to affirm that in our society plastic cannot be eliminated. Instead, we could think of a "*plastexit*", to quote Claudio Bovino, meaning fighting the dispersion of plastic waste in the environment as well as promoting research and the introduction on the market of alternative materials with lower environmental impact, and greater potential for recycling and recovery[29]. Therefore, the correct use of plastic needs to be implemented, encouraging citizens to change their lifestyles[30].

To promote "*plastexit*", it is therefore necessary to act firstly on the producer (by producing less plastic) and then on the end-of-life of the product (more recycling/recovery of the plastic produced)[31]. In this respect, EPR systems can certainly play an important role in raising finance, incentivising companies to produce more sustainable plastic products and setting up privately managed funds to finance investments in environmentally sustainable solutions and technologies[32]. However, even with EPR's extension and the implementation of separate collection and plastic waste management systems, consumers remain the main perpetrators of non-compliant behaviours. The SUP directive focuses on awareness-raising campaigns towards these end consumers, but the result is qualitatively uncertain. Certainly, to incentivize good consumer behaviour, there should be a market

[28] European Commission, *Executive Summary of the Impact Assessment Single Use Plastics & Fishing Gear Accompanying The Document Proposal for a Directive of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment*, SWD(2018) 255 final.
[29] C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, cit. at 4, 589.
[30] C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, cit. at 4, 589; G. Balocco, *L'inquinamento determinato dalla plastica: una problematica planetaria*, 4 Giornale dir. amm. 480 (2020).
[31] C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, cit. at 4, 698.
[32] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment*, SWD(2018) 256 final 3.

supply of viable alternatives to ordinary plastics[33]. However, these alternatives (when they exist) are not always of equivalent handling, quality, and convenience to plastic products, they require raw materials with higher costs than plastic[34], and they lack clear labelling or marking for end consumers[35]. This necessarily brings consumers to perform a cost-benefit analysis that may lead them to choose the plastic product that is more cost-effective (higher production costs necessarily fall on the end consumer) and functional.

In addition, as already outlined, while wanting to condemn plastics, or at least single-use plastics, less consideration is given to the impacts that phasing out these products from the market may have on it. Indeed, many plastic manufacturers are threatened with closure and thousands of workers with redundancy. Therefore, a solution could be to allocate national funds to allow producers to reinvent themselves and to change their business by producing plastic free and alternative products[36]. Also, a fund can be used to adopt guidelines on single use plastic products (on the chemical composition of plastic goods, on their proper end-of-life management, etc.) to ensure a minimum impact on the market without distortions of competition[37]. The main challenge remains, however, the improvement of the internal management of the company to better meet European circular expectations[38]; this can

[33] A. Muratori, *Prodotti in plastica monouso: dalla Dir. 2019/907/UE, regole "circolari" contro la dispersione nell'ambiente*, 7 Ambiente & Sviluppo 524 (2019); C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, cit. at 4, 698.

[34] S. Thomas, *Personal Property Law for a Zero-Waste Circular Economy: Using Retention of Title Clauses to Reduce Plastics Waste*, 15 LEAD 179 (2019).

[35] Even if the European Commission sets the goal of clear labelling by 2021 of cups, sanitary pads, wet wipes, tampons and applicators and tobacco products with filters, underlining their plastic content, environmental risks, and proper disposal methods. European Commission, *Turning the tide on single-use plastics*, (2019). See also C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, cit. at 4, 692.

[36] C. Bovino, *Plastexit, in che termini realizzare la necessaria uscita dalla plastica (parte prima)*, cit. at 4, 698.

[37] E. Capone, *La Direttiva (UE) 2019/904 (Single Use Plastics – SUP o "Plastic Free") e la protezione del territorio da parte degli enti locali*, 5 Riv giur. Amb. 1 (2019); G. Balocco, *L'inquinamento determinato dalla plastica: una problematica planetaria*, cit. at 30, 471.

[38] European Commission, *A European Strategy For Plastics In A Circular Economy*, COM (2018) 028 final 19.

be improved starting from raising awareness among the citizens and consequently among workers and business managers.

An important aspect that should be pointed out is that SUP directive contains contradictions such as those relating to three-litre beverage bottles, for which EPR begins on 31 December 2024, while the development of public services for their separate collection and recycling to ensure that at least 77% of the waste is recycled by 31 December 2025. In addition, regarding food containers and beverage cups, the directive does not set a European-wide reduction target, but a vague requirement to achieve an "ambitious and sustained reduction" of these products by 2026. This requirement does not provide a sufficient incentive to reduce the consumption of these products, and without precise targets it is difficult to measure compliance. The directive also excludes from its scope many everyday goods such as plastic cups or toothpaste tubes[39]. These aspects have certainly contributed to the delays and lack of completeness in the transposition of the directive in EU Member Countries.

Moreover, although the directive is undoubtedly innovative in its approach[40], it does not consider citizens' rights to a healthy environment[41] which is instead crucial for incentivizing the reduction of single-use plastic use.

Lastly, given the nature of plastic waste, which is easily transported by tides, currents and wind, a global action is necessary[42] that is not limited to EU Member States sharing the same seas or geographical areas[43]. Indeed, in the absence of a globally coordinated policy, restrictions on market access or

[39] G. Balocco, *L'inquinamento determinato dalla plastica: una problematica planetaria*, cit. at 30, 479.

[40] To quote De Vido, the directive is based on five Rs: Reduction, Restrictions, Requirements, Responsibility, Recycling. S. De Vido, *Climate Change and the right to a healthy environment*, 114 (2019).

[41] S. De Vido, *La direttiva UE sulla plastica monouso alla luce del diritto umano ad un ambiente salubre*, 1 Studi sull'integrazione europea 133 (2020).

[42] L. Belviso, *Lotta alla plastica ed ecosistemi marini. Il quadro giuridico all'indomani della direttiva UE/2019/904*, cit. at 4, 191.

[43] A recent analysis, conducted by the Helmholtz Association of German Research Centres in Munich, shows that 90% of the plastic spilled into the oceans comes from the Yangze, Indus, Yellow River, Hai, Nile, Brahmaputra Ganges, Pearl River, Amur, Niger, and Mekong rivers. G. Balocco, *L'inquinamento determinato dalla plastica: una problematica planetaria*, cit. at 30, 479.

obstacles to the free movement of goods are to be expected[44] along with the lower competitiveness of EU companies subject to greater costs than foreign ones.

Also, while directive 2019/904/EU has provided important tools[45], its implementation, postponed to 2025 or even 2029, undoubtedly slows down the adoption of plastic-free solutions. Probably a more short-term goal would have prompted more EU countries to take immediate action to implement more environmentally sustainable products and more efficient collection systems. However, with this delay in implementation, less efficient countries will likely continue to delay taking action.

In addition, the percentage of recycled plastic in the composition of bottles of 25% by 2025 and 30% by 2030 is, presumably, quite meagre as the targets of some multinationals are much more ambitious (such as a Dutch mineral water brand which was the first to make bottles made of 100% recycled plastic or another US beverage brand which has set a target of 50% recycled plastic by 2030). It seems then that the market is moving faster than the legislator.

4. The different models of transposition of directive 2019/904/EU into national and regional law

It was reported that only a few EU Member States (such as France or Estonia) managed to meet the 3 July 2021 deadline bringing into force regulations, laws, and administrative provisions necessary to transpose into national laws the directive. They have left behind other Member States (Bulgaria, Romania, Slovakia, Czech Republic, and Poland) which have just started the transposition process. Many other countries are just in the middle, meaning that while they may have undertaken some work, they are still too slow and they didn't meet the short transposition deadline.

Indeed, 3 July 2021 deadline did not provide for several States enough time or opportunity to develop and implement harmonised rules, also because the guidelines implementing the directive were only published in June 2021, almost a year later than originally planned.

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[44] G. Balocco, *L'inquinamento determinato dalla plastica: una problematica planetaria*, cit. at 30, 476.

[45] W. Piontek, *The Circular Plastic Economy and the Instruments to Implement It*, cit. at 2, 30.

The current state of legislative processes across the EU shows unprecedented fragmentation and different timing of transposition. Italy may be the only country to take the questionable decision to exclude biobased plastic products from the scope of the transposition law, while in Sweden delay seems to be an inevitable scenario due to the extremely high number of responses the draft text of the national law received from stakeholders. However, many other countries, such as Romania and Bulgaria, have not yet taken real steps towards transposition.

4.1 Virtuous countries banning single use plastic products

The analysis of the transposition of the SUP directive begins with the most well-performing countries that have transposed all or most of the EU provisions.

One of the most virtuous State is Estonia, that has been particularly praised for its deposit and return system covering beer, cider, and soft drinks bottles for the past fifteen years. Also, Estonia is working to extend this system to single-use and refillable packaging for spirits, soft drinks, and syrup. It is reported that Estonia will set a minimum charge for single-use cups and food containers of €0.50, impose the availability of reusable packaging from 2023, and eliminate single-use packaging completely by 2025. In addition, local government will have to ensure that reusable containers and cutlery are provided at public events from 2023[46].

Another example is Ireland, which is planning to introduce additional bans to those required by the directive (on non-medical wet wipes, single-use sachets and hotel toiletries) in 2022. In addition, a national decree for PET bottles and cans is expected to be in place by the end of 2022 to reach the 90% collection target, while trials of EPR with eco-modulation of tariffs are underway. The aim is to set an EPR scheme which provides a reward to sustainable producers in 2023. A "latte levy" will also be in place from 2022 to incentivise a reduction in the consumption of disposable cups, as well as a ban on the use of disposable cups in restaurants.

Then Greece, which has banned the use of single-use plastics in the public sector. Specifically, as stipulated in Law 4736/2020, on

[46] HKTDC Research, *Several Member States Miss Single-Use Plastics Directive Transposition Deadline*, HKTDC Research (2021).

the abolition of single-use plastics, all public bodies (general government bodies) are obliged to stop supplying ten specific types of single-use plastics, in line with EU directives. The transposition period for the directive began in February 2021 and to encourage reduced consumption, a reciprocal tax of €0.04 will be levied on all plastic cups and food containers from 1 January 2022. Also, reduction targets of 30% and 60% have been set for cups and food containers (by 2024 and 2026 respectively). In addition, there are binding requirements for retailers to provide reusable packaging and mandatory rebates for consumers who bring their own reusable packaging. These measures affect the entire hospitality and retail sector and will apply from January 2022. From that date, catering services will no longer be able to use single-use plastic products. In addition, to reduce the consumption of bottled water, the provision of public taps has been made mandatory in all municipal sports centres and playgrounds (from July 2021). Marking requirements will be applied to all single-use products covered by the directive from 1 January 2022, so that citizens know which products are intended for re-use, which for recycling and which for composting; also, caps and lids tied to caps will became compulsory for all plastic containers (food and drink) by July 2024.

Another example is France, where law No. 398/2018 amended the Environment Code by adopting a more stringent approach banning, as of 1 January 2020, single-use plastic products such as toothpicks, plates and straws. In addition, from 1 January 2025, plastic food containers for cooking and heating as well as plastic food services in gathering places such as schools or universities will be banned. Also, France banned six months before SUP directive the single-use plastic products. The draft implementing law proposes to set the maximum plastic content threshold for single-use cups at 15% from 3 July 2021, 8% from 1 January 2024 and 0% from 2026 and it provides for a general ban on all single-use packaging by 2040. Regarding EPR, France preceded the EU requirements by setting up from 2021 schemes for tobacco products' industry. Regarding design requirements, France will be ahead of the EU directive, with cap requirements introduced already in 2021. However, France has not introduced a national strategy to raise awareness among French citizens; campaigns will certainly take place at local level, except those for tobacco products for which a national campaign conducted at least once every two years by EPR organisations is planned.

About Germany, it decided to introduce an obligation for larger restaurants and take-away establishments to offer reusable cups and food containers from 2023. In implementing the directive, from 2022 almost all previously applicable exemptions from mandatory deposit for single-use plastic bottles and cans will no longer apply. As far as EPR schemes are concerned, it is still uncertain how Germany will implement these measures. Discussions are still ongoing on how to calculate and capture the costs of cleaning and waste collection. Concerning separate collection, Germany will meet the 77% and 90% targets of the SUP directive, even if beverage containers such as Tetra Pack, which contain partly plastic, are not collected separately and there are no plans to include them in separate bins. Regarding design requirements, PET beverage bottles in Germany already have a 25% recycled content. To go beyond business as usual, Germany should aim to achieve a total recycled content of up to 60% by 2030 with an intermediate target of 40% by 2025. Germany has implemented the EU directive in several national texts: a comprehensive waste law transposing several waste directives, an ordinance on the prohibition of single-use plastics and an ordinance on the labelling of single-use plastics which entered into force on 3 July 2021.

In the Netherlands, the 90% collection target for beverage containers is expected to be achieved through the existing national law for single-use PET bottles by 2022. The Netherlands also has EPR legislation for packaging which will be extended to other product categories to include beverage cups and light bags. New EPR schemes will also be created for tobacco products with filters (by 2023), balloons and wet wipes (by 2024). Awareness-raising measures will be funded by the government until the EPR schemes are launched, but no specific long-term awareness-raising strategy has been decided upon. Also, no consumption reduction target has yet been decided, although local NGOs have joined forces to push for specific targets (50% reduction for cups and 30% reduction for food containers in 2025). The Dutch government is taking further measures to combat waste. From 1 July 2021, a deposit of fifteen cents will be in force for plastic drinks bottles containing less than one litre. The producers of the bottles are responsible for introducing the deposit system and accommodations and small businesses are not required to collect them. From 31 December 2022, cans of soda, water and beer will also have a deposit of fifteen cents, even if how and where these cans will be collected is still

unknown. Also, in the Netherlands the rules for labelling, banning, and applying EPR scheme have a progressive time frame. From 3 July 2021 products made of oxo-degradable synthetics, balloon rods (except those for industrial or other professional use), cotton tips (excluded those for medical use), polystyrene foam food and drink containers and cups, straws (excluded those for medical use), stirrers, cutlery and plates are banned (loose caps and lids, that have to be fastened to bottles of up to three litres, are banned by 3 July 2024), while within this date filter tobacco products packaging, drinking cups, packaging of moist towelettes, sanitary bandages, tampons and tampon applicators are subject to labelling rules in order to inform consumers on: the products' containment of plastics, their proper disposal and the adverse impact of litter on the ecosystem. Regarding the application of the EPR scheme, it applies from 5 January 2023 for filter tobacco products, bags, and wrappers, drinking cups, light carrier bags and one-person food packaging, while from 31 December 2024 for moist towelettes, balloons and fishing gear[47].

Finally, in Belgium, the draft federal law will introduce from October 2022 restrictions on all single-use plastic beverage and food containers and on single-use plastic bags (except very light ones). On the other items, which follow the list of the SUP directive, the bans apply from the entry into force of the law.

From this review, it emerges clearly that most of the initiatives taken by States relate to the reduction of single-use plastic products (such as straws or single-use containers) while only some States have focused on the implementation of EPR systems. But what emerges from this analysis is that apart from the Netherlands (which has not adopted a long-term strategy anyway) States have not focused on policies to raise public awareness. This is because, as highlighted above, the directive itself does not give emphasis to this aspect, which nevertheless is essential for building a plastic-free society. Indeed, as it will be later highlighted, a state policy is efficient in reducing single-use plastic consumption if it starts with citizens, making them aware of the products they use and of their proper disposal. Anyway, the Countries listed in this paragraph can be considered virtuous in SUP directive transposition, unlike those that will be mentioned in the next paragraph.

[47] https://www.kvk.nl/english/rules-and-laws/ban-on-single-use-plastics/.

4.2 The least efficient States. What is lacking?

Contrary to the States listed in the previous paragraph, some Countries are far behind the plastic regulations' implementation such as Romania (Government Ordinance 6/2021 on reducing the impact of certain plastic products on the environment was recently approved) or Slovakia. Regarding separate collection, Slovakia plans to have a decree for beverage containers by 2023, which means a delay of one year compared to what was initially announced in a draft law presented by the Ministry of Environment in September 2019. The deposit is expected to be twelve cents per PET bottle (and ten cents per can). According to the new legislation, the deposit will be mandatory for establishments of more than three hundred m^2, and voluntary below this area. Regarding bans, through its amendment to the Waste Act, Slovakia is following the bans of the SUP directive from three years onwards. The authorities have started to transpose the EU directive in two laws: Act 11 September 2019, No. 302 establishing a decree for single-use beverage packaging and Act 460/2019 amending the Slovak Waste Act No. 75/2015 which entered into force on 27 December 2019. Simultaneously, benefiting from the support of the OECD, Slovakia has initiated discussions and working groups on the circular economy with a view to adopting its national circular economy strategy in the first quarter of 2022[48].

Among the reasons that have undoubtedly led these States to lag behind is the fact that the deadline of 3 July 2021 has been very stringent, not allowing some states that are not in the forefront of sustainable production to adapt to the new plastic-free rules. In addition, long-term goals perceived to be far off by individual States have evidently contributed to a delay in the transposition of the directive, which was seen as not very imperative in dictating targets. This is also evident in contrast to local entities, which, as it will be analysed in the next section, have sometimes been ahead of the States in transposing the EU provisions as they are closer to the citizens and consequently more burdened by the need to fight the problem of plastic pollution.

[48] https://www.kvk.nl/english/rules-and-laws/ban-on-single-use-plastics/.

4.3 Local implementation of single use plastic regulations

In recent years it has happened that some local entities have been ahead of the states in implementing single-use plastic reduction policies and measures.

For instance, the Municipality of Rethymno in Greece signed on 12 March 2020 a memorandum of cooperation between the Region of Crete, the Municipalities, and the hoteliers of Crete for the sustainable management of beach waste and the SUP's reduction. With this memorandum, the Municipalities committed to include specific terms for the protection of the coast and the sea when offering the management of organised beaches and to clean the rest of the beaches once a week. Hoteliers, on the other hand, have undertaken, among other things, to remove single-use plastic, replace plastic bottles with glass ones and provide ashtrays on the beach. It will then be up to the Region of Crete to monitor the implementation actions of all parties, to report when commitments are not followed and to terminate cooperation with parties that repeatedly fail to comply with the agreement.

In Austria, Montanuniversität Leoben (MUL) worked on the realisation of regional hubs in the Styria region as part of the eCircular Flagship project. The main objective of the eCircular project is the reduction of plastic waste along the value chain. The project aims to support companies and organisations in their efforts to reduce plastic waste. This includes the creation of regional hubs as a central focal point to which stakeholders can address their requests and needs.

Then there is the BLASTIC project, which monitors and maps the sources and pathways of marine litter in four areas (Turku in Finland, Södertälje in Sweden, Tallinn in Estonia, and Liepaja in Latvia) to demonstrate how plastic waste makes its way from urban areas to the Baltic Sea. BLASTIC developed a checklist for mapping the sources, flows and routes of marine litter and formulated a methodology for monitoring its distribution in rivers and coastal waters in and around the Baltic Sea. Local plans for the prevention and reduction of marine litter were developed in the pilot areas, with a focus on plastic waste from cities.

In France, the Provence-Alpes-Côte d'Azur region is facing two major problems: multiple illegal practices and poor performance in established sectors (relatively low collection rate, low public awareness, etc.). To tackle these problems, the Regional Council integrated in its regional waste planning a target of zero

plastic waste in deposit in 2030 presenting different programmes such as the call for projects "*Zero Plastic Waste in the Mediterranean*" to support innovation. It also finances the MerTerre association in accompanying the structures registered on the ReMed Zero Plastic platform. This initiative brings together a wide range of public and private actors to share know-how and strengthen local initiatives in the service of a zero-waste objective. In partnership with the ARBE (Regional Agency for Biodiversity and the Environment), they have launched a Zero Plastic Waste charter. Signatories (communities, companies, schools) are invited to explain what they are doing to reduce and eliminate plastic from their premises/activities by following a reduction plan and being helped and trained by the regional agency. The region also works in collaboration with several CPIE (Centre of Permanent Initiative for the Environment) throughout its territory and it is carrying out more plastic reduction programmes at local level through more channels. The region is working with the CPIE Côte Provençale to zero plastic canteens and reduce waste in canteens (for example, to replace plastic containers for cooking, heating, and serving in canteens and to increase the value of the waste produced through the recycling of packaging or the composting of organic waste).

Another example is Belgium, where some regions introduced measures to limit single-use plastics before the federal law was adopted. In Flanders, drinks cannot be served in single-use packaging at public events or government buildings from 2020 (unless event organisers can guarantee that 90% is collected separately for recycling). From 2022, it will also not be allowed to serve food in single-use plastic in government buildings. In Wallonia, restrictions on single-use plastic items listed in the directive (except for cotton swabs) started at the beginning of 2021, six months before the deadline set by EU law. In 2020, Wallonia also banned the distribution of plastic advertising material on vehicles that are stationary or parked on any road open to the public, and the use and release of confetti, streamers and other projectiles made of plastic, as well as the distribution in plastic film of advertisements and all other free non-advertising publications; in particular, targets are set to reduce the use of plastic film by December 2021 by at least 50%, to reach a total ban by the end of 2022. In the Brussels-Capital Region, the city of Brussels and some other cities have also taken measures at city level. As of 1 July 2019, the distribution and use of single-use plastics (for example: straws,

food containers and their packaging, cutlery, drink stirrers, beverage glasses, etc.) have been banned during events in public space. On recycling, the federal legislative proposal also includes a requirement for labels on bottles to ensure that they can be easily removed to facilitate refilling.

Also, since the Belgian federal law lacks EPR schemes, they have been transposed at regional level. For example, in the Flemish law, although it does not clearly list the products concerned, it mentions EPR schemes (following the definition of the directive) stating that they will cover all products that are present as waste in a significant way, but without targeting plastics more than other materials. Flanders is considering introducing an obligation for all producers who contribute significantly (5%) to waste to pay for cleaning costs. So, in Belgium, overall, implementation follows the minimum requirements set by the SUP directive, but for some measures, in relation to food and drink containers, there is a great deal of ambition at both federal and regional level[49].

So, it emerges that at the national level it has been preferred a stringent approach aimed at preventing the marketing of certain products containing plastic which are considered potentially harmful to the environment and human health, while Regions have, depending on the case, moved in the direction of stringent bans on the marketing of plastic products or on recycling standards. What emerges, however, is the emphasis given by local entities to the education and awareness of citizens (or public employees) which have to be considered the real pillars for the creation of a plastic-free society. This is the main difference (besides the timeliness of adopting policies to fight single-use plastics) between regions and states. Probably the reason for local entities to involve and seek more dialogue with the community is related to the territorial proximity between the administrative entity and citizens. In any case, it appears that, no matter how virtuous these initiatives are, there is a need for coordination and for common national (and then EU) policies to reach "*plastexit*"; this can only be pursued through timely and detailed regulations that take citizens as a starting point.

[49] For all these info about EU States see Plastic Solution Fund, *Moving on form single-use plastic: how is Europe doing?*, (2021) https://rethinkplasticalliance.eu/wp-content/uploads/2021/06/SUP-Assessment-Design-final.pdf.

5. The Italian case

To conclude the analysis on EU States, Italy can be examined since it is one of the most efficient EU Countries regarding SUP regulation.

Indeed, Italy, with 2018 Financial Law, banned cotton buds from 1 January 2019 and established an obligation to affix on products' packaging information for their proper disposal and an explicit remind of the prohibition to throw them into sewers and toilets (Law 27 December 2017, No. 205, art. 1, para 545).

By implementing directive 2015/720/EU on plastic bags and pouches, Law 3 August 2017, No. 123, introduced to the Italian Environmental Code articles 226bis and 226ter on banning the marketing of plastic bags and on reducing the marketing of plastic bags made of ultralight material. The Circular Plastic Strategy of 2018 was implemented partially by article 1, paragraph 802, Law 30 December 2018, No. 145, which introduced article 226quater into the Environmental Code setting prevention objective of SUP production made of fossil material. On the other hand, Financial Law 2020 (Law 27 December 2019, No. 160) imposed a plastic tax amounting to €0.45 per kg of plastic in article 1, paragraphs 634-658. The purpose of this tax is to reduce and disincentivize the use of products containing disposable plastic that are intended to contain, protect, handle, or deliver goods or food, even if in the form of sheets or films. However, the imposition of this tax has not been unanimously accepted and its application has been postponed to 1 January 2024[50]. Authoritative opinion[51] considers this instrument a mere system for collecting money that it is not then used for technological recycling innovations; the business associations of plastic and packaging producers have also criticized this tax as it is expected to lead to a significant reduction in company turnover (between 10% and 15%) with negative consequences for investment and employment[52]. On 4 November 2021 then Italy approved the reception of SUP directive.

[50] Legge 29 dicembre 2022, n. 197.

[51] A. Muratori, *La Plastic Tax, dopo liti e revisioni, è ora legge dello Stato: ma è utile, o no?*, 1 Ambiente & Sviluppo 9 (2020).

[52] G. Balocco, *L'inquinamento determinato dalla plastica: una problematica planetaria*, cit. at 30, 480.

5.1 Italian regional regulations: pioneering the elimination of disposable plastics

In addition to the regulatory provisions listed above, Italy is an excellent example in terms of regional regulations. Indeed, the Italian case is emblematic and exemplary in terms of the approval of measures to address single-use plastics by local authorities even before the State.

Among these, there is Law 1 August 2019, No. 27, of the Marche Region. With this law, the Region intends to regulate the use of plastic products to reduce their production, promote sustainable development and spread social and environmental education. Article 2 of the law specifies the prohibition of the use of SUP products (such as straws, plates, cups, and cotton buds) and oxo-degradable plastic products, as defined by article 3 of SUP directive. On the other hand, the use of such products is permitted, pursuant to article 5, in the event of sanitary emergencies, personalized diets with medical certifications that cannot be packaged on site, waterworks service interruptions or natural disasters. For other products, such as food containers, there is instead a restriction on their consumption (art. 2, para 2). Article 4 provides for a more restrictive provision compared to the directive, prohibiting smoking on the regional coastline in the absence of specific containers for the collection of post-consumer waste from tobacco products containing plastic. Article 7 assigns to the Regional Council the promotion of research and industrial development projects for the substitution of plastic materials, also through the granting of regional contributions. For products not listed in article 2, the Council promotes the reduction of their use by encouraging deposit/refund systems. Article 8 concerns citizens awareness campaigns incentivising the reduction of disposable and oxo-degradable plastics.

Another virtuous Italian Region is Emilia-Romagna whose Regional Council adopted Resolution 11 November 2019, No. 2000, with which the Region promised to regulate the transition towards more sustainable consumption systems. Already in 2015, the Region adopted Law No. 16 to orient the regional economy towards more resilient and circular system by identifying ambitious waste management objectives in line with the EU hierarchy and creating a Regional Waste Management Plan. Among the various tools initiated by the Region, there is the Green Shopping Cart logo that distinguishes the stores that are members of the Regional

Environmental Qualification System characterized by plastic waste prevention systems through, for example, the sale of products in bulk. Instead, the 2019 resolution launched the #Plastic-freER Strategy with which the Emilia-Romagna Region aims to prevent the production of SUP products and implement their life cycle. The Region also commits to progressively replace single-use plastic products listed in Annex B of the 2019 directive, as well as plastic bottles, from the offices of the Regional Administration, the Region's in-house companies and the Regional Agencies. In collective catering (canteens, hospitals), beaches, protected areas of the Region, festivals, public events and fairs, the Region proposes to promote the replacement of disposable plastic tableware with sustainable ones. Also, as part of the Regional Program of Information and Education for Sustainability referred to in Regional Law 29 December 2009, No. 25, actions have been established to raise awareness and educate citizens to more sustainable behaviours. The Region is also concerned about the production chains in the plastic sector helping them to convert to renewable plastic production, rewarding those that experiment plastic-free solutions or that promote the use of alternative materials.

Then there is Campania Region, which on 4 December 2019 adopted Law No. 26 that entry into force on 3 July 2021, the same deadline of SUP directive. In article 1, paragraph 1, the law prohibits, from 3 July 2021, the use of single-use plastic products (including tableware and balloon rods) during fairs or events that are also financed and organized by the Region and the Local Authorities. Paragraph 2, on the other hand, prohibits the use of disposable plastic containers or tableware in protected areas and parks, without referring to beaches of the maritime domain. Finally, paragraph 3 prohibits disposable plastic goods in the offices and premises of regional authorities when serving food or drinks, including from vending machines. The Region promotes awareness and information campaigns for the employees of the Regional Council, the Entities, and all citizens to make them responsible for behaving virtuously aiming at reducing waste production (SUP waste particularly) and informing them about the sanctions and prohibitions provided for by law.

From these three examples, it is clear that some Italian Regions have been ahead of the State in regulating single-use plastic. However, what emerges from this examination is that not

only have the Regions been conscientious about reducing the consumption of plastic in public places, but more importantly these local authorities have been concerned about raising awareness through information campaigns, unlike several EU Countries. Among the reasons that probably prompted these Regions (all three of them overlook the sea) to regulate citizens' awareness is the fact that they struggle with plastic accumulations on beaches and have to dispose of them properly. The fact that they perceive the problem more closely on the beaches has perhaps led those Regions to regulate more and earlier on the subject; but this should evidently give rise to the question as to why States have not acted in the same way, maybe perceiving the problem as more distant. Moreover, as it will be discussed in the next section, Italian local authorities have been also involved in administrative litigation on the issue.

Anyway, certainly these entities (and the European ones seen above) should be taken as models for speeding up the transposition of European legislation on SUP and for fostering public education and awareness on the issue.

5.2 Trade union and bathing establishment ordinances on plastic. The case of Italian administrative jurisprudence

As mentioned above, the anticipated implementation of SUP directive by Regions and Municipalities brought to case law.

In Italy, the first court to have pronounced is the Administrative Regional Tribunal of Sicily, Palermo. This Tribunal adopted two decisions partially different from each other after being seized by companies that produced disposable plastic tableware[53]. With both rulings, the Tribunal suspended trade union ordinances of the Municipality of Trapani (29 March 2019, No. 32) and the Municipality of Santa Flavia (5 February 2019, No. 5). Both ordinances prohibited the distribution, marketing and use of disposable products containing food and beverages made of materials that were not compostable or biodegradable, referring to SUP directive. The prohibition also extended to public parties and every public event. The Tribunal opted for their suspension for the absence of the regulatory requirements that would have justified the adoption of contingent and urgent ordinances, since in these

[53] Administrative Regional Tribunal Sicilia, Palermo, Sez. I, ordinanze cautelari, 4 luglio 2019, No. 798 and 807.

cases there weren't unpredictable and exceptional situations, and for no time limits for the provided prohibitions[54].

Subsequently to these judgments, the Administrative Tribunal of Abruzzo Region ruled in the Council Chamber on 10 July 2019[55] on the legitimacy of the Teramo Mayor's ordinance of 9 April 2019, No. 63. This ordinance, in the wake of those in Sicily, banned the use of SUP goods that are not compostable or biodegradable, while allowing the gradual disposal of any stocks present in points of sale and warehouses of such material (for plastic bottles the date was 30 September 2019). The Abruzzo's Tribunal ruled contrary to the Sicilian one, maintaining in force the trade union ordinance, since no serious and irreparable damage had been caused to disposable plastic's producers that also produced compostable and biodegradable goods. The Tribunal affirms that the prohibition is limited to the city of Teramo, within which companies can reinvest in distribution and production of eco-sustainable products without losing the market shares occupied by traditional plastic products.

Another case is the one that occurred before the Puglia Regional Administrative Court in relation to a bathing ordinance of the Puglia Region that prohibited the distribution, marketing, and use of single-use plastic products on the Region's beaches. The ordinance was based on the recent SUP directive and on 24 July 2019 the Puglia Court suspended the Region's ordinance, recalling a previous ruling of 23 July 2019, No. 1063, in which it had annulled the trade union ordinance of the Municipality of Andria imposing the use of biodegradable and compostable tableware in food and beverage vending machines. It also states that the 2019 directive requires earlier transposition by the States since it intervenes on competition and places restrictions on the market and it ruled that the Region cannot regulate a matter of exclusive State competence pursuant to article 117, paragraph 2, letter s) of the Italian

[54] Contingent and urgent ordinances are an *extra ordinem* instrument and they are not compatible with measures aimed at prohibiting or reducing the use of plastic, which should be considered permanent. Some authors share the conclusion of such jurisprudence, since plastic free resolutions/agendas containing measures of environmental policy should be preferred to prohibitions (as also suggested by the National Association of Italian Municipalities). U. Barelli, *La Strategia e le norme dell'Unione Europea contro la dispersione della plastica nell'ambiente e la loro attuazione in Italia, nelle Regioni e nei Comuni*, cit. at 4, 19.

[55] Administrative Regional Tribunal Abruzzo, Sez. I, ordinanza cautelare, 10 luglio 2019, No. 123.

Constitution. The Region therefore appeals to the Council of State, Fourth Section, that with order 30 August 2019, No. 4273, rejected the suspension of the effectiveness of the order. Indeed, the Council of State found in article 6, paragraph 2, letter b, of the Regional Law 10 April 2015, No. 17 the regulatory basis of the power exercised by the Region. The judges, contrary to what was previously provided by the Tribunal, then agreed that the bathing ordinance pursues a public interest to ensure a safe use of the maritime domain, providing that the Regions have the power to dictate more restrictive rules than those provided at national level. This assertion is based on the Constitutional Court's jurisprudence[56] according to which, even though the subject matter environmental protection falls within the exclusive jurisdiction of the State pursuant to article 117, paragraph 2, letter s) of the Constitution, the Regions maintain a degree of autonomy which allows them to dictate higher protection standards[57]. Obviously, if the state's transposition of the SUP directive will be stricter than the regional rules, these will have to comply with the transposing state law.

From this brief jurisprudential review, there is undoubtedly a need to provide for uniform single-use plastic provisions at the national level, which should then be transposed to the regional level to avoid initiatives by local authorities in conflict with the regulations.

6. Conclusions

This paper shows Europe's increasing attention to the issue of plastics and plastic waste.

Directive 2019/904/EU is undoubtedly innovative in this respect by setting specific targets in terms of product composition, recycling rates and EPR systems. However, the short deadline of 3 July 2021 has not allowed several states to implement plastic-free policies, especially those that had not taken action to regulate the issue before 2019.

Although Italy is not the only European Country to have witnessed local implementation, the paper shows how several Italian regions have adopted before the State plastic ordinances to reduce the use of disposable plastics and to raise awareness among

[56] Constitutional Court decision 17 January 2019, No. 7.

[57] For example, Italian Constitutional Court decision 19 June 2018, No. 198 and decision 21 February 2018, No. 66.

citizens. This has also led to case law on the issue, which have always been resolved in favour of a fair compromise between the environmental protection and waste reduction and the different jurisdiction between the State and the local entities.

One aspect that has emerged from this examination is that of awareness-raising campaigns. The 2019 directive emphasises this aspect with the obligation of clear and comprehensive labels in its article 7 while local authorities have taken more care of this fundamental aspect. Indeed, while it is essential to invest in a more circular, well designed, and durable production, it is also necessary to raise awareness among end consumers of the negative impacts that improper product disposal can have on the environment. In this regard, extended producer responsibility systems play an essential role in raising financial resources to invest not only in new production technologies but also in citizens' awareness-raising campaigns.

Thus, the strengths and weaknesses of EU legislation and consequently of its (sometimes difficult) transposition into national laws emerge from this study. Indeed, while undoubtedly the SUP directive has been pioneering in the field by setting detailed targets for the reduction and recycling of single-use plastics, it has several critical issues such as the short deadline for transposition, which has undoubtedly disadvantaged the least sustainable countries. In addition, the wide margin of discretion left to states in transposition along with the long-term targets (up to 2029 in some cases) has contributed to states' perception of the plastics problem as not immediate and, consequently, postponable. This is exacerbated by the fact that the transition to plastic-free production systems presupposes a change within companies, needing more know-how and investment in green production. This obviously increases the prices of production and of the products themselves, making EU companies less competitive in the global market than those in non-EU countries which are not subject to such obligations. This probably contributed to the delay in the transposition of the directive, which, moreover, affects only a small circle of countries (those in Europe) whereas the plastic pollution problem is undoubtedly more far-reaching.

Thus, although the SUP Directive can be considered a milestone in the field, it should probably have started with public awareness of single-use plastics. Public awareness and education campaigns have been neglected by most EU countries, unlike local

authorities closer to the community. Starting with citizens and increasing their awareness of the consequences of improper use and disposal of plastics would also help raise awareness among companies, which, to attract consumers who are sensitive to sustainability issues, would have a greater incentive to adopt sustainable production processes. Moreover, starting from the bottom would also incentivize states (and then the European Union) to adopt stricter regulations on the subject.

Therefore, in the coming years, it will be necessary to rethink the regulations on single-use plastic with greater involvement of local communities and citizens, which are the real cornerstones of the fight against single-use plastic. It is indeed from the bottom up that it is necessary to work from to achieve the long-awaited "*plastexit*."

URBAN SUSTAINABLE DEVELOPMENT AND INNOVATION PARTNERSHIPS

Christian Iaione[1]

Abstract

The urban innovation and sustainable development agendas currently guiding policy initiatives at both the European and global level, illustrate a shift from cities as objects of research to cities as testbeds for policy experimentalism. This article introduces the concept of Urban Sustainable Development and Innovation Partnerships (USDIPs) as a key legal and policy tool to design and manage policy experiments that can at the same time accelerate the technological and ecological transition and guarantee accountability and equality if they involve a multiplicity of local stakeholders and in particular community and scientific actors collaborating in delivering sustainable development-oriented (otherwise known also as "mission-oriented") innovation.

The theoretical triangulation of literature on inclusive and innovative public-private-partnerships (PPPs), urban co-governance, and citizen science can contribute significantly to the development of a theory on urban sustainable development and innovation co-governance. The analysis of the existing multi-disciplinary scholarship shows that these new forms of urban governance apply the theory of the commons to cities' most promising attempts to answer the technological and ecological

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transition. The intersection between innovation procurement and pre-commercial procurement, sustainable development and urban co-governance, city science imposes the design and use of new legal tools and more specifically new forms of public partnerships enabling the full integration of community and scientific actors within city governance.

The article first reviews the academic discussion on the most inclusive and innovative forms of public-private partnerships, urban co-governance, and city science. Then, tapping into the global and European policy context, the article explains that co-governance has become key to policies, programs, and projects aimed at delivering urban sustainable development.

These forms of cooperation between urban authorities, private stakeholders and community-based key urban actors are acquiring greater significance within the global and European level policy framework. But the EU Urban Innovative Actions Initiative (UIA) and specifically the "UIA Co-City Turin" project on collaborative management of urban commons to counteract poverty and socio-spatial polarization are considered here as a blueprint case study in USDIPs experimentation. The article however draws empirical evidence also from twelve other city projects particularly relevant to co-governance and city science, all funded by UIA. The empirical analysis shows that an approach rooted in multistakeholder and equitable cooperation can serve as a powerful accelerator and as a safeguard for a more equitable urban sustainable development that leverages the power of innovation procurement and city science.

In particular, the empirical analysis of these projects demonstrates that innovation procurement and city science can play a fundamental role in accelerating mission-oriented innovation. More in general this analysis demonstrates the need for a larger policy toolkit. The empirical evidence emerging from the case studies unveils a set of four key tools instrumental in the combined effort of creating USDIPs: (1) a legal and policy initiative leveraging the flexibility and adaptiveness of innovation procurement at the city level; (2) the design and rollout of a social and sustainable finance plan; (3) the use of digital tools to nurture and manage the complexity of multistakeholder cooperation and (4) institutional and physical spaces to invest on capacity building of both public and non-public actors.

Finally, this article calls for concrete policy action at the EU level to use USDIPs to bridge the gap between different policy agendas such as the Green New Deal Industrial Plan, the Horizon Europe 100 climate-neutral and Smart Cities Mission, the new European Urban Initiative, and the 2021-2027 Cohesion Policy.

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1. Introduction

The legal category of Urban Sustainable Development and Innovation Partnerships (USDIPs) that this article advances is a first attempt at capturing the distinctive features of a new breed of multistakeholder cooperation agreements attempting to go beyond the traditional public-private partnerships models (PPPs), even the most inclusive and innovative models of PPP[2]. USDIPs try to coalesce a plurality of urban stakeholders around projects and initiatives EU cities are forging to produce just and sustainable innovation at the city level.

They build on one side on the widespread diffusion of new democratic and inclusive urban governance and legal arrangements based on the cooperation between public, private, scientific, social, and civic actors that operate on an equal footing in the common interest of a city[3]. Their implementation increasingly relies on new forms of public partnerships[4] and the growing role played by scientific actors in the city under the scholarly and policy framework of city science[5].

USDIPs do not rely on a notion of innovation that follows a Schumpeterian approach to development and applies it to the urban context. Schumpeter defined development as a "new combination of productive means (..). This concept covers five cases: (i) the introduction of a new good and of a new quality of a good (2) the introduction of a new method of production, that is one not yet tested by experience, which need by no means to be

[2] See P. Chirulli, C. Iaione, *La Co-Città. Diritto urbano e politiche pubbliche per i beni comuni e la rigenerazione urbana* (2018); S. Valaguzza ed E. Parisi, *Public private partnerships. Governing common interests* (2020).
[3] S.R. Foster, C. Iaione, *Co-Cities. Innovative Transitions toward Just and Self-Sustaining Communities* (2022).
[4] S. Valaguzza, E. Parisi, *Ricerca sull'identità giuridica del Partenariato Pubblico-Privato*, in 1 Munus 1 (2020).
[5] C. Nevejan, *City Science*, 1 *Values for Survival Cahier* 126 (2020).

founded upon a discovery scientifically new and can also exist in a new way of handling a commodity (3) the opening of a new market (…) (4) the conquest of a new source of supply of raw materials (..) (5) the carrying of the new organization of any industry or the breaking up of a monopoly position"[6]. To adapt the concept of innovation to the urban context, this article adopts on one side the definition provided by the EU program Urban Innovative Actions Initiative (hereinafter: UIA). This program characterizes urban innovation as "new products, services and processes able to add value to the specific policy field and have never been tested before in Europe"[7]. On the other side, this article considers the definition of local democratic innovations as city-led initiatives aiming at fostering innovations which are defined as: "innovative programs at the municipal level in which some form of civil society participation was institutionalized"[8].

Cities are increasingly playing the role of facilitators creating the conditions to enable the birth and rollout of more collaborative, sustainability-minded just innovation ecosystems. In these ecosystems the equitable redistribution of decision-making powers and economic benefits is key. City inhabitants are therefore encouraged and supported in developing projects and skills to build collaborative relationships among each other, with public authorities and other city actors. USDIPs represent a legal category that can shape and formalize these new governance and legal arrangements pushing for a more equitable cooperation between local communities, public authorities, civil society, local businesses, and knowledge institutions[9].

Structure of the article is articulated in four parts. The article first reviews the academic discussion on the most innovative and inclusive forms of PPPs, urban co-governance and city science. Then, embedding the discussion within the global and European policy context, it highlights how co-governance of urban

[6] J.A Schumpeter & A.J. Nichol, *Robinson's Economics of Imperfect Competition*, 42(2) *Journal of Political Economy* 249–259 (1934).
[7] A. Barresi, *L'iniziativa comunitaria Urban Innovative Actions: una lettura critica dei progetti selezionati*, 14 TECHNE (2017).
[8] G. Baiocchi, P. Heller & M.K. Silva, *Bootstrapping Democracy: Urban Reforms in Brazil* (2011).
[9] S. Foster, C. Iaione, *The City as a Commons*, 34 Yale Law & Policy Review 281 (2016).

innovation has become central in programs and projects designed to achieve urban sustainable development.

USDIPs emerge as the best way to conceptualize the complexity of these co-governance mechanisms and find their blueprint in the regulation on urban collaboration experimented in various Italian cities and more specifically through the UIA "Co-City Turin" project[10]. This regulation has become the source of a set of new forms of urban multistakeholder partnerships that apply the theory of the commons to the city[11]. Starting from the exemplary case study of the City of Turin (Italy), the article provides more empirical evidence by elaborating on twelve city projects all funded by the urban EU program UIA particularly relevant for their use of a co-governance arrangement, as well as the use of legal tools inspired by innovation procurement and by the role played by scientific actors in the city.

An empirical analysis of these thirteen case studies enabled to draw key takeaways and insights on USDIPs experimented to reach multistakeholder governance and inclusive innovation. Operational proposals, supported by the empirical evidence collected from the case studies, as well as from other European programs and projects, such as the EU programs Horizon2020 and Urbact, unveil a set of four key tools instrumental to a possible policy framework enabling USDIPs: (1) an urban legal policy framework leveraging the connection with innovation procurement; (2) a social and sustainable finance to support the startup and long-term sustainability of USDIPs; (3) the implementation of digital tools enabling and accelerating participation and cooperation of a large network of stakeholders and (4) institutional tools guaranteeing and nurturing capacity building in city government and the local ecosystems.

Finally, the key finding emerging from the analysis is the need to integrate city science and innovation partnerships within a larger policy program on urban sustainable development by using USDIPs as key delivery mechanisms for policy programs aiming at delivering a just transition in cities from both a technological and climate point of view.

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[10] Projects documents are available at https://uia-initiative.eu/en/uia-cities/turin

[11] S. Foster, C. Iaione, *The City as a Commons*, cit. at 9.

2. Beyond Public-Private Partnerships: USDIPs as Public-Private-Science-Social-Community Partnerships

The relevance of public-private partnerships in the management of public infrastructure or services has informed the culture and practice of public administrations in the last decades[12].

However, the traditional model promoted in the 1990s finds itself at an important crossroad[13]. The most successful partnerships appear today to be more complex and hybrid[14]. Its most recent epiphanies are evolving towards partnerships embedding openness[15], and innovation or sustainable development goals[16].

Nonetheless the literature still fails to understand the consideration of multistakeholdership, the common interest leading to an equitable sharing of the benefits, the collaborative dialogues or co-design process leading to their closing, the outcome-oriented, ex-post evaluation approach as key distinctive features of these newly conceived forms of cooperation[17].

Indeed, Tvarnø still defines these new forms of PPPs as "a collaboration between a public authority and the industry. The

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[12] See S. Arrowsmith, *Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict?*, 37 *Common Market Law Review* 7009 (2000); C.D. Tvarno, *Law and regulatory aspects of PPP*, in C. Greve, G. Hodge & A. Boardman (eds.), *International Handbook on Public-Private Partnerships* 216-235 (2010).

[13] C.D. Tvarnø, *Climate Public Private Partnerships in the EU*, 15 European Procurement & Public Private Partnership Law Review 200 (2020).

[14] A. Castelli, *Smart Cities and Innovation Partnership*, 13 European Procurement & Public Private Partnership Law Review 207 (2018); J. Leigland, *Public-Private Partnerships in Developing Countries: The Emerging Evidence-based Critique*, 33 The World Bank Research Observer, 103 (2018).

[15] Daniel E. Schoeni, *Whither Innovation: Why Open Systems Architecture May Deliver on the False Promise of Public-Private Partnerships*, 70 Admin. L. Rev. 409 (2018).

[16] F. Fracchia, S. Vernile, *I contratti pubblici come strumento dello sviluppo ambientale*, in 2 *Rivista quadrimestrale di Diritto dell'Ambiente* 2020, p. 4; L. Mélon, *Sustainable Public Procurement Best Practices at Sub-National Level*, European Procurement & Public Private Partnership Law Review 138 (2020); S.M. Denta, *Public-Private Partnership for the Climate*, 16 European Procurement & Public Private Partnership Law Review 318 (2021); Bruno De Cazalet, *The New UNCITRAL Legislative Guide on Public-Private Partnerships (PPP) and New Model Legislative Provisions*, INT'l Bus. L.J. 387 (2020).

[17] See C. Iaione, *L'azione collettiva urbana tra partenariato pubblico-comunità e pubblico-comunità-privato*, in P. Chirulli, C. Iaione (ed.), *La Co-Città*, cit. at 2; Id., *Il diritto all'innovazione sostenibile per l'investimento nelle infrastrutture sociali. Un'analisi empirica*, in Riv. giur. ed. 301 (2021).

industry holds the technology and the capital; the public entity holds the knowledge of the climate needs"[18].

2.1 Inclusive and Innovative Public-Private Partnerships

The model of public-private partnerships for the delivery and management of public infrastructure or services is an established leading practice in Italian public law[19]. This is rooted in a broader culture of public-private partnership that was initiated in the eighties and it is still dominant today in the practice of public management. However, considering the challenges posed to the law by global crises that percolate at the local level (for example, the climate crises and the pervasive development of disruptive technologies), this model might be obsolete, at least in its original configuration.

First, empirical evidence on the use of PPP is available now, roughly 30 years after their first ideation. In developed countries, progressive critiques against PPPs and more generally against the profit-oriented (rather than public service-oriented) framing of the public sector–private actors' relationships[20] are growing. According to some estimates, in low- and middle-income countries the use of PPPs is not even pervasive, representing between up to 25% of the overall infrastructure development, and between 5 and 15% in OECD countries[21]. Their impacts of poverty are not significant[22], suggesting that the main justification for the contracting of a private actor, that of providing affordable access to the poor to essential services, may be flawed.

Yet, some authors in public procurement law are speculating on a potential category of climate public-private partnerships[23]. The idea behind these efforts is to use leverage on the existing legal framework for public procurement but apply some changes that are required to structure the collaboration between public and private actors better when it comes to climate change mitigation or adaptation measures.

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[18] See C.D. Tvarnø, *Climate Public Private Partnerships in the EU*, cit. at 13.
[19] R. Dipace, *Partenariato pubblico-privato e contratti atipici* (2006).
[20] M. Mazzucato, R. Collington, *The Big Con. How the consulting industry weakens our businesses, infantilizes our governments, and warps our economies* (2022).
[21] J. Leigland, *Public-Private Partnerships in Developing Countries: The Emerging Evidence-based Critique*, in 33 *The World Bank Research Observer* 107 (2018).
[22] J. Leigland, *Public-Private Partnerships in Developing Countries*, cit. at 21, 108.
[23] C.D. Tvarnø, *Climate Public Private Partnerships in the EU*, cit. at 13.

Other scholars are speculating on the necessity to envision multi-auctorial categories of partnerships. This small group of scholars is advocating for the inclusion in the partnerships of a variety of actors from civil society and different forms of not-for-profit entities such as social enterprises, NGOs, Foundations, and even informal groups such as, for example, service end users and city inhabitants. The assumption behind these theorizations is that these arrangements would be a more sustainable and equitable form of partnership[24]. Examples have been defined as public-private-people partnerships or, still within a bilateral relationship, public-community partnerships[25]. Initially developed in the urban planning of smart cities projects' field[26], it expanded to other areas such as research and innovation[27], disaster response[28], culture, and cultural heritage[29].

The role of civic, social, not-for-profit, research and innovation actors in PPPs theory is gaining the attention of the scholarship also thanks to the Next Generation EU plan[30] and more in general due to the EU 2021-2027 policy framework which is increasingly valuing the role of these actors in the co-production of public value[31].

2.1.1. Inclusive PPPs

The Italian legal framework does not recognize yet a public-private-people or a public-community partnership model as a

[24] C. Irazábal, *Public, Private, People Partnerships (PPPPs): Reflections from Latin American Cases*, in A. Lehavi (ed), *Private Communities and Urban Governance* 191-214 (2016).

[25] R. Lang et al., *Co-operative Governance of Public-Citizen partnerships: Two Diametrical Participation Modes*, in L. Gnan et al (eds.), *Conceptualizing and Researching Governance in Public and Non-Profit Organizations* 227–246 (2013).

[26] P. Marana et al., *A framework for public-private-people partnerships in the city resilience-building process*, in 110 *Safety Science* 39-50 (2018).

[27] C.

[28] H. Seddighi et al., *Public-Private-People Partnerships (4P) for Improving the Response to COVID-19 in Iran*, in 15 *Disaster Medicine and Public Health Preparedness* 44 (2021).

[29] C. Boniotti, *The public–private–people partnership (P4) for cultural heritage management purposes*, in 13 *Journal of Cultural Heritage Management and Sustainable Development* 4/5 (2023).

[30] A. Moliterni, *Le prospettive del partenariato pubblico-privato nella stagione del PNRR*, in 2 Dir. Amm. 449 (2022).

[31] S. Valaguzza, *Sustainable Development in Public Contracts, an Example of Strategic Regulation* (2016).

legitimate legal vehicle for the delivery of public services or management of public goods. However, recent legal reforms of the 'Third Sector Code' and the 'Public Contracts Code' introduce forms of collaboration between public and social actors that are inspired by the principle of solidarity and civic collaboration, rather than competition[32].

The reform of the 'Third Sector Code', *Codice del Terzo Settore*[33], introduced two provisions on co-design involving the public sector and not-for-profit organizations, and one on the concession of publicly owned cultural heritage assets needing restoration to not-for-profit organizations, respectively in articles 55 and 71. The 'Public Contracts Code', *Codice dei Contratti Pubblici*[34] introduces, at articles 189 and 190, two new forms of inclusive partnerships: the 'horizontal subsidiarity interventions' and the 'administrative barter' *(baratto amministrativo*), better defined in the text of article 190 as 'social partnership'.

In particular, the social partnership was already provided by a previous legislative decree, n. 133/2014 (art. 24) but its scope was more limited. The social partnership provision gives local entities (i.e., Cities; Metropolitan Cities; Regions) the authority to realize contracts with residents acting individually or jointly (for example, an NGO), to realize projects on a specific territorial area having as object interventions of urban decay, public space cleaning, maintenance and improvement of green spaces, recovery and reuse of unused buildings or brownfields. The projects are carried out by the civil society actors, free of charge for the local entity. The local entities can foresee an in-kind compensation for individuals involved, a tax credit or a tax exemption on regional or city taxes. Tax credits or exemption can be granted to residents who owe city taxes. The Court of Auditors qualified this legal provision as expression of the constitutional principle of horizontal subsidiarity (art. 118, c. 4)[35]. The type of contract realized as social partnership does not fall within the purview of the EU law definition of a concession or public works contract: the residents are not

[32] C. Iaione, *L'azione collettiva urbana tra partenariato pubblico-comunità e pubblico-comunità-privato*, in P. Chirulli, C. Iaione (ed.), *La Co-Città*, cit. at 2; R. Cavallo Perin, *Proprietà pubblica e uso comune dei beni tra diritti di libertà e doveri di solidarietà*, 4 Dir. Amm. 839 (2018).
[33] Italian Legislative Decree n. 117/2017.
[34] Italian Legislative Decree n. 50/2016.
[35] Corte conti, Sez. autonomie, n. 16/2017.

professional actors performing a type of work that they regularly offer on the market; there is no economic exchange, although the fact that the individuals can be compensated with tax credits distinguishes it from volunteering work; the projects are realized with the spirit of pursuing the general, public interest and not for economic profit.

Even though it does not qualify as a public contract after all, the social partnership contract is still under the purview of the Public Contracts Code (*contratto incluso*) for Rosanna De Nictolis[36], because the object of the partnership is the realization of a public work or service. The inclusion in the Public Contracts Code has the effect of applying some of the procedural safeguards that normally apply also to public contracts that exempted from the Code. In other words, the social partnership contract is excluded from the purview of EU public procurement law but it is included pursuant to the Italian Public Contracts Code. The Italian Public Contracts Code has a broader scope than the EU law definition of public procurement and concession agreements. This is especially true if article 190 is read in combination with article 36 on contracts under the minimum threshold (*contratti sotto soglia*). Especially if a private individual initiates a proposal of social partnership, for a project whose overall costs is lower than the threshold, the local entity has the legitimacy to directly award the contract to an economic operatopr, without a public procurement procedure (*gara d'appalto*). Fabio Giglioni[37], who agrees that the social partnership contracts cannot be classified as a form of income-generating contracts subject to public procurement law, advocates for a new intervention of the legislator as the only way to clarify the legal nature of social partnerships. Valaguzza and Parisi note that the possibility for social actors to propose projects allows non state actors to contribute to the definition of the general, public interest, going beyond the mere execution of a project[38].

The issue that seems to emerge is that, in both the Public Contracts and the Third Sector Code, the relationship being regulated is a bilateral relationship between the public actor (i.e.,

[36] R. De Nictolis, *Il baratto amministrativo (o partenariato sociale),* in P. Chirulli, C. Iaione (eds.), *La Co-Città*, cit. at 2, 61.
[37] F. Giglioni, *Limiti e potenzialità del baratto amministrativo,* 3 Rivista Trimestrale di Scienza dell'amministrazione (2016).
[38] S. Valaguzza, E. Parisi, *Ricerca sull'identità giuridica del partenariato pubblico-privato*, cit. at 4, 7.

the City) and a private actor (i.e., an NGO). Under this view, a social partnership is not that dissimilar from a public-private partnership, except that the private actor is not interested in pursuing economic gain.

This generates issues from the perspective of the feasibility of the projects. Is it possible to conduct a complex urban regeneration project with a not-for-profit model? It also raises risks of lack of inclusivity. Vulnerable, low income or minority individuals and communities may not be sufficiently resourced to be proactive and realize a project of renovation of a publicly owned building for no compensation or for tax credits (which cast a shadow on potential exploitation of fragile individuals with a tax debt). These are the kind of issues that advocates of public-private-people partnerships are trying to address.

Scholars analyzing case studies of projects that resemble public-private-people partnerships have spotted positive impacts, as well as downsides. For example, in projects of water provisions in low-income areas,[39] the inclusion of NGOs equipped with poverty awareness and connected to the needs of the local populations makes the intervention effective from the perspective of granting access to service and providing poverty alleviation (e.g.: producing the effect of lowering the monthly cost of water provision for households and allowing them to create and maintain job opportunities thanks to this). However, these cases also seem to entail risks of instrumentalization of the social or community partners[40].

From a legal perspective, it is probably evident at this point that the literature described here is interdisciplinary and fragmented. The heavy reliance on small-size samples of case studies and the geographical fragmentation of the research also entails that the knowledge generated by these studies is not generalizable, nor transferrable without proper contextualization. The concept of partnership is not always used to describe a legal arrangement within a public procurement framework. It is often used to encompass collaborative relationships between multiple actors in the context of projects, programs, coordination mechanisms tackling complex situations like social, ecological,

[39] R. Franceys, A. Weitz, *Public–private community partnerships in infrastructure for the poor*, 15 J. Int. Dev. 1083 (2003).
[40] M. Le Feuvre et al., *Understanding Stakeholder Interactions in Urban Partnerships*, 52 Cities 55–65 (2016).

economic, health crisis[41] characterized by high risks of failure, lack of information and therefore uncertainty that suggest the creation of a large coalition of actors coalesced around a common goal[42]. It is, therefore, necessary for legal scholars to take these case studies more seriously and address issues like the legal basis of a public-private-people partnerships or the implications in terms of revenues distributions and liability allocations, and obviously the role of public and other actors like the scientific actors.

2.1.2. Innovative PPPs

Social innovation partnerships like the ones described in the previous paragraph are not the sole new kid in the town of new collaboration models between the public administrations and a larger network of other stakeholders beyond the private economic operators. The literature on technological innovation and procurement again more specifically the applied to the city, in particular smart cities, and urban innovation[43], is increasingly pointing to innovative procurement practices overcoming the business-as-usual PPP model of long-term exclusively profit-oriented private operation of public infrastructure and services[44].

The analysis of the literature on research and development services and pre-commercial procurement first clarifies that these are innovative forms of partnerships and secondly sheds light on a further epiphany of a much broader legal category and definition of public private partnerships, different from the usual definition of PPPs relying essentially on the key distinctive features of a particular form of PPP (*i.e.* concession agreements)[45].

The European Commission notice "*Guidance on Innovation Procurement*" of 18 June 2021 clarified that the key distinctive feature of these partnerships is governing the deployment of a

[41] A. Moliterni, *Le prospettive del partenariato pubblico-privato nella stagione del PNRR*, in 2 Dir. Amm. 449 (2022).
[42] R. Cavallo Perin, G.M. Racca, *La cooperazione amministrativa europea nei contratti e servizi pubblici*, in 6 Riv. It. Dir. Pubbl. Com. 1457 (2016).
[43] R. Caranta, P.C. Gomes, *Public procurement and innovation*, *ERA Forum* 371–385 (2021).
[44] P. Marana, L. Labaka & J.M. Sarriegi, *A framework for public-private-people partnerships in the city resilience-building process*, in *Safety Science* 39-50 (2018).
[45] L. Vandercruysse, *Data Protection in Smart Cities: Pre-Commercial Procurement as a Silver Bullet?*, 17(2) European procurement & public private partnership law review 81 (2022).

common interest project by using expressions like "mutually beneficial solution" or "risk benefit sharing"[46].

As demonstrated in the previous paragraph on inclusive partnerships moving towards the involvement of a larger array of partners, including civic society actors, city inhabitants, and local communities for social and ecological objectives, R&D services contracts and pre-commercial procurement are partnerships that allow the risk and benefit of investing in innovative services and infrastructures to be shared amongst multiple actors. In this case the main protagonist are normally innovators, SMEs, start-ups, and spin-offs created by knowledge, scientific operators and responsible research and innovation or sustainable development private economic operators.

The Urban Agenda Partnership on Innovative and Responsible Procurement has tapped into the potential of these innovative PPPs by formally considering public-private-people partnerships (4Ps), Public-Community Partnerships (PCPs), Public-Private-Community Partnerships (PPCPs) and therefore also public-private-science-social-community partnerships (5Ps) as institutional, legal, and policy arrangements that could foster innovation and sustainable development through the strategic use of public procurement and public contracts.

Researching innovative approaches to public procurement represents a key task of the action plan of the Urban Partnership on Innovative and Responsible Procurement[47]. The action plan of the Urban Partnership on Innovative and Responsible Procurement suggests also the introduction of "innovation procurement brokers […] offering concrete support to public buyers and public administrations willing to exploit the full potential of the EU Directives on procurement which grant room for the experimentation of newly conceived partnerships with the private

[46] European Commission, *Guidance on Innovation Procurement*, C (2021) 4320 final, 18 June 2021, p. 56. In the Italian legal context this has been sanctioned both by the scholarship A. Blasini, *Prime riflessioni in tema di appalto pre-commerciale*, 19 Federalismi (2016); C. Spada, *I contratti di ricerca e sviluppo*, 3 Dir. Amm. 687 (2021) and by the interpretation of the Italian Anti-Corruption authority ANAC with deliberations n. 58 of 30 January 2019, AG 1/2019/AP and n. 619 of 4 July 2018, AG 7/2018/AP; opinion 30 July 2013, AG 42/2013. See also administrative tribunal decision TAR, Puglia, Lecce, sez. I, 21 July 2010, n. 1791.

[47] Urban Partnership on Innovative and Responsible Procurement, *Action Plan*, 2018, available at https://futurium.ec.europa.eu/en/urban-agenda/public-procurement/library/public-procurement-partnership-final-action-plan.

or social sector and local communities especially at the urban level (e.g. public-social partnerships, public-private-community partnerships, public-community partnerships, public-private-people partnerships, etc.), as well as collaborative dialogue procedures to enable the co-design of such social and digital innovation partnerships and innovative procurement solutions."

The action plan of the Urban Partnership calls on innovation procurement brokers both at the local and national level to "involve civil society and local communities in the co-creation of innovative solutions to urban challenges"[48]. This approach is coherent with the overall EU Public Procurement strategy contributing to the corroboration of a legal basis for which PPCPs or P5s or PCPs are to be understood as USDIPs.

The question that arises is now, whether existing public procurement laws and regulations are enough to support this type of partnership. Specifically, is the public Procurement of Innovation a potential tool to support these innovation urban partnerships? This article elaborates on the issue and argues that a possible answer is that of USDIPs existing as a variation of the existing PPI tools.

This solution presents several challenges a) they have never been experimented before; b) pre-commercial procurement and PPI have been designed for public-private-industry or university actors' collaboration and therefore their adaptation seems complex but it is necessary to try; c) there are several critical points related to the involvement of city inhabitants and civil society in general in public procurement procedures according to the existing literature and policy debate.

As a matter of fact, EU Directives clearly state that these rules are intended to support "Research and innovation, including eco-innovation and social innovation" (EU Directive 2014/24, 47). According to the directives they should be "among the main drivers of future growth and have been put at the center of the Europe 2020 strategy for smart, sustainable and inclusive growth". And that is why the 2014 legislative package has foreseen a new contractual tool: The Innovation Partnership. Now, this new legal tool seems to have been narrowly interpreted as aimed only at digital innovation. Practice, especially in cities, has demonstrated that Innovation

[48] Urban Partnership on Innovative and Responsible Procurement, *Action Plan*, cit. at 46.

Partnerships can extend their scope to also encompass social innovation initiatives and/or social-digital innovation initiatives, such as many of the cases under which PCPs fall. The EU directives equally recognize the principle of self-organization and public–public cooperation. Considering that many of these urban common's initiatives act in the general interest, it is possible to understand the cooperation between the city and the urban commons as a reconstructed form of public-public cooperation. Finally, the EU Commission initiated a stakeholder consultation to gather suggestions on the scope of a guidance on green and social procurement and the issues it should address, including "how to best integrate the demand-side function for social innovation and social entrepreneurship"[49].

There are critical points related to the involvement of city inhabitants and civil society in general in public procurement procedures. They can be related to expertise, knowledge and representation. If the civil society groups involved are not representative or do not possess the necessary knowledge and experience to actively cooperate with both public and private actors, there is an inherent risk that their role within a public procurement process will be meaningless or produce distortive or negative effects[50].

As innovating public procurement legal tools and procedure is a central challenge for many European programs working on urban sustainable development. As we will see UIA projects, such as Co-City (Turin) and USE-IT (Birmingham) for instance, highlight the need to identify new institutional frameworks to allow a productive collaboration between different city actors. As highlighted at the beginning of the article, UIA indeed stresses that in order to test and implement bold solutions, urban authorities cannot act alone: "(…) urban authorities need to involve all the key stakeholders that can bring expertise and knowledge on the specific policy issue to be addressed. These include agencies, organizations,

[49] Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Making Public Procurement work in and for Europe,* COM(2017) 0572 final 2017 at 8. See C. Iaione, *Public procurement with social impact*, September 13, 2021, available at https://cooperativecity.org/2021/09/13/public-procurement-with-social-impact/

[50] C. Cravero, *Rethinking the Role of Civil Society in Public Procurement*, 14 European Procurement & Public Private Law Review 30 (2019).

private sector, research institutions, NGOs […] Bold projects need them all"[51].

Besides, introducing end-users in the procurement process allows the development of more collaborative and therefore more innovative solutions targeting local challenges and needs.

2.2 The Role of Communities in Urban Governance.

Public policy programs across cities have forged new legal tools allowing inhabitants to take action on challenges and opportunities within their communities. Local governments have appeared receptive to the innovative dynamics needed to push public administration towards collective urban welfare. These approaches represent a policy and legal response to the challenge of going beyond the traditional duality of PPPs. This article finds that while the unequivocal relevance of PPPs appears to head the movement, the traditional model promoted in the 1990s finds itself at an important crossroad[52]; Today's most successful partnerships appear under hybrid forms, evolving towards more sustainable, equitable and participatory forms of multi stakeholder partnerships. An innovative approach to partnerships emerges from the policy horizon with a strong emphasis on end-user's participation and involvement. These models of partnership integrating the community in the planning process itself exist under a variety of forms, to name a few: public-private-people partnerships (PPPPs), Public-Community Partnerships (PCPs), Public-Private-Community Partnerships (PPCPs) or Community Benefits Agreements (CBAs). Theories of urban informality, self-organization and neighborhood governance come to light in this notion of end-user's integration. The cooperation between local communities, civil society, businesses and knowledge institutions becomes action-oriented policy in these theories of urban co-governance.

This article seeks to highlight the role of civic, social or not-for-profit actors within the world of urban governance. Often, when regional government representatives decide to support bottom-up initiative, the tensions between the different urban stakeholders are lessened. The social implications are in the realm of participatory

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[51] See UIA, *What is Urban Innovative Actions?*, available at *https://www.uia-initiative.eu/en/about-us/what-urban-innovative-actions*.

[52] F. Miraftab, *Public-Private Partnerships: The Trojan Horse of Neoliberal Development?*, in 24(1) Journal of Planning Education and Research 89–101 (2004).

democracy as it appears to strengthen the solidarity and social cohesion at the neighborhood level[53]. An interesting concept here is the strengthening of the role of city inhabitants as co-producers of local public services[54].

In this sense, Ostrom considered the role of city inhabitants as a key element to achieve the improved delivery of services as well as strengthen social cohesion and the democratic empowerment of citizens. Elinor Ostrom's empirical research on Common Pool Resources (CPRs) investigates the cooperative governance strategy as a way of dealing with CPRs dilemma and avoiding the tragedy of the commons. It is an alternative to the public (the "Leviathan" solution) or the private property solution.

The attention of the literature on collective action for the commons is also concentrating on the emerging field of urban commons. The governance of urban commons can be conceptualized as a new form of sharing, governing, producing and owning urban resources. The coproduction of public services refers to "an arrangement wherein city inhabitants produce their own services at least in part"[55].

The research by Richard Lang[56] brings forth the example of Austrian local partnerships' structures wherein municipalities are seeking support from their city inhabitants in the delivery of vital public services such as childcare, care for the elderly, education and recreational facilities. It is suggested that sustainable user and citizen empowerment becomes a question of "bottom-linked institutionalization rather than bottom-up creativity alone"[57]. The 2013 report on Co-operative Governance of Public-Citizen Partnerships and participation modes presents the possibility of PCPs enhancing participatory democracy as well as improving public service provision. Indications of cooperative governance

[53] R. Lang, D. Rößl & D. Weismeier-Sammer, *Co-operative Governance of Public-Citizen Partnerships: Two Diametrical Participation Modes*, in L. Gnan, A. Hinna, F. Monteduro (eds.), *Studies in Public and Non-Profit Governance. Vol. 1: Conceptualizing and Researching Governance in Public and Non-Profit Organizations* 227 (2013).

[54] C. Hess, E. Ostrom (eds.), *Understanding Knowledge as a commons* (2007).

[55] T. Brandsen, V. Pestoff, *Co-production, the third sector and the delivery of public services,* 8:4 *Public Management Review* 493-501 (2006).

[56] R. Lang & A. Novy, *Cooperative Housing and Social Cohesion: The Role of Linking Social Capital,* 22:8 European Planning Studies 1744-1764 (2014).

[57] R. Lang, D. Rößl & D. Weismeier-Sammer, *Co-operative Governance of Public-Citizen Partnerships: Two Diametrical Participation Modes,* cit. at 4, 7.

strengthening solidarity and social cohesion at the neighborhood level were also found throughout this article.

Community Benefits Agreements (CBA) represent here another important tool for integrating the roles of civic, social or not-for-profit actors within the processes of urban governance. A CBA is defined as "a private agreement between a community coalition and the developer on multiple issues that may or may not be included in the regular planning process. The CBA is different from other private agreements in that it is between a developer and a coalition of multiple community groups with plural interests"[58]. In this form of governance, community groups can negotiate directly with the developer rather than having to go through the hoops of bureaucracy embedded within city staff, politicians or the added difficulties of legislative action.

In this context, citizen science, in particular the citizen production of data through analog or digital tools, can prove valuable to prevent pollution of natural resources or reduce environmentally related health risks[59]. Cities are experimenting with citizen science to inform and shape smart city policies or solve challenges such as air quality. The City of Bristol developed a "Bristol Approach to citizen sensing", which provides a set of tools and a way of working that helps different groups – from council members and businesses to schools and community organizations – to tackle the pressing issues in their community. It does so by using a range of sensors – usually a mix of new and old technology – and meshing it with the wider resources and knowhow that already exists in the involved community. Through the first pilot project, supported by Urbact, more than 700 people 13-80 years old were engaged in more than 45 events and workshops. Three sets of prototype citizen sensing tools were devised, designed, deployed and tested, tackling damp homes, food waste and mental health.

A theoretical framework guiding the institutional design of co-governance of cities' resources can be found in the theory of urban commons and the quintuple helix of governance. The underlying principle in a commons-based understanding of urban

[58] M. Baxamusa, *Empowering Communities through Deliberation the Model of Community Benefits Agreements*, in 27 Journal of Planning Education and Research 261-276 (2008).

[59] A. Berti Suman, M. Van Geenhuizen, *Not just noise monitoring: rethinking citizen sensing for risk-related problem-solving*, 63:3 Journal of Environmental Planning and Management 546-567 (2020)

space, assets, services and infrastructures is that resources within the city can be shared, co-managed, co-produced and cooperatively owned. The fair distribution of social and economic resources of the city and communities is at the heart of this 'commons' conceptualization[60].

Elinor Ostrom and her followers, the scholars of the Bloomington School of Political Economy have analyzed how urban commons are shaped by urban transitions [61].Several authors investigated the dynamics of production of urban commons as a social practice. Relevant research efforts are recently emerging in different economics and geography studies to identify and understand the mechanisms of functioning and sustainability of collaborative strategies to govern shared urban resources or public spaces or co-producing services[62]. The study of the urban commons is indeed trans-disciplinary and approached the issue from a different standpoint. The commons are often framed as a reaction against conjunctural phenomena (financial and economic crisis) to increase access to resources at risk of privatization and achieve the goal of equality. The investigation of the related emergence of policy innovations that foster active citizenship, collaborative democracy and governance of city commons and the way this process shapes relevant dimensions of urban democracy is still an open challenge. The effect of conjunctural financial and economic phenomena on cities were analyzed by Sassen in terms of the connection between financial investments in urban spaces in global cities and increase of inequalities[63].

The activation of forms of collective action and political protest for reclaiming urban commons as a reaction against the impact of financialization and the post-2008 economic crisis is a

[60] S. Foster, C. Iaione, *Ostrom in the City*, *Ostrom in the City: Design Principles and Practices for the Urban Commons,* in D. Cole, B. Hudson, J. Rosenbloom (eds.), *Routledge Handbook of the Study of the Commons* 235-255 (2019).
[61] E. Ostrom, H. Nagendra, *Applying the social-ecological system framework to the diagnosis of urban lake commons in Bangalore, India*, 19(2) Ecology and Society 67, (2014).
[62] K. Soma, M.W.C. Dijkshoorn-Dekker, N.B.P. Polman, *Stakeholder contributions through transitions towards urban sustainability*, 37 Sustainable Cities and Society (2018); C. Wyborn, A. Datta, J. Montana, M. Ryan, P. Leith, B. Chaffin, C. Miller, L. van Kerkhoff, *Co-Producing Sustainability: Reordering the Governance of Science, Policy, and Practice*, 44:1 Annual Review of Environment and Resources 319-346 (2019).
[63] S. Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (2014).

common object of study in the sociological or anthropological strand of literature[64].

At the same time, we can observe a blossoming of urban commons- oriented policies that are experimental and innovative in cities, most famously in the City of Bologna, which was a pioneer in this area, the city of Barcelona, with the government led by Barcelona en Comu that is providing a radical approach toward the urban commons or the city of Naples, where the city recognized illegal occupations of city owned buildings as urban commons. These policies activate local city inhabitants to collectively decide over, manage or govern a host of urban resources, which can range from open spaces to buildings to culture. In some cases, they provide a radical approach to change the democratic engagement in their cities and to promote new forms of social inclusion and justice. Relevant research efforts are devoted to the understanding of the processes behind the activation of collective action for the urban commons and the mechanism of self-governance carried out by NGOs or urban social movements. Although we can observe research efforts for analyzing and assessing policy strategies for active citizenship, collaborative democracy, and governance of the city commons, particularly in the research strand devoted to the democratic innovations and deliberative or participatory democracy, a comprehensive analytical framework, and empirical efforts to describe the phenomenon and his implications for democratic quality and inequality in cities are lacking.

Social movements and civil society organizations advocating for the urban commons and the right to the city have a global extent and so are single cities or cities' networks policy initiatives such as the Mexico City Charter for the Right to the City (2008) as well as NGO–based networks such as the Global Platform for the Right to the city. This analysis stresses on one side a relational process of collaboration – not focusing only on the commons as shared resources, but also as a process of social cooperation – and on the other side on the way they reconfigure the relationship between urban social movements and public institutions. This can also be defined as a literature on "urban commoning". Here, the scholars try to capture the nature of how urban inhabitants are changing the way of living and working and

[64] D. Harvey, *Rebel cities: from the right to the city to the urban revolution* (2013).

being in cities - *i.e.* commoning in different aspects - and investigate the dynamics of production of urban commons as a social practice [65]. These aspects also relate to some of the policies and other governance innovations that this article is trying to capture.

Urban Commons have led to the emergence of a new approach to bringing innovation and sustainability in cities. Co-cities are based on a large partnership approach, going beyond the duality of the public-private relationship. The commons imply ultimately the creation of economic diversity in the city, in itself impossible without the economic independence of the urban commons' supporters. The legal recognition provided through existing forms of urban partnerships is no longer sufficient. A model of sustainability is needed to bring about true commons in the city.

Many cities have taken the leap and complemented the legal recognition of commons with a concrete and holistic vision of the city as a cooperative space, or co-city. There have been implementations of institutions, economic and financial operations, as well as digital and educational platforms designed as the first steps towards the final goal of truly enabling a collective and collaborative governance of the city.

The previous paragraph argued that there is room for a model of governance of innovation that is based on the application of the triple and quadruple helix theories to the urban context. It also showed the necessity to include in such models another category of actor, the unorganized social actors (*i.e.* city inhabitants, local communities not organized as NGOs or in other legal forms).

The notion of urban co-governance invoked here herein involves the pooling of resources and important collaboration between five categories of actors – social innovators, public authorities, businesses, civil society organizations and knowledge institutions – representing the above mentioned "quintuple helix model". These co-governance arrangements have three main aims: fostering social innovation in urban welfare provision, spurring collaborative economies as a driver of local economic development, and promoting inclusive urban regeneration of blighted areas.

[65] C. Borch & M. Kornberger, *Urban Commons: Rethinking the City* (2015).

The triple helix model, first designed by Etzkowitz and Leydesdorff[66], is based on the tripartite relationship between universities, industry and governments. The Quadruple Helix, developed by Carayannis & Campbell[67], is blended in the aspect of a media and culture based public. The Quintuple Helix has added environmental knowledge and innovation into this framework of understanding. It is interpreted as an approach in line with sustainable development and social ecology. The goal of this 2012 evolution of the helix model into a quintuple helix was to design and propose a conversation bringing to the table an interdisciplinary framework of analysis to the question of sustainable development tying together knowledge, innovation and the environment. This model folds in the triple and quadruple helix and contextualizes them within the broader issue of sustainability. An application of such theories of the urban context is lacking. The concept of the quintuple helix could be at the core of an evolution of these models towards a model of governance of urban innovation that includes a wider variety of actors. The authors Carayannis and Campbell imply that a comprehensive understanding of this latest helix model proves that knowledge production and its use, as well as innovation, must be set in context by the natural environment of society itself.

The quintuple helix builds off the highly interactive and collaborative governance model of the triple helix and is being tested throughout Italian cities. Universities are facilitating the creation of partnerships between public and private organizations, social innovators and city inhabitants.

On the basis of these findings, a scientifically-driven research project called the "Co-Cities Project" has been developed. The "Co-City"[68] is based on five design principles extracted from practice in the field and cases identified as sharing similar approaches, values and methodologies. While some of these design principles find their origins within Ostrom's principles for the governance of

[66] H. Etzkowitz, L. Leydesdorff, *The Dynamics of Innovation: From National Systems and "Mode 2" to a Triple Helix of University–Industry–Government Relations*, 29 Research Policy 109-123 (2000).
[67] E.G. Carayannis & D. Campbell, '*Mode 3*' *and* '*Quadruple Helix*'*: Toward a 21st century fractal innovation ecosystem*, International Journal of Technology Management (2009).
[68] S. Foster. C. Iaione, *The City as Commons,* in *Yale Law & Policy Review*, 2016, 34, 281.

Common Pool Resources, they are each adapted to the contexts of the urban commons and the realities of constructing common resources in the city. Five key design principles for the urban commons have been identified: (1) Collective governance; (2) Enabling State; (3) Social and Economic Pooling; (4) Experimentalism and (5) Tech Justice.

The Co-City framework builds itself around the structure of co-governance. Co-governance is presented throughout this article as a formula based on varying degrees of self-governance, shared, collaborative and polycentric organizations in the management of urban assets, resources and services in the city. In the principles of the quintuple helix model[69], we find new forms of urban governance models applying the theory of the commons to the city. The Community integration and end-user involvement frameworks of the PCPs seen above are multi-stakeholder partnerships going in the direction of an increasingly sustainable model of urban development. Resting on the fundamental concept of co-governance, this article will take the reader through the processes of Urban Sustainable Development and Innovation Partnerships (USDIPs) and the ways to unlock the underlying potential of going beyond the static public-private dualities.

2.3 Urban Innovation and City Science

The article conceptualizes city science as a type of citizen science, embedding an emerging perspective on the role of city inhabitants, social, civic, and nonprofit actors in producing empirically driven knowledge, rooted in concrete experimentations, on innovative governance arrangements for cities' resources in cooperation with local governments and knowledge institutions.

City science theory comes into play within a theory of urban co-governance as a way to define the body of knowledge produced by experimentations on innovative forms of governance of city resources. However, city science can also be a way for cities to implement the right to benefit from science and its applications. The

[69] E.G. Carayannis, D. Campbell, '*Mode 3*' *and* '*Quadruple Helix*'*: Toward a 21st century fractal innovation ecosystem*, in International Journal of Technology Management (2009).

right to science is recognized by Article 15 of the International Covenant of Economic, Social and Cultural Rights (ICESCR)[70].

Debate on Article 15 and the right to science more broadly has been largely neglected in the literature on economic and social rights, and by States[71]. However, recently, the debate on this has been revived[72].

In 2020, the Committee on Economic Social and Cultural Rights (CESCR) published a comment on article 15. The first, important clarification is on the normative content of the right to science which encompasses a right to receive the benefits of the applications of scientific progress, but also a right to participate in scientific progress[73]. The comment clarifies that the definition of science is not limited to scientific research produced by scientific professionals, but also any form of knowledge that contributes to the production of scientific progress. Citizen science which refers to 'ordinary people doing science'[74], is included in the realm of the right to science. The right to the protection of intellectual property and to enjoy the freedom to research or to not perform research if contrary to one's ethical principles is also part of the normative content. The right also provides the possibility of states to impose limitations on the right, to protect people from the implications that the right to science might have on other economic, social, and cultural rights. And, generally speaking, 'limitations can also be

[70] According to article 15 right to science is operationalized as "the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". For the full realization of this right States shall take initiatives aimed at "the conservation, the development and the diffusion of science and culture" (par. 2), but also "undertake to respect the freedom indispensable for scientific research and creative activity" (par. 3), and "recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields." (par. 4).

[71] A.M. Hubert, *The Human Right to Science and Its Relationship to International Environmental Law,* 31 European Journal of International Law, 2, 625–656 (2020).

[72] C. Geiger, B.J. Jütte, *Conceptualizing a 'Right to Research' and Its Implications for Copyright Law: An International and European Perspective*, 77 PIJIP/TLS Research Paper Series (2022).

[73] General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) At 2.

[74] Ibid at 3.

necessary when the research affects human beings in order to protect their dignity, their integrity, and their consent when involved in the research'[75].

The normative content of the right to science entails a duty of the State to protect the freedom to pursue scientific research. States have several obligations: a general obligations to remove all barriers that hinder the equal participation of citizen in scientific activities; States must 'adopt the measures necessary to eliminate conditions and combat attitudes that perpetuate inequality and discrimination in order to enable all individuals and groups to enjoy this right without discrimination, including on the grounds of religion, national origin, sex, sexual orientation and gender identity, race and ethnic identity, disability, poverty and any other relevant status'[76].

States must pay attention to vulnerable groups, for example women, children, persons with disabilities, persons afflicted by poverty; indigenous peoples and local communities, who should participate in a global intercultural dialogue for scientific progress, as their inputs are precious, and science should not be used as an instrument of cultural imposition[77]". For example, States must ensure that all children, especially children living in poverty and/or children living with disability, 'have full access to the enjoyment of the right to participate in and to enjoy the benefits of scientific progress and its applications, as they are entitled to special care and assistance, especially through pedagogical tools and quality scientific education that allow the development of the child's personality, talents, and mental and physical abilities to their fullest potential'[78].

In terms of specific obligations, the States have an obligation to protect, an obligation to respect, and an obligation to fulfill the right to science. The core obligations are: Eliminate laws, policies and practices that unjustifiably limit access by individuals or particular groups to facilities, services, goods and information related to science, scientific knowledge and its applications; Identify and eliminate any law, policy, practice, prejudice or stereotype that undermines women's and girls' participation in scientific and technological areas; Remove limitations to the

[75] Ibid at 5.
[76] Ibid at 6.
[77] Ibid at 8.
[78] Ibid at 8.

freedom of scientific research that are incompatible with article 4 of the Covenant; Develop a participatory national framework law on this right that includes legal remedies in case of violations, and adopt and implement a participatory national strategy or action plan for the realization of this right that includes a strategy for the conservation, the development and the diffusion of science; Ensure that people have access to the basic education and skills necessary for the comprehension and application of scientific knowledge and that scientific education in both public and private schools respects the best available scientific knowledge; Ensure access to those applications of scientific progress that are critical to the enjoyment of the right to health and other economic, social and cultural rights; Ensure that in the allocation of public resources, priority is given to research in areas where there is the greatest need for scientific progress in health, food and other basic needs related to economic, social and cultural rights and the well-being of the population, especially with regard to vulnerable and marginalized groups; Adopt mechanisms aimed at aligning government policies and programmes with the best available, generally accepted scientific evidence; Ensure that health professionals are properly trained in using and applying modern technologies and medicines resulting from scientific progress; Promote accurate scientific information and refrain from disinformation, disparagement and deliberately misinforming the public in an effort to erode citizen understanding and respect for science and scientific research; Adopt mechanisms to protect people from the harmful consequences of false, misleading and pseudoscience-based practices, especially when other economic, social and cultural rights are at risk; Foster the development of international contacts and cooperation in the scientific field, without imposing restrictions on the movements of persons, goods and knowledge beyond those that are justifiable in accordance with article 4 of the Covenant[79].

This is also where city science connects with citizen science theory, mentioned above. Citizen science advances greater availability and open sharing of research and findings, but also a collaborative way of producing science through everyday engagement and cooperation between citizens, professional scientists, policy makers[80]. Overall, as Effy Vayena and John

[79] Ibid at 11.

[80] A. Berti Suman, *Challenges for Citizen Science and the EU Open Science agenda under the GDPR*, in Eur Data Prot. L. Rev. (2018).

Tasioulas[81] noted already when theorizing a human right to citizen science, the legal framework for the right to science is still heavily concerned with the right of individuals to access the benefits of science equally, rather than individuals being able to contribute to science, whether as professionals or as ordinary people.

To the extent that CSOs do promote the integration of researchers into city bureaucracy and that they promote science at the service of the everyday challenges of cities, they are expression of the State implementing the right to science. But in those cases where the CSOs adopts urban co-governance as a working method but also a goal, then it becomes an implementation of the more dormant dimension of citizen science.

To address some of these issues in connection with their climate neutrality strategy, the City of Reggio Emilia recently issued a City Regulation for democracy and urban climate justice. The Regulation defines among its rules the possibility of an institutionalized 'City Climate Neutral Contract' with knowledge, economic and social actors. How this can be used to steer the collaboration with regional institutions toward achieving common climate justice goals is an open question. The role of the CSO in this phase is to support the City in drafting the Regulation and in coordinating the inputs of all the different actors into the administrative process.[82] But this is a purely anecdotal observation. This is not inherently connected to the nature of the CSO, which may also well be a research-oriented team supporting the city in promoting its policies. The task of connecting city science with citizen science is a normative one and must be directed by the policies.

3. The Global and EU policy framework for Urban Sustainable Development

The theories developed above must be positioned within the broader international and EU policy framework. Co-governance

[81] E. Vayena, J. Tasioulas, *"We the Scientists": a Human Right to Citizen Science*, 28 Philos. Technol 479 (2015).

[82] City of Reggio Emilia, *Regolamento sulla democrazia e la giustizia urbana e climatica* (2022), available at https://www.comune.re.it/documenti-e-dati/atti-normativi/regolamenti/regolamento-sulla-democrazia-e-la-giustizia-urbana-e-climatica-a-reggio-emilia (last visited Dec. 12, 2022) (text only available in Italian, more materials in English available at www.euarenas.eu).

and urban commons are indeed recognized by UN-Habitat, Human Rights frameworks especially in housing, EU framework vertical policies (such as the City science initiative), the Urban Agenda for the EU as well as the Cohesion Policy and in particular its urban programs (URBACT, UIA) on urban sustainable development. The diversity of programs, levels and policies involved are brought to investigate how this approach can be implemented. A co-governance approach is foreseen for cities to realize successful sustainable and inclusive urban development and supports the creation of multi stakeholder Urban Sustainable Development and Innovation Partnerships (PPCPs or P5s or PCPs). With this article's combined approach of co-governance and city science, a framework for sustainable urban development is envisioned on the basis of the involvement of city inhabitants as actors in both issues of collective interests and processes of co-governance. In this sense, the concept of USIP was elaborated through the lighthouse case study of the Co-City Turin Project in honor of its innovative legal design.

As brilliantly recalled by Mariana Mazzucato[83] in the so-called Missions Report, Nelson's work on The Moon and the Ghetto[84] raises the fundamental question of "why innovation has resulted in such difficult feats as landing a man on the moon, and yet continues to be so terribly disorganized and technologically unsavvy in dealing with the earthlier problems of poverty, illiteracy, and the emergence of ghettos and slums. He argued that while politics was partly the culprit, the real problem was that a purely scientific and technological solution could not solve such problems. There is a greater need to combine understandings of sociology, politics, economics and technology to solve these problems, as well as to make the conscious decision to point innovation towards them. This is exactly what a well-designed mission can achieve."

The Missions Report underlines how important it is to enable the following elements: bottom-up solutions and experimentation, participation across different actors, stronger civic engagement, new forms of partnerships for co-design and co-creation. It also recognizes that cities are important drivers of innovation and

[83] M. Mazzucato, *Mission-Oriented Research & Innovation in the European Union. A problem- solving approach to fuel innovation-led growth*, European Commission Directorate-General for Research and Innovation, (2018).
[84] R.R. Nelson, *The Moon and the Ghetto Revisited,* in *Science and Public Policy*, 38(9), pp. 681–690, (2011).

advances the idea that public procurement, as much as social innovation, is a key lever for the implementation of a missions driven policy[85].

The starting point of this article is to position this approach to urban innovations within the existing international and EU policy framework on urban sustainable development. The article argues that an approach towards PCPs or PPCs as a leverage for urban sustainable development is enshrined in global policies as well as in EU policies and agenda. Having elaborated above on the conception of Urban Commons and the importance of urban co-governance, this article aims at presenting an alternative approach to creating a city ecosystem in which sustainable development is in reach. Through innovative procurement processes and urban partnerships, UN and EU frameworks, initiatives such as City Science Initiative (CSI), Cities Initiative and the UIA initiative present important aspects of urban sustainable development.

3.1 The Agenda 2030 and the New Urban Agenda (NUA) of the United Nations

The 2030 Agenda for Sustainable Development of the United Nations and a subset of the Sustainable Development Goals set by the Agenda itself, set a crucial framework of action for sustainable urban development, in particular through two of the seventeen goals[86].

The first one is Goal 11 of making cities and human settlements inclusive, safe, resilient and sustainable, which includes target 11.3 "By 2030, enhance inclusive and sustainable urbanization and capacity for participatory, integrated and sustainable human settlement planning and management in all countries". The second one is Goal 17 of strengthening the means of implementation and revitalize the global partnership for sustainable development in particular target 17.16 "enhance the global partnership for sustainable development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the sustainable development goals in all countries,

[85] M. Mazzucato, *Mission-Oriented Research & Innovation in the European Union*, cit. at 71.

[86] C.C. Anderson, D. Manfred, A. Warchold, J.P. Kropp, & P. Pradhan, *A systems model of SDG target influence on the 2030 Agenda for Sustainable Development*, 17:4 *Sustainability science* 1459 (2022).

in particular developing countries", target 17.17 "Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships" and 17.19 "By 2030, build on existing initiatives to develop measurements of progress on sustainable development that complement gross domestic product, and support statistical capacity-building in developing countries".

The NUA contributes to the implementation and localization of the 2030 Agenda for sustainable development. Multi-stakeholder partnerships clearly emerge as a way to implement the NUA objectives[87]. The NUA is committed to promoting "the systematic use of multi-stakeholder partnerships in urban development processes, as appropriate, establishing clear and transparent policies, financial and administrative frameworks and procedures, as well as planning guidelines for multi-stakeholder partnerships"[88].

It also values the role of city inhabitants as urban actors. It refers to "citizen-centric" digital-governance tools to implement technological innovations and it enhances the role that urban renewal strategies based on urban resources, for instance cultural heritage, can play in strengthening citizenship and participation. Paragraph 149 of the NUA states: "We will support local government associations as promoters and providers of capacity development, recognizing and strengthening, as appropriate, both their involvement in national consultations on urban policies and development priorities and their cooperation with subnational and local governments, along with civil society, the private sector, professionals, academia and research institutions, and their existing networks, to deliver on capacity-development programs."

3.2. The EU Framework. The Urban Agenda for the EU (Pact of Amsterdam) and the European Green Deal

The Urban Agenda for the EU recognizes "the potential of civil society to co-create innovative solutions to urban challenges, which can contribute to public policy making at all levels of

[87] N. Davidson, G. Tewari (eds.), *Law and the New Urban Agenda* (2020).

[88] SDG17 of *The New Urban Agenda* which was adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, on 20 October 2016. It was endorsed by the United Nations General Assembly at its sixty-eighth plenary meeting of the seventy-first session on 23 December 2016.

government and strengthen democracy in the EU" stating: "[i]n order to address the increasingly complex challenges in Urban Areas, it is important that Urban Authorities cooperate with local communities, civil society, businesses and knowledge institutions. Together they are the main drivers in shaping sustainable development with the aim of enhancing the environmental, economic, social and cultural progress of Urban Areas. EU, national, regional and local policies should set the necessary framework in which citizens, NGOs, businesses and Urban Authorities, with the contribution of knowledge institutions, can tackle their most pressing challenges."[89]

The need for new governance models that push Urban Authorities to cooperate with local communities, civil society, businesses and knowledge institutions is indeed one of the key messages sent by the Pact of Amsterdam. Co-governance is seen as a fundamental tool to both foster democratic decision-making and social innovation. The Urban Agenda for the EU calls for a recognition of "the potential of civil society to co-create innovative solutions to urban challenges, which can contribute to public policy making at all levels of government and strengthen democracy in the EU" (Urban Agenda for the EU, Title X, point 52). Co-creation models moreover prompt social urban innovation: local communities, civil society, business, and knowledge institutions together with urban authorities "are the main drivers in shaping sustainable development with the aim of enhancing the environmental, economic, social and cultural progress of Urban Areas" (Urban Agenda for the EU, preamble, 4).

In addition to addressing governance and social innovation through the Urban Agenda, the EU has been working on supporting innovation in member-states by launching several initiatives in the field of social innovation. Under Horizon 2020, the European commission has funded "innovation actions" through Large Scale Demonstration Projects that address the cross-cutting Focus Area on 'Smart and Sustainable Cities': "These demo projects are widening the solution portfolio beyond technological innovation and include social innovation for new governance, finance, and business models that can help develop new and sustainable markets for innovative solutions"[90]. The creation of the

[89] European Commission, *Urban Agenda for the EU – Pact of Amsterdam* (2016).
[90] European Commission, DG RTD, *EU Research and Innovation for and with Cities – Yearly Mapping Report – September 2017*, 10.

European Capital of Innovation Award also symbolizes the EU-wide effort to promote social innovation at the city level. Last year, Athens won the iCapital Award 2019 for its innovative policies on the social integration of migrant populations.

One of the avenues taken by the Urban Agenda for the EU is the implementation of a multi-stakeholder approach towards sustainable urban development, through the Urban Partnerships constituted within the Agenda. The Urban Agenda for the EU recognized this potential and has identified responsible and innovative public procurement as one of the twelve priority themes around which partnerships among various governmental levels and stakeholders were founded. We can identify references to a multi-stakeholder approach in many of the partnerships. For instance, the Partnership on Sustainable land use and nature-based solutions are focused on conservation of natural resources and sustainable use of land, containing the phenomena of urban sprawl. This is a key issue in terms of urban planning to which the NUA gives a peculiar operationalization by specifying that to fight urban sprawl, cities need to promote sustainable use of land as well as mixed social and economic use. (New Urban Agenda, 71). One of the actions identified by the TP Action Plan "Identifying and Managing Under-Used Land" (Sustainable Use of land and nature-based solution partnership, 2019) specifically provides that cities promote the creation of collaborative partnerships between public, private, social actors and other stakeholder that could be interested in the process. Above all, the "Partnership on Innovative and Responsible Public procurement" aims to push forward the development and implementation of an ambitious procurement strategy as an integrated and supportive management tool for governance. The Urban Agenda for the EU highlights the strategic importance of Public Procurement and Procurement of Innovation from a governance point of view, as they constitute management tools that cities can use to address social and environmental challenges.

Through the European Green deal, the European Commission calls for rethinking governance models to reach a more sustainable EU[91]. This policy roadmap aims at making the continent's economy climate neutral by turning environmental

[91] A. Bongardt, F. Torres, *The European green deal: More than an exit strategy to the pandemic crisis, a building block of a sustainable European economic model*, 60 *Journal of Common Market Studies* 170-185 (2022).

challenges into opportunities for innovation across all policy areas. A major policy initiative is the creation of the Just Transition Mechanism, making the transition just and inclusive for all. In the words of Ursula von der Leyen, "people are at the core of the European Green Deal [...]. And it will only work if it is just - and if it works for all"[92]. This mechanism will provide financial support to the regions most affected by the green transition towards carbon neutrality, amongst which cities. But it is about more than funding, as the Just Transition Platform will provide technical assistance to both Member States and investors to "make sure the affected communities, local authorities, social partners and non-governmental organizations are involved" (Financing the green transition, 2020). It also relies on Horizon Europe to leverage public and private investments for research and innovation. The European Commission thus emphasizes the need for co-governance and innovative territorial collaboration to address the challenges brought by climate change in all areas.

3.3. The City Science Initiative

A handful of European municipalities are experimenting with an organizational innovation: City Science Offices (CSOs). While CSOs are not a public-private-people partnership themselves, they are an organizational innovation that can create multi-actor partnerships, or they can be part of one. The phenomenon is still in its infancy, so it is too soon to tell, but it definitely is an innovation to keep under close observation. The Joint Research Center of the European Union created a "City Science Initiative" (CSI)[93], along with the City Science Office (CSO) of the City of Amsterdam, as a coalition of CSOs in Europe. Among participant cities are Reggio Emilia, Athens, Paris. The City Science Initiative's objective is to provide structured and long-term contact between cities, science officers working in the CSOs, European level actors and other stakeholders.

[92] U. von der Leyen, *Financing the green transition: The European Green Deal Investment Plan and Just Transition Mechanism*, Statement 14 January 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_17.

[93] European Commission, JRC Science Hub Communities, *City Science Initiative* (2020) available at https://ec.europa.eu/jrc/communities/en/community/city-science-initiative.

By putting forward the idea of a mutual exchange, cities are promoting an increased interconnectivity between their bureaucracy and research, sharing fundamentally the values of citizen science initiatives. Recognizing that urban policies on co-governance of resources, services and infrastructures form part of a larger framework concerning the role of cities in the international policy making arena, we must consider the international dimension of cities' activities and on which policy domains it is currently directed. City science might be directed towards the development of solutions to cope with climate change or pandemic prevention.

The CSOs are interdisciplinary teams of researchers or individual researchers, hired temporarily through a university-City agreement. The CSO takes the form of a physical or virtual setting where innovative civic entrepreneurs of the city, students, and urban social innovators, converge, share resources and knowledge, and join efforts with more structured and organized actors (public, private, social) to generate new solutions to tackle inclusive sustainable development targets that the City struggles to address alone.

The Municipality of Amsterdam was the first city in Europe to appoint a City Science Officer, prominent urban design scholar Caroline Nevejan. Its function is twofold: to develop structured collaborations between the City and knowledge institutions in the area; to inform urban policy making with emerging research trends that could potentially contribute to solve urban challenges[94].

In Italy, the City of Reggio Emilia (Emilia Romagna) created a City Science Office with the social science university 'Luiss'. The Reggio Emilia CSO is composed by an interdisciplinary team of researchers (law; political science; management; architectural engineering) that could help draft policies on climate and technological justice[95]. The Reggio Emilia CSO is part of a broader effort of the city government to create an institutional, collaborative ecosystem composed by science actors, local communities, socio-economic actors, and city government. In the last few years, the city crafted legal and policy tools to leverage the potential role of

[94] C. Nevejan, *City Science for Urban Challenges. Pilot assessment and future potential of the City Science Initiative 2019–2020*, https://openresearch.amsterdam/nl/page/63027/city-science-for-urban-challenges (last visited Sep 25, 2022).

[95] For full disclosure, the author of this article is involved in the Reggio Emilia CSO, in the capacity of coordinator of the research team and lead scholar.

residents, social, civic, and non-profit actors, mission-oriented local start-ups, and SMEs in experimenting with solutions for urban challenges and promoting inclusive economic development. Through the "Neighbourhood as a Commons" urban policy program, the City in 2015 approved a Regulation for Citizenship Agreement that introduces: an administrative office for social innovation; a new professional figure, the neighbourhood architect; a network of neighbourhood houses; a regulatory tool the citizens/neighbourhood agreement. In 2017, it initiated the "Co-Laboratory" initiative aimed at designing the governance and functions of the Reggio Emilia Open Lab as a space for co-creation, incubation, and acceleration of social economy solutions offering neighbourhoods-based community-owned services and infrastructure[96]. The Covid-19 pandemic confirmed the relevance of proximity services and citizen-co-owned local infrastructures as they increase city preparedness to crises.[97] The CSO provides support as a scientific advisor for the co-design of urban policies requiring a cross-cutting, interdisciplinary policy approach. Thus, it supports the social innovation department in facilitating and coordinating the capacity building of city officers. On the other hand, it manages specific projects through policy and business experimentalism labs to engage multiple public, private, social, scientific, and community actors in order to generate trailblazing and very experimental projects, policies, and solutions, that can benefit from an intergenerational knowledge exchange as confirmed by the possibility to have on field Ph.D. students actively involved in local challenges and problem-based research.

4. Bridging Urban Sustainable Development, Urban Innovation and Urban Governance: A Cross-cutting analysis of UIA case studies.

A key emerging feature related to the increasing relevance of cities at the EU level is their capacity to foster multi-stakeholder

[96] A. Antonelli et al., *Promoting Urban Co-Governance: Towards Just and Democratic Ecological Transitions in Cities (IT)*, UN Habitat (2020), https://urbanmaestro.org/wp-content/uploads/2021/03/urban-maestro_promoting-urban-co-governance-by-a-antonelli-e-de-nictolis-c-iaione.pdf.

[97] https://opendata.comune.re.it/dataset/questionario-reggio-emilia-come-va (City of Reggio Emilia Institutional Website), (last visited Sep 25, 2022).

urban governance or "urban co-governance" and city science approaches to address complex urban challenges. This is reflected both in literature on urban co-governance and in the policy documents on urban sustainable development at the UN and EU level.

The previous part of the article positioned the urban co-governance and city science concepts, both initially introduced and discussed from a theoretical perspective, within a broader policy framework. It aimed to show whether and how practices of urban co-governance are valuable to the European and global urban goals, especially when implemented adopting urban commons institutional design principles.

This part advances the hypothesis that the sustainable urban development approach enshrined by such policies can be locally implemented through urban co-governance and city science. This entails the adoption of a multi-stakeholder approach stressing the role of public actors, private actors, non-governmental organizations (NGOs), knowledge institutions and city inhabitants that those policies foresee in some of their provisions or that they implement through urban programs such as the Urban Innovative Actions (UIA) initiative on which this article is focused.

This article argues that the implementation of this approach increases the access to urban resources and creates governance capacity of local communities towards them. By supporting this process, cities can structure opportunities to generate community-led urban sustainable development and innovation. Therefore, they can empower city inhabitants and improve the responsiveness of city governance. Among the tools that cities can use or craft to stimulate this process, USDIPs leverage among other things innovative ways to apply procurement rules, one of the greatest challenges for including a variety of urban actors in urban innovation. Codifying USDIPs would stimulate further the rule of law, accelerate investment in innovation and eventually increase the capacity of local bureaucracies to manage innovation procurement.

The UIA initiative is a perfect testbed for this approach. It is an initiative of the European Union within the Cohesion policy, supported by the Regional Development Fund. The UIA aims at providing urban areas throughout the EU with resources to apply innovative solutions to emerging urban challenges. UIA seeks to help cities answer complex challenges by facilitating innovation

within urban structures and authorities and going beyond the traditionally applied policies and services provided[98].

UIA supports the testing of new and innovative solutions addressing issues related to sustainable urban development through pilot projects. UIA advocates primarily to provide urban authorities throughout Europe the space and resources necessary to create arenas of innovation and bring about new answers to the increasingly interconnected challenges cities are facing today.

UIA projects have brought about the production of key knowledge surrounding the need to identify new institutional frameworks allowing productive collaboration between urban actors and enabling social production of urban law and policies[99]. UIA emphasizes the importance of testing and implementing bold solutions as well as the idea that urban authorities cannot act alone: "(…) urban authorities need to involve all the key stakeholders that can bring expertise and knowledge on the specific policy issue to be addressed. These include agencies, organizations, private sector, research institutions, NGOs […] Bold projects need them all"[100].

Within this framework of cooperation between urban authorities, stakeholders and key urban actors, the Urban partnership report on Public Procurement acquires full significance. Researching innovative approaches to procurement represents a key element of our understanding of urban governance. Innovating public procurement by streamlining public money spending, making strategic use of the UIA funds, and setting up multi-actor's collaboration schemes are some of the challenges inherent to the UIA mission.

The following paragraph provides case studies from the UIA initiative. The UIA was, in fact, designed to stimulate urban innovation and put innovating public procurement as one of its operational challenges. We will therefore gather empirical evidence from a basket of UIA funded projects on how this vision can be achieved by cities through PPCPs or P5s or PCPs.

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[98] C. Iaione, *The Pacts of Collaboration as Public-People Partnerships. UIA Cities, Zoom-in I* (2018), available at https://www.uia-initiative.eu/sites/default/files/2018-07/Turin%20-%2001-051%20Co-City%20-%20Christian%20Iaione%20-%20Zoom-in%201-%20 July%202018.pdf

[99] U. Mattei, A. Quarta, *Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law*, 1 Italian L.J. 303 (2015).

[100] Urban Innovative Actions Initiative, 2019.

4.1 The UIA project Co-City Turin, a blueprint case for urban co-governance.

The exemplary case of Turin's Co-City Project serves as a lighthouse case study for this article. Its experimentation with co-governance and commons are in fact an exemplary case of an urban innovation that resulted from experimentations. These experimentations, based on the collaboration of the City with city inhabitants, produced a body of knowledge that constitutes a form of city science on governance[101].

This knowledge was then codified in a policy. Adopting an experimentation-based, scientific oriented approach, in fact, the City the City produced a new version of the Regulation for Governing Urban Commons. The new Regulation was adopted after the end of the Co-City project implementation phase and the reviews and integrations were inserted on the basis of the lessons' learnt through the experimentations on the factors that enable collective action and sustainability of the commons' co-governance.

The project, beginning in 2017, studied and implemented collaborative management of urban commons as a tool to counteract poverty and socio-spatial polarization. The UIA Co-City project has been carried out through a partnership with the Computer Science Department and the Law School of the University of Turin, the National Association of Municipalities (ANCI) and the Cascina Roccafranca Foundation as the leader of the Neighborhood Houses Network[102].

The results are seen through the renewal of real estate and public spaces considered as urban commons and instruments of social inclusion. Through the Neighbourhood Houses Networks, city inhabitants found the information necessary to support the drafting of proposals for different pacts of collaboration as well as the opportunities to meet other city inhabitants interested in cooperating in efforts to take care or regenerate these same urban commons. These pacts of collaboration represent the key legal tools of the Co-City project, envisioned through the Regulation for the collaborative governance of the urban commons. Many of the pacts of collaboration implemented through the Turin project envisioned

[101] See R.A. Albanese, E. Michelazzo, *Manuale di diritto dei beni comuni urbani* (2020).

[102] G. Ferrero, A. Zanasi, *Co-City Torino*, in *Urban Maestro* (2020), available at https://urbanmaestro.org/wp-content/uploads/2020/09/urban-maestro_co-city -torino_g-ferrero-a-zanasi.pdf.

an innovative form of partnership notably seen through the Via Cumiana pact proposing a green Neighbourhood house resulting in the design of a covered square. The body of knowledge produced by the Turin Co-City project is instrumentalized throughout this article in as a comparative lighthouse case study approach for USDIPs experimentation. In comparing the failures and successes of this first exemplary case, to the twelve UIA case studies chosen for their respective innovative value, this article creates a reliable toolkit for establishing functioning and successful USDIPs.

Such policies and programs bring opportunities and challenges for urban policy and practice, in light of the implementation of their goals and targets. The city model designed by the global and European urban policies introduced above is close to the urban model designed by the scholarship on urban co-governance and the more recent one on the urban commons and the City as a Commons. This is a model of development found throughout the Turin Co-City project.

The initiatives presented above, as well as the EC's programmatic lines, show how multi-stakeholder collaboration is a key strategic component of the Urban Agenda for the EU. Public procurement is identified as a key factor to foster sustainability and resilience in cities, as well as for equitable urban growth. It must be carried out through innovative legal tools and sustainability mechanisms, as experimented by the city of Turin through the Co-City project[103].

The European Commission further invests in innovation through a specific focus on the development of new commercial solutions, aimed at maximizing the potential of small companies and entrepreneurs to turn bright ideas into action. European Innovation Partnerships (EIPs) and the pilot project on the European Innovation Council (EIC) are two examples of this effort. Currently, there are five European Innovation Partnerships working in the health, agriculture, raw materials, water, as well as smart cities and communities' sectors. These EIPs "act across the whole research and innovation chain, bringing together all relevant actors at EU, national and regional levels in order to: (i) step up research and development efforts; (ii) coordinate investments in demonstration and pilots; (iii) anticipate and fast-track any necessary regulation and standards; and (iv) mobilize 'demand' in

[103] G. Ferrero, A. Zanasi, *Co-City Torino*, cit. at 99.

particular through better coordinated public procurement to ensure that any breakthroughs are quickly brought to market".[104]

Practice across thematic fields has therefore shown that Innovative partnerships constitute a key strategic tool to foster digital and social innovation in cities. The European Innovation Council pilot initiative also taps into the potential of these multi-level and cross-sectorial partnerships by investing in the skills of local entrepreneurial communities. The European Commission has confirmed its intention to set up this new body under the Horizon Europe proposal with the aim of "supporting top-class innovators, entrepreneurs, small companies and researchers with bright ideas and the ambition to scale-up internationally"[105].

The main driver behind these initiatives is the need to fast-track the kind of innovation that can create new potential markets and contribute to solve current challenges. Patrick Child, the European Commission Deputy Director General for Research & Innovation, reiterated the programmatic line of the Commission for Horizon Europe during the "Science for the City" Roundtable, jointly organized by the City of Amsterdam Chief Science Officer, the DG Research & Innovation, and the Joint Research Centre. The Deputy Director General confirmed the EU Commission intention to move towards more multi-stakeholder partnership models in order to build bridges among disciplines and increase the level of engagement of local actors. The Commission is aiming to make EU R&I strategy more linked to local challenges, with a stronger place-based approach, triggering a shift from cities as objects of research to cities as systems of engagement.

Such an approach has been at the center of the discussion of the above-mentioned "Science for the City" roundtable, which has brought together innovation officers, Chief Science Officers (CSOs), and European cities network organizations from all over Europe in order to discuss the existing structures of interaction between urban policy making and scientific research. The informal roundtable allowed for the sharing of solutions as well as common challenges among cities like Amsterdam, Berlin, Copenhagen, Madrid, Paris,

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[104] ERA-LEARN, *Other ERA relevant Partnership Initiatives. European Innovation Partnerships (EIPs)*, available at https://www.era-learn.eu/partnerships-in-a-nutshell/type-of-networks/partnerships-under-horizon-2020/other-era-relevant-partnership-initiatives (last accessed 22 December 2022).

[105] European Commission, *European Innovation Council: empowering European innovators: business acceleration services: corporate days 2017-18* (2019).

Groningen, Reggio Emilia, Stockholm, Hamburg, Cork (and more). This initiative underlined the need for the creation of new regulatory and governance frameworks, capable of enabling cooperation between knowledge institutions and city administrations in order to foster social innovation. It also highlighted the need for innovative institutions able to bring together public, private, knowledge and civil society actors in order to bring collaborative design and implement innovative solutions to tackle the variety of local challenges[106].

Many other organizations at the European level have contributed to the debate on social innovation[107]. The work of EUROCITIES is especially interesting for the purpose of this study as it confirms the necessity of a wide debate within the European community of urban authorities and city experts on the state of local innovation systems in cities and on the role of city administrations in the design and implementation of new institutional models for the development of social innovation. Both the EUROCITIES Spring Economic Development Forum, taking place in Florence from the 27th to the 29th of March, and the EUROCITIES Social Innovation Lab, taking place in Glasgow on the 26th and 27th of March, indeed tackled these questions. The EDF forum in Florence brought together urban authorities and urban experts to "discuss how new business models, new methods of participation and co-creation of innovations, stronger and more agile institutions, innovation ecosystem local champions, and better cities involvement for better regulations, can all contribute to the development of a stronger European Innovation ecosystem". The Pan-European Matchathon hosted in May 2020 enabled the brokerage of a total of 2335 partnerships by the European Commission. This example of innovation brokerage illustrates vividly the role we have envisioned for brokers in public procurement. Both the previous EUv Virus European-wide hackathon and the following Matchathon act as examples of exactly how the Commission, acting as a broker, can 'fast track' the creation and development of these citizen-led solutions to all kinds of challenges. These new partnerships, henceforth created to tackle

106 See the City Science Initiative, available at https://openresearch.amsterdam/nl/page/43873/european-city-science-initiative-csi-eu

107 See Eurocities, People's power to improve cities, 2021, available at https://eurocities.eu/latest/peoples-power-to-improve-cities/

the challenges of the global health crisis, will be scaled up over the coming months in an effort to accelerate and improve the European wide recovery. Alongside the EDF Forum, the theme of the Social Innovation Lab in Glasgow will be 'Making Inclusive Cities through Social Innovation'. It represents a one-of-a-kind initiative that will gather "100 urban policy-makers, city practitioners and 'change makers' (social entrepreneurs, start-ups with social impact, foundations) from over 50 cities in Europe to share social innovations, learn to transfer their lessons and co-create potential solutions to implement in cities".

The Charter of Fundamental Rights of the European Union states in Article 34 (3) that in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices[108].

Along the same line is the European Pillar of Social Rights proclaimed on 17 November 2017 which recognizes through principle 8 the importance of social dialogue and collective action and the right to access essential services.

President Juncker and Commissioner Thyssen jointly declared on November 13th, 2018: "The Commission has also launched a number of legislative proposals to implement the Pillar. But several of our proposals are still under negotiation between the European Parliament and the Member States. This concerns in particular the European Labour Authority, our initiative on work-life balance for parents and carers, the new Directive on transparent and predictable working conditions, and the reform of the rules on social security coordination. It also includes our proposal for the next European budget to help the Member States invest in people. The European Social Fund Plus alone is to be equipped with more than €100 billion over the period 2021 to 2027. To deliver on our joint promise, we must make swift progress on all these proposals before the European elections in May 2019. Together with the European Parliament, Member States, social partners and civil society, we are committed to safeguard and promote social rights

[108] European Commission, *European Pillar of Social Rights: Statement by President Juncker, Vice- President Dombrovskis and Commissioner Thyssen one year following its proclamation*, available at https://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=9240&furtherNews=yes.

that better support fair and well-functioning labour markets and welfare systems now and in the future."[109]

However, we know that 800 million jobs worldwide will be lost to automation[110] and that 1.5 trillion euro is the estimated need for social infrastructure from 2018 through 2030[111].

The EU Commission has implemented the Social Investment Package aimed at scaling up projects and policies on social innovation. In particular, within the EU framework, the objective is to strengthen levels of autonomy and possibility of action of city inhabitants in society and support them in their work and social lives.

The European Commission made also a clear reference to social innovation within the EaSI Program (Employment and Social Innovation), outlining a framework of priority interventions in the Regulation and relating it to two key challenges.

This article aims at developing two main strands of ideas when it comes to analyzing the state of the art in the field of innovative procurement practices.

On the one hand, the research will focus on understanding the functioning and the use that has been done of the institutional mechanism of PPPs and PCPs. On the other hand, it seeks to identify what are the institutional infrastructures that can be developed in order to sustain these partnerships. In other words, we will delve into the literature and the case studies on PPPs, PPCPs or P5s, PCPs, while analyzing the role of different institutional instruments that can make these partnerships work: innovation brokers, urban laboratories, living labs, CTOs, Competence centers, Chief Science Officers. The ultimate goal of this research is to map existing practices of urban co-governance of innovation when it comes to public procurement, using a basket of cases from UIA funded projects, and understand what the main challenges are. In order to do this, this article will attempt to respond to the three following questions: We will analyze the challenges surrounding the formation of innovative procurement practices and the connections that exist among the different

[109] President Juncker and Commissioner Thyssen jointly declared on November 13th, 2018.

[110] McKinsey Global Institute, *Jobs Lost, Jobs Gained: Workforce Transitions in a Time of Automation* (2017).

[111] A. Hemerijck, M. Mazzucato, E. Reviglio, *Social Investment and Infrastructure*, in F. Saraceno, F. Cerniglia (eds.), *A European Public Investment Outlook* (2020).

practices mentioned (PPCPs or P5s or PCPs, innovation brokers, urban labs, CSOs).

As mentioned in the introductory presentation, local administrations often encounter numerous challenges when it comes to designing and implementing innovative procurement practices. During the 'Science for the City' roundtable, city officials and representatives from cities organizations have highlighted the regulatory and governance barriers that hinder the development of a structured cooperation between the public sector, knowledge institutions, and civil society organizations.

Inherent to this reflection is the necessity to transform the role of public administrations, city inhabitants, civil society organizations and private actors.

Before we delve into the description of the operational challenges, it is important to ground the approach empirically and bring robust evidence to how the approach is described in this article. It is rooted in the most innovative projects financed or considered by the main EU programs aimed at dealing with urban governance and policy innovations.

4.2 A selection and analysis of case studies of approved UIA projects (1st, 2nd and 3rd call for proposals)

The basket of case studies analyzed for the article is composed of 12 cases selected from a dataset of the 56 projects admitted to funding in the first 3 UIA calls for proposal. The selection was based on the policy inputs as well as on an evaluation of the key tools and dimensions of the "Co-City"[112] developed on above.

The basket of case studies was selected on the basis of the following dimensions:

- Experimentation of a form of shared management or collaborative governance of an urban asset or infrastructure (both tangible or intangible)
- Involvement of the urban community/communities aimed at the creation of PPCPs or P5s or PCPs
- Sustainable and inclusive Economic development purposes

[112] C. Iaione, *Città, scienza e innovazione. Il diritto alla scienza per la città come pietra angolare di una nuova governance urbana orientata allo sviluppo sostenibile e alla responsabilità intergenerazionale*, in *Munus*, pp. 491 – 551.

- Co-design/collaborative process implemented
- Use of digital platform(s)
- Role for a "Neighborhood House" to provide learning and institutional tools to local communities and to act as a bridge between urban authorities and local communities

We collected through web mining the information available on the 56 projects using the official UIA website. The information for the case studies selection were collected using: a) the project general description; b) the project library's contents, namely the project journals, Zoom ins, media and project news.

The projects admitted to funding in the fourth call for proposals were excluded from the selection since at the time of writing their implementation phase was in a too early stage[113] to allow the analysis to measure the project's outputs and potential outcomes. Once the information was collected, the basket of case studies was filtered using the criteria that at least one source of information was available in the project library.

Building on the understanding of the city as a commons, the cross-cutting analysis of UIA projects aims at collecting a series of lessons and best practices for the future of our co-city project and Urban and Science Innovative Partnerships.

After the first analysis of the dataset, a basket of 12 projects was selected:

1. Barcelona, "B-MINCOME - Combining guaranteed minimum income and active social policies in deprived urban areas"
2. Birmingham, "USE-IT! - Unlocking Social and Economic Innovation Together"
3. Gothenburg, "FED – Fossil Free Energy District"
4. Lille, "TAST'in FIVES - Transforming Areas with Social Talents: Feed, Include, Value, Educate, Share"
5. Nantes, "5Bridges - Creating bridges between homeless and local communities"
6. Vienna, "CORE – An incubator for innovative integration projects in Vienna"
7. Athens, "Curing the limbo"

[113] X. Wu, M. Ramesh, M. Howlett & S. Fritzen, *The Public Policy Primer. Managing the policy process* (2010).

8. Maribor, "URBAN SOIL 4 FOOD - Establishment of Innovative Urban Soil Based Economy Circles to Increase Local Food Self-sufficiency and Minimize Environmental Footprint"
9. Brussels, "CALICO - Care and Living in Community"
10. Budapest, "E-co-Housing"
11. Lyon, "Home Silk Road - Housing toward empowerment"
12. Matarò, "Yes We Rent"

The basket could most certainly benefit from the integration of more cases. We suggest, as a future research agenda, to integrate the analysis with cases from the fourth call of proposals as well as cases from the previous calls for proposals that are not included in this analysis because at the time of data collection they had not yet produced measurable outputs for the scope of analysis of the article. Examples are: two projects in the city of Ghent "ICCARus (Gent knapt op) - Improving housing Conditions for CAptive Residents in Ghent" and TMaaS - Traffic Management as a Service; a project in the city of Pozzuoli, "MAC - Monteruscello Agro City"; a project in the City of Bologna, "S.A.L.U.S. 'W' SPACE - Sustainable Accessible Livable Usable Social Space for Intercultural Wellbeing, Welfare and Welcoming".

The following phase of data collection and analysis consisted in the in-depth analysis of projects' outputs available in the project's library as well as for additional data gathered through semi-structured interviews conducted with one or two key interlocutors of each project: the project coordinator appointed by the City and/or the project expert appointed by UIA. The data collected was coded against an analytical grid crafted by the author.

The analytical grid builds on the body of knowledge produced by the UIA expert's academic activity within the urban commons and PCPs and PPCPs scholarship as well as on the work carried out as an UIA expert for the Co-City project of the City of Turin. The UIA Co-City Turin project carried out an intense knowledge production effort to measure such innovation and their potential impacts in terms of urban sustainable and inclusive development at the neighborhood level.

The empirical analysis was based on the measurement of five design principles of the governance of urban commons, elaborated

through the Co-Cities theory[114]. In order to identify potential fertile grounds for a city in transition from the governance of various urban commons towards the governance of the city as a commons or Co-city, it is useful to offer a gradient which captures the most relevant characteristics of that transition. These principles are: urban co-governance; enabling state; social and economic urban pooling; urban experimentalism; tech justice. For the article, the analytical grid was inspired by the Co-City framework but focused primarily on the first dimension, urban co-governance. The author crafted specific indicators aimed at measuring the creation of a PPCPs as well as detecting the legal tools adopted and the type of governance implemented.

The grid is composed of the following variables:

Actors	Partnerships	Initiator (policy goal)	Management /Governance mode	Use/Impact	Sustainability and responsibility	Legal tools adopted	Role of Community
Typology of actors involved (public, private, scientific, NGOs, communities, others)	Presence of a public-community or public-private-community partnership	Purely economic or public policy (sustainable development)	Participatory /Deliberative /Collaborative vs. Traditional/Exclusionary	External Mutualism vs. Exclusive rights of use	Risks on one actor (mainly the public) vs. risks is shared	PPI solutions / PPPs /	Community empowered vs. Community as a beneficiary

Finally, two further sets of case studies were considered but only through desk analysis, one rooted in projects of the Horizon 2020 program and another rooted in the URBACT program to see if they show similar variables and use of similar policy tools.

4.2.1. Barcelona (Spain), "B-MINCOME - Combining guaranteed minimum income and active social policies in deprived urban areas"

The B-MINCOME project aims at empowering vulnerable families through the creation of a guaranteed minimum revenue, hence relieving economic pressure.

[114] S. Foster, C. Iaione, *Co-Cities*, cit. at 4; Id., *Ostrom in the City*, cit. at 4.

The point of departure of the B-MINCOME project is a municipal desire to redesign the provision of social services to fight off urban poverty. In particular, the initiative aims at building a participatory and community-oriented system empowering vulnerable populations, reducing their dependence on subsidies in the long term and making them the actors of the service they receive through the creation of a guaranteed minimum income (GMI).

To this end, B-MINCOME is conducted by a partnership gathering municipal authorities, a think-tank, a research center and multiple universities. The project also includes key stakeholders such as social services and the Chamber of Commerce. The large engagement of knowledge institutions has enabled the development of a research-oriented process. Indeed, the experimental approach is a major strength of B-MINCOME. The guaranteed minimum income created is distributed on a trial basis with randomized control groups to test various types of revenues and their impact on the reduction of urban poverty. This experimentalism will enable the development of more efficient welfare services in the long run.

To test its relevance within the larger framework of social services provision, the GMI in Barcelona is accompanied by a set of other services made available to the selected families to provide them with a greater autonomy and responsibility, as a lever to overcome poverty. The project has thus developed an innovative ecosystem enhancing private, public and community initiatives. One of them is the creation of a social currency, which should covert part of the GMI. Such a tool stimulates local exchanges and services, creating a form of pooling economies. Overall, the innovative services provided by social workers enabled to unlock the full potential and opportunities brought by the GMI that relieves economic insecurity and pressure, thus giving greater freedom of choice to the families that benefited from it.

Despite not using the EU public procurement or legal framework, the B-MINCOME project brings important learning insights with regards to the governance and working structure of social services. Innovative and community-oriented welfare requires a large flexibility in social workers' activities to bring participative and group-work that would better respond to people's needs.

4.2.2. Birmingham (United Kingdom), "USE-IT! - Unlocking Social and Economic Innovation Together"

UIA Category: urban poverty

The USE-IT! Project addresses integration of migrants through the development of social enterprises. It aims to identify and train overseas migrants with relevant medical and non-medical qualifications that could be matched with jobs available in the NHS hospital, a major provider of health resources and employment in the area of Greater Icknield.

The projects' achievements are impressive: 208 individuals with relevant medical and non-medical qualifications are on the USE-IT! clients database; 143 have been invited to the free training for the language exam IELTS (International English Language Testing System); 15 persons have started work experience placements at the Hospital; 32 are in paid work in Health Care as an interim employment opportunity.

There was strong cooperation between the local government, the health service, universities and neighborhoods to gather qualitative and quantitative data as well as to create jobs and social enterprises.

The cornerstone of the project was the partnership constituted between the NHS Trust, the social care providers and the hospital and community organizations. This partnership was key to build effective employment paths for migrants in the new NHS hospital built through the project.

The USE-IT! project supported the development of socio-economic activities in the community through social enterprises and cooperatives, boosting "community services" through city inhabitants and socially innovative producers; this is linked notably to a hospital and housing developments in the project's area. The main activities have been the awareness and capacity building within the communities in the area of Greater Icknield to activate inhabitants to become social and community entrepreneurs and to solve local social and economic issues by starting social enterprises, cooperatives and community businesses. The project developed a Social Enterprise network, an Online Networking Platform (SOHO) and a social enterprise consortia. The platform hosting consortium is a key tool to support social partnerships because it allows existing social and community businesses to connect and cooperate for new opportunities together in different market areas (health and social care, creative industry, food, construction and tourism).

4.2.3. Gothenburg (Sweden), "FED – Fossil Free Energy Districts"

UIA category: energy transition

The FED project addresses the district level energy system to reduce carbon consumption. The municipality of Gothenburg aims at reducing energy consumption in the city. It also has as its goal to develop the innovative FED project establishing a local marketplace for electricity, heating and cooling that would work towards an energy transition.

The project aimed at experimenting and developing a new energy system at the district level based on the use of information and communication technologies for electricity, healing and cooling. The technology enables a smoothing of energy consumption, reducing peak loads, and enhancing the use of fossil-free energy. It has a strong experimental aspect with the municipality foreseeing a scaling-up in the future, which could make Gothenburg a carbon free city.

The FED project is based on a public-private partnership involving the local government, numerous public and private companies working mostly in the energy sector, and two research centers. In the project, the community is an end beneficiary who is not directly involved during the process, given that FED is based on business-to-business transactions and marketplace.

The experimentation of the project took place mainly on the campus turned into a "demonstrator area". This was so due to the legal context: the exemption from the law of concession of electricity distribution made it possible to test and validate the district level energy market. It also aimed at balancing buildings usage profiles, managing the volatility of energy markets through an optimization system. On the business side of things, the project enabled the creation of sustainable markets fostering exchange and cooperation between stakeholders to create value.

The strength of the FED project is its sustainability. The district level energy market entails new revenues and flows for key stakeholders: utility companies, third party suppliers, homeowners and users, meaning the community. This cost-effective energy improvement strategy enables the implementation of green solutions while avoiding the increase of rental cost for the most vulnerable of the city's inhabitants.

4.2.4. Lille (France), "TAST'in FIVES - Transforming Areas with Social Talents: Feed, Include, Value, Educate, Share"

UIA category: urban poverty

Lille project "TAST'in FIVES - Transforming Areas with Social Talents: Feed, Include, Value, Educate, Share" aims at building a shared space to provide social meals. The project will build a collective governance for the space. The main goal of the project is to activate urban development through social entrepreneurship promotion using the topic of food as a commons as an entry point for the activation of collective action.

The collective governance mechanisms adopted are particularly relevant to our work. The use of a shared community kitchen illustrates for this article the concept of USDIPs and serves to demonstrate an important example of district-based inclusive economic development. The TAST'in FIVES project is a lighthouse case study within this article, illustrating the potential of a co-governance mechanism based on a PCP in instigating district-based inclusive economic development.

The project aims at counteracting poverty in a low-income neighborhood of the city of Lille, the Fives district (50% of the population lives under the nationally established threshold of poverty). It will do so through the creation of a collective kitchen in the Fives-Cail-Babcock brownfield. The kitchen will be a space to provide training opportunities, job opportunities and socialization opportunities around shared meals to counteract loneliness.

The main innovation of the collective kitchen is the co-governance mechanism based on a PCP aimed at empowering the neighborhood inhabitants and relying upon them to be drivers of the district-based inclusive economic development. At the same time, the Lille case the challenges faced when developing co-governance, in particular the challenge of reaching out to and involving actors that are not part of the project's initial partnership.

The kitchen is not operative yet. A temporary site has been set up to carry out a co-design and experimentation phase while the kitchen facility was under construction. The project invested serious efforts in an experimental strategy of involvement of stakeholders, particularly of neighborhood inhabitants, through the co-design process of the community kitchen, the future incubator, and the organization of food-related workshops in the temporary kitchen. The co-design process was implemented through a series of participatory workshops and co-creation workshops on field (in

the temporary site) that involved local inhabitants, public authorities, NGO, and entrepreneurs with a food-related business idea. The goal of the workshops was to collect input on the design of the future collective kitchen alongside engaging the actors that could be involved at a later stage of the process when both spaces will be set up and running their activities. The food-related workshops also proved key to engaging with neighborhood inhabitants, NGOs, and a number of non-UIA partners booking the kitchen for various purposes. All of this shows that ownership of the project is building up at neighborhood level. The project strongly relies upon local NGOs and public services as being anchors of the involvement of beneficiaries in the co-production process of the facility.

There remain significant challenges, however, when it comes to the project's ability to reach out to socially excluded populations as well as inhabitants who have yet to enroll in NGOs or public social services.

The City of Lille has also decided to launch a call for proposals for the organization of social events on the temporary site. A total of 30.000 euros will be allocated to food-related social business projects, with a minimum of 500 euros and a maximum of 3.000 euros per project. Beneficiaries will use the community kitchen for free and receive support from the City of Lille for their dissemination. By targeting NGOs and groups of inhabitants operating in the Fives district, this call for proposals aims at boosting the involvement of the latter in activities on site to enrich the partnership with social actors and to improve the outreach of the project.

The partners are still in the phase of designing the governance model which will be based on the output of the co-design workshops. The collective kitchen is not yet operative.

The public procurement did not present major challenges in the first phase of the project's implementation. It will certainly present some challenges however once the kitchen will be fully operative. The Lille project brought to light a key feature of public procurement in collaborative governance partnerships: the tendering process cannot formally make space for the whole partnership. Therefore, a potentially important challenge facing projects like these is that of embedding its vision and complex design in each and every one of the tendering processes issued by the partners.

4.2.5. Nantes (France), "5Bridges - Creating bridges between homeless and local communities"

UIA category: urban poverty

The 5Bridges project experiments with an urban design–based strategy to counteract homelessness and promote social integration. The project is based on the premise that the pathways towards homelessness (inadequate housing, unemployment, social segregation, poor health) can be counteracted with a policy strategy based on high quality housing. It adopts a comprehensive approach towards homelessness as a complex and multi-variable situation. The 5Bridges project will create a high-quality housing unit (it will be able to host 40 people) within an urban regeneration project in a central area of the city of Nantes. This is far from the conventional approach towards public and social housing wherein complexes are often built in poorly served areas in the cities' outskirts far from many of the workplace and without social or economic diversity. This more traditional approach may result in a worsening of the social segregation of homeless people. Rather, Nantes' project embraces the assumption that social segregation is often the result of a negative perception of homeless people living in shelters within isolated areas. Such negative perceptions are due to the lack of interaction with the rest of the urban population, and directly tied to the isolation of the urban areas in which shelters are positioned.

5bridges foresees the creation of a building operating as a one-stop shop interconnecting different social groups, providing work opportunities, as well as social and solidarity services (e.g. housing, health care, and other tailored social services) and counting on an active involvement and empowerment of potential users. The mechanism of collective governance of the one-stop shop is not in place yet. In this first phase of project implementation, the activities focused on the process of co-design of the complex itself, involving inhabitants of the area, homeless people, welfare and social service professionals.

The project embraced co-design as a working methodology to design the functioning of the solidarity shop. However, the relationship between the homeless as potential clients involved in the co-design phase and the neighborhood inhabitants proved so difficult that the experimentation with the urban farm was brought to suspension. Moreover, the number of neighborhood inhabitants involved remains too weak. In a process of co-design that strongly

empowers the homeless people, the professional expertise of social workers might continue to be unnecessarily undervalued. That's why the project managers decided to take more time to organize the participation of homeless people and bring about their empowerment.

Alongside a hostel and a social housing complex, 5bridges will also host an urban farm and social kitchen, social economic activities (in particular, a solidarity shop) and a set of health care services. This is called a "One stop shop" for homelessness.

Public procurement is a very important factor in this project. The construction work as well as core tasks of social and community activities are tendered out in this way. This element is key to the proposals made in the next part of this article in efforts to move towards collaborative governance in such Urban Sustainable Development and Innovation Partnerships.

One aspect in which there is scope for improvement is in the lack of involvement of the stakeholders active in the fight against homelessness in the tendering procedures of the 5bridges project. The impact of the project on the way homelessness is addressed in the city would be greater if the stakeholders usually involved in these policies participated in the project. They could learn from it, and finally implement changes and improvement thanks to these processes. Their participation should therefore be more thoroughly encouraged.

In projects experimenting with co-governance partnerships for urban innovation, a key challenge is identifying a social business model. Securing a business model that is financially and socially sustainable for activities supported by a multi-stakeholder partnership and run by the urban community is crucial. In the 5bridges project it is clear that public procurement has helped to inject creativity and innovation even within the core tasks. An example is the tendering out of the development and management of the urban farm, a key feature of the one-stop shop for homelessness. The tender has been awarded to a provider that turned the high expectations of the design into a financially viable proposal.

4.2.6. Vienna CoRE (Austria) - "CoRE – An incubator for innovative integration projects in Vienna"

The Vienna CoRE project promotes the creation of a physical and digital platform to enable cross-sectorial cooperation and peer mentoring for integration of asylum seekers.

CoRE' becomes a lighthouse case study throughout this article in its use of digital tools for co-governance purposes. It is a key example of tech-based citizen-led innovation. The utilization of a digital platform co-created by cooperation between refugees and professionals brings a crucial element of analysis to the article.

CoRE has been conceptualized as an empowerment fabric jointly planned, utilized and operated by public institutions, NGOs, civil society initiatives and refugees. It is aimed at developing a physical and digital platform focused on finding innovative solutions to facilitating the integration of highly fragile refugees such as unaccompanied minors. CoRE initiates a smart transformation of the integration system by considering refugees as equal partners with whom to work in collaboration with rather than solely as passive beneficiaries.

The CoRE building offers both community spaces and services, pooling resources from a broad range of stakeholders to promote the proper integration of asylum seekers. Services offered include mentoring and coaching to empower refugees' entrepreneurship capacity, as well as the facilitation towards access to affordable housing solutions and social and cultural integration. CoRE has also launched a call for ideas through which related projects can apply for funding, including funding for Housing First and Health Promotion projects. This was CoRE's greatest success in their implementation of various integration projects based on social cooperation between NGOs, civil society initiatives and refugees. CoRE is thus perceived as the incubator of innovative integration projects. The digital platform was co-created and realized by refugees and professionals in cooperation. It provides information, in native languages and in an accessible format, on the integration opportunities and basic services available in the city and at the CoRE facility. The last aspect of the project is to function as a think-tank. This entails that CoRE will continuously monitor and evaluate the innovative solutions and policies tested. Such analysis will enable the adoption and development of new practices.

Injecting innovation into the system of integration of refugees is a cornerstone of the CoRE project and public procurement is of a crucial relevance. The project is characterized

by a high degree of flexibility, resulting from both systemic factors and from the characteristics of the innovation involved.

Public procurement was identified since the beginning as the main challenge of the project's implementation as the features of its innovation require a high degree of flexibility, especially in a policy domain that is so innately subject to change. The project might therefore need to adapt to the changing legislative framework. A big challenge for CoRE is adapting to the changing demands of the target beneficiaries resulting from a more restrictive approach in asylum law at the national level, which required adjustment of the projects' activities.

The project as a whole is highly experimental, and evolutions are difficult to predict. Several of the tasks of this project, starting from the digital platform development to the social capital building and training activities carried out in the CoRE hub are inherently collaborative, especially because they are self-organized by NGOs and refugees involved.

4.2.7. Athens (Greece), "Curing the Limbo - From apathy to active citizenship: Empowering refugees and migrants in limbo state to ignite housing affordability"

The project "Curing the limbo" (City of Athens, Greece) develops innovative affordable housing solutions and collaborative arrangements to improve the employability of refugees.

Curing the limbo addresses the issue of refugee integration through affordable housing, support to find employment and involvement in active citizenship activities. This is achieved by supporting the refugees and local unemployed searching for affordable housing and employment by leveraging on the promotion of social integration through concrete involvement of existing community-led neighborhood improvement activities.

By utilizing a learning and institutional tool, the project 'Curing the Limbo' has demonstrated how such elements can bring about a mutually beneficial result to two parties that previously were unknown to one another. Athens' project here represents another lighthouse case study for the use of learning and institutional tools enabling the Urban Sustainable Development and Innovation Partnerships described in this article. In associating refugees with property owners, the project has created a form of brokerage of need and availability. The pooling together of the available resources has rendered fruitful exchanges.

The project creates a circular "housing exchange" system. Refugees receive affordable living spaces from the city's available housing stock or from privately owned stocks, through the intermediary of the City while they are involved in citizen-led activities addressing the improvement of quality of life in cities' neighborhoods. Participants receive training supervised by the University of Athens, (including language learning, psychosocial support, "street law" knowledge, social and soft skills).

The exchange is developed around the incentives given both to tax-paying property owners of currently empty spaces as well as to the beneficiaries through their integrated inclusion in active citizenship activities organized by inhabitants and/or NGOs. The idea behind it is that through the involvement of refugees in the activities of the civil society the integration process will be facilitated and the opportunities to find affordable housing options will be increased. As a potential result of relations and connections created through the activities the emergence of accommodation options that are not yet in the radar of the public housing stock. The housing exchange mechanism is based on the city acting as a platform between multiple actors pooling their resources to facilitate the integration of refugees in the social and economic life of the city. The cornerstones of the housing exchange models are the connections between refugees and civil society initiatives for the city neighborhoods; the intermediation provided by the City between large property owners and individual property owners and the refugees in search for an affordable housing solution; the training offered to refugees of language and ICT courses.

The City has a proactive role coordinating the pooling of resources of the multi-stakeholder partnership.

The City uses Synathina - a platform developed by the City to collect and connect the civil society initiatives for urban regeneration, cultural activities, cooperative placemaking, community organizing taking place in Athens in order to identify all activities in which the refugees beneficiaries of the project can be put in contact with and provide capacity building workshops for cultural mediators acting as ambassadors bridging together refugees and local communities.

The Synathina platform is also used to launch the call for property owners willing to cooperate with the Curing the limbo project. To map existing and potential housing opportunities the City created a list of abandoned properties in the city and at the

same time, is developing partnerships with the big property owners in the City. So far, the most advanced relationships are with the University of Athens, an institution with over 700 apartments and buildings – that signed a Memorandum of Understanding with the City and the Ministry of Labor, one of the largest property owners of the whole Country. A series of meetings were organized with individual property owners through the National landowner association. The beneficiaries have access to a package composed of lower rent in exchange for 2.200 euros renovation budget (for the property owners) and a 6 months subsidy for the refugees (the preliminary findings from the first round of meetings with property owners show that this package might not be attractive enough and there property owners sometimes have doubts that six months is enough time for refugees to find a job allowing them to pay a rent). To facilitate the process, the project constituted a Housing facilitation unit that will design tailored housing plans for refugees. A key role is played by Catholic Relief Services - United States Conference of Catholic Bishops Greek Branch - that has issued a report with a review of innovative housing mechanisms: exchange models, credit-based systems, incentive schemes.

In the case of Athens, public procurement did not play an enabling role. The project did not adopt legal tools offered by the EU public procurement for innovation framework. The public procurement procedures are indeed very complex in Greece and this resulted in additional burden and delays for the project in its initial phase.

4.2.8 Maribor (Slovenia), "URBAN SOIL 4 FOOD - Establishment of Innovative Urban Soil Based Economy Circles to Increase Local Food Self-sufficiency and Minimize Environmental Footprint."

Issue addressed and policy domain: transformation of municipal waste in urban soil community gardens to reduce carbon footprint

The municipality of Maribor launched Urban Soil 4 Food to reuse the city's waste in the circular economy and minimize its environmental footprint. Its goal is to optimize the use of local resources in a sustainable fashion, in a mutually connected system bringing together public and private companies, city inhabitants and local government. The creation of a model of urban-soil based economy aims at positive economic, environmental and social

outcomes. The production of the urban community gardens will be part of a local circle to increase the city's self-sufficiency.

The municipality partnered up with three NGOs working on social projects and innovation, as well as infrastructure and public service providers, a consulting company and a national research institute for the project. Urban Soil 4 Food is thus close to the quintuple helix model gathering actors from both public and private sector, the community and knowledge institutions.

The project is testing a pilot system for urban soil production based on waste from various sectors including the industry. The experimental approach is also reflected in the creation of an Agri Living Lab in which activities regarding social innovation, urban environment and agriculture take place. Moreover, Urban Soil 4 Food aims at creating an urban food chain from the community gardens to promote local production and consumption. In this context, they are still working to build a sustainable business model based on the pilot system for urban soil production.

The urban community gardens were built on unused municipal land and are open to the public after a year, monitored by the NGO Aktiviraj.se. They emphasized the importance of learning-by-doing in the first phase of the project's experimental gardens, as a "know-how tool kit" for individual gardeners. The community gardens involved diverse populations and are an opportunity for social inclusion through workshops and community building. The definition of the open call process to identify the criteria for selecting the gardeners was made in collaborative fashion and a participatory approach was adopted for the development of the gardens' management model.

Public procurement is a crucial part of the project, especially for the technological part of the project. Despite the length of the procedure, Urban Soil 4 Food is proceeding with the procurement process for the soil production facility and have already signed the rental agreement for the pilot site. They are also working on environmental permits.

4.2.9. Brussels (Belgium), "CALICO - Care and Living in Community"

The Calico project supports the creation of a community land trust for housing purposes. Through Calico, the City of Brussels is pushing for a new form of welfare that would rely less on institutions and more on civil society. It does so by providing

community-land trust housing, providing an alternative opportunity to building a community-led model of care and strong collaboration amongst different urban actors. The project aims also at reinforcing the autonomy of vulnerable populations and bringing forth their social inclusion through greater participation in the decision-making process.

Calico is the fruit of a large partnership gathering several local and regional public authorities, community land trusts, interest groups advocating for the right to housing, and a research institute. The project experiments with a model of public-community cooperation for urban innovation.

The pilot project will provide thirty-four homes organized in three community-led cohousing clusters. The community land trust bought the land and common parts of the building, sharing the risk with the municipality and enabling the renting of affordable and social apartments. Each cluster will target a specific group particularly affected by housing issues, such as women, older people and low-income families, with an intergenerational and intercultural approach. The future inhabitants have been selected and chosen groups constituted at the very beginning of the project to make sure their involvement will be seen every step of the way. They will benefit from workshops and training for cohousing and property management to reinforce their autonomy.

The building will be managed following a cooperative model, although it is not formally and legally constituted as such. This means that inhabitants will be in charge of the maintenance and management of the common spaces and organize social gatherings to improve social cohesion.

The community land trust resale mechanism supported by public funding will ensure the sustainability of the project and guarantee that affordable housing will be provided in the long term with some kind of economic returns.

Calico is not based on the European legal framework and used the national procurement law for the restructuring of the building that will host the project.

4.2.10. Budapest (Hungary), "E-Co-Housing - Co-creating a Regenerative Housing Project Together with the Community"

The E-Co-Housing project was funded by UIA under the category “housing” and it supports the creation of a regenerative and collaborative social housing community co-created by

inhabitants. Sustainability is key in the project's design way, alongside the increase of awareness among district inhabitants to the topic. To answer housing needs, the project proposes the creation of a modular building adapted to the different size of the families it will host. It relies upon the principles of circular economy to create a green space, through the regenerative use of land and the recycling of waste of materials.

A crucial aspect of the project's partnership is the large involvement of the private sector, which is not always easy in collaborative projects which due to their nature tend to gather mostly the interest of mostly public and community actors. E-Co-Housing brings together the municipality, four small and medium-sized enterprises working mostly in urban planning and sustainable development, NGOs, a research institute as well as an infrastructure and public service provider. This is a very comprehensive partnership which again echoes the quintuple helix model.

E-Co-Housing will offer housing collaboratively created by inhabitants themselves for around 100 people in a social community. The future renters are involved from the design process and for each step of the project. They were precisely selected on the basis of their motivation for cooperation and community development, besides the economic considerations. Some empowerment mentoring programs will be conducted for the creation and development of a sustainable social housing community.

In E-Co-Housing, great attention was paid to the public procurement process. It was the first milestone of the project in May 2019. An integrated design process enabled the provision of tender documentation for the public procurement needed for the construction of a modular multi story regenerative building. This design process was supported by the use of the innovative system enshrined in the Building Information Modelling system. Moreover, the architects were directly involved in the partnership, making them part of the project rather than simple contractors, which should guarantee the realization of a building true to the ambitions of the project.

4.2.11. Lyon (France), "Home Silk Road - Housing toward empowerment"

The Home Silk Road project experimented with innovative accessible housing as a tool to foster territorial, economic and social integration through urban planning, social cohesion, culture and heritage enhancement. The project acknowledges the role of municipal authorities in fighting gentrification and providing accessible housing for vulnerable groups, most notably in central neighborhoods. The project aims at changing the housing paradigm and bringing vulnerable populations, which are too often relegated to the urban peripheries, to the heart of the city. This effort aims to show that these 'at risk inhabitants can also contribute to the societal and economic value of these areas.

In Lyon's community restaurant project is used a source of funding built on a hybrid economic model for neighbourhood sustainable economic development. This makes the Home Silk Road project a lighthouse case study for the financial tools presented as an operational proposal in this article. Through a financially sustainable model, the restaurant is able to contribute to stimulating the economy of the community and fostering the neighborhood perennity.

The populations benefitting from this new housing space will have a more direct access to urban resources and opportunities. They will benefit from a new kind of welfare, through support aiming at giving them new tools for citizen empowerment. The project also foresees the creation of other services in the building, fostering social interactions that will also alleviate the negative perception of vulnerable populations.

The partnership leading the Home Silk Road project involves public, private and social actors. The Lyon Metropole and Villeurbanne municipality are associated with a public infrastructure and services provider, the East Metropole Housing, a cultural interest group (the Ecumenical Cultural Centre) and the association ALYNEA, which accompanies persons in situation of precariousness towards social and professional autonomy. This collaboration was enabled by a French legal tool, the Economic Interest Grouping (Groupement d'Intérêt Economique).

This initial partnership is enriched by the inclusion of the community, especially of vulnerable populations, at each stage of the design and implementation process, including that of procurement. Twenty temporary occupation agreements were also set with diverse local NGOs working on art and culture, inclusion, city lab and handcraft, as a way to anticipate future collaborations

for an upcoming multipurpose project that is lead in parallel of Home Silk Road, as part of the larger territorial development on l'Autre Soie brownfield. The Home Silk Road will function as a laboratory that will gather inhabitants with housing and non-housing business partners to renovate an emblematic building. The place will then host diverse populations in need (migrants, students, families) through different housing adaptable solutions, as well as services enhancing innovation and community aggregation.

The lab format will enable the testing of new housing solutions. For instance, as soon as the first phase of construction work will begin, a new model of temporary housing will be provided for thirty vulnerable families which will be offered support through capacity building and integration activities.

A community restaurant has already opened, attracting people from the neighborhood and offices around. This ensures a diversity that alleviates the stigma that could be attached to the complex. This restaurant is a source of self-financing but the economic model, still in discussion, will be a hybrid one.

Public procurement was crucial in the project, as the services offered by Home Silk Road started along with the construction work through an integrated worksite. Therefore, it is necessary to include the new model of temporary housing as part of the renovation work. A participatory process that includes inhabitants and users' consultations enabled this innovative renewal.

Moreover, social clauses were put in the procurement to guarantee the inclusion of unemployed people in the restructuration work, meaning that 2930 hours will be dedicated to them during construction works.

4.2.12. Matarò (Spain), "Yes We Rent - leveraging vacant private property to build up a cooperative affordable housing scheme"

The Matarò project got funded through the UIA category "housing" experimented with an organizational model of a publicly funded and controlled multi-stakeholder cooperative of homeowners providing affordable housing.

The key learning for this article is the successful use of the legal tool of cooperatives. This makes the case of Matarò an important element of the article analysis.

The model works on the basis of the empowerment and self-management potential of coops as well as the empowerment of its tenants. The model of cooperatives enables a self-organization of homeowners that will create favourable conditions to generating affordable and stable rental housing. The project aims at transforming vacant private property into accessible rental supply, thus using housing for territorial inclusion and social cohesion in the city. It also recognizes the role of the community and private individuals in providing services and social opportunities such as affordable housing. Yes We Rent! aims at developing a replicable model that could thus be exported. The project is the fruit of a multi-stakeholder partnership between Mataró City Council, the provincial authority of Barcelona, NGOs (Fundació Unió de Cooperadors and Fundació Jovent) and research institutions (IGOP and TecnoCampus). They worked with key local stakeholders in the steering group, advisory board and technical commission to run the project, however homeowners are not directly part of the partnership due to existing regulation, there are only social clauses.

A Learning event was organized on the 12th of December 2019 to reach a larger audience of experts, key parties and to gain support from a larger variety of people. It was an opportunity to discuss the role of municipal administrations in promoting the rental of social housing.

The Yes We Rent! project proposes innovative housing solutions in the form of the creation of cooperatives of tenants offering. Owners of empty properties joined the project and were trained to learn the functioning of the cooperative.

Given that their houses and apartments are not rented because of lack of resources and fear of tenants not paying, certain incentives were put in place to foster homeowners' commitment through a virtual currency created by the cooperative itself. Additional financial and organizational support is provided for the writing of rental contracts, the energy-oriented renovation of the property (up to 16,000 € for renovation and up to 2,000 € for energy-related renovation measures can be subsidized), through tax relief and rent guarantee. At the start of the project, while the cooperative remains under construction, the municipality will act as a contractor for homeowners and thus ensure the delivery of the incentives. On the owner side, they must each commit to renting their property to the affordable housing scheme for a minimum of five years below market price.

The final goal of the project is to hand over the affordable housing scheme to the cooperative once it becomes itself a sustainable autonomous agent in the housing market. They are working to attract new empty flats and defining a solid financial model that will enable the city council to take leave from the project. They then foresee a scaling-up beyond the municipality of Matarò via a collaboration with other cities.

The project does not plan innovative public procurement as it addresses existing private housing that is not yet occupied. However, professional training was provided to unemployed youth for the rehabilitation of vacant flats for the scheme, so that they are ready to be rented. This will enable homeowners of the cooperative to hire youth in the perspective of restructuring work in their own private houses or apartments that are subsidized by the municipality. Through the renovation work, the city targets the employability of young people, an issue that remains important in Matarò. The training provided with the association Salesians Sant Jordi will give them better starting opportunities on the labour market even after the renovation of Yes We Rent! Properties.

4.3. Key Takeaways from the Comparative Analysis of UIA case studies.

The selection of UIA projects listed and analyzed above has brought to light several new operational insights and new challenges to urban co-governance theories. With the background understanding of the Turin Co-City Project and its co-governance innovation, the case study analysis leads to some key takeaways useful to illustrate and build further the concept of USDIPs.

A key element of our analysis of these cities initiatives is the need to couple comprehensive policy frameworks composed of a wide array of legal tools enabling co-governance – therefore not limiting the consideration to pacts of collaboration or civic uses, but integrating also other tools like innovation procurement, impact contracts, participatory foundations, community coops and community land trusts - with financial tools (solidarity funding; mechanisms to allow the initiation of forms of external mutualism and solidarity) and innovative strategies of multi-stakeholder engagement, often centered on the creation of physical and virtual experimentation and learning environments (*i.e.* living labs, city science offices, innovation brokering spaces or platforms, etc.). This

article finds empirically relevant solutions for implementing co-governance theory as shown throughout the previous case studies and the lessons learned from their analyses.

The implementation of the Community Land Trust as a legal design tool in the CALICO project in Brussels is of significant importance to this article's understanding of co-governance. The project has allowed for the community and inhabitants to have a substantial legal voice in development processes. Utilizing the legal tool of community land trusts has allowed the project to make its partnership functional and grant to the community members a role of their own in the processes. The long-term benefits of such legal tools ensure the sustainability of the project. The success of the community land trust has made Calico's project a lighthouse example of the integrating legal policy program elaborated on in the following pages of this article.

Matarò's "Yes we Rent!" has also conducted a similar approach by utilizing the legal design tool of cooperative housing, creating a possibility for economic profitability from the project. This grants inhabitants important forms of independence and long-term sustainability for housing. The use of these legal tools to create innovative approaches to challenges of urban governance supports in this way the concept of Urban Sustainable Development and Innovation Partnerships.

In the case of Lyon, a community restaurant is used as a source of funding, building a hybrid economic model for neighbourhood sustainable economic development. Through a financially sustainable model, the restaurant is able to contribute to stimulating the economy of the community and fostering neighbourhood durability. The same element is seen through the collective governance mechanisms adopted in the Lille's TAST'in FIVES project. The use of a shared community kitchen illustrates for this article the concept of USDIPs and serves to demonstrate an important example of district-based inclusive economic development. The TAST'in FIVES project is a lighthouse case study within this article, illustrating the potential of co-governance mechanism based on a PCP in instigating district based inclusive economic development.

In Gothenburg's FED project on energy transition, we find important involvement of the private sector, bringing about significant opportunities for the community to create pooling economies. The use of digital tools is also significant in Vienna's

CoRE incubator for refugee integration. Through the collaboratively created platform, the citizen-led tech-based innovation adds an important element to the understanding of co-governance presented throughout this article. The brokerage aspect of CoRE's project is seen through its goal of enabling cross-sectorial cooperation and peer mentoring for integration of asylum seekers.

4.3.1. An Integrated Approach rooted in Co-Governance and City Science.

With this article combined approach of co-governance and city science, a framework for sustainable urban development is envisioned on the basis of the involvement of city inhabitants as actors in both issues of collective interests and processes of co-governance. In this way, the exemplary case of Turin's Co-City Project serves as the foundation for this article analysis. The innovative legal design elaborated in this case study has largely contributed to the understanding of USDIPs and the extended role of city inhabitants as going beyond that of data providers. Instead, it is the combined efforts with other actors such as learning institutions (Universities and schools), private economic actors and social innovators. This is the approach taken by the CSI initiative in efforts to include university researchers within City Offices for the benefits of data collection and the shaping of policy. Throughout this article we find these actors continually experimenting with a set of tools themselves instrumental to the success of urban co-governance. This toolkit composed of legal, learning, digital and financial tools represent the foundations of this article operational proposals in the creation of sustainable USDIPs.

In the case of Turin, for instance the pacts of collaboration initiated through this framework were the first legal tools to be utilized in the ongoing process of establishing sustainable USIP) With the innovative legal and economic nature of these first partnerships came the issue of risk aversion. The challenge becomes integrating risk-takers in the inside processes of public administration to boost innovation funding and propel the innovators.

In Athens, the combined use of digital tools and learning processes resulted in a successful collaboration between users and suppliers for housing units. The digital platform created is used in this project to launch a call to property owners that are then allowed to rent their property to migrants and refugees with the help of a

mechanism distributing the risk between the owner, the tenant and the City. The learning exchange existing between users and suppliers defines the project as an innovative solution to both housing crises as well as inequalities of opportunities.

A key factor herein is the need for capacity building processes especially in terms of financial skills for local communities and legal skills in terms of policy capacity. This challenge is tackled through the support of advisors in projects supporting the City's adaptation of existing tools of the legal framework to the project's goals. Through an integrated policy approach, we find that the scope of influence is greater and makes clearer the strong ties between policy and law in this new wave of urban governance.

This article rested on the theories of urban co-governance and its relationship to city science initiatives. The concept of USDIPs was built through a co-city science approach. This governance model is characterized at its core by the shift from a model of top-down decision-making to one understood by bottom-up and citizen-led solutions. It is an approach based on the collaboration and shared responsibility of each and every one of the different actors and stakeholders that make up the city and its ecosystem. Through the lens of this proposed co-city science, this article foresees the involvement of city inhabitants as going far beyond mere data providers. USDIPs imagine city inhabitants as contributing actors to the ongoing processes of co-governance taking place with a variety of actors, from knowledge institutions to private economic actors, social innovators, and the public sector. The science produced in this way has contributed to the experimentation measures of the tools instrumentalized and fundamental to the continuous development of the urban co-governance concept. Legal tools as in the exemplary case of Turin's innovative legal design are found to be the first tool in the kit as they present an initial, written regulation for the project and its potential. Learning tools were found such as Collaboratories (Co-Labs) or NGO houses as seen in Riga's partnerships between the city council and local NGOS inside a former school. The UIA case study example of Fed Gothenburg or Vienna's CoRE project demonstrated important use of digital tools for their respective efforts of sustainability and social integration. Financial tools of social project financing were used in projects such as Lyon's community restaurant as a source of funding built on a hybrid

economic model for neighborhood sustainable economic development. In this way, we find that many cities have taken the leap towards legal recognition of urban commons. When applied with a holistic vision of the city as a space of cooperation or co-city, there have been successful implementations of institutions, economic and financial operations, as well as digital and educational platforms designed as the first steps towards the final goal of truly enabling a collective and collaborative governance of the city.

4.3.2. The Brokerage Role of Innovation Procurement

With these four tools properly instrumentalized this article aims at establishing concrete and functioning city science and innovation partnerships. However, to do so it is key to examine the brokerage role of public procurement for innovation.

In a recent output[115] of the Urban Agenda for the EU on Innovation Public Procurement Broker (IPPB), the focus is put on elements of 'open innovation intermediation'.

Innovation Public Procurement Broker (IPPB): IPPB is an intermediary in the interaction between public solution seekers and all the possible solution providers aimed to support public procurement of research[116].

The Urban Agenda for the EU discusses the importance of this brokerage between innovative SMEs or start-ups and public buyers on the basis of the naturally weak links connecting the two parties of innovation solutions. In this way, IPPB establishes the overdue partnership of key actors in urban governance innovation.

With arguments in favour of public sector beneficiaries, the recent guidelines for IPPB establish the positive impacts on policy-making and urban governance. The incorporation of this document was important to the understanding of this article as it illustrates

[115] Urban Agenda for the EU, *Innovation Public Procurement Broker (IPPB) An introduction for practitioners Guidelines to design a broker for innovation public procurement* (2020), available at https://ec.europa.eu/futurium/en/system/files/ged/action_7_innovation_public_procurement_broker_guideline.pdf, established a set of guidelines to design a broker for innovation public procurement was released. It established a procurement strategy with the tagline 'using a city's buying power to achieve political goals.

[116] Urban Agenda for the EU, *Innovation Public Procurement Broker (IPPB) An introduction for practitioners Guidelines to design a broker for innovation public procurement*, cit. 105.

the arguments made for an integrated approach to innovation supported by the four-part operational tool kit proposed throughout the following pages.

This same document situates public procurement in its role as a 'powerful tool for spending public money in an efficient, sustainable and strategic manner for driving the development of innovation' – in this way, IPPB is understood as more than merely a unidimensional legal tool. In the context of both this article and the EU guidelines elaborated on above, public procurement is seen as a sustainable model for cities to address the everyday challenges of socio-economic inequalities, environmental changes and bureaucratic inefficiencies. In a similar scope of understanding as this article, IPPB requires a consistent and integrated strategy of locally-tailored policies and case-sensitive financing. Cooperation is needed between different levels of actors at government levels, private involvement, and innovation creator in order to create effective partnerships of public procurement as well as to spread the word and verified information on efforts of Innovation and Responsible Public Procurement.

IPPB represents a key lesson learnt throughout the research processes internal to this article on the state of Urban Sustainable Development and Innovation Partnerships. The UIA case studies of projects such as Birmingham's USE IT! platform grants this article a strong basis of analysis for incorporating the importance of IPPB in the operational proposals and conclusions of this article.

5. The need for a Policy Toolkit to Establish USDIPs

The analysis finds that the case studies analyzed throughout this article generate enough empirical evidence for policy solutions and administrative measures necessary for implementing concrete co-governance measures in urban sustainable development and innovation processes. Based on the analysis of the thirteen UIA projects which used the key dimensions extracted from the Co-Cities framework[117], this article suggests the adoption of a policy toolkit. The findings provided above have demonstrated a meaningful connection between governance innovation and city science initiatives. Bridging co-governance to city science suggests however the need for a four-part policy toolkit composed of the

[117] S. Foster, C. Iaione, *Co-Cities*, cit. at 4.

following operational elements: (1) a regulatory initiative recognizing USDIPs and leveraging the existing innovation procurement legal framework; (2) financial tools; (3) learning and institutional tools and (4) digital and technological tools.

5.1. Innovation in procurement and public contracts tools

As mentioned above, multi-level governance at the city level often results in the creation of multi-actor partnerships to provide for service or infrastructure development. While Public-Private-Partnerships (PPPs) have by now become a common solution for the public sector risk aversion and for its lack of resources, it is increasingly clear that sustainable innovation and smart city infrastructures require new types of partnership in order to overcome the public-private binary[118].

We have found the best practice to be the integration of existing and newly innovated legal tools. These tools are pacts of collaboration, Urban Civic Uses, Agreements pursuant to the existing legal framework (i.e. in the case of Madrid, Spain), Community Coops and Community Land Trusts. Through an integrated policy approach, we find that the scope of influence is greater and makes clear the strong ties between policy and law in this new wave of urban governance measures. As mentioned above, the pacts of collaboration initiated through this framework were the first legal tools to be utilized in the ongoing process of establishing a sustainable innovative urban partnership. With the innovative legal and economic nature of these first partnerships came the issue of risk aversion as a complex issue facing many public municipal officials. The challenge becomes about the necessity of having risk-takers in the inside process of public administration to boost innovation funding and propel the innovators. The Co-City Turin project was able to forge and adopt an UIP approach. The direction in which such cooperative meetings are going is one of sustainability, generating both social and economic impacts, based on frameworks of end-user engagement in which financial institutions can safely invest their resources and finally go beyond the traditional and hence-forth questionable model of PPP investment.

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[118] C. Oliveira Cruz & J. Miranda Sarmento, *Public-Private Partnerships and Smart Cities, in Network Industries Quarterly*, - Vol 19 - Issue 3 "Regulatory challenges for smart cities", (2017).

The challenge emerges clearly in cases like the Lille project Tast'n'Five. Finding partners willing to share the legal and financial responsibility related to the management of the collective kitchen was challenging and the City was brought to ask for support. A key role was played by a publicly owned investment company, EPARECA, (Etablissement Public d'Aménagement) for the redevelopment and restructuring of commercial spaces in deprived neighborhoods. The Lille experience shows clearly that the key issue around local government acting as enablers of the commons, through economic development, is financial sustainability. The capacity of the community to develop a business plan pursuing social benefits while being financially viable, has also presented itself as a significant challenge. In such a process, actors such as public/institutional investors providing advice and capacity building for the financial aspects to cities proves crucial. In the Budapest project this is seen through the Eco-Housing, Community development and economic empowerment mentoring programs involving future renters from the design process.

A crucial role is played by the public demand for innovation. The academic discussion and policy practice on innovation policy often focuses on supply-side measures such as grants and neglects public procurement as a demand-side driven innovation policy measure[119]. We argue whether urban public procurement can be a leverage for the development of sustainable urban innovations. An example is the Nantes project 5Bridges, where the city supported the creation of multi-stakeholder mechanisms of governance of the space, to benefit the most socially excluded groups of the neighborhood with a sustainable social business model. Public procurement participated in the innovative and creative processes, although the contractors were eventually selected through a standard tender procedure.

Especially when it comes to the inclusion of city inhabitants and civic associations, innovative procurement practices hold the potential to experiment new regulatory and governance solutions for the co-design, collaborative management, and implementation of urban regeneration projects as well as service delivery. The projects did not use any of the tools that the EU legal framework on public procurement offer to support the purchase of innovation

[119] J. Edler, L. Georghiou, *Public procurement and innovation: resurrecting the demand side,* 36 Research Policy 949–963 (2007).

(Public Procurement of Innovative Solutions or Pre-Commercial Procurement) but used traditional procedures of public tendering.

Although the inclusion of city inhabitants in pre-procurement phases or in the service design and implementation is said to reduce the risks linked to top-down complex urban regeneration projects, infrastructure development or service delivery; the literature on public-private-people partnerships (P4)[120] sees increased public engagement as a strategy that "can help improve the development process by moderating the risk of unforeseen oppositions, building clear responsibilities and rights, and creating opportunities for public inputs; scholars argue that formulating such effective and genuine public engagement framework for PPP projects would assist government bodies (…) to better realize the changing public aspirations and demands for infrastructure planning and policy formulation, the concrete implementation of innovative procedures entails a high degree of complexity at the local level. Building a framework where cities can feel free to experiment with innovative procurement procedures safely, share risk, receive support from advisors and policy capacity building processes is crucial. Although all projects analyzed are aimed at building a co-governance strategy where the community plays a pivotal role, the institutional and legal tools adopted often result in bilateral or exclusionary governance mechanisms. The spaces and infrastructures renovated through the project will be eventually managed by a single NGO or a service provider with the communities as beneficiaries.

In cases like Lyon Silk Road (where the social restaurant designed through the project will be managed by inhabitants) and Lille Tast'n five (where a cooperative gathering of diverse actors will manage one of the buildings) there is a higher degree of control and responsibility on the communities' side, although the involvement of private economic actors/financial actors and knowledge actors in the partnership is still weak.

If public-private-people partnerships represent an alternative option to the traditional PPPs, a further step can be taken by establishing public-people partnerships that allow for a direct participation of city inhabitants both in the procurement and in the delivery/implementation process. The UIA Co-City project

[120] S.T. Ng, J.M.W. Wong, & K.K.W. Wong, *A public private people partnerships (P4) process framework for infrastructure development in Hong Kong*, 31 Cities 370 (2013).

is a clear example of this and represents a unique experiment in the field of innovative partnership. As a matter of fact, the Co-City model "a) establishes a procedure of "collaborative dialogue" as it implies the co-design of the content of the construction of the partnerships and therefore creates the possibility to replace collaboration with competition as a design principle of tendering procedures; b) it attempts to go beyond the traditional concession or public contract approach trying to build a more cooperative system in which there is no transfer of risk but rather a sharing of risks. Thanks to the legal tool of the so called "pacts of collaboration", citizens and the administration cooperate for the care, shared management and regeneration of urban commons. The introduction of 'pacts of collaboration' could be considered "as the first example of social innovation-led public–people or public-private-people partnerships" [121].

5.2. The Financial Tool: Urban Commons Project Finance

When speaking of innovation in public procurement and more widely of social innovation it is important to address the rise of new financing instruments aimed at investing in projects with a social impact[122]: "Social Finance (SF) defines the set of alternative lending and investment approaches for financing projects and ventures, requiring to generate both positive impacts on society, the environment, or sustainable development, along with financial returns"[123].

As much as they are aimed at creating positive social impact, Social Finance instruments are key tools for the development of the social innovation sector. In fact, Moore et al. define SF "both as a social innovation itself and as a vehicle for redirecting financial capital, thus providing new opportunities for social innovation to grow[124].

The first model of social project finance was born in the UK in 2007 as an organization that aimed to tackle the problem of

[121] S.R. Foster, C. Iaione, *Ostrom in the city*, cit. at 4.
[122] W. Cheng, S. Mohamed, *The World That Changes the World: How Philanthropy, Innovation and Entrepreneurship are Transforming the Social Ecosystem* (2010).
[123] F. Rizzi, C. Pellegrini, M. Battaglia, *The structuring of social finance: Emerging approaches for supporting environmentally and socially impactful projects*, 170 Journal of Cleaner Production 805-817 (2018).
[124] M.L. Moore, F.R. Westley & A. Nicholls, *The Social Finance and Social Innovation Nexus*, 3:2 Journal of Social Entrepreneurship 115-132 (2012).

reoffending short-sentenced offenders from the Peterborough prison. The idea behind it was to provide support to vulnerable city inhabitants that were struggling to find their way back into society after prison.

Thanks to the coming together of professionals from the social, financial and government sector, this project has been able to rethink the purpose of financial instruments and couple economic growth with social impact. As of 2017, the Peterborough Social Impact Bond has "reduced reoffending of short-sentenced offenders by 9% compared to a national control group" (Social Finance Group, Peterborough, 2017).

There are multiple financial instruments used in the sector of Social Project Finance, depending on the sector: Social Investment Bank, Social Impact Bonds and Development Impact Bonds. Social Impact Bonds are especially interesting for the purpose of this research as their mechanism implies the involvement of a public subject, who indirectly guarantees the financing for a social utility project managed by a non-profit subject in light of the attainment of a specific result. In other words, with Social Impact Bonds (SIBs) "a payer (usually Government, at a national, regional or local level) agrees to pay for measurable improved outcomes of social projects, and this prospective income is used to attract the necessary funds from commercial, public or social investors to offset the costs of the activity that will achieve those better results" (Mulgan, 2010). The potential of this model lies in the injection of financial capital to provide funding for civil society initiatives with the transferring of risk to the public authorities.

Especially when it comes to the digital infrastructure, circular economy, renewable energy, and cultural heritage sectors, Social Finance solutions provide a partnership model able to have a real impact on local communities. They are able to bring together local associations, citizens, private and public actors. The case of Reggio Emilia is especially relevant to provide a practical example of how the coming together of these actors can positively benefit a marginalized community. The project "Coviolo Wireless" represents an example of local investment in digital infrastructures that allows for the extension of the wifi access to an area of the City of Reggio Emilia characterized by its severe digital divide. The project realized community wi-fi thanks to the collaboration between the local community, the City, civic entrepreneurs and public and private operators. Using the neighborhood social center

as a community infrastructure, city inhabitants have been able to access the new wireless broadband coverage at an affordable cost. After having won the European Broadband Awards 2017, the Coviolo Wireless model has been replicated in other neighborhoods in Reggio Emilia.

In the Gothenburg Fed project, a mechanism of risk sharing was created to support the Energy district through diverse sources of funding and creation of a sustainable business for energy efficiency. the Lille project TAST'in FIVES invested serious efforts in an experimental strategy of involvement of stakeholders, particularly of neighborhood inhabitants, through the co-design process of the community kitchen and the future incubator and the organization of food-related workshops in the temporary kitchen, that proved key to engage neighborhood inhabitants and NGOs. A total of 30.000 euros will be allocated to food-related social business projects, with a minimum of 500 euros and a maximum of 3.000 euros per project. In the Brussels project CALICO, a mechanism of risk sharing is created through public funding and a CLT resale mechanism that ensures sustainability of affordable housing on the long run. In the Matarò project Yes We Rent, the risk-sharing mechanism is temporary and used as a leverage to stimulate collective action. The project start-up with public support and subsidies, but the city will leave the cooperative as soon as it becomes sustainable. The possible role played by tech finance and purpose finance shall also be discussed.

5.3. The Institutional and Learning Tool: the Co-Labs as urban innovation brokers

Bringing so many different actors together, finding the proper ways, methodologies, rules to foster such multi-stakeholder forms of cooperation such as P5s and PCPs requires attention, competences, skills, time and resources.

The action plan of the Urban Partnership on Innovative and Responsible Procurement mentions innovation brokers. They are third party facilitators that offer support to public administrations by acting as moderators between private, public, and civic actors. Innovation brokers at the urban level can manifest themselves in the form of public officials in charge of research and innovation (i.e., Chief Science Officers, Chief Innovation Officers, etc.) or in the form of entities like Urban Laboratories, Living Labs, or Competence Centers.

The role of a brokering place and/or agency in pushing the public sector to invest in innovative partnerships with private and civic actors has been proven to foster innovation in procurement processes. Innovation brokers allow for the overcoming of barriers inherent to public sector service delivery. The literature on PPP shows that the public sector lacks skills, incentives, and resources to experiment and change its traditional system of service delivery through partnership with city inhabitants and other civil society actors[125] . In order to effectively innovate, there is therefore a need for risk-takers in public administrations to overcome the barriers of change and experiment new partnerships with different actors. They are also brought to brainstorm on new ideas for service delivery and are generally open to test innovative solutions coming from external actors.

In many cases, especially at the city level, such public open innovation processes are supported by what we can call urban laboratories acting as innovation brokers. We can observe in this way, digital innovation brokers, such as digital platforms. In Athens, these platforms are used to launch calls to property owners that are then allowed to rent their property to migrants and refugees with a mechanism that distribute the risk between the owner, the tenant, and the City; or physical innovation brokers, exemplified by the neighborhood houses that have a key role in disintermediating between the City and local communities in the Co-City Turin project.

Similar features emerge in the incubator created through the Vienna CORE project, as a physical and digital platform presenting a high degree of empowerment of the community. The platform was collaboratively designed and is managed by the refugees involved in the program, although aspects related to platform ownership, data governance and the possibility to develop services starting from the data collected through the platform are still far from advanced. They can also take the form of "science parks", as in the case of Gothenburg project FED where in the board you can find alongside public authorities the local stakeholders, that develop projects at the park / district area. Be it "Collaboratories", 'Urban Innovation Labs" or "Living Labs", these environments generally act as intermediaries between public authorities, private

[125] S.A. Ahmed, S.M Ali, *People as partners: Facilitating people's participation in public–private partnerships for solid waste management*, in Habitat International 781-796 (2006).

actors, knowledge institutions, civic society actors and city inhabitants[126]. Living Labs are for instance defined as forums "for innovation, applied to the development of new products, systems, services, and processes, employing working methods to integrate people into the entire development process as users and co-creators, to explore, examine, experiment, test and evaluate new ideas, scenarios, processes, systems, concepts and creative solutions in complex and real context"[127]. Urban laboratories are especially suited to experiment with multi-stakeholder collaboration[128] on pressing urban challenges such as climate change and sustainability[129] digital and technological tools for citizen-centered smart cities and, more recently, with cultural heritage innovative reuse[130].

Innovation brokers therefore play an important role not only in the production of knowledge but also for their experimental innovative solution to local challenges. They often allow for multi-actors meeting and networking; they set up collaborative processes of design and implementation; they foster learning and skills development; and provide for the infrastructure necessary for the participation of civic society actors or citizens, through the organizations of meetings, assemblies, and workshops. This is the case for the "Local Competence Centers" mentioned in the WP 2 of the Urban Partnership Action Plan: "Learning can happen through cooperation and peer learning, namely through Local Competence Centres which provide opportunities for training and skills development, but also for networking, technical assistance provision and potentially joint purchases. Such Local Competence

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126 M. Gascó, *Living labs: Implementing open innovation in the public sector*, in Government Information Quarterly 90-98 (2017).

127 H. Bulkeley, S. Marvin, Y.V. Palgan, K. McCormick, M. Breitfuss-Loidl, L. Mai, T. von Wirth, & N. Frantzeskaki, *Urban living laboratories: Conducting the experimental city*?, *26*(4) *European Urban and Regional Studies* 317–335 (2019); E. Eneqvist, J. Algehed, C. Jensen & A. Karvonen, *Legitimacy in municipal experimental governance: questioning the public good in urban innovation practices*, 30:8 European Planning Studies, 1596-1614 (2022).

128 T. Tukiainen, S. Leminen & M. Westerlund, *Cities as collaborative innovation platforms*, 5:10 Technology Innovation Management Review (2015).

129 Y. Voytenko, K. McCormick, J. Evans & G. Schliwa, *Urban living labs for sustainability and low carbon cities in Europe: towards a research agenda*, Journal of Cleaner production 123 (2016).

130 C. Garzillo, A. Gravagnuolo & S. Ragozino, *Circular governance models for cultural heritage adaptive reuse: the experimentation of Heritage Innovation partnerships* (2018).

Centres are specifically valuable for smaller and medium-sized cities, and can complement new and on-going national and EU-wide initiatives, such as the Procure2Innovate project that was launched by DG CONNECT" (Urban Partnership on Innovative and Responsible Procurement, Action Plan, December 2018)

Closing the gap between public administration, service providers, users, and facilitating cooperation and exchanges between these actors, appears as the principal goal of innovation brokers. They have become essential instruments for the development of USDIPs.

The role of USDIPs is crucial to strengthening cities' capacity to develop their innovations. They can do so by providing legal and institutional tools allowing cities to experiment, support measurement, knowledge capitalization, the scaling up and ultimately the mobility of the innovations' achievements. In addition to attracting investments in key issues of the European Social Pillars and in issues such as climate transition, social cohesion, social protection for vulnerable people, culture, and cultural heritage, it appears coherent with the new strategic agenda of the European Council (Council of Europe, a New Strategic agenda, 2019) which highlights how these values lay at the heart of the European identity. Also, USDIPs could be spaces of interaction and mutual improvement of the EU funding addressing cities, namely UIA, URBACT, urban-related topics of Horizon2020, allowing them to mutually learn from one another and at the same time supporting cities with the implementation of their complex challenges acting as a capacity building tool focused on solving legal and institutional-capacity related obstacles through innovative applied methodologies. It will ultimately support cities in one of the greatest challenges they face in the future, implementing at the local level the objectives established by the Global Urban Agenda. This challenge and its potential solution envision cities as places for sustainable and inclusive development and entrusts them with the role of experimenting with concrete implementation solutions to develop resilient, safe, inclusive, sustainable, place-based social and economic development.

5.4. The role of digital tools

With the increasingly connected network of cities, city diplomacy has emerged as an important area of study for urban scholars. The international cooperation observed has taken an

important role in shaping urban policies, notably in the vein of 'citizen-science' wherein citizen production of data, through both analog and digital tools, is encouraged in efforts inform and shape better functioning and just cities. European cities, such as UIA projects Gothenburg and Vienna seen in this article, are going in the direction of city science investments. In the FED project in Gothenburg, it was the tech-based development of a new energy system at the district level based on the use of information and communication technologies for electricity, heating and cooling. The technology created enables a smoothing of energy consumption, reducing peak loads and bringing positive outcomes to both user and supplier. The important involvement of the private sector has also enabled the community to create pooling economies, rendering the project sustainable. In Vienna, CoRE promotes the creation of a physical and digital platform to enable cross-sectorial cooperation and peer mentoring for integration of asylum seekers. The use of a co-created digital platform for collaborative governance and sustainable living conditions, presents this project under a city science light.

The digital tools this article has identified as being valuable elements to fostering cooperation and innovation partnerships are (1) E-procurement platforms; (2) cooperatively owned digital platforms and (3) online forums coordinated by city authorities for the safe meeting and prosperous discussion of a variety of urban actors. The third element, digitalization for urban co-governance, might find an important relevance in the post-Covid-19 era. Creating an online space, perhaps connected to or managed by the Co-Labs, for inhabitants and other urban actors to meet and discuss the challenges they are facing might be essential in ensuring the continuity of these collaborative processes. In a society where social distancing and face masks are becoming the new normal, adapting and innovating public forums is essential. Having these online forums coordinated by city authorities and attended by key urban actors will potentially allow for innovation partnerships to continue to grow both in importance and in citizen participation.

6. Conclusions and Call for Concrete Policy Action: Bridging Policy Agendas

Fostering cooperation between urban authorities and key urban stakeholders through legal arrangements that shape urban

co-governance partnerships has the capacity to accelerate urban sustainable development and innovation. Local communities and knowledge institutions need to be fully onboard and work together with urban authorities, civil society organizations and local business. These partners can be "the main drivers in shaping sustainable development with the aim of enhancing the environmental, economic, social and cultural progress of Urban Areas"[131]. The analysis developed in this article leads to three main conclusions for this to happen.

First, benchmarking in terms of existing policies, practices and projects at the EU, national and local level has proven that public procurement can be both an enabler and a factor hampering the process. An intervention on public contracts regulatory frameworks would contribute to bringing all cities to the same level and would allow most of the projects to overcome their main challenges. In some of the UIA projects analyzed, legal arrangements for inclusive and innovative partnerships played a crucial role. The recommendations to reform the public contracts to sustain urban innovations such as those at the core of the UIA projects can be applied to other cases. In these projects the mastery of innovative public procurement and partnerships proved to be an obstacle or an accelerator.

As a general remark, the preference of the national legislation for competition as the only guarantee for security and quality of the public procurement procedures results in underestimation of the environmental, social and governance aspects. The UIA projects demonstrate that this could generate a possible loss of territorial economic, social, and climatic value. Through a public procurement procedure based purely on competition it might it be difficult to adapt to local environmental and social conditions. The suggestion emerging from the UIA projects is that, when the local ecosystem can satisfy the request, it is preferable to develop local pre-commercial solutions and networks as opposed to acquiring the service on the market from large economic operators or electronic public marketplaces. The basic issue at stake here is the protection of the local environment and the network of local communities and businesses. To achieve this, it is important to tap into local networks directly and support their work to protect the local environment or boost the pooling of

[131] European Commission, *Urban Agenda for the EU – Pact of Amsterdam* (2016).

their resources to make their places more attractive, thereby strengthening their economic and social bonds, as well as sense of ownership towards their environment and spaces. This can only be done by introducing USDIPs as legal tools based on the territoriality, the level of cross-sectoral integration, the knowledge of local social and territorial context, as well as the climate and social impact.

More specifically, where a publicly owned building is concerned, the national regulatory provisions necessarily normally foresee the sole consideration of the economic value of real estate to award the public contracts. This provision makes it very challenging for the use of these assets for sustainable development, cultural and social activities. While there is the possibility, in general, of evaluating social utility and demonstrating the cost-effectiveness of managing the building for social purposes, it is also true that this is a complicated path, filled with obstacles even for entrepreneurial and skilled civil servants. This procedures and legal tools enabling specific consideration of sustainable development goals should be codified and simplified.

Second, these innovative forms of urban partnerships cannot become self-sustainable without proper financial support. The presence of socially and ecologically minded financial actors is key to building this policy program. Therefore, when speaking of sustainable development through innovation and newly conceived partnerships it is essential to design them as ready to finance instruments sharing a common goal of investing in projects with true and valuable social impact. Sustainable and Social Finance encompasses the set of alternative lending and investment approaches for financing projects and ventures, to generate both positive impacts of society and on the environment[132]. Combining innovation, urban development and concrete, sustainable projects is the framework under which the USDIPs are flourishing. This policy program represents the ingredients needed for the proper fostering of sustainable and resilient cities built on equitable growth and strong community ties.

Third, one of the biggest challenges related to USDIPs is that given their complexity they may not stimulate the participation of actors external to the partnership if they are not involved in the

[132] See reports and other materials of the *Platform on Sustainable Finance*, available at https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance/platform-sustainable-finance_en

project since the beginning. The role of urban laboratories (*i.e.* open labs, living labs, houses of emerging technologies, collaboratories and other spaces for experimentation and prototyping, even if they are digital or virtual) in injecting collaboration in the development of the solutions is very relevant to allowing this activity of outreach and engagement. It also ensures coordination both between partners and with external actors under the umbrella of a same and unified vision, even in cases when the interests, motivation, tools and resources available are very different between partners and the tasks are diversified. This is often the case with the prototype and development of complex innovations. The use of physical and virtual spaces for experimentation also brings the different city actors to learn and face together recurring obstacles such as public procurement. Indeed, they are also necessary as physical and technological environments where cities and urban actors can meet, discuss and engage in mutual capacity building processes as well as work out appropriate solutions. These spaces should be utilized to develop concrete experimentations at the neighborhood level through which cities stakeholders can mutually learn from one another and then export to other places.

Finally, the analysis developed in this article has also identified two key needs. First, there is the need to fine-tune this practices and projects with the rapidly evolving EU policy framework implementing the Green Deal Industrial Plan, the 100 Climate-Neutral and Smart Cities Horizon Europe Mission, the new 2021 – 2027 Cohesion policy. The second is instead the need for a more formal recognition of a general principle that establishes and protect the rights of local communities and recognizes the role of scientific actors. They all need to sit not only at the decision-making table but also at the "dinner table" to share a "piece of the pie" which means that when it comes to redistribute the benefits, the shares, the profits they need to be treated as equal partners, much like private and social partners currently are. This is the only way for USDIPs to truly add value to the conversation and represent a step beyond even more inclusive and innovative forms of PPPs.

BOOK REVIEW

MARIA DE BENEDETTO, *CORRUPTION FROM A REGULATORY PERSPECTIVE*, OXFORD, HART, 2021

*Edoardo Chiti**

This is an important and fascinating book. Its central idea is that administrative corruption, as a phenomenon strictly connected to the ineffectiveness of rules, is a regulatory issue and should be treated accordingly. More precisely, administrative corruption requires to be addressed by taking into consideration rules and regulation during their whole life-cycle, in order to strengthen their effectiveness and to drastically reduce the room for infringements and administrative corruption. The search for regulatory effectiveness should therefore be integral to any serious model of anticorruption policy: rules should be designed, implemented and enforced in such a way to ensure their full effectiveness, if anticorruption policies really want to achieve their objectives. While such overall approach is not entirely new, as the relations between rules and corruption have been previously investigated by some authors, including Marco d'Alberti and Anthony Ogus, the argument developed in the book clearly represents a major contribution to legal research on integrity and corruption, as well as to administrative law and regulatory studies.

The inquiry opens with an explanation of the main relevant concepts. This part is much more than an introduction to the research: it provides the reader with an insightful and sophisticated discussion of three key notions involved in the regulatory perspective taken by the Author, namely 'rules', 'controls' and 'corruption' (Chapter 1). Each concept is presented in a way which is functional to the line of reasoning articulated in the subsequent chapters, without however simplifying the underlying theoretical issues.

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As for 'rules', in the regulatory perspective taken in the book, they are conceptualized as the basic functional unit of regulation, which should be understood as a 'collection of rules' in a specific policy field. In this context, they raise essential functional issues: rules should be designed in such a way to effectively achieve their objectives, without producing unintended side-effects, including corruption. In particular, their effectiveness depend on three conditions, namely the 'legal normative' features of rules (their comprehensibility, validity and binding force), the hight rates of compliance and low costs of enforcement, and their capability to achieve the desired results ('outcome'). This analytical framework allows the Author to identify the diversity of situations in which rules are dysfunctional, as well as to point to the relevance of trust as an 'intangible factor' of rules' effectiveness. Also the second key notion, 'corruption', is discussed in relation to the regulatory perspective which shapes the inquiry. Corruption is a 'regulatory issue' because it is always connected with rules. As such, it is a wide phenomenon, referring to any abuse of public power for private benefits and determined by bad quality or bad functioning of rules which establish and regulate that public power. This understanding of corruption, which goes beyond the boundaries of criminal law, is then differentiated from some contiguous notions, such as 'conflict of interest', and further articulated. The Author appropriately stresses that corruption, in a regulatory perspective, may be subjective or objective, depending on whether it refers to individuals' or aggregate behaviours; and that it covers both the actual instances and the risk of corruption, that is 'corruptibility'. As for 'controls', the third key notion of the inquiry, the model which is considered more fruitful in the regulatory perspective taken in the book is that of the Principal-Agent-Client. Indeed, the model - which involves three actors, namely the state and its citizens (the Principal), civil servants (the Agent) and private actors (the Client) - is broad enough to take into consideration different types of corruption processes, on the one hand, and different kinds of controls, on the other. From an anticorruption point of view, each of the three relationships (between Principal and Agent, between Principal and Client, and between Agent and Client) opens the way to specific forms of corruption and should therefore be subject to specific types of control: administrative controls, in the case of the relationships between Principal and Agent; public controls of private activities, as for the relationships between Principal and

Client; while criminal ex-post controls apply to the Agent-Client relationship.

The central part of the book articulates the main argument of the inquiry. Set the scene and clarified the basic concepts, the Author discusses, first, anticorruption strategies (Chapter 2), then the rules necessary to implement a coherent and sound anticorruption strategy (Chapter 3) and the specific role played by controls in reducing corruption (Chapter 4). The overall perspective is essentially normative, as the Author aims at identifying an ideal (although realistic) regulatory toolbox to tackle corruption. But there is room for descriptions and empirical analyses of the regulatory models at work in some domestic orders. This is the case, for example, of France, Spain, England and Italy, with the latter considered as a particularly interesting case for its inherent tension between big regulatory failures (from legislative inflation to rigid controlling, overwhelming bureaucracy and distrust in public institutions) and ambitious attempts to develop an appropriate anticorruption strategy, recently fueled by the National Recovery and Resilience Plan.

As convincingly argued by the Author, current anticorruption strategies are, in descriptive terms, the result of global constraints and domestic policies. Since the last decade of the XXth century, international and global regimes have laid down a rich pattern of binding and soft law measures aimed at preventing and repressing corruption in national polities; this is the case, for example, of the Transparency International Corruption Perceptions Index (1995), the United Nations Convention against Corruption (2003) and the OECD recommendations on transparency and integrity in different fields of government action. While the rise of international and global regulation has reduced the room for national autonomy, domestic anticorruption policies nevertheless differ in many regards one from the other. The Author suggests that three main models are at work in Western countries. They are not alternatives to each other, but rather represent incremental responses to corruption. One is 'conventional anticorruption', based on a traditional deterrence approach and relying on anticorruption offices carrying out a control function over public institutions. Another is 'behavioural anticorruption', which exploits the contributions coming from behavioural and cognitive sciences. The third model, 'regulatory anticorruption', is oriented to prevent corruption by focusing on rules and regulatory delivery.

Here comes the normative stance of the Author, who argues that the last model, the regulatory one, is to be preferred over the others on a functional basis, as it may address some of the shortcomings of conventional anticorruption, while, at the same tine, integrating insights from the behavioural approach.

The discussion on anticorruption rules, presented in Chapter 3, takes a further step. If regulatory anticorruption is a promising strategy, which rules are required for its implementation? The answer provided by the Author revolves around the idea that 'managing rules' is the fundamental rationale of a regulatory approach to corruption, as the quality and effectiveness of anticorruption strategies ultimately depend on *ex ante* and *ex post* evaluation of the regulatory framework. Managing rules, though, should be articulated in two different directions. First, it should be directed to the regulatory stock, which can be managed through simplification programmes (broadly meant as programmes oriented to the reduction of the number of rules as well as of compliance costs and administrative burdens) and by providing advocacy powers to national anticorruption bodies (which should be able, for example, to propose regulatory changes and report information to regulators). Second, managing rules should address the regulatory flow, which can be managed by using specialized regulatory tools, such as a specialized impact assessment, and by tracing the interests at stake in the regulatory process.

In this overall framework, controls play a specific role as anticorruption tools. The Author appropriately highlights the relevance of controls, meant as a system of different but functionally complementary instruments, both in regulatory theory and in public law: controls are necessary tools for making rules effective, in particular in the compliance phase of the regulatory cycle, as well as a key instrument of the power-checking function historically developed by public law over the last two centuries. She then articulates a practical approach to controls, by pointing to a number of factors which may impair their effectiveness (starting with the risk of selective control and the costs produced by control activities) and by putting forward a set of proposals. In particular, it is argued that the following elements are essential in order to establish effective controls: information, to be developed in the perspective of evidence-based policy-making; the proper design of controls in regulation (that should also guarantee privacy and data protection); appropriate planning of controls; the concrete ways in

which controls are implemented, ranging from cooperation to coercion; communication strategies; reform of the regime of controls, where this is needed to increase compliance.

Building on this analysis, the last chapter aims at identifying a 'formula' for combating corruption via regulation and controls. The regulatory anticorruption toolkit presented by the Author is based on a specific instrument referred to as 'corruptibility assessment'. Such instrument is different from the corruption impact analysis at work in some legal orders. Indeed, it focusses on the probability that corruption will follow from certain legislation, by pointing to three main elements: the incentives or disincentives in regulation which promote, directly or indirectly, administrative corruption; a protocol to identify and assess the risk of corruption produced by specific rules, starting from legal concepts, such as that of authorization, and language indicators, with a view to activating the appropriate anticorruption responses; criminal databases capable of providing information for early administrative anticorruption, as in the case of data suggesting that some policy sectors or specific administrative powers may be involved in corruption more frequently than others. While these elements may be used in different types of anticorruption strategies, they always encapsulate and promote a regulatory approach to anticorruption, that is an approach based on the assumption that rules are at the same time determinants of administrative corruption and anticorruption tools. The last word, however, is left to the 'human, intangible side of regulation' (p. 192), which the Author ultimately identifies in 'trust'. Trust is the intangible factor which is at the basis of rules' effectiveness. Accordingly, repairing and restoring trust should be part of any regulatory approach to anticorruption.

The book has many merits. First, it is a remarkable contribution to research on anticorruption law and policy. Literature in the field is notoriously abundant and diverse, covering many different issues and taking a plurality of points of view (see e.g., among the most recent contributions, A. Graycar (Ed.), *Handbook on Corruption, Ethics and Integrity in Public Administration* (2020); F. Merloni, *Corruption and Public Administration. The Italian Case in a Comparative Perspective* (2020); C. Hodges and R. Steinholtz, *Ethical Business Practice and Regulation* (2017)). The inquiry carried out in this book contributes to such literature by providing a sophisticated and well developed regulatory toolkit to tackle corruption. As already observed, the regulatory approach taken in

the inquiry is not entirely new, as it finds some precedents in some important studies on the relationships between rules and corruption (see, in particular, M. d'Alberti (Ed.), *Corruzione e pubbliche amministrazioni* (2017); and A. Ogus, *Corruption and Regulatory Structures*, in *Law & Policy*, 2004, 329). What is genuinely innovative, though, is the way in which the regulatory approach to corruption is articulated and developed. The Author provides a systematic and coherent reconstruction of the micro-dynamics of regulatory anticorruption. With great analytical precision and clarity, she demonstrates, one step after the other, how an anticorruption regulatory strategy could and should be designed. The result is an operational toolkit, a pragmatic combination of instruments which may serve both as a benchmark to assess anticorruption measures currently used in Western States and as a source of inspiration for governments to develop new and more effective strategies. The reader may disagree with this or that specific element of the toolkit, perhaps even reject the idea that corruption is a regulatory side-effect, but it is difficult to deny that the 'formula' presented by the Author is a powerful and highly coherent synthesis of the way in which a regulatory anticorruption strategy, as well as its implementing rules, should be designed.

A second merit of the book is its attempt to go beyond the technocratic dimension of regulatory anticorruption. Admittedly, the toolbox is a set of instruments and techniques functionally oriented to a specific policy objective. Yet, its deep rationale is ultimately human and social, rather than technocratic. In a somehow circular way, the inquiry opens and ends up with a reference to trust as the intangible element at the basis of rules' effectiveness. The basic perspective is therefore one in which regulatory effectiveness actually depends upon trust, in at least three senses: public institutions require trust to function properly and ensure policy delivery; the lack of trust in institutions decreases the degree of compliant behaviour; institutions can and should promote and protect trust, for example in market and political competition. The reference to trust may appear a bit paradoxical in an inquiry clearly focussed on the instruments capable of operationalizing an anticorruption regulatory strategy. But it is not, of course. In functional terms, trust is the glue that allows the proper functioning of such instruments, the social value animating and sustaining the regulatory effort against corruption. At a deeper level, trust is a dimension of law, as recently stressed by some

original lines of research in legal philosophy (see in particular T. Greco, *La legge della fiducia. Alle radici del diritto* (2021)). At the same time, by pointing to trust as a foundation of the regulatory anticorruption strategy, the Author brings in the regulatory discourse a number of new and complex questions, starting with those concerning the ways in which regulatory techniques, organizational structures and procedural instruments should be designed in order to build social cooperation, facilitate shared interpretations and behaviours, and promote trust in institutions and inter-private relationships.

Finally, the book is an interesting (and successful) methodological experiment. The Author puts her disciplinary background in administrative law at the service of an inquiry in law and regulation. The dividend is rich. The administrative law perspective shapes and deepens the regulatory understanding of corruption as well as the design of appropriate anticorruption strategies. For example, the lenses of administrative law are particularly useful in illuminating a number of important issues, such as, for example, defensive administration, the relevance of interests in the regulatory process, the functional rationale of controls. From this point of view, the book shows how regulatory studies may benefit from insights coming from legal analysis, and from administrative law in particular. It also shows, however, that administrative law scholarship may be in turn enriched, perhaps even revitalized, by the interaction and contamination with regulatory studies. The regulatory approach, for example, sheds some light on the functional dimension of administrative law and the orientation of its structures and processes towards specific policy targets. It also opens the way to research on the relationship between bucreaucratic behaviour and the quality of rules, as well as, at a more profound level, on the effectiveness of administrative law and its enabling conditions. And it comes with no surprise that the Maria De Benedetto has recently co-authored with Guido Corso and Nicoletta Rangone a monograph on the effectiveness of administrative law (*Diritto administrative effettivo* (2022). It is, indeed, a further confirmation of the fruitful results of the method experimented in this book on regulatory anticorruption.

JOURNALS REVIEW

U.S. LAW REVIEWS: A FOCUS ON ADMINISTRATIVE LAW

*Marco Lunardelli**

LISA SCHULTZ BRESSMAN, *The Jurisprudence of "Degree and Difference": Justice Breyer and Judicial Deference*, 132 Yale L.J. F. 729 (Nov. 21, 2022)

This essay is included in the scholarly production related to Stephen Breyer's recent retirement from the U.S. Supreme Court. In it, professor Schultz Bressman analyzed Breyer's contribution to the *Chevron* doctrine resulting from a 1986 article of his[1]. As Schultz Bressman points out, then-Judge Breyer adopted a "context-specific approach", according to which a court was allowed to grant an agency interpretation "binding deference, some deference, or no deference at all"(730), depending on the legal issue and the specific statutory provision considered. In particular, he identified a series of criteria, the application of which enabled a court to recognize the right amount of deference on a case-by-case basis. The criteria were the following (734): a) the agency's special expertise; b) either the agency or the court's ability to give a more correct answer to a certain legal issue; c) the existence of a "major question", which Congress most likely intended to address itself, instead of leaving it to an agency, which usually regulates or decides anyway "interstitial" issues, arising "in the course of the statute's daily administration"; d) imprecision or broadness of statutory language; e) the ability of the answer to the question to provide elucidation to the law to apply; f) the exclusion of the risk of "tunnel vision", i.e., of an agency's tendency to expanding its authority beyond the one Congress assigned to it; g) the ability of an agency interpretation to

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[1] S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

be deemed binding, from both a procedural and a substantive perspective, in conformity with congressional intent[2].

Schultz Bressman considers the major questions doctrine as the most prominent of those criteria, in light of its future impact on the Supreme Court, and this doctrine, therefore, has to be ascribed to Breyer. In a 2000 decision[3], the Supreme Court excluded that the Food, Drug, and Cosmetic Act delegated the Food and Drug Administration (FDA) rulemaking power concerning nicotine and cigarettes, because it was a very significant question from economic and political perspectives. In such cases, delegation is legitimate only if it is express. The Court detected "tunnel vision" (736) in the FDA's decision to regulate tobacco products on the basis of its statutory mission to protect public health. In a 2015 decision[4], instead, the Court held that a statutory provision on tax credits did not assign the Internal Revenue Service (IRS) the power to adopt a rule extending the tax-credit provision to federal exchanges, in addition to State ones. The IRS, indeed, was deemed to lack "specialized expertise" (738). By contrast, in a 2007 case[5], the Court identified such expertise. The case was concerned with a provision delegating the authority to define the concept of "equalization" to the Secretary of Education in granting subsidies to school districts. In a 2002 decision[6], the Court opted for *Chevron* deference towards the Social Security Administration's interpretation of the Social Security Act. Schultz Bressman defines *Barnhart* "the Court's most forthright application of Justice Breyer's factor-based, context-specific approach to judicial deference" (743).

When Breyer retired from the bench, the Supreme Court had already showed its new – and still ongoing – approach. The conservative majority has adopted a "simple rule: no deference" (744). In doing so, it has applied a much stronger version of the major questions doctrine than the one devised by Breyer. This new approach emerges clearly from a 2021 per curiam opinion[7]. The Court denied the Centers for Disease Control and Prevention (CDC) the ability to establish a nationwide eviction moratorium in

[2] See S. Breyer, *Judicial Review of Questions of Law and Policy*, cit. at 1, 370-372.
[3] *Food & Drug Adm'n v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
[4] *King v. Burwell*, 576 U.S. 473 (2015).
[5] *Zuni Public School District No. 89 v. Dep't of Education*, 550 U.S. 81 (2007).
[6] *Barnhart v. Walton*, 535 U.S. 212 (2002).
[7] *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam).

favor of certain tenants living in counties with high COVID-19 transmission levels. According to the Court, Congress has to "speak clearly when authorizing an agency to exercise powers of vast economic and political significance"[8]. Breyer, however, dissented, by arguing that it was not "demonstrably clear" that the CDC lacked the required authority to issue the moratorium, and pointing out that this agency has the power to adopt measures, such as quarantines, capable of affecting individuals rights and freedoms significantly[9]. Similarly, in a 2022 per curiam opinion[10], the Court deemed unlawful a vaccine mandate imposed by the Occupational Safety & Health Administration (OSHA) in workplaces covered by the Occupational Safety and Health Act for two reasons. Firstly, such an issue is of great economic and political significance, thus presumedly left to Congress. Secondly, OSHA's primary mission, this public interest, is workplace safety and not public health. Overall, Congress had to delegate legislative power to agencies expressly. Justice Gorsuch wrote a concurrent opinion, which meant the major questions doctrine as "a clear-statement super rule: no deference *and* no delegation"[11] (746). Breyer and other Justices dissented, by observing that the vaccine mandate falls within the relevant statutory provision. In another very recent decision, the Court rejected an Environmental Protection Agency's (EPA's) rule on electric-power generation by using the major questions doctrine[12]. Justice Kagan, joined by Justices Breyer and Sotomayor, wrote a dissenting opinion, which considered that of the majority as having the purpose of replacing the ordinary method of statutory interpretation with a "two-step inquiry". The first step is aimed at assessing whether agency action has an extraordinary character. The second step is to ascertain the existence of a congressional authorization to exercising that power. More generally, *West Virginia* certified that the major questions doctrine "is now an official canon of construction that prohibits agencies from issuing interpretations that address matters of significance absent clear congressional authorization" (749). Overall, the Supreme Court's

[8] *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, cit. at 7, 2489.
[9] *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, cit. at 7, respectively 2490 and 2492.
[10] *Nat'l Federation of Independent Business (NFIB) v. Occupational Safety & Health Adm'n (OSHA)*, 142 S. Ct. 661 (2022) (*per curiam*).
[11] Italics in original.
[12] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

current conservative majority has dismantled Justice Breyer's context-specific – i.e., case-by-case – approach and turned his conception of the major questions doctrine into a rule substantially prohibiting any deference. Therefore, when the doctrine applies, "*Chevron* drops from the analysis" (754).

THOMAS B. GRIFFITH, HALEY N. PROCTOR, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 Yale L.J. F. 693 (Nov. 21, 2022)

This article falls within the same scholarly production as the essay reviewed above, and it focuses on one of the issues the latter deals with, i.e., the major questions doctrine. After an analysis of it, the article investigates its relation with the *Chevron* doctrine. It underlines (700) that, in the absence of the major questions doctrine, *Chevron* works as a two-step test. The first step requires the court to assess whether the statutory provision is ambiguous. If it is not, the court applies the provision, according to its ordinary meaning. If it is, on the contrary, the court proceeds to Step Two, where the assessment to carry out is whether the agency's interpretation of the provision is reasonable. Scholars have also identified a Step Zero, which requires a preliminary test, aimed at establishing whether the case under consideration may be encompassed within the *Chevron* doctrine's scope. In a 2007 case[13], the Supreme Court applied the major questions doctrine to the definition of "air pollutant", by arguing consequently that the inclusion of greenhouse gases in this definition derived from the plain meaning of the term, so there was no room for the *Chevron* doctrine. In other words, the Court's conclusion was "consistent with an understanding of the doctrine as a *Chevron* Step-Zero rule". The article observes that the major questions doctrine was conceived of as "a refinement of *Chevron*'s approximation of congressional intent", based on the assumption that Congress routinely "does not vest significant policy-making authority in agencies because Congress should not do so" (702). The doctrine, therefore, requires the latter "to speak clearly if it wishes to delegate decisions of great political or economic significance to an administrative agency" (703).

[13] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

Breyer formulated flexible standards as a reaction to the rigid way *Chevron* used to be applied, for he believed – and still does – that Congress and agencies should be free to determine the allocation of decision-making powers, even as far as the formulation of policies is concerned, "in a way that best promotes the public good" (705). Accordingly, except for one case[14], he dissented (708) from the Supreme Court's opinions considering the major questions doctrine as a sort of high threshold for allowing Congress to delegate legislative – *rectius*, regulatory – powers to agencies on matters of great economic and political significance. Breyer, indeed, believes that agencies exercising policy-making powers may be "held democratically accountable through the President" (710). Breyer's flexible approach and his major questions doctrine became dominant within the Supreme Court in the early 2000s, when *Chevron*'s soundness was being questioned. However, he progressively ended up being a defender of the *Chevron* doctrine (712). In a 2014 decision[15], the Court revised its former conception of the definition of "air pollutant" as used in the Clear Air Act. By applying the major questions doctrine and using an argument based on the separation of powers, the Court meant this definition not to include greenhouse gases. As for this argument, however, Breyer observed that the EPA should be able to use its "technical expertise and administrative experience". He also deemed the precise determination of the content of the statutory definition mentioned above to be an "interstitial" question, which "Congress typically leaves to the agencies"[16].

As the article points out, some Supreme Court's decisions concerning the COVID-19 pandemic resulted in a closer relation between the major questions doctrine and the nondelegation doctrine. In the decision on the OSHA's vaccine mandate, the majority substantially shifted the burden of proof. Instead of imposing the burden upon who claims the unlawfulness of a given regulatory – or policy-making – power exercised by an agency, the majority required the agency to pinpoint a provision expressly assigning itself that power. The close relation between the two doctrines is realized by means of a reference to the separation of powers and to the principle of democratic accountability. In this

[14] *Gonzales v. Oregon*, 546 U.S. 243 (2006).
[15] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).
[16] *Utility Air Regulatory Group v. EPA*, cit. at 15, 341-342 (Breyer, J., concurring in part and dissenting in part).

perspective, only those chosen by the people through a democratic process are allowed to make the "difficult trade-offs" (715) between public health and individual freedoms that the COVID-19 pandemic implied. Justice Breyer and other dissenters developed a reasoning, which "flipped the majority's presumption, asking not whether Congress had clearly conferred this authority, but instead whether Congress had clearly denied it" (716). Finally, the *West Virginia* decision somehow closed the circle, by expressly recognizing the major questions doctrine. According to Justice Gorsuch's concurrence, the need for a clear authorization to answer a major question, given by Congress to a certain agency, has its constitutional foundation in Article I's Vesting Clause. Breyer joined Justice Kagan's dissent, which the essay here under review defines "a tribute to Breyer's administrative-law jurisprudence" (717).

The final part of the essay seeks to envision what role Breyer's view will play in the next future. Firstly, the contrast between Justices Breyer and Kavanaugh on the meaning and implications of the separation of powers is highlighted (721). Secondly, the essay points out that Justice Kavanaugh laid down some standards, aimed at identifying when a rule is encompassed in the scope of the major questions doctrine, such as the monetary quantification of the effects of the rule and the number of people affected by it. He conceives of the doctrine "as a simple inversion of *Chevron*" (722). Meant this way, the doctrine prevents an agency from relying on statutory ambiguity to adopt rules on major issues. Therefore, the *Chevron* doctrine, if applied, may go almost never further than Step One. Recently, the Supreme Court has showed to embrace Justice Kavanaugh's interpretation of the major questions doctrine. The essay argues that this view appears to be moderate, if compared to the one expressed by other justices, who would rather put the *Chevron* doctrine out of the picture completely (723). Overall, the Justices objecting to the *Chevron* doctrine on the basis of the separation of powers may indeed be deemed to have cured the former's side effects and other problems related to the delegation of legislative power to agencies. Yet at the same time, by turning to the major questions doctrine – the essay concludes – they may be causing "another unintended imbalance" (727).

ALLISON M. WHELAN, *Executive Capture of Agency Decisionmaking*, 75 Vand. L. Rev. 1787 (2022)

This essay focuses on internal agency capture, a concept encompassing all the measures, methods, and instruments, whereby an administration in the United States may try to influence federal agencies' action, namely technical assessments, by imposing its political views. The article begins with underlining that the President or other high-ranking White House officials may seek to direct technical – or scientific – decisionmaking even when the outcome is "contrary to the agency's mission and the public interest" (1791). Despite recognizing the President the authority to exercise some influence on administrative activities and admitting that this authority may expand during national emergencies, the essay considers the executive interference in that kind of decisionmaking as "a uniquely problematic issue, particularly when it occurs covertly" (1793). A much more traditional issue is external agency capture, whose most famous example is lobbying and which is exacerbated by the practice known as "revolving door" (1798). It consists in individuals usually starting their career in the private industry, then working with an agency with rulemaking powers for some years, and finally taking back their position in the same business, usually with a promotion.

The executive interference with agency action may not be ruled out beforehand (1806-1807). Not only do some federal statutes provide for such interference, but, in a 2019 decision, the Supreme Court excluded that an agency's decision concerning policymaking is unlawful just because "it might have been influenced by political considerations or prompted by an Administration's priorities"[17]. Furthermore, some interference appears to be inherent, considering the President's power to appoint persons sharing his political views as agency heads, a power that is completed by that of removal, unless a statutory provision establishes otherwise (1809-1810). However, political influences should not extend to scientific decisions, since the latter are neither policies not rules (1813). If such influences occur, they usually bring about a violation of the principles of impartiality and objectivity in making that kind of decisions, and they may also compromise agencies' credibility, thus the public trust in administrative activities (1814).

[17] *Dep't of Commerce v. New York*, 139 S. Ct. 2573 (2019).

Then, the article provides some examples of executive interference, taken mainly from the Trump Administration but also from former ones, as well as from the current administration. One example dating back to the George W. Bush Administration is concerned with emergency contraception. The FDA's long-lasting opposition to make emergency contraceptives over-the-counter drugs, i.e., drugs that may be sold without a prescription, other than without age restrictions, shows how political values may affect scientific – namely, purely medical – evaluations (1818-1825). A second example is given by the in-person dispensing requirement for mifepristone, thus for access to abortion (1826-1834).

A third example is the executive's massive involvement in scientific decisionmaking during the COVID-19 pandemic. In this regard, the article quite extensively dwells on President Trump's pressures on the FDA for approving the usage of hydroxychloroquine as a drug against COVID-19. However, while the article stresses that the executive interference with agency action is particularly dangerous when it occurs indirectly, this is hardly the case with President Trump's stance on the issue. The President's frequent tweets urging the FDA to subject hydroxychloroquine to an emergency use authorization, indeed, made such interference manifest. Accordingly, the President's contrast with Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health (NIH), was evident, as well, as the latter radically excluded that drug's effectiveness as a cure for COVID-19 (1836-1840). The controversy between the Administration and scientists at the NIH also led to the removal of the Director of the Biomedical Advanced Research and Development Authority (1841). The article maintains that this controversy and, more generally, the executive's pressures and influences concerning scientific assessments generated "a worrisome tone early in the pandemic, raising significant concern about the credibility of the FDA's subsequent decisions and fostering an 'anti-expert instinct' that continued throughout the pandemic" (1841-1842).

As said above, however, the Biden Administration did not abstain from political pressures on this issue, either, even though they were made in a less direct manner. The article refers to the Administration's announcement of a plan offering booster shots to all Americans, a plan that was set to start in September 2021. The ability of this decision to serve as an instrument of indirect political

interference derived from its timing. The decision, indeed, came before the FDA and the CDC carried out a review and considered adopting recommendations concerning the COVID-19 vaccination campaign (1847). As the article observes, other ways to guide the booster shot plan might have been devised, "without giving the appearance that the Administration overstepped into matters of science". To put it differently, the right sequence of the two activities was reversed. The announcement of the Administration's plan should have come after the FDA's and the CDC's decisions (1848). In particular, the CDC Director overruled the agency's advisory panel decision establishing the criteria identifying the population eligible for booster shots to enhance the classes of citizens included in that population. Similarly to what had occurred during the Trump Administration, and despite the FDA's resistance to the executive's pressures, such a situation brought about some effects, not only in the short term. Among those effects, the article pinpoints "vaccine hesitancy, diminished public trust and confidence, and potentially long-lasting reputational damage" (1850), especially to the FDA itself.

In light of the high likelihood of such executive interference, the article proposes the establishment, through a statutory provision, of a Scientific Integrity Office (SIO), conceived of as an independent body with an oversight function. Its primary purpose is to ensure not only accountability, but also the credibility of agencies entrusted with scientific decision-making functions, and thus public trust in the federal government comprehensively (1853-1854). The author identifies the source of inspiration for this proposal in a 2014 essay, which crafted the conception of so-called "Offices of Goodness"[18]. While those offices were devised as a component of individual agencies' internal structure, the SIO is meant as an "external entity", having the mission of "promoting the scientific integrity of agency scientific decisionmaking" (1854). Essentially, the SIO's oversight function consists in guarding against possible political interference with agencies with such an authority and, more broadly, in preventing both the external capture and the internal one (1855). The SIO is deemed to be able to carry out its function not only proactively but also upon an agency employee's or a member of the general public's request or report.

[18] See M. Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 Cardozo L. Rev. 53 (2014)

However, such an element makes the SIO's functioning quite similar to whistleblowing. It is demonstrated by the fact that the specific legislation should enjoin "retaliation" against those who report an attempt of political influence on scientific decisionmaking (1857). Furthermore, the author envision the SIO's reports to be subject to a twofold obligation: They have to be submitted to Congress and made available to the public, thus published online (1859). The proposal at issue is accompanied by the identification of a series of flaws of congressional oversight function, which constitutes another instrument of preventing political interference with agencies' technical assessments. In exercising this function through its committees and subcommittees, for instance, Congress, too, may suffer from capture (1862-1866). As for judicial review meant as an instrument thereof, the author stresses the courts' traditional deferential approach (1866-1869). However, it does not appear convincing the argument, according to which the SIO would be better suited than courts for "prob[ing] the mental processes" of the persons involved in political interference just because the former would not be limited to consider on-the-record material during its investigation (1870).

Finally, the article points out that another remedy against the political pressures under discussion may be turning the FDA into an independent agency. However, as is observed, the fact that a given agency is independent does not make it "immune from executive interference" (1873). Independent agencies are also subject to the risk of external capture (1874). Furthermore, to include the FDA among independent agencies would require "significant restructuring" (1875), because just ensuring the Commissioner, i.e., the agency head, protections from the President's removal power would not suffice. Overall, agencies' internal capture seems to be a problem hard to solve.

ALEXANDER NABAVI-NOORI, *Agency Control and Internally Binding Norms*, 131 Yale L.J. 1278 (2022)

This essay is aimed at analyzing the binding nature of agencies' guidance documents as a means of restricting officials' and employees' discretion in exercising decision-making powers. First of all, the essay points out that, unlike the rulemaking power, agencies' power to adopt guidance is not subject to notice-and-comment procedures. The APA, indeed, provides for just few

procedural requirements when an agency formulates a policy or an interpretation of general applicability. Furthermore, since agency guidance is not tantamount to rulemaking, guidance documents do not have legislative force. Accordingly, at least in general terms, those documents may not produce binding effects on individuals outside the agency (1281-1282). The study investigates the internal binding effects of agency guidance, which constitute an instrument an agency usually deploys to direct and control the exercise of decision-making powers by the agency personnel at different levels of the internal hierarchy. However, not always do courts recognize the ability of agency guidance to produce such effects on officials and employees (1284-1285). Agency guidance encompasses various classes of documents, such as "compliance manuals, field manuals, enforcement guidance, policy guidance, policy statements, management directives, enforcement memoranda, standard interpretations, and fact sheets" (1291). These and other types of documents are often deemed to be binding by agency officials (1295).

Guidance documents usually are aimed at realizing "agency self-regulation" (1297), which may be relevant from both a substantive and a procedural perspective. As for the former, the specific purpose is to restrict administrative discretion in the enforcement of statutory provisions. As far as procedural aspects are concerned, a typical example is guidance, whereby agency leadership establishes criteria lower-level officials have to follow in conducting investigations (1298). The substantive perspective is followed when an agency intends to ensure uniformity in the exercise of discretion by frontline staff. To achieve this purpose, indeed, the agency head or another top-level organ may adopt guidance laying down policies, principles, and standards, which bind subordinate staff in making discretionary decisions. If provided for as binding, such guidance results in "an internal 'law' of the agency" (1298-1299). It has been argued that agency officials usually approve of this solution, for they "prefer to enforce rules written down to an amorphous set of informal practices"[19]. However, even when not formally binding, guidance may be *de facto* perceived as such by agency staff, whose position lies at the low levels in the chain of hierarchy. The hierarchical – or anyway top-down – character of internal relationships and the fact that an

[19] E. Magill, *Foreword*, *Agency Self-Regulation*, 77 Geo. Wash. L. Rev. 887 (2009).

agency has an "interest in providing 'consistent answers to contested questions that arise in similar cases'[20] encourage agency actors to follow guidance" (1299). Case-law shows that there is not an univocal approach in the application of the so-called binding-norm test by courts. It means that they infer different implications from the fact that certain guidance is binding only internally, i.e., towards the agency personnel (1304).

The second part of the article analyzes the internal effects of guidance adopted by three different agencies. The first one considered is the U.S. Equal Employment Opportunity Commission (EEOC), an independent agency, whose main function is to conduct investigations on alleged workplace discrimination cases (1313). Within this agency, the Office of Legal Counsel has the power to draft the guidance the EEOC has to approve. Such guidance is aimed at ensuring that the legal views it expresses are consistently applied by the whole agency personnel (1315). As the article underlines, therefore, those guidance documents are not just an instrument for the oversight of lower-level agency staff. Their primary purpose, indeed, is to ensure that the interpretations of antidiscrimination law provisions the EEOC provides have uniform implementation. Evidence is found in the fact that guidance documents on merely procedural issues receives less adherence by the agency personnel than those containing legal interpretations (1318). Even when frontline officials depart from this kind of guidance, their behavior may be characterized as a sort of excess of zeal. In those cases, indeed, the officials intend "to pursue more expansive interpretations of antidiscrimination law in ways that comported with the spirit of the guidance" (1319).

The second agency, whose guidance the article reviews, is the OSHA. This agency is a component of the Department of Labor, and its mission is to enforce obligations concerning job safety and health standards. This mission is accomplished by the conduction of inspections, but, unlike the EEOC, this agency does not express its own legal views. Relevant statutory interpretations, indeed, are provided by the department's attorneys (1320-1321). The agency adopts various types of guidance documents establishing rules, methods, and standards for carrying out those investigations. The – more or less – binding effect of those types of documents depends

[20] B. Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 Yale L.J. 2150 (2019).

on the addresses' specific position within the internal organization of the agency, as "each stage of the agency hierarchy has distinct levels of rigidity". In any case, the most important guidance document having this purpose is the OSHA Field Operations Manual, which is very detailed and "includes precise instructions that channel the discretionary decisions of inspectors across the country" (1322). As is the case with the EEOC, guidance concerning substantive issues is deemed to have binding effects on the agency officials by the OSHA itself (1325). However, if compared with that agency, the OSHA guidance appears to be "more preoccupied with establishing procedural consistency" (1327).

The third agency the article considers is the U.S. Citizenship and Immigration Services (USCIS), which is a component of the Department of Homeland Security. Its main function is to adjudicate immigration-related benefits (1327-1328). The article identifies two peculiar features of the USCIS. Firstly, its mission is politically sensitive. Secondly, a significant margin of discretion is necessarily assigned to the agency officials having the decision-making power upon conclusion of adjudication proceedings, as the financial resources the agency may employ are not enough to respond to all the applications for benefits it receives (1329). Guidance, therefore, is an essential tool to guide and thus restrict the exercise of administrative discretion by agency staff. The main guidance document is the USCIS Policy Manual (1330). In light of those features, guidance is also aimed at ensuring agency officials' political accountability. To this end, furthermore, the Attorney General is assigned not only an oversight function but also the power to select and review adjudications at the Board of Immigration Appeals (1332).

The third and last part of the article discusses judicial review of the guidance ai issue. One of the existing approaches is based on a presumption that guidance documents do not have binding effects on the affected persons, unless they have been subject to notice and comment. This approach has the advantage of overcoming the difficult issue of the binding character of guidance. A different position has been expressed mainly by a scholar. He has maintained that an agency is entitled to adopt guidance that is binding on its staff without carrying out a notice-and-comment procedure, but only "if persons affected by the document will have a fair opportunity to contest the document at a later stage in the

implementation process"[21]. However, this solution does not clarify how courts should treat cases, in which certain guidance is *de facto* binding, for an agency considers it instrumental to ensuring consistency in the interpretation and application of statutory provisions by the agency staff. Anyway, the article underlines that courts seldom "go beyond the language on the face of the guidance itself and to the underlying agency practice" (1338-1339). Then, the article proposes an approach that, on the basis of the analysis previously conducted, balances the needs of each agency to ensure consistency in the carrying out of its functions and tasks, on the one hand, and the need of regulated parties not to be bound to agency guidance devised only for internal purposes, on the other hand (1340-1344). However, as the author justly stresses in the conclusion, the topic addressed by this article needs further research (1345).

BLAKE EMERSON, *The Binary Executive*, 132 Yale L.J. F. 756 (Nov. 21, 2022)

This article constitutes a coherent continuation of the discussion on the implications of Justice Breyer's retirement from the Supreme Court reported above. The premise of the article is the current critical approach followed by the Court's conservative majority towards the delegation of rulemaking and especially policymaking powers to federal agencies by Congress. This approach, together with the unitary executive theory, according to which the whole executive power is vested in the President, who therefore has the authority to direct all agencies, leads Professor Emerson to argue that the Court ends up exercising executive power. The court's approach results in the emergence of a new regime, characterized by "two chief executives: the President and the Court". Therefore, the theory mentioned above is not correct, as the "Executive is not unitary; it is binary" (757). By conducting de novo review of agency policymaking, indeed, the Justices adopting the approach at issue "are taking a share of executive power for themselves and acting collectively as the President's cochief of the federal government" (764).

[21] R.M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 305 (2018).

Note, *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 Harv. L. Rev. 1104 (2022)

This note addresses an issue that has gained importance in recent years: the need to increase affordable housing by using instruments that are compatible with U.S. land use law. Currently, such housing is usually located in disadvantaged areas. States often delegate to local governments the authority to plan land use development. However, members of local planning boards are political appointees, "subject to capture by homeowners", who oppose the construction of affordable housing on a regular basis (1108). Furthermore, even if individuals are recognized standing to challenge zoning decisions, courts usually adopt a deferential approach towards those decisions whenever some voices against affordable housing, such as those of homeowners, were expressed in the relevant public hearings (1109). The note proposes recognizing affordable housing as a right to prevent municipalities from exercising their discretion to reduce its availability (1114). The note deems this solution to be able to promote "a more democratic form of local governance that considers the housing needs of less wealthy and less politically influential residents" (1115). To be effective, this right should be enforceable before a court by those potentially eligible for affordable housing (1117). The burden of proof should be divided between the two main parties: The Plaintiff has to show that a certain zoning or land use decision has the effect of causing shortage of such housing, while the municipality has to prove that the decision at issue "is necessary to achieve a legitimate government interest and could not be achieved through an alternative, less burdensome approach" (1119). Finally, the note argues that the ideal solution would be to include the right to affordable housing in a constitutional provision at state level (1124).

JOSHUA C. MACEY, BRIAN M. RICHARDSON, *Checks, Not Balances*, 101 Texas L. Rev. 89 (2022)

This essay is concerned with a topic analyzed by other essays already reviewed, i.e., the widespread criticism of rulemaking and policymaking powers assigned to federal agencies on the basis of the separation of powers and the unitary executive theory. From a historical perspective, the essay reaches the conclusion that the administrative State is fully legitimate and has to be defended by

endorsing a peculiar conception of the separation of powers, meant as aimed at "pursu[ing] the end of anti-domination between the branches" (99). First of all, the essay points out that the nondelegation doctrine is usually conceived of as related to the problem with ensuring agencies' accountability, and that the Supreme Court has applied the unitary executive theory to multiple contexts in the past few years (103-104). According to many scholars (106), the constitutional foundation of the administrative State, which therefore justifies its legitimacy, is the Necessary and Proper Clause[22]. Other constitutional foundations have been identified, such as the Opinion Clause (108), included in Article II, devoted to the powers of the President of the United States[23]. The delegation of administrative discretion to agencies may also be seen as a means to face the exigencies Congress pinpoints (109-110). The essays deems the logic underlying the separation of powers to be "each branch's *capacity* to check the others"[24] (114). It also argues that the Founding Fathers did not establish rigid boundaries among the three branches of the federal government. In particular, most of them believed that "a precise taxonomy of each branch's powers would fail to prevent Congress or the President from acting despotically" (123). Therefore, the authors object to the traditional conception of the separation of powers as "a system of checks *and* balances"[25], by maintaining that the Framers actually devised just "a system of checks" (129).

After a series of historical examples, the authors apply their conception of the separation of powers to the main doctrines used to question the legitimacy of the administrative State. Firstly, they consider the nondelegation doctrine, as well as the major questions doctrine, inconsistent with that conception (154-155). In particular, the nondelegation doctrine lacks any soundness, to the extent that each of the three branches of the federal government is not conceived of as having a rigid, independent scope. They further stress, indeed, that the Framers "abandoned the Anti-Federalists' separationist ideal" to embrace a view acknowledging that each branch may have a part of the authority theoretically vested in the others. Therefore, a statute delegating a broad policy-making power to a certain federal agency is constitutionally valid, provided

[22] Article I, § 8, cl. 18, U.S. Const.
[23] Article II, § 2, cl. 1, U.S. Const.
[24] Italics in original.
[25] Italics in original.

that it does not violate "the principle of anti-domination", i.e., it does not prevent one branch from being able to exercise a check on the other (156-157). As far as the theory of the unitary executive is concerned, the conception of the separation of powers the authors champion implies that the Executive's – and thus the agencies' – powers are legitimate if they fall within either a specific delegation decided by Congress or the authority established by Article II of the constitution, namely by the Take Care Clause[26] (157-158). The President has a general authority to oversee the executive branch, and this clause may be considered as the constitutional foundation of the President's power to remove agency officials. This power may lawfully be exercised when it is necessary to take care that statutes are faithfully executed, thus when those officials are not performing their duties (159-160). At the same time, restrictions to the removal power established by Congress are lawful, as well. Indeed, a statutory provision, pursuant to which the President may remove agency officials only in case of neglect of duty by them, prevents the President himself from "dominat[ing] the other branch" (160). Finally, statutory provisions assigning agencies adjudication powers are compatible with the Judiciary's authority established by Article III, for the Constitution does not rule out radically the possibility that the other two branches have the power to decide individual cases (161-162).

Law Reviews' Abbreviations
Yale L.J. F.: The Yale Law Journal Forum
Vand. L. Rev.: Vanderbilt Law Review
Yale L.J.: Yale Law Journal
Harv. L. Rev.: Harvard Law Review
Texas L. Rev. : Texas Law Review

[26] Article II, § 3, U.S. Const.